



Issue Date: 12 December 2017

Case No.: 2016-AIR-00025

In the Matter of

PETER CARNAHAN

Complainant

v.

HARRIS AIRCRAFT SERVICES

Respondent

DECISION AND ORDER DENYING 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 CFR 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

On August 24, 2015, Complainant filed complaints of retaliation with the Occupational Safety and Health Administration (“OSHA”) under the Act, asserting that Respondent and Lidar America¹ violated AIR 21 when Respondent allegedly provided a negative reference and the other company failed to hire him as a result of the negative reference.

On June 15, 2016, OSHA awarded Complainant’s complaint, finding that Respondent was covered under the Act, and that Complainant’s protected activity—the filing of two previous AIR 21 complaints with OSHA—was a contributing factor to the adverse action of providing a negative reference.

On July 29, 2016, the Department of Labor Office of Administrative Law Judges (“OALJ”) received Employer’s objection to the Secretary’s finding. Consequently, on July 28, 2016, this matter was assigned to the Tribunal.

¹ During the August 29, 2016 teleconference, *see* pp. 5-6, Complainant “did not object” to Lidar America’s dismissal from the instant matter.

On August 2, 2016, this Tribunal issued a Notice of Assignment and Conference Call. In this Order, the parties were instructed, “Discovery is to commence immediately.” As part of this Order, the parties were notified that a telephone conference was to occur on August 29, 2016.

On August 29, 2016, the Tribunal held a teleconference in this matter. At this point, Complainant still appeared *pro se*. During this teleconference, the Tribunal informed Complainant that these proceedings are governed by the Rules of Practice contained in 29 C.F.R. Part 18 and reminded the parties to begin discovery as quickly as possible. Tr. at 5 and 11. The Tribunal also reminded the parties of their discovery obligations. Tr. at 11. During this teleconference, the Tribunal established January 27, 2017 as the closing date of discovery.

On August 31, 2016, the Tribunal issued a Notice of Hearing and Pre-hearing Order, which set forth, in detail, hearing dates and deadlines, including the January 27, 2017 discovery deadline.

On January 11, 2017, after numerous extensions and missed deadlines, Respondent filed its Motion to Compel Discovery. In its motion, Respondent asserted that “[i]t is impossible for [it] to properly and efficiently defend against [Complainant’s] claims when he fails to provide even the most rudimentary responses to discovery.” Respondent requested that this Tribunal Order Complainant to answer its discovery requests no later than January 27, 2017 and for discovery to be extended an additional 30 days for Respondent alone. On January 24, 2017, Complainant answered Respondent’s discovery requests. On February 10, 2017, Respondent filed a Motion to Dismiss seeking dismissal of Complainant’s complaint as a sanction for Complainant’s failure to comply with this Tribunal’s January 12, 2017 Discovery Order as well as his ongoing discovery violations. An Order dated February 13, 2017 denied “at this time” Respondent’s Motion to Dismiss, but allowed Respondent to re-raise the issue at hearing if Complainant continued his failure to respond to Respondent’s document request. The Tribunal warned Complainant of its intentions to consider the application of sanctions in such case.

On February 8, 2017, this Tribunal denied Respondent’s Motion for Summary Decision, finding that “a genuine issue of material fact exists as to whether Respondent engages in interstate air transportation and therefore constitutes an air carrier, making it a covered entity under the AIR21 whistleblower statute.”

The Tribunal presided over hearings in this matter on March 7 and March 8, 2017. Complainant appeared *pro se*. Respondent secured the representation of counsel. At the hearing the Solicitor entered an appearance with the anticipation that this Tribunal would enforce a settlement agreement reached in an earlier AIR 21 proceeding.

On May 23, 2017, this Tribunal acknowledged the Solicitor’s withdrawal from further participation in the proceedings, citing 29 C.F.R. § 1979.108, due to the parties coming to a “separate agreement resolving their issues in this matter.” However, this Tribunal allowed withdrawal only to the extent that the Solicitor referred to an earlier matter, which was referenced at the hearing, and not resolution of the above captioned claim.

FACTUAL BACKGROUND AND EVIDENCE

A. Brief Overview of the Factual Background

Complainant worked for Respondent for a short period in 2014. After Complainant's termination, he filed OSHA complaint Nos. 0-0130-14-014 and 0-0130-14-016, which the parties agreed to settle in December 2014. Subsequent to the settlement date, Complainant submitted OSHA complaint No. 0-0130-15-009, which gave rise to the current matter. The current matter involves two instances of Respondent's alleged blacklisting behavior, in violation of the Act's whistleblower protection scheme. On June 16, 2016, OSHA issued a "Secretary's Findings" letter, which found a violation of the Act and required Respondent to pay certain damages. On July 20, 2016, Respondent objected to the OSHA's findings and requested a *de novo* hearing before OALJ.

B. Testimonial Evidence

Below is a summary of the sworn testimony of those witnesses who appeared at the hearing.

Peter Carnahan, Complainant (pp. 45-179)

Complainant earned his private pilot certificate shortly after graduating from Culver Military Academy. In 2000 he segued from being a boat captain to flying again, eventually earning his Airline Transport Pilot ("ATP") certificate in California. He thereafter gave flight instruction for a couple of years and then got his first jet job flying a Citation Jet CE 500. He had always wanted to live in Alaska so he went up to Anchorage and handed out resumes at the airport looking for work. Eventually a company called Arctic Circle contacted him and offered him a position where he worked for a few short months. He then was offered a job in Fairbanks, Alaska making more money flying a Chieftain aircraft. Complainant then went back to flying a jet for Premier Jet until 2008, when he was laid off. He also has flown in Afghanistan and Africa. Complainant has approximately 4,600 hours total flight time, with about 1,600 hours flying jets.

Complainant flew for Respondent for only a very short time. He worked for Respondent from the end of April 2014 until the beginning of June 2014. Tr. at 49. Respondent paid him \$300 a day and he worked five days a week. Tr. at 49 and 87. Respondent is a scheduled operator, but the schedule frequently changed. Complainant did not know what kind of air carrier certificate Respondent held at the time of his employment. When asked what he meant by "scheduled flights" Complainant said he would get to work every morning at 6:00 a.m. His motto was "I'm an on-time airline." For example, if the departure schedule for Klawock was 8:00 a.m., then Complainant wanted to be wheels up at 8:00 a.m. A typical schedule would be to fly to Klawock, Alaska in the morning and then back. Respondent also conducted on-demand operations. All of these flights occurred within the state of Alaska. Complainant typically flew a

Piper Chieftain (PA-31) aircraft, a twin engine aircraft with IO-540 engines whose cabin is not pressurized. The Chieftain is a nine or less passenger seat aircraft.² Tr. at 49-54.

CX 1A is a summary of events and a timeline concerning Complainant's issues with Respondent leading up to his termination of employment. Complainant brought these matters to the attention of Mark Hackett, Respondent's Director of Operations. Complainant had safety concerns regarding the passengers and himself, as well as a concern that his licensing could be at stake. On one occasion, Respondent wanted him to fly a severely intoxicated person to Klawock; Complainant stopped that from happening. Complainant could be in violation of FAA rules for allowing the intoxicated person to fly aboard his aircraft.³ The dispatcher was well aware that this passenger was intoxicated for she escorted him to the plane, and stated "[h]e's totally f**king wasted", and when she let go of him the man fell forward on his chest onto the boarding stairs and crawled aboard the aircraft." Tr. at 58. Respondent had a Part 135 air carrier certificate; Respondent has operations specifications ("OpSpecs"). Complainant was ultimately able to get the man removed from the aircraft. Later on, he heard Mark Hackett say something like "You'll get used to this." Tr. at 55-60.

Complainant recalled an issue with the waiting area door to the tarmac; it was open a lot and anyone could wander onto the tarmac. Respondent conducts single pilot operations, so when Complainant recalled that he was in the pilot's seat that generally means that he was about to start the aircraft. On one occasion, Complainant recalled that an eight-year old girl came out on the tarmac and passed by the propeller to wave at him. Having an unescorted child on the tarmac, according to Complainant, is a safety issue, especially when Respondent's employees were not out there. He thought this was a Department of Transportation related issue for they have jurisdiction over an airport's tarmac. In another incident about one-half of his passengers were already on the ramp waiting for him to come in to the aircraft. When doing his paperwork, he did not know what they were doing out there and could have easily just walked from the aircraft over to the fuel pit or over to the Alaska Airlines aircraft. Complainant conjectured that it should be Respondent's responsibility to corral the passengers (not his responsibility) while he is preparing the aircraft for departure. Tr. at 61-64.

Complainant reported an incident where a brake caliper fell off the aircraft and a starter motor fell off the bottom of the aircraft but remained attached by either an electrical cable or hydraulic line. Complainant also reported that the aircraft's engines consumed a large quantity of oil daily. At Respondent there was a 55 gallon drum of oil. Complainant would fill up a gallon jug with oil and every morning pour a gallon plus of oil into each engine. Complainant understood that planes break, but he had a lot of maintenance problems with Respondent's aircraft. Complainant did not write these items up in the logbook because "I was told early on not to do write ups. I was told to go through Mark Hackett and then Mark Hackett would go to maintenance." Complainant recalled another issue with a cracked cylinder head on the Chieftain. Tr. at 64-73.

² There are certain additional maintenance requirements if an air carrier operates an aircraft with more than nine passenger seats. See 14 C.F.R. §§135.415, 135.416, 35.417 and 135.423 through 135.443. See also Tr. at 53.

³ See 14 C.F.R. § 135.121(c); see also 14 C.F.R. § 91.17(b); Tr. at 57.

Complainant believes that Scott Harris was blaming him for the engine anomalies and Respondent insinuated that he did not do a preflight check. At some point, Complainant went to Mrs. Harris and told her “I’m going to stop flying at the end of the day due to some concerns I have and I’ll finish my flights.” The next day he had a conversation with Mark Hackett about several safety related items. Mr. Hackett told Complainant that Respondent would get all of those items fixed and asked Complainant to come back to work, and he agreed to do that. Complainant gave his notice to quit based on the ramp issues, maintenance issues, including: that Respondent’s aircraft burned oil at an alarming rate, that Respondent wanted Complainant to log flight time as opposed to record block time, and that Respondent requested Complainant to board intoxicated individuals onto its planes.⁴ Complainant reiterated that these were Part 135 flights. Tr. at 73-80.

After Complainant agreed to go back to work, “it just became apparent that things weren’t changing.” Complainant recalled another individual that walked up to the propeller as he was about to start the engine. The office manager continued to use foul language. The aircraft engines also continued to burn oil. In one incident, he had a slight power loss on departure. A passenger reported that one of the engines was smoking a lot. When he got to Sitka he reported the slight power loss to a mechanic. The mechanic was unable to duplicate the problem so Complainant prepared for another flight and boarded passengers. As he started toward the runway, he received a call from the mechanic that had just deemed the aircraft airworthy and said that he was cancelling the flight. When Complainant asked the mechanic why, after he had returned to the ramp and de-boarded the passengers, the mechanic told him that he was working on a hunch and could not handle having passengers die. Tr. at 80-82. After this, Complainant was told that he was flying tomorrow so the next day he came to the office, but had not first checked his telephone. Consequently, he jumped into the aircraft, started it up, taxied a distance from the building and warmed up the engines. When he taxied back and got out of the aircraft, he was told that he was not flying that day. On his way home, he stopped by the TSA office.⁵ There he asked if there was something that could be done about the ramp issues, Complainant had noticed while in the Respondent’s employ, and further reported that he had drunk people out there. Tr. at 80-84. He did not submit any type of written complainant; Complainant recalled “it was just a conversation with two guys in a ring that lasted all of I would say a minute.” Tr. at 86.

