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Issue Date: 13 January 2017

Case No.: 2015-AIR-00027

In the Matter of

VAN McMULLEN
Complainant

v.

FIGEAC AERO NORTH AMERICA
Respondent

DECISION AND ORDER GRANTING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a U.S. Department of Labor ("DOL") complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed his AIR 21 complaint with the Occupational Safety and Health Administration ("OSHA") on October 13, 2014. JX 1. On January 28, 2015, OSHA dismissed the claim. Complainant's Facsimile, Jun. 12, 2015, EX A. Though OSHA found that Complainant timely filed the claim, that Complainant and Respondent are covered under the Act, and that Complainant established a *prima facie* case, OSHA determined that Respondent carried its burden of demonstrating, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. *Id.* The Department acknowledged that Complainant received the Secretary's Findings on June 12, 2015. Complainant Facsimile, Jun. 12, 2015, EX B.

By facsimile dated June 12, 2015, Complainant contested OSHA's findings and requested a hearing in this matter. By facsimile dated June 23, 2015, Respondent submitted a Motion to Dismiss Complainant's Objections and Request for Hearing as Untimely Filed.

This matter was assigned to me on July 1, 2015.

On July 6, 2015, Complainant submitted a Memorandum in Opposition to Motion to Dismiss, to which Complainant attached correspondence from OSHA confirming that Complainant did not receive the Secretary's Findings, originally issued in January 2015, until June 12, 2015. OSHA "apologize[d] for this administrative error regarding delivery of the Findings letter." Complainant's Mem. Opp'n, EX A.

On July 29, 2015, this Tribunal issued the Notice of Assignment and Conference Call in this matter. By facsimile dated August 10, 2015, Respondent submitted a Statement in Response to Notice of Assignment and Conference Call, in which Respondent conceded that Complainant timely filed his complaints with OSHA, but denied that any acts of retaliation or discrimination occurred. Respondent advised that it preferred November 16, 2015 for a hearing near Wichita, Kansas, and that it would only need one day to present its defense. Respondent further advised that documents were exchanged during the OSHA investigation, and that it continued to contest the timeliness of Complainant's appeal of OSHA's findings. Complainant submitted his response to the Notice of Assignment and Conference Call on August 10, 2015.

On August 25, 2015, this Tribunal issued the Notice of Hearing and Pre-Hearing Order in this matter, and set the hearing for February 9, 2016 through February 11, 2016. Subsequently, by facsimile dated January 11, 2016, Complainant submitted an Unopposed Motion to Change Pre-Hearing and Hearing Dates. By Order issued January 20, 2016, this Tribunal granted the parties' Motion for Continuance and rescheduled the hearing for April 18, 2016 through April 20, 2016.

Respondent submitted its Motion for Summary Judgment, with accompanying exhibits, on January 7, 2016. By facsimile dated January 21, 2016, Complainant submitted an Unopposed Motion to Extend Response Deadline. By Order issued January 26, 2016, this Tribunal granted Complainant's Unopposed Motion to Extend Response Deadline. By facsimile dated February 1, 2016, Complainant submitted his Response to Motion for Summary Decision, and submitted the exhibits accompanying his Response by mail on February 2, 2016.

On February 10, 2016, Respondent filed a Motion for Leave to File a Reply Brief in Support of Respondent's Motion for Summary Decision. By Order issued February 18, 2016, this Tribunal denied Respondent's Motion for Leave to File Reply Brief.

On February 23, 2016, this Tribunal issued an Order Denying Respondent's Motion for Summary Decision.

On February 25, 2016, Complainant filed an unopposed Motion to Extend Deadline to File a Motion to Compel Discovery Responses, which this Tribunal granted by Order issued February 26, 2016.

On March 28, 2016, this Tribunal held a teleconference to determine the status of the case. During this teleconference the issue of the use of an interpreter for Mr. Jean Claude Maillard's testimony via teleconference arose; the parties agreed to the use of an interpreter.[1]

[1] Transcript of the March 28, 2016 teleconference, at 7.

This Tribunal held a hearing in this matter in Wichita, Kansas from April 18 to 19, 2016.[2] The Complainant and Respondent's representatives were present during all of these proceedings. During this hearing, this Tribunal admitted Joint Exhibits ("JX") 1 - 44,[3] Respondent's Exhibits ("RX") 1-3,[4] and Complainant's Exhibits ("CX") 201-203.[5]

Complainant submitted his closing argument on July 1, 2016 ("Compl. Br."). Respondent submitted its closing argument on July 29, 2016 ("Resp. Brief"). Complainant submitted his reply to Respondent's closing argument on August 15, 2016.

II. ISSUES

- Are Complainant and/or Respondent covered under the Act?
- Did Complainant engage in protected activity?
- Did Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would Respondent have taken the same adverse action?

A. Complainant's Position

Complainant alleges that he engaged in protected activity by informing Mr. Maillard that Mr. Hocine Benaoum was threatening Ms. Kim Sawyer because she refused to falsify First Article Inspection ("FAI") documentation in violation of 14 C.F.R. § 21.2(a). He also alleges his filing a complaint with the FAA on July 30, 2014 was protected activity and there is a strong temporal nexus between the protected activity and the adverse action. Compl. Br. at ¶¶ 43 and 62.

Complainant asserts that Respondent is an airline component parts plant that sells parts to air carriers who transport passengers. He maintains that Respondent is a production approval holder (PAH) who holds a parts manufacturer approval (PMA), matters governed by 14 C.F.R. Part 21. He notes that 14 C.F.R. Part 45 requires that the manufacturer of a PMA article must permanently and legibly mark a part and must establish quality control systems to ensure the parts manufactured conform to the corresponding design approval. This is necessary for the air carrier must be able to verify the origin and authenticity of any parts or components that it acquires for installation on the air carrier's aircraft. He asserts that "[i]t is undisputed that Respondent bought and sold parts that were ultimately built into, or used in, passenger airplanes." Compl. Br. at ¶¶ 44-47.

Complainant maintains that Respondent's assertion that the FAI process was merely a private contractual agreement between suppliers and manufacturers is unpersuasive, for the FAI

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[2] The Transcript of the April 18-19, 2016 proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 6-25.
[3] Tr. at 26.
[4] Tr. at 385 and 453.
[5] Tr. at 26-27. ALJ-1, slides presented during opening statements, were also marked for identification and admitted. *Id.* at 99.

process is the means through which Respondent complies with the FAA regulations. Compl. Br. at ¶ 48.

Complainant asserts that "Respondent does not challenge this element" referencing 49 U.S.C. § 42121(a), and argues that it is undisputed that Mr. Maillard terminated Complainant's employment by letter dated July 31, 2014. He thereafter focuses his argument on the contributing factor analysis. Complainant maintains that he engaged in protected activity on July 26, 28 and 30, 2014. Mr. Maillard was the person responsible for the adverse action, the termination of Complainant's employment. Respondent had direct knowledge of the protected activity and the adverse action occurred within six days of Complainant's original email raising Mr. Benaoum's alleged improper actions. Compl. Br. at ¶¶ 49 – 56.

Respondent asserts that it terminated Complainant for legitimate, non-retaliatory reasons: performance problems, disclosure of confidential information, and seeking legal advice without authorization. Complainant notes that Respondent's finance executive directed a Wichita employee travel to Montreal to help Respondent perform basic financial functions requiring the disclosure of confidential financial information. Complainant testified that he had worked with Sonaca, the entity from whom Respondent purchased the Wichita plant in May 2014, and asserts that Ms. Becky Herington corroborated this testimony. Further, Respondent is a publically owned and publicly traded company and Respondent's profits fall within an exception to confidential information set forth Clause 7.6 in Complainant's employment agreement. As for the third basis, Ms. Gaye Tibbets testified that Complainant seemed to be trying to protect Respondent from the risk of retaliation against one of his subordinate employees. Her law firm had previously done work for the facility now owned by Respondent: work Respondent was billed for and paid. Complainant maintains that his use of Ms. Tibbets's firm was legitimate, reasonable, and consistent with past practice. Compl. Br. at ¶¶ 57 - 61.

In short, Complainant asserts that he has established that he performed protected activity where he was subjected to an adverse action, termination of employment. He further maintains that Respondent cannot show by clear and convincing evidence that it would have terminated Complainant absent his protected activity. As such, he seeks lost wages in the amount of $100,000, lost retirement funds of $18,000, compensatory damages of $50,000, prejudgment interest, and reasonable attorneys' fees and costs of pursuing this action. Compl. Br. at ¶¶ 71-72.

B. Respondent's Position

Respondent reminds the Tribunal that Complainant bears the initial burden, and only then does the burden shift to Respondent. Respondent does not dispute that it is subject to the requirements of AIR 21 and all FAA requirements regarding FAIs. Resp. Brief at ¶ 44. However, Complainant performed no protected activity. Complainant alleges that he engaged in protected activity by informing Mr. Maillard that Mr. Benaoum had asked Ms. Sawyer to alter information included on the FAIs; but she refused to do so. Complainant's allegation contains a fatal flaw because Ms. Sawyer refused to falsify any document; she did her job and was allowed to do so. Complainant was also aware that no violation occurred. The mere reporting of pressure to commit a violation does not constitute protected activity when that pressure is rejected and a violation does not occur. Mr. Benaoum, the person purportedly applying the

pressure, had no authority to fire Ms. Sawyer and never threatened her. Thus, Respondent maintains that it was not objectively reasonable for Complainant to believe that a violation had occurred, and although Complainant is not required to prove the existence of an actual violation, he is required to establish that his belief of a violation was objectively reasonable. Resp. Brief at ¶¶ 45 – 52.

Further, there can only be retaliation if the decision maker knew of the purported actions that are the basis for the protected activity. Mr. Maillard was the only person that made the decision whether to terminate Complainant's employment. Complainant alleges that knowledge of his complaint can be imputed to Mr. Maillard because Respondent has an IT department with remote access to employee computers; this is wild speculation. Mr. Maillard's unrebutted testimony is that he did not see the two FAIs (JX 23 and JX 24) until he testified at the hearing. Thus, Complainant's termination from Employment could not have been based on these documents. The sole activity that Mr. Maillard was aware of at the time of Complainant's termination was Mr. Benaoum's requests to Ms. Sawyer. When Mr. Maillard requested actual evidence of Mr. Benaoum's alleged falsifications, Complainant did not provide any. Resp. Brief at ¶¶ 53 – 57.

Even assuming there is a finding of protected activity, Complainant cannot establish that the protected activity was a contributing factor to Complainant's termination from employment. Respondent maintains that the earliest date that protected activity occurred was July 25, 2014, the date Complainant notified Mr. Maillard of Mr. Benaoum's alleged improper questioning of Ms. Sawyer. Resp. Brief at ¶¶ 59-61.

There were separate grounds to terminate Complainant's employment. On June 24, 2014, Complainant shared projected profit information with Respondent's competitor, Sonaca. Complainant had no legitimate business purpose in disclosing this information as it was not necessary to close the books following the sale of the Wichita facility by Sonaca to Respondent. Complainant's employment contract contained a non-disclosure confidentiality provision that he violated by doing this. Mr. Maillard had concerns about Complainant's work ethic and Complainant knew that Mr. Maillard had lost trust in him. At one point Complainant told Mr. Constanzo, a Sonaca employee, that he might need a reference and letter of recommendation. Of note, Complainant is now employed by Sonaca, the competitor with which he shared confidential information. When Complainant contacted an attorney on Respondent's behalf, he falsely represented that the owner of the company was pressuring an employee to falsify records. As a result, he obtained a generic letter from the law firm regarding whistleblower protections in order to cloak himself in the protections provided by AIR 21. None of these activities were protected, and all occurred before Mr. Maillard learned of the two FAIs purporting to be evidence of falsification. In short, the only element that Complainant can establish is an adverse action occurred. Resp. Brief at ¶¶ 62 – 73.

Finally, even if a contributing factor can be established, there are clear and convincing reasons that Respondent would have terminated Complainant's employment in the absence of Complainant's protected activity. Issues with Complainant's job performance pre-date all allegations of protected activity. Complainant breached his employment contract by communicating confidential financial information to a competitor. Respondent maintains that

Complainant contacted an attorney allegedly on behalf of Respondent, provided that attorney with false information, and he did so without Respondent's authorization. When Complainant realized that his job was in jeopardy, he made serious, unsubstantiated allegations against a co-worker in an attempt to cloak himself in whistleblower protection. Accordingly, the Complainant's complaint should be denied. Resp. Brief at ¶¶ 74 – 80.

III. FACTUAL BACKGROUND AND EVIDENCE

A. Stipulated Facts[6]

1. Respondent acquired an airline components parts plant in Wichita, Kansas pursuant to an agreement between the previous owner, Sonaca, Inc., and it in the spring of 2014.
2. Complainant was hired as general manager of the Wichita plant by Sonaca in March 2014.
3. Respondent and Complainant entered into an employment contract on May 2, 2014, and Complainant continued as general manager of the Wichita plant.
4. Complainant's job duties were set out in his employment contract.[7]
5. Complainant reported to Jean Claude Maillard, the CEO of Respondent's parent company, in Figeac, France.
6. Hocine Benaoum, at all relevant times, was vice president of sales for Respondent, and he also reported directly to the CEO.
7. An "FAI" is a First Article Inspection Report.
8. Respondent, at all relevant times, was doing business with Mecachrome.
9. Kim Sawyer is Respondent's Qualify Assurance Manager and reported to Complainant.
10. At no time was Kim Sawyer demoted or fired from her job.
11. Hocine Benaoum, at all relevant times, had no authority to hire or fire any employees at Respondent.
12. Jean Claude Maillard made the decision to terminate Complainant's employment and Complainant was notified in writing of this decision by a letter dated July 31, 2014. JX 21.
13. Complainant accepted a job with Sonaca Montreal on or about November or December 2014.

B. Facts in Dispute

1. Complainant's Statement of Facts

Complainant's employment contract defined his duties as the general manager for the Wichita facility. These duties included "enforcing ethical business practices"; "establishing and enforcing organization standards"; and "developing a climate for offering information and opinions." Compl. Br. at ¶ 2.

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[6] These stipulated facts are contained in both parties' closing briefs.
[7] The contract is located in JX 3.

Respondent is a subsidiary of Figeac, a company that makes parts used in passenger aircraft. Mr. Benaoum began working for Figeac in October 2007, and was Respondent's vice president for sales who reported directly to Mr. Maillard. Compl. Br. at ¶¶ 3 and 6.

Mecachrome is a customer of Respondent that purchases parts, and it accounts for about 80% of Respondent's work in Wichita. Compl. Br. at ¶ 5

According to a June 4, 2014 email written by Ms. Sawyer, she reported that on May 16, 2014 Mr. Benaoum asked her if she could change the Quik Tek machining Certificate of Conformance logo to a Figeac-Aero logo. On May 30, 2014, Mr. Benaoum again asked Ms. Sawyer to not mention R&R aero on the FAI if at all possible. Ms. Sawyer told Mr. Benaoum that she could not do this because it would be falsification. Ms. Sawyer acknowledged that she had not received any more such requests since May 30, 2014. At the hearing Mr. Benaoum admitted asking Ms. Sawyer to do this as he did not want customers to have source information for parts to prevent those customers from getting their parts direct from Respondent's source. Compl. Br. at ¶¶ 7-9.

Ms. Sawyer's co-worker testified that Mr. Benaoum's requests to alter documents was "all she [Sawyer] ever talked about" and that Ms. Sawyer was afraid for her job. And it was not a comical or joking manner as Ms. Sawyer portrayed during her testimony. Ms. Harrington, another co-worker of Ms. Sawyer, similarly testified that Mr. Benaoum's requests to Ms. Sawyer were frequent and not a laughing matter. Compl. Br. at ¶¶ 10-11.

Ms. Sawyer testified about inconsistencies in the FAI documentation on parts with which she and Mr. Benaoum had a confrontation. JX 23 and JX 24 purport to be the same part, yet the part numbers do not match. Ms. Sawyer could not explain this, nor could she explain the differences in the specification number or that the exhibits reflect different suppliers. Compl. Br. at ¶¶ 13 – 18.

Complainant told Mr. Maillard on multiple occasions that Mr. Benaoum's requests raised FAA compliance issues. Compl. Br. at ¶ 12. On July 26, 2014, via email, Complainant brought Mr. Benaoum's actions to the attention of Mr. Maillard, specifically referencing compliance with the AS9100[8] procedures and the possibility that, by not following their process, an upcoming audit would generate findings and potential issues in passing the audit. Complainant explained that Mr. Benaoum's request to omit names of suppliers that machined parts or omit data constituted falsification of an FAA document. Compl. Br. at ¶ 19.

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[8] "AS9100 is a widely adopted and standardized quality management system for the aerospace industry. It was released in October, 1999, by the Society of Automotive Engineers and the European Association of Aerospace Industries." *See* https://en.wikipedia.org/wiki/AS9100. It is a manufacturing standard that supplements ISO 9001. In 2000, "the FAA determined that AS9100 to be a comprehensive quality standard containing the basic quality control/assurance elements required by the current Code of Federal Regulations (C.F.R.), Title 14, Part 21." Ltr fm Manager, Production and Airworthiness Certification Division to Americas Aerospace Quality Group (Mar. 20, 2002), available at https://www.faa.gov/aircraft/air_cert/production_approvals/mfg_best_practice/media/AS9100GordonRevA.pdf. *See also* AC 00-56B, Voluntary Industry Distributor Accreditation Program (May 27, 2015), at Table 1 (FAA Acceptable Organizations and Their Quality System Standards).

Two days later Mr. Maillard sent Complainant a three page email response. Mr. Maillard denied that Mr. Benaoum asked Ms. Sawyer to falsify anything. On July 28, 2014, Complainant attempted to reiterate and further explain his concern. Complainant told Mr. Maillard on multiple occasions that Mr. Benaoum's requests raised FAA compliance issues. Compl. Br. at ¶ 20 - 22. Days later Mr. Maillard terminated Complainant's employment alleging performance problems, disclosure of confidential information, seeking legal advice without authorization, and making a false claim to cloak himself with whistleblower protection. Compl. Br. at ¶ 27.

As for the disclosure of confidential information, Ms. Herington testified about the substantial difficulties with the accounting software after the transfer from Sonaca. Sonaca's offices in Montreal had previously handled the Wichita facility's accounting and nobody in Wichita was trained on the software to run it independently. In fact, Respondent's director of finance was copied on the emails where Sonaca's assistance was solicited and financial information was shared; sharing Respondent's financial information was not a problem for Ms. Cazenave. Ms. Cazenave remains employed by Respondent's parent company. Compl. Br. at ¶¶ 29 – 31.

Complainant did seek and receive legal counsel from Ms. Tibbets, who was a member of a law firm previously used by Sonaca. Ms. Tibbets provided a legal opinion letter and Respondent paid her firm for those services. Compl. Br. at ¶ 32.

It took Complainant ten months to find a new job and resulted in a wage loss of $100,000, as well as health insurance benefits. Loss of the health insurance benefits impacted the Complainant, his spouse and their three minor children. Additionally, Complainant had to withdraw $18,000 from his Boeing 401(k) to offset costs during his unemployment. Compl. Br. at ¶¶ 36 – 38.

2. Respondent's Statement of Facts

The Complainant was an at-will employee of Respondent bound by a nondisclosure confidentiality provision in this Employment Contract, specifically paragraphs 7.5 and 7.6. Violation of this agreement permitted the Respondent to terminate Complainant without notice. Resp. Brief at ¶¶ 2 – 4.

Ms. Sawyer testified that Mr. Benaoum asked her on three occasions about leaving certain information off or changing information on an FAI. However, she always told him that it could not be done. Upon hearing of these requests, Complainant directed Ms. Sawyer to put the Quik Tek logo matter into an email to him. Resp. Brief at ¶¶ 5 and 7.

Ms. Sawyer prepared a "letter of complaint" about Mr. Benaoum's requests, dated June 4, 2014.[9] However, Complainant did nothing with this letter until July 25, 2014 when he sent it

[9] Respondent further notes that, although Complainant testified that Mr. Benaoum was in Wichita on June 4, 2014 and threatened Ms. Sawyer's job, Respondent produced Mr. Benaoum's passport and an airline ticket proving that Mr. Benaoum was out of the country at that time. Resp. Brief. at ¶ 11. *See also* RX 2 and 3.

to Mr. Maillard. Resp. Brief. at ¶ 6. And although Complainant testified at the hearing that he had notified Mr. Maillard earlier of these issues, his answers to interrogatories and his deposition testimony do not support his contention. Resp. Brief at ¶ 10.

Mr. Benaoum testified that he was asking about what was possible concerning information on FAIs, but that he depended on Ms. Sawyer to tell him the requirements as that was her job, not his. Mr. Benaoum never threatened Ms. Sawyer's job as he had no authority over her. At no time did he ask Ms. Sawyer to falsify any documents. In his current position as the Wichita facility's general manager, he still depends on Ms. Sawyer to ensure compliance. Resp. Brief at ¶¶ 8, 9, 12 and 13.

Mr. Maillard was the sole decision maker about whether to terminate Complainant's employment. Mr. Benaoum had no part in Mr. Maillard's decision and did not know about Complainant's allegations to Mr. Maillard until after Complainant had been terminated. Resp. Brief at ¶ 14.

Complainant testified that he never provided the two FAIs (JX 23 and JX 24) to Mr. Maillard, and Mr. Maillard testified that he had not seen them until he saw them at the hearing. At the hearing, Complainant said he told Mr. Maillard of a problem with the FAIs sometime in mid-July, whereas during his earlier deposition testimony he stated that he was not aware of JX 23 and JX 24 until July 30, 2014, by which time Mr. Maillard had already decided to terminate him. Further, he admitted at the hearing that he did not know that there was any problem with the FAIs until he received the second one dated July 28, 2014. Thus, Mr. Maillard was not aware of the existence of these documents at the time he terminated Complainant's employment.[10] Resp. Brief at ¶ 15.

Respondent asserts that the only concern Complainant expressed in his July 25, 2014 letter to Mr. Maillard concerns Mr. Benaoum's request to Ms. Sawyer to omit a supplier's name from the FAI. But Ms. Sawyer at all times filled out the FAI paperwork in compliance with all laws and regulations; suppliers' names were never omitted by her. Resp. Brief. at ¶¶ 16 - 17. No witness testified that any FAI was ever falsified. Resp. Brief at ¶ 21.

Complainant did not tell Mr. Maillard about his FAA complaint until July 30, 2014, and made no allegation about his FAA complaint in his OSHA claim filed shortly after he was terminated from employment. Resp. Brief. at ¶ 19. On July 27, 2014, Mr. Maillard requested that Complainant provide proof of the alleged falsification of any FAIs. Complainant never provided Mr. Maillard any evidence that Mr. Benaoum had caused any FAI to be falsified. Resp. Brief at ¶ 22 - 23. However, on July 28, 2014, Complainant sent two emails in response to Mr. Maillard's request. One clarified that he did not make a complaint, but made Mr. Maillard aware of another employee's complaint. In the second, Complainant alleged Mr. Benaoum's request to falsify was itself fraud, and reminded Mr. Maillard that he was entitled to six months' severance pay in the event his employment was terminated. Resp. Brief. at ¶ 24.

[10] Ergo, Respondent argues that these documents can play no part in this Tribunal's decision. Resp. Brief at ¶ 15.

The main reason Mr. Maillard terminated Complainant was because Complainant shared projected profit information with Sonaca, a competitor of Respondent. Complainant's email dated June 24, 2014 to Mr. Paul Constanzo of Sonaca included information about profits, but the only thing to be shared with Sonaca concerned production management software and closing out books. Ms. Harrington testified that she did not share any of Respondent's financial information going forward, but was concerned with closing the books for May and June 2014. Mr. Maillard was also displeased with Complainant's work hours based on information received from Ms. Myriam Cazenave, his assistant Chief Financial Officer. She reported that Complainant often left work early, and Complainant admitted to Mr. Maillard that he left early every day to care for a handicapped child. Mr. Maillaird expressed his concerns in an email dated July 21, 2014. Resp. Brief. at ¶ 25 - 27. Finally, Complainant did not contact the Wichita facility's new owners to ascertain what law firm he should contact if he needed legal counsel; instead he contacted the same firm used by Sonaca. Complainant provided generic and incorrect information to the firm to cloak himself from whistleblower retaliation. Following Complainant's meeting with Ms. Tibbets he told Ms. Sawyer that if either of them got fired, they would be entitled to $1 million. Resp. Brief. at ¶¶ 29, 32 - 33.

Finally, Respondent asserts that Complainant has provided no evidence to support his claim for compensatory damages and is "double dipping" because of Complainant's use of his retirement savings. Resp. Brief at ¶ 38.

C. Testimonial Evidence

The sworn testimony of the witnesses who appeared at the hearing is summarized below.

