

**U.S. Department of Labor**

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**Issue Date: 16 August 2018**

**CASE NO.: 2016-AIR-22**

**IN THE MATTER OF**

**IGNACIO G. DELAO JR.**

**Complainant**

**v.**

**VT SAN ANTONIO AEROSPACE, INC.**

**Respondent**

APPEARANCES:

ADAM PONCIO, ESQ.

For The Complainant

MICHAEL V. GALO JR., ESQ.

For The Respondent

Before: LEE J. ROMERO JR.  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises under the employee protective provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, *et seq.*, Public Law 106-181, Title V, § 519 and the regulations thereunder at 29 C.F.R. Part 1979, brought by Ignacio G. Delao Jr. (Complainant) against VT San Antonio Aerospace, Inc. (Respondent). These statutory provisions prohibit discrimination by air carriers or contractors/subcontractors of air carriers from discharging or otherwise discriminating against an employee for providing the employer or the federal government with information relating to any violation or alleged

violation of orders, regulations, or standards of the Federal Aviation Administration (FAA) or any other provision of federal law relating to air carrier safety.

## I. PROCEDURAL BACKGROUND

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 2, 2015, alleging that Respondent retaliated against him and discharged him due to his raising aviation safety issues with management officials. The OSHA Regional Administrator dismissed Complainant's complaint on April 15, 2016, after determining that it had no merit. (ALJX-1). Specifically, the OSHA Regional Administrator determined that there was no evidence suggesting a nexus between the protected activity and the adverse action suffered by the Complainant. Id.

On May 13, 2016, Complainant filed a request for a formal hearing with the Office of Administrative Law Judges (OALJ). (ALJX-2). This matter was referred to OALJ for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order dated June 24, 2016, was issued, scheduling a formal hearing in San Antonio, Texas, on November 16, 2016. (ALJX-3).

On July 11, 2016, Complainant requested an extension to file his pleadings. On September 26, 2016, Employer filed a Motion to Dismiss as a result of Complainant's inaction and failure to comply with the undersigned's Pre-Hearing Order. On October 6, 2016, the undersigned issued an Order, denying Respondent's motion and requesting Complainant respond as to whether he wished to proceed with the matter. On October 31, 2016, Complainant filed a Joint Agreed Motion for Continuance.

On November 9, 2016, the undersigned issued a Second Notice of Hearing and Revised Pre-Hearing Order, informing the parties of the formal hearing on April 25, 2017, in San Antonio, Texas. (ALJX-4). On December 5, 2016, Complainant filed his Statement of Claim. (ALJX-5). On December 23, 2016, Respondent filed its Answer and Defenses to Complainant's Statement of Claim. (ALJX-6).

On February 21, 2017, Complainant filed an advisory notice, and a request for continuance and resetting of deadlines. On March 9, 2017, the undersigned issued a Third Notice of Hearing and Revised Pre-Hearing Order, setting the formal hearing for June 26, 2017, in San Antonio, Texas. (ALJX-7). On May 31, 2017, the undersigned issued a notice, stating the hearing would

be located in San Antonio, Texas. (ALJX-8). On June 21, 2017, the undersigned issued a Fourth Notice of Hearing and Revised Pre-Hearing Order, rescheduling the formal hearing for December 5, 2017, in San Antonio, Texas. (ALJX-9). On November 16, 2017, the undersigned issued another notice, noting the hearing location in San Antonio, Texas. (ALJX-10).

A de novo hearing was held in San Antonio, Texas, on December 5, 2017. Complainant offered 18 exhibits, all of which were admitted into evidence. Respondent proffered 13 exhibits, and all were admitted into evidence. Additionally, ten Administrative Law Judge exhibits were admitted into evidence. This decision is based upon a full consideration of the entire record.<sup>1</sup>

Post-hearing briefs were received from Respondent and Complainant on March 6, 2018, and March 8, 2018, respectively. Based on the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## II. ISSUES

1. Whether Respondent is a covered employer under the Act, and whether Complainant is a covered employee under the Act?
2. Whether Complainant engaged in protected activity?
3. Whether Complainant suffered an adverse action(s) as a result of engaging in protected activity?
4. Whether Complainant's activity was a contributing factor in Respondent's alleged discrimination against Complainant?
5. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainant having engaged in protected activity?

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<sup>1</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Complainant's Exhibits: CX-\_\_\_\_; Respondent's Exhibits: RX-\_\_\_\_; and Administrative Law Judge Exhibits: ALJX-\_\_\_\_.

### III. SUMMARY OF THE EVIDENCE

#### The Testimonial Evidence

##### Ignacio G. Delao Jr.

Complainant testified he is from San Antonio, Texas, and that he graduated in aircraft maintenance from St. Phillip's College in San Antonio. (Tr. 17). He began working as a structural mechanic at Dee Howard. Complainant stated he has been working in mechanical and structural aviation for 17 or 18 years, or perhaps 20 years. He worked for Respondent in December 2014 until October 12, 2015, which is when he was terminated. He believes he was hired by STS through Airplanes, but more specifically, by Tim Reinhard, who accepted his resume. (Tr. 18). He could not remember how much he was earning but assumed it was \$23.00 per hour, working 10 or 12 hours per day. He testified that he made \$35,000 to \$44,000. The latter amount was with overtime. (Tr. 19). As of October 2015, Complainant surmised he earned \$38,000, which was based on his earnings of \$900 or \$1,100 per week. (Tr. 20).

While employed by Respondent, Complainant reported mainly to Jeff May, his supervisor.<sup>2</sup> However, he could report to anyone. Id. He indicated Mr. May was his direct supervisor. Therefore, when he would call off from work, he would call Mr. May. He further indicated that he "always" called to inform his supervisor when he was not going to be at work. He testified that Respondent's procedure for calling off required that the employee notify his supervisor when he was going to be absent. (Tr. 21). Complainant stated he would report to Tim Reinhard, a manager, whom he rarely saw, if he did not report to Mr. May. (Tr. 22).

Moreover, Complainant testified that while employed by Respondent, he was working on a 737 Boeing, BBJ, which was "a luxury aircraft for a private individual." Id.

Complainant further testified that while working for Respondent he recalled losing a socket while working on an airplane. He believed this occurred in early April 2015. He recalled working in the main cabin of the aircraft, while mechanic, Jacob Reece, was on the floor. He stated Jacob Reece hit his leg, and he reacted by dropping an "11/32 socket," which

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<sup>2</sup>Complainant testified that when he began the job Mr. May was the lead supervisor but later became a supervisor. (Tr. 20).

was his personal tool. (Tr. 23). When he lost the tool, Complainant was working on the "right-hand side just after the right-hand main cabin door probably right in line 48, somewhere around in there." There was an opening because they were placing the floorboards, which was the last step. (Tr. 26). He indicated that he had just replaced a high lock, and then he broke the collar, which is when Jacob Reece moved his foot, and he dropped the socket. When he dropped it, the cockpit was behind him, and the socket began "rolling to an opening that was in the plastic area" and "fell into two pipes." He later indicated, "It hit two pipes." Complainant testified that he "heard two pings and it disappeared." According to Complainant, the plastic prevented Foreign Object Debris (FOD). (Tr. 27).

Complainant explained that a new contractor came in called "fuelers;" therefore, his contract team had to pause the work they were doing while the new contract team could "put or find a pipe for the fuel line." In doing so, the new contract team removed the plastic and then placed it back. However, Complainant believes the new contract team overlooked a small hole, which is where the socket rolled. He maintained there was a part of the plastic that was not taped down correctly and, as a result, the socket was able to make "its way through there." (Tr. 28). He testified the socket dropped in the "ENE bay area," which is the electronic compartment that is below the floorboards. (Tr. 29).

He further stated "inspection was a job in case the area is not clean," and that "you have to vacuum the area no matter what or else the job is not going to go nowhere." (Tr. 28).

Complainant also testified there are classes that he has taken about foreign objects, and how the use of a metal spatula can cause scratches, which can cause cracks. When he was hired, he was required to attend orientation as well as another orientation called "GMM." He explained that as a new hire the person must become oriented with the aircrafts and the General Maintenance Menu. In short, the new hire would learn about the safety rules (e.g., how to keep foreign objects out of the aircraft), and become familiar with the aircraft. Once orientation is completed, the new hire becomes certified. Id.

He explained that while at Randolph Air Force Base, his tools were "shadow[ed]" and identified by his last name and last four digits of his Social Security number. (Tr. 23). According to Complainant, tools are shadowed in case they go missing,

which means foam is cutout in the shape of the tool. (Tr. 23-24).

Complainant averred he had a list of his inventory while he was employed by Randolph Air Force Base. Every morning an inspector would look at an individual's tool box to make sure each tool was accounted for, and repeat this process at the end of the person's shift, which would take 10 to 15 minutes. (Tr. 24). Respondent, however, did not have a shadowing box policy. Complainant stated there were no "tool controls." The tools did not have to be shadowed, and there were no shadowing boxes. (Tr. 25).

Complainant testified that when the airplane was being put together, each piece was situated so there were no gaps, "no less than a quarter." Some components were placed so closely that if the socket had been lodged in the airplane, Complainant stated "something [was] going to happen." He explained there are control cables, wires for Avionics, and wires for all other instruments in the cockpit and mechanical parts. (Tr. 30). There is also a ladder that retracts from the door. Complainant indicated the socket could have been lodged in any of these areas and could cause damage. (Tr. 30-31). The socket could have even fallen in the longeron,<sup>3</sup> thus, causing an obstruction that could damage the airplane, for example, the airplane may crack, meaning the skin of the airplane. (Tr. 31, 33).

Complainant also stated the socket could have affected the oxygen bottles because there are electrical components. The socket could have ruptured one of the lines, which could have led to a fire or some other major catastrophe. (Tr. 31).

After losing the socket, Complainant conversed with his coworker, Orlando Barrios, about the missing piece, and then Complainant went down to look for it for 10 or 15 minutes. Immediately following this, Complainant went to Mr. May and told him about the missing tool. Complainant stated he asked Mr. May if he could take time to look for it, and Mr. May approved. At the end of his shift, he approached Mr. May again, asking if he could stay after work to look for the tool. (Tr. 33). However, Mr. May told him not to worry, and that they would look for it the next day. (Tr. 33-34). According to Complainant, that conversation occurred around 1:45 pm. (Tr. 34).

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<sup>3</sup> Complainant testified that the longeron "is a long strip of line . . . with tons of rivets . . . that go all the way around and you attach the skin to them." He explained the longeron "is like a V." The longeron "basically parts that hold[] the skin together . . . ." (Tr. 32).

On the following day, Complainant and a few others looked for the socket; he stated six or seven individuals helped search for the tool. Id. Complainant further testified that for the first two days they all searched for the tool. He stated they "agreed that probably more stuff would have to come out because [they] [couldn't] get to certain areas on the lower bottom of it because it [was] so difficult." Complainant indicated they used magnets, flashlights, and mechanical fingers during their search. In order to find the tool, Complainant believed they would have had to remove the "boxes components" and the "Atchinson bottles," which required that a "non-routine" be written up. He stated, "They weren't going to go through all that trouble, no." (Tr. 35).

Complainant stated he was concerned about the missing tool because if something happened and it was not reported, it would fall back on him because his initials were on the socket and people's lives were at risk. (Tr. 36). He testified that he voiced his concerns to Mr. May, and that he thought it was appropriate to write-up a FAA document concerning the missing tool. He believed he told Mr. May this on either the second or third day of searching for the tool. Mr. May, however, responded, "Don't worry about it. If the airplane doesn't catch fire, you should be all right." (Tr. 37). Complainant stated there was no laughter when this comment was made. (Tr. 38).

When Counsel asked Complainant "[h]ow many times did you express your concerns to Mr. May that there would be a safety issue . . . [?]" Complainant responded as follows: "There was supposed to be times and of course throughout until I got terminated, I kept over and over and every chance I'd get, I'd look in there whenever I had a chance, even sometimes on my breaks if I had a chance." He testified the first time he expressed concern was the day after the tool went missing. Id.

Complainant maintained it was Mr. May's responsibility to provide him with the form to report the missing part. He also stated the airplane was not totally disassembled as Respondent alleged, because 90% of the structural work had been completed. (Tr. 39).

Moreover, he stated the MAT 25 form was for "a lost tool on their part." Complainant believed there was a FAA document to be completed, because the FAA must have record of a tool left on an airplane. In Complainant's opinion, the difference in forms is the MAT 25 was so Respondent knew who to return the part to,

and the FAA document was in case something happened as a result of a tool. He testified that the MAT 25 form was part of Respondent's policy. (Tr. 40).

Complainant further testified that he was familiar with CX-10, Employee Missing Tool Policy (also identified as VTSAA-DE000477), which is handed out at orientation. (Tr. 41). He could not recall who provided him with the policy. (Tr. 41-42). Nevertheless, he stated the policy had to be read and signed, indicating the person was familiar with the document and agreed to it. (Tr. 42). He testified that he understood the purpose of the document. In short, he stated the document required the employee report a lost tool. The individual could look for the tool, and he or she could report the tool to his or her supervisor. He acknowledged that the last page of CX-10 was the actual form titled "VT San Antonio Aerospace, Inc. Employee Lost Tool report." (Tr. 43). Complainant indicated this was not the form to be submitted to the FAA. He stated the MAT 25 form was not for reporting safety issues, but rather when an individual was concerned with getting his or her tool back. (Tr. 44). He did not recall Respondent providing him with any policy regarding what was needed to report to the FAA in cases of lost tools on airplanes. He could only recall Respondent indicating there is a form for the FAA. He also recalled some discussion at safety training regarding reporting items to the FAA that do not belong on airplanes. He explained that Respondent's missing tool policy does not refer to the FAA procedure. (Tr. 45). Complainant also stated he did not recall Respondent's policy addressing missing tool safety or FAA compliance. (Tr. 46).