After his TSA visit, there were a series of emails⁶ and eventually Mr. Harris called him and left a message saying that “You went to TSA. That’s bullshit. There’s no reason for you ever to come back here. I want my keys.” Tr. at 85. This call occurred on June 3, 2014. Tr. at 86. Complainant turned his keys to Respondent’s facility to the Sitka police the next day. The following day the police served him with a “No Trespass” order. Tr. at 85. Complainant thought that was kind of retaliatory.

Complainant reported the matter to OSHA on June 4, 2014; Ms. Brown was the investigator. Respondent mentioned to her that he carried a firearm and that caused her

⁴ Complainant also complained about the foul mouth of the office manager, but acknowledged that this was not a safety-related issue but an issue of her professionalism. Tr. at 78-79.

⁵ Complainant had also stopped by the TSA office that morning on his way in to work. Tr. at 83.

⁶ See Tr. at 87 and CX 9.

demeanor to change towards him. Complainant admitted to Investigator Brown that he carried a firearm. He carried it as part of his emergency kit. When asked by the Tribunal, Complainant said the Respondent's operations specifications ("OPSPECS") were silent about one of its pilots carrying a sidearm. However, Complainant noted the remote nature of air operations in Alaska and that many pilots do carry them.⁷ But he said that he carried a .22 caliber pistol for personal protection. Tr. at 89.

At some point in time Complainant entered into a settlement agreement with Respondent that concerns the details about the actions that were taken against him as a result of reporting to TSA. Following this agreement, Complainant applied for a position with Lidar America. He learned from a Lidar America's human resources employee that Respondent gave him a negative reference. The Lidar America representative said that she would have to call him back after learning of this negative reference, but she never called back. Tr. at 91. The general substance of what happened is contained in an email from the Lidar America representative to Complainant at CX 17. This occurred in July 2015. Tr. at 91-3.

In September 2015, Boutique Air hired Complainant. As part of that hiring process, Boutique Air performed a PRIA check.⁸ When Respondent returned the PRIA inquiry to Boutique Air, Complainant was asked to explain Respondent's reply that he was terminated. Complainant explained that he had filed an OSHA complainant and that Respondent was supposed to give him a neutral reference, per the terms of the settlement of the OSHA claim. About a week later he went to training for Boutique Air in Denver. When they were handing out uniforms they did not have one for him, which he thought was interesting. After this incident, Complainant "got on the plane and went home." Tr. at 93-94.

Since that time he has sought additional employment in aviation. He worked in Africa from October 1, 2014 to March 31, 2015 where he earned \$800 per day. After his work in Africa, he went to work for L3 communications from January 1, 2016 through April 30, 2016 making \$800 per day. RX 1 reflects the dates of those employments. See Tr. at 94-103.

Complainant has stopped applying for other jobs out of fear that they "will be permanently wiped off the possibility of me being employed if [Respondent] were to send a PRIA saying 'terminated', you know, 'personnel problems, mismanagement of company aircraft.'" Tr. at 103.

Concerning damages, Complainant wants the Tribunal to require Respondent to provide specific language in response to a PRIA request. Complainant did not work from June 2014 through September 30, 2014 and from April 1, 2015 to December 31, 2015, nor has he worked since May 1, 2016. He seeks reimbursement for his litigation expenses. Complainant does not desire his reinstatement with Respondent. Tr. at 103-06.

⁷ See also Tr. at 112-16.

⁸ PRIA stands for Pilot Records Improvement Act of 1996. Tr. at 9. PRIA requires that a hiring air carrier "request, receive and evaluate certain information concerning a [pilot's] training, experience, qualification, and safety background, before allowing that individual to begin service as a pilot with their company." https://www.faa.gov/pilots/lic_cert/pria/. See 49 U.S.C. § 44703.

Complainant disputed the allegations recounted by one of Respondent's mechanics in CX 46 about an incident in Hoonah where the aircraft's flaps would not retract and his operation of the aircraft on the return flight claiming he would overheat the aircraft engines. Tr. at 114-19.

On cross-examination, Complainant identified Mark Hackett as Respondent's Director of Operations and was his immediate supervisor. Respondent offered both scheduled and on-demand flights. When Complainant referenced a "squawk," he was referring to a maintenance anomaly.

Boutique Air contacted Complainant for employment in September 2015. Complainant was hired to be a pilot in command of a Pilatus PC-12MG, but Boutique Air fired Complainant during the paperwork portion of the process. Complainant noted that JX 2 has his signature at the bottom of the document. Complainant averred that the Respondent's training records likely were received by Boutique Air shortly after August 31, 2015. Tr. at 122-27.

Between June 3 and July 1, 2014, Complainant applied for jobs. He stayed in Sitka during that time and also did some hiking "and the like." He could recall the names of three companies he applied to during that time period. Complainant did not keep any records of which companies he sent resumes to.⁹ Complainant acknowledged that he has "direct proof" of Respondent providing negative reference on two occasions. When asked, Complainant was unable to identify the companies who received negative references from Respondent; Complainant stated "I don't remember." Complainant recalled conversations he had with potential employers—like a mapping company in Fargo, North Dakota—who did not call him back after they told him they would call Respondent as a reference. Complainant recognized that he "can't prove any of that." Complainant was able to obtain two pilot-jobs after Respondent terminated his employment; each did not require a PRIA.

Complainant's employment in Africa was terminated after reporting mechanical issues on the aircraft he was flying. He was not given a reason for his termination, but Complainant believes he was terminated because, during training, he felt uncomfortable with the first officer he was assigned to. Complainant asked that the first officer be replaced with a flight safety person for his type rating check ride. Complainant had concerns about the performance of the first officer and did not want that first officer flying with him during the check ride as Complainant had never failed a check ride. Tr. at 127-36.

Back in 2013, Complainant was doing a little bit of construction work to earn a living, besides flying. For example, he spent a couple of months building a 24 foot long conference table for a company in Santa Monica, California. And during this time frame he was sending out resumes for pilot work. Tr. at 137. During cross-examination, Complainant was asked to review his prior aviation employment history, his reasons for departing those earlier positions, and what work he performed during the breaks in his aviation employment. Tr. at 137-49.

Concerning the intoxicated passenger incident he detailed earlier, Complainant denied that Mr. Hackett stated to him that "You will get used to identifying and dealing with intoxicated persons in the proper manner." Tr. at 149-50. As for the brake caliper incident at Sitka,

⁹ Nor did he keep records of to whom he sent resumes to in July and August 2015. Tr. at 159.

Complainant recalled that he performed a walk around of the aircraft prior to departure. Complainant did not perform his comprehensive pre-flight check on that particular flight, because he usually performed that check prior to the first flight of the day, and this flight occurred later in the day. Complainant acknowledged that he did not write up the brake caliper incident in the aircraft log book; he only told Mr. Hackett about it.¹⁰ Complainant explained he was trying to be flexible, in the spirit of getting along, by first having the mechanics make the entries. Tr. at 152-53. Complainant initially said that the photographs of the cracked cylinders were taken around May 20, 2014, but when shown the photograph date stamp Complainant acknowledged that they were taken on June 2, 2014. Tr. at 157. Complainant vehemently denied having a conversation about his handgun while the aircraft flaps were being prepared at Hoonah. Tr. at 157-58. Complainant stated that two weeks elapsed from Boutique Air's receipt of the PRIA and his termination from Boutique Air. Tr. at 618. Complainant admitted that after Respondent terminated his employment, in addition to his OSHA complaint, he filed a separate complaint with the FAA. Tr. at 170-71.

Robert Scott Harris (pp. 188-261)

Mr. Harris is Respondent's president and has served in that capacity since 1998. He began his aviation career as an aviation electrician in the U.S. Coast Guard. He left active duty after eight years and found work in Sitka, Alaska as an airframe and powerplant mechanic ("A&P").¹¹ He worked for that company for about seven years and decided to start off in his own business, so he started a maintenance facility (Harris Aircraft Maintenance) doing maintenance for airlines such as Alaska Airlines, Empire Airlines, and Evergreen Airlines.¹² He also worked on general aviation aircraft. As things changed, Respondent moved into an air taxi mode, which is a big part of Respondent's business currently, although they still continue to provide aircraft maintenance services. Tr. at 190. Back in 2014, Respondent held an air operator certificate where it was authorized to conduct commuter operations. In January 2017, Respondent was issued an air carrier certificate. Back in 2014 and 2015, Respondent was conducting scheduled commuter service to Sitka, Hoonah, Juneau, Kake, Klawock, Gustavus, Wrangell and Petersburg. Tr. at 191. Respondent would fly anywhere within the State of Alaska as part of its on-demand services. During that time period, Respondent did not operate more than 12 miles off shore, did not fly into Canada and were not authorized to carry the U.S. mail. RX 3 is the final order dated August 5, 2016 by the U.S. Department of Transportation concerning public convenience and necessity. RX 4 is another similar order from 2015. Tr. at 195.

The decision to terminate Complainant's employment occurred on roughly June 3, 2014. Concerning the intoxicated passenger incident, the gentleman could not get into the aircraft. It

¹⁰ Following this testimony the Tribunal took official notice of 14 C.F.R. § 135.65(b). Tr. at 155.

¹¹ Mr. Harris also holds an FAA Inspection Authorization ("IA"), but is not a certificated pilot. Tr. at 190.

¹² The Tribunal takes notice that these airlines are or were Part 121 operators. Empire Air operated aircraft painted as FedEx and came into Sitka daily. Respondent had a contract with them for emergency maintenance. Evergreen International used to come up into Sitka with freight and Respondent would provide maintenance. Mr. Harris said "[t]hey came through the Seattle area." They utilized ATR aircraft to transport this freight. Tr. at 233.

was Respondent's staff that brought the intoxicated passenger back to the office and the plane departed without him. Mr. Harris was the one that gave this man a ride to a short term housing facility at the local native hospital. As for the statement by Mr. Hackett, if it was said, "you'll get used to it," it was not meant in the context alleged.

A lot of people we transport are hospital patients, out-patients, or patients just recently off of medication or surgery, or in some cases, some of the native population can appear to be inebriated or otherwise not fit for boarding. What [Mr.] Hackett was referring to was being able to distinguish between what these passengers were."

Tr. at 196.

Mr. Harris' recollection about the broken brake caliper, was that one of his staff mechanics walked by the airplane and noticed the left-hand tire was severely abraded; the brake caliper was not hanging free from the aircraft. The flight was delayed, the passengers removed, the plane was brought into the hangar, Respondent changed the wheel assembly and pushed it out. It was a 15 to 20 minute job. The passengers were re-boarded and the flight departed. As for the starter motor hanging free, that was just not the case. The starter bolts were in fact loose but none of the hardware was detached. The starter was removed, a bracket replaced, the starter was reinstalled and it was functionally checked; "it was a mechanical irregularity of truly no significance." Tr. at 198. It was shortly after Complainant's termination that the FAA came to the facility and Respondent had to provide information on the wheel assembly and other things as well. The FAA was completely satisfied with Respondent's records.

Respondent owned a Navajo aircraft, which had engines that consumed oil and smoked. At the time of purchase, the aircraft had mid to high time engines on it. The engines did consume oil but not gallons of oil per day. But "I'm here to tell you, if you don't check the oil for a week, you're going to have to add a gallon or two of oil, guaranteed." Tr. at 205. Under normal circumstances, using two quarts of oil a day is well within tolerances. Anything that would have gotten to the level testified to by Complainant would have been cause to change the engine. Tr. at 204-05. The smoke Complainant is referencing is from the turbo charger and they take a lot of oil. Respondent had two issues with its aircraft's turbochargers. Respondent felt that the turbo chargers were not being cooled properly and that they were being operated too hot. Tr. at 206-08. Respondent believed that Complainant was shock cooling the engine. Complainant had turbine engine flight-time; on such engines, one can drop out of the sky like a rock without concern for the integrity of the engine. However, this type of maneuver causes problems with piston powered engines. Mr. Harris stated that "[Respondent] had too many pieces of evidence pointing to" Complainant chopping the engines for a steep descent instead of properly cooling the engines. Tr. at 208.