Van McMullen (Tr. at 29-206)

Complainant started in aviation as a child growing up. His father was vice president of commercial modification for Boeing. He started working in aviation in 1985 as a mechanic with a company called Hayes International. He progressed from a mechanic to eventually become executive management. He has been in the aviation business for thirty years. Tr. at 29.

He became familiar with a company named Sonaca[11] after he received a phone call from a Sonaca Executive. A customer at Spirit Tulsa, from Gulfstream Airlines, asked Complainant if he was interested in a vice president general manager position for a facility that was growing and had a lot of opportunities. At that time, he was the Director of Operations for Spirit Tulsa where he supervised 950 employees. Sonaca management was looking for an individual to run its Wichita facility following the termination of its general manager. Tr. at 30-32.

Sonaca owned a plant in Wichita by Jabara Airport. Complainant was hired to run that plant and worked for Sonaca for three months, from March 2014 until May 6, 2014. This plant was different from his prior experience because it was a job shop rather than a plant that performed contractual work. Tr. at 31-32, 37. He described job shop work as work that just comes in; "It could be one part one week. It could be ten parts the next ." Tr. at 32. The ratio of the work at Sonaca was 65 percent job shop and 35 percent contract work. At that time, there

[11] This was the name of the company that owned the Wichita facility prior to Respondent purchasing it.

were three main contracts with Learjet, Gulfstream and Triumph. The facility was configured such that it had processing capabilities on one side and manufacturing on the other. Tr. at 32-33. "Sonaca is the world leader for slats."[12] Tr. at 32. The facility in Wichita complemented Sonaca's facility in Canada. *Id.*

Complainant explained the difficulty in forecasting budgets because the work fluctuated. He had to look at how the costs were spread across the board very carefully. When he first arrived at Sonaca, he had an Excel spreadsheet that showed the type of work they were working on and when it was due. They did not track quality issues, defects within the process, or allocation of materials for each part. Tr. at 33-34. "[F]rom the financial point of view, you couldn't tell where you're bleeding at, if you were making money or losing money, why and where." Tr. at 34. The company was losing $450,000 to $500,000 per month on average. In March 2014, when he took over, he had to realign the company. He put together a report structure he called a "DEC" to see how the company was doing each day, and each department head was responsible for reporting to the Director of Operations. Tr. at 34-35. Complainant did this so he could look at other issues. In the first month he was in charge, the losses went from $450,000 down to just $25,000. The following month, the facility was profitable and it turned a $100,000 profit in his third month there. Tr. at 35. In those initial months, he first looked at the contract payment terms and renegotiated them. When he arrived, the contract terms to Sonaca's suppliers were net 30, while it was on net 60 on getting paid from its customers. He then changed the contract prices for the parts it was servicing; essentially, the company had not changed its price structure since 2009. He saved $4,000 per month by getting rid of employee uniforms and eliminating janitor services. Tr. at 36-37.

Jean Claude Maillard is the CEO and founder of Respondent, which is a large machine facility in Europe. Complainant first meet Mr. Maillard, in Wichita, two weeks prior to Sonaca selling the Wichita facility to Respondent. At the time of this meeting, he also met Hocine Benaoum. Mr. Benaoum was introduced as the salesman that reported to France, but was stationed out of Miami, Florida. Tr. at 38. The meeting lasted about three hours. At this meeting, Complainant brought his DEC, showing the performance of the facility. They discussed the sales forecast for May 2014; he forecasted $750,000 for deliverables. Mr. Maillard wanted him to do $500,000 that month and he interpreted that to mean Mr. Maillard wanted him to hold back on the books until the company became part of Respondent's organization. He told Mr. Maillard that he could not do that. Mr. Benaoum also explained to Mr. Maillard as well that the customers already knew their delivery dates. During this meeting, Mr. Benaoum acted as an interpreter because Mr. Maillard speaks very limited English. Tr. at 39-40. During this meeting, the goal that Mr. Maillard set out was that the Wichita facility generate $200 million a year within five years of operation. "For a facility to grow to $200 million in five years that was doing less than $20 million a year in business is very, very aggressive." Tr. at 61.

JX 3 is the employment contract between Complainant and Respondent; it includes a six month severance package provision. In addition, the contract included a provision that provided Complainant four weeks' notice prior to termination. He understood these terms to mean that if

[12] Slats are similar in function to flaps, except that are located on the leading edge of the aircraft wing. Slats alter the shape of the wing to increase lift. *See generally,* https://www.grc.nasa.gov/www/k-12/airplane/flap.html.

he was terminated, he would receive four weeks of notice and receive six months of wages thereafter. This was the first time that Complainant had worked for a foreign company. He did not know Respondent's business principles and he knew that Mr. Maillard wanted to turn the company into a machine company, a very difficult transition. The employment contract was a "cut and paste" from his earlier Sonaca contract, and he did not write the employment contract; he assumes someone in Respondent's human resources wrote the contract. Tr. at 42-43.

After Respondent purchased the Wichita facility, Complainant had a second meeting with Mr. Maillard. This meeting occurred a few weeks after the sale closed. The two made arrangements to have Complainant, Mr. Maillard and Mr. Benaoum meet the company's key customers: Triumph in Dallas; Monitor GKN in New York; GKN Wellington; and Spirit Aerosystems, all of which had existing contracts with Sonaca. The goal was to introduce Respondent as a company because it was not well known in the United States. That meeting did not go well because of the language barrier. Mr. Maillard used the term "turnover" for the word "revenue." GKN Wellington expressed concern about who was going to be there to build its parts if everyone was fired. Therefore, this misunderstanding required damage control following the meeting to explain what Mr. Maillard really meant; Mr. Maillard did not act in bad faith, the concern purely stemmed from the language barrier. Tr. at 43-44.

JX 6 is an email that Kim Sawyer, the manager of quality, wrote and presented to Complainant addressing two different incidents. She was a very knowledgeable inspector. The letter concerns an incident that occurred between herself and another employee. He heard about the incident because the facilities are small and the building echoes. Tr. at 45-46. Ms. Sawyer brought this to his attention because she was concerned that Mr. Benaoum was "using a lot of language and issues and yelling, and [she] didn't know if it was just his culture that didn't work with American culture at all. You can't use your authority and the title and position to coerce people into making decisions on paperwork." Tr. at 46. Notwithstanding the May 30, 2014 email (JX 6)[13], the problems with Mr. Benaoum continued. Tr. at 100.

Initially, Ms. Sawyer had been trying to ship a part that was machined, and Quik Tek (another machine shop in Wichita) had worked on this part. Respondent was doing business with Quik Tek and Chrome Plus. Mr. Benaoum had sold an order to Mecachrome for "speed shop work." Complainant had not heard of this term before, but speed shop work comes in as a purchase order that has to be done very quickly. Mr. Benaoum, as a salesman, went to Canada where Mecachrome is located and "sold the fact that we were a processing house" and that Respondent had the capabilities in Wichita to do the type of work Mecachrome wanted done; which was not true, because Respondent doesn't have any machines at all in Wichita." Tr. at 47-48. The part Mecachrome needed required taking a raw of piece of stainless steel and milling it via heat treatment and stress relief. This part was intended for a Bombardier aircraft, a passenger plane. Bombardier is an air carrier.[14] Respondent had Quik Tek machine the parts and Chrome

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[13] *See also* JX 5.

[14] This Tribunal notes that Bombardier does not hold an air carrier certificate. *See* https://www.transportation.gov/policy/aviation-policy/certificated-air-carriers-list. However, it does manufacture aircraft that are used by air carriers. *See generally,* http://www.bombardier.com/en/aerospace/commercial-aircraft.html.

Plus executed the processing (heat treatment and stress relief), because Respondent's facilities could not perform that work. Tr. at 48.

A First Article Inspection ("FAI") is a process used when the very first part comes through production. This process and its documentation are stringent to ensure that the part meets all of the requirements under the specifications. FAI tests are done "to make sure that you're going to be able to produce these parts, whether you do one or five [the] exact way each time, so it's very important to have a first article." Tr. at 49. A certificate of conformity ("C of C") is the document that states that the part meets the configuration on the FAI.[15] The FAA requires both an FAI and a C of C for a certified part; one without the other is not sufficient. The reason these documents are so important is because of traceability.[16] If the part fails, the FAA wants to have a paperwork trail to go back and trace how the part was made or repaired, and who made the part or repaired it. This paperwork goes with the part and stays with the aircraft for the life of the aircraft. Tr. at 49-52.

Ms. Sawyer reported to Complainant that Mr. Benaoum wanted her to remove the Quik Tek logos from the FAI and the C of C. Without the logos, the FAA "would absolutely have no way to track this part at all, none." Tr. at 52. Complainant surmised that Mr. Benaoum wanted this done because the logo shows that someone other than Respondent actually did the work, and Mr. Benaoum did not want the customer to know who this was because the customer could directly solicit that other company to have the work accomplished. Tr. at 50.

Ms. Sawyer also reported another incident that occurred on May 30, 2014 in JX 5. This time, Mr. Benaoum asked her to not mention another company, R&R, a machine shop in Wichita, on the FAI. In that instance, R&R had manufactured and machined the part itself. By law, that information needs to be disclosed on an FAI.[17] Around the time he learned of these incidents, the facility was about to undergo an AS9100 audit.[18] This is the process where the FAA monitors how the company conducts its manufacturing procedures.[19] Tr. at 52-53. Complainant had concerns about what Ms. Sawyer reported because when the company did an internal audit, it discovered that "30 or 40 percent of the people they were sending parts to through [Mr. Benaoum's] speed shop work were not on our approved supplier list." Tr. at 54. That is a "huge problem" because the company has "to verify that if you send a part to a company, that company is qualified to manufacture that part and has the same policies and procedures in place to verify the process is compliant."[20] *Id.* Three people played a role in

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[15] *See* 14 C.F.R. §§ 21.130 and 21.303(b). A certificate of conformity provides evidence that a part was produced by a manufacturer holding an FAA-approved manufacturing process. *See also* 14 C.F.R. § 21.33.

In her January 2016 deposition, Ms. Sawyer explained that the FAI is used throughout the process but a certificate of conformity is generated at the end of the process stating that the parts was processed correctly to all customer specifications and customer engineering. CX 202 at 15 – 16.

[16] *See generally* 14 C.F.R. Part 21, subpart K and Part 45, subpart B.

[17] *See* 14 C.F.R. § 21.316.

[18] *See* footnote 8, *supra.*

[19] 14 C.F.R. § 21.310.

[20] *See* 14 C.F.R. § 21.316(h). *See also* 14 C.F.R. §§ 21.307 and 21.137(b).

having non-approved suppliers work on these parts for Respondent: Troy Boese, April Shinkle and Mr. Benaoum. *Id.*

JX 9 is an email dialogue dated July 24, 2014 between Ms. Sawyer, Vincent Rousseau and Mr. Benaoum; Complainant was courtesy copied on it.

JX 8 is an email exchange between Complainant and Mr. Benaoum. At the end of the email to Mr. Benaoum, he wrote: "My team here is not your punching bag. It's not your place to say you will fire a manager that works for me." Tr. at 55. Complainant wrote that because Ms. Sawyer and Tony Herington came to him saying that Mr. Benaoum, while in the smoking area outside, yelled and cussed at employees, threatening that he was going to fire all of them. *Id.*

Mr. Benaoum did not report to Complainant. Mr. Benaoum reported to Respondent, but Complainant did not know the identity of Mr. Benaoum's direct supervisor. He did know that Mr. Benaoum corresponded with Mr. Maillard when Mr. Benaoum worked in the Wichita facility. He tried to address issues with Mr. Benaoum in June 2014. That email (JX 8) came about after a lengthy telephone conversation, "which was a screaming match," with Mr. Benaoum, and it came to the point where he had to explain to Mr. Benaoum that they were not going to operate at that facility in that way anymore. Tr. at 55-56.

When Complainant joined Sonaca, the company had no human resources department or staff, and they did not have a complaint system. Tr. at 56. As for the finance and accounting personnel, they used a system called Visual into which they input the information. Sonaca had no accounting department at all. After the transition to Respondent, the finance and accounting "was zero." Under the prior owner, Sonaca, finance and accounting functions were performed at its offices in Montreal. For these reasons, Complainant had to hire Elizabeth Moore to help with the accounting; however, she did not understand Visual, nor did any of the staff that worked at the facility. It became a bad situation; the company did not have money in the accounts to pay for payroll and company's account payables (which were supposed to be net 90) were 180 and 200 days. Tr. at 56-57.

He received 20 to 30 emails per day for months from Myriam Cazenave, who is now the chief financial officer for Respondent's North American Division. Previously, she worked as an auditor and was part of the sale acquisition. She came to the Wichita facility to help manage the books and started to put a system in place to help the Wichita system work with the system in France. Tr. at 58. Ms. Cazenave currently works in France with Mr. Maillard. Tr. at 61.

JX 38 is an email chain involving Ms. Cazenave and Becky Herington. Complainant hired Ms. Herington to help with the books, make payroll and make some sense of the Visual system. Tr. at 58. Complainant described the situation as a rocky road regarding the finance and accounting when Respondent took over the company. It got to the point where Complainant had to make payments out of his own pocket to keep the company running. Every day was a battle. Due to the seven-hour difference in time between Wichita and France, and because Respondent did not understand the Visual system, and Ms. Cazenave's refusal to give cash to the facility until he gave her a profit and loss statement, Complainant stated that "it was a muddled mess." Tr. at 58, 62.

Upon learning of the difficulties presented by the Visual system, Ms. Cazenave told Ms. Herington and another employee that Ms. Herington needed to go to Montreal to work with Paul Costanzo to straighten out Respondent's Wichita facility's books. Mr. Costanzo worked for Sonaca in Montreal, the company from which Respondent purchased the Wichita facility. She asked that Complainant contact Paul Costanzo and facilitate a training session between Sonaca personnel and the Respondent's Wichita facility team. This occurred after the sale of the Wichita facility by Sonaca to Respondent. To close the books for the months of June and July, Complainant needed Sonaca's help. Tr. at 58-59. "In order to close a month, you have to have all the invoices, all the POs [purchase orders]. You have to have the bank statements. You have to have access to our computers. You have to really go into our computer system and find out what we are doing and how we operated, what we had inputted percentage-wise for net 30, net 60, or whatever payment we're doing. So everything, access to everything we had in our facility." Tr. at 60. Ms. Herington went to Montreal to share this information with Sonaca approximately three weeks prior to Complainant's termination of employment. Tr. at 61.

Issues with Mr. Benaoum occurred every day, but he began to "ruffle the feathers of employees" once the speed shop work began. Tr. at 61-62. Initially, if the facility needed something, he would go to Ms. Cazenave to provide cash for the facility. He had a lot of pressure from Mr. Maillard. If a request for quote came in, Complainant would have a team sit at a table and decide how long it would take to obtain the material given the facilities' manpower and production schedule. Tr. 62-63. "The problem [was] the speed shop work was Greek to us." Tr. at 63. It was very frustrating for Mr. Benaoum because Respondent dealt exclusively in machine parts, which differed from the work the Wichita facility had done in the past. *Id.*

JX 23 is the FAI dated July 10, 2014. It concerns very large heat shield parts that measured over four feet long intended for Mecachrome. The original PO had 80 parts. The two parts on this document cost about $150,000 apiece to manufacture. Mr. Benaoum decided to have these two parts worked on by Respondent's facilities in France. On page two of this document, it indicates that stainless steel, 15-5 PH was used. It gives the specification number, which is the AMS number located in the second column. It also indicates when the part was machined, documents the penetrant inspection, and also documents a passivate process to an AMS specification, the type of paint used. Complainant explained that he had to make sure the part complied with that process. He also explained the importance of marking the part, with the actual part number, so one knows exactly who manufactured the part. In that instance, the part number was 5-6E 130167-2. Tr. at 63-66.

This document came to his attention during a morning staff meeting when he learned of a problem with delivery of that part because the FAA paperwork did not support the criteria that Ms. Sawyer had for the C of C. Ms. Sawyer needed to verify that processes reflected on the form had been accomplished, and the Wichita personnel did not know that the part was being manufactured in Figeac, France. Nor did they know that it was going to be drop-shipped from France to Mecachrome in Canada. As the parent and thus the contract originator, the Wichita facility was asked to prepare the C of C for this part. To address this problem, Complainant directed Ms. Sawyer to contact an employee of Figeac France to see if he could forward any documentation they had on the FAI, due to a few discrepancies in the part's paperwork. In

particular, no one could verify the following: whether the dimensions met the specifications; where the material raw stock came from and whether it came from the United States or Europe; who performed the penetrate inspection; and when, where and how the passivate and paint were done. Tr. at 66-67. "[T]here was no supporting documentation that came back to our facility from the part being manufactured. It just was manufactured and then sent to Mecachrome." Tr. at 67. If Ms. Sawyer could have verified these issues through paperwork, Complainant would have allowed her, as a seasoned inspector, to issue the certificate. If not, Complainant would have advised her to return the part to the facility or have the part pulled from the aircraft in Canada. Tr. at 68.

JX 9 is a series of emails between Ms. Sawyer and a buyer at Mecachrome in Canada. Ms. Sawyer asked to send part number -5-01 back to the Wichita facility so she could complete the FAA documentation. Then, Mr. Benaoum became involved, telling her that Mecachrome would not return the part as it was in the process of drilling it out. Mr. Benaoum caused this problem because he coordinated a ship date and method with Respondent's facility in Figeac France without telling the Wichita facility's quality control or shipping departments. Tr. at 71-72.

JX 37 is an email that included Ms. Sawyer, Mr. Benaoum and later himself.[21] Here, a Mecachrome buyer asked for a copy of the bubble drawing concerning a part. A Respondent representative from France, Mr. Said El-Mokadem, was "trying to pull one over on the customer" for he did not want Mecachrome to know there was a problem because the red stamp on the bubble drawing indicates an issue. Mr. Benaoum responded to that email that he did not want Mecachrome to see that Respondent had subcontracted the work. He does not know if the bubble drawing reached Mecachrome. Tr. at 73-74.

The issue of providing Mecachrome with the bubble drawing with the red stamp caused him to contact Gaye Tibbets of the Hite, Tanning Law firm.[22] He wanted to protect the company. Respondent had no knowledge of American business practices and the FAA, and he wanted to be able to provide a response to Mr. Maillard's in-depth questions about the issues. He contacted the law firm to see how the company could avoid any legal issues. Tr. at 75. When Complainant called the law firm, he described a situation with two employees, one of whom did not work for him, and gave the person some quick background since the firm had not dealt with the Wichita facility since Respondent purchased the company. He had tried to work with Mr. Benaoum on these issues, but he did not report to him; consequently, he explained, "I can't fix it," so his only recourse was to raise the matter with Mr. Maillard who could take the issue to his HR department. Tr. at 79-80. The law firm provided a letter that he requested and he provided a copy of that letter to Mr. Maillard. Tr. at 81-82; *see* JX 16.

Complainant had scheduled telephone calls with Mr. Maillard twice a week and sent Mr. Maillard his DEC report daily; this document described how the Wichita facility operated every

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[21] The initial email exchange occurred between Ms. Sawyer and Mr. Benaoum on June 25, 2014. Ms. Sawyer forwarded this email exchange to Complainant on July 18, 2014. *See* JX 37.

[22] As reflected by the handwritten notes of counsel at JX 35 at FANA 001228, the call occurred on July 18, 2014; the same day that Ms. Sawyer forwarded the email exchange between herself and Mr. Benaoum to Complainant.

day. Mr. Maillard was located in France and Complainant wanted to inundate Mr. Maillard with information so he could learn about how the Wichita facility operated. These twice weekly telephone calls would last from 15 to 30 minutes. Mr. Maillard wanted to practice his English on him so he could learn the language. During these meetings Complainant expressed his concerns about Mr. Benaoum, telling him that these problems were recurring. Complainant expressed that in the American culture, if someone does not report to him, he cannot tell him or her to stop doing something or to leave the facility. Mr. Maillard wanted Complainant to have a good relationship with Mr. Benaoum and believed that operations and sales should work closely together. He discussed with Mr. Maillard how Mr. Benaoum showed aggression toward Complainant's team, creating what he considered a hostile work environment. Finally, Mr. Maillard told Complainant to put his concerns about Mr. Benaoum in writing and to send it to Mr. Maillard. Tr. at 76-77; *see* JX 15.

JX 20 is a document he received on July 25 from Ms. Sawyer concerning an incident that occurred that day with Mr. Benaoum. Tr. at 79. Mr. Benaoum "was back to yelling, not just yelling, but the point of threatening yelling." Tr. at 80. The incident involved a part that was required to be plus or minus 10,000 tolerance[23] on a speed shop job, a very hard and costly type of tolerance to maintain. The part did not meet specification. Mr. Benaoum went to the employee in the insuring department and in charge of the Wichita facility contracts, and wanted that employee to "just have us trim the part ourselves and ship it." Tr. at 80-81. This would have been unauthorized rework and not consistent with the facilities compliance program. Tr. at 81.

JX 15 is a document generated in response to conversations that Mr. Maillard and Complainant had had for several weeks on the telephone, where Mr. Maillard asked him to explain his concerns. He explained to Mr. Maillard that speed shop work was totally new to the Wichita facility. Previously, the facility was "banging rivets and processing parts." Nobody working in the facility was familiar with speed shop work. However, the Wichita facility operated under the ISO and AS9100 procedures and processes. In France, Respondent was not governed or certified the same way as the Wichita facility. He explained that they had to go through a board in its process and "It's not a one-man band." Mr. Benaoum's violations of procedures in the Wichita facility had already incurred a $125,000 penalty from Mecachrome for late deliveries, with this figure growing each day. Tr. at 82-84.

The letter also explains several instances where Mr. Benaoum asked in different ways to remove or omit information on the FAI so that the customers did not learn that somebody else built the parts. Under AS9100, one can only use approved suppliers and the Wichita facility was about to have an AS9100 audit, which would have uncovered the omission. Complainant believed that such a finding made during Respondent's first audit, "would be a very bad reference for us." Tr. at 85-86.

JX 17 is a response to Complainant's letter to Mr. Maillard (JX 15) from an unknown party in which Mr. Maillard reserves the right to lodge a complaint against him or anyone else for defamation of Mr. Benaoum. Tr. at 86-87. In this letter, Mr. Maillard wrote that he gave Complainant "full power and unlimited funds to apply these rules." Tr. at 88. No one told him

[23] This Tribunal infers that this meant 10,000th of an inch.

that he could not consult with the attorneys on file at the company; the same attorneys used when Sonaca owned the facility, and he had no reason not to continue to go to them. When the sale occurred, the Wichita facility still had the same retainer and all of the contracts rolled over from Sonaca to Respondent. Tr. at 89.

JX 14 contains one of two emails Complainant sent to Mr. Maillard following his July 27, 2014 letter. JX 39 was an email from Mr. Benaoum to Complainant and Ms. Cazenave concerning the penalties Mecachrome imposed for Mr. Benaoum's actions. JX 18 is an email Complainant sent to Mr. Maillard on July 28, 2014, an email Mr. Maillard "instantly" sent to Mr. Benaoum and Ms. Cazenave. Tr. at 91-92.

JX 24 is the second FAI issued on July 28, 2014 from a different inspector, dated almost 18 days past the original FAI and all of the processes that Ms. Sawyer and Complainant had challenged to the earlier FAI were removed. "That made us a problem. Now we had a falsified document." Tr. at 92-93. Complainant made a report to the FAA on July 30, 2014.

On July 31, 2014, Mr. Maillard called Complainant on Complainant's cell phone. Mr. Maillard was on speakerphone but did not identify who else was with him during that call. Mr. Maillard informed Complainant of his immediate termination of employment because Complainant had contacted the FAA and because he had given proprietary information to Mr. Costanzo at Sonaca; specifically that that Respondent's facility in Wichita expected a $1.2 million profit. However, Respondent is a public company and its record of profits are available to stockholders. JX 21 is the termination letter dated July 31, 2014. Prior to receiving that letter, Complainant did not receive any specific warnings that he had violated section 1.1 or 7.5 of his contract or that he needed to fix those problems. Tr. at 94-95.

Complainant was terminated on July 31, 2014 and made $120,000 per year at that time plus a $20,000 bonus, including covered medical expenses which extended to his wife and three children. He obtained a new job ten months later in May 2015, and so he lost $100,000 in salary. As a result of the termination, he accumulated medical bills and had to withdraw $18,000 out of his Boeing 401(k) to help offset costs. He is asking for $50,000 in compensatory damages.[24] His termination has caused hardship in his family and his home life. He's an "old school" guy, but "it was very difficult to work as hard as I did to try to protect the company and help it grow, and then be discarded like for a total misunderstanding. It's just hard to wake up in the morning and look at your family that way." Tr. at 96-98.

On cross-examination, Complainant did not recall when he first alerted the FAA about any compliance concerns. Tr. at 102. He had communicated to Mr. Maillard his concerns about FAA compliance in his telephone calls with him prior to July 25, 2014, recollecting this happened sometime in May 2014. Tr. at 104. However, he did not have conclusive evidence until he received the second FAI. *Id.* The subject of FAA compliance was one of the topics of every telephone conversation he had with Mr. Maillard from May until July 2014.[25] Tr. at 105.