When questioned about the second time in which the tool was searched for, Complainant responded stating the following:

Well, we looked for it. I had to give Jeff a chance to actually spend the rest of the day looking for it, but at the end of the day which only gave us a lost cause because we couldn't find it. I mean, it was just -- - we knew exactly what we were looking at because of the components the way they're put together and all the mechanics complained. They said, 'Look, I can't get in there. There's no room. I mean, we can't see what's underneath. We have to take this stuff out. I can't get my hands in there' and that was it at the end of the shift.

(Tr. 46-47). He stated Thomas Costello, Jacob Reece, James Moy, Orlando, and another mechanic or two were involved in the search. He averred there were about four to six mechanics searching for the tool; each person took turns looking for the tool throughout the day. He testified that this occurred three days after the tool went missing. (Tr. 47). After the three day period, one person may have searched for an hour and another for an hour or 30 minutes. Complainant testified that he also searched off and on. He indicated he told everyone about the missing tool. (Tr. 48.)

Throughout the search for the tool, Complainant expressed to Mr. May his inability to sleep, and that he was uncomfortable knowing the tool was still on the airplane. He testified he did not feel the issue would be taken care of, but he hoped that Respondent would work with him to recover the tool when work slowed down; however, that never happened. After asking for the form, Complainant believed the best way to handle the situation was to work with Respondent. Id. He stated "the aircraft was not airworthy<sup>4</sup> at the time because inspection [had] to give it its blessing." (Tr. 48-49).

Complainant asserted he "definitely" expressed his safety concerns because he understood the socket could hit something or become trapped in the wires or lead to a serious problem. He testified that Respondent's policy would not protect him against the FAA or the Federal Bureau of Investigations (FBI) if the aircraft crashes. Thus, he asked Respondent if there was a form that needed to be completed regarding the lost tool because he knew Respondent's policy would not protect him.<sup>5</sup> He stated he told Respondent the following, "The FAA has to know about it and if you give me this form, then we can contact them or deal with their superiors and then we'll take it from there." He indicated he wanted to resolve the problem internally, rather than go to the FAA and cause a problem. (Tr. 49). He wanted a form so the FAA could conduct an investigation. However, he testified he was never provided with any form to submit to the FAA, and that Respondent "just looked the other way." He stated every time he complained about the form, "they would just kind

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<sup>4</sup> Complainant testified airworthy means "that the inspectors have to give the airplanes their blessings," so "they have to look at throughout. Every time that you do a job, they have to look at a certain area that you did and they have to stamp it, when it's complete . . . ." Tr. 66).

<sup>5</sup> Specifically, Complainant stated he asked Respondent, "Did [he] need to fill out a form that [he] lost a tool?" (Tr. 49).

of turn against me." He asserted he "definitely" complained to Mr. May about the foreign object debris and the damage that it could cause. (Tr. 50).

Furthermore, Complainant indicated he has taken FAA classes and has received certificates. He testified that he is familiar with FAA requirements for foreign object debris and/or foreign object damage prevention. He maintained the FAA requires that you report any lost tool or damage which may be caused by foreign debris. Complainant stated a form had to be submitted to the FAA if no one intends to search for the tool. (Tr. 51). He also testified that he would be liable if the tool was located after an airplane crash, and there would be corporate liability. He stated he was concerned about fines or punishment, which is why he wanted to resolve the issue internally. (Tr. 52).

He stated the times he mentioned the lost tool were back to back. He stated he meant two or three weeks "like maybe the 4th, the 5th, and then it stopped for a while, maybe a month, maybe two months and then later I mentioned it and it just went on like that." He also indicated there was never any attempt to file a report with the FAA, and he never made a report either. (Tr. 53).

After mentioning the tool on several occasions to Mr. May, Complainant mentioned it to Tim Reinhard, Gina Foster, and Ashley Ramsey. Id. He stated they all told him "Your supervisor should be able to take care of it." (Tr. 53-54). Complainant testified that after telling Mr. May, he went to Gina Foster, a Human Resources representative. He recalled reporting it to her in September 2015; however, this was not the first time in which he reported it to her. (Tr. 54). He contacted her because he knew she handled various issues, they had a rapport, and she would know where to direct him. (Tr. 54-55). He believed Ms. Foster would do the right thing in this situation, and he explained to her that the more people that he told about the lost tool the more people that would be involved. According to Complainant, Ms. Foster provided him with Ms. Ramsey's number, whom he believed was Ms. Foster's supervisor. (Tr. 55-56).

He indicated he called Ms. Foster twice about the form and about his safety concerns. (Tr. 56-57). He testified that he called Ms. Ramsey immediately after receiving her number, which was presumably early September. He told her about the lost tool and the difficulty he was having trying to follow procedure.

(Tr. 57). He explained to her that he wanted to report the lost tool; however, he did not want to report it to the FAA but had to report it in an effort to protect himself and the safety of the airplane. According to Complainant, Ms. Ramsey told him to relay this to his supervisor, and Complainant indicated he had told his supervisor but he was getting nowhere. He also told her that the more people who knew about the situation the more people that would be involved. (Tr. 58). He also stated Ms. Ramsey did not provide him with any forms related to the FAA, and that she did not indicate any concerns related to safety regulations or his complaints regarding non-compliance with regulations. (Tr. 59).

After his conversation with Ms. Ramsey, Complainant complained again to Mr. May. Id. He surmised he complained to Mr. May about 10 or 15 times. (Tr. 59-60). He testified that Mr. May never provided him with any instructions on how to locate the form. Mr. May, however, told Complainant to stop worrying about it. Complainant stated Mr. May was not concerned about the tool or safety. (Tr. 60). Mr. May also did not appear concerned about FAA regulations. By the time he was terminated, Complainant was suffering from stomach problems due to his nervousness regarding the tool. (Tr. 61).

He also testified that he reported the lost tool to Kelly Venduza, who was his coordinator for STS, three or four times in September and perhaps April. (Tr. 61-62). She told Complainant that Mr. May should be able to resolve the issue. (Tr. 62).

Moreover, Complainant stated Mr. May provided him with training and set his schedule. He indicated Mr. Reinhard terminated him. (Tr. 63). He testified that when he brought the issue up to Mr. Reinhard, Mr. Reinhard ignored him. Complainant stated he told Mr. Reinhard that he had not completed a form to report the lost tool, but he had requested the form from Mr. May. Nevertheless, Mr. May never provided him with the form. On a separate occasion, Complainant wanted to ask Mr. May for the form, but Mr. May had lost his sister; thus, Complainant did not believe it was an appropriate time to ask, which would have been his third request. (Tr. 64). He stated one of the discussions with Mr. May occurred prior to his conversation with Ms. Foster, and the other was after Mr. May's sister passed away and after speaking with Ms. Ramsey. (Tr. 65).

He further testified that he believes he spoke with Ms. Venduza about the tool around the time the airplane was required

to be airworthy. He also spoke with her about the tool when he was having discussions about his insurance. Id.

He also testified that he told an inspector, Mike Barry, about the missing tool, and another inspector named Eddie was also aware of the situation. (Tr. 66). The inspectors work for Respondent. He stated there was a FAA inspector, but he could not recall the individual's name. He indicated there were no FAA inspectors on site, and that Mike Barry was "FAA certified." (Tr. 67).

When Complainant was employed by Randolph, their lost tool policy required that the plant be shut down or all work cease on the airplane. Work could not go forward until the part was found, and if not found, then "it [went] [to] the higher ups and they have to shut down everything. They shut down the airplane completely." He indicated he never had a problem with any other employer regarding their lost tool policy. He testified that the lost tool policy is an industry standard adhered to by most companies if the FAA is involved. (Tr. 68).

Complainant acknowledged that CX-10, page VTSAA-DE000472, was Respondent's attendance and record of hours worked policy. Complainant indicated he was familiar with the policy because it was provided during orientation, and new hires have to read and sign it. (Tr. 69). After viewing Section 6.1.3, called Notification of Absence shall be as follows, on page 473, Complainant indicated he was familiar with the procedure for notifying Respondent of an intended absence. (Tr. 70).

When he planned to take consecutive days off, he would notify Mr. May. If Mr. May was not available, then he would notify Mr. Reinhard, the security guard, or anyone else that worked in the area, including Human Resources. He testified he made it a point to notify Mr. May, and that he understood the procedure. Id. He believed he may have called Mr. Reinhard once and left a message regarding an absence. The primary person he called was Mr. May. (Tr. 71).

Complainant also stated he was familiar with Respondent's no call, no show policy. He testified that he did not recall ever having a no call, no show, but later he definitively stated he did not have a no call, no show. When he had an opportunity to provide advance notice of an absence (i.e., calling the day before), he would. However, sometimes he would call the day he was sick or the day the physician requested x-rays. While he was employed by Respondent, Complainant suffered multiple

ailments. Initially, he suffered a knee injury, and then he had an issue with his scrotum. Id. He indicated at one point he asked Mr. Reinhard for time off when work slowed down (meaning they did not have any work), which Mr. Reinhard approved. When there was work, Complainant would not take off, but if there was no work, he would rearrange his doctor's appointments. (Tr. 72). He also testified that he suffered from "incredible stomach discomfort[]." (Tr. 73). He later discovered on December 14, 2015, that he had kidney stones. He went to the emergency room twice. He indicated that he needed time off for medical treatment "almost all the time" because he was worried about the tool. He began taking sleeping pills to deal with nervousness caused by the lost tool and also painkillers. The first time that he asked for time off was due to his knee injury. (Tr. 74).

When the tool went missing, Complainant was located in the Western Hanger but was later reassigned to Hanger 7 because his previous area did not have any work. (Tr. 72-73). He indicated that when there was no work, mechanics would walk around, stand about, or go to a different hanger. (Tr. 72). He was reassigned to Hanger 7 on October 9th; Mr. May told him that he was to report to Hugo Espitia.<sup>6</sup> (Tr. 73).

Complainant testified that CX-3 was a (Google) calendar of his absences that Mr. Reinhard and Mr. May created. He became aware of the document during Mr. Reinhard's deposition. Upon a review of the calendar, Complainant testified that in March he had a doctor's appointment with Dr. Wisenthal's office, who he saw for "everything" and who referred him to a specialist. He indicated he took time off for his scrotum surgery, which Mr. Reinhard approved. He suspected this was around May. He stated Respondent always was aware when he needed time off for his medical conditions. (Tr. 76).

Complainant reviewed CX-3, page VTSAA-DE000012, and then testified that he had doctor's appointments due to his stomach problems during the month of October 2015, and since there was no work he requested "a couple of days" off. He maintained Mr. May texted him back "sure," indicating it was okay to take time off because there was no work at the time. He indicated this was from October 5, 2015 to October 9, 2015, which is when he returned back to work. (Tr. 77). He believed Mr. May sent that text on October 5th. He explained that he called Mr. May but received no answer. Then he left him a message, and Mr. May

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<sup>6</sup> Hugo Espitia was the supervisor in Hanger 7. (Tr. 79).

responded to him via text. He told Mr. May about his stomach discomfort. However, if there was work, he requested Mr. May to call him, and he would come into work and rearrange his doctor's appointment. He maintained that he told Mr. May he would be out for "a couple of days." He also testified that he told Mr. May that he might be out till Friday, and that he would return the following week, which was the "worst case scenario." (Tr. 78).

Nevertheless, Complainant testified he worked that Friday, which was the day he was transferred to Mr. Espitia's hanger to work on a door modification that required some new adjustments, fittings, and drilling. He stated Mr. Espitia requested that he come in on Saturday. Mr. Espitia also asked Complainant about the time needed to complete the project. (Tr. 79). If he did the work by himself, Complainant estimated it would take at least a month and a half. He did not believe two workers was sufficient for the job. Complainant thought the job would require "six 12's or seven 12's" and a gopher. Complainant testified that he worked a full shift that Saturday, October 10th. He recalled them saying, "We're going to go home early. Me, you, and Hugo are going to take Sunday/Monday, so that way we can go to church, then after that we'll start fresh on Tuesday." He stated he did not work on Sunday, October 11th. (Tr. 80). Complainant indicated he did not work that day because Mr. Espitia told him he was not going to be at work. "Those were his days off." He stated Mr. Espitia realized that they would be working seven 12 shifts, and that it was best for them to rest. Thus, Complainant was supposed to be off on Sunday, the 11th and Monday, the 12th. (Tr. 81).

He acknowledged that on CX-3, the (Google) calendar showed "no call, no show" on October 12th. Complainant testified that he was never contacted to come to work that day, and that he did not have any missed calls from Raul or Mr. Espitia. Id. He also testified that he does not have anything from work stating he was to report that day. He maintained the only person that called him that day was Ms. Venduza to tell him he was terminated. He further indicated that he was undergoing his CT scan that day, which he communicated to Mr. Espitia on Saturday. He stated he told Mr. Espitia since he was going to be off that Sunday and Monday, he would undergo the CT scan on Monday. Before that, he thought he would have to do the CT scan after finishing the mud work or after work hours. According to Complainant, Mr. Espitia approved. He indicated he was reporting to Mr. Espitia since he was his supervisor. (Tr. 82).