Respondent provides survival gear on each of its aircraft. It is Mr. Harris's understanding that it is illegal under the federal aviation regulations to carry a firearm so Respondent does not allow it. Mr. Harris learned that Complainant was carrying a firearm in his fanny pack after his then lead mechanic, Michael Haisten, told him about it following the incident at Hoonah. Mr. Harris learned of the flap issue (that flaps would not retract after Complainant's landing) late in

the day. Mr. Harris contacted Complainant and asked him if he would have an issue flying that airplane back if Respondent wanted to get a ferry permit. Later they figured out that they could obtain relief from the aircraft's minimum equipment list ("MEL"). The MEL said they did not need flaps to operate the aircraft so long as they had been verified at neutral; retracted all the way. So Mr. Harris dispatched Mr. Haisten to Hoonah where he retracted the flaps manually and locked them in place, and pulled and collared the electric flap circuit breaker. They flew the plane back, performed the repair and put the plane back into service clearing the MEL item. Tr. at 211-12.

On June 3, 2014, the day Respondent terminated Complainant's employment, Mr. Harris was in his office. At some point there was commotion out in the hangar. Complainant later came into his office agitated. Complainant told Mr. Harris that he did not like the fact that they were blaming him for the turbo chargers and cylinder issues on the one aircraft. Prior to this conversation, one of the mechanics observed the aircraft smoking before departure. So they turned the aircraft around and put the passengers on another aircraft. The mechanics then pulled the smoking aircraft's turbo chargers and also removed a cracked cylinder. It was Mr. Harris' conclusion from the condition of the turbo chargers and the cracked cylinder that the engines had been running way too hot. Tr. at 213-15. After that conversation, it was clear to Mr. Harris that they were going to have to operate without Complainant. Respondent had hired him back, "I hate to say out of desperation, but in our business, when you have pilots on staff, we don't have the luxury of extra pilots. [Respondent] had a full flight scheduled and they had people on the books for month's ahead and it needed staff." Tr. at 217. So Mr. Harris talked with one of Respondent's dispatchers and they agreed that Respondent had to do something different. This occurred early in the morning that day. Then someone mentioned to Mr. Harris that TSA had come by to ask about Respondent allowing people on the ramp unescorted. "So it snowballed from there." Tr. at 218-19. Mr. Harris was not in the office when the TSA agent showed up.

After Complainant left the hangar he was difficult to get ahold of; he did not answer telephone calls or texts. At the end of the day, Mr. Harris left a voicemail on Complainant's telephone that he wanted back the Respondent's keys and ID issued to Complainant. This became a big issue because Respondent did not want someone who is not allowed on the ramp to have a key. Someone for Respondent finally got ahold of Complainant and Complainant demanded that someone come to his apartment to get the keys. Respondent's personnel were not willing to do that. Ultimately, Respondent got the keys from the police department where Complainant went and turned them in. Mr. Harris requested a no-trespass order because he was concerned that Complainant would retaliate against Respondent. Mr. Harris gave copies of the order to DOT and Alaska Airlines for once one goes through Respondent's hangar, they are on the ramp at Alaska Airlines which is right next door. Mr. Harris did this because of Complainant's demeanor. And there was concern with Respondent's staff because they knew that Complainant carried a hand gun. Tr. at 219-22.

Later, Respondent did receive an unemployment request from the state of California. The document did not make any sense to Respondent. Respondent filled out the paperwork and returned it and did not hear anything further about it until Complainant's first OSHA action where Respondent was accused of trying to deny him his unemployment benefits. Tr. at 222-23.

Ultimately, Respondent entered into a settlement agreement with Complainant about those matters because it was going to spend more money fighting it than to mitigating it through settlement. Since then, Respondent has received calls from potential employers of Complainant. Boutique Air was one of entities that called. Prior to that call, Mr. Harris had directed the office to put through anyone contacting Respondent about Complainant directly to him. When asked about Complainant's termination, Mr. Harris told the Boutique Air person that he could not talk about that and that he is eligible to rehire; he just stayed neutral. Mr. Harris said "I cannot and will not comment." Complainant's PRIA form includes his hire and termination date, and under the notes section it stated "Personal issues and mismanagement of company aircraft." According to the OSHA settlement, that document was supposed to be removed from Respondent's records; however, such removal did not happen. When a PRIA request came in from Boutique Air, Respondent's Director of Operations, Rob Murray, retrieved Complainant's file, scanned the PRIA and sent it without reading it. Tr. at 226, 252. Mr. Hackett—not Mr. Murray—authored the alleged negative reference found on Complainant's PRIA. Tr. at 227. Respondent does not have to apply for PRIA so it does not use them and there is no reason that Complainant could not have applied for work at other air taxi companies that do not require PRIA. Tr. at 224-27.

Upon the Tribunal's questioning, Mr. Harris explained that the difference between an operating certificate and an air carrier certificate is the operating certificate does not have any underlying economic authority. And although at that time Respondent had an operating certificate, it was following Part 135 regulations. Respondent has "for years" provided emergency maintenance to Alaska Airlines, a Part 121 operator, but Respondent does not have a formal contract with Alaska Airlines. As part of that, Respondent has to prove to Alaska Airlines that Respondent complies with a drug and alcohol program and submits an A449 annually to them.¹³ And when Respondent's mechanics perform maintenance on Alaska Airlines' aircraft, they are in "constant contact" with their maintenance control and perform maintenance as directed by Alaska Airlines. While Respondent is not allowed to perform required inspection items ("RII"), they could be tasked to perform safety-related items. Tr. at 229-32.

On cross-examination, Mr. Harris noted that he conducted emergency maintenance for both Empire Air and Evergreen Airlines. Mr. Harris explained that, for any of the air carriers that Respondent performed maintenance for, he had to provide records of Respondent's drug and alcohol program, OPSPECS, and often had to provide A&P license information on those people working on the aircraft. This emergency service was to be available 24 hours a day if they called. This began back in 1999. Evergreen is no longer flying into Sitka as they stopped coming into there around 2000. Empire Air and Alaska Airlines both still fly into Sitka. Respondent also services Delta Airlines, but Delta Airlines only services Sitksa in the summer. Delta Airlines also flies to Sitka from Seattle, Washington. Alaska Airlines flies in and out of Sitka 24 hours a day and flies to Seattle from Sitka, although not direct as they normally come through either Ketchikan or Juneau. Mr. Harris was unable to "think of any [other airlines] that come through that [Respondent] routinely service[s]." As for Respondent's scheduled flights, all are to paved runways. For the charter work, Respondent will fly into unpaved air strips but not when flying the Navajo aircraft. Respondent "predominately" operates within the Tongass National Forest, but needs permission to land within the wilderness areas of the Park. In

¹³ See generally, 14 C.F.R. Part 120.

addition, Respondent was receiving Essential Air Service¹⁴ subsidies to go to Port Alexander from Sitka using a float plane. Respondent performed this route from 1999 until 2016. Respondent also served as an Essential Air Service operator until March 2016, providing federally subsidized air service to Port Arthur, Alaska. Tr. at 232-43.

Mr. Harris reiterated that part of the reason he sought a no-trespass order was because Complainant would not return his badges and keys. The keys were returned one or two days after Complainant departed. CX 1A reflects that, on June 4, 2014, one day after he was terminated, Complainant was asked to return the keys to the police station. He did that at approximately 2 p.m. on the Fourth. Yet Mr. Harris sought a no-trespass order upon Complainant on June 5th. See CX 9, CX 12. Tr. at 246-50. Mr. Harris denied that he instructed Mr. Hackett to give Complainant a negative reference for Boutique Air or Lidar America. Mr. Harris acknowledged that Complainant operated both of its Navajos. He agreed that it was possible that the engines on N38KC were smoking and consuming more than the normal amount of crank case oil because of a variety of factors. Mr. Harris agreed that allowing an intoxicated passenger aboard an aircraft could place the pilot's license in jeopardy. Also, operating one of Respondent's aircraft with a known mechanical irregularity would place Complainant's license at risk. Mr. Harris acknowledged that one of his employees used foul language in the work place. Complainant then presented Mr. Harris with the language in 14 C.F.R. § 135.119 allowing crewmembers in certain circumstances to carry firearms; Mr. Harris responded that Respondent—the certificate holder—did not authorize Complainant's actions, as the regulation requires. Mr. Harris acknowledged that Respondent had no documentation that Complainant was "written up" while working for Respondent. Mr. Harris admitted that he drafted CX 2 and CX 15. In response to Complainant's question about whether Harris left "that [voicemail] message," indicating a "voice recording of [Mr. Harris] firing [Complainant], Mr. Harris admitted that he did leave Complainant a "voicemail message." Tr. at 251-61.

Ali Clayton (pp. 262-80)¹⁵

Ms. Clayton was an employee of Respondent during May and June 2014, Complainant's tenure with Respondent. During that time she was the office manager and dispatcher. Complainant was a line pilot for Respondent. During her time with Respondent she worked with about 15 pilots, and she definitely struggled working with Complainant. He did not adjust well to Respondent's culture and standard operating procedures. Respondent is a very flexible and fluid outfit and this was hard for Complainant to adapt to. Complainant constantly fought her authority and direction. It was Complainant's way or the highway. At one point Complainant did put in his two weeks' notice and Complainant pretty much told Mark Hackett that it was Ms. Clayton's fault. Mr. Hackett sat down with Complainant for a good hour and a half and listened to his complaints about her. Complainant wanted her to be nicer to him. Tr. at 262-64.

¹⁴ The Essential Air Service Program was established after airline deregulation in 1978. See 49 U.S.C. §§ 41731-41748. The program was established to guarantee small communities access to the National Air Transportation System by subsidizing the costs of air carriers to conduct scheduled air transportation operations into these communities. See <https://www.transportation.gov/policy/aviation-policy/small-community-rural-air-service/essential-air-service>.

¹⁵ Ms. Clayton testified telephonically.

On June 3, 2014, Ms. Clayton served as lead dispatcher. She opened the office around 6 a.m. The pilots usually go to the Navajos to warm up the planes prior to the first flight and that is what happened that day. One pilot, Brock Bauder, came in to warm up his aircraft but his aircraft was not there. She assumed it was him warming up the plane. Complainant came in after warming it up and she confronted him and told him that it was his day off, he was told that the prior evening and that Mr. Bauder was flying the aircraft. Complainant was perturbed by this and told her that since he had already warmed up the plane he was going to fly it, and she told him that is not how it works. After the exchange, Complainant walked back to Mr. Harris' office. Mr. Harris came out and asked how can they make the schedule work with one pilot. At that point, they were moving forward without Complainant. Tr. at 266-67.

About a half hour later, TSA employees came over and mentioned that there was an upset employee of Respondent who came in on a bicycle and said that Respondent was allowing people out onto the tarmac and they wanted to check with her. Ms. Clayton showed them Respondent's doors, how they are monitored and how they protect the ramp. After this they left. Complainant had already made the decision to leave before TSA had even arrived that morning. It was her impression that this incident was the last straw with Complainant; he had many issues leading up to this. Tr. at 267-68.