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[24] Complainant also asked for $250,000 punitive damages; however, punitive damages are not permitted by the statute. Tr. at 98.

[25] During the cross-examination, Respondent asked Complainant about his answers to its interrogatories concerning which laws or regulations Complainant alleges Respondent violated. Tr. at 106.

JX 1 is Complainant's complaint to OSHA dated October 13, 2014 and there is no reference to his verbal dialogue with Mr. Maillard about FAA violations in his complaint. He attached the email that he asked Ms. Sawyer to prepare and send to him to his complaint. This email referenced a nonconforming part and an incident concerning a speed shop job. Ultimately, Respondent obtained a formal disposition from Mecachrome to ship the part as is. Thus there was no evidence of falsification as to the nonconforming part that was shipped to Mecachrome. Tr. at 114-115.

Complainant called Ms. Tibbets, an employment attorney of the firm that the Wichita facility had previously used, on behalf of the company. Tr. 123. He did not gain permission from Mr. Maillard in advance to contact a lawyer, but he did not need to. He requested an opinion letter from Ms. Tibbets concerning Ms. Sawyer being pressured to falsify FAIs, but he did not tell her that he was a victim of retaliation. Tr. at 124-25. He denied obtaining the opinion letter under false pretenses in hopes to get Mr. Maillard to "back off" of him. Tr. at 141. Similarly, he denied calling Ms. Tibbets to cloak himself with whistleblower protection. *Id.* at 143.

He was not aware that as of July 25, 2014, Respondent had concerns about his job performance and he repeatedly denied that he believed that Respondent ever had any problems with his work performance. *See* Tr. at 125-33. However, Complainant conceded that JX 10 appears to show that he indicated he "may need a reference and a letter of recommendation after this is over." Tr. at 133. He acknowledged an email (JX 30) from Ms. Cazenave, detailing a series of questions she had asked of him, which she wrote were unanswered. Tr. at 135-38. Complainant also agreed that Ms. Sawyer's June 4, 2014 email (JX 6) and her July 30, 2014 email (JX 1, Attachment A) do not indicate that she felt threatened by Mr. Benaoum, nor did Complainant bring the June 4, 2014 email to Mr. Maillard's attention. Tr. at 140-41. He denied telling Ms. Sawyer that if Respondent fired either him or her that he would collect a million dollars. Tr. at 143. Complainant believed Mr. Benaoum did not do acceptable work, but acknowledged that Mr. Benaoum currently holds the position Complainant previously held at the Wichita facility. Tr. at 148.

Complainant agreed that AS9100 compliance is not a governmental requirement, but it is a standard mandated by private industry and the company would not win certain contracts if the company was not AS9100 qualified. AS9100 provides assurances that the supplier or manufacturer follows set guidelines and procedures that the aerospace industry wants to see. Tr. at 154. Certified private consultants, not the FAA, performed the audit referenced by Complainant on direct examination. *Id.* at 155-56.

The evidence concerning falsification of the FAI is contained in JX 23 and 24. On JX 23, box 22, July 10, 2014 is written. Above that box is a circle with a line across it with the FGA, which represents Respondent and an inspector number below that, number 54. To the left of that stamp is a signature. That signature means "that they went through the entire process of the FAA FAI, first article inspection, and completed on this day. It doesn't mean they did the part that day, but completed the inspection process that day." Tr. at 167. The Wichita facility inspection

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Complainant's answers during his testimony focused on FAI compliance rather than FAA compliance. *Id.* at 106 – 108.

department had a problem with accomplishing the process on that day. When Ms. Sawyer responded to Respondent's office in France on that FAI, it provided JX 24, which renews the verification process by a different inspector. So, the documents reflect two different inspectors, both on the same part, each saying they verified all the parts. One of those two documents (JX 23 or JX 24) is false. Tr. at 167-69. Complainant recalled realizing the company had a problem by the middle of July. He did not have verification of falsification until July 28, 2014. He maintained that his statement during his deposition that he did not become aware of JX 23 and JX 24 until July 30, 2014 was an oversight on his part. Tr. at 169-173. Complainant did not provide Mr. Maillard with a copy of his complaint to the FAA prior to his termination. However, he believed that Mr. Maillard learned of his complaint to the FAA by someone working for Mr. Maillard who accessed his computer. On July 31, 2014 Mr. Maillard told Complainant during their telephone call terminating him that Mr. Maillard knew about the FAA complaint. Tr. at 174-75.

The employment contract Complainant had with Respondent is virtually the same as the one he had with Sonaca, except for section 7.3. This provision concerns noncompetition and Respondent's personnel in France inserted it into the contract. He admitted that the six month severance package as part of the contract was his idea. Complainant did not believe that he was an employee at will, but did understand that he could be terminated at any time with four weeks of written notice. Tr. 177-179.

On re-direct examination, Complainant said JX 23 and JX 24 are mutually exclusive documents; only one can be true. JX 25 at page four shows that Complainant knew of this discrepancy by July 23, 2014. Tr. at 189. Concerning JX 30, Complainant asked Ms. Cazenave for costs for five different programs on five different occasions and did not receive an answer; the problem was, "We could not go through Visual and provide the documentation, because we had no way to access it from an accounting point of view. The only way to address these questions would be close the month out and then address them then. We had to wait until we sent our team to Montreal to be trained [on Visual] before we could answer those questions." Tr. at 195.

Upon my questioning, Complainant said the FAI process was part of the Parts Manufacturer Approval process.[26] The Wichita facility received requests for parts from aircraft manufacturers and air carriers. Tr. 197-98. There is "huge significance" between JX 23 and JX 24 because in JX 23 he cannot verify the five different activities set forth on page 2 of the documents. When the Wichita facility inquired into requesting substantial documentation to support the performance of these actions, Respondent's personnel in France could not provide them. Therefore, "they withdrew the activities off the FAI and gave us a separate one with a different inspector on it." Tr. at 199. "[T]he part would have been drop-shipped to Mecachrome to Canada prior to the second FAI [JX 24]," *Id.* Complainant only recently learned that Respondent had a different law firm than the one he used to consult. The only law firm that sent him a bill was Hite Fanning, the firm he contacted to obtain the legal opinion letter. Tr. at 202. The telephone conversation in which Mr. Maillard informed Complainant of his termination of employment occurred about 9 a.m. on July 31, 2014. During this telephone call, Mr. Maillard told him that Mr. Boese, one of Respondent's employees at the Wichita facility, would provide

[26] *See* 14 C.F.R. subpart K.

his actual letter of discharge. Later that day, Complainant received his termination of employment letter from Mr. Boese; Mr. Maillard had emailed it to Mr. Boese to give to Complainant. Tr. at 204.

Shannon Walker (Tr. at 206 - 221)

Ms. Walker started working at the Wichita plant in May 2012, for Sonaca. She began as a temporary employee, but eventually became a permanent employee as a procurement agent, and she procured parts for the 727 bulkhead. After Respondent purchased the Wichita facility from Sonaca, she continued to work there. She knows Complainant, Ms. Sawyer and Mr. Benaoum, the latter of whom worked in sales. She did not have to interface with Mr. Benaoum as part of her job, but he would come and talk to her sometimes. He mostly talked about sending parts to France. There was a language barrier because they had a hard time understanding each other. Tr. at 206-09. She did not know how many hours a week Mr. Benaoum worked at the plant. Complainant usually came in to work around seven or eight o'clock and did not leave until five or six o'clock. She worked at the Wichita plant before and after Complainant came on board to run it. When he came to the plant, Complainant made changes upon finding errors on the books. For example, they did not even know how long it took to make the bulkhead and Complainant made employees report such times. Mr. Benaoum had called her in and told her that she would probably be fired, but she never heard him threaten anybody else's job. That occurred soon after Complainant was fired. Tr. at 210-11. She knew that Ms. Sawyer was upset because Mr. Benaoum tried to convince her to take some machining plates off of an FAI document, and Ms. Sawyer "was scared she was going to get fired if she didn't do it." Tr. at 211. Ms. Sawyer was scared every day for "like a month….That's all she ever talked about, any of us." *Id.* at 212. She believed that the requests from Mr. Benaoum were not a laughing matter because "She [Ms. Sawyer] was in tears." Tr. at 212. She remembered going to lunch with Complainant after Respondent terminated him, but she did not remember talk of a lawsuit. Respondent terminated Ms. Walker from its Wichita facility in August 2014, when it told her that it planned to consolidate her job with another program manager's job and only needed one of them. Tr. at 212-13.

On cross-examination, Ms. Walker said she worked as a program manager at the Wichita facility. She did not know Complainant prior to Complainant working at Sonaca. Tr. at 214. Complainant did not approach her after his termination to advise her that he was looking to form a new company. Mr. Jeffrey Russell, Complainant's immediate successor, terminated Ms. Walker's employment. She denied that Respondent fired her because she referred to another employee in a profane way. Tr. 219-21.

Rebecca ("Becky") Herington (Tr. at 222 - 238)

Ms. Herington worked at Respondent's Wichita facility's accounting department from June 2014 until the end of August 2014. Her husband and Complainant worked together at Spirit. Before working for Respondent, she did not know Mr. Benaoum. Tr. at 223. Mr. Benaoum was the salesman and he was at the plant "pretty frequently." Tr. at 224. Complainant was at the plant every day; he usually arrived before her and most days he was there after she left. She usually arrived at the plant about 8:00 to 8:30 a.m. and left around 5:00 p.m. *Id.*

There were problems with the plant's finances: nothing was being paid and no entries were being made into the accounting system. Prior to her joining the company, Montreal (Sonaca) had done all of the accounting for the plant. Respondent had not sent the money it was supposed to upon completion of the purchase to pay off the payables. The acquisition was completed in early May 2014, and she joined the company in June 2014, at which time finances were not in a good state. There were problems with the manufacturing process system called Visual. She lacked familiarity with that system and asked to receive training at the plant, but Respondent did not want to pay for it. Thus, she was directed to go to Mr. Costanzo at Sonaca. She thinks that she went to Montreal sometime in July. JX 38 is an email chain from July 9 and 10, 2014, with Mr. Costanzo and Ms. Cazenave listed as recipients. Ms. Cazenave was the director of finance for Respondent in France and her chief financial officer was also copied on some of the email correspondence. Tr. at 224-28. Speaking of the financial position of the Wichita facility, Ms. Cazenave advised Ms. Herington that she would "need to ask Paul Costanzo. And so [Ms. Herington] would reach out to Paul Costanzo, and he would say, well, why is she telling you to ask me. And so then he would give me whatever information I needed…." Tr. at 228. When she went to Montreal to visit Sonaca's staff to discuss the Wichita facility's books; they were allowed access to the plant's computers. *Id.*

She had conversations with Ms. Sawyer about the problems she had with Mr. Benaoum and with the way he treated her. For example, a conversation occurred about Ms. Sawyer removing some information from a document and then signing that document; she did not want to do that as she knew that it violated the regulations. However, she did not want to lose her job. She discussed this with Ms. Sawyer "[u]sually on a daily basis." Tr. at 228-29.

On cross-examination, Ms. Herington admitted to knowing Complainant for three or four years, as Complainant hired her. She heard about the position while at the facility on an accounting consulting assignment, though she is not a CPA. Her husband has known Complainant since 2010. Complainant and her husband socialized together, but not on a monthly basis. Tr. at 230-32. She quit working for Respondent at the end of August 2014 because she was not happy with the environment. Tr. at 233-34. "[I]t was a lot of disarray, and there wasn't a real clear level of who was in charge, and anytime I asked about financial information that I was supposed to be directed to [Ms. Cazenave], their director of finance, I always got pushed towards, you need to ask Paul Costanzo or somebody else." Tr. at 234. Since leaving Respondent's Wichita facility, she worked as a temporary hire at a small machine shop in its accounting department, and in May 2015, she joined a software media publishing company in its finance department. Tr. at 235-36.

On re-direct examination, she stated that she sought and received the assistance of Sonaca to close the books for the months of May and June of 2014. Tr. at 237.

<u>Kim Sawyer (Tr. at 239 - 310)</u>

Ms. Sawyer is the quality assurance manager for Respondent's Wichita facility. She first joined the company as a quality engineer, but later became the quality manager on March 25, 2014. The quality manager ensures that all specifications, OEM, industry standards, internal

audits, FAIs, C of C s, and CARTs[27] are compliant. Tr. at 240-41. Ms. Sawyer explained an FAI as "anytime you produce a brand new part number or anything that's been stopped for more than 24 months, it's required to have a first article inspection…it's the first part of the production run. You have to run the first part to prove up process, to ensure that everything is correct and good and compliant…then production can continue on with more parts." Tr. at 241-42. A certificate of compliance is a document "certifying that everything that's listed on that certificate of compliance is within the customer specifications, anything to the PO." Tr. at 242. A C of C goes on every part, whether it is a production part or FAI. "After the first part is made and accepted with the C of C, all other parts behind it does [sic] not require a FAI, but it does require a C of C." *Id.* At the time Complainant worked for Respondent, she was the only one performing FAIs. She never made any false documentation on an FAI. Tr. at 242-43.

Mr. Benaoum first joined the Wichita facility as the director of sales and, later on, he became the general manager. She first met him sometime after Respondent purchased the plant. At that time he was based in Florida. Tr. at 243-44. He did not come to the Wichita plant very often and she would not normally see him because she worked upstairs and "a lot of stuff would happen downstairs." Tr. at 244. She did not approach Complainant with a complaint about Mr. Benaoum on her own, but Complainant asked her to send an email about Mr. Benaoum. Tr. at 245.

One morning, on June 4, 2014, Ms. Herington assembled all the managers for a meeting. At this meeting, conducted in secret in Complainant's office, Complainant, Mr. Boese, Mr. Wilson, Ms. Walker, Complainant, and Ms. Sawyer attended, and she thought Ms. Herington also attended. She was told that she could not take notes and that all phones had to be put away. Complainant then pulled his phone out and started reading an email that he received from Mr. Benaoum; this email stated that two employees were incompetent and that they needed to go. Tr. at 246. At the end of the meeting, Complainant told them "that it was up to us which way we wanted to go, what path to go down, so it was up to us." Tr. at 247. She described her reaction as "mad," particularly at Mr. Benaoum, and she went outside after the meeting to smoke. While outside, she commented to Complainant, "You know, that's really funny that I'm being called incompetent. I was like, I wasn't very incompetent when I was asked to remove a Quik Tek logo off a C of C for machining and replace Figeac Aero." *Id.* Having told Complainant of that incident for the first time, Complainant requested that she send him an email transcribing what she had just told him; this email is contained in JX 6. Ms. Sawyer stated that the email was not a complaint against Mr. Benaoum, she was just letting out anger. Mr. Benaoum has never threatened her job, and he did not threaten her on June 4 because he was not in the facility that day. However, Complainant has threatened her job. Respondent's personnel in France were very upset that the Wichita facility had two different email addresses and told Complainant to remove the second email address. In an email, Respondent's personnel told the Wichita facility employees not to use the Aeromad.com email, or else they would face termination of their employment. Tr. at 248-250.

Mr. Benaoum asked her to try not to put R&R on the FAI. When she told him that she could not do that, he never pressed her any more on that issue. She never falsified any documentation by changing or taking off a subcontractor's name, because she still had to show

[27] The term CARTs was not explained to the Tribunal.

evidence of the work they performed. Complainant told her that Mr. Benaoum was trying to retaliate against her. On May 16, 2014, the Wichita plant performed speed shop work for Mecachrome parts and she and Mr. Benaoum spoke in Mr. Boese's office. Mr. Benaoum "was holding up the C of C and was kind of laughing, saying, can't we remove this logo and put Figeac." Tr. at 252-253. She answered no, for that would be a falsification. *Id.*

Concerning the R&R incident (JX 5), she sent emails to Complainant on July 18, 2014 when he asked her to provide him with all emails "[p]ertaining to any conversations between [Mr. Benaoum] and I." Tr. at 254. Complainant forwarded an email exchange between her and Mr. Benaoum to Complainant on July 18, 2014, as well as emails dated June 25, 2014, located at JX 37. In this incident, she submitted an FAI to Mecachrome and they in turn wanted a bubble drawing, "and since [Respondent Wichita] did not machine the part, I was asking France for that." Tr. at 255. She did not send the bubble drawing to the customer, but she received a lightly-colored one from France. She told the people in France to expect a request for more information if needed as the drawing was so light. She did not recall if she had previously complained to Complainant about Mr. Benaoum concerning this incident. Tr. at 256-57.

JX 20 refers to a document that she wrote and left on Complainant's desk. This concerned a speed shop hot part in which the facility was "kind of late, and…waiting for a hot part to come from our supplier." The part arrived with a nonconformity. At that time, her office was downstairs and across from Mr. Boese's office, and she overheard Mr. Benaoum on the telephone asking Mr. Boese if the paperwork could be done in-house. Ms. Sawyer intervened with an answer "no" because a disposition from the customer must precede the release of a nonconforming part from the facility. Tr. at 257-58. "And after some very heated argument, he then called the customer, and I got what I wanted, and I released the part." Tr. at 258-59. Mr. Herington and Mr. Boese and another person Ms. Sawyer could not remember were in Mr. Boese's office. That unidentified person said something to Complainant and Complainant asked that Ms. Herington make a statement and leave it on his desk Monday morning, as that was a Friday night. The company did nothing wrong because she did not let the nonconforming product leave the Wichita facility without the customer's disposition. Mr. Benaoum did not keep her from doing the job; she was frustrated with him, but once she brought out the specifications and industrial specs and standards and pointed it out to him, he understood better. She never felt that her job was threatened by him. Tr. at 259-60.

JX 23 and JX 24 concern the same part. JX 23 references 56E130167-5. JX 24 references 56E1301167-5-1. She explained, "The reason why the first FAI was rejected is because that -01 needed to be on there per PO." Tr. at 261-62. JX 23 shows that Figeac France completed the FAI on July 9. For this part, the Wichita facility was the customer and Respondent's facility in France was the supplier. When reviewing this FAI, she noted that the part number was different and she also noted that for the penetrant, passivate, paint and marking, because they all had "nonapplicables" on the form. Based on this, she asked for more information as to who performed the tests. JX 9 contains emails concerning this part. At Complainant's direction, Ms. Sawyer sent the email to an individual named Vincent. JX 9 also contains a response from Mr. Benaoum, who stated that Mecachrome is drilling on that part and not going to return it. Tr. at 263-66. Based on this, she prepared a Notice of Escapement[28] to the

[28] JX 41. *See also* Tr. at 271.

customer to let them know that a part did not "have all the documentation [it] needed that's now gone to the customer." Tr. at 266-67. JX 24, dated July 28, 2014 by Respondent's facility in France, would have been sent to her via email. This email responded to her request for information for the non-applicable areas of the first FAI (JX 23). She did not believe that she had sent the escapement notice to Mecachrome prior to receiving JX 24. In JX 34, she told Mr. Benaoum that Respondent's facility in France gave her a copy of the C of C that was delivered to Mecachrome for that part. She did not know whether all the necessary documentation was done because "This is a C of C from France to Mecachrome, because this is what I wanted, because I would not sign the C of C or the FAI, because I did not do that part." Tr. at 268. The C of C was not signed until December 2014. *Id.*

She raised the issue of the second C of C with the company, asking why the processes on the first one had been removed, as reflected in JX 40 and 41. Tr. at 269. "I was raising issues from the beginning with this part." Tr. at 270. She did not feel anything kept her from raising questions about these FAIs. The FAA did not look in to the FAIs, but it investigated this part number, and looked more closely into Mecachrome. Ms. Sawyer did not falsify any aspect of this part in Wichita. Tr. at 271-72.

Shortly after being interviewed by an OSHA investigator concerning Complainant's case, she went to France for FAI training on a working assignment, and not for fun. Prior to Complainant's termination of employment, she knew that he had consulted an attorney and Complainant told her that if either of them was fired, they would receive a million dollars under the whistleblower law. Tr. at 276-78.

A day or so after Complainant was fired she went to a local establishment on North Rock Road with three other people from the plant. Complainant came in and sat down and he started talking about a marble building for sale "kind of catty-corner" to Respondent's Wichita facility. Complainant talked about buying that building and starting his own company. He said that everyone he needed to do that was right there at the table. Tr. at 279-80. During this lunch, he asked the employees to start gathering information to help "get the company going… to get specs and look at specs and research specs, to try to get approvals and authorization for that company." Tr. at 282.

Complainant has raised his voice with her in the past; he raised his voice a lot, making it difficult to work for him. Ms. Sawyer also observed that Complainant took a lot of smoke breaks when he worked at Respondent's Wichita facility. Complainant was absent when she showed up for work or when she left from work. Tr. at 279-81.

The audit conducted in July uncovered seven findings and the company corrected those findings. The company did not lose its AS9100 accreditation. Tr. at 283.

During her deposition in January 2016, at the break, Complainant approached her and said that "this isn't nothing against you; this is all against [Mr. Benaoum]." Tr. at 284.

On cross-examination, Ms. Sawyer said that after the "secret meeting" she was concerned and felt threatened because of the characterization of the employees as incompetent. Her concerns stemmed from what Complainant told her, not what Mr. Benaoum told her. Tr. at 285.

Ms. Sawyer further explained that the purpose of the C of C is to establish traceability. Tr. at 286. And, "[i]f the C of C had the Quik Tek logo removed off of it and then [Respondent's] logo placed onto it and then given to the customer, that is falsification." Tr. at 288. She acknowledged that on May 16 that she told Mr. Benaoum that this constituted falsification and he started laughing that he did not want her to do that, and then on May 30, Mr. Benaoum wanted her to leave R&R off of the FAI. *Id.* "May 16 was the Quik Tek C of C for machining. May 30 was for asking if I can just leave off the name R&R off of Form 2 of the FAI." Tr. at 289. If she omitted the supplier from the FAI, one would not be able to show who machined the part. Mr. Benaoum wanted her to change the documents but "it's not falsification if it's not done." Tr. at 289-90.

JX 37 was the bubble drawing that the customer had requested in which repeated photocopying rendered the logo stamp difficult to see; "[y]ou could kind of see it, see the red on there." Tr. at 291-92. On June 25, Mr. Benaoum asked her to avoid listing a subcontractor in the paperwork. Ms. Sawyer could not ascertain whether Mr. Benaoum sent the email in jest. Tr. at 293. JX 23, the first FAI discussed, listed the inspector as Romain Teulade. By signing that document, Mr. Teulade represented that he had inspected the part. Tr. at 294-95. JX 24 indicated that on July 28, 2014 Mathieu Garrigues signed off on inspecting that part. However, Ms. Sawyer acknowledged that part was in Canada having holes drilled in it on July 28, 2014. Tr. at 295. On JX 25, Respondent's facility in France labeled five of the processes on the form as "not applicable", they were not completed. In JX 25, she asked who performed those required tests as all of those steps were required for the part. JX 23 and JX 24 are two different versions of the same FAI. Tr. at 296-98. JX 23 indicates accomplishment of these five steps, but the "NA" indicates that they were not done. Tr. at 299.

Upon my questioning, Ms. Sawyer could not explain why JX-23 indicates Mecachrome on one form, while JX-24 shows Aerospace Precision Metals as the special process supplier; they are different companies. She also could not explain how the identical material used for the identified part came from two different companies. Tr. at 308. On JX-24 the certificate of the material that came to produce the part is missing. The customer relies upon the Respondent's documentation when determining if it meets the criteria for installation on an aircraft, although the customer ultimately makes that determination. Tr. at 309-10.

Jean Claude Maillard[29] (Tr. at 318 – 376)

Mr. Maillard, who lives in France, has served as president of Respondent since its founding in 1989. He first met Complainant in April 2014 at the moment of purchase of the Wichita facility. At that time, Complainant was the general manager of the facility. He met with Complainant in Wichita prior to purchasing the facility. Thereafter, he talked to Complainant on the telephone more or less once a month. Mr. Maillard spoke English to Complainant as best he

[29] Mr. Maillard testified through use of a sworn interpreter and via video-teleconference from France. Tr. at 317.

could. In addition, he had email contact with Complainant. He looked at financial statements as a means to evaluate the performance of the Wichita facility. Tr. at 319-321.

Ms. Cazenave is the financial officer in France who "checked out the financial results of the factory in Wichita." Tr. at 321. Ms. Cazenave had a lot of contact with Complainant after Mr. Maillard purchased the Wichita facility. *Id.*

Mr. Maillard began to have concerns about Complainant's performance as a general manager. Complainant disclosed financial information to Sonaca, a competitor of Respondent. Complainant also started his days around 8:30 to 9 o'clock and ended them around 3 to 3:30 p.m., and he did not feel that Complainant set a good example in terms of personal investment in his work. He knows this because Ms. Cazenave had frequent contact with Complainant, and she understood that he did not work complete days. "[W]hen Mr. [Maillard] asked him to try to work longer hours and set a better example, he said he couldn't because he had a handicapped child that he had to take care of." Tr. at 322.