When he was terminated, he told Ms. Venduza that Mr. Espitia knew about his CT scan at Sanderos Imaging Solutions.<sup>7</sup> He testified that only Mr. Espitia knew about the CT scan. (Tr. 83). He averred Mr. May and Mr. Reinhard did not work Saturday and Sunday; therefore, they were not on the roster to call to inquire whether it was okay to work since they were at home. (Tr. 83-84). Complainant stated no one told him he had to be at work, and that he could not undergo his CT scan. He also testified that no one told him to reschedule his doctor's appointment. (Tr. 84).

Complainant testified he believes he was terminated because he "created a situation where [he] was complaining a lot and [he] created aggravation among them," meaning they retaliated against him. He stated they were "aggravated . . . , and it turned into hostility against [him] and it made things impossible." Complainant indicated he was complaining about the lost tool, and they would not cooperate. He felt the atmosphere worsened after he complained. (Tr. 85).

After his termination, Complainant spoke with Mr. Espitia, and Mr. Espitia asked if he could help. Mr. Espitia also asked why he was not at work, and Complainant told him he was terminated. Mr. Espitia told Complainant he would speak with Mr. May. However, Mr. Espitia never called Complainant back. Complainant stated Mr. Espitia also wanted to speak to Mr. Reinhard because Mr. Espitia needed him to work on the door. (Tr. 86).

Following his termination, Complainant also filed for unemployment. Id. As a result, he had to conduct five searches a week, although he sometimes did more. He also began selling at flea markets, which he has become good at; he stated he probably made more money than when he worked for Flo Aire, his employer after Respondent. Between October 2015 and March 2016, Complainant stated he always performed at least five job searches per week. (Tr. 87).

He testified that he began working for Flo Aire, an air condition company in San Antonio, Texas, around March 2016. (Tr. 87-88). He indicated he was told he would make \$18.00 per hour if he worked the second shift. However, he was paid \$16.00 per hour from noon to 6:00 pm, and from 6:00 pm to 9:00 pm, he

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<sup>7</sup> Sendero Imaging & Treatment Center is the name of the facility where Complainant underwent the CT scan. (CX-15, VTSAA-DE000402).

was paid \$18.00 per hour. His paycheck indicated his schedule was from noon to 9:00 pm. (Tr. 88).

Complainant reviewed CX-14, which were records for employment provided to the U.S. Department of Labor, Office of Administrative (Law) Judge(s). (Tr. 88-89). Specifically, the records were from Flo Aire, and on page 9 (or VTSAA-DE000288) was an affidavit for employment signed by Complainant dated March 23, 2016. (Tr. 90).

He indicated he applied with Flo Aire April 23, 2016, and that his earnings totaled approximately \$520.00 for the first week. He worked there for either two or three weeks; however, he believed it was only two weeks because that is when he received his paycheck and saw it was incorrect. For that two week period, Complainant made approximately \$1,040.00. Id. Afterwards, Complainant quit due to the discrepancy in pay, and he continued searching for work. He stated he received a job offer from Johnson Service Group and contemplated going to Spokane, Washington. He thought the job offer was made in April, but it did not "go through" until the following month. Following this employment, Complainant worked for Bellingham. (Tr. 91).

Upon reviewing CX-12, records for Johnson Service Group, page 33 (or VTSAA-DE000276), Complainant testified that he was hired on while the company's workers were on strike. According to page 23 of that exhibit, Complainant's net pay was \$12,434.03. (Tr. 92). He stated the job was located in Spokane, Washington. While employed, he worked "seven 12's" the entire month without a day off. (Tr. 93).

Complainant later went to Bellingham to work for Zodiac, working on interior cabinets. His pay ranged from \$30.00 to \$40.00 or \$35.00 to \$45.00. The contract house was Launch. Id. He acknowledged that CX-13 was a document from Launch, Work for Solutions.<sup>8</sup> He testified he made \$10,000 to \$11,000 while working for Zodiac, which was a month's pay. Later, he testified that he "definitely [made] \$10,000." (Tr. 94). However, according to CX-13, page 23 (or VSTAA-DE000464), Complainant made \$600.00. Nevertheless, Complainant indicated he received documentation of the \$10,000 amount, and that he was not sure if per diem was included in the amount referenced in

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<sup>8</sup> The actual name is Launch Technical Workforce Solutions. (CX-13, VTSAA-DE000462).

CX-13, VTSAA-DE000464. (Tr. 95). Complainant later testified the document did reflect overtime per diem. (Tr. 96).

Once he left Zodiac, Complainant began selling at flea markets. However, he never stopped looking for work. He indicated the jobs he is interested in are in Maine or Washington. Simply put, the jobs are in the North. He stated the job with Triumph in Canada was on hold. Complainant testified that he is still actively seeking employment but doubts he will be hired in San Antonio. He stated he would be interested in a job if he makes more than what he makes at the flea market. At this point, he has exhausted his resources, and has applied for "4M which is M-7 about 10 or 15 times and Boeing with PDS . . . about that same amount to no avail." Id.

He testified that after he left Bellingham he began working at the flea market in August 2016. The booth cost \$200.00 plus a \$25.00 tax, totaling \$225.00 per month. Initially, Complainant was earning \$1,200.00 to \$1,800.00 per month. As his salesmanship improved, he started selling guitars, amplifiers, cameras, etc. Anything he could get from a pawn shop, garage sale, Craig's list, etc. he would sell. (Tr. 97). Complainant testified that during 2016 he averaged about \$2,200.00 to \$2,500.00, so a total of \$24,000 yearly. He presumed the total would be the same for 2017. He further stated he received tips from the vendors and from his sister who previously sold items with their brother. From August 2016 to December 2016, he may have earned \$8,000.00. (Tr. 98). However, that amount is not the net pay because it does not take into account the merchandise that was purchased. So, after factoring in merchandise, his profit might be \$4,000.00. As time progresses, he earns more than he spends on merchandise. His profit for 2017 is approximately \$9,000.00 or between \$9,000.00 and \$12,000.00. (Tr. 99).

Complainant further testified that he is not current on his mortgage. Id. He is behind because he does not have sufficient funds. However, sometimes he does make enough to pay the mortgage. Complainant stated he first defaulted on a payment around November 2016, which was a result of paying for his sister's medication and the final cancer bill for his mother. He testified that he is his sister's primary caregiver, and that her main medication is for high blood pressure. He also testified that his mother passed away in 2008, which was the year after his brother was robbed and hit over the head. He ultimately died from a hemorrhage. (Tr. 100). Complainant testified that he has paid all of his mother's outstanding bills

but that there are one or two being looked into that are not of concern at the moment. (Tr. 101).

Complainant stated the current job market does not consist of jobs with pay in line with his credentials. The jobs pay either \$14.00 or \$18.00 per hour. Since his termination, he has received five or six CPS disconnection notices. Currently, he is in the process of setting up a payment plan. He has also fallen behind on other bills. He stated he owes money to friends and family. He testified that it is humiliating/embarrassing to borrow money. At this point, he has borrowed \$1,200 for his truck. In total, he believes he has borrowed approximately \$15,000.00. Id. He has also failed to make payments on his security system. The outstanding bill for the security system is \$65.00 or \$68.00. The monthly bill is approximately \$32.00 per month. He also stated he pawned his tools, and that he has items at roughly 15 pawn shops to include some of his brother's belongings. (Tr. 102). He stated he has not been treated by any therapist because it is financially difficult without insurance. He testified that his co-pay to see Dr. Wiesenthal is \$300.00 without insurance. (Tr. 103).

On cross-examination, Complainant testified that after losing the socket he "definitely" got along with Mr. May. He further stated he liked Mr. May, and that he liked working for him. Id. He also felt Mr. May treated him with respect, and that he never had any complaints about the way in which Mr. May treated him. Mr. May also "always" approved Complainant's time off for medical reasons. Complainant could not recall any other boss that treated him better than Mr. May. (Tr. 104).

Once more, he stated he approached Mr. May approximately 15 times about the lost tool. He testified that Mr. May along with his coworkers worked diligently to locate the missing tool. Complainant indicated that they could not work to their full potential searching for the missing tool because more components would have needed to be removed, and that "they complained about that." Id. When they searched for the lost tool, only the floorboards were removed. The oxygen bottles were never removed or the batteries. He stated the racks were probably not empty and by that he meant "definitely" they were there. (Tr. 105).

Complainant testified that when Mr. May stated, "Don't worry about it. If the airplane doesn't catch fire, you should be all right," Mr. May was being serious. He did not say it in a joking way. Complainant stated this comment was made the next day after losing the tool. (Tr. 106). However, during

Complainant's deposition, he testified that he did not recall having any conversations with Mr. May after losing the tool.<sup>9</sup> At the hearing, Complainant explained that "what [he] meant to say was if it was days after." (Tr. 108).

Complainant acknowledged that during the course of the hearing he did testify about being harassed. Nevertheless, he testified that Mr. May never harassed him. Mr. Reinhard, on the other hand, made a "smart remark" to him. Complainant replied, "No" when Counsel posed the following question regarding the smart remark: "It didn't relate to this lost tool, did it?" He stated he characterized the remark as harassment because of the way in which Mr. Reinhard made the remark, and because of his complaining about the lost tool. He surmised that the lost tool incident may have affected how Mr. Reinhard made the remark. (Tr. 109). According to Complainant, Mr. Reinhard responded to his inquiry about flying the airplane, stating: "I wouldn't fly this piece of shit even if they gave it to me because it's put together with Band-Aids." Complainant felt the statement "was a little bit --- it was not proper." Complainant indicated the airplane referenced was new and had only been flown once. He also stated the reference to Band-Aids was made because most mechanics hear stories about how some mechanics perform their jobs. Complainant testified that he does "good work," and that he took pride in his work. (Tr. 110). In his opinion, most of his coworkers were not "good" at their jobs, which he did not communicate to the FAA because he did not know each mechanic's level. For example, there are "heavy hitters" that can work on wheels and pylons, whereas other mechanics simply perform regular work. (Tr. 111).

Complainant testified that he is not an engineer but a structures mechanic. He is not an inspector and has never worked for the FAA. Id. He also testified that he never went to the FAA, and that nothing prevented him from going to the FAA about his concerns regarding the airworthiness of the airplane. He indicated he did not go to the FAA because he thought the issue could be resolved internally. However, shortly after being fired, Complainant went to the FAA. (Tr. 112).

After confronting Mr. May about the situation, Complainant reached out to Ms. Foster in Human Resources. Complainant believed Human Resources could assist him because "they have the ability to do something when there's a human factor involved or

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<sup>9</sup> Complainant's deposition is not part of the record. It was used for impeachment purposes but was not offered as an exhibit.

some issues, concerns that involves an individual who has sleepless nights or whatever and they might direct you in the right direction."<sup>10</sup> (Tr. 113).

He told Mr. Reinhard that there was a situation regarding a lost tool, and that something needed to be done to take care of the situation. Id. Complainant testified that he did not tell Mr. Reinhard about Mr. May's refusal to give him the lost tool document but that the situation needed to be handled. He stated there were other managers other than Mr. Reinhard, such as Ed Ashley, Director of Maintenance. Yet, he never approached Mr. Ashley. He also never spoke with Ed Onway, who is superior to Mr. Ashley, although some individuals recommended that he speak with him. (Tr. 114). He testified that he did not know the head guy, and that he never communicated the issue to him. (Tr. 115).

Furthermore, Complainant testified that he was not aware of a hotline to report harassment. He stated the FAA form was to make the FAA aware of an object left on an airplane. He stated he had seen the government document/form before at FAA classes, and that he was familiar with the form. He even indicated the form might be "[found] on the computer somewhere." Id. He asserted that an individual would have to ask the FAA for the particular form that needed to be completed as a result of the lost tool. He said, "There has to be a document. There is a document out there." However, he never produced the document during litigation because it was never requested. He testified that he is "pretty sure" the FAA has the form. (Tr. 116). However, Complainant testified that he did not know the standard or regulation that mandates such a form. Complainant stated he never conducted a computer search for the form, because he felt it was Mr. May's responsibility. He stated he was simply concerned about the issue. (Tr. 117).

He stated he was unaware of an employee having the ability to shut down work if he or she felt there was a dangerous situation. He indicated the supervisor would have that authority. He felt the issue regarding the lost tool was the only incident in which Mr. May did not act in a way that was safety conscious. Complainant testified that he would not say Mr. May was a very safety conscious supervisor because when he approached him about the lost tool Mr. May was "not really concerned about safety." (Tr. 118).

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<sup>10</sup> Complainant agreed that "a human factor could almost be a human condition that could cause an error or maybe a safety risk to the plane." (Tr. 163).

Complainant indicated that after he was terminated he went to OSHA. (Tr. 119).

Moreover, he testified that his left knee injury occurred in July 2015 while working for Respondent. He believes the date was the 24th or the 27th. Id. He averred he sought treatment from his primary doctor, Dr. Wiesenthal; Dr. Hebert, a specialist, on the 30th; and Dr. Patrick Simon on August 12, 2015, who is affiliated with Northeast Orthopaedics. (Tr. 120). During the hearing, Complainant reviewed the August 12, 2015 treatment note created by Dr. Simon, which reads as follows: "He was apparently at home in the backyard when he twisted his knee and felt popping sensation on the lateral side and had significant pain and swelling." Complainant testified that he did not tell that to Dr. Simon but to the head nurse. He further testified that he never said he hurt himself at home, but rather while in the backyard. He stated he told the head nurse, "I have a situation at work that Dr. Wiesenthal and Dr. Hebert are looking into it." (Tr. 121). Then he told her that he was in the backyard, and that he might have stepped on a rock, and twisted and aggravated his injury and needed something for the pain. He testified that he told the head nurse about the work injury, and that if she did not write it down it was because Drs. Wiesenthal and Hebert were looking into the matter and he was having trouble with his insurance, which he had discussed with Ms. Venduza. He further testified that he told the nurse, "Because of the issue, I'm going through some hard times and stuff, I'm here because of the aggravated situation that I have. Dr. Wiesenthal and Dr. Hebert are taking care of it." (Tr. 122). Complainant did not recall telling the doctor at San Antonio Orthopedic Group on July 30th the following: "He was mowing his lawn about two weeks ago when he slipped on a rock on some slanted ground and sustained a twisting injury to his left knee." (Tr. 122-123).