Ms. Clayton was aware of the no-trespass order as Respondent immediately put that on. Complainant wanted one of Respondent's employees to come to his place of residence to collect his badge and keys. Respondent did not approve of that. There was quite a bit of back and forth trying to get those items back. She had concerns about her personal safety because Complainant told people that he was going to stay in Sitka. Tr. at 268-69.

On cross-examination, Ms. Clayton recalled the sit down meeting she referenced occurred around May 24, 2014. Complainant did not listen to any of the things that she had directed. She believed that it was Complainant not following a flight manifest which caused the meeting. When she confronted Complainant about it he did not like her attitude. Complainant told Mr. Hackett that she was rude and hard to work with. Complainant would forget his manifest which showed his flight routing, and he would forget his weight and balance books all the time. This occurred four times at least. But when asked if she had records of these events, Ms. Clayton did not. Ms. Clayton recalled an incident where Complainant was to go from Klawock to Kake and instead Complainant brought the passengers to Sitka. She told Complainant he had to fly the passengers back to Kake. She denied yelling at Complainant, although Complainant referenced a text stream from Ms. Clayton admitting she screamed at Complainant. When asked about any other incident, Ms. Clayton could not recall one. She acknowledged that other pilots have left things behind or made mistakes, including leaving passengers or freight behind. The difference was Complainant never thought that he was wrong, and the other pilots got better; Complainant never did. Ms. Clayton admitted that she cursed at work before and used foul language in front of Complainant. Tr. at 270-80.

Brock Bauder (pp. 282-89)¹⁶

Mr. Bauder worked for Respondent during the May and June 2014 timeframe. He flew a Piper twin engine for Respondent. He knows Complainant and recalled an incident that occurred on June 3, 2014. When Mr. Bauder arrived at work to perform his pre-flight checks, Complainant was already present, standing outside getting the other aircraft ready to go for the day. He asked Complainant what he was doing because Complainant was not supposed to be flying. When he came back out to grab his stuff once he confirmed that he was not supposed to be flying, Mr. Bauder made another statement to which Complainant replied with a derogatory comment. And that was the last that he saw Complainant. Mr. Bauder surmised from Complainant's demeanor that something clearly happened when he went into the office; Complainant seemed pretty "ticked off."

On cross-examination, Mr. Bauder said the profane comment Complainant made after leaving Mr. Harris' office. By that time, Mr. Bauder had known Complainant for about a month and he found Complainant to be a polite man. Complainant was not difficult to talk to and Mr. Bauder liked Complainant; he was a descent fellow employee. Complainant "did a pretty good job" of operating the aircraft.

Upon questioning by the Tribunal, Mr. Bauder relayed that he holds an airline transport pilot certificate, a certified flight instructor – instruments and multi-engine instructor ratings. He is also type rated in the Dash 8 series aircraft. He had about 14,000 hours total time. Mr. Bauder knew Ms. Clayton. When asked the question "Were there times when she would use what I will call 'sailor language,'" Mr. Bauder answered "Oh yeah. Sometimes, I would call it more as frequent."

Kelly Boddy (pp. 291-302)¹⁷

Ms. Boddy worked for the Alaska Department of Transportation at the Sitka Airport in May and June 2014. She is an equipment operator and takes care of security badging at the airport as well as handling TSA matters. Ms. Boddy is familiar with Complainant. He was a pilot for Respondent and she provided him with the badge to get access to the airport. Ms. Boddy issued Complainant his badge on May 19, 2014; he returned it shortly thereafter, on May 28, 2014. A couple of days later Complainant came back to the office to retrieve it, but she had already destroyed it. So he had to resubmit his paperwork. It was the next day that Ms. Boddy received a call from a TSA agent who had received concerns from Complainant about a security breach at the airport, specifically that Respondent was not properly escorting passengers on the runway. In response, they increased their patrols and talked to Mr. Harris about the concerns since it was his business that was cited as having the security issue. Then there was a criminal trespass order sent to her office regarding Complainant. So they then had their crews watching, not only Respondent for possibly not escorting passengers, but watching out for Complainant. Following these reports, her office personnel did not observe any issues with Respondent escorting persons on the ramp nor did they observe Complainant on the airport at any time.

¹⁶ Mr. Bauder testified telephonically.

¹⁷ Ms. Boddy testified telephonically.

On cross-examination, based upon her email, Ms. Boddy said the reason Respondent acquired the no-trespass order was because Respondent could not get their keys or his employee ID badge back from Complainant. She also recognized Complainant's voice as the person that also made anonymous complaints about Respondent, but Complainant's concerns were about internal operations, not security matters.

Michael Haisten (pp. 303-24)¹⁸

Mr. Haisten is Respondent's Director of Maintenance and has been employed by Respondent since 2012. He holds a private pilot certificate and has about 2,000 hours total flight time. He recalls preparing a document recounting his dealings with Complainant. Mr. Haisten was the mechanic sent to Hoonah in May of 2014 to temporarily repair or retract the flaps on an aircraft so it could be flown back to Sitka. Complainant was in a hurry to leave Hoonah because he was told bears frequented the airport in the evening. Mr. Haisten joked with Complainant that he was going to have to protect him while he worked on the plane. Complainant said he would do that with a firearm that he carried with him. As for the repair, Mr. Haisten manually retracted each flap to its up stop position. There was no bailing wire or chewing gum used. They departed Hoonah together; Mr. Haisten sat in the right seat. During the climb out of Hoonah, Complainant operated the aircraft at an unusually steep altitude, overheating the engines in the process. Mr. Haisten told Complainant this and Complainant told him that is the way that he normally operated the aircraft in case of an engine failure. When one engine got to "red line", Mr. Haisten opened the cowl flap to help cool the engine and asked Complainant to lower the nose to increase cooling; Complainant did so.¹⁹ They made a no flap landing at Sitka. On another occasion, Mr. Haisten overheard Complainant talking to one of the dispatchers about coming over a ridge, dumping flaps, chopping power and coming down like an elevator. When he heard this, Mr. Haisten told Complainant that piston engines cannot be operated that way due to the damage shock cooling does to the engines. Complainant really did not like his comment. Tr. at 303-08.

On May 29, 2014, Mr. Haisten and another mechanic performed routine maintenance on one of Respondent's Navajo's, N38KC. No real defects were noted with the exception of the right engine only contained four to five quarts of oil; that is below the minimum operating level. He pointed this out to Complainant and told him that was unacceptable. This visibly upset Complainant. On May 31, 2014, Complainant informed him that he was having a turbo issue with the same aircraft. Mr. Haisten took the aircraft out on the ramp and did an engine run up. Everything operated within normal limits so he returned the aircraft to Complainant. When Complainant started the aircraft up for his next flight and after the plane started to taxi, the amount of smoke coming off the aircraft concerned Mr. Haisten, so he called the aircraft back and had Complainant use another aircraft for his trip. When Respondent started maintenance on N38KC it discovered both turbo chargers had excessive bearing play and oil staining on the hot side oil seal. Both of these anomalies can occur when the oil operates at too high a temperature.

¹⁸ Mr. Haisten testified telephonically.

¹⁹ Later, the Tribunal asked Mr. Haisten how he knew the engine was at red line. He stated that the aircraft that had a 3-in-1 engine monitoring gauge for each engine reflecting oil temperature, cylinder head temperature and oil pressure. Tr. at 322-23.

Consequently, Respondent replaced both turbo chargers and ran the engine again. This time Respondent discovered a cracked cylinder head on the left engine, number one cylinder so that was replaced as well. Mr. Haisten also discovered that both engines only had four to five quarts of oil in them.²⁰ This was just two days after the prior maintenance so “to have that amount of oil consumption in two days indicates things were not going well with those engines.” Yet there were no issues being reported to the mechanics until that time. Tr. at 308-11.

On cross-examination, Mr. Haisten said he was asked to write CX 46 by Mr. Harris sometime in 2014. Mr. Haisten drafted CX 46 around the time Complainant was leaving or had left Respondent’s employ. Mr. Haisten acknowledged that they had a 55-gallon drum of aviation oil in the hangar with a spigot. It had a one gallon container to put oil in for further dispensing. Mr. Haisten explained that an engine consumes oil during normal operations and inspecting an aircraft’s engine for its oil level is a normal part of pre-flight operations. The reason the aircraft only had four or five quarts of oil in it, according to Mr. Haisten, was because the pilot did not check the oil or did not check it frequently enough. Engine oil should be checked daily, Mr. Haisten averred, and if the consumption seems high it should be checked multiple times during the day. Mr. Haisten had no way of knowing how many quarts N38KC was burning daily in May 2014. Mr. Haisten stated that the engine would burn more than a gallon of oil a day if there something was something not operating correctly, such as if the turbo chargers were burning the oil or the rings were bad. According to Mr. Haisten’s notes, between May 29 and May 31, 2014 the turbo chargers did have failing oil seals. Tr. at 311-14.

If Mr. Haisten was to purchase a firearm for bear protection, he would get a high caliber firearm. A .22 caliber would not be his first choice. Complainant was the person that told Mr. Haisten that Complainant carried a hand gun. Mr. Haisten does not know what kind of handgun Complainant carried as Complainant carried it in his fanny pack. Tr. at 315-16.

Mr. Haisten denied radioing Complainant on May 31 to cancel the flight, while Complainant was taxiing, saying “I’m canceling the flight. I’m working on a hunch. I can’t handle the thought of women and children dying.” It was the smoke that he observed coming from the airplane that caused him to cancel the flight.

C. Stipulated Facts

The parties proffered no stipulated facts.

D. Facts in Dispute

1. Complainant’s Statement of Facts

Complainant provided a statement of facts within his August 29, 2014 “Events and Timeline Leading up to Termination from [Respondent],” CX 1, summarized as follows:

²⁰ Mr. Haisten later explained that each engine has an oil dip stick that reflects the level of oil in the engine. He stated that it was Respondent’s standard practice to refill the engine with oil once it reaches the 9-quart level, a level reflected on the engine’s dip stick. Tr. at 323-24.

- Respondent’s employees allowed unescorted persons to enter the tarmac.
- One day a five year-old girl ran onto the tarmac “into the vicinity of the propeller”; no employee of the Respondent intervened.
- Two engine parts broke, including a brake caliper and a starter motor. The latter part “fell off/dislodged the aircraft while it was in flight.”
- Respondent asked Complainant to fly a “disabled aircraft . . . where the wing flaps had failed to retract after landing.”
- On May 22, 2014, Respondent asked Complainant to fly an inebriated passenger. When Complainant complained, [Mr.] Hackett responded “You’ll get used to it.”
- On May 27, 2014, Complainant “informed Mrs. Harris that [he] was not willing to continue to fly [for Respondent] unless changes were made,” after Respondent’s dispatcher “yelled and cursed” at Respondent concerning a scheduling issue. On May 28, 2014, Respondent’s employee sent Complainant a text message apologizing. Complainant returned his key cards, keys, and an ID at 10:00 A.M. on May 28, 2014. At 1:11 p.m., Complainant discussed certain issues with [Mr.] Hackett, including the intoxicated person, the dispatcher’s behavior, unauthorized and unescorted persons on the tarmac, logging time, required rest, maintenance issue like broken parts, and schedule changes.
- On May 29, 2014, Complainant had another text message conversation with Respondent’s dispatcher. Complainant agreed to continue to fly for Respondent.
- On May 31, 2014, Complainant reported certain power loss and smoking engine issues he experienced that day to Respondent’s mechanic; although he could not duplicate the issues, Respondent’s mechanic cancelled the flight and readied a new plane.
- On June 2, 2014, Complainant noted that another of Respondent’s employees walked too close to the propeller of Complainant’s plane.
- On June 2, 2014 Complainant received messages that he was not scheduled to work for the next few days; however, Complainant went to work on June 3, 2014 because he did not notice the messages. Complainant left work and stopped at the local TSA office “to inquire about what could be done about the still disturbing problem of unauthorized access to the tarmac particularly in proximity to planes about to be powers.” Complainant also discussed the incident with intoxicated individuals being allowed ramp access and boarding access.
- “Shortly thereafter,” Respondent received text messages from Respondent “via multiple texts.”²¹ The texts read, in full:

Hey Peter, so TSA stopped by here saying they just had [one of Respondent’s pilots] stop by saying some weird things. They said he was on a bike and was talking about letting people in illegally through [the] out gate. Just wondering what is going on there. Seems a bit weird with you just leaving with. [sic]. You seemed upset and I hope that you don’t feel that way. It was a mistake on

²¹ Based on the phone number shown on the screenshot, the sender of the text messages appears to be Respondent’s dispatcher.

our end with trying to schedule and juggle all these pilots. I feel your frustration but I hope you understand give us a little slack. So the Feds have been calling all day about a call they got today. Really bummed you are doing this. A response would be appreciated. Felt like I, as well as [Respondent] have given you a lot with this opportunity as a job, but on a personal level as well. I don't feel reciprocation from you. We are not coming to pick up your stuff. Please take your key and badges to the police station. Have it there by [unreadable] if not, well..."