The revelation about disclosing the financial information to Sonaca occurred in the fall of 2014. However, upon the reminder that he had discharged Complainant July 31, 2014, Mr. Maillard testified that he honestly did not remember the exact date of the firing. Tr. at 322-23. Regardless, the main reason why he discharged Complainant was for the disclosure of the financial information. Although Figeac is a publically traded company, the information disclosed is of the entire company and the public information concerns the entire group of companies; Complainant disclosed financial specifics to Sonaca of the Wichita facility in violation of his confidentiality agreement. Tr. at 323-24.

Mr. Maillard did not believe that Mecachrome, a customer of Respondent, was also a potential customer of Sonaca. Tr. at 324.

JX-13 is an email between Complainant and Mr. Maillard where Complainant asked if he had lost trust in him. Mr. Maillard asked him to improve his relationship with the team and he told Complainant that he did not think that Complainant was working hard enough, and he asked Complainant to tell him what time of the day he arrives at the workplace and when he leaves for the day. Apparently, Complainant's relationship with Ms. Cazenave, and perhaps with other workers in the factory, was not great. Tr. at 325.

During a telephone conversation with Complainant, Complainant mentioned Mr. Benaoum having problems with somebody in another corporation, wishing to accelerate the process of delivering parts to a client. "So it's perfectly normal for [Mr. Benaoum] to write to the directors in charge of quality control, because that's his role." Tr. at 327. Prior to the July 25, 2014 letter, Complainant did not make the allegation that Mr. Benaoum had asked for falsification of documents. Complainant never showed Mr. Maillard any document that Kim Sawyer or anyone else at the Wichita facility had falsified. Tr. at 327. Mr. Maillard said that he had never seen JX-23 and JX-24 prior to his testimony at the hearing. Tr. at 329.

JX-17 is a letter Mr. Maillard sent to Complainant; he believes written in response to JX-15. In that letter, he asked Complainant to show him proof of any falsification; Complainant never produced such evidence. Tr. at 329-30.

On July 31, 2014, Mr. Maillard terminated Complainant's employment as reflected in JX-21. Prior to having an employee give this letter to Complainant, Mr. Maillard had a telephone conversation with Complainant. He denied knowing that Complainant had filed a complaint with the FAA, and had not seen JX-2 prior to his testimony. Mr. Maillard wrote the July 31, 2014 letter a couple of days after the conversation. Tr. at 332-33. The main reason that he terminated Complainant "was because of the transfer of financial information to Sonaca. That was for him the big reason for the firing and not the other." Tr. at 333. The other reasons were Complainant's work ethic and the way he could not coexist with other team members at the Wichita facility. *Id.*

On cross-examination, Mr. Maillard acknowledged that he reproached Complainant for not setting a good example at the plant because he was not working hard enough. Tr. at 335. Figeac has 2,000 employees worldwide at nine facilities in five countries with a central office located in Figeac, France. Mr. Maillard maintained that no information between Respondent's sister companies should ever be disclosed. Mr. Maillard acknowledged that the company used e-mail that was not encrypted to exchange information. The company had a network and the Wichita facility was part of that network. As part of maintaining this network, Figeac's IT personnel had remote access to the computers in Wichita. Tr. at 337-39.

Respondent has a two-stage procedure regarding discipline and investigations. Initially, the company representative meets to talk, discuss and identify the problem, and then sets goals on how to correct the problem. To ensure that the instructions were clear and the employee has corrected his or her behavior, the first meeting is documented. If the problem can be fixed, subsequent meetings can follow. But if the problem is too serious and warrants termination of employment, the employee can be terminated after just one meeting. In order to make that sort of determination, one needs accurate information and review relevant documents. Tr. at 339-40. Respondent has a form that it uses so that it can trace the problem, and conduct discussion and negotiations about this matter. Tr. at 345-46.

Mr. Maillard referenced five reasons for terminating Complainant: his work ethic; he wasn't getting along with his team; he was not getting along with Mr. Benaoum; he made a false allegation against Mr. Benaoum; and he had shared confidential financial information with Sonaca. Tr. at 341. He gathered his information about Complainant's work ethic through Ms. Cazenave, who is based in France, but he did not keep notes of those conversations. He also spoke to Mr. Benaoum in June 2014 about the hours Complainant worked. Initially, he said that Mr. Benaoum worked in the Wichita facility three or four days a week but when questioned about this further, Mr. Maillard said, "He cannot assert that." Tr. at 342. He also spoke with Complainant about the issue; Complainant himself admitted that he was often absent because of the situation with his child. Tr. at 343. As for the second reason, both Complainant and Mr. Benaoum confirmed they had a bad relationship and asserted that they did not work together as they should have. Mr. Maillard agreed that looking at these three items alone, he "would not have fired [Complainant] over that." Tr. at 344. The matter concerning the allegation of

falsification represented more proof that the relationship between Complainant and Mr. Benaoum had soured. Tr. at 348.

JX-13 is an email exchange between Mr. Maillard and Complainant on July 21, 2014. In this email, Complainant asked if Mr. Maillard was happy with him and Mr. Maillard mentioned that Complainant needed to improve on his relationship with Mr. Benaoum. The email did not reference Complainant sharing any financial information, or any allegations pertaining to Mr. Benaoum. He acknowledged that these factors did not cause him to terminate Complainant on July 21, 2014. Tr. at 346-47.

He decided to terminate Complainant when he learned that Complainant had given confidential financial information to a competitor. He discovered that Complainant shared financial information with Sonaca sometime in July 2014. Tr. at 348. Mr. Maillard felt that sharing the financial information was serious and Complainant had lost his trust. Tr. at 344, 348. Mr. Maillard was not sure of the exact date he learned of the shared financial information, but he assumed that it was the end of July based on JX-21. He did not investigate why the information was shared because "[i]t was too serious for him to spend his time trying to investigate why it was happening." Tr. at 348. He spoke with Complainant on the phone about it, but he obtained no satisfactory information from him and could not recollect what Complainant told him as the reason. He knew that Ms. Cazenave did not have a lot of respect for Complainant because he did not work hard enough. Tr. at 349.

The purchase of the Wichita facility took place on May 2, 2014. After that, Respondent "asked Montreal Sonaca to help them with production management only, and that under no circumstances when it's asking for assistance with production management do you disclose sensitive financial information." Tr. at 350.

JX 36 is an email, dated June 16, 2014, from Complainant to Mr. Maillard, with Ms. Cazenave included in this email and financial reports attached. *Id.* Part of this email trail includes an email from Ms. Cazenave that says, "If you cannot perform the financial statements with your team, you will have to tell us as soon as possible. I want to know today if I have to call Paul Costanzo." Tr. at 351. Mr. Maillard maintained that this was in reference to the Visual software used in production management "and not at all about disclosing financial information." *Id.* He denied that Sonaca needed access to financial information after the sale to assist in the financial reporting process. When pressed, he acknowledged that the Wichita facility did not have any specific instructions to ensure that Sonaca did not have access to its financial information. Tr. at 352. For Mr. Maillard, "it's a basic rule of the employees not to share financial information with competitors, so he didn't require additional instructions." Tr. at 352-53.

Mr. Maillard was not sure when he learned of concerns about Mr. Benaoum asking an employee to file or prepare false documents. He understood "quickly" how the matter had come to that point without an investigation. Mr. Benaoum is a sales representative who promises to deliver parts to customers within a certain time frame. When the facility does not deliver the part as promised, the sales representative goes back to the factory and asks the employees in charge of production and quality control when delivery will occur. Tr. at 354-55. Asking an employee

to falsify a document is a very bad example of retaining core values and "[Mr. Maillard was] absolutely convinced that [Mr. Benaoum] never asked that documents be falsified, but simply that the process be accelerated so delivery could take place as soon as possible." Tr. at 355. Even if Mr. Benaoum had asked an employee on multiple occasions to falsify documents, that would not be grounds for his termination because his job is to sell. *Id.*

Referring to JX-17, Mr. Maillard agreed that he had received the Gaye Tibbets letter by July 27, 2014 and did not believe that Complainant had forged this document. Tr. at 356-57. Mr. Maillard asserted that Complainant approached him with concerns about Mr. Benaoum pressuring Kim Sawyer sometime in June or July. Tr. at 362-63. He did not investigate the matter further or talk to Kim Sawyer, because it is common in the aerospace industry "that the salesperson puts pressure on production and on quality to try to meet deadlines." Tr. at 358. However, he agreed that a salesperson should not request repeatedly that the quality assurance manager falsify documents. Tr. at 358-59. As Complainant never produced falsified documents, "he assumed that there were none." Tr. at 360. Mr. Maillard admitted that he did not know how Ms. Sawyer felt about the pressure applied by Mr. Benaoum. Tr. at 364.

On re-direct examination, Mr. Maillard agreed that there is a distinction between requesting the omission of information on a document and falsification. He further stated because Ms. Sawyer's job depended on the accuracy and truth of the document, she likely would not have falsified it. He also said that if Mr. Benaoum had Ms. Sawyer do something wrong, and if Complainant had shown proof of that to him, he would have taken disciplinary action against Mr. Benaoum. Tr. at 365-66.

There is a difference between the kind of information shared for closing out booking and sharing of projected profit information, according to Mr. Maillard. Tr. at 367. He was concerned that Complainant disclosed the Wichita facility's entire financial situation for the months of May, June, and July to Sonaca. *Id.* He did not recall having asked his IT people to access Complainant's computer.

Upon my questioning, Mr. Maillard said that he communicated to Complainant that he was primarily responsible for ensuring compliance with federal laws and regulations in a letter he wrote at JX-17. However, Complainant should have come to him with a harassment complaint, and not to turn to an attorney. Tr. at 368-69. Complainant was responsible for paying the Wichita facility's bills. Respondent's French parent company sent money to the Wichita facility to compensate its employees. Ms. Cazenave was in France in May, June and July 2014, although Mr. Maillard thought that she visited the Wichita facility in May and July. Mr. Maillard learned of Complainant's work ethic exclusively through correspondence with Ms. Cazenave. Tr. at 370-71.

<u>Hocine Benaoum (Tr. at 377 – 429)</u>

Mr. Benaoum has worked for Respondent since October 2007. He is the general manager of various sales offices across the U.S., including the Wichita facility, where Complainant previously served as general manager. In May through July 2014, he was Respondent's vice president of sales. During that time period, he did not oversee the operations of the Wichita

plant. He had no authority over Complainant or any of the employees at the Wichita facility. He characterized his relationship with Complainant as initially good, but by the end of May, early June 2014, it began to deteriorate. JX-8 is an email exchange between himself and Complainant about some data he needed. Prior to that email, they had had a "tough" telephone call, in which he communicated to Complainant that he needed some information and that he needed Complainant to do his job. Mr. Benaoum received this email in response to that telephone call. Complainant's email intimates that Mr. Benaoum threatened to fire people, though he does not know to whom Complainant was referring. On June 4, he was in France on holiday, not in Wichita as Complainant alleged in his testimony. Tr. at 378-382. He left the United States on May 26, 2014 and returned on June 17, 2014. Tr. at 384-88. *See* RX-2 and RX 3. In May, June and July 2014, he lived in Miami, Florida.

Concerning the Mecachrome PO that the Wichita facility received in May, Mr. Benaoum had no doubt in his mind that Complainant did not involve himself enough because the customer kept complaining to him about the lack of answers to its requests. Mecachrome's work represented 80 percent of the revenue the Wichita facility generated during the months of May, June and July. Mr. Benaoum was not in Wichita much of the time because he primarily traveled to see a customer in Florida. For this reason, he could not judge Complainant's work, but based his opinion on the feedback he received from customers. Tr. at 389-90.

JX-12 is another email chain between Complainant and Mr. Benaoum dated July 9 and 10, 2014. The first part of the email concerns Ms. Cazenave's request for financial information from Complainant. In this email Mr. Benaoum lists three matters that Complainant represented that were not true. The first concerned securing land and offices for free next to where the company was based. But later, Complainant came back and told Mr. Maillard the land and office would cost $1.2 million. Next, he committed to things that were not achievable. As of July 9, 2014, he did not believe that he could trust Complainant. Tr. at 391-93. Later in JX-12 Mr. Benaoum asks if Complainant is threatening him. Every time he disagreed with Complainant on something, Complainant would tell him that the rules in France differed from those in the United States, and that he did not respect the rules in the United States. When Mr. Benaoum did not agree with Complainant, Complainant would tell him that he could face trouble, which he felt constituted intimidation. Complainant intimated that disagreeing with him was disagreeing with the FAA. Tr. at 393-95.

When shown JX-2, Mr. Benaoum said that he only learned of Complainant's FAA complaint about a month or two after Complainant's termination through the new Wichita general manager, Jeff Russell. Tr. at 397 - 98. Mr. Benaoum indicated that he did have access to Complainant's email or electric records. He learned of Complainant's termination on July 31, 2014, the day Complainant was let go. Mr. Benaoum acknowledged that he was in France on that date, but played no role in the decision to terminate Complainant's employment. Tr. at 399-400. He returned to the United States on August 3, 2014. Tr. at 428; *see* RX 3.

On cross-examination, Mr. Benaoum admitted that he had asked a question of Kim Sawyer two times, the first time around May 14. Specifically, he asked if it was possible to avoid putting the name of the supplier for the part, so the customer would not know the place and address where Respondent bought the parts. Tr. at 401 - 02. He asked because the supplier is

also located in Wichita and he did not want the customer to cut Respondent out of their purchasing process. Ms. Sawyer told him that she did not think that could be done. She later told him that to do so would constitute a falsification. Tr. at 402 - 04. He denied asking Ms. Sawyer to remove the supplier's logo from a document and put Respondent's logo on the document instead, but admitted that he told her it was not in the company's interest that the customer know where it purchased its materials. JX-6 concerns an incident that occurred on May 30, 2014, in which a group gathered in a room, including Mr. Benaoum and Ms. Sawyer, to prepare an FAI. Complainant had left the room. Mr. Benaoum did not recall what purchase order it concerned, but he picked up the paper and asked if certain information needed to be on it. Ms. Sawyer said yes. The email at JX-6 references the word falsification, but Ms. Sawyer did not mention to him exactly the word "falsification"; he has never heard the word falsification from Ms. Sawyer. Tr. at 407-10.

JX-20 is an email concerning an incident that occurred on July 25, 2014, where he allegedly screamed at Ms. Sawyer "beyond the point of recognition," while the two spoke on the phone. He admitted that he screamed at Ms. Sawyer because he was mad, but not "beyond the point of recognition" because his mother was sleeping next door at two o'clock in the morning when the incident occurred. "We had parts that was [sic] stuck for quality issue, and [Ms. Sawyer] wanted to review a document from the customer." Tr. at 411 – 412. "I told [Ms. Sawyer], stop telling me what we cannot do; tell us what we can do instead. I spoke with the customer. We agreed on some things, and the part left the right day, in agreement with [Ms. Sawyer]." Tr. at 413. He had "passionate discussions" with Ms. Sawyer "maybe three, four times." *Id.* On June 25, 2014, despite knowing it was wrong to ask Ms. Sawyer to remove suppliers from paperwork, he asked her again to do so. Tr. at 418. He did this "[t]o make sure" that this could not be done. *Id.* That was probably the last time he made that request to Ms. Sawyer. Mr. Benaoum characterized his approach as a question, and not a falsification. Tr. at 419. He said his request on May 16, 2014 (JX-6) "doesn't count" as a falsification because Ms. Sawyer expressed her uncertainty as to whether his request was permitted. Tr. at 420. In all correspondence between them, Mr. Benaoum insisted that Ms. Sawyer never used the word falsification. Tr. at 420-21.

On redirect, Mr. Benaoum said he had no formal training concerning completing the FAIs or any other documentation. He relied on Ms. Sawyer for this. As the current general manager at the Wichita facility, he still relies on Ms. Sawyer for the compliance side of the business. Tr. at 422. He now has the authority to fire employees at the Wichita plant and has not fired Ms. Sawyer. However, on re-cross-examination, Mr. Benaoum agreed that as the current general manager he is responsible for legal compliance at the plant. Tr. at 424-25.

Upon my questioning, Mr. Benaoum said that after his wedding he returned to the United States on August 3, 2014. *See* RX-3.

Gaye Tibbets (Tr. at 429 – 443)[30]

Ms. Tibbets is an attorney who practices employment law. Tr. at 430. Her first contact with Complainant occurred shortly before July 18, 2014. JX-35. She believed that Complainant contacted her partner and her partner asked her to call Complainant back; she talked to Complainant on July 18, 2014. This was the first time that she had ever talked to Complainant. She had done work for Sonaca for many years, and she knew the previous general manager very well; she was not aware that he had departed until she talked to Complainant. Tr. at 432.

Complainant had called expressing concern about receiving pressure from the owners of the company "to either change some records or discipline this person or tell them to stop." Tr. at 433. She recommended to Complainant that she prepare an opinion letter that laid out what can happen when an employer applies pressure about trying to stop someone from dealing with the FAA. JX-16 is the letter that she prepared. Ms. Tibbets understood that Complainant was going to share this letter with his superiors. Tr. at 433-34. She believed that Complainant "was concerned the people above him did not understand the ramifications of whatever it was they were encouraging him to do." Tr. at 434. About a week or so after she prepared the letter, she heard from Complainant. Her notes at JX-35 include the words "brutal response," "legal action for defamation." Tr. at 435. She recalled making those notes during that call, and that Complainant told her either that he had been fired, or he and the woman he was concerned about had been fired. She did not recall much after that, other than the brevity of the conversation because she represented the company. *Id.*

Ms. Tibbets, at Respondent counsel's request, checked to see whether Respondent paid a monthly retainer to her firm. Her firm had billed Respondent for work they had done, but found no monthly retainer. "And, in fact, I only found that we billed them for a couple of months after they became Figeac, because we didn't do any work." Tr. at 437.

On cross-examination, Ms. Tibbets agreed that since all of her case citations pertained to the FAA, she knew the issue dealt with some sort of FAA retaliation or potential retaliation. She maintained that she recommended to Complainant that she write an opinion letter that Complainant could take to show someone. Tr. at 439-40.

Upon my questioning, Ms. Tibbets said she had a strong relationship with the previous general manager at Sonaca and it was within his purview to seek legal counsel from her office. However, she had no direct knowledge of whether those types of communications continued after the sale of the facility. Tr. at 442-43.

[30] During the testimony, I specifically asked counsel whether there was an issue of privilege. Respondent's counsel stated that Respondent waived this issue and Respondent was conceding that Complainant acted in his capacity as general manager for Respondent at the time at issue. *See* Tr. at 431.

Troy Boese (Tr. at 443 – 452)

Mr. Boese is employed by Respondent at the Wichita facility. He worked at the facility for Sonaca prior to Respondent's purchase. He has worked at the Wichita facility since November 2007, and he has been the director of engineering for about two years. He has very little oversight of FAA compliance. Tr. at 444-445.

Mr. Boese described Complainant as a very demanding general manager. He did not have an opinion either way as to whether Complainant was a hard worker. Complainant raised his voice at employees and he had threatened to fire employees. Complainant and Mr. Benaoum had a very hostile relationship. He could tell from the very first meeting they had after Respondent purchased the company from Sonaca that they did not hit it off very well. Tr. at 446-47. "They were two like leader-type roles, and you could tell only one leader was going to remain." Tr. at 447.

He vaguely remembered a meeting that took place on June 4, 2014 where Tony Herington rounded up all of the managers at the plant where they assembled at Complainant's office. He did not recall the details of the meeting, other than everyone had been directed to turn off their telephones and devices. He also recalled Complainant telling the managers that Mr. Benaoum thought that they were all incompetent, and he was looking for their replacements. Tr. at 447-49.

On July 31, 2014, he was to hand-deliver a letter from Mr. Maillard to Complainant, after Mr. Maillard had a telephone conversation with Complainant. JX-21 is that letter. When he delivered the letter, he thought that Complainant expected the termination because he had already packed up some of his belongings in a small box a few days prior. He was not surprised that Complainant had been fired as that facility had been through five general managers in eight years. Tr. at 449-50.

D. Summary of the Documentary Evidence

In support of his case, Complainant presents the following evidence, as summarized below:

Exhibit	Description
CX 201	Transcript of Sawyer's interview on 1/21/15[31]
CX 202	Transcript of Sawyer's videotaped deposition on 1/19/16
CX 203	Transcript of Benaoum's deposition on 1/19/16

[31] At the hearing Complainant proffered a CD containing CX 201. However, this Tribunal directed that he provide a transcript of that interview. Tr. at 27. Complainant provided this Tribunal with the transcript on May 2, 2016.

In support of its position, Respondent presents the following evidence, as summarized below:

Exhibit	Description
RX 1	Extract of Complainant's 12/14/15 deposition
RX 2	Airline receipt for flight from Fort Lauderdale to Brussels
RX 3	Photocopy of 3 pages of Benaoum's redacted passport

The parties also presented the following key joint exhibits:[32]

Exhibit	Description
JX 1	Complainant's OSHA complaint, dated 10/13/14
JX 2	Electronic complaint
JX 3	Complainant's employment agreement
JX 5	Sawyer's 5/30/14 email to Benaoum
JX 6	Sawyer's 6/4/14 email to Complainant
JX 8	Benaoum's 6/4/14 email to Complainant re: Speed Shop Status Project 1
JX 9	Sawyer's 7/24/14 email string regarding Mecachrome shipment
JX 12	7/9-7/10/14 email string between Complainant and Benaoum
JX 13	7/21/14 email string between Complainant and Maillard re: employee complaint
JX 14	7/28/14 email string between Complainant and Maillard re: employee complaint
JX 15	Complainant's 7/25/14 letter to Maillard
JX 16	Tibbets's 7/25/14 legal opinion letter to Complainant
JX 17	Maillard's 7/27/14 letter to Complainant
JX 20	Sawyer's 7/25/14 statement
JX 21	Maillard's 7/31/14 termination of employment letter to Complainant
JX 23	7/10/14 First Article Inspection
JX 24	7/28/14 First Article Inspection
JX 25	Email string between Sawyer and Figeac France
JX 30	Cazenave's 7/24/14 email to Complainant
JX 34	12/9/14 email with Certificate of Compliance dated 7/24/14 from Mecachrome for 56E130167-5 attached
JX 36	Email from Cazenave to Complainant addressing financial issues, the need for training for use of the Visual software, and the possible need to contact Paul Costanzo from Sonaca[33]
JX 37	Emails between Ms. Sawyer and Mr. Benaoum, Mr. El-Mokadem or Mr. Rousseau from 6/24/15 and 6/25/15
JX 38	Cazenave's 7/9/14 email to Harrington
JX 39	Benaoum's 7/24/14 email to Complainant and Cazenave

[32] This Tribunal considered all of the Joint Exhibits, especially those mentioned during the hearing testimony. However, those referenced below are the most salient for rendering this Decision. This Tribunal need not summarize every exhibit offered.

[33] This exhibit includes emails regarding the company's financials from June 2014.

IV. CONCLUSIONS OF LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he is a person protected by the Act; (2) he engaged in protected activity; (3) Respondent took unfavorable personnel action against him; and (4) the protected activity was a contributing factor in the unfavorable personnel action.[34] *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).[35] If Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)); *Palmer v. Canadian National Railway / Illinois Central Railroad Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 56, DOL Rptr. at 60 (Sept. 30, 2016).

A. Credibility

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

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

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

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so

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[34] *See also Brune v. Horizon Air Industries, Inc.*, ARB Case No. 04-037, ALJ No. 2002-AIR-8 (Jan. 31, 2006), slip op. at 15 (once Complainant reaches the hearing, "he must prove protected activity, adverse action, and causation by a preponderance of evidence, not merely establish a rebuttable presumption that the employer discriminated").

[35] *See also Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6 (ARB Jan. 30, 2004).

> natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-24 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, this Tribunal based its credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

This Tribunal finds the Complainant to be a credible witness and will give his testimony substantial weight. Throughout the hearing, the Complainant was honest and forthcoming about the events in this case. Granted there were some inconsistence, such as whether Mr. Benaoum was in Wichita on June 4, 2014. However, overall Complainant was consistent with his testimony and supported his testimony with reasonable and plausible explanations. This Tribunal found that Complainant was truthful and forthright at the hearing, and finds no reason to question his credibility.

This Tribunal also found Ms. Herington's testimony to be highly credible and gave it substantial weight for the reasons described below. The Tribunal found the testimony of Ms. Tibbets, Ms. Walker and Mr. Boese to be credible and gave their testimony full probative weight. The Tribunal found portions of the testimony of Ms. Sawyer, Mr. Benaoum and Mr. Maillard less credible as will be described later in this decision.