He further testified that he recalled drinking after work one time. He stated he would go to Dan Golden's house and drink beer occasionally. He also stated he would drink on some work nights and on the weekends. However, in the Social History section of the San Antonio Orthopedic Group treatment note, it states, "Do you drink?" and Complainant's response was "Frequently drunk." Complainant asserted that it should have reflected "frequently drink[s]." He indicated he is not an alcoholic and never has been because his father taught him how to drink. (Tr. 124). He testified that he did not recall

telling Dr. Wiesenthal or his office he hurt his left knee at home. (Tr. 125).

Additionally, Complainant testified that he received Respondent's attendance policy on several occasions because he worked for STS multiple times. Each orientation would include a discussion about policies and procedures to include attendance and the call-in policy. Id. He understood and was aware that if an individual had two "no calls, no shows" the individual would have to resign. (Tr. 126).

He also testified that on October 5, 2015, he called and left a message for Mr. May, stating he was not coming into work. (Tr. 126-127). He testified that he did not recall mentioning a dead truck battery. He stated he told Mr. May about his stomach pains, that he would be out "a couple of days," and if there was work he would come in and reschedule his doctor's appointments. Mr. May replied, approving Complainant's leave. He believes he told Mr. May he would return Friday, but he was unsure. (Tr. 127). He also could not recall whether he had a doctor's appointment the day he called off, but he knew he had an appointment the next day, the 6th of October, to see Dr. Wiesenthal. (Tr. 128). Complainant believes he made telephone calls to his other doctor on October 5th. He also stated he may have been awaiting a telephone call from Dr. Wiesenthal. He further testified that he could not have done anything on the 5th because of his severe stomach pains. On October 6, 2015, he went to the doctor, and the doctor was unsure what was wrong with him. (Tr. 129). The doctor did not restrict Complainant from working. (Tr. 129-130). The doctor only recommended that Complainant take it easy. (Tr. 130). On October 7th, Complainant did not return to work due to the pain he was experiencing. (Tr. 131). He indicated he did not miss work because of his knee or his scrotum. He testified that he also missed work on October 8th and returned on October 9th. When he returned, Mr. May did not have any conversation with him about his absences. (Tr. 132).

Complainant testified that when he returned after being absent, he would bring Mr. May his excuses and Mr. May would tell him to "[p]ut them on top of [his] toolbox" and that "it's not necessary." However, Complainant continued to provide the excuses because he understood the procedure. Id.

When he told Mr. May he would take off for "a couple of days," Complainant understood that to mean he could have taken ten days off. He testified he did not know the definition for

"a couple of days." According to Complainant, "a couple of days" could mean ten or twenty days; he did not know. He indicated he did not know "a couple of days" means two. (Tr. 133). He later stated "a couple of days" could mean two or maybe three days. He testified that he "put [his] trust in Jeff" when he did not call every day he took off thereby violating policy. (Tr. 134). He felt like his health was more important. (Tr. 134-135). When he returned on the 9th, he and some of his fellow coworkers were assigned to work for Mr. Espitia because Mr. May's section no longer had any work. (Tr. 135). Complainant indicated "Tim's favorites" had not been re-assigned; the average mechanics were re-assigned. He testified he did not believe Mr. Reinhard and Mr. May considered him an average mechanic because he had received compliments from George Growdy, despite Mr. Reinhard's comments during his deposition that implied he was a "mediocre mechanic." He indicated his "resume speaks for itself." He also indicated his resume illustrates he changes jobs often, because contract work pays more than working directly for a company. He further stated he worked for M-7, and that he worked for Respondent several times. (Tr. 136).

Since being terminated, he applied several times to work for M-7. However, he testified he will not be hired because the hiring manager, David McKnight, is a close friend of Mr. Reinhard and Mr. McKnight's son works for Mr. Reinhard. He further testified that he never worked for a company for more than a year because he takes another job that pays more money. (Tr. 137).

Upon reviewing CX-13, Complainant's Launch application, he testified as to why his application states his reason for leaving Respondent was "no work, layoff." He explained that sometimes coordinators alter a job applicant's application because they "are desperate so you can work for them . . . ." He further indicated he did not have a copy of his application. (Tr. 138). He also testified he completed the application electronically, and that it did include his signature. Complainant indicated he had no evidence to prove Launch altered his application as suggested. (Tr. 139). He also testified he did not believe his reason for leaving Flo Aire, "No overtime work, only 40-hour work schedule," was inconsistent with his testimony that he left due to the owner's breach of promise concerning pay. He stated there was only a 40-hour schedule at Flo Aire. He acknowledged he testified that the owner breached his promise. (Tr. 140). He stated that if the application indicated he was terminated, a mechanic like himself would not

be hired. He testified he heard of stories where applications were altered, and that his resume was altered once or twice. Complainant acknowledged that CX-11, Flo Aire application, contained, what appeared to be, his handwriting. He wrote next to reason for leaving his employment with Respondent "[n]o work." Complainant indicated that he did not have any work because he was terminated. He stated, "Do I have to be specific and say I was terminated[?]" He testified that he would not say he was terminated due to attendance. (Tr. 141).

He indicated he was told later that he was terminated due to his attendance, which was communicated by Ms. Venduza. Thereafter, he testified that Ms. Venduza implied he was terminated due to attendance problems. He also testified he did not recall telling OSHA he was terminated due to his attendance. (Tr. 142).

Before his termination, Complainant worked part of October 9th and on October 10th for Mr. Espitia. He did not work on October 11th. Complainant testified that his traditional off days were Saturday and Sunday when he worked for Mr. May. When he went to work for Mr. Espitia, he was "on loan," according to Respondent. He testified it was possible he was still under Mr. May's supervision, although loaned to Mr. Espitia. According to Complainant, he requested to be transferred to Mr. Espitia because there was a lack of work. (Tr. 143). He stated he was unaware he was on loan but that he was transferred. On Monday, October 12th, Complainant did not work, and he did not call Mr. May or Mr. Espitia. Complainant stated Mr. Espitia told him he would not work in Hanger 7 on October 12th. If he was assigned to that area, Complainant indicated he would have worked that Monday even though he had a CT scan scheduled that day. During his deposition, Complainant stated he did not miss work due to his appointment. Complainant indicated he could have gone to work and still made his appointment. (Tr. 144). He stated he missed work because Mr. Espitia gave him the day off since Mr. Espitia was not going to be at work. Mr. Espitia planned on them working Tuesday, seven 12's. Complainant further testified that Mr. Espitia and Raul were not going to be at work on the 12th, because that was their regular off day. He indicated he would be surprised if Mr. Espitia did work that day. He testified that he spoke with Mr. Espitia on October 13th. (Tr. 146).

He also testified that on the 12th Ms. Venduza had not mentioned his termination was due to his attendance but that Mr. Reinhard no longer wanted his services. Complainant opined this

was a result of his complaint, which caused people to become aggravated and led to hostility against him. He felt this was not mere speculation but was based on what he experienced. Id. The hostility was from other mechanics. He stated Mr. Reinhard never showed any hostility nor did any other managers. He believed termination was the perfect way to get rid of him if Mr. Reinhard and Mr. May were tired of his complaints. In his opinion, they got tired of his complaints, which was evident because he had Saturdays and Sundays off, they allowed him any day off, Mr. Espitia told him to take the day off, he told Mr. Espitia he had a CT scan, and then he was fired. (Tr. 147). Complainant testified that he was fired due to hostility from non-management coworkers. (Tr. 148). He indicated he could not make a determination as to whether Mr. Espitia had any animosity against him. (Tr. 149).

Next, Complainant testified his direct employer while working for Respondent was STS, which was the contract house that issued his paychecks. Id. Complainant's unemployment benefits were associated with STS's account. He stated that initially Mr. Reinhard would not tell him why he was fired, but once "TWC" requested a reason, Ms. Venduza told Complainant it was due to his attendance. (Tr. 149-150). Eventually, Complainant received his unemployment benefits, and there was no appeal. He stated he may have received benefits for five or six months, perhaps more; he could not recall. He believed he received \$400.00 or \$500.00 bi-weekly; however, he could not recall. He might have even received \$600.00 bi-weekly. (Tr. 150).

The first job he received after his termination was with Flo Aire, which he voluntarily quit. (Tr. 150-151). Complainant agreed that he could have continued to work there until he acquired another job. He attempted to work out the disagreement with the owner regarding the pay, but the owner commented that if he pays one person one amount another person will want that same amount. (Tr. 151). Complainant stated that at that time he had been communicating with Johnson Service Group, who was willing to pay him \$10,000.00 per month. He believed there might be many job opportunities in Washington. After resigning from Flo Aire and before working for Johnson Service Group, he sold items at the flea market. During this time, he did not work for someone else. (Tr. 152). He surmised the length of time between jobs was from one to three months, but he could not recall. While selling at the flea market, Complainant earned as much as he did while at Flo Aire. While working for Johnson Service Group, he was a strike replacer

where he made a substantial amount of money, far more than what he made with Respondent. (Tr. 153).

After the strike ended, he began working through a contract house called Launch in Bellingham. Zodiac was the company he was working for, making approximately \$12,000.00 per month. He testified that he did not quit the job, and that he was not fired. (Tr. 154). Complainant stated he had a family emergency, more specifically, his sister was in the emergency room; therefore, he had to return home. Before leaving the job, he explained to his supervisor he had a family emergency. He indicated his supervisor was "very cooperative." His job was placed on hold for a week or two weeks. However, on the day he was to return to Washington, his sister had "another episode" and was brought to the emergency room. Complainant testified that he explained it to "them," and "they" said, "Well let's see what --- Launch, what the company wants to do." That day he was scheduled to work but, of course, he was unable to make it. (Tr. 155). He did not feel as though he lost the job because the company was not hiring anymore so they were not sure if the job would be available. Complainant believed he no longer had the job due his sister's medical problems. He testified "family situations and health are more important than other things." At that time, his other sister was battling cancer, and she was the individual that typically helped the other sister. So, when his sister ended up in the hospital, he decided to return. (Tr. 156).

He further stated the sister that was hospitalized has high blood pressure and herniated discs due to an accident. She does not receive Social Security Disability benefits. She is able to do the following: bathe, cook, and cares for herself. However, she does not drive. He testified that they live together. (Tr. 157). She does not have any mental health issues, and Complainant has not been appointed by the court to be her guardian. He also testified he did not leave his job with Zodiac to care for his sister, but rather to find out what was wrong with her and because the doctor stated he needed to speak with him and that x-rays were going to be taken. He indicated he "definitely" could have returned to his job in Washington. (Tr. 158).

On re-direct examination, Complainant acknowledged that on page 59 of his deposition he stated he did not continue to complain about the FAA form. However, on page 64 of his deposition, Complainant indicated he continued to mention the form. (Tr. 161). Complainant testified that he continued to

ask Mr. May for the form for "[p]robably a month or two . . . ." (Tr. 161-162).

He also testified that he was familiar with human factors after taking a class while with M-7. (Tr. 162). Moreover, Complainant testified that Respondent never indicated it had any issue with his work. (Tr. 164).

Lastly, when Complainant worked for Respondent, he worked in the West Hanger until there was no work, which is when Complainant was placed on facility maintenance, performing floor work or demolition work. Complainant testified that for months there was no work. (Tr. 165). When transferred to Hanger 7 with Mr. Espitia, he was to work on a door modification. He averred the transfer was a result of there being no work in the West Hanger. Before being terminated, Complainant never returned to the West Hanger. He indicated he told Air Flow Services he was terminated because there was no work. (Tr. 166). He stated he did not indicate on his applications that he was terminated because he needed work, and he needed to pay his bills. (Tr. 167).

### **Hugo Espitia**

Mr. Espitia testified that he is a supervisor at VT San Antonio Aerospace, VT. (Tr. 168). He has been a supervisor for three years; however, he started with the company in 2007. (Tr. 168-169). Prior to becoming a supervisor, Mr. Espitia was a mechanic. (Tr. 168).

He further testified that Complainant worked as his helper. He could not recall which two days Complainant was loaned to him because he was gone for two days. Nevertheless, he did recall Complainant being loaned to him from the West Side. He testified that Complainant was under Mr. May's supervision. When Complainant was sent to his area, Complainant did not become his employee. He explained that when an employee is loaned out, work is assigned to that individual. At that time, Mr. Espitia's area had received a large amount of work; thus, he needed help. As a result, mechanics were sent over to his area. (Tr. 169). He approximated that ten mechanics were sent to his area to assist him. Mr. Espitia did not personally select Complainant; he was just sent over. (Tr.170).

Mr. Espitia stated he does not remember telling Complainant he could take two days off. Specifically, Mr. Espitia testified that he did not recall saying, "You take Sunday and Monday."

Nevertheless, he also stated, "I can remember telling him, Yeah, take two days off, but the way the situation was [at] that . . . time, I don't think I said that, yeah, you can take two days off." Id. He did recall the project they were working on, when it had to be completed, and the mechanics working on the project: Raul and Complainant. (Tr. 170-171). He also indicated he remembered saying, "Get with the other mechanic and cover all this so the work can be in progress all week." Mr. Espitia assumed the mechanics would have alternate days off. (Tr. 171).