- Complainant then called TSA and told them he was unhappy with TSA's actions which "may have gotten me fired."
- On June 3, 2014, [Mr.] Harris fired Complainant by email, stating in full:²²

Hey Peter, it's Scott. Kinda [sic] spent the day putting out the fires you started. I appreciate that very much and . . . I just want you to know I don't think you need to come back to this place for any reason whatsoever. I'd appreciate my key back. I'd like to hear from you. I want that key. We can get you paid. But . . . I don't appreciate your visit to TSA. I think that was bullshit . . . I just don't man, that's bullshit so . . . I'll leave it at that.
- On June 4, 2014, Complainant engaged in a text message conversation with Respondent's dispatcher; after Complainant insisted that an employee of Respondent sign for his key and badges, the dispatcher threatened to call the police.
- Also on June 4, 2014, [Mr.] Harris left another voicemail offering to pick up Complainant's keys and ID.²³
- Complainant called Respondent at 1:03 p.m. to return the keys but could not get ahold of [Mr.] Harris. Complainant spoke to an OSHA investigator who suggested Complainant return the items to the police department.
- On June 5, 2014, Complainant was served a "no trespass order" from Respondent.

Complainant averred that he told his "immediate supervisor" at Respondent of the foregoing issues.

2. Respondent's Statement of Facts

Respondent provided no specific statement of facts.

²² Although Complainant included a written transcript of the contents of this voicemail within CX 1, video files attached to Complainant's exhibits contain footage of Complainant playing Mr. Harris's voicemail. This Tribunal finds the transcript, as Complainant included it within CX 1, is the same or substantially similar to the contents of Mr. Harris's voicemail.

²³ A video of Complainant playing this voicemail from his phone is also included within the CD attached to CX 1.

E. Summary of the Documentary Evidence²⁴

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

Exhibit	Description
CX 1	(a) Events and timeline leading up to [Complainant's] termination. (b) Regarding [Respondent's] Track Record. (c) Letter of conclusion.
CX 2	Response to 26JUN2014 Letter from Mr. Harris to EDD
CX 3	Amended AIR21 Complaint
CX 4	(a) 26JUN2014 Letter from Mr. Harris (b) Telephone transcription from EDD
CX 5	EDD Appeal Decision – Respondent told EDD that it fired Complainant on June 2, 2014. Complainant told EDD his last day of work was June 3, 2014. EDD decided Complainant was “not payable” and fired due to not taking precautions like landing the plane too early and making the passengers feel uncomfortable. Complainant had already quit “and his behavior was erratic.” Complainant appealed and on August 22, 2014, an administrative law judge reversed the EDD’s determination and qualified Complainant for unemployment benefits.
CX 6	Letter from Respondent’s counsel, dated August 7, 2014, disagreeing with the EDD-ALJ’s determination. Respondent alleged “is not involved in interstate commerce in terms of flight service.”
CX 7	Emails from Lycoming and Western Skyways about the alleged cracked cylinder.
CX 8	FAA regulations concerning, <i>inter alia</i> , prohibiting the carriage of weapons on about aircraft.
CX 9	Text transcriptions from Dispatcher Alli, with dates between May 8, 2014 and June 4, 2014.
CX 10	Complainant’s phone records, indicating that “Harris Air” ²⁵ called his cell phone on May 27, 2014 at 5:56 p.m. and, on the same day, “Mrs. Harris” called on 7:02 p.m. On May 28, 2014, “Mark Hackett” called Complainant’s phone at 1:10 p.m.
CX 11	Flight Aware Records
CX 12	No Trespass Order - Written on original but not photocopying; As requested I

²⁴ The following exhibits were specifically admitted at hearing:

- JX 1-2 admitted. Tr. at 9–10, 324–25.
- CX 1-21, 23-31 and 42-46 admitted Tr. at 21-22. CX 22 and 32 rejected. Tr. at 19, 21.
- CX 24-41 and 47 withdrawn. Tr. at 12-13. Later verified CX 1-21, 23-31, 33 and 42-46 admitted. Tr. at 325.
- RX 1-4 admitted Tr. at 11.
- RX 5 and 6 admitted 188. Later verified RX 1 to 6 admitted Tr. at 325.
- SX 1 admitted Tr. at 24, 325.
- ALJX 1–2 admitted Tr. at 28.

²⁵ The names in quotation marks were handwritten, apparently by Complainant.

Exhibit	Description
	Returned all items to Sitka PD on 6/4/2014 @ 1400 hours. Signed by Jackie A139. Called Juneau Airport informing them [of] the whereabouts of the two (2) items @ 2:05 PM AK time.
CX 13	Badge/Key Receipts
CX 14	Cylinder Head photos
CX 15	Mr. Harris's September 17, 2014, letter in rebuttal to CX 1(a). Mr. Harris stated that there is no proof to the allegation that Respondent lets passengers and others onto the tarmac unattended or that Respondent has "a generally negligent attitude toward aircraft maintenance." Respondent further argued that there is no harm in asking a pilot if he were comfortable flying a disabled airplane on a ferry permit. Respondent terminated Complainant, allegedly, due to Complainant's maintenance and operation of his aircraft. Complainant allegedly "willfully operated our equipment negligently ultimately causing damage." Respondent acknowledged the intoxicated person incident, but said that "our office staff was responsible for disallowing him boarding."
CX 16	PRIA from Respondent to Boutique Air. Complainant was hired on April 11, 2014 and allegedly terminated on June 8, 2014 due to "mismanagement of company aircraft and personal problems."
CX 17	July 16, 2015 Email from Lidar America to Complainant saying that Respondent was "unable to disclose information due to litigation process."
CX 18	Boutique Air Job Offer Letter, dated September 14, 2015.
CX 19	Egli Air Haul Job Offer, dated April 2, 2014.
CX 20	Alaska Senate Bill 53.
CX 21	Arctic's Air Academy (Emergency Equipment).
CX 23	Civilian Arming Program Document.
CX 24	Warbellow's Air Notice to Quit Email.
CX 25	Arctic Circle Air Notice to Quit Email.
CX 26	Cylinder Head photos.
CX 27	Settlement Agreement, dated December 11, 2014.
CX 28	Boutique Air Wage Claim.
CX 29	FOIA Request.
CX 30	Lidar President, Juan Beltran, August 25, 2016 Statement that Respondent told Lidar's head of HR, Diane Alvarez, that it could not discuss Complainant's employment due to "a litigation dispute." Angelica Guerrero told [Complainant] this the next day.
CX 31	Voicemails from [Mr.] Harris and [Mr.] Hackett.
CX 33	Safety Equipment.
CX 42	June 16, 2016 Secretary's Findings letter from OSHA.
CX 43	Email from Keith Windham of Boutique Air to Complainant asking about his termination from Respondent. Complainant responded he was "fired by voicemail by the owner of [Respondent] for reporting two specific incidents to the TSA regarding [Respondent's] practices. He stated this in the voicemail." Complainant filed a separate OSHA complaint to "address [Respondent's] continuing disregard" to an agreement requiring neutral references, which settled Complainant's first AIR-21 complainant (OSHA Nos. 0-0130-14-014

Exhibit	Description
	and 0-0130-14-016).
CX 44	KMR Aviation Email.
CX 45	Email exchange between Complainant and Angelica Guerrero of Lidar HR.
CX 46	Letter penned by Michael Haisten. Mr. Haisten alleged that Complainant carried a firearm on the airplane, and flew in a manner that might overheat the engines. Mr. Haisten opened the cowl flaps to increase cooling. Complainant also used shock cooling, which might crack cylinder heads. On May 29, 2014, Mr. Haisten noted that Complainant was operating one of his aircraft's engines with low oil. Mr. Haisten observed smoke coming from one of the engines so grounded the flight. Mr. Haisten found a cracked cylinder head on the left position and that both engines required oil.
CX 47	Culver Military Range Report.

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

Exhibit	Description
RX 1	<p>Complainant's Discovery Responses:</p> <ul style="list-style-type: none"> • Complainant applied to "several positions" after his "Notice of Quit" on May 27, 2014. <i>See</i> RX 1 at 7. • Complainant averred that Respondent made negative references about him to Lidar America, stating that information about Complainant could not be released "due to prior litigation," and citing to an email from Angelica Guerrero. Respondent also told Boutique Air that Complainant was "Terminated 6/3/14 – mismanagement of company aircraft and personnel problems." <i>See</i> RX 1 at 7. Complainant did not receive permanent employment from either employer. <i>See</i> RX 1 at 8. • Complainant's records showed that he landed in Kake, Alaska on May 25-27, 2014. <i>See</i> RX 1 at 11. • Complainant landed in Klawock, Alaska on May 25-May 27, 2014, "although not employed by [Respondent]." • Complainant "routinely carried packages, envelopes, etc." but does not know further information about such mail.
RX 2	Employment Opportunities for Pilots.
RX 3	DOT Final Order dated August 5, 2016.
RX 4	<p>DOT Show Cause Order dated August 7, 2016:</p> <ul style="list-style-type: none"> • Respondent operates "wholly within the State of Alaska." <ul style="list-style-type: none"> ○ Respondent "is not expanding its current operations and is merely requesting an interstate certificate to continue its schedule and charter operations between points within the State of Alaska." • Robert Scott Harris is Respondent's President and Treasurer. • Mark Hackett is Respondent's Director of Operations. • Respondent "conducts intrastate scheduled and on-demand operations in

Exhibit	Description
	<p>the Southeast Alaska region using small aircraft from Sitka Airport.”</p> <ul style="list-style-type: none"> • “If granted certificate authority, the applicant proposes to continue to provide the same service in addition to expanded scheduled passenger operations to provide additional EAS destinations and U.S. mail transportation service as they are put out for bid.”
RX 5 and RX 6	<p>Respondent’s Operating Certificate:</p> <ul style="list-style-type: none"> • Respondent is authorized to undertake commuter and on demand operations.

In support of its position, Solicitor presents the following evidence, as described below:

Exhibit	Description
SX 1	E-mail chain involving [Complainant] and Angelica Guerrero, from Lidar America, LLC and it included Mr. Kammer’s request as an investigator for that e-mail chain.

The parties also present the following joint exhibits:

Exhibit	Description
JX 1	December 4, 2014 Settlement Agreement between Complainant and Respondent. Respondent, <i>inter alia</i> , agreed to provide a neutral reference concerning Complainant.
JX 2	Air Carrier and Other Records Requested, PRIA.