B. Complainant's *Prima Facie* Case

1. Covered Employer

AIR 21 applies only to air carriers, or contractors or subcontractors of air carriers. 49 U.S.C. § 42121(a). There is no evidence in the current record that Respondent is an air carrier.[36]

[36] Air carriers, are defined as citizens of the United States who directly or indirectly provide air transportation. 49 U.S.C. § 40102(a)(3). A "citizen of the United States" includes a corporation or association organized under the laws of the United States. 49 U.S.C. § 40102(a)(15)(c). Even under the expansive reading of air carrier in *Cobb v. FedEx Corp. Svcs, Inc.*, ARB Case No. 12-052, ALJ No. 2010-AIR-24 (Dec. 13, 2013), Respondent does not provide direct or indirect air transportation. *Id.* at 10-12. Air transportation means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft. 49 U.S.C. § 40102(a)(5). *See also* 29 C.F.R. § 1979.101.

Thus, the question posed is whether there is evidence that Respondent is a contractor or a subcontractor of an air carrier. The statute states "the term 'contractor' means a *company* that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). The definition does not require that the employee perform a safety sensitive function, but as will be explained later, that frequently is the case. This definition has two parts: the company must perform safety-sensitive functions AND that company must perform those functions for an air carrier. Neither the statute nor the implementing regulations define what constitutes "safety-sensitive functions."

a. Does Respondent perform safety sensitive functions?

An overview of the FAA's regulatory scheme is necessary for an understanding of the issues in manufacturing raised in this complaint and to address whether Respondent performs a safety sensitive function.[37] The Federal Aviation Act of 1958[38] directs the Secretary of Transportation to promote flight safety by establishing minimum standards for aircraft design, materials, workmanship, construction, and performance. 49 U.S.C. § 40101. Congress established a multi-step certification process to monitor the aviation industry's compliance with these requirements. 49 U.S.C. § 44704. Authority over the process rests with the FAA. 49 U.S.C. § 44701.

In broad terms, the FAA regulatory scheme for transport category aircraft is located in 14 C.F.R. and is broken down into four major parts: Part 25 (design); Part 21 (production); Part 43 (maintenance)[39]; and Part 91 (operation)[40] As this case focuses on the production of an aircraft part, this decision will primarily focus on Part 21.

Before an aircraft may be considered airworthy, it (1) must conform to its type certificate, if that certificate has been modified by supplemental type certificates and by Airworthiness Directives[41]; and (2) must be in condition for safe operation. *See Administrator v. Nielsen*, NTSB Order No. EA-3755 at 4 (1992) (citing *Administrator v. Doppes*, 5 NTSB 50, 52 n. 6 (1985)).[42] In addition to the foregoing requirements, an aircraft must pass all required

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[37] For a slightly different view of the FAA's regulatory scheme, *see United States. v. S.A. Empresa De Viacao Aerea Rio Grandesne (Varig Airlines) et al.*, 467 U.S. 797 (1984) (hereafter *Varig Airlines*).

[38] P.L. 85-726, 72 Stat. 731 (enacted Aug. 23, 1958).

[39] The owner/operator holds primary responsibility for maintaining the aircraft in an airworthy condition. 14 C.F.R. § 91.403.

[40] In general, when transport category aircraft are operated by U.S. air carriers, their maintenance and operations are further regulated by Parts 121 and 135.

[41] FAA's airworthiness directives are legally enforceable rules that apply to the following products: aircraft, aircraft engines, propellers, and appliances. 14 C.F.R. § 39.3. The FAA issues an airworthiness directive addressing a product when its finds that an unsafe condition exists in the product; and the condition is likely to exist or develop in other products of the same type design. 14 C.F.R. § 39.5. Anyone who operates an aircraft that does not meet the requirements of an applicable airworthiness direction is in violation of Part 39 and subject to adverse action by the FAA each time the aircraft is operated, be it certificate action or civil penalty. *See* 14 C.F.R. §§ 39.7 and 39.9.

[42] "It is well-established that an aircraft is deemed 'airworthy' only when it conforms to its type certificate (if and as that certificate has been modified by supplemental type certificates and by

inspections before an aircraft is considered airworthy. *See In the Matter of USAir, Inc.*, FAA Order No. 1996-25, Docket No. CP94EA0045, 1996 WL 509937. *See also* 14. C.F.R. § 3.5(a). *See generally,* 14 C.F.R. § 21.183.

The Federal Aviation Administration (FAA) has promulgated comprehensive regulations setting out the minimum safety standards that aircraft designers and manufacturers must meet before marketing their aircraft.[43] *See, e.g.* 14 C.F.R. Parts 21, 23 and 25.[44] At each step of the certification process, an FAA employee or an FAA-designated representative[45] evaluates materials submitted by the aircraft manufacturer to determine whether it has satisfied these regulatory requirements.[46] Upon a showing that the requirements have been met, the FAA issues an appropriate certificate permitting the manufacturer to continue with production and marketing. *Varig Airlines*, 467 U.S. at 804-06. The FAA regulations for certifying aircraft for commercial use are identified at 14 C.F.R. Part 21 "Certification Procedures for Products and Parts".[47] These regulations provide the procedural requirements for issuance of Type Certificates.

There are three main steps in the certification process: a type certificate[48], a production certificate, and an airworthiness certificate. 49 U.S.C. §§ 44702 and 44704. A manufacturer wishing to introduce a new type of aircraft must first obtain FAA approval of the plane's basic design in the form of a type certificate.[49] After receiving an application for a type certificate, the FAA typically requires the applicant to make such tests as the FAA deems necessary in the interests of safety. 49 U.S.C. § 44704(a)(1). By regulation, the FAA makes the applicant itself

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Airworthiness Directives), and is in condition for safe operation." *Administrator v. Bailey and Avila,* NTSB Order No. EA-4294 at 4 (1994), WL 702156 (N.T.S.B.).

[43] The baseline regulation for commercial aircraft is 14 C.F.R. Part 21 for it addresses the certification procedures for products and parts. Parts 23 and 25 set forth more stringent airworthiness standards an aircraft manufacturer must meet when developing or producing a commuter or transport category aircraft.

[44] Part 21 is the certification process while Part 23 (generally aircraft under 12,500 lbs. gross takeoff weight) and Part 25 (aircraft over 12,500 lbs. gross takeoff weight) delineate specific certification standards for the aircraft.

[45] Because the FAA does not have nearly the number of engineers needed to complete this elaborate compliance review on its own, the law allows the FAA to delegate certain inspection and certification responsibilities to properly qualified private persons. These "designated engineering representatives" (DERs) and other representatives assist in the FAA certification process. They are typically employees of the aircraft manufacturers or contractors themselves who possess detailed knowledge of an aircraft's design based on their day-to-day involvement in its development or production. *See* 14 C.F.R. Part 183.

[46] These processes and inspections must be documented during the certification process before the aircraft is approved for service or return to service. *See* 14 C.F.R. § 21.1(b)(1).

[47] The regulation defines a "product" as an aircraft, aircraft engine, or propeller. 14 C.F.R. § 21.1(b)(6).

[48] Some confuse the type certificate data sheet (TCDS) with the type certificate. 14 C.F.R. § 21.41 makes clear that the TCDS is evidence that the product has been type certificated, but the type certificate includes much more than the TCDS.

[49] For an overview of the type certificate process, *see* FAA Order 8110.4C (change 5)(Dec. 20, 2011). 14 C.F.R. § 21.41 provides:

> Each type certificate is considered to include the type design, the operating limitations, the certificate data sheet, the applicable regulations of this subchapter with which the Administrator records compliance, and any other conditions or limitations prescribed for the product in this subchapter.

responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements. The applicant must submit to the FAA the designs, drawings, test reports, and computations necessary to show that the aircraft satisfies FAA regulations. It must certify that it has complied with the applicable requirements. 14 C.F.R. § 21.20. The "type design" that must be submitted includes the drawings and specifications necessary to define the configuration and design features of the product, as well as information on the materials and processes necessary to define the structural strength of the product. 14 C.F.R. § 21.31. Then the manufacturer must produce a prototype of the aircraft and conduct ground tests and flight tests on it. FAA employees or their representatives review the resulting data and make such inspections or tests as they deem necessary to ascertain compliance with the regulations. If the FAA finds that the proposed aircraft design meets the minimum safety standards, it signifies its approval by issuing a type certificate. *Varig Airlines*, 467 U.S. at 805-06.

Production may not begin until a manufacturer obtains a production certificate from the FAA authorizing the manufacture of duplicates of the prototype. 14 C.F.R. Part 21, subpart G. To obtain a production certificate, the manufacturer must prove to the FAA that it has established and can maintain a quality control system to assure that each aircraft (including parts purchased from suppliers) will meet the design provisions of the type certificate.[50] 14 C.F.R. Part 21, subpart G. When it is satisfied that duplicate aircraft will conform to the approved type design, the FAA issues a production certificate, and the manufacturer may begin mass production of the approved aircraft. Regulations require a production certificate holder to notify the FAA of any changes in its quality control system that may affect the inspection, conformity, or airworthiness of its product. 14 C.F.R. § 21.150(b).[51]

Finally, before any aircraft may be placed into service, its owner must obtain an airworthiness certificate from the FAA. 14 C.F.R. § 21.183. Such a certificate signifies that the particular aircraft in question conforms to the type certificate and is in condition for safe operation.[52] Once issued, the airworthiness certificate remains effective as long as the maintenance, preventive maintenance, and alterations are performed per Parts 43 and 91. 14 C.F.R. § 21.181(a)(1). Any deviation, without FAA approval, from the aircraft's type design renders the aircraft unairworthy.[53] It is unlawful for any person to operate an aircraft in air commerce without a valid airworthiness (or conformity) certificate.[54]

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[50] *See generally,* FAA Order 8120.22A, *Production Approval Procedures* (Jan. 11, 2016).

[51] The requirement extends to Parts Manufacturer Approval holders as well. *See id.* at § 21.320(b).

[52] The definition of "airworthiness" is derived from this criteria. *See also*, 14 C.F.R. 3.5(a).
One of the most important sections of this regulation is 14 C.F.R. § 21.50, "Instructions for continued airworthiness and manufacturer's maintenance manuals having airworthiness limitations sections." When an aircraft is first delivered from the airplane manufacturer, it must come with maintenance manuals that define the inspection and maintenance actions necessary to maintain the aircraft in an airworthy condition.

[53] While the bar is low to render an aircraft unairworthy, it is not absolute, for in a Letter of Interpretation, FAA counsel wrote the following about when an aircraft is airworthy:

> While the statute sets forth the requirements for the issuance of an airworthiness certificate, NTSB case law has recognized the difference between a new aircraft and one that has been in service, *i.e.*, an aircraft may have accumulated a certain amount of wear

The FAA may reexamine an airman and reinspect any other certificate holder (*i.e.* aircraft, part manufacturer approval holder) at any time and may modify, suspend or revoke it.[55] *See* 49 U.S.C. § 44709. The FAA may investigate a suspected violation of safety regulations and may issue an order to compel compliance if it finds a violation. It also has the power to impose fines and can bring a civil or criminal action against persons who violate the regulations. *See* 14 C.F.R. Part 13.

As part of the above process, an aircraft manufacturer can either manufacture its own parts under its production certificate, or it can contract out the manufacture of those parts. When parts are provided to the production certificate holder they are accompanied with an FAA Conformity Certificate Form 8130-2.[56] This form includes a certification that the part was manufactured in conformity with data forming the basis for the type certificate and required disclosure of any deviations from the type certificate.

In this case, the parts being manufactured are for use on Transport Category aircraft that are type certificated using Part 25. Part 21 addresses conditions a company must meet to obtain the FAA's permission to manufacture a given aircraft and its parts. Parts 23 and 25 set forth the

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> and minor defects and still be considered to substantially conform to its type certificate and therefore be airworthy, if it still is in condition for safe operation. *Administrator v. Calavaero,* 5 NTSB 1099, 1101 (1986) ("However, we do not agree that every scratch, dent, 'pinhole' of corrosion, missing screw, or other defect, no matter how minor or where located on the aircraft, dictates the conclusion that the aircraft's design, construction, or performance has been impaired by the design defect to a degree that the aircraft no longer conforms to its type certificate."). Important in the NTSB's reasoning was that the FAA had not shown that "the alleged defects or discrepancies had had an adverse impact on the level of safety that an aircraft's conformity with its type certificate is intended to insure, or to counter the substantial evidence adduced by respondent that they had not had such an impact." *Id.* at 1101; *Administrator v. Calavaero,* 5 NTSB 1105 (1986) (quoting in part *Id.* 1101). *See* also *Administrator v. Frost*, NTSB Order No. EA-4680 (1998).

Letter of Interpretation from the FAA Office of Chief Counsel to the Director, Association of Flight Attendants, March 26, 2008, regarding Request for Interpretation of 14 C.F.R. §§ 91.7(b) and 3.5(a), *located at* http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/ (last visited Sept. 16, 2016).

[54] *See* 14 C.F.R. §§ 91.7(a), 121.153(a)(2) and 135.25(a)(2).

[55] 49 U.S.C. § 44709(a) provides:

> **(a) Reinspection and Reexamination**. - The Administrator of the Federal Aviation Administration may reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under section 44703 of this title.

[56] A certificate of conformity provides evidence that a part was produced by a manufacturer holding an FAA-approved manufacturing process. One could also use FAA Form 8130-3, Airworthiness Approval Form, which can be used for multiple purposes such as approval for return to service after maintenance or alteration by an authorized Part 145 repair station, or a U.S. air carrier having an approved Continuous Airworthiness Maintenance Program.

standards a manufacturer must achieve to obtain the type certificate. Part 23 establishes the standards for most small aircraft: aircraft that carry 19 persons or less. The regulations pertaining to the design, production and operation of transport category aircraft used by air carriers are more stringent and contained in Parts 25 and 121. These Parts of the regulation are used by the FAA to fulfill the requirement in 49 U.S.C. § 44701 that the Administrator consider the difference between air transportation and other air commerce. Aircraft certificated under this type certificate are the large aircraft the public is accustomed to traveling in during scheduled operations.[57]

In addition to the type certificate process, the FAA has also instituted a regulatory scheme governing the manufacture and sale of replacement parts. Any person, in addition to the manufacturer, may apply to the FAA for a Parts Manufacturer Approval ("PMA"), which allows the holder to manufacture and sell specific replacement parts directly to the owners of aircraft. One method of obtaining a PMA is to demonstrate that "the design of the [replacement] part is identical to the design of a[n original] part . . . covered under a type certificate."[58] *See* 14 C.F.R. § 21.303(c)(4). Here, it is undisputed that the Respondent manufactured and repaired components for Transport Category aircraft, aircraft used by air carriers.[59]

Replacement parts and parts used to modify a "type certificated" aircraft must be manufactured according to FAA specifications, except under certain limited circumstances. 14 C.F.R. § 21.9.[60] In general, a parts manufacturer must obtain a "Parts Manufacturer Approval"

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[57] However, the ability to carry passengers is not part of the certification process. In fact, many of these aircraft are used to transport cargo only.

[58] Design approval for PMA can be obtained either on (1) tests and computations grounds, or (2) on the basis of identicality. For approval on the first ground, reports and computations must be submitted to the FAA to show design of the part meets airworthiness standards. For approval on identicality grounds, the applicant need only submit its design and parts drawings of the OEM to establish the designs are identical. It appears that is this method that allowed Respondent to produce the parts at issue in this case.

[59] The aircraft manufacturer maintains responsibility for quality of the parts used in the production of an aircraft and the regulations make it responsible for the quality control of those that manufacture parts for placement on one of its aircraft. *See* 14 C.F.R. § 21.146.

[60] **§ 21.9 Replacement and modification articles.**

(a) If a person knows, or should know, that a replacement or modification article is reasonably likely to be installed on a type-certificated product, the person may not produce that article unless it is--

(1) Produced under a type certificate;

(2) Produced under an FAA production approval;

(3) A standard part (such as a nut or bolt) manufactured in compliance with a government or established industry specification;

(4) A commercial part as defined in § 21.1 of this part;

(5) Produced by an owner or operator for maintaining or altering that owner or operator's product; or

(6) Fabricated by an appropriately rated certificate holder with a quality system, and consumed in the repair or alteration of a product or article in accordance with part 43 of this chapter.

(b) Except as provided in paragraphs (a)(1) and (a)(2) of this section, a person who produces a replacement or modification article for sale may not represent that part as suitable for installation on a type-certificated product.

("PMA") from the FAA by providing evidence that its "design of the part" meets FAA airworthiness requirements and by certifying that it has a "fabrication inspection system" in place to ensure continued compliance with FAA requirements. *See generally* 14 C.F.R. § 21.303.[61] Extensive design testing is required to obtain a Parts Manufacturer Approval ("PMA"). However, 14 C.F.R. § 21.303(c)(4) expressly waives this requirement if "the design of the part is identical to the design of a part that is covered under a type certificate."

The regulations make clear that as a PMA holder, Respondent must strictly comply with the following responsibilities:

> Each holder of a PMA must—(a) Amend the document required by § 21.305 as necessary to reflect changes in the organization and provide these amendments to the FAA; (b) Maintain the quality system in compliance with the data and procedures approved for the PMA; (c) Ensure that each PMA article conforms to its approved design and *is in a condition for safe operation*; (d) *Mark the PMA article* for which an approval has been issued. Marking must be in accordance with part 45 of this chapter, including any critical parts; (e) Identify any portion of the PMA article (e.g., sub-assemblies, component parts, or replacement articles) that leave the manufacturer's facility as FAA approved with the manufacturer's part number and name, trademark, symbol, or other FAA approved manufacturer's identification; (f) Have access to design data necessary *to determine conformity and airworthiness for each article produced under the PMA*; (g) Retain each document granting PMA and make it available to the FAA upon request; and (h) *Make available to the FAA information regarding all delegation of authority to suppliers*.

14 C.F.R. § 21.316 (emphasis added).

Further, 14 C.F.R. § 3.5(c) prohibits misleading statements concerning parts reasonably believed to be installed on type certificated aircraft. It prohibits material misrepresentations or

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(c) Except as provided in paragraphs (a)(1) and (a)(2) of this section, a person may not sell or represent an article as suitable for installation on an aircraft type-certificated under §§ 21.25(a)(2) or 21.27 unless that article--

(1) Was declared surplus by the U.S. Armed Forces, and

(2) Was intended for use on that aircraft model by the U.S. Armed Forces.

The issue of the introduction of unapproved parts on to type certificated aircraft has been the subject of much concern to the aviation industry for decades and served as the impetus for enactment of 14 C.F.R. Part 3. *See* 70 Fed. Reg. 54,822 (Sept. 16, 2005). *See* Sharkey, *The Federal Aviation Administration suspected unapproved parts program: The Need to Eliminate Safety Risks Posed by Unapproved Aircraft Parts*, 65 J. Air L. & Com. 795 (2000).

[61] 14 C.F.R. § 21.9 governs only the (1) production, (2) of modification or replacement parts, (3) for sale, (4) with the specific intent (or with the knowledge it was substantially certain) the parts would be installed on a type certificated product. *Id; In the Matter of Pacific Sky Supply, Inc.*, 1993 FAA LEXIS 206, 1993 WL 833101 (FAA Order No. 93-19) (June 9, 1993)(addressed the old § 21.303 but most of the wording in 21.303 at the time of this decision was moved § 21.9 in 2009. 74 Fed. Reg. 53,385). *See also* FAA Order 8110.42D, *Parts Manufacturer Approval Procedures* (Mar. 21, 2014); FAA Order 8110.118, *Commercial Parts* (Sept. 20, 2012).

material omissions concerning that part and the prohibition extends to the records associated with that aircraft part. Moreover, 14 C.F.R. § 21.2(a)(2) prohibits a person from making or *causing to be made* any intentionally fraudulent, false or misleading statement in any record used to show compliance with any requirement of Part 21. (emphasis added).

In short, if Respondent's customers place the parts that Respondent supplies on a type-certificated aircraft, those parts must conform to their design, or to the approved modification of their design, in order to ensure end-state airworthiness. *See generally* 14 C.F.R. §§ 21.121-21.165; *see* 14 C.F.R. § 21.1(b)(1) ("Airworthiness approval means a document issued by the FAA for an aircraft, aircraft engine, propeller, or article which certifies that the aircraft, aircraft engine, propeller, or article conforms to its approved design and is in a condition for safe operation").

Once a part is placed into service on a type certificated aircraft, there will come a time when it needs to be repaired or replaced. At this stage, the air carrier assumes primary responsibility for the airworthiness of its aircraft, and the performance of all of the maintenance or alterations on its aircraft.[62] Only certificated entities, be it an individual[63] or business,[64] can repair aircraft parts for return to service on a type certificated aircraft. One such entity is a repair facility certificated under 14 C.F.R. Part 145. When performing repairs for an air carrier, a Part 145 repair station must follow that air carrier's maintenance program, whether the air carrier has a continuous airworthiness maintenance program (CAMP) or in certain cases for Part 135 air carriers, can use the aircraft manufacturer's maintenance manual.[65] 14 C.F.R. § 145.205. Testimony revealed that not only did Respondent hold a PMA, but that it is also a repair station. Tr. at 197, 311.

As shown above, the role of the PMA certificate holder and repair station certificate holder is inextricably intertwined with both the type certificate holder and the aircraft operator (*i.e.* air carrier). 14 C.F.R. § 21.303. A PMA authorizes the manufacturer of a modification or

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[62] *See* 14 C.F.R. §§ 121.363 and 135.413.

[63] *See* 14 C.F.R. Part 65 as well as 14 C.F.R. § 43.3. 14 C.F.R. § 91.403(b) provides: "No person may perform maintenance, preventive maintenance, or alteration on an aircraft other than as prescribed in this subpart and other applicable regulations, including Part 43 of this chapter."

[64] *See* 14 C.F.R. § 21.303 and Part 145. *See, e.g.,* 14 C.F.R. §§ 121.367, 121.374 and 135.411. *See also* 14 C.F.R. SFAR 36. 14 C.F.R. § 21.50 requires that the aircraft manufacturer provides a complete set of Instructions for Continued Airworthiness. In general, this document is the building block for air carriers when developing their General Maintenance Manual. *See* 14 C.F.R. § 121.135. It should be noted that while the business must be certificated, individuals that work at a repair station need not themselves be certificated under Part 65.

[65] An air carrier under part 121 or § 135.411(a)(2), as applicable, must develop and use a CAMP. The CAMP may be (and often is) based upon documents issued by the manufacturer, sometimes called "maintenance planning documents". However, under § 25.1529, the manufacture does not develop a CAMP. Nor can the raw information contained in the instructions for continued airworthiness meet the requirements in § 121.369 without extensive additional implementation and administrative data. In short, except for certain operations under Part 135 (aircraft weighing less than 12,500 pounds and that can carry 9 or less passengers), the air carrier cannot choose a manufacturer's maintenance manual or program as described in 14 C.F.R. § 91.409(f)(3).

replacement part for sale for installation on a type certificated product.[66] However, it does not include an authorization to install on aircraft. The air carrier relies upon the PMA's certificate of conformity that the aircraft part is airworthy when it exercises its authority to actually place the part on to the aircraft.

Once an air carrier purchases an aircraft and places it into service, the aircraft must be maintained. It can maintain the aircraft using its own resources or it can use a company that holds a repair station certificate authorized under 14 C.F.R. Part 145. A repair station is authorized to perform maintenance on air carrier aircraft (listed on the air carrier's operations specifications) under 14 C.F.R. § 43.13(c). The broad requirements of § 43.13(c) are further specified in 14 C.F.R. §§ 145.201, 145.205 and 121.709. The methods, techniques and practices for conducting maintenance on a given air carrier's aircraft are specifically defined in the manual system required to be developed and maintained by the air carrier and used by the repair station. *See* 14 C.F.R. §§ 121.133 and 121.135(b)(17)(18) and (20). Of import, once maintenance is performed on an aircraft, it cannot thereafter be legally flown[67] until a certified mechanic[68] or appropriately rated entity approves the aircraft for return to service. Notably, an "approval of return to service" after maintenance can only be accomplished by a certificated mechanic or appropriately rated repairman specifically trained and authorized by the air carrier. *See* 14 C.F.R. § 121.709. Here, the air carrier, and not the repair station, approves the aircraft for return to service. When a repair station performs maintenance under § 145.205, personnel involved are effectively employees of the air carrier.

In sum, the companies and their employees that manufacture and repair aircraft parts for type certificated aircraft are so inextricably intertwined with the overall safety construct of the regulations that it is unimaginable that those that provide such services do not perform a safety sensitive function. The fact that the FAA requires such detailed records, inspections, and production standards alone strongly supports the notion that these parts are of a safety sensitive nature. To hold otherwise would eviscerate the need for such oversight of the manufacturing and repair of aviation parts. The production of conforming parts and the maintenance of those parts for installation on transport category aircraft goes to the very heart of Congress's mandate that air carriers have a duty "to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A).