When Complainant did not come into work that Monday, Mr. Espitia called Mr. May because no one was working on the door. He called Mr. May because Complainant was not his employee. Id. He recalled Mr. May asking, "He's not there?" Although he later testified that he was not sure what Mr. May stated, but that he remembered it was a short telephone call. He further indicated he was not informed of Complainant's termination on October 12th or any other day. Mr. Espitia recalled speaking with Raul about Complainant's whereabouts, because he knew Raul had spoken with Complainant. (Tr. 172).

On cross-examination, Mr. Espitia acknowledged that he does not recall many details, such as whether he told Complainant he could take off that Monday. (Tr. 172-173). Mr. Espitia testified that he permitted the mechanics to take off on alternate days.<sup>11</sup> He indicated he did not know whether Raul worked on the 12th. He stated he spoke with Raul on Friday or Saturday. (Tr. 173). However, Mr. Espitia later testified that Raul did not work that Monday. Mr. Espitia stated his off days are Saturday and Sunday. He also testified that Complainant never told him which days he and Raul decided to take off. Therefore, he was not sure who decided to work that Monday. He also could not recall if Complainant told him about the CT scan scheduled on that Monday, and he did not know Complainant underwent the CT scan that Monday. (Tr. 174).

Mr. Espitia testified that Complainant was only in his area Friday and Saturday, and that Complainant should have communicated with his boss about the CT scan and that he would be off. (Tr. 175).

Mr. Espitia also testified that Complainant and Raul performed good work that Friday and Saturday. He expected

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<sup>11</sup> Mr. Espitia indicated that alternate days off was fine as long as the job was "covered." (Tr. 173).

Complainant would return that Monday. If Complainant had returned on the 13th (Tuesday), Mr. Espitia would have recommended that he continue working for him, because he had no problem with Complainant. (Tr. 175).

He explained that if a mechanic is assigned to him, he is authorized to approve leave requests. However, if the mechanic is not assigned to him, then the person has to go directly to his supervisor to have the leave approved. Id. He testified that in October 2015 Complainant told him that his off days were Saturday and Sunday. Nevertheless, Mr. Espitia did not know what were Complainant's off days; therefore, he needed to report to his supervisor. He indicated that Complainant was responsible for showing up to his assigned area, and that the only thing he could do for Complainant was provide him with work. (Tr. 176).

He further stated he never asked Mr. May or Mr. Reinhard about Complainant after he was terminated. The last he heard was that Mr. May fired Complainant. He never asked the reasoning for the termination. Mr. Espitia stated Mr. May's group had been sent over to work for him for two or three weeks prior to Complainant working for him; therefore, he expected more of Mr. May's staff to be sent over to his area. Id.

On redirect examination, Mr. Espitia testified that Raul did not work on Monday, October 12, 2015. (Tr. 177).

### **Jeffrey May**

Mr. May testified that he attended school at Hallmart in the 1990s, and thereafter he began working in aviation for Dee Howard in 1992. He indicated he remained with Dee Howard until the mid-1990s. Following his employment with Dee Howard, he began working for Northrup Grumman in Lake Charles, Louisiana. Then, he later worked for Raytheon in Waco, Texas, and later began working for Gulfstream in Savannah, Georgia. (Tr. 178). Afterwards, he returned to work in Waco, Texas, where he began an armored car company, which was in operation for seven years. (Tr. 178-179). After the company shut down, Mr. May worked for VTSA as a contractor where we worked for approximately one year. Upon leaving there, Mr. May went to work for Aero,<sup>12</sup> which is his current employer. (Tr. 179).

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<sup>12</sup> Mr. May's employer is Aeria Luxury Interiors, and he is the supervisor of structures, maintenance, and modification for completions. (CX-1, VTSAA-DE000001).

He testified that during all his periods of employment in the "aerospace industry," he received safety training. He also stated he never taught safety training; he was simply a mechanic. Id.

Moreover, he acknowledged that (Complainant's) Exhibit 1 was an email he sent after Complainant was terminated. Id. He testified that the reason for the email was in response to a whistleblower complaint received regarding the lost tool. The email stated Complainant "was working on card number" and "drawing number seat insulation aircraft LYTBG." The email further stated, "Close to the end of shift in mid-March Jay [Complainant] came to me and told me he had lost a socket. I asked him how it could be lost because he had all the EWIS protection and plastic barrier in place to prevent FOD from going through." (Tr. 180).

He testified that the abbreviation "FOD" (Foreign Object Debris) is industry standard. He was not sure if the abbreviation is used in safety training. Id. He indicated that during safety training he learned about the dangers of losing FOD. For instance, the FOD can create a safety hazard. With respect to the lost socket, Mr. May stated it did not create a safety issue or pose a danger. Mr. May testified that when Complainant lost the tool, he was mainly concerned with finding it, rather than the safety of the airplane. (Tr. 181). However, Mr. May did not believe he asked Complainant why he was concerned with finding the lost tool. (Tr. 182).

Furthermore, Mr. May testified that he was familiar with Foreign Object Debris, Foreign Object Damage, and FOD, Prevention for Aviation Maintenance and Manufacturing. He stated foreign object debris is the "trash and particles and dust" and any other item that should not be on an airplane. He indicated the lost socket could be considered FOD. If Complainant had explained to Mr. May that he had training on FODs and that the lost tool caused him to be concerned, Mr. May stated he could have understood why Complainant felt there was a risk and safety hazard due to the lost socket. Id.

He testified Complainant complained to him about the lost socket approximately two times or at maximum three times. Id. The first time Complainant complained was the day he lost the socket, specifically, at the end of Complainant's shift. He surmised it might have been March 2015. Mr. May could not recall the next instance when Complainant complained, but he did testify that they searched for the lost socket the day it went

missing, and that much more time was expended searching for the tool. He indicated Complainant wanted to file a document in response to the lost tool. He also testified they searched for the lost tool for a few days to a week. (Tr. 183). He did not recall Complainant complaining in September 2015 about filing a report. (Tr. 183-184).

Mr. May testified that the week of October 5th through October 12th was a slow week, because there was no work in his department. As a result, Complainant was loaned out to a different hanger because the other hanger had plenty of work to do on an airplane. (Tr. 184). Complainant was officially loaned out on Friday, October 9th. Mr. May stated he believes Complainant worked October 9th and 10th. Mr. May also testified that on October 5th Complainant called him and told him that his car battery was dead, and that he would either work that day or the next day. However, Complainant did not return on the 6th, 7th, or 8th. (Tr. 185). After returning to work, Complainant told him he had stomach issues. (Tr. 185-186). When Complainant failed to return on the 6th through 8th, Mr. May considered those to be "no calls and no shows." He testified that Complainant was to return either on that Monday or at the latest that Tuesday. Mr. May also testified that when Complainant returned, he discussed his absences, and he informed him of the serious nature of his offense. Mr. May stated he disregarded the absences because he knew Complainant was going to be working for Mr. Espitia. (Tr. 186).

Mr. May also stated he never heard Mr. Reinhard only fired Complainant due to his absence on October 12th. He also indicated he never read Mr. Reinhard's deposition. Id. If Mr. Reinhard stated the termination was due solely to the October 12th absence, Mr. May stated he was unsure if he considered the absences from October 5th through the 8th. When he and Mr. Reinhard discussed Complainant's absences from the 5th through the 8th, prior to termination, they gave Complainant "the benefit of the doubt" and sent him over to Mr. Espitia's area. When Complainant failed to show that Monday, Mr. May stated that was the determining factor because he had just been counseled about his absences that Friday. (Tr. 187).

He further testified that he did not speak with Complainant on October 12th or on October 13th. He indicated that he never heard Complainant was told he could take off on the 12th. Mr. May stated Complainant would not have been fired if he knew he was given that day off. He stated Mr. Espitia called him on October 12th and asked about Complainant's whereabouts. Mr.

Espitia asked him if he knew where Complainant was or if Complainant was in his area. Mr. May testified that if Complainant's rendition of events is accurate, he had no opinion concerning giving Complainant his job back. (Tr. 188). If Complainant would have called him, Mr. May testified "that would have changed everything." He testified that they overlooked Complainant's absences from the 5th through 8th and loaned him out to Mr. Espitia. (Tr. 189).

On cross-examination, Mr. May testified that they spent "over a week, over 40 hours" searching for the lost socket. He indicated that when an airplane is put back together, the department goes through an area closeout, which means "each component that goes back in the plane is "consented for" by the Avionics crew, by Q&C, by [his] department everybody that pertains to what goes in that certain section. Everybody has to consent before it goes through . . . Quality Control." Id. He testified that his department spent more than 40 hours searching for the lost socket tool, which does not include the time spent by Avionics and the other crew. He explained that for every part that is placed in the airplane there is a piece of paper attached to it signifying it is accounted for. (Tr. 190).

Mr. May stated that the airplane Complainant was working on arrived in December 2014. During Christmas break, the airplane remained in Hanger 8. In January the airplane was placed in his hanger, the West Hanger, and his department began disassembling it in January, February, and March. (Tr. 191). He further explained that the racks were taken out of the airplane as well as the batteries, the oxygen bottles, and the black boxes. (Tr. 191-192). At the time the tool was lost, Mr. May believed they had enough room to search for the missing tool. He described the spot as "tight" with insulation. However, the insulation had to be removed due to the search. He further stated they removed the floorboards and the stairs along with the "plastics." He testified that he does not believe anything else could have been done to locate the socket. (Tr. 192). Mr. May also testified that after the search Complainant told him he was unsure whether the socket was on the airplane. Mr. May indicated that he did not hold it against Complainant that he lost the tool or that he reported it. (Tr. 193).

He stated he did not recall Complainant complaining about the lost tool up until September 2015. He also testified that Complainant absolutely did not complain 15 times to him about the lost tool. Furthermore, he stated the lost tool or the reporting of it was not factored into Complainant's termination.

Id. Mr. May also testified that he had never heard of an FAA form that needed to be completed to document the lost socket. (Tr. 194).

On redirect examination, Mr. May stated had he known of Complainant's CT scan on October 12th, it would have been an excused absence. Id.

On re-cross, Mr. May testified that if Complainant's CT scan did not interfere with his work, then he would have expected him to be at work. Id.

On a subsequent examination by Complainant's Counsel, Mr. May testified once more that had Complainant notified him of his CT scan he would not have been terminated. He further stated he generally does not know the time of his employees' appointments. He testified that "a lot of times, guys just don't want to be at work," meaning they would prefer to be home. (Tr. 195).

Upon questioning by Respondent's Counsel, Mr. May testified that had Complainant been at work on the 5th, 6th, 7th, or the 8th he would have been sent over to Mr. Espitia earlier. This is because Mr. Espitia's area had much work because an old airplane had just arrived with much structural work needing to be completed. (Tr. 196).

Upon questioning by the undersigned, Mr. May stated Complainant asked him for a FAA form; however, he testified that he does not have the form and never saw the form. Mr. May testified that he searched for the form, and that there is no form to be provided to the FAA. Id.

When questioned by Complainant's Counsel, Mr. May testified that because he never heard of or saw the form, he "wouldn't know how to go about that." (Tr. 197).

In response to Respondent Counsel's questioning, Mr. May stated if Complainant had any concerns regarding the lost tool or reporting it, he could have informed Mr. Reinhard or the QC Manager. He indicated that other people did become involved with the situation much later, but he did not believe Complainant had reached out to those particular individuals. According to Mr. May, other individuals became involved two or three weeks following the lost tool. Mr. May stated Complainant never went to the Director of Maintenance or any other higher authority figure. Id. He testified that he notified these other individuals. Specifically, he stated he notified Mr.

Reinhard. He could not remember whether he told the Director of Maintenance or if Mr. Reinhard did. (Tr. 198). Lastly, he stated that if an employee believes there is a safety concern that is not being addressed, the employee could submit their concern on Respondent's intranet site. Mr. May did not believe Complainant did that. (Tr. 199).

### **Timothy Reinhard**

Mr. Reinhard testified that he did not customarily deal with lost tool complaints. He stated he did not recall Complainant complaining directly to him about the lost tool. Mr. Reinhard indicated that he terminated Complainant because Mr. May told him Complainant was a no call, no show on October 12th. (Tr. 201). He also testified that the only date he considered when terminating Complainant was October 12th. (Tr. 201-202).

On cross-examination, Mr. Reinhard indicated he did not recall Complainant complaining about the lost tool or that Mr. May was not allowing him to file a report. Mr. Reinhard also denied making a statement to Complainant about not wanting to fly the airplane because it was put together with Band-Aids. (Tr. 202).

### **Ashley Ramsey**

Ms. Ramsey testified that she is a HR Administrator. She also stated she does not know Complainant, and that she does not remember the Complainant complaining to her about a lost socket. She testified that she did not recall the Complainant complaining to her about a FAA form to report the lost tool. If he did make the complaint, she testified that she would have remembered that. (Tr. 204).

She further testified that she does not handle safety issues concerning airplanes. In addition, she stated she does know Ms. Foster, and that she no longer works for the company. Ms. Foster was a HR Administrator, who handled contract issues. She testified that she works directly with employees. Her job duties include hiring, W-4 amendments, pay changes, processing notes, and completing paperwork. She stated she reports to Shannon Hayes. (Tr. 205). Ms. Hayes is the Assistant HR Manager, who reports to Kathleen Flores. If an employee has an issue regarding harassment, discrimination, or unfair treatment, the person would report that to Ms. Flores. (Tr. 206).