Additionally, the Tribunal admitted two exhibits into the record:

Exhibit	Description
ALJX 1	Note from one Dr. Treasa Davis dated March 6, 2017.
ALJX 2	Copy of Complainant’s hotel bill for Lakewood, WA, March 6, 2017.

II. ISSUES

- Is the Respondent and/or Complainant covered under the Act?
- Did the Complainant engage in protected activity?
- Did the 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 the Respondent have taken the same adverse action?
- What remedies, if any, is Complainant due?

III. THE POSITIONS OF THE PARTIES

1. Complainant's Position²⁶

Complainant wrote that he was employed by Respondent from April 2014 until May 3, 2014. Complainant learned of his termination from Mr. Harris's voicemail message. Complainant alleged that he was an employee protected under the Act and that Respondent is a covered employer, because it "performs contract maintenance for several air carriers such as Alaska Airlines." Complainant alleged protected activities involve "reporting [Respondent] activities to three U.S. government agencies after discussing those activities with [Complainant's] supervisor, Mr. Scott Hackett," Respondent's Director of Operations. Complainant continued that he received an unfavorable employment action when Mr. Harris fired him the same day, "approximately twelve hours after the Complainant reported those activities." Mr. Harris allegedly told Complainant in the voicemail that his "TSA reporting" was the reason for his termination. Complainant discussed his understanding, per Mr. Harris's testimony, that no adverse personnel records were created during the course of Complainant's employment with Respondent.²⁷

2. Respondent's Position

Respondent argued, generally, that the Department lacks jurisdiction over Complainant's complaint, because Respondent is not an "air carrier." *See* Employer's Brief at 1-4. Respondent argued in the alternative that Complainant was not a covered employee. *Id.* at 5-9. Respondent discussed Complainant's prima facie case, stating that Complainant's 2014 complaints "do not qualify as protected activity under 49 U.S.C. § 42121(a)(1)-(4)." *Id.* at 10-17. Respondent further stated that "substantial evidence does not support a finding that [Respondent] provided negative references, violated the settlement agreement or otherwise took an unfavorable personnel action as required for a violation of 49 U.S. C. § 42121(a)," and that even if they did occur, there is no evidence that Complainant's protected activity contributed to the purported adverse actions. *Id.* at 18-20.

IV. CONCLUSIONS OF FACT AND 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 engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If the record preponderantly establishes the three foregoing elements of Complainant's establishes *prima facie* case, the burden then 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)).

²⁶ The following paragraph is a summary of Complainant's May 26, 2017 Brief.

²⁷ Complainant appended a printout of 49 U.S.C. §42121, and included approximately thirty pages indicating his attempts at securing employment after his termination from Respondent.

Complainant appears before the Tribunal *pro se*, and therefore should recognize that—unlike the Tribunal’s determination in its denial of Respondent’s Motion to Dismiss, which viewed the evidence in a light most favorable to the Complainant, as a nonmoving party—the law provides no special standards to either party at this stage of the adjudicatory process. The Tribunal will simply review the record to determine whether the preponderant evidence²⁸ establishes that Respondent violated the Act and Complainant deserves benefits.

Equity demands this Tribunal to construe liberally the complaints and papers filed by *pro se* litigants “in deference to their lack of training in the law and with a degree of adjudicative latitude.” *Jenkins v. CSX Transp., Inc.*, ARB No. 13-029, slip op. at 10-11 (May 15, 2014) (internal quotation marks omitted); see *Wyatt v. Hunt Transport*, ARB No. 11-039, slip op. at 2 (Sept. 21, 2012); *Williams v. Nat’l R.R. Passenger Corp.*, ARB No. 12-068, slip op. at 3 (Dec. 19, 2013). Here, Complainant has elected to proceed *pro se* and this Tribunal has kept a deferential predisposition when considering Complainant’s dealings with the Office. See, e.g., February 13, 2017 Order (denying Respondent’s Motion to Dismiss even in light of Complainant’s continued failure to participate in discovery), February 8, 2017 Order (denying Respondent’s Motion for Summary Decision). Although the Tribunal has considered Complainant’s *pro se* status in its procedural dealings with the parties, as illustrated in the discussion that follows, the Tribunal has not extended such deference to the weight accorded to the evidence the parties have submitted. In accordance with the Tribunal’s statements at the hearing, Tr. at 15, the Tribunal will determine the appropriate weight to the parties’ evidence based on the value of the contents therein, without deference to the party’s status.

A. Complainant’s Prima Facie Case

1. Covered Employer

The whistleblower provision of AIR 21 is set forth in 49 U.S.C. § 42121(a). In relevant part, it provides that “[n]o **air carrier or contractor or subcontractor of an air carrier** may discharge . . . or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . .” filed a proceeding relevant to a violation of federal law. “**Air carrier**”²⁹ is defined in 49 U.S.C. § 40102(a) as “a citizen of the United States undertaking by any means, directly or indirectly, to provide **air transportation**.” (Emphasis added.) “**Air transportation**,” is in turn defined as “foreign air transportation, **interstate air transportation**, or the transportation of mail by aircraft.” 49 U.S.C. § 40102(a)(5) (emphasis added).

²⁸ See generally PREPONDERANCE OF THE EVIDENCE, Black’s Law Dictionary (10th ed. 2014) (“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”).

²⁹ Respondent does not argue that it is not a citizen of the United States, and the evidence of record establishes that Respondent is a “citizen of the United States” as the Act defines that phrase. See RX 4; RX 5; RX 6.

Respondent's chief jurisdictional argument is that it is not an "air carrier," as the Act defines that term. See Respondent's Brief at 2–4. In the February 8, 2017 Order Denying Respondent's Motion for Summary Decision, this Tribunal found that Summary Decision was inappropriate because Respondent may have organized trips with tour companies situated in the lower 48 states; the Tribunal, therefore, allowed the case to proceed to a hearing. After a review of the entirety of the evidence of record, however, this Tribunal finds that Respondent operates entirely within the State of Alaska. See Tr. at 49–54, 190-95; RX 4; RX 6.³⁰ Further, the record does not establish that Respondent contracts with interstate carriers in such a way that it is appropriate to impute liability onto Respondent, following *Civil Aeronautics Board v. Friedkin Aeronautics*, 246 F.2d 173, 175 (9th Cir. 1957), which was discussed in the Summary Decision Order. Because at the time of the alleged protected activity, Respondent's operations involved neither interstate nor foreign transportation, and because Respondent was never authorized to carry U.S. Mail, it cannot provide "air transportation," as that term is defined at 49 U.S.C. § 40102(a)(5). Therefore, Respondent was not an "air carrier" under the Act.

Nevertheless, coverage under the Act is not limited to "air carriers"; contractors or subcontractors of air carriers are also potentially liable. See 29 C.F.R. § 1979.101. According to the regulations, the term "**Contractor**" means "a company that performs **safety-sensitive functions by contract for an air carrier.**" 29 C.F.R. § 1979.101 (emphasis added). In the Final Rule implementing this definition, OSHA agreed with a submitter's comment that the term "'safety-sensitive functions' includes security-related activities." See Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 FED. REG. 14100, 14101–02 (Mar. 21, 2003). Thus, the Act may cover Respondent if the preponderant evidence shows that it performed safety or security functions for an air carrier.

Here, the preponderant evidence establishes that, at the time of the protected activity, Respondent performed safety sensitive work for air carriers, such as Alaska Air. Much of the evidence proving this point stems from the testimony of Mr. Harris, Respondent's President and Treasurer. RX 4. Notably, Mr. Harris testified that Respondent provides aircraft maintenance services for Alaska Airlines. Tr. at 190. Alaska Airlines is a Part 121 air carrier that conducts interstate air commerce.³¹ "For years," Mr. Harris continued, Respondent provided emergency maintenance to Alaska Airlines, which he also identified as a Part 121 operator. Although Respondent did not have a formal contract with Alaska Airlines, Respondent is required to comply with Alaska Airline's drug and alcohol program³² and submits documents to them

³⁰ Although not admitted at hearing, in its February 8, 2017 Order Denying Respondent's Motion for Summary Decision, this Tribunal accessed Respondent's website, <http://harrisair.com/scheduled-destinations>, and remarked that "all of Respondent's listed destinations . . . exist within the [State of Alaska]." Additionally, Respondent's operating certificate authorizes Respondent "to operate as an Air Operator and conduct intrastate carriage operations." See RX 5.

³¹ See www.alaskaair.com. See also <https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/3185/cert-carrier-list2017.pdf>.

³² See 14 C.F.R. § 120.35(b) which requires a Part 121 air carrier to subject its contractors that perform aircraft maintenance to the air carrier's drug and alcohol program; *McMullen v. Figeac Aero N. Am.*, OALJ No. 2015-AIR-27, slip op. at 51 n.85 (Jan. 13, 2017) (discussing the Part 120 drug and alcohol

annually. Mr. Harris further stated that Respondent's mechanics are in "constant contact" with Alaska Air when providing maintenance. Mr. Harris also acknowledged that the maintenance Respondent performed "could be" safety-related. Tr. at 232-43.

This Tribunal accords controlling weight to Mr. Harris's testimony on the issue of Respondent's relationship with Alaska Airlines due to his position as Respondent's President and Treasurer. *See* RX 4. The credible testimony Mr. Harris presented is sufficient to establish that Respondent performs safety-sensitive functions for, *inter alia*, Alaska Airlines.³³ Absent Respondent's maintenance services, it is possible for the aircraft of such Part 121 operators³⁴ to become unsafe for continued operation. Indeed, Mr. Harris admitted that some repairs Respondent conducted "could be" safety related. Tr. at 229-43. Additionally, Respondent served as a contractor for Alaska Airlines when it obtained a no trespass Order against Complainant. Mr. Harris explained that he initiated such an Order, in part, because Alaska Airlines and Respondent have adjacent hangars at the Sitka Airport, and Alaska Airlines was "concerned," possibly about the situation between Respondent and Complainant. Tr. at 221. According to the Final Rule, OSHA considers security related activities "safety related" under the definition of the term "air carrier." *See* 68 FED. REG. at 14101-02. For the foregoing reasons, the record establishes that Respondent is a subcontractor of, *inter alia*, Alaska Airlines—a Part 121 carrier—and performs safety sensitive functions—including security functions as evidenced by the no trespass order Respondent filed against Complainant—in that capacity. Accordingly, this Tribunal finds that Complainant has met his burden to show that Respondent is a "contractor," and therefore a covered employer under the Act, as a "company that performs safety-sensitive functions by contract"³⁵ for an air carrier." 29 C.F.R. § 1979.101; 49 U.S.C. § 42121(a).

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 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. 49 U.S. § 42121(a). The governing regulations define the term "employee" as:

regulations, and how 14 C.F.R. § 120.105(e) specifically designates "aircraft maintenance and preventive maintenance duties" as a job involving safety sensitive functions).

³³ The record also contains evidence, albeit less evidence, that Respondent still performs safety-sensitive functions for Empire Airlines. *See, e.g.*, Tr. at 235.

³⁴ Mr. Harris admitted that Alaska Airlines is a Part 121 carrier. Tr. at 233-34.

³⁵ The fact that Respondent and Alaska Airlines never memorialized their agreement in writing does not demonstrate the lack of a contractual relationship. It is axiomatic that a contract need not be written to evince a binding contractual relationship. Additionally, Mr. Harris testified to other factors showing a contractual relationship between Respondent and Alaska Airlines, including sending them documentation, and maintaining "constant contact" when performing maintenance. The record, therefore, shows a contractual relationship between Respondent and Alaska Airlines for the purpose of providing safety-sensitive functions.

an individual presently or **formerly working** for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

29 C.F.R. § 1979.101 (emphasis added).

Here, Complainant alleges two colorable claims of retaliation. The first occurred when Respondent allegedly gave a negative reference to Lidar America, Complainant's putative employer. The second occurred when Respondent completed a PRIA form, which stated that Complainant was terminated due to his alleged "mismanagement of company aircraft and personal problems."³⁶ See OSHA Secretary's Findings Letter dated June 16, 2016. The record shows that Respondent employed Complainant from the end of April 2014 until June 3, 2014. See Tr. at 85, 196, 251-61; CX 1; CX 5.