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[66] When the FAA approves an aircraft, it issues a type certificate under Part 23 or Part 25 of its regulations. 14 C.F.R. §§ 21.11-21.53. The type certificate covers the whole aircraft. Here, some of the parts involved Bombardier aircraft. Bombardier would hold the type certificate for each of their separate aircraft designs. The FAA must also approve modifications to a particular aircraft, whether designed by the original manufacturer or a third-party, after which the FAA issues a supplemental type certificate ("STC"). 14 C.F.R. § 21.113. An STC enables its holder to manufacture a component or a part for an aircraft system. Any person, in addition to the original manufacturer, may petition the FAA for a PMA, which allows the holder to manufacture and sell specific replacement parts directly to aircraft owners. ("No person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval . . . .").

[67] *See* 14 C.F.R. § 91.407(a)(1).

[68] 14 C.F.R. § 43.9(a)(4).

Accordingly, this Tribunal finds that by their very nature, companies that produce parts under a PMA or serve as a repair station for type certificated aircraft perform a safety sensitive function.[69] As Respondent is a contractor manufacturing and/or repairing aircraft parts used on Transport Category aircraft,[70] this Tribunal finds that Respondent performs a safety sensitive function. But this conclusion only answers the first part of the definition; what remains is the issue of whether Respondent performs a safety sensitive function by contract *for an air carrier*.

b. Does the Respondent have a contract with an air carrier?

According to Complainant, Respondent manufactures[71] parts for passenger carrying aircraft. Tr. at 48. Further, the parties have stipulated that Respondent acquired the Wichita plant, which is an "airline component parts plant."[72] In its initial brief, Respondent wrote that it "does not dispute that it is subject to the requirements of AIR 21 and all FAA requirements regarding FAIs." Resp. Br. at ¶ 44. One of Respondent's customers is Bombardier. Tr. at 198.

Because of the uncertainty of whether the parties had stipulated that they were subject to the Act, on October 25, 2016, this Tribunal asked the parties to brief the issue of whether the Employer is an air carrier or a contractor or subcontractor of an air carrier as defined in 49 U.S.C. § 42121(a) and (e).[73] Both parties provided briefs on this specific issue.

Respondent asserts that the Tribunal does not have jurisdiction over the matter because Complainant has failed to establish that it is an Employer subject to the Act. It noted that none of the entities Complainant referenced in his case are air carriers; specifically, Boeing, Embraer, or Bombardier. It asserts that it did not admit facts that established that it was subject to the Act. Further, it maintains that Complainant failed to establish the necessary link between its activities and those of an air carrier. *See* Resp. Specific Brief, at 4-8.

Complainant's brief argues that Respondent conceded AIR 21 coverage and that its judicial admission on AIR 21 coverage is binding and controlling.[74] He maintains that by admitting that "'it is subject to the requirements of AIR 21,' it has implicitly and irrevocably also admitted that it is an 'air carrier, contractor, or subcontractor of an air carrier,' and therefore satisfies this element of [Complainant's] claim." *See* Compl. Specific Brief, at 3. Complainant also asserts that Respondent is a contractor of an air carrier because it contracts with Spirit AeroSystems whose customers include Southwest Airlines, United Airlines and American Airlines, and that Spirit is the largest contractor working on the Boeing 737 and 787 programs.

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[69] This rationale extends to companies that are supposed to hold a PMA or repair station certificate to manufacture the parts or perform repairs, but for whatever reason do not.

[70] *See* 14 C.F.R. Part 25.

[71] It actually appears that Mecachrome manufacturers many of the parts for Respondent and Respondent then sells the parts to Bombardier. Tr. at 48.

[72] *See* Compl. Brief at ¶ 1 and Resp. Brief at ¶ 1.

[73] *See* Notice of Intent to Take Official Notice of the Following Fact, Reference Certain Publically Available Documents, and Order to Further Brief a Specific Issue (Oct. 25, 2016).

[74] Complainant also cites to OSHA's findings where it was determined that Respondent was an air carrier subject to the Act. *See Secretary's Finding*s, dated Jan. 28, 2015 filed as Ex. A to Complainant's Objections and Request for Hearing.

Id. at 4-5. As part of its brief, it attached the four documents identified as CX 204, CX 205, CX 206 and CX 207. CX 204 is a document purporting to be from Respondent's website. CX 205 is the Spirit AeroSystems Holdings, Inc. SEC Form 10-k filing for FY 2014. CX 206 is a copy of the FAA's list of certificated air carriers last updated May 29, 2015. CX 207 is Boeing's SEC Form 10-k filing for FY 2014.

Complainant seeks to supplement the record by attaching CX 204 – 207. Submitting these documents Complainant is essentially filing a motion to reopen the record. 29 C.F.R. § 18.90(b). Such a motion should only be granted if the offering party shows that new and material evidence has become available *and could not have been discovered with reasonable diligence before the record closed. Id.* (emphasis added). While this Tribunal will consider the matters contained in the FAA's publically available air carrier database, it will not admit or consider the matters contained in the SEC filings, specifically CX 205 and CX 207, nor will it consider CX 204, which purportedly came from Respondent's website. These matters could have been, and should have been, presented prior to the close of the hearing.

Complainant testified that Bombardier is an air carrier; however, this is not the case. A review of the FAA database that lists all U.S. air carriers does not include Bombardier as an entity that holds an air carrier certificate.[75] An entity must hold an air carrier or operating certificate to conduct air carrier operations. 49 U.S.C. § 44705; *see also* 14 C.F.R. §§ 119.1(b) and 119.5. Furthermore, Bombardier manufactures aircraft other than commercial aircraft. It manufactures, for example, business aircraft such as the Learjet and manufactures specialized aircraft for special mission requirements.[76] However, Complainant also testified that Respondent not only produces parts for aircraft manufacturers, but also receives requests for parts directly from air carriers after the aircraft has come on line. Tr. at 197-98. Complainant explained that the First Article Inspection was part of the "PMA process." Tr. at 197. And this Tribunal notes that the Respondent has never disputed that it was PMA holder. This Tribunal concludes by a preponderance of evidence that Respondent holds a parts manufacturer approval ("PMA"). Additionally during questioning, Complainant intimated that Respondent is also a repair station. Tr. at 311.

As the holder of a PMA, Respondent is required to maintain a quality system that meets the requirements of § 21.137; this includes ensuring that each supplier-provided product conforms to the production approval holder's requirements. § 21.137(c)(1). Each PMA article must also conform to its approved design and is in a condition for safe operation. 14 C.F.R. § 21.316(c). It is also required to identify (i.e. mark) any portion of the PMA article that leaves its facilities with the manufacturer's part number and name, trademark, symbol, or other FAA approved manufacturer's identification. *Id.* at § 21.316 (d) and (e). Finally, Respondent must make available to the FAA all delegations of authority to suppliers. *Id.* at § 21.316 (h).

Respondent stipulated that it "acquired an *airline* component parts plant." Resp. Br., at 2. (emphasis added). It did not merely stipulate that it acquired an aircraft component parts plant.

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[75] *See* footnote 73 and accompanying text.

[76] *See* http://www.bombardier.com/content/bombardiercom/en/aerospace.html. Additionally, until October 1, 2016, Bombardier also had an amphibious aircraft program. *See* http://www.bombardier.com/en/aerospace/amphibious-aircraft.html.

This is a key distinction. The MERRIAM-WEBSTER DICTIONARY definition of an airline is "a company that owns and operates many airplanes which are used for carrying passengers and goods to different places."[77] The OXFORD DICTIONARY defines airline as "an organization providing a regular public service of air transport on one or more routes."[78] Wikipedia describes an airline as "a company that provides air transport services for traveling passengers and freight."[79] In short, the terms airline and air carrier are synonymous.[80] When paired with Respondent's statement that it "does not dispute that it is subject to the requirements of AIR 21 and all FAA requirements regarding FAIs", Respondent has conceded that it is subject to the Act. Complainant reasonably relied on these statements when presenting its case; specifically that Respondent did not contest that it contracted for air carriers.

The weight of the evidence supports a finding that the parts Respondent manufactures are for use on Transport Category aircraft and such aircraft are commonly used by air carriers (a.k.a. airlines) in the conduct of their operations. All aircraft with 20 or more passenger seats and weighing over 19,000 pounds require Transport Category aircraft certification. 14 C.F.R. Part 25. Complainant need not show placement of a particular part on a particular aircraft of a particular air carrier to satisfy his burden of proof. Aviation parts are well-regulated. One can reasonably conclude that an approved part provided by a parts manufacturer that holds a PMA would be installed on the aircraft for which it was designed.

Accordingly, this Tribunal finds that, by their very nature and as demonstrated by the extensive regulatory oversight of these companies, businesses that manufacture or repair parts for use on type certificated aircraft perform safety sensitive functions. Respondent is such a business because, as a PMA holder and repair station that certifies the conformity of a part to be installed on a type certificated aircraft, Respondent performs a safety sensitive function. Complainant has established, by a preponderance of evidence, that the parts the Respondent performed work on were for Transport Category aircraft, aircraft used by air carriers in the conduct of their operations.

2. Protected employee

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from "discharg[ing]" or "otherwise discriminat[ing] against

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[77] http://www.merriam-webster.com/dictionary/airline.
[78] https://en.oxforddictionaries.com/definition/airline.
[79] https://en.wikipedia.org/wiki/Airline.
[80] If anything, an airline is a sub-category of the term air carrier. An air carrier can be scheduled or unscheduled operations, or supplemental operations. *See* 14 C.F.R. Parts 121, 125 and 135. The term airline is not specifically defined in the Federal Aviation Regulations. However, the word is used for a specific certificate, an airline transport pilot certificate. *See* 14 C.F.R. § 61.53. Further, to operate as pilot in command of a Part 121 flight (i.e. passenger carrying operations), the pilot in command must hold an airline pilot certificate with the appropriate type rating. 14 C.F.R. § 121.436. A type rating is an additional "certification" that the pilot is qualified to fly a particular type of aircraft such as the Boeing 737 or Airbus A320. *See* 14 C.F.R. § 61.31; *see also* FAA Order 8900.1, figure 5-88 available at http://registry.faa.gov/TypeRatings/.

any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in the air carrier safety-related activities the statute covers.

The employee is protected if he:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States; [or]
> (2) has filed, caused to be filed, or is about to file (with any 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; . . . .[81]

Complainant, as the general manager of the Wichita facility, was responsible for the quality control of parts for placement on an aircraft operated by air carriers. Ms. Sawyer testified at her deposition that she informed him of any parts she discovered with quality defects. *See* CX 201 at 3. The very reason this case arose was due to concerns over the quality and traceability of the work performed on aircraft parts that had left the facility. One could hardly argue that the person evaluating whether an aircraft part meets the specific requirements for later installation on an aircraft does not perform a safety-sensitive function.

The FAA itself recognizes that the whistleblower protections are focused on the act performed, not on the person performing the action. The FAA has promulgated AC 120-81, Whistleblower Protection Program (Air Carrier) (Mar. 25, 2004). In it, the FAA defines air carrier safety:

> [A]ir carrier safety is any safety concern that you believe, in good faith, is a violation of an FAA regulation, order, or standard or any other Federal law that implicates the safety and security of air carriers. The safety information you report must be **related to air carrier safety** (not personal safety). The following are examples of information related to air carrier safety:
> • Falsification of records
> • Noncompliance with flight and rest requirements
> • Improper maintenance practices
> • Security breaches
> • Inadequate compliance with training requirements
> • Use of suspected unapproved aircraft parts
> • Improper manufacturing procedures

[81] 49 U.S.C. § 42121(a)(1) and (2). Subsections (3) and (4) are not applicable in this case. An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

- Crewmember medical qualifications
- Improper production of aircraft parts
- Instruction not to document aircraft maintenance discrepancies

Id. at ¶ 6, available at https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC120-81.pdf.

This FAA directive, coupled with Congress's demonstrated intent to ensure comprehensive safety in the aviation industry, indicates that this Tribunal should evaluate other factors, not just the employee's duties, to determine whether an employee has performed a safety sensitive function. Some other areas of focus include the employer's function as an air carrier, or within the construct of support to air carrier operations, such as the manufacturing of parts to be installed on air carrier aircraft. Here, Complainant's concern over the omission of an approved supplier's name on the part falls under a number of the examples of air carrier-related safety, such as noncompliance with documentation requirements, improper manufacturing procedures, and ultimately the potential for operation of an unairworthy aircraft. Further, the parties stipulated that Respondent purchased an airline component parts plant in Wichita, which Complainant oversaw. An airline component parts plant, owned and operated by Respondent, very clearly performs a safety sensitive function. *See also* discussion at section (B)1(a), *supra*.

This Tribunal is aware that earlier cases have focused on whether the *employee* performs a sensitive function rather that addressing whether the *employer* performs a safety sensitive function.[82] The focus in those earlier decisions concerned whether the employee was subject to the FAA's drug and alcohol monitoring program. This Tribunal affirmatively rejects the reasoning in those earlier decisions for the reasons explained below.

The overarching purpose of the Act is to protect employees that report safety related concerns. *Cobb, v. FedEx Corp. Svcs, Inc.*, ARB Case No. 12-052, ALJ No. 2010-AIR-024, at slip op. 12 (Dec. 13, 2013).[83] Contractors provide a critical role in aviation safety and are subject to FAA

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[82] As general background, during promulgation of the Department of Labor's regulations implementing the Act, the National Whistleblower Center (NWC) specifically raised the issue of the term "safety-sensitive functions." This may explain the confusion regarding the focus of "safety sensitive functions." OSHA responded as follows:

> The NWC suggested that the definition of "safety-sensitive" should include persons who work for contractors who are in a position to witness and/or identify the misconduct of other employees or contractors as opposed to reporting only on the employee's own employer. OSHA agrees that "safety-sensitive functions" include security-related activities, but believes that the definition as written is adequate.

68 Fed. Reg. 14,099, 14,101- 02 (Mar. 21, 2003). The guidance from this response is not particularly illuminating, but one can glean from this response that at least security-related activities are a subset of safety-sensitive functions.

[83] *See* 146 CONG. REC. S1247-07, S1252 (daily ed. Mar. 8, 2000) (statement of Sen. Grassley) ("Whistle-blower protection adds another, much needed, layer of protection for the traveling public using our Nation's air transportation system."); 146 Cong. CONG. REC. S1255-01, S1257 (daily ed. Mar. 8, 2000) (statement of Sen. Hollings) (AIR 21 includes "whistleblower protection to aid in our safety efforts

regulations. As such, the FAA places many obligations upon the air carrier to ensure oversight of its contractors, particularly those who provide parts for installation on type certificated aircraft. Congress mandated that "assigning and maintaining safety as the highest priority in air commerce." 49 U.S.C. §40101(a)(1).[84] It flies in the face of the purpose of the Act to read "safety-sensitive function" so as to extend protection only to the mechanic that places a part on an aircraft, but to not extend that same protection to the very person that makes the part that the mechanic will place on the aircraft. The correct installation of a part onto an aircraft is just as important to safety as the correct manufacturing of that the part.

In *Cobb v. FedEx Corp. Svcs., Inc.*, ARB Case No. 12-052 (Dec. 13, 2013), the ALJ turned to the definition of "safety-sensitive function" contained in FAA drug and alcohol testing regulations. *Id.* at 7. "Safety-sensitive functions" under those regulations include flight crewmember duties, flight attendant duties, flight instruction duties, aircraft dispatcher duties, aircraft maintenance and preventive maintenance duties, ground security coordinator duties, aviation screening duties, and air traffic control duties. However the scope and purpose of those rules were far narrower than those set forth in the whistleblower statutes.[85] *Cobb* itself

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and protect workers willing to expose safety problems."); 146 Cong. CONG. REC. H1002-01, H1008 (daily ed. Mar. 15, 2000) (statement of Rep. Boehlert) (the whistleblower provisions will "ensure that aviation workers can blow the whistle on safety problems without looking over their shoulders and fearing retaliation.").

[84] This provision applies to Chapter 421 of title 49 U.S.C., the Chapter where the whistleblower protections at issue are located. Congress separately directed that the Administrator of the FAA to consider certain safety considerations in the public interest. Foremost of those factors is the assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. 49 U.S.C. § 40101(d)(1).

[85] The Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §§ 45101-45017 requires drug and alcohol testing of safety-sensitive transportation employees in aviation and other transportation industries. Under the Act's authority, the Department of Transportation ("DOT") promulgated regulations requiring pre-employment, random, and post-accident drug and alcohol tests for employees throughout the transportation industry. 49 C.F.R. Part 40. The FAA promulgated drug and alcohol testing regulations specific to aviation. In 2007, the drug and alcohol testing regulations applicable to air carriers operating were found in Part 121 and Part 121, Appendices I (drug testing program) and J (alcohol misuse prevention program). Section 121.457 required each certificate holder or operator operating under Part 121 to test each of its employees who performed a safety-sensitive function for certain drugs in accordance with the standards forth in Part 121, Appendix I. Air carriers operating under Part 121 also were required to test employees performing safety-sensitive functions for alcohol misuse in accordance with the standards set forth in Appendix J under Section 121.459(b). In 2009, the drug and alcohol testing regulations for Part 119 certificate holders were consolidated in a new 14 C.F.R. Part 120. 74 Fed. Reg. 22,563 (May 14, 2009). The requirements of § 121.457(a) are now set forth in the Federal Aviation Regulations (FAR) at 14 C.F.R. § 120.35. Consequently, under the current drug and alcohol regulations, 14 C.F.R. § 120.105, the following duties are considered safety sensitive functions:

(a) Flight crewmember duties.
(b) Flight attendant duties.
(c) Flight instruction duties.
(d) Aircraft dispatcher duties.
(e) Aircraft maintenance and preventive maintenance duties.
(f) Ground security coordinator duties.
(g) Aviation screening duties.

recognized that a broad definition of "air carrier" was necessary to give full effect to the purpose underlying the Act.[86] "Furthermore, by prohibiting 'contractors and subcontractors,' as well as air carriers, from retaliating against employees for engaging in protected activity, Congress conveyed a clear aim to promote *comprehensive* aviation safety." *Id.* at 10 (emphasis added).

In *Wallum v. Bell Helicopter Textron, Inc.*, DOL Case No. 2009-AIR-00006 (Apr. 2, 2009), prior to a hearing on the complaint, Bell filed a motion to dismiss on the grounds that it was not an air carrier or contractor and therefore not a covered employer under AIR 21. In granting the motion for summary decision, the administrative law judge referenced the House Report which made reference to the FAA's drug and alcohol program. *Id., slip op.* at 4.[87] As Complainant did not perform one of the eight functions identified in the FAA's drug and alcohol provisions of the regulation, the ALJ reasoned that Wallum was not protected under the Act.[88] On appeal, the Administrative Review Board ("Board") reversed and remanded the case for further consideration. *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081 (Sept. 2, 2011). The Board found that the ALJ had not considered "whether Wallum's reference to the internet evidence bearing on the issue of coverage could show that Bell was an air carrier or a contractor as defined by AIR 21 and thus a covered employer subject to AIR 21's whistleblower provisions. Nor did the ALJ address Wallum's argument that Bell's website *showed other air safety aspects of its business*." *Id.*, slip op. at 6-7 (emphasis added). The Board never resolved this issue because the parties ultimately settled the matter. *See Wallum v. Bell Helicopter Textron, Inc.*, DOL Case No. 2009-AIR-00006, *Order Granting Joint Motion to Dismiss with Prejudice* (Mar. 7, 2012). Although *Bell* did not reach the merits, the Board invoked the *employer's* operation as a business entity in its analysis as to whether the employee performed a safety sensitive function. The Board's discussion left unanswered the interpretation of "safety sensitive function" beyond the scope of the eight duties enumerated in Part 121 drug and alcohol program.

For all the foregoing reasons, I find that Respondent is a contractor of one or more air carriers and that Complainant has established by the preponderance of evidence that he was an employee protected by the Act. The focus of the Act is to protect the public by promoting disclosure of potentially unsafe conditions, be it while actually operating the aircraft or maintaining the aircraft. This finding does not mean that all employees of contractors or

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(h) Air traffic control duties.

[86] This Tribunal also declines to follow the rationale in *Cobb* that Federal Express Services was an "air carrier" under the Act. Instead, it would have deemed the employer a contractor of an air carrier that performed a safety sensitive function.

[87] The House Report that accompanies the Act provides the following in its section-by-section summary when addressing the term contractor in § 42121(e):

> Subsection (e) uses a definition of ''contractor'' *similar to* the one found in the drug testing rules at 14 C.F.R. 121, Appendix I. This will ensure that employees actually have some expertise in a safety- sensitive position in order to avail themselves of the protections offered by this legislation. (emphasis added).

H.R. REP. NO. 106-167, pt. 1, at 121 (1999).
Use of the phrase "similar to" can reasonably be interpreted to mean not limited to. Again, the focus is one of the employee's role in providing safety in air commerce.

[88] *See* footnote 85, *supra*.

subcontractors of air carriers are automatically protected by the Act. Whether the employee of a given contractor or subcontractor is protected hinges upon a nexus of their duties to air carrier safety. The party seeking the benefits of the protection bears the burden of establishing this nexus. Here, the Complainant's belief that Mr. Benaoum pressured Ms. Sawyer to falsify information violating its PMA provided that nexus.

3. Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration 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 any 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 such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

Here, the statute focuses on what the employee reports, and when the employee reports the matter. The Board has explained, "As a matter of law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C.A. § 42121(a)) (emphasizing, "an employee need not prove an *actual* FAA violation to satisfy the protected activity" provided that the employee's report concerns a "federal law related to air carrier safety and the employee's belief that the violation occurred is subjectively and objectively reasonable") (emphasis in original).[89] Thus, the "complainant must prove that he

[89] Moreover, that "management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively reasonable." *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 5-6 (Nov. 5, 2013); *see also Sewade*, ARB No. 13-098, slip op. at 8 ("When an employee makes a protected complaint, the employer's response (positive or negative) does not change that AIR 21 protected activity has occurred"); *Andaya v. Atlas Air, Inc.*, 2012 U.S. Dist. LEXIS 78654, 2012 WL 1871511 (S.D.N.Y. Apr. 30, 2012)(The employee need not specifically identify to the employer what laws the employer's conduct violates, but must complain of conduct which he reasonably believes 'definitively and specifically relate' to conduct included in [the Sarbanes-Oxley Act].").

reasonably believed in the existence of a violation," and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, ALJ No. 2013-AIR-16, slip op. at 5 (Jan. 21, 2016). Regarding the former, "To prove subjective belief, a complainant must prove that he held the belief in good faith." *Id.* Regarding the latter, the Board explained: "To determine whether a subjective belief is objectively reasonable, one assesses a complainant's belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (evaluating the reasonableness of belief of the *Burdette* complainant, a pilot, against that of a pilot with similar training and experience) (internal quotation marks omitted).

However, the Board observed, "mere words do not create an FAA violation when the parties' actual conduct does not violate FAA regulations." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, slip op. at 6 (June 30, 2010). Though the complainant "need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009); *see also Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004). Similarly, "once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Malmanger, supra* at 8 (internal quotation marks omitted) (holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and "did not reasonably believe that safety violations existed at the time he made his complaint").[90]

Discussion of Protected Activity[91]

Respondent is a PMA holder and appears to be a repair station. Here, Complainant alleges that he engaged in protected activity by informing Mr. Maillard that Mr. Benaoum threatened Ms. Sawyer because she refused to falsify FAI documentation in violation of 14 C.F.R. § 21.2(a),[92] in addition to filing a complaint with the FAA on July 30, 2014. Compl. Br. at ¶ 43. This Tribunal will look at each alleged protected activity in turn.

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[90] *See also Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-063, slip op. at 9 (June 30, 2008); *Williams v. U.S. Dep't of Labor*, 157 Fed. App'x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996 STA-20, slip op. at 1 (Nov. 12, 1996).

[91] Unlike the standard for a motion for summary decision, evidence introduced at the hearing is no longer entitled to be looked at in the light most favorable to Complainant, who has the burden of placing evidence of protected activity in the record. *See* Tr. at 6-7 and 771.

Complainant also asserts protected activity by his filing his complaint with the FAA on July 30, 2014.

[92] This Section, entitled "Falsification of applications, reports, or records," provides:

> No person shall make or cause to be made—(1) Any fraudulent or intentionally false statement on any application for a certificate or approval under this part; (2) Any fraudulent or intentionally false entry in any record or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or the exercise of the privileges of any certificate or approval issued under this part; (3) Any reproduction for a fraudulent purpose of any certificate or approval issued under this part; (4) Any alteration of any certificate or approval issued under this part.

The crux of his complaint is not simply that Mr. Benaoum posed a question to Kim Sawyer on three occasions[93] about the contractual FAI requirements as Respondent maintains, but he instead asked Ms. Sawyer to alter or omit information in the certification she prepared. Respondent maintains that this "does not even remotely violate any FAA statute or regulation." Resp. Br. at 9. Respondent further points out that on each of those occasions Ms. Sawyer refused to omit or change the form. *Id.* at 19.