Ms. Ramsey stated she was "very certain" Complainant never spoke with her regarding the lost tool or his inability to report it. Id.

On cross-examination, Ms. Ramsey testified that if an individual comes to her with an issue, her first question is whether the person is Respondent's employee or a contractor. (Tr. 206-207). If a contractor, then she directs the person to report to their coordinator. She stated Complainant's coordinator was Ms. Venduza. So, if Complainant had a concern, she would have directed him to Ms. Venduza. She testified that the only information she inputted into the system was an individual's job title and their name. She stated she had no knowledge of the person's pay. She also had no knowledge regarding job duties because she did not work in the hangers. (Tr. 207).

#### **Other Records**

#### **VT San Antonio Aerospace, Inc. Policy & Procedure Acknowledgement Form**

On December 29, 2014, Complainant acknowledged he was aware of MAT-025. (RX-1, VTSAA-DE000047; CX-6, VTSAA-DE000047; CX-10, VTSAA-DE000480).

#### **VT San Antonio Aerospace, Inc. Policy and Procedure Manual Subject: Attendance & Record of Hours Worked**

Respondent's attendance and record of hours worked states, in part, that the Manager of Human Resources is responsible for enforcing and updating the policy. (RX-2, VTSAA-DE000472; CX-10, VTSAA-DE000472). The policy also states that an employee is responsible for reporting for duty when scheduled to work. If the employee fails to call and report ("no call, no shows") to work for two consecutive days, the "employee is considered to have abandoned their job and is subject to termination." The same applies to two inconsecutive days. If an employee will be absent, the employee is required to call the security guard at least 30 minutes prior to his start time. The employee must also inform his lead, supervisor, or manager. (RX-2, VTSAA-DE000473; CX-10, VTSAA-DE000473). When an employee is hired, the person is assigned a unique employee number, which is used "for identification and recording of attendance and other employee activities." (RX-2, VTSAA-DE000474; CX-10, VTSAA-DE000474).

**VT San Antonio Aerospace Policy and Procedure Manual**  
**Subject: Employee Missing Tools**

The purpose of the employee missing tool policy is "to provide a procedure for employees to register personal tools that are missing at the facility so they may be returned to their proper owner." The policy applies to all of Respondent's employees. According to the policy, the Manager of Tooling/Warehouse, through the Tooling Lead, is responsible for enforcing and updating the policy. "Employees may list personal tools missing at the VT San Antonio Aerospace, Inc. facility on the 'Employee Lost Tool Report' [Form MAT-025-1]." The report is maintained in each tool room. (RX-2, VTSAA-DE000477; CX-10, VTSAA-DE000477). The employee is only required to register the missing tool at one tool room. It is the Tool Room Lead that is responsible for maintaining a copy of the report sent to other tool rooms in order for tools to be registered with all tool rooms. The tools registered must "have a minimum replacement catalog value of \$100.00." The tool must be identified with a serial number, an etched name, an etched social security number, etc. A missing tool may remain on the registered Employee Lost Tool Report for a maximum of six months or until found, whichever comes first. (RX-2, VTSAA-DE000478; CX-10, VTSAA-DE000478).

**Texas Worker's Compensation**

Complainant filed a claim for worker's compensation for a left knee injury he stated occurred on July 24, 2015. (CX-18, p. 1). Complainant stated he slipped and fell on a wet area at work. He also alleged he was exposed to insulation, fiberglass, mold, and water damaged structural building materials due to construction work. (CX-18, p. 2).

**The San Antonio Orthopaedic Group, LLP**

On July 30, 2015, Complainant sought treatment for left knee pain. Complainant stated he experienced pain for one week after falling into a dip while doing yard work. He indicated his left knee turned in the opposite direction of his body. In the Social History section of the treatment note, it states, in part, "Do you drink alcohol? Frequently Drunk." (RX-4, VTSAA-DE000416; CX-16, VTSAA-DE000416).

Complainant's treatment note dated August 3, 2015, states Complainant "was mowing his lawn about two weeks ago when he stepped on a rock on some slanted ground and sustained a

twisting injury to his left knee." (RX-4, VTSAA-DE000420; CX-16, VTSAA-DE000420).

#### **Northeast Orthopaedics & Sports Medicine**

On August 12, 2015, Dr. Patrick M. Simon noted Complainant complained of a left knee injury. Complainant explained to Dr. Simon that he injured his left knee at home in his backyard, at which time he experienced a popping sensation on the lateral side, and significant pain and swelling. (RX-5, VTSAA-DE000436).

On August 14, 2015, Dr. Simon certified that Complainant was able to return to full duty with no restrictions on August 18, 2015. (RX-3, VTSAA-DE000026; CX-5, VTSAA-DE000026).

#### **Martin J. Wiesenthal, M.D., P.A.**

On October 6, 2015, Complainant sought treatment from Dr. Wiesenthal for abdominal pain. The treatment note indicates Complainant had been suffering from abdominal pain for several weeks. (CX-15, VTSAA-DE000315).

#### **Email from Timothy Reinhard to Kelly Venduza, Ed Ashley, and Jeffrey May**

On October 12, 2015, Mr. Reinhard emailed Ms. Venduza, stating he was terminating Complainant due to attendance problems. (RX-5, VTSAA-DE000015; RX-9, VTSAA-DE000015; CX-2, VTSAA-DE000006).

#### **Sendero Imaging & Treatment Center**

On October 12, 2015, Complainant underwent a right upper quadrant sonogram, and CT scan of the abdomen and pelvis without contrast, which was requested by Dr. Wiesenthal. (CX-15, VTSAA-DE000400, VTSAA-DE000402).

#### **Contract Personnel Termination Form**

The form indicates Complainant was involuntarily terminated for attendance. It notes Complainant last worked on October 10, 2015, and that his project manager was T. Reinhard. The document was signed October 13, 2015. (RX-5, VTSAA-DE000014; RX-10, VTSAA-DE000014; CX-2, VTSAA-DE000005).

## **VT SAA Personnel Database Screenshot**

Respondent's personnel database indicates Complainant was terminated due to poor attendance. (CX-2, VTSAA-DE000004).

## **Email Communication between John Ross and John Loomis**

On October 28, 2015, the Director of Quality, John Ross, emailed John Loomis,<sup>13</sup> stating he conducted a meeting with his team in regards to the whistleblower allegation made by Complainant concerning the lost tool. He further stated that when the tool went missing a team of six individuals performed a thorough search for the tool. He also indicated "the probability of the tool being lost is nil due to the fact that EWIS (plastic protection) is placed in open areas where debris or other items may have the potential to fall through." The other quality control measure to locate the debris was the area closeout process, which requires that an inspector evaluate the area prior to closure. Mr. Ross explained to Mr. Loomis that the area was searched several times after the area was closed. Furthermore, Complainant indicated he did not believe the tool was in there. He believed the tool could have been picked up by someone else. (RX-6, VTSAA-DE000023; CX-4, VTSAA-DE000023).

On October 29, 2015, Mr. Loomis responded to Mr. Ross, stating Form MAT-025-1, Employee Lost Tool Report should have been provided in this instance, and he requested that Mr. Ross send him a copy of the form. In Mr. Ross's response, he stated he would request the form from the team and check to see if the form was submitted. In addition, he stated the MAT-025-1 is completed by the employee, and that the tool must have a minimum catalog value of \$100.00. (RX-6, VTSAA-DE000022; CX-4, VTSAA-DE000022).

In Mr. Ross's follow-up email, also dated October 29, 2015, he indicated he consulted with the team and was informed that Complainant did not submit the form to the Lead or to the Supervisor. (RX-5, VTSAA-DE000021; CX-4, VTSAA-DE000021).

## **San Antonio Aerospace, Inc. Intranet**

The intranet printout illustrates Complainant worked on October 9, 2015, for 8.21 hours and on October 10, 2015, for 1.35 hours. Raul Perez worked on October 9, 2015, for 8.79 hours and on October 10, 2015, for .05 hours. Mr. Espitia

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<sup>13</sup> John Loomis is an Avionics & Airworthiness Inspector.

worked on October 12, 2015, for 1.07 hours. On October 17, 2015, Mr. Perez worked for .03 hours. (RX-6, VTSAA-DE000030; RX-7, VTSAA-DE000030).

### **San Antonio Aerospace, Inc. Overview Time Events**

Respondent's personnel time log database shows Complainant clocked out on October 10, 2015, at 15:36:49. (RX-6, VTSAA-DE000032).

### **Google Calendar**

A copy of the Google calendar with handwritten notes states the dates Complainant missed work. Listed are the following dates in 2015: March 2, April 18, May 2, June 2, July 5, August 15, September 1, and October 5. (RX-8, VTSAA-DE000033; CX-3, VTSAA-DE000011). On the calendar for the month of August 2015, there is a handwritten note spread across the dates of August 28th through August 30th, which states "knee hurt him." (RX-8, VTSAA-DE000038; CX-3, VTSAA-DE000038). For the month of October 2015, there are multiple handwritten notes. On October 5th, there is a note that states, "[b]attery dead in truck." For October 5th through 8th, there is a note which states, "[n]o call [n]o show." Lastly, on October 12th, there is a note which states, "[n]o call [n]o show." (RX-8, VTSAA-DE000040; CX-3, VTSAA-DE000012).

### **Email from Jeff May to Ed Ashley and Tim Reinhard**

On October 27, 2015, Mr. May sent an email to Mr. Ashley and Mr. Reinhard, recapping the lost tool incident in mid-March. He stated Complainant told him that he had lost a socket. Mr. May responded to Complainant how did he lose the socket when there was "EWIS protection" and a plastic barrier to prevent FOD from going through. He further stated Complainant searched for the socket the rest of that day and the next. However, Complainant was not successful in finding the socket; thus, Mr. May requested that Orlando Barrios, James Moy, Daniel Golden, Thomas Castillo, and Martin De La Cerda, Complainant's nephew, search for the socket. Mr. May stated they searched for hours, but were unsuccessful in locating the socket. Days later, Complainant approached him, and stated he did not believe the socket was inside of the airplane. Complainant further stated the socket could have been located anywhere. Perhaps, someone may have picked up the socket. Later, the airplane underwent several modifications, cleanings, and approvals. Mr. May indicated he never told Complainant to forget about the socket.

Actually, Complainant failed to mention the socket again. In addition, Mr. May stated Complainant was not terminated as a result of the socket, but rather he was terminated because of his ongoing attendance problems and no call, no shows. (CX-1, VTSAA-DE000001).

### **ST Aerospace Complaint Procedure**

The complaint procedure requires that an employee promptly report any incident of harassment or any other violation of the company's EEO/Harassment Policy directly to the Human Resources Manager. It further states that it is insufficient to report the incident to the employee's manager or supervisor. (CX-10, VTSAA-DE000061).

### **ST Aerospace EEO Harassment Policy**

The policy states, in part, that ST Aerospace does not tolerate any form of harassment of its employees. "Harassment includes any hostile, intimidating, offensive, insulting, demeaning or otherwise unwelcome words or conduct." "Harassment of our employees is forbidden and will result in disciplinary action, which may include immediate discharge." (CX-10, VTSAA-DE000062).

### **Flo Aire Service Inc. Application for Employment**

Complainant noted the reason for leaving his employment with Respondent was "no work." (RX-11, VTSAA-DE000286; CX-14, VTSAA-DE000286).

### **Launch Employment Application**

Complainant noted the reason for leaving his employment with Flo Aire was "no over time work/only 40 hour week schedule." He listed the reason for leaving his employment with Respondent was "no work/layoffs." (RX-13, VTSAA-DE000444; CX-13, VTSAA-DE000444).

### **Employment Training Summary**

Complainant completed, in relevant part, the following courses: Human Factors Ethics (4 HR); Human Factors Introduction; Human Factors Program Training for Maintenance; Safety Training (Recurrent); and Maintenance Ethics, Standards, and Best Practices. (CX-B-2, VTSAA-DE000045).

#### IV. CONTENTIONS OF THE PARTIES

Complainant contends Respondent has not disputed he engaged in protected activities. Specifically, he alleges he reported a lost tool, and after a day and a half of searching for it and requesting a lost tool report, Respondent told him not to worry and to forget about it, which was a safety risk and violation. He contends he complained to Respondent about his inability to file a report with the FAA after requesting the necessary paperwork. He alleges he was denied the lost tool report. He also argues Respondent was not compliant with FAA standard allowable limits with respect to a HI-LOC that was placed too close to a cable. Complainant asserts he was trained on FAA regulations, which require that he prevent FOD or foreign object damage, and to report it. Additionally, Complainant argues that Respondent has not disputed possessing knowledge of the protected complaint(s).

Following the lost tool incident, Complainant also contends he was told there was no more work in his area. Then Complainant asked to continue to work but was reassigned to "lesser duties." Complainant contends "he was forced to perform manual work with an injured knee" because Respondent stated there was not much work so employees were made to work in facility maintenance. As a result, Complainant argues he suffered respiratory problems. Complainant contends he was "reassigned in an effort to force him to quit because of his safety complaints." He also contends the work environment worsened after each request for the FAA form. He further argues he was wrongfully terminated as a result of his protected activities.