The record, therefore, demonstrates that Complainant was an employee, as that term is defined under the Act: Complainant was an "individual . . . formerly working" for Respondent when Respondent allegedly provided him negative performance appraisals to potential employers. Complainant is therefore an "employee" under 29 C.F.R. § 1979.101.

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**

³⁶ Complainant's retaliatory firing was the subject of two OSHA complaints, designated OSHA Nos.: 0-0130-14-014 and 0-0130-14-016. The Agreement the parties entered into in December 2014, see JX 1, disposed of these matters; therefore, this Tribunal declines to reconsider Complainant's retaliatory firing in the instant case. To do so would violate the bedrock legal principle of *res judicata* and potentially open Respondent to judgement and penalty concerning the same issue affecting the same parties. See generally RES JUDICATA, Black's Law Dictionary (10th ed. 2014) (*res judicata* means "a thing is adjudicated"; the three essential elements of *res judicata* are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties); Restatement (Second) of Judgments § 17 (1982).

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) (emphasis added); see *Kinser v. Mesaba Aviation, Inc.*, OALJ No. 2003-AIR-00007, slip op. at 24 (Feb. 9, 2004) (“Filing a complaint or charge of employer retaliation because of safety and quality control activities is protected activity.”).

Discussion of Protected Activity

Complainant’s complaint involves two instances of protected activity: (1) Complainant’s settled complaints to OSHA (OSHA Nos. 0-0130-14-014 and 0-0130-14-016); and (2) Complainant’s June 4, 2014 disclosure to the TSA of his belief that Respondent’s action constituted violations of the air safety regulations. Concerning the former allegation, this Tribunal finds the existence of Complainant’s settled OSHA claims per se evidence of protected activity under § 42121(a)(2) (mandating that an employer cannot discriminate against an employee who “has filed . . . a proceeding relating to . . . any other provision of Federal law relating to air carrier safety”). The latter allegation requires more discussion.

The Board has explained, “[a]s 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, 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)). Thus, the “complainant must prove that he reasonably believed in the existence of a violation”; the reasonableness of this belief contains both a subjective component and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Regarding the former element, “[t]o prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* Regarding the latter, the Board explained, “[t]o 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 the belief of the *Burdette* complainant, a pilot, against the belief 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 (Jun. 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 (Jul. 2, 2009). 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.” *Id.* 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”).

Complainant’s Concerns Were Subjectively Reasonable

Complainant held a good faith subjective belief that the topics he discussed with TSA related to air carrier safety. *See Burdette*, ARB No. 14-059, slip op. at 5. Concerning the intoxicated passenger, Complainant testified to his understanding that it would constitute a violation of FAA rules to allow such a passenger to board an aircraft. Tr. at 55–60. Concerning the ramp issues, Complainant testified that having an unescorted eight year old on the tarmac constituted a safety issue under the Department of Transportation’s purview. Tr. at 61–64. Complainant recalled another incident where his passengers were waiting for him on the tarmac, which also presented safety issues. *Id.* Complainant even attempted to resign from Respondent’s employ due to the foregoing issues. Tr. at 73–80. Such a serious act demonstrates Complainant’s subjective belief that the issues he discussed with TSA concerned violations of federal law related to air carrier safety. For the foregoing reasons, this Tribunal finds that Complainant held a good faith subjective belief that the issues he discussed with TSA involved the violation of federal law related to air safety.

Complainant’s Concerns Were Objectively Reasonable

Objectivity is found by “assess[ing] a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experiences as the aggrieved employee.” *See Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). The record contains testimonial and documentary evidence concerning whether Complainant’s concerns were objectively reasonable. The preponderant evidence of record demonstrates the objective reasonableness of Complainant’s concerns.

Complainant testified, generally, that the issues he discussed with TSA concerned violations of federal aviation safety laws. *See, e.g.*, Tr. at 55–86. At the time of his alleged protected activity, Complainant had worked as a pilot for approximately ten years. *See* RX 1; Tr. at 45–49 (at the time of the hearing, Complainant had acquired some 4,600 total hours of flight time); Tr. at 282–89 (where Mr. Bauder—a certified pilot with over 14,000 hours of total flight time—testified that Complainant “did a pretty good job” operating his aircraft). The Tribunal, therefore, finds that Complainant is an experienced pilot. Accordingly, Complainant’s testimony that the issues he discussed with TSA were safety related merit some weight, because of Complainant’s substantial training and experience piloting aircraft.

Mr. Harris testified specifically on the intoxicated passenger incident. It was his recollection that the passenger was too intoxicated to fly and so did not board the aircraft. Tr. at 195. Later, Mr. Harris agreed that if Complainant allowed an intoxicated passenger to fly, it could place his pilot’s license in jeopardy. Tr. at 251–61. Although Mr. Harris did not state as such, this Tribunal finds that Mr. Harris likely based his statement on FAA regulations. *See, e.g.*, 14 C.F.R. § 135.121(c); *see also* 14 C.F.R. § 91.17(b). Because this regulation is

undoubtedly safety related, Mr. Harris's testimony does not contradict Complainant's assertion that his complaints to TSA were safety related and therefore helps demonstrate that Complainant's concerns were objectively reasonable. Additionally, the Tribunal notes that the record contains no other evidence—for example from a subject matter expert—that the concerns Complainant shared with TSA were not objectively reasonable for a similarly situated pilot to hold. Therefore, this Tribunal finds that the preponderant evidence of record demonstrates that Complainant's complaints to TSA concerning Respondent's safety practices were objectively reasonable.

Conclusion: The record contains two separate instances of protected activity.

Complainant held a subjective, good faith belief that the concerns he shared with TSA about Respondent's business practices involved air carrier safety. The preponderant evidence further shows that Complainant's belief was objectively reasonable. Complainant, therefore, has succeeded in his burden to prove that his complaints to TSA constituted protected activity. Additionally, per the Act, the very existence of Complainant's OSHA complaint against Respondent is per se evidence of protected activity. *See* 49 U.S.C. § 42121(a)(2). Therefore, the record establishes two separate instances of protected activity.

4. Adverse Action

The Act provides, “[n]o 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, “[a]n adverse action . . . 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, slip op. at 13-14 (Sep. 28, 2011); *see Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sep. 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.

Notably, the Act's supplementing regulations specifically mention blacklisting as a “prohibited act.” 29 C.F.R. § 1979.102(b). Blacklisting “is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate.” *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, slip op. at 5 (Nov. 28, 2003). The goal of blacklisting activity is “to disseminate damaging information that affirmatively prevents another person from finding employment.” *Id.* To rise to the level of blacklisting, the communication “must be motivated at least in part by protected activity.” *Odom v. Anchor Lithkemko/Inter'l Paper*, ARB No. 96-189, slip op. at 12 (Oct. 10, 1997) (finding a complainant's allegations of blacklisting “without merit because he did not prove” that his employer's criticism of his work performance and ineligibility for rehire were “based on or motivated even in part by any of his protected activity, including

this complaint”); *see Gaballa v. The Atlantic Group*, 94-ERA-9 (Sec’y Jan. 18, 1996) (upholding an ALJ’s finding of a violation of the Energy Reorganization Act’s whistleblower protection provisions when a complainant’s former employer discussed complainant’s discrimination complaint with a putative employer). Anti-blacklisting legislation is designed to deter an employer from making “improper references [about] an employee’s protected activity” to future employers. *Pickett*, ARB Nos. 02-056 and 02-0596 at 6.

Adverse Action: Discussion

Complainant alleges two colorable instances of Respondent’s blacklisting behavior.³⁷ First, Complainant avers that Respondent gave him a negative reference in violation of the December 2014 Settlement Agreement when it told Boutique Air the reasons for his termination on the PRIA form. *See* JX 1 (requiring Respondent to provide neutral references to Complainant’s putative employers and to refrain from any discussion of Complainant’s protected activity or anything “that could be construed as damaging [to] the name, character, or employment of Complainant”); CX 16; Tr. at 92-94, 252. Respondent’s sending Boutique Air Complainant’s unredacted PRIA is clearly adverse action, in light of the terms of the settlement agreement.³⁸

Second, Complainant alleged that Respondent gave him a negative reference in relation to his application for employment with Lidar America. *See* CX 17; CX 30; SX 1; Tr. at 90-92, 104, 120, 251-52. Respondent contends that the alleged negative reference “was merely that [t]hey are unable to disclose information due to a litigation process.” *See* Respondent’s Brief (citing CX 17; CX 45; SX 1). Respondent argues that such a “vague reference to a litigation process does not” amount to adverse action. *Id.*

The evidence of record concerning Respondent’s alleged adverse blacklisting actions concerning Lidar America derive entirely from hearsay³⁹ evidence. *See, e.g.,* CX 17; CX 30; Tr. at 90–93, 161–62. For example, CX 17, the July 16, 2015 email from Ms. Guerrero to Complainant contains Ms. Guerrero’s understanding of what Respondent told Lidar America; this is a classic example of hearsay evidence. Assuming, *arguendo*, the record contained evidence from the Respondent or its agents about what was actually said to Ms. Guerrero, such evidence would not constitute hearsay evidence, because, in that case, the evidence would derive from the recollection of the individual who actually committed the alleged adverse action. Here,

³⁷ Again, Complainant is precluded from relitigating his firing due to the December 2014 Settlement Agreement, JX 1; Complainant has already received an agreed-to sum concerning his firing. Therefore, this Tribunal declines to discuss any adverse action arising from his termination, citing the principle of *res judicata*.

³⁸ However, the Tribunal explains below that the record contains no evidence to link the adverse action to Complainant’s protected activity.

³⁹ Black’s Law Dictionary defines the term “hearsay,” principally, as: “testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness.” HEARSAY, Black’s Law Dictionary (10th ed. 2014). The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges defines “hearsay” as “a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.”²⁹ C.F.R. § 18.801(c); Fed. R. Ev. 801.

the record contains no evidence derived from the declarant of the statement to Lidar America. Accordingly, the evidence of record on this issue is, at the very least, hearsay evidence.

Nevertheless, if Mr. Beltran's statement at CX 30 is to be believed—and this Tribunal finds no reason for him to have lied on his own affidavit—the evidence likely constitutes “double-hearsay,” or a hearsay statement that itself contains hearsay statements. *See* HEARSAY, Black's Law Dictionary (10th ed. 2014). Mr. Beltran attested that Diane Alvarez, not Ms. Guerrero, contacted Respondent; the Tribunal is left to presume that Ms. Alvarez then told Ms. Guerrero, who told Complainant. *See* CX 30. This Tribunal finds, therefore, that the evidence of record on this issue is comprised of double-hearsay evidence.

At hearing, the Tribunal admitted evidence of Respondent's purported statements to Lidar America over Respondent's hearsay objection. *See* Tr. at 15. Although it is true that formal rules of evidence are not applied to AIR 21 proceedings, 29 C.F.R. § 1979.107(d), it is entirely within the province of this Tribunal to accord such statements their appropriate weight.⁴⁰ *Weil v. Planet Airways, Inc.*, ARB No. 04-074, 2003-AIR-18, slip op. at 4 (Oct. 31, 2005). The governing regulations require the Tribunal to apply “principles designed to assure production of the most probative evidence.” 29 C.F.R. § 1979.107(d). Therefore, this Tribunal will accord less weight to the hearsay statements in evidence, unless the record contains corroborative evidence that such statements capture the truth of what Respondent purportedly said to Lidar America.