The Act is designed to protect the public and to prevent unsafe conditions from actualizing in air commerce. It would seem inconsistent to not provide protections to a person until an actual violation occurred, when the very purpose of the Act aims to prevent the unsafe acts from occurring. The Act should not be read so as to hinder protections until the defective part arrives on the aircraft or has entered the stream of commerce. The objective should be to prevent defective parts, be they defective paperwork or the part itself, from entering the inventory in the first place. Reporting discrepancies in the process and not having to wait until such time as the part becomes unapproved helps to effectively accomplish this goal.

Complainant's email to Mr. Maillard on July 25, 2014 was a protected activity. JX 15. In this email, he notified Respondent's chief executive officer, Mr. Maillard, of possible violations of the federal aviation regulations. It matters not that the email does not cite to a specific violation. What matters is Complainant believed it to be a violation, a belief that was reasonable.

Respondent is subject to 14 C.F.R. § 21.9, which provides in pertinent part:

> (a) If a person knows, or should know, that a replacement or modification article *is reasonably likely to be installed on a type-certificated product*, the person may not produce that article unless it is--(1) Produced under a type certificate; (2) *Produced under an FAA production approval*; . . . (4) A commercial part as defined in § 21.1 of this part; (5) Produced by an owner or operator for maintaining or altering that owner or operator's product; or (6) Fabricated by an appropriately rated certificate holder with a quality system, and consumed in the repair or alteration of a product or article in accordance with part 43 of this chapter. (b) Except as provided in paragraphs (a)(1) and (a)(2) of this section, a person who produces a replacement or modification article for sale may not represent that part as suitable for installation on a type-certificated product.

14 C.F.R. § 21.9(a)-(b) (emphasis added).

The FAI process was the means by which Respondent ensured compliance with 14 C.F.R. § 21.9. Thus, Respondent's argument that the FAI process merely constituted a private contractual agreement between suppliers and manufacturers is singularly unpersuasive. The FAI process was the means through which Respondent complied with the pertinent FAA regulations.

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[93] In its brief, Respondent concedes that Ms. Sawyer testified that Mr. Benaoum asked her on three occasions about leaving off or changing information on an FAI. Resp. Br. at 4.

Therefore, every single FAI document Respondent produced needed to have contained all information required under those FAA regulations, or Respondent would have violated them.

Complainant's email communicated that Mr. Benaoum asked Ms. Sawyer to falsify FAI documents in violation of 14 C.F.R. § 21.2(a). In her June 4, 2014 email to Complainant, Ms. Sawyer wrote:

> On May 16th, 2014 for the shipment of our first set of parts to Mecachrome in which Quik Tek and Chrome plus provided the processes required. I was asked to [sic] if I could change Quik Tek machining Certificate of Conformance logo to a figeac-aero logo for machining by Hocine. . . . On May 30th, 2014 when Hocine was asking me to send FAI data to Mecachrome he asked to not mention R&R aero on the FAI if at ALL possible.

JX 6.

Essentially, Mr. Benaoum asked Ms. Sawyer to omit information that was required to be documented to show compliance with its PMA. Title 14 C.F.R. § 21.2(a) provides in pertinent part that "A person may not make *or cause to be made* any … intentionally false or misleading statement in any record or report that is kept, made, or used to show compliance with any requirement of [Part 21]." Further, 14 C.F.R. § 3.5(c)(2) provides that "no person may make, *or cause to be made, through the omission of material information* … that a … part… is acceptable for installation on a type-certificated product in any record if that representation is likely to mislead a consumer acting reasonably under the circumstances." (emphasis added). No evidence exists that shows that Mr. Benaoum successfully convinced Ms. Sawyer to alter the logo. However, had Mr. Benaoum done so, Respondent would have been in violation of these regulations and subject to stiff civil penalties if not revocation or suspension of the company's authority to manufacture future parts.[94] Further, as will be addressed below, there is evidence that parts that Mr. Benaoum sold had traceability issues reflected on its documentation; specifically part number 56E130187-5-01 as demonstrated by JX 23 and JX 24.

The Act does not require the consummation of an actual violation. The Act extends its protections to "information relating to any violation *or alleged violation* of any order, regulation, or standard of the [FAA]. 49 U.S.C. § 42121(a)(1). Complainant is not a lawyer and thus not well-versed in administrative litigation such that he could have objectively known which actions actually constitute an FAA violation. He viewed the mere attempt to omit information as an FAA violation. This Tribunal need not decide that issue. More relevantly, Complainant asserted that Mr. Benaoum's actions were alleged violations, and he communicated this belief to Mr. Maillard. Given the breath of 14 C.F.R. §§ 3.5(c), 21.2(a) and 21.9 and the highly regulated nature of the industry as a whole, this Tribunal finds Complainant's concerns well based and reasonable.

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[94] *See* 14 C.F.R. § 21.2(b)(2) and FAA Order 2150.3B. In addition to possible suspension or revocation of its PMA, Respondent could be subject to a civil penalty of up to $25,000 for each occurrence. *See* FAA Order 2150.3B at App. B.

Respondent argues that the evidence concerning the FAIs at JX 23 and JX 24 are not persuasive because Complainant never provided them to Respondent prior to Mr. Maillard's decision to terminate his employment. These exhibits concern aircraft Part number 56E130167-5-01. However, this argument ignores the evidence in the context of the chain of events. Although Complainant did not have a "smoking gun" piece of evidence at the time he communicated his concerns to Mr. Maillard, possession of actual proof is not the same as raising the concern prior to and while endeavoring to obtain the proof. At a minimum, Complainant knew of an ongoing documentation issue with a part manufactured and "inspected" in France, a part where the Wichita facility was responsible for its certification. Mr. Benaoum, the same person who sought the omission of information in earlier parts documentation, coordinated these actions.

Complainant credibly testified that Mr. Benaoum was the person who decided to have the part manufactured in France for Mecachrome rather than at the Wichita facility. Tr. at 64. On July 22, 2014, Ms. Sawyer discovered that Respondent had used Figeac France as an unapproved supplier for a part that had been shipped to a customer under Respondent's AS9100 certification and expressed her concern in an email to Mr. El-Mokadem. JX 9. Use of an approved supplier is part of the requirements under AS9100 and Part 21. *See* JX 15 and 14 C.F.R. §§ 21.303 and 21.137(c). Shortly thereafter, Complainant became aware of an issue with the part associated with JX 23 and JX 24. Ms. Sawyer copied him on an email to Mr. Benaoum on the afternoon of July 23, 2014, alerting him to an issue with Part Number 56E130167-5-01. JX 25. Complainant credibly testified that he learned about problems with this part during his morning staff meeting when Ms. Sawyer raised the issued; that would be July 24, 2014. Tr. at 66. According to JX 23, this part was inspected on July 9, 2014 and a penetrate inspection, passivate, paint and marking, were marked "N/A." Review and approval of this inspection occurred on July 10, 2014. Upon receipt of this information, Ms. Sawyer realized discrepancies in the paperwork and contacted Mr. Benaoum via email on July 23, 2015, and expressed several concerns. JX 25. On July 24, 2014, Ms. Sawyer wrote to Mecachrome and asked that it ship the part to the Wichita facility at Complainant's direction. JX 29; Tr. at 265 – 66. Mr. Benaoum replied that Mecachrome would not return the part as it had already started working on the part. JX 29. On July 25, 2014, Complainant expressed his concerns to Mr. Maillard about Mr. Benaoum's actions. JX 15. Mr. Benaoum had to know during this time that he confronted a documentation problem with this particular part at the same time Complainant raised concerns about his actions to Mr. Maillard. JX 1, Ex C and JX 15. While no direct evidence indicates that Mr. Maillard shared Complainant's July 25, 2014 email and letter (JX 15) to him with Mr. Benaoum, there is evidence that he forwarded Complainant's correspondence about his FAI concerns and Mr. Benaoum's actions to Mr. Benaoum (copying Ms. Cazenave) just over an hour after receiving it. JX 18. This lends support to at least the inference that Mr. Benaoum knew of the allegations against him during this time, and casts some doubt on his testimony that he had no role[95] in the decision to terminate Complainant. Tr. at 400.

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[95] The testimony was as follows:

Q: D]id you have any role in the decision to terminate [Complainant]?
A: Absolutely not.
Q: Who made that decision?
A: Jean Claude Maillard by himself. He was his boss.

Ms. Sawyer's concerns about the lack of proper documentation persisted into July 29, 2014 when Ms. Sawyer identified five deficiencies in the paperwork that required correction before she would release the paperwork to Mecachrome. JX 25; *see also* Tr. at 66 - 68. The "new" paperwork dated July 28, 2014 (JX 24) provided to Ms. Sawyer appears to cure the problem by omitting reference to the required tests contained in the original certification. The required penetrant inspection, passivate, paint and marking are simply omitted from the description of the processes used to manufacture this part in JX 24 as compared to JX 23. Without the proper paperwork this part was not approved for installation on to a type certificated aircraft. Respondent and Figeac in France now had a problem because the part had already been shipped to the customer located in Canada and because the supplier had started working on the part, it refused to return it. JX 9 and JX 29. Even in the light most favorable to Respondent, there is clear evidence that it omitted key information about this part prior to shipment in violation of the Federal Aviation Regulations.

The chain of events is ample grounds for Complainant to conclude "That made us a problem. Now we had a falsified document." Tr. at 94. Given that the Certificate of Compliance was not finally signed off until December 2014, a real question remains as to whether this part was used in air commerce in the intervening months. Unfortunately, the evidence before this Tribunal does not allow it to come to a conclusion on that issue one way or the other. But this Tribunal finds that the paperwork for this part had material information omitted from it and that omission would violate the Federal Aviation Regulations, particularly 14 C.F.R. § 3.5(c)(2). As Complainant was aware of this sequence of events, as evidenced by his involvement in the email strings described above, this Tribunal finds his concerns about omission of information in the FAI's were objectively and subjectively reasonable.

Further, the witnesses' reaction to this request for document for the part "inspected" in France is enlightening. Complainant was so concerned about the omission that, upon learning of the incidents, he directed Ms. Sawyer to prepare an email documenting the incident (Tr. at 80; CX 201 at 4; JX 19), sought legal advice (Tr. at 123), and then emailed the information to Mr. Maillard (Tr. at 101). Mr. Maillard seemed to think it permissible for Mr. Benaoum to ask the question, and had no evidence of intimidation or falsification. Tr. at 328 – 29. Moreover, Mr. Maillard did not direct an investigation. Tr. at 345. Instead, he accused Complainant of improprieties. In Mr. Maillard's letter dated July 27, 2014, he clearly communicates that he is considering terminating Complainant. JX 1 at Ex B, pages 320-21.

On July 28, 2014, Complainant informed Mr. Maillard that omitting information on the FAI could be considered fraud; this too qualifies as a protected activity. JX 18. Three days after this email, and without conducting any sort of investigation,[96] Mr. Maillard terminated Complainant's employment. JX 21. Also on July 28, 2014 or shortly thereafter, Complainant received the FAI that found a nonconformity issue with the part. Tr. at 169 – 173, 267. On July 30, 2014, Complainant received the email from Ms. Sawyer recounting the events of her conversations about non-conforming information with Mr. Benaoum. JX 19; JX 1 at Ex A.

[96] Mr. Maillard did testify that he spoke to Ms. Cazenave but he also admitted that he did little, if any, investigation into the facts, or even discussed the matter with Complainant prior to his termination from employment. Tr. at 345.

It is apparent from the record that Complainant and Mr. Benaoum developed a personality conflict. Ms. Sawyer testified that she thought Mr. Benaoum's requests were in jest. However, I do not find her testimony credible on this issue. Rather, I find the testimony of Ms. Herington's highly credible and illuminating. She testified that Ms. Sawyer was scared that she would lose her job, cried, and talked about the matter all of the time. Ms. Herington no longer works for Respondent, so she has no apparent reason to color her testimony. However, with Complainant absent from the plant, Ms. Sawyer's concern about job security is reasonable, and not unexpected, especially since Mr. Benaoum became her boss.

However, Complainant did admit that he never provided Mr. Maillard with either JX 23 or JX 24. Instead he provided Ms. Sawyer's email (JX 6) as evidence of the problem. Respondent argues that is not evidence of falsification. Resp. Br. at 7, n. 2. Respondent further argues that Complainant's concern about the upcoming audit did not relate to FAA violations, but rather an industry expectation. *Id.* at 7 – 8. Respondent therefore postulates that the protected activity does not extend to these two exhibits. *Id.* at 7.

As to Respondent's argument that any alleged falsification would have involved Ms. Sawyer and not the Complainant, the focus of the AIR21 whistleblower provision does not concern the employee who committed the falsification; nor does the employee seeking protection have to be personally involved in the falsification. Instead, the statute protects an employee who "provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard." 49 U.S.C. § 42121(a)(1). As discussed above, Complainant had a reasonable belief that information was omitted from the FAI and reported his knowledge to both Mr. Maillard and the FAA. Because Complainant has met that standard, his personal involvement in the alleged violation is immaterial. Further, even if, as Respondent contends, no violation of FAA laws or regulations occurred, "[i]t is… well established that the protection afforded whistleblowers who raise concerns regarding statutory violations is contingent on meeting the…reasonable belief standard rather than proving that actual violations have occurred." *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip. op. at 17 (ARB July 14, 2000). Thus, Complainant need not have waited for an FAA violation to occur in order to report the omission and still enjoy whistleblower protection.

4. Adverse Action

The Act provides, "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" engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 09-118, ALJ No. 2008-SOX-64, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-5, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v.*

White, 548 U.S. 53 (2006), was error). However, the Board has clarified, "*Burlington*'s adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated: "Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.[97] Accordingly, the Board views "the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline." *Williams*, ARB No. 09-018 at 10-11. The Board further observed that "even *paid* administrative leave may be considered an adverse action under certain circumstances." *Id.* at 14 (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-00038, slip op. at 4-5 (Apr. 20, 1998) (holding that "although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus"). However, this does not mean that every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.

Discussion of Adverse Action

Respondent does not challenge this element, and the evidence is undisputed that Mr. Maillard terminated Complainant's employment by letter dated July 31, 2014. *See* JX 1 at Ex D.

5. Contributing Factor Analysis

Finally, Complainant must demonstrate that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in

[97] *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: "To settle any lingering confusion in AIR 21 cases, we now clarify that the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term 'discriminate' is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress").

connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The Board has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, "did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer,* ARB No. 16-035, slip op. at 21; *see also id.* at USDOL Rptr., page 22.

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9, slip op. at 6-7(Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer,* ARB No. 16-035, slip op. at 56; *see also id.* at USDOL Rptr., page 59.

Discussion of Contributing Factor Analysis

Complainant engaged in protected activity on July 26, 28 and 30, 2014, and it is undisputed that Respondent terminated Complainant's employment on July 31, 2014. Complainant brought his concerns directly to Mr. Maillard's attention, and Mr. Maillard expressly acknowledged Complainant's concerns, and Mr. Maillard ultimately fired Complainant. Thus, Mr. Maillard, as the individual responsible for the adverse action, clearly had knowledge of the alleged protected activity, as demonstrated by the language in Mr. Maillard's July 27, 2014 email and in Mr. Maillard's July 31, 2014 letter terminating Complainant's employment. *See* JX 17; *see also* JX 21 (Maillard refers to the alleged protected activity by writing, "Such allegations on your part concerned a mere question by Hocine Benaoum, another employee of [Respondent]. In this regard, your allegation of wrongdoing is false and a transparent effort to cloak yourself in anti-retaliation protection"). Mr. Maillard also testified to his knowledge of the protected activity at the hearing, characterizing "these allegations of falsification [as] just one more proof that the work relationship between [Complainant] and [Mr. Benaoum] was no good." Tr. at 348. Respondent had direct knowledge of the alleged protected activity, and the adverse action occurred within five days of

Complainant's July 26, 2014 email, within three days of Complainant's July 28, 2014 email, and one day after Complainant filed a complaint with the FAA.

Conclusion: Complainant's *Prima Facie* Case

In sum, this Tribunal finds by a preponderance of evidence that the Employer is subject to the Act, Complainant engaged in protected activity on July 25, 2014 and July 28, 2014 when he sent emails to Mr. Maillard expressing his concerns about Mr. Benaoum's actions might constitute FAI and FAA infractions, and that these protective activities, separately and together, were contributing factors in his termination from employment three days later, on July 31, 2014. Accordingly, the burden now shifts to the Respondent to establish by clear and convincing evidence that it would have terminated Complainant's employer in the absence of this protected activity.[98]

6. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant's Protected Activity

Complainant has established the elements of an AIR21 complaint. However, the Act provides, "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." 49 U.S.C.A. § 42121(b)(2)(B)(iv). "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11, slip op. at 11 (May 26, 2010); *Palmer*, ARB No. 16-035, slip. op at 52. The Board further explained, "Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11; *Palmer*, ARB No. 16-035, slip. op at 52. The Board further explained, "Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11.

However, where an employer proffers shifting explanations for its adverse action, or engages in disparate treatment of similarly situated employees, the employer's "explanations do not clearly and convincingly indicate that it would have" taken the same unfavorable action absent the protected activity. *See Negron*, ARB No. 04-021 at 8; *see also Douglas v. SkyWest Airlines, Inc.*, ARB Nos. 08-070 and 08-074, ALJ No. 2006-AIR-14 (Sept. 30, 2009). "An employer's shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason." *Douglas*, ARB Nos. 08-070 and 08-074, slip op. at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees, employees involved in or accused of the same or similar conduct, are disciplined in different ways. *Id.* at 17; *see also Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the

[98] *See Palmer*, ARB No. 16-035, slip op. at 52; *see also id* at USDOL Rptr., page 55.

administrative law judge's credibility determinations and "factual findings regarding temporal proximity, pretext, and shifting defenses . . . thus preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity").

Discussion of Respondent's Same Decision Defense

Respondent maintains that even if Complainant engaged in protected activity, Respondent presented overwhelming evidence that it would have terminated Complainant in any event. Respondent's bases for termination of Complainant rest on four grounds: performance problems; disclosure of confidential information; seeking legal advice without authorization; and making a false claim against Mr. Benaoum "to cloak himself" with whistleblower protection.[99] These arguments will be addressed in turn.

a. Performance problems

Respondent maintains that Complainant delivered a poor performance and did not work very hard. It offered testimony that Mr. Maillard heard from Ms. Cazenave that Complainant did not work regular hours. Tr. at 322. Mr. Maillard provides testimony about difficulties Ms. Cazenave might have been having while attempting to communicate with Complainant a continent away.[100] Ms. Cazenave worked for Respondent in France and did not testify at the hearing.[101] Mr. Maillard stated that Ms. Cazenave continuously tried to reach Complainant several times at 3:00 p.m. or 3:30 p.m., Wichita time and at 9 or 10 a.m., but failed to reach him. However, Mr. Maillard also admitted that Ms. Cazenave was his only source regarding Complainant's work habits. Tr. at 371.

The above testimony amounts to double hearsay evidence and merits little weight. For example, this Tribunal notes that 3 p.m. in Wichita would equate to 10 p.m. Figeac, France

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[99] However, Mr. Maillard testified as follows:

> Q Can we agree that the three items that we've talked about so far, the work ethic, the getting along with [Mr. Benaoum] and getting along with the team, although they were, in your view, factors, without the sharing of financial information, you would not have fired [Complainant] over that. Correct?
>
> A Right. So he agrees, yes. If it had just been about the work ethic and the teamwork and all that, he would have given him time to work it out. But when you share financial information with a competitor, it's too serious. He said, the trust is broken, and that's it.

Tr. at 344.

[100] Ms. Cazenave worked for Respondent in France. Tr. at 61 and 342.

[101] This Tribunal finds it curious that neither party called Ms. Cazenave as a witness, given her involvement around the issues of the alleged unauthorized disclosure of confidential information and Complainant's alleged work ethic. Further, it appears that Ms. Cazenave still works for Respondent. Tr. at 58, 321 and 342; *see also* Compl. Br. ¶ 31. The Tribunal understands the possible difficulty of calling Ms. Cazenave as a witness for the hearing; however, Respondent was able to obtain Mr. Maillard's testimony from France via Skype. Even if that was not possible, Respondent could have offered at least deposition or other sworn testimony. The absence of her sworn testimony lessens the weight this Tribunal gives to her statements contained throughout the record.

time.[102] This Tribunal is skeptical, without more information, that Ms. Cazenave regularly worked at 10 p.m. at night. Rather, this Tribunal thinks it more likely that Ms. Cazenave contacted Complainant at 9 or 10 a.m. Wichita time, which would be 4 or 5 p.m. in France. Complainant also testified that he communicated by phone with Respondent's personnel based in France during these hours. *See* Tr. at 94, 103, 204.

Mr. Maillard also testified that Complainant admitted to him that he worked from 9:30 to 3:30 because he had to care for a handicapped child. Tr. at 372. Mr. Maillard's contacts with Complainant were similarly limited, and then almost exclusively by telephone. Complainant creditably testified that he had scheduled telephone calls with Mr. Maillard twice a week, usually around 9 a.m. or 10:00 a.m. Central time,[103] and those only lasted 15 to 30 minutes. Tr. at 76, 103. Mr. Maillard testified that he only talked to Complainant "[f]rom time to time . . . more or less once a month." Tr. at 320. This Tribunal finds it difficult to accept that Mr. Maillard could judge Complainant's work hours based on just such infrequent contacts.

Contrast this contention with the testimony of other witnesses, particularly Ms. Sawyer, Ms. Walker and Ms. Herington. Ms. Sawyer testified that they had a meeting every morning at 8:30 a.m. where she had to present information to Complainant about the status of work in the shop. *See* CX 201 at 21-23. Complainant showed up to work between 7 and 8 a.m. as she arrived prior to him to prepare a PowerPoint slide for the daily morning meeting. CX 201 at 24. She testified that the personnel at the Wichita facility were expected to work 10 to 12 hours a day.[104] CX 201 at 20. Ms. Walker testified that Complainant usually "came in around seven, eight o'clock, and he didn't leave until five, six o'clock. Tr. at 210. Ms. Herington testified that Complainant did work hard, was at the plant every day and usually arrived at the office around 8 to 8:30 and Complainant was there when she left around 5 p.m. Tr. at 224.

In the light most favorable to Mr. Maillard, this Tribunal accepts that Complainant stated to him on *an* occasion that Complainant left work early to care for his child. However, it begs credibility that a general manager of a plant would only work a 30 hour week when his staff worked 10 to 12 hour days. Surely, had his work ethic been so lacking, Respondent would have been able to produce a witness with direct observations of Complainant's abbreviated work hours. This discrepancy can be possibly explained by the language barrier, as Mr. Maillard spoke his primary language, French, and used a translator while testifying. To extend such a representation without more direct evidence defies common sense. In short, there is no credible evidence that Complainant "did not work very hard."

Further, if Respondent by its contention is referencing the profitability of the Wichita facility, it provided no evidence to rebut Complainant's claims that he was responsible for making great strides in turning a facility that was losing money into one that either lost less money per month, or actually became profitable. Tr. at 8, 35. Respondent provided little, if any

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[102] *See* http://www.timeanddate.com/worldclock/difference.html?p1=403.

[103] *See* Tr. at 103; *see also* JX 13 (July 21, 2014 email from Mr. Maillard to Complainant)("Please, let us talk. Would you call me tomorrow at 5:00 p.m., France time."). This would be 10:00 a.m. Wichita time.

[104] *See also* CX 201 at 26. During her deposition, Ms. Sawyer testified that she "worked from approximately 6 a.m., sometimes 5:30 a.m. until 6, 7, 8:00 [th]at night." CX 201 at 19. However, Ms. Sawyer did comment that Complainant took a lot of smoke breaks. Tr. at 281.

evidence, to demonstrate that Complainant, or Wichita facility failed to meet goals established by Respondent. In either case, Respondent falls woefully short of establishing by clear and convincing evidence that Complainant was a poor performer.

b. Disclosure of confidential information

This Tribunal finds this reason for terminating the employment of Complainant a pretext for the reasons explained below.

Respondent asserts that Complainant disclosed confidential financial information to Sonaca and, according to Mr. Maillard, this was the primary reason for Complainant's discharge. Resp. Br. at ¶ 25; Tr. at 323 and 333. But this assertion directly controverts the evidence presented. Prior to the sale by Sonaca to Respondent of the Wichita facility, Sonaca handled the accounting from Montreal. Tr. at 57, 225 - 26. Mr. Maillard testified that in the purchase agreement of the Wichita facility itself "it's stated specifically . . . that in the process of the purchase, that Sonaca needed to help [Respondent] in any way necessary to understand this production management software called Visual." Tr. at 353.