Complainant avers the only reason Respondent provided for terminating him was his absence from work on October 12, 2015. However, Complainant contends Respondent admitted Complainant's absence would have been excused since Complainant was undergoing a CT scan. As a result, Complainant argues that since Respondent admitted Complainant's absence was a "protected" absence this is evidence his termination was pretextual. Complainant also argues Respondent has failed to provide clear and convincing evidence that it would have terminated Complainant for his protected absence irrespective of the lost tool.<sup>14</sup>

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<sup>14</sup> In Complainant's brief, he contends there were two adverse actions as a result of his protected activity: (1) reduction in hours due to a lack of work and (2) his termination. Complainant argues that the only element that is disputed is whether Complainant's protected activity contributed to his

Complainant also finds Respondent's argument that the tool was not of a size to warrant a reasonable belief that a violation had been committed irrelevant. Complainant asserts Mr. May testified that foreign object debris could end up in an airplane and could cause damage. He argues Respondent was not concerned about the lost tool, and that he determined what procedure and protocol was required and concluded it was not followed.

Respondent, on the other hand, contends Complainant's reasons for his termination are not supported by the facts. First, Respondent argues that complaints by non-management coworkers do not constitute evidence that Respondent harbored any animus against the Complainant. Additionally, no evidence exists that management expressed any animus against the Complainant for either the lost tool or insisting it be reported to the FAA. In fact, Complainant testified that he and Mr. May had a good work relationship, and that Mr. May treated him with respect, never harassed him, and gave him all the time he needed off for medical reasons. Respondent contends that if Mr. May wanted to terminate Complainant's employment, he could have fired him after his no call, no show on October 6th through 8th. Respondent also argues that Mr. May could have terminated Complainant because of a lack of work in his department, but instead loaned Complainant out to another department, which is not conduct of a supervisor that harbored a retaliatory animus towards his employee.

Moreover, Respondent argues Complainant's allegation that he was given October 12th off was undercut by Mr. Espitia's testimony, who denied given him the day off. Respondent contends that "it was entirely reasonable for May and Reinhard to conclude that [Complainant] was not taking the [c]ompany's policy seriously, even after being warned by May." Respondent also argues that Complainant's excuse for missing work due to his CT scan is "unavailing" because he admitted he did not miss work because of the appointment, and that he could have gone to work regardless of the appointment.

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adverse employment actions. Complainant asserts that Respondent only reduced his hours after he lost the tool in the airplane, and after repeatedly asking for the FAA form. I find Complainant mentions a reduction in hours due to a lack of work for the first time in brief. Accordingly, since no Amended Complaint was filed with this Court, I will address the allegations as mentioned in Complainant's Complaint.

In sum, Respondent argues there is no evidence that Complainant's complaints factored into Respondent's decision to terminate him.

Respondent also contends some of Complainant's testimony was "clearly false" or "at least highly suspect," thus, raising the issue of his credibility.

Lastly, Respondent argues there is clear and convincing evidence that Complainant would have been discharged despite his contentions. Specifically, Respondent contends that Mr. May and Mr. Reinhard had no animus towards Complainant, that Complainant had violated the attendance policy previously, and that he never received approval from his supervisor to take off from work on October 12th.

Assuming, arguendo, Complainant proves his **prima facie** case, Respondent argues any damages would need to be offset by his unemployment benefits and his interim earnings obtained through his various periods of employment.

#### **V. APPLICABLE PROVISIONS OF AIR-21**

The employee protective provision of AIR 21 is set forth at 49 U.S.C. § 42121. AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provides 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 carriers safety" under subtitle VII of Title 49 of the United States Code or any other law of the United States.

49 U.S.C.A. § 42121(a) states:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

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

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

**VI. ELEMENTS OF AIR-21 VIOLATIONS AND BURDENS OF PROOF**

Accordingly, to establish a **prima facie** case of discrimination under AIR 21, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;
2. The complainant engaged in protected activity as defined by the act;
3. The employer took adverse action against the employee;
4. The employer knew or had knowledge that the employee was engaging in protected activity; and

5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-003, at 8-9 (ARB Jan. 30, 2004); Svensen v. Air Methods, Inc., ARB No. 03-074, ALJ No. 2002-AIR-16, at 7 (ARB Aug. 26, 2004). The fifth **prima facie** element can be shown by proving that a complainant's protected activity was a contributing factor to any adverse action bestowed by respondent. Hirst v. Se. Airlines, Inc., ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47, at 7 (ARB Jan. 31, 2007); see also Lanigan v. ABX Air, Inc., ALJ No. 2007-AIR-010 (ALJ Apr. 30, 2008).

Moreover, the evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) of AIR 21 require Complainant to establish ". . . a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C.A. § 42121(b)(2)(B). To prevail in an AIR 21 adjudication, Complainant must demonstrate or prove his **prima facie** case by a preponderance of the evidence. Clemmons v. Ameristar Airways et al., ARB No. 08-067, ALJ No. 2004-AIR-011, at 4-5 (ARB May 26, 2010); Malmanger v. Air Evac EMS, Inc., ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). Preponderance of evidence is the greater weight of evidence or superior evidence, weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Brune v. Horizon Air Indus., Inc., ARB No. 04-037, ALJ No. 2002-AIR-08, at 13 (ARB Jan. 31, 2006).

After Complainant has established his **prima facie** case by a preponderance of the evidence, an employer is then required to demonstrate ". . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(b); 29 C.F.R. § 1979.104(c); see also Kinser v. Mesaba Aviation, Inc., ALJ No. 2003-AIR-007 (ALJ Feb. 9, 2004). Thus, Respondent may avoid liability under AIR 21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. Taylor v. Express One Int'l, Inc., ALJ No. 2001-AIR-002 (ALJ Feb. 15, 2002). If Respondent meets this burden, the inference of discrimination is rebutted and complainant then assumes the burden of proving by a

preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." Id.

### **A. Credibility**

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., 92-ERA-19, at 4 (Sec'y Oct. 23, 1995).

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

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

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altomose Const. Co. v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

In this instance, I found Complainant was both equivocal and contradictory. Thus, I find his credibility to be poor.

Here, Complainant testified that he sustained a left knee injury on July 24, 2015 or July 27, 2015, while working for Respondent. Yet, when he sought treatment at the San Antonio Orthopaedic Group on July 30, 2015, he indicated he sustained the left knee injury while performing yard work at his home. He reiterated the same scenario to the staff at the Northeast Orthopaedics & Sports Medicine. Complainant even filed for workers' compensation benefits through the Texas Workers' Commission, alleging he sustained a left knee injury while at work.

Complainant also testified that he left Mr. May a message, stating he would take off from work on October 5th, and that he would be out for "a couple of days." During the hearing, Complainant asserted "a couple of days" could mean two days, three days, ten days, or maybe even twenty days. When he was questioned as to whether he ever had a no call, no show, Complainant stated he had not. However, later during the testimony, Complainant testified that he had put his trust in Mr. May when he did not call in every day during October 2015 (i.e., October 6th through 8th).

Complainant's testimony continued to vacillate when he testified about the FAA form. First, Complainant testified that he recalled Respondent mentioning the FAA form, and having to report lost tools on an airplane to the FAA. Next, Complainant stated he asked Respondent if he had to complete a form. Then he testified "that there has to be a form." Followed by, "there is a form" that needed to be completed and submitted to the FAA.

At one point during the hearing, Complainant testified the purpose of the form was in case no one searched for the tool. Then, he later testified that the form needed to be completed if FOD was left on the airplane.

He also testified that he never went to the FAA about the tool incident, but then he later testified he went to the FAA after he was terminated.

Complainant further testified that Mr. Espitia told him he would be off work on Monday, October 12th, and that Raul and he could have that Monday off. However, according to Respondent's intranet time log, Mr. Espitia worked on October 12th, which was

articulated by Mr. Espitia during his testimony, and expected Raul or Complainant to be present.

In addition, Complainant's lack of candor was further on display when he testified he wrote on his Launch application the reason for leaving his employment with Respondent was due to "no work, layoffs," which was a falsehood. He also wrote "no over time work/only 40 hour week schedule," for his reason for leaving Flo Aire, which was disingenuous because he actually quit. When questioned during the formal hearing about his reasons for leaving his various employment, Complainant asserted, "Do I have to be specific and say I was terminated[?]"

During Complainant's deposition, he stated he did not recall having any conversations with Mr. May following the lost tool; however, during the hearing, he testified that he did have conversations with Mr. May after he lost the tool. Also during his deposition, he stated he did not continue to ask Mr. May about the FAA form, but in the next breath, he stated he did continue to ask Mr. May about the FAA form.

With respect to the other witnesses, I found the testimony of Mr. Espitia, Mr. May, Mr. Reinhard, and Ms. Ramsey to be generally credible.

Moreover, in order to more suitably address the issues in this matter, the undersigned shall address each of the **prima facie** elements separately.

#### **B. Employer and Employee Status**

Under 49 U.S.C. § 40102(a), air carrier is defined as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." Air transportation is defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5). Contractor means "a company that performs safety-sensitive functions by contract for an air carrier." 29 C.F.R. § 1979.101.

A covered employee under AIR 21 regulations is defined as:

An individual presently or formerly working for an air carrier or 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.

Here, Respondent states in its brief that it "provides [m]aintenance, [r]epair, and [o]verhaul (MRO) services for commercial airlines and cargo companies." It does not contest its status as a contractor. In the Secretary's Findings, the OSHA Regional Administrator found Respondent to be a "contractor" under the law. Additionally, there is no evidence of record to refute Respondent's status. Accordingly, I find and conclude Respondent is a "contractor" and therefore a covered employer under the Act because it provides safety-sensitive functions by contract for air carriers.

With regard to Complainant, he was an aircraft structures mechanic through a contract house, Airplanes, Inc., that provided workers to Respondent, a contractor under the Act. Complainant worked for Respondent from December 29, 2014 through October 12, 2015, at which time he was terminated by Mr. Reinhard, one of Respondent's supervisory employees. In the Secretary's Findings, the OSHA Regional Administrator found Complainant to be a covered employee. In Respondent's Answer, it admitted Complainant was a covered employee under the Act. In the parties' briefs, neither party contested Complainant's status as a covered employee. Therefore, I find and conclude Complainant is a covered employee under the Act because his employment was affected by Respondent.

### **C. Protected Activity**

"An employee engages in protected activity any time he or she 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, so long as the employee's belief of a violation is subjectively and objectively reasonable." Occhione v. PSA Airlines, Inc., ARB No. 13-061, ALJ No. 2011-AIR-12, at 9 (ARB Nov. 26, 2014) (quoting Benjamin v Citationshares Mgmt., LLC, ARB No. 12-029, ALJ No. 2010-AIR-1, at 5 (ARB Nov. 5, 2013)).

In Sewade v. Halo-Flight, Inc., the Administrative Review Board (ARB) held "the AIR 21 whistleblower statute does not require that protected activity relate 'definitely and specifically' to a safety issue." ARB No. 13-098, ALJ No. 2013-

AIR-9, at 8 (ARB Feb. 13, 2015). “[A]n employee need not prove an actual FAA violation to satisfy protected activity . . . .” Id. However, the complainant’s “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, at 9.

Complainant is not required to communicate the reasonableness of his or her belief with his or her employer or agencies. Sylvester v. Paraxel Int’l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-00039 and 00042, at 19 (ARB May 25, 2011). Nevertheless, communications made by the complainant that convey the reasonable belief to the employer “may provide evidence of reasonableness or causation.” Id. at 15. In determining whether an employee “actually believed the conduct complained of constituted a violation of pertinent law,” “the plaintiff’s particular educational background and sophistication [is] pertinent.” Id. at 14-15 (quoting Day v. Staples, Inc., 555 F.3d 42, 54 n.10 (1st Cir. 2009)).

In order to prove the subjective element, the complainant must prove he or she held the belief in good faith. Burdette v. ExpressJet Airlines, Inc., ARB No. 14-059, ALJ No. 2013-AIR-16, at 5 (ARB Jan. 21, 2016). Whereas with objective reasonableness, the complainant’s protected activity “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” Sylvester, at 15 (quoting Harp v. Charter Commc’ns, 558 F.3d 722, 723 (7th Cir. 2009)).

### ***Subjective Reasonableness***

Complainant contends he reported a lost tool (i.e., the 11/32 socket) and requested a lost tool report (FAA form) but was told to forget about it. He alleges he was denied the FAA form. He further contends he reported a non-compliant HI-LOC, which did not comport with FAA standard allowable limits.

Complainant also testified that he was familiar with FAA requirements, specifically, foreign object debris and/or foreign object damage prevention, and human factors. He indicated human factors are specific to FAA regulations that he studied and learned. He further testified about the safety concerns he had regarding the lost tool, for instance, the socket becoming lodged in-between the retractable ladder, control cables, or the wires for Avionics.

In order to determine if Complainant had a good faith belief that he lost a tool and reported the loss as a safety issue and a FAA form was required to report the lost tool, the undersigned must determine whether Complainant had a good faith belief that a FAA form exists.

Initially, Complainant testified that he recalled Respondent mentioning the FAA form. Then Complainant testified that he questioned Respondent about the form, asking "Did [he] need to fill out a form that [he] lost a tool?," which is quite confounding since Complainant's entire argument rest upon the notion that he believed the FAA form was required. Additionally, I find Complainant's question inconsistent with his latter testimony, stating the reason he never searched for the form was because it was Mr. May's responsibility. However, if it was truly Mr. May's responsibility, why was Complainant asking Respondent if **he** needed to fill out the lost tool form? Furthermore, Complainant testified that he saw the form during his FAA classes. Then he stated "there has to be a document," which definitely begs the question, if Complainant saw the document during his FAA classes and Respondent told him about the FAA form, why would he merely presuppose there is a form? Later, Complainant testified "[t]here is a document out there," and that he was "pretty sure" the form existed, implying he is more than certain the document exists, which undoubtedly conflicts with his earlier testimony. He also testified that he never had any problem with other employers' regarding their lost tool policy, which suggests he should have some familiarity with the FAA form he alleges Respondent was supposed to complete because those employers would have submitted the same form. Yet, Complainant never mentioned having to complete the FAA form while employed elsewhere or other employers completing the form.