After thorough review of the record, the Tribunal gives very little weight to the hearsay statements. Critically, the record contains no sworn statement from Ms. Alvarez concerning her recollection of Respondent's alleged adverse action. Rather, the record contains the sworn statement of Mr. Beltran, who was not involved in any discussion with Respondent; Mr. Beltran's affidavit contains his understanding of what Ms. Alvarez understood Respondent to have said about Complainant's employment. CX 30. Like Ms. Guerrero's statement, Mr. Beltran's affidavit contains double hearsay. Without corroborating information—for example Ms. Alvarez's affidavit or examination under oath, subject to cross-examination—such hearsay evidence merits very little weight.⁴¹ The record further does not establish how Ms. Guerrero received word from Ms. Alvarez concerning her conversation with Respondent. Such evidence would help the Tribunal understand the veracity of Ms. Alvarez's statement, which is also double hearsay.⁴² Accordingly, her statement too deserves very little weight. CX 17.

The record, furthermore, contains various indications—sometimes competing indications—about what Respondent actually told Lidar America about the Complainant's employment. For example, in response to Complainant's request, Ms. Guerrero wrote that

⁴⁰ The Tribunal placed the parties on notice of its intentions to admit hearsay evidence, but to give such evidence the weight it deserves. *See* Tr. at 15.

⁴¹ Additionally, Complainant surmised that Mr. Hackett made the statements to Lidar America, Tr. at 119-20; however, Complainant did not call Mr. Hackett to the stand. The Tribunal surmises that Mr. Hackett's testimony would have helped to establish exactly what Respondent said to Lidar America.

⁴² The Tribunal notes that Complainant's testimony about Respondent's statements to Lidar America is likely triple hearsay: Respondent told Ms. Guerrero who repeated Respondent's statement to Ms. Alvarez who told Respondent's statement to Complainant who told Respondent's statement to the Tribunal.

Respondent was “unable to disclose information **due to a litigation process.**” CX 17 (emphasis added for clarity). According to Mr. Beltran, Respondent told Ms. Alvarez that “no information could be disclosed as it relates to [Complainant], **by virtue of a ‘litigation dispute.’**” CX 30 (emphasis added for clarity). Additionally, Complainant’s characterization of the conversation changed throughout his examination. Initially, Complainant testified that Respondent told Lidar America that Respondent “couldn’t tell [Lidar America] anything about [Complainant] or divulge any formation due to a – **due to litigation that [Complainant] had engaged in with them.**” Tr. at 91 (emphasis added for clarity). Later, Complainant testified that Lidar America told Complainant, as he then recalled it, “[Respondent] said that they are unable to disclose information **due to a litigation process.**” Tr. at 161 (emphasis added for clarity). Complainant admitted that the statement that he “engaged in litigation” with Respondent is a different phrase from the phrase “due to a litigation process.” Tr. at 161-62. The elastic nature of Respondent’s alleged comment to Lidar America, as exhibited within the evidence of record, underscores the credibility issues surrounding the use of hearsay evidence, and further undermines Complainant’s argument that Respondent engaged in adverse action in its statements to Lidar America. To wit: Complainant bears the burden to prove that an adverse action occurred, and the hearsay evidence he employed within his case-in-chief does not adequately establish exactly what Respondent told Lidar America.

Language is important. Complainant’s inability to establish the exact phrasing Respondent used in its discussion with Lidar America further detracts from his burden to demonstrate that an adverse action occurred. In *Gaballa*, 94-ERA-0009, at 2, the Secretary of Labor affirmed an ALJ who found that blacklisting occurred when the Respondent “referred to [the complainant’s] complaint about discrimination,” because such “discriminatory referencing” violated the ERA’s whistleblower protections provisions. Assuming, *arguendo*, Respondent told Lidar America about the “litigation process,” Respondent’s statement did not reference Complainant’s complaint of discrimination, and so would not run afoul of the standard set in *Gaballa*. See *Odom*, ARB No. 96-189 at 112 (finding no blacklisting occurred, in part, through a comparison of the *Gaballa* case, where “the employer explicitly mentioned the employee’s protected complaint of retaliation”; the employer in *Odom* made no such statement); *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, slip op. at 5–6 (Nov. 30, 2006) (requiring a complainant claiming blacklisting to establish that a former employer provided “damaging information” to a putative employer “that prevented [the complainant] from finding employment”). Here, because Complainant has attempted to demonstrate that the adverse action occurred through hearsay evidence—and because the record contains multiple iterations of the exact content of the hearsay statement—the Tribunal finds Complainant unable to establish by a preponderance of evidence that Respondent’s vague statement including discriminatory referencing, and therefore involves an adverse blacklisting action.

The Tribunal finds, further, that fault for Lidar America’s knowledge that Respondent’s statement involved Complainant’s protected activity lies with Complainant, not Respondent. See CX 30 (where Mr. Beltran wrote that Complainant, after hearing of Respondent’s statement to Lidar America, “responded by indicating that he had made a complaint relating to maintenance issues” concerning Respondent’s aircraft). In this instance, not only did Respondent not provide Lidar America with a reference to Complainant’s discriminatory complaint, according to Mr. Beltran’s statement—the validity of which Complaint did not dispute—Complainant was the

party who provided the discriminatory context to Respondent's vague statement. *Cf. Gaballa*, 94-ERA-0009, at 2 (finding that the complainant's former employer unlawfully discriminated against the complainant when it specifically referred to the complainants past complaints of discrimination). Complainant's inability to show that Respondent's actions referenced his prior whistleblowing behavior, combined with his affirmative statement to Lidar America of same, further detracts from Complainant's burden to prove that Respondent committed an adverse action in its statement to Lidar America.

Adverse Action: Conclusion

Complainant has successfully established that Respondent committed adverse action when it sent the unredacted PRIA to Boutique Air. Nevertheless, Complainant is unable to show that Complainant's statements to Lidar America constituted protected activity for the following salient reasons. First, Complainant relied on unreliable hearsay evidence to establish that Respondent committed an adverse action. The reliability of such evidence was further undermined, because Complainant never established the exact phrasing that Respondent used when it allegedly committed the claimed adverse action. The undeveloped nature of the record on this point precluded this Tribunal from making a finding of fact as to exactly what Respondent said to Lidar America. This Tribunal found such deficiencies detrimental to Complainant's burden to establish adverse action, because case law requires a reference to the Complainant's whistleblowing behavior in order to rise to the level of blacklisting. The possibility that Complainant—not Respondent—provided information to Lidar America coloring Complainant's "litigation" as a whistleblower claim, solidified this Tribunal's determination that Complainant is unable to establish that Respondent committed an adverse action in its conversation with Lidar America. In summation, the record contains an insufficient quantum of probative evidence to establish that Respondent's statements to Lidar America constitute an adverse employment action.

5. Contributing Factor Analysis

Because Complainant successfully established that Respondent committed an adverse action in the PRIA it sent to Boutique Air, however, it is necessary to discuss whether Complainant's protected activity was a contributing factor in Respondent's decision to take an 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 connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, OALJ 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 National Railway/Illinois Central Railroad Company*, ARB No. 16-035, OALJ No. 2014-FRS-154, USDOL Reporter, page 15 (Sep. 30, 2016). The ARB has characterized the contributing factor requirement as a "low standard," which is "broad and forgiving." *Palmer*, ARB No. 16-035 at 53. Therefore, 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 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, OALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: "did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, USDOL Reporter, page 52 (emphasis in the original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, 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); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). "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, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted* to infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity." *Palmer*, ARB No. 16-035, USDOL Reporter, page 56.

Discussion of the Contributing Factor Element Relating to the PRIA Sent to Boutique Air

To the extent that Complainant asks this Tribunal to enforce the terms of the settlement agreement requiring a neutral reference from Respondent, that request is denied. The December 2014 Settlement Agreement is clear that the agreement is "enforceable in an appropriate United States District Court." JX 1. Furthermore, by statute, enforcement of the terms of the Secretary's Order dismissing the OSHA complaints due to the settlement agreement at JX 1 rests with a United States District Court. 49 U.S.C. § 49121(b)(6). This Tribunal, therefore, lacks jurisdiction to enforce the December 2014 settlement agreement, and Complainant is unable to rely on the terms of the agreement to establish that Complainant's whistleblowing to TSA—the protected activity giving rise to the events leading to the settlement agreement—as the reason Respondent did not provide a neutral reference in the PRIA request.

Complainant, however, may establish this element through a showing that the very existence of his complaints to OSHA (OSHA Nos. 0-0130-14-014 and 0-0130-14-016) were the reason that Respondent engaged in the alleged retaliatory action of sending his unredacted PRIA to Boutique Air. The record establishes no such connection. In fact, Mr. Harris testified that his Director of Operation, Rob Murray, retrieved Complainant's file, scanned the PRIA and sent the document without reading it. Tr. at 226, 252, 260. The Tribunal finds this version of events plausible, because Mr. Hackett—not Mr. Murray—was the author of the negative reference found on Complainant's PRIA. Tr. at 227. Additionally, Mr. Harris "absolutely [did] not" instruct Mr. Hackett to write the negative reference found on Complainant's PRIA. Tr. at 251. This Tribunal considers the foregoing evidence compelling that Respondent's actions in sending the PRIA were not related to Complainant's protected activity of filing the OSHA complaints.

The record contains little to no evidence that Respondent did, indeed, retaliate against Complainant when it sent the PRIA to Boutique Air; however, as discussed above, temporal proximity may provide circumstantial evidence of retaliatory motive. Here, Complainant filed his OSHA claim in June 2014; the parties settled the matter in December 2014. Tr. at 25; JX 1. Mr. Murray did not send the PRIA to Boutique Air until September 2015. See CX 16; Tr. at 93. The Tribunal finds it unreasonable that Respondent acted out of retaliatory intent due to the period of time that elapsed between Complainant's OSHA complaints and the alleged retaliatory action. See *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, p. 9 (Nov. 30, 2005) (finding, in part, that a six month gap between the protected activity and the adverse action severed the complainant's temporal proximity argument); *Svensen v. Air Methods, Inc.*, ARB No. 03-074, p. 8 (Aug. 26, 2004) (holding in dicta that a nine day period between the complainant's protected activity and his firing would support the complainant's theory of temporal proximity). Additionally, because Mr. Murray—not Mr. Hackett who wrote the negative reference on Complainant's PRIA—actually sent the document, this Tribunal finds that an intervening act severed any causal nexus between Complainant's OSHA complaint and the alleged adverse action of sending the PRIA to blacklist Complainant. Indeed, the record does not establish Mr. Murray's awareness of Complainant's protected activity. For the foregoing reasons, this Tribunal finds that Complainant is unable to establish that Respondent's alleged retaliatory action of sending the PRIA to Boutique Air was caused in any way by his OSHA complaint.

V. CONCLUSION

The preponderant evidence demonstrates that Complainant is unable to make out a prima facie case, as is his burden. Complainant successfully established that Respondent is a covered employer and that he is a protected person; he also showed that protected activity occurred. Although the record did not demonstrate that Respondent's statement to Lidar America constituted an adverse blacklisting action, Respondent did commit an adverse action when it provided the PRIA to Boutique Air. Nevertheless, the preponderant evidence did not show that Complainant's protected activity motivated in any way Respondent's actions; a necessary requirement to establish Complainant's prima facie case.

VI. ORDER

Complainant is unable to make out his prima facie case. Accordingly, his complaint is hereby **DISMISSED**.

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

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).