Ms. Herington testified to significant difficulties with the accounting software the Wichita facility used, as no one at the Wichita facility knew how to operate the software properly. Tr. at 224 – 26. It was Respondent that opted to send Ms. Herington to Montreal for training on the accounting software. Tr. at 226. Ms. Herington, who this Tribunal found to be highly credible, testified that the financial information shared with Sonaca was necessary to help her understand the process for closing the books. Tr. at 228. JX 38 reflects an email exchange between Ms. Herrington and Ms. Cazenave demonstrating the exchange of such financial information. When informed during the hearing that Complainant was fired for sharing financial information with Sonaca, Ms. Herington responded as follows:

> That would be crazy. I was directed by [Ms. Cazenave], and her CFO was carbon-copied on some of those emails, when I would ask her questions regarding the financial position of Wichita, [Respondent] now, and she would tell me to – well, you need to ask Paul Costanzo [of Sonaca]… [Mr. Costanzo] would say well, why is she telling you to ask me. And so then he would give me whatever information I need, you know, without any problems. . . .

Tr. at 227 – 28.

And as part of closing the books, personnel at the Wichita facility had to provide profit and loss information to those who completed the books. As Complainant explained, Ms. Cazenave "would not give cash to our company until we gave her a profit and loss statement. We couldn't do a profit and loss statement, because we didn't know how to do Visual." Tr. at 62.

Furthermore, Ms. Cazenave, a finance manager for Respondent, directed that Ms. Herington work with Sonaca to organize the Wichita facility books. *See* JX 38. In an email to Complainant on June 17, 2014, Ms. Cazenave wrote: "Perhaps, I will call Paul Costanzo to help us to perform *the complete financial statements for May*. Because if we do not finish May, we

cannot open June into Visual." JX 36 (emphasis added). She further wrote: "[T]he issue about the training on Visual must be resolved as soon as possible. If you cannot perform the financial statements with your team, you have to tell us as soon as possible. I want to know today if we have to call Paul Costanzo." JX 36. Mr. Costanzo is the Sonaca employee identified as the person helping Complainant sort out Respondent's books. This provides strong evidence that not only did Respondent's finance office encourage coordination with Sonaca's finance personnel, but it actively coordinated with Respondent to obtain accurate financial records during this time.

Complainant openly communicated with his Sonaca contacts to close the books. For example on July 1, 2014, Mr. Costanzo, a Sonaca employee, emailed Complainant explaining the accounting "mess" that was left behind. Less than two hours after receiving that email, Complainant forwarded it to Ms. Cazenave because he "wanted to keep [her] in the dialog" with the Sonaca and the issues with closing the books. JX 10; *see also* JX 11.

This Tribunal finds that, as the general manager of the Wichita facility, Complainant was caught between a financial rock and a hard place. In May through June 2014, circumstances forced him to attempt to operate a business with no finance department and little, if any, accounting support from Respondent. Respondent did not rebut Complainant's testimony about these financial struggles during this time period. He received support from only two places, Sonaca and Respondent's finance personnel in France. The evidence establishes that Respondent's financial personnel not only knew that Complainant shared information with Sonaca, but it also actively encouraged the sharing of financial information and sought training from Sonaca's financial personnel. In particular, this Tribunal notes that the issue of disclosure of confidential information was not raised in any documents until Mr. Maillard's termination letter of July 31, 2014. All of the prior email correspondence focused on either his work ethic, his relationship with Mr. Benaoum, or Mr. Benaoum's attempts to persuade Ms. Sawyer to alter the FAIs, or issues with the processing of the necessary documents for issuance of the C of C. To then base a termination for sharing this same financial information is disingenuous at best.

Further, Mr. Maillard asserted that his concern was Complainant "gave the whole thing, the whole package to Sonaca" concerning the facility's projected profits for May, June and July. Tr. at 367. But Respondent does not explain why Sonaca would not have access to Respondent's financial records, so as to enable its personnel to assist Respondent in closing its books for those months. Respondent references Complainant's June 24, 2014 email to Mr. Costanzo (JX 10) as support for the proposition Complainant disclosed profit information. In this email Complainant does reference hopes of having a profit of over $500,000. However, Complainant's statement amounts to a mere expression of hope that the facility would gross $500,000. Such speculation is analogous to hoping that one will receive a $1,000 tax refund upon turning over his or her records to a tax preparer. The taxpayer must await the results of the record to learn whether he indeed received the refund. Complainant did not share this information surreptitiously such that he could have had a duplicitous motive, which would have provided Respondent with a justifiable reason to terminate his employment. To the contrary, this Tribunal finds Complainant's rationale for his sharing of financial information credible and with the knowledge of at least Ms. Cazenave, Respondent's auditor with oversight of the Wichita facility's books.

c. Seeking legal advice without authorization

Respondent maintains that Complainant sought legal advice without authorization; this Tribunal disagrees. Complainant, as the general manager of the Wichita facility, had overall responsibility for actions within that plant. The contract between Respondent and Complainant entrusts Complainant to "enforc[e] ethical business practices." JX 3, ¶ 1.1. An addendum to this contract lists fourteen matters that require Mr. Maillard's approval to allow Complainant to act; it does not list seeking advice of counsel for the company. JX 4.

Mr. Maillard unambiguously informed Complainant that part of his responsibilities included "be[ing] compliant with federal laws, this is obvious and strictly not negotiable for any reason or excuse." JX 17. After alerting Mr. Maillard of some issues with FAIs and the pressure Mr. Benaoum applied to Ms. Sawyer, Mr. Maillard, in his July 27, 2014 letter, chastised Complainant and reminded him that "I gave you full power, and unlimited financial funds to apply these rules," related to "Federal or any law or rule linked with our activity." JX 17. This supports Complainant's interpretation of his role that he had the authority to communicate with the law firm for purposes of protecting the company. Complainant also provided a contemporaneous motive for seeking advice from the law firm. In his July 28, 2014 email to Mr. Maillard, he wrote:

> [Ms. Sawyer] seeking the protection of the company for this act and in fear of retaliation for reporting this illegal act submitted to me the facts of the situation as the General Manager and NOT having a HR department, I asked for the advice of our legal team that have represented Sonaca Wichita for ten years. The recommendations for this act have been sent to you for your review from Hite Fanning & Honeyman LLP, my intention for this communication was the intent of protection for [Respondent] from legal action.

JX 1 at Ex C.

Next, the legal opinion letter itself sets out the assumptions provided to the lawyers for drafting the opinion. Ms. Tibbets' letter addresses "the risks of retaliating against an employee for not altering FAA documents or for reporting problems to the FAA or FAI." JX 16. The letter speaks for itself as the general facts are consistent with Ms. Sawyer's reports of Mr. Benaoum's actions. Nothing in the letter remotely intimates that Complainant tried "to cloak [himself] in anti-retaliation protection" as asserted in Mr. Maillard's July 31, 2014 termination of employment letter. JX 1 at Ex D. Likewise, Ms. Tibbet's handwritten notes concerning the matter made no reference to Complainant seeking protection for himself. Instead, her notations include "no HR dept" and "France employee pressuring – FIA [sic] – want to. She made a complaint in email." These notes support Complainant's assertion that the underlying reason for seeking legal counsel was to protect the company.

Further, the Wichita facility, while under Sonaca, had a pre-existing relationship with the law firm such that Complainant went to seek legal advice, as Ms. Tibbets testified that she had done work on behalf of Sonaca. Tr. at 432. Of import, Ms. Tibbets testified that the firm

performed work for Respondent after the sale of the Wichita facility to Respondent. This law firm billed Respondent monthly for work it would have done for Respondent in a given month, and Respondent paid the bill after its purchase of Sonaca. Tr. at 436 – 37. Thus, Ms. Tibbets's testimony indicates that Respondent's relationship with that law firm was a continuing one. Finally, during the hearing, Respondent conceded that it had waived the attorney-client relationship in order to allow Ms. Tibbets to testify in the matter, and Respondent acknowledged that Complainant acted in his capacity for the company at the time he sought the law firm's advice. Tr. at 431. Thus, the evidence strongly suggests that Complainant had the authority to seek this law firm's counsel.

The evidence is compelling that Complainant's motive in seeking legal advice was an attempt to protect the company, not to cloak himself with protections. Particularly, Respondent's contract and the authority Mr. Maillard understood Claimant to have, clearly imply that Complainant had the authority to seek legal counsel on behalf of the Wichita facility. Under the facts of this case, Respondent's rationale for discharging Complainant on this basis is not objectively or subjectively reasonable, and this Tribunal finds it wholly without merit.

d. Making false claims against Mr. Benaoum.

Respondent argues that Complainant's allegations that Mr. Benaoum falsified documents is false. There is no evidence that Mr. Benaoum himself falsified documents, however evidence exists indicating that he attempted to create a falsified document by pressuring Ms. Sawyer to change the information on certificates of conformity.

The Wichita plant knew that it had a problem with a particular part by at least July 22, 2014. In an email to Mr. Benaoum dated July 22, 2014, Ms. Sawyer notified him of a problem with a part supplied by Figeac France that Respondent shipped to the customer. However, Figeac France was not on the approved supplier list. JX 9; Tr. at 152. This is important because a parts manufacturer can only use suppliers listed on an approved supplier list. *See* 14 C.F.R. 21.137 (which incorporates § 21.137(c)).[105] A supplier is a "person *at any tier in the supply chain* who provides a product, article, or service that is used or consumed in the design or manufacture of, or installed on, a product or article" on an aircraft. 14 C.F.R. 21.1(b)(10)(emphasis added). Complainant knew that this was a problem, for in an email he asked Ms. Sawyer "how many violations do we currently have to address and by part number what parts are effected." JX 9 (email from Complaint to Ms. Sawyer, dated 7/22/2014 07:24 p.m.)[106] Complainant and Ms. Sawyer referenced violations of AS9100 in their communications related to this part. Ms. Sawyer in particular told Mr. Mokadem that the Wichita facility has "a very strict process that has to be followed in accordance with AS9100." JX 9. AS9100 is that standard by which the company remains in compliance with the federal aviation regulations.[107]

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[105] *See also id.* at § 21.146. *See generally* AC 21.303-4, Application For Parts Manufacturer Approval Via Tests and Computations or Identically (Mar. 21, 2014).

[106] This document is Bates stamped FANA000799. This also indicates that Complainant's awareness of the requirements in 14 C.F.R. §§ 21.303 and 21.316.

[107] *See* footnote 8.

With an audit approaching, Complainant contacted Ms. Sawyer and others to ascertain whether the Wichita operation was in compliance with AS9100, requiring the disclosure of the use of approved suppliers. Complainant seemed to recognize the urgency of the audit, the first one since Respondent's acquisition of the facility. JX 9. Having previously been advised by Ms. Sawyer of Mr. Benaoum's request that she omit the name of a supplier on a part (JX 6), Complainant had reason to bring the matter to Mr. Maillard, even if an actual violation had not taken place. Because Complainant had a good faith concern that a violation had occurred, or tried to preemptively prevent one from happening based on information from Ms. Sawyer, this Tribunal finds that Respondent cannot establish that Complainant made false claims against Mr. Benaoum.

Based on a review of all of the evidence, this Tribunal finds by a preponderance of the evidence that Complainant and Respondent are subject to the Act; that Complainant engaged in protected activity on July 25, 2014 and July 28, 2014; and his protected activity was a contributing factor in an adverse action, his termination. Furthermore, Respondent has failed to present clear and convincing evidence that they would have terminated Complainant in the absence of his protected activity.

In sum, Respondent has failed to establish the existence of legitimate, nondiscriminatory grounds for Complainant's termination. This Tribunal has analyzed all the evidence and testimony of record, and when the Tribunal considers all the evidence as a whole, this Tribunal continues to find that Respondent acted with discriminatory intent. The proffered reasons for Respondent's action are disingenuous, and therefore, support this Tribunal's finding that discriminatory intent is present. Accordingly, Complainant has prevailed in his claim and is entitled to relief.

V. RELIEF

The Office of Administrative Law Judges "Rules of Practice and Procedure", 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. §1979.107(a). Under those rules, the complainant is obligated, within 21 days of entry of an initial notice or order acknowledging the case has been docketed (29 C.F.R. §18.50(c)(i)(iv)), and "without awaiting a discovery request" (29 C.F.R. §18.50(c)(1)(i)), to disclose to Respondent, *inter alia*,

> A computation of each category of damages claimed by the disclosing party–who must also make available for inspection and copying as under §18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

29 C.F.R. §18.50(c)(1)(i)(C).

Furthermore, under 29 C.F.R. §18.53, the complainant has a continuing duty throughout the litigation to "supplement or correct" that disclosure if, at any time, the complainant learned it had become incomplete or incorrect in some material respect. Given those obligations, one

would reasonably expect to find at some point in Complainant's 23-page closing brief[108] a computation of claimed damages. To my astonishment, there is none.

AIR 21 provides that if a violation of AIR 21 is found, the administrative law judge shall order the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. 49 U.S.C. § 42121(b)(3)(B); *see also Evans*, slip op. at 19 and 29 C.F.R. § 1979.109(b)).

Complainant seeks the following relief:[109]

- $100,000 in lost wages and loss of health insurance benefits. Compl. Br. at ¶¶ 36, 72; Tr. at 96;
- $18,000 he had to withdraw from his 401(k). Compl Br. at ¶¶ 38, 72
- $50,000 compensatory damages. Compl. Br. at ¶72
- Reasonable attorney's fees. Compl. Br. at ¶72.

A. Reinstatement

While the Act envisions reinstatement as an automatic remedy, neither party raised this as a remedy at the hearing or in their briefs. Further, the testimony made clear that returning Complainant back to the Wichita facility is impracticable, and would displace Mr. Benaoum as the General Manager. Given the animus that exists between these individuals and the closeness with which they would have to continue to work, it would not be conducive for either party. Therefore, this Tribunal will not order Complainant's reinstatement. *See Clemmons v. Ameristar Airways, Inc.* ARB No. 08-067, ALJ No. 2004-AIR-11 (May 26, 2010).

B. Back Pay

Complainant has the burden to prove the back pay he has lost. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (ARB Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

While a non-working employee has the duty to mitigate his damages by seeking suitable employment, it is well established that the employer has the burden of establishing that the back-pay award should be reduced because the employee did not exercise diligence in seeking and obtaining other employment. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (Mar. 29, 2000). Further, a Complainant cannot "double dip" by

[108] Nor did Complainant address this in his 5-page reply brief.
[109] *See also* Tr. at 96 – 97.

earning wages while receiving disability retirement or benefits. *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-002, slip op. at 28 (Feb. 29, 2000).

There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with "unrealistic exactitude." *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (June 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628. Back pay awards are not reduced by the amount of income and social security taxes that would have been deducted from the wages the complainant would have received. *Id.* at 627. Interim earnings at a replacement job are deducted from back pay awards. *Id*. at 623. Although a terminated employee has a duty to mitigate damages by diligently seeking substantially equivalent employment, the respondent bears the burden of proving that the complainant failed to properly mitigate damages. *Id.*; *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 19 (Feb. 9, 2001).

The respondent must show that the complainant failed to use reasonable diligence to secure a substantially equivalent, available position. *Id.* The benefit of doubt ordinarily goes to the complainant. *Id*. This Tribunal finds that in this matter the Respondent failed to provide sufficient evidence to illustrate a lack of mitigation.

Here, Respondent terminated Complainant from employment on July 31, 2014. JX 21. At that time, he earned $120,000 plus a $20,000 bonus and full medical benefits, and he did not obtain new employment until May 2015: a 10-month time lapse.[110] Tr. at 96. Respondent has presented no evidence that Complainant did not attempt to seek new employment with due diligence. Further, Respondent provided no evidence that Complainant did not seek comparable jobs available to him. Therefore, Complainant has established $100,000 in back pay.[111]

Complainant would be entitled to compensation for his bonus pay and reimbursement for the continued medical coverage for himself, his spouse and his three children.[112] However, unlike his back pay, Complainant did not provide information about the cost and expenses for these items, nor did he explain such in his brief. Therefore, as Complainant has the burden to establish the amount of his damages, and he has failed to provide any information about the criteria for when this bonus was due[113] or when the bonus occurred, this Tribunal cannot award these expenses in damages.[114]

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[110] This Tribunal notes that the parties' stipulation of facts includes a statement that Complainant accepted a job with Sonaca Montreal on or about November or December 2014. *See* Resp. Br., at ¶ 1(m). However, this Tribunal notes a distinction between accepting a job and actually being employed and earning a salary. As Respondent offered no explanation for this possible inconsistency, Complainant has met its burden via Complainant's unrebutted testimony that he did not work until May 2015. Tr. at 96.

[111] ($120,000 per year / 12 months) x 10 months = $100,000.

[112] Tr. at 96.

[113] All that Complainant provided was testimony of a $20,000 bonus. *See* Tr. at 96.

[114] The Complainant only provided the following testimony concerning his medical expenses:

Q What was your health insurance, the value of it, if you know?
A I don't know off the top of my head. It was good insurance.
Q All right. And why is health insurance important to you?

C. Non-economic Compensatory Damages

"Compensatory damages are designed to compensate discriminates not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001). Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (June 30, 2009). *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 24, 2010)) (affirming ALJ's award of $50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (ARB Apr. 22, 2013). Reasonable emotional distress damages may be based solely upon the employee's testimony. *Ferguson*, ARB No. 10-075, slip op. at 7-8. Nonetheless, a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

Complainant seeks $50,000 in non-economic damages arguing that he and his family have suffered from emotional distress and mental anguish because of his discriminatory employment termination. A determination as to a complainant's entitlement to non-economic compensatory damages is a subjective determination. One must take into consideration the facts and circumstances of each individual claim. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004). Furthermore, although psychiatric or medical testimony makes it easier to prove damages, a complainant can still receive those damages without such testimony. *Jones v. EG&G Def. Materials, Inc.*, ARB Case No. 97-129, ALJ Case No., 95-CAA-3 (ARB Sept. 29, 1998).

Any award of compensatory damages must be supported by substantial evidence. An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). However, a complainant's credible testimony alone is sufficient to establish emotional distress. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op. at 8 (ARB Jan. 31, 2008).[115] Complainant's testimony at the hearing concerning the stress he and his family

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A It's important to me, because now I'm facing medical bills I have no insurance to cover.
Q Do you have any family members that need medical coverage?
A I have a two-year-old son. I have a 14-year-old -- 15-year-old son, and a ten-year-old daughter, and my wife, so --
Q Okay.
A Pretty active.

Tr. at 96-97.

[115] *See also Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 22 (ARB Sept. 29, 1998) ("Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. … All that is required is that the complainant

experienced as a result of Respondent's adverse actions, including the stress of the loss of health care benefits supports a finding that he be granted non-economic compensatory damages. Complainant seeks $50,000. This Tribunal finds that Complainant credibly expressed the emotional toll that his firing had on him and his family:

> My wife wishes she could be here. It was three months of very difficult time before the termination, and then after the termination. I'm a proud guy. I'm an old school kind of guy, and I don't whine, cry and complain. But it was very difficult to work as hard as I did to try to protect the company and help it grow, and then be discarded like for a total misunderstanding. It's just hard to wake up in the morning and look at your family that way.

Tr. at 97 – 98.

"[A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001). In similar cases, compensatory damages have ranged from $4,000 to $250,000.[116] However, despite Complainant's credible testimony, its lack of any specificity, warrants compensatory damages at the lower end of this spectrum. This Tribunal finds

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show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." (internal citations omitted)).

[116] In *Vieques Air Link v. USDOL*, No. 05-01278, 437 F.3d 102 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed a compensatory damages award of $50,000 for mental anguish as supported by substantial evidence where the complainant credibly testified that he struggled to support his wife and two infant children while he looked for a new full-time job following his termination by the respondent. He had been forced to sell both of the family's modest cars and deplete their meager savings to make ends meet. He testified that this ordeal caused him pain and suffering. The court noted that the ALJ had taken into consideration like circumstances found to support similar awards in other cases which had come before the ARB, and that the ARB had agreed with the ALJ's assessment based on the complainant's credible testimony.

See also, *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (awarding $50,000 in compensatory damages for emotional distress); *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 28, 2010) ($20,000 in compensatory damages for emotional distress and loss of reputation); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063 (ARB June 30, 2008) ($10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008) ($5,000); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 04-STA-43 (ARB Dec. 29, 2005) ($20,000); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) ($4,000); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004) ($10,000); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-030 (ARB Feb. 9, 2001) ($250,000); *Jones v. EG&G Defense Materials*, ARB No. 97-129, ALJ No. 95-CAA-003 (ARB Sept. 29, 1998) ($50,000); *Van Der Meer v. Western Kentucky Univ.*, ARB No. 97-078, ALJ No. 95-ERA-038 (ARB Apr. 20, 1998) ($40,000); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-029 (ARB Oct. 9, 1997) ($75,000); *Bigham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-037 (ARB Sept. 5, 1996) ($20,000).

$5,000 in compensatory damages is more appropriate.[117] Accordingly, $5,000 in compensatory damages is awarded.

D. Interest

A prevailing complainant is entitled to interest on an award of backpay. *See EEOC v. Ky. St. Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996); *Doyle v. Hydro Nuclear Servs.* ARB Nos. 99-041, 99-042, 00-012 (May 17, 2000), slip op. at 17-19.[118] Compounding interest is calculated quarterly, and the proper rate is the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points. *Doyle*, slip op. at 17-19 (*citing* 26 U.S.C. §6621(a)(2)). Complainant shall also receive post-judgment interest on his back pay award, which is calculated by the identical formula set forth in *Doyle*.

E. Other compensation

Complainant and Respondent had a written employment contract. JX 3. This contract provides that the contract would be terminated by both parties upon four weeks written notice at least. JX 3 at ¶ 10.2. While Mr. Maillard does not specifically reference it in his July 31, 2014 letter (JX 21) terminating Complainant's employment, he appears to have relied upon the ¶10.3 that provides: "If Employee is in violation of this Agreement, Employer may terminate employment without notice and with compensation to Employee only to the date of such termination." Resp. Br. at ¶ 4. As this Tribunal finds that the termination stemmed from discriminatory reasons, and not from any fault of Complainant, that provision does not apply. However, the contract did provide that if Respondent desired to terminate the agreement without Complainant's consent he was to receive a 6 month severance package. JX 3 at ¶ 7.3(ii). Nothing in this clause indicates that Complainant would not be entitled to this severance even upon finding immediate subsequent employment. The severance is the damages he was to receive after due notice. Here, no such notice occurred. Unlike the Board's decision in *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (Sept. 30, 2009), the parties entered the employment contract into evidence. The Complainant seeks $100,000 for ten months of lost wages, or $10,000 per month. Therefore, this Tribunal finds that in addition to Complainant's back pay, he should also receive $60,000 in severance pay, the amount he would have received had Respondent provided timely notice of his termination within the terms of the

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[117] *See, e.g.*, *Hobson v. Combined Transport, Inc.*, ALJ No. 2005-STA-035 at 12 (ALJ Nov. 10, 2005) (complainant awarded $5,000 for "increased anxiety and stress" with "only one reference during his testimony to the anxiety and stress that resulted from the Respondent's actions"), *aff'd*. *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008); *Jackson v. Butler & Co.*, ALJ No. 2003-STA-026 at 10 (ALJ June 25, 2003) (complainant awarded $4,000 based on feeling "moody, depressed, and short tempered with a low self-esteem and sense of embarrassment"), *aff'd. Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ALJ No. 2002-STA-035 at 41–42 (ALJ Mar. 6, 2003) (awarding $10,000 in compensatory damages due to emotional distress, marital strain, and complainant's inability to continue providing the same level of financial security for his wife), *aff'd*. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095 (ARB Aug. 6, 2004).

[118] *See also Cefalu v. Roadway Express, Inc.*, ARB No. 09-070 (Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051 (Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB No. 00-045 (Dec. 29, 2000), slip op. at 9.

contract, and been afforded the opportunity to seek employment. Further, Respondent was affirmatively aware of this provision because in Complainant's July 28, 2014 email to Mr. Maillard, he specifically informed him of this provision. *See* JX 18. Accordingly, this Tribunal awards $60,000 to Complainant; but for Respondent's actions, Complainant would have received these funds in a normal termination of his employment.

Complainant also seeks $18,000 for restoration of Complainant's 401(k). Unfortunately, Complainant provided no evidence other than his testimony as to the amounts of these withdrawals. Had he provided proof of withdrawals or some other tangible evidence, he may well be entitled to compensation for these sums. However, Complainant bears the burden of establishing damages and this Tribunal finds insufficient evidence to award monies claimed as a loss from his retirement accounts.

F. Attorney Fees and Costs

Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have twenty-one (21) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have fourteen (14) days within which to file any reply to Respondents' response.

VI. ORDER

Respondent shall provide Complainant the following:

1. $100,000 in back wages plus interest;
2. $60,000 in severance pay plus interest since August 1, 2014;
3. $5,000 in compensatory damages; and,
4. Reimbursement for all reasonable attorney fees, expenses, and costs incurred in prosecution of this matter.

SO ORDERED

Digitally signed by Scott R. Morris
DN: CN=Scott R. Morris,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, NJ

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

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).