I also find Complainant's testimony regarding the retrieval of the FAA form highly suspect. At one point, Complainant testified that one might be able to get the form on the computer. Then he stated an individual would have to ask the FAA for the form. However, interestingly enough, Complainant not once conducted a cursory search for the FAA form or contacted the FAA about the "supposed" lost tool form.

Complainant also testified that Mr. May along with several other coworkers helped look for the lost tool.

Mr. May testified that he did not hold against Complainant the fact that he lost the tool or that he reported it. In fact,

he along with others searched over 40 hours for the lost tool. Lastly, Mr. May testified that Complainant told May he was unsure whether the socket was even on the airplane.

Based on the foregoing, I find and conclude Complainant did not hold a good faith, subjective belief that failure to complete a FAA form violated a FAA requirement, because his testimony regarding the FAA form was inconsistent and highly-questionable. Complainant also did not harbor a good faith belief in the end that he even lost the socket tool after searching for the tool for over forty hours.

Lastly, “[a] party’s failure to present an argument or contest an element of a claim will result in a waiver of the issue.” See Florek v. E. Air Ctr., Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, at 6 (ARB May 21, 2009).<sup>15</sup> Here, Complainant failed to address the HI-LOC issue in his brief. Therefore, I find and conclude Complainant waived this issue.

### ***Objective Reasonableness***

Despite my finding that Complainant did not possess a subjective, reasonable belief that he engaged in protected activity, I will analyze whether Complainant held an objective, reasonable belief.

At the formal hearing, Complainant testified that he worked as a mechanical and structural mechanic for 17 or 18 years, or perhaps 20 years. He also testified that he completed FAA classes and received various certificates. Upon review of the record, I find there are several copies of training course attendance forms for courses Complainant completed, such as: Human Factors Ethics (4 HR); Human Factors Introduction; Human Factors Program Training for Maintenance; Safety Training (Recurrent); and Maintenance Ethics, Standards, and Best Practices. Therefore, I find Complainant is an experienced mechanic and is knowledgeable of safety matters.

Complainant’s supervisor, Mr. May, began his aviation career in 1992. He stated he was a mechanic by trade but was currently a supervisor. As a result, I find he, too, is

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<sup>15</sup> Notwithstanding Complainant’s waiver of the HI-LOC issue, I find there is no documentary or testimonial evidence that Complainant complained to Respondent about a HI-LOC failing to comply with FAA regulations, standards, or orders. Therefore, I conclude Complainant did not engage in any protected activity concerning the HI-LOC.

experienced in the aviation industry. Mr. May also testified that he completed safety classes while working in aviation, that he learned about the dangers of losing FOD, and that FOD could pose a safety hazard. Based on the foregoing, I find Mr. May is also knowledgeable of safety matters.

In order to determine if there was an objective, reasonable belief that Respondent violated a FAA form requirement, I find there must be an objective, reasonable belief that a FAA form even existed.

As discussed previously, I found Complainant's testimony was inconsistent as to the existence of the FAA form.

With regard to Mr. May, he testified that Complainant asked him for the FAA form. However, he indicated he did not have the form and never saw the form. He also testified that he searched for the form, and that there is no such form as suggested by Complainant.

Based on the foregoing, I find Mr. May's and Complainant's testimony greatly differed regarding the existence of the FAA form. Here, Mr. May's testimony was unwavering regarding the **nonexistence** of the FAA form, whereas Complainant wavered throughout the hearing in regard to the form. Given they are both experienced in the aviation industry; have similar knowledge, training, and experience; and Complainant is a highly incredible witness, I find and conclude Complainant's belief that Respondent failed to provide a FAA form as mandated by the FAA not objectively reasonable based on a preponderance of the evidence.

#### **D. Knowledge of Protected Activity**

The ARB has stated that "[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR 21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity." Peck, at 14 (citing Bartlik v. TVA, 88-ERA-15, at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996)); 49 U.S.C. § 42121(a).

Assuming, arguendo, Complainant engaged in protected activity, the parties do not contest Respondent had knowledge of the protected activity. During the formal hearing, Complainant

and Mr. May, both testified that Complainant reported the lost tool and asked for a FAA form to report the missing item.

#### **E. Alleged Unfavorable Personnel Action**

Section 42121(a) of AIR 21 proscribes employer retaliation, stating that no air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because of the employee's protected activity. These provisions are the statutory foundation for the requirement that a complainant must show an adverse employment action. The implementing regulations specify that it is a violation of the Act for an employer "to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee" for engaging in protected activity. 29 C.F.R. § 1979.102(b).

[T]he purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes.

Melton v. Yellow Transp., Inc., ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008). Moreover, the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action." Id. The majority summarized:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. . . . Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse"

rather than "tangible consequence," or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent.

Id.

Here, Complainant contends he was terminated and reassigned as a result of his protected activity.<sup>16</sup>

Assuming, arguendo, Complainant engaged in protected activity, the parties do not dispute Complainant's employment was terminated effective October 12, 2015, which qualifies as an adverse employment action under AIR 21. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b).

With regard to Complainant's reassignment allegation, the parties do not dispute Complainant was reassigned from the Western Hanger to Hanger 7; however, I do not find the reassignment to be an adverse action.

Here, the reassignment to Hanger 7 to perform door modification work was not materially adverse because it was a favorable employment decision, rather than an unfavorable decision. In this instance, Complainant was provided with an opportunity to perform work, perhaps lesser duties in nature than the work he performed as a mechanic, and to continue to receive a paycheck, rather than being laid off due to a lack of work in the Western Hanger. In addition, the reassignment was merely temporary, not permanent, based on a reduction in work at the time. Thus, there were no actual changes in Complainant's permanent position, meaning the terms, conditions, or privileges of his employment.

#### **F. Contributing Factor**

A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the

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<sup>16</sup> In brief, Complainant contends one adverse personnel action was a reduction in his hours due to a lack of work; however, in Complainant's complaint he never discusses a reduction in hours. Therefore, I shall focus on the issues raised in his complaint because Complainant did not file an amended complaint addressing this new issue. Nevertheless, I note that had Complainant raised the issue in his complaint I would have found Complainant's contention unavailing because any reduction in his hours was a natural consequence of a reduction in work, which Complainant testified to repeatedly. More importantly, the reduction in hours was remedied by reassigning Complainant.

outcome of the decision." Marano v. Dept. of Justice, 2 F.3d 1137, 1148 (Fed. Cir. 1993). The complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that [r]espondent'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 Pac. R.R., ARB No. 11-091ALJ No., 2010-FRS-00020, at 8 (ARB May 31, 2013). The trier of fact should ask the following question to determine if the contributing factor element is satisfied: "[D]id the protected activity play a role, any role whatsoever, in the adverse action?" Palmer v. Canadian Nat'l Ry./Il. Cent. R.R. Co., ARB No. 16-035, ALJ No. 2014-FRS-154, at 15 (ARB Sept. 30, 2016). Additionally, the ARB held "that the level of causation that a complainant needs to show is extremely low," and that the ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's non[-]retaliatory reasons." Id. The ARB has described the contributing factor element as a "low standard" that is "broad and forgiving." Id. at 53.

The complainant may prove causation through direct or circumstantial evidence, which requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, ALJ No. 2008-ERA-003, at 13 (ARB June 24, 2011). "Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence." Benjamin, at 11-12.

"Temporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a **prima facie** showing of knowledge and causation." Barker v. Ameristar Airways, Inc., ARB No. 05-058, ALJ No. 2004-AIR-12, at 7 (ARB Dec. 31, 2007); 29 C.F.R. § 1979.104(b)(2). Although temporal proximity "may support an inference of retaliation, the inference is not necessarily dispositive." Robinson V. Nw. Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-022, at 9 (ARB Nov. 30, 2005). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." Barber v. Planet

Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19, at 6-7 (ARB 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, at 56. As a general matter, the ARB has concluded that an adverse action occurring within one year from the date of protected activity provides sufficient temporal proximity to infer that the adverse action was motivated by the protected activity. See, e.g., Thomas v. Ariz. Pub. Serv. Co., 89-ERA-19 (Sec'y Sept. 17, 1993) (finding, under the Energy Reorganization Act, 42 U.S.C. § 5831 et seq., that an inference of causation arose where about one year elapsed between the Complainant's protected activity and the adverse personnel action).<sup>17</sup> However, in Robinson v. Nw. Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-022, at 9 (ARB Nov. 30, 2005), the ARB found that a six month gap between the protected activity and the adverse action severed the complainant's temporal proximity argument.

The ARB has also held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, at 29, 55. Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. E. Air Ctr., Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)).

Assuming, arguendo, Complainant engaged in protected activity, he contends Respondent's reason for his termination is pretextual because his absence on October 12, 2015, was for a medical reason.

During the formal hearing, Complainant testified that he got along with Mr. May, that he liked him, and that he also liked working for him. He further testified that Mr. May treated him with respect, and that he never had any complaint regarding the way in which Mr. May treated him. Additionally, Mr. May "always" approved Complainant's time off for medical reasons. He also testified that Mr. May never harassed him.

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<sup>17</sup> AIR 21 was modeled on the Energy Reorganization Act, 42 U.S.C. § 5851, et seq.; see Peck, at 9.

Complainant further testified that he could not recall any other boss that treated him better than Mr. May.

With regard to Mr. Reinhard, Complainant testified that he made a "smart remark" to him about the airplane being held together with Band-Aids, yet he did not believe the remark was in relation to the lost tool. Nevertheless, he contends Mr. Reinhard harassed him based on the remark made, and he hypothesized the lost tool may have had an affect on the way in which Mr. Reinahrd made the remark. Mr. Reinhard, on the other hand, testified that he never made the remark suggested by Complainant.

Overall, Complainant testified he never experienced any harassment by Mr. May, Mr. Reinhard, or any other managers.

When questioned about harassment, Complainant testified that he was fired due to hostility from **non-management coworkers**. He further testified that "Tim's [Reinhard] favorites" were not reassigned, and that the average mechanics were reassigned to Mr. Espitia's area, although he did not believe Mr. Reinhard and Mr. May considered him an average mechanic.

He also stated the week of October 5th through October 12th was a slow week because there was no work in his department. Consequently, Complainant was loaned out to a different hanger because it had plenty of work. Furthermore, he indicated the reason for Complainant's termination was his absence on October 12, 2015. He testified that after Complainant returned to work after missing October 5th through October 8th, Complainant was counseled about his absences. He also stated that he and Mr. Reinhard had given Complainant "the benefit of the doubt" regarding the reason behind his extended absence from October 5th through October 8th.

Based on the foregoing, I find and conclude Complainant and management maintained a cordial relationship even after Complainant lost the tool and requested the FAA form. In fact, instead of firing Complainant due to his no call, no shows in October 2015, Respondent decided to retain Complainant after counseling him about his consecutive absences. Respondent also offered Complainant a helping hand in searching for the lost tool, which is not indicative of a retaliatory intent.

With regard to Complainant's absence on October 12th, Complainant contends Mr. Espitia allowed him to take off. He

indicated Mr. Hugo Espitia stated, "Me, you, and **Hugo** are going to take Sunday/Monday, so that way we can go to church, then after that we'll start fresh on Tuesday." Yet, according to Respondent's time log, Mr. Espitia worked on Monday, October 12th, which is contrary to Complainant's testimony. In addition, the statement does not suggest Mr. Espitia told Complainant to take off Monday because Mr. Espitia more than likely would not refer to himself by his first name.

Moreover, during the formal hearing, Mr. Reinhard testified that he only considered Complainant's October 12th absence when he decided to terminate him. Yet, according to Respondent's employee attendance policy, an employee will be subject to employment if he misses **two consecutive or inconsecutive days** of work without calling beforehand. In this instance, however, Complainant failed to call off from work on October 12th and was subsequently fired. Thus, Respondent failed to follow its policy, which I find is not atypical. For instance, when Complainant was absent from October 6th through October 8th, Complainant was merely counseled, rather than terminated like policy mandates. Thusly, I find it unreasonable to conclude Complainant's reporting of his lost tool and requesting a FAA form contributed to his termination because when Respondent had a justifiable reason to terminate Complainant after his extended period of absences, it did not. As a consequence, it is not rationale to suggest pretext is established simply because Respondent failed to adhere to its employee attendance policy when it fired Complainant. Contra Florek v. E. Air Ctr., ARB No. 07-0113, ALJ No. 2006-AIR-9 (ARB May 21, 2009).

Lastly, Complainant's absences on October 6th through October 8th, which did not lead to termination, and the absence on October 12th, which did lead to termination, all occurred **seven** months apart from when Complainant engaged in alleged protected activity. Consequently, I find and conclude it is unreasonable to infer an illegal motivation behind Complainant's termination based solely on the temporal proximity between the protected activity and the October 12th absence.

Accordingly, I find and conclude the preponderant weight of the evidence establishes Respondent's legitimate, nondiscriminatory reason alone was the contributing factor for Complainant's termination.

## VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against Ignacio G. Delao Jr. because of his alleged protected activity and, accordingly, Iganico G. Delao Jr.'s complaint is hereby **DISMISSED**.

**ORDERED** this 16<sup>th</sup> day of August, 2018, at Covington, Louisiana.

LEE J. ROMERO JR.  
Administrative Law Judge

**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).