

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 27 February 2019

Case No.: 2017-AIR-00016

In the Matter of

DANIEL FORRAND

Complainant

v.

FEDEX EXPRESS

Respondent

DECISION AND ORDER DENYING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. *See* 49 U.S.C. § 42121. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 67 Fed. Reg. 15,453 (Apr. 1, 2002). The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed the arguments of the parties, and the applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration ("OSHA") on November 16, 2015, alleging that Respondent violated AIR 21. Specifically, Complainant alleged that Respondent issued him an Online Compliment and Counseling ("OLCC") on November 11, 2015 for filing three Maintenance Safety Reports ("MSR") in October/November 2015, which noted defective data plates on landing gears. Complainant amended his OSHA complaint three times—on December 4, 2015, March 14, 2016, and April 4, 2016—alleging additional instances of Respondent's retaliatory conduct.

OSHA dismissed his complaint on March 7, 2017, finding no reasonable cause to conclude that Respondent violated AIR 21. Complainant appealed OSHA's decision to the Office of Administrative Law Judges ("OALJ") on March 29, 2017, and the matter was assigned to this Tribunal on April 26, 2017.

On April 26, 2017, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated May 23, 2017, and attached his statement, which was originally transmitted as part of his Complaint to OSHA. Respondent responded to the Notice of Assignment by letter dated May 15, 2017. By Order dated June 19, 2017, the undersigned set the hearing dates as November 13 through November 21, 2017.

On October 11, 2017, Respondent filed a Motion for Summary Decision, arguing that there was no genuine dispute regarding the material facts of Complainant's case. Complainant filed an Opposition to Respondent's Motion for Summary Judgment on October 24, 2017. Respondent submitted a Reply in support of its Motion for Summary Decision on October 31, 2017. On November 3, 2017, the Tribunal issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision. Of the issues raised,¹ the only issue where summary decision was granted concerned Respondent's failure to promote/hire Complainant to the Avionics Component Tech position. *Id.* at 3.

Respondent submitted its prehearing statement and proposed exhibit list on October 27, 2017. Complainant submitted prehearing materials on October 26, 2017.

This Tribunal held a hearing in this matter in Long Beach, California from November 13 to 16, 2017.² Complainant and Respondent's representative³ were present during all of these proceedings. At the hearing, this Tribunal admitted Joint Exhibits ("JX") A – J,⁴ Respondent's Exhibits ("RX") 1 – RX 37 and RX 39 – RX 68,⁵ Complainant's Exhibits ("CX") 3 – CX 8 and CX 10 – CX 29.⁶

Complainant submitted his closing brief on March 2, 2018.⁷ Respondent submitted its closing brief on May 2, 2018.⁸ Complainant filed his reply brief on May 16, 2018.

¹ Respondent sought summary decision on Complainant's claims that the following were acts of retaliation:

- its May 18, 2015 rejection of his avionics component tech application;
- the OLCC Complainant received on May 26, 2016;
- the August 17, 2016 investigation to Respondent's Burbank facility;
- Respondent created a hostile work environment.

Respondent further argued that any alleged retaliations by it for Complainant's workplace violence complaints against Mr. Ogden, Mr. Ruggieri, Mr. Hanniff, and Mr. Galino were time barred. Respondent also asserted that Complainant could not establish a prima facie case of retaliation because he was unable to show that his engagement in any protected activity was a contributing factor in any adverse action.

² The Transcript of the November 13-16, 2017 proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 10-19.

³ In addition to Respondent's counsel, its corporate representative, Mr. Kraficzik, was also present during the entire hearing.

⁴ Tr. at 25.

⁵ Tr. at 27, 199, 221, 222, 305, 320, 418, 419. In addition, RX 5 – RX 7 were replaced by new exhibits in the mist of the hearing. Tr. at 241-43.

⁶ Tr. at Tr. at 22-24. *See also* Tr. at 766. In addition, the undersigned marked ALJ 1. Tr. at 194.

⁷ On January 24, 2018, Complainant was granted one extension to file his brief.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Overview of the Events leading to the dispute before the Tribunal

Complainant is an aviation maintenance technician (“AMT”) that works at Respondent’s Los Angeles International Airport (“LAX”) Hangar Maintenance Facility. He has made several allegations of retaliation for actions he took at both this facility and Respondent’s Burbank facility. Specifically, he claims that Respondent retaliated against him for submitting safety reports or for reporting mechanical discrepancies on non-routine forms while working at the LAX facility. In addition, he claims Respondent’s management threatened him and that Respondent has been using cameras to surveil his work area. Each of these allegations will be individually addressed. Besides the Complainant, the following individuals are referenced throughout this decision:⁹

- Mr. Scott Ogden is currently the Vice President of aircraft maintenance.¹⁰
- Mr. Rocky Ruggierri is Managing Director of Quality Control.¹¹
- Mr. George Hanniff is the Manager at the Los Angeles aircraft maintenance hangar.¹² Tr. at 720-28.
- Mr. Jeffrey Krafczik is Complainant’s direct supervisor at the Los Angeles hangar.¹³ Tr. at 428-518.
- Mr. Steven Sobczak is a senior manager at Respondent’s Los Angeles hangar.¹⁴ Tr. at 698-718.
- Mr. Edward Lyons was Respondent’s Vice President of Technical Operations Safety.¹⁵
- Mr. Randy Walker is a manager on LAX Hangar facility floor.¹⁶ Tr. at 663-697.
- Mr. Eric Galindo is a Human Resources Advisor.¹⁷ Tr. at 344-422.

⁸ On March 5, 2018, Respondent was granted one extension to file its brief.

⁹ Tr. at 70, 96, 101, 105, 283, 287. There were several additional individuals mentioned throughout the hearing but these appear to be the key individuals,

¹⁰ Tr. at 287.

¹¹ Tr. at 287.

¹² See also Tr. at 287. Mr. George Hanniff has worked for Respondent for 12 years and is an Aircraft Maintenance Manager for Respondent. He normally manages hangar bay 3. He holds an A&P certificate and a private pilot’s license. Tr. at 720.

¹³ Tr. at 428. Mr. Krafczik is an aircraft maintenance manager. He holds an A&P certificate. He has been in his current position 13 years, with 20 years total working for Respondent. He is responsible for coordinating the work scope, executing the plan for aircraft maintenance, and administering AMT’s. Complainant reports to him and has done so for six or seven years. Tr. at 429-30.

¹⁴ Tr. at 96, 698. Mr. Sobczak has worked slightly over 11 years at Respondent’s LAX maintenance hangar. He is a Senior Manager of aircraft maintenance, supervises about 140 people, holds an A&P certificate, and has over 34 years of aviation experience. Tr. at 698-99.

¹⁵ Tr. at 101, 105, 252.

¹⁶ Tr. at 83, 625, 663. Complainant described him as the former manager of Bay 1 within the hangar. At the time of his testimony, Mr. Walker was the manager of the interior shop and tool room. Tr. at 663.

¹⁷ Tr. at 287. Mr. Steve Galindo is an HR advisor, holds no FAA certificates and has been employed by Respondent for about 20 years. Prior to becoming an HR advisor, he worked for Respondent for 15 years

- Ms. Pamela Santucci is a Human Resources Advisor.¹⁸ Tr. at 609-621.
- Ms. Pam Wheeler is an Engineering System Administrator.¹⁹

B. Stipulated Facts²⁰

1. Employer is an “air carrier” and Complainant is an “employee,” both subject to the Act.
2. The warning contained in the moving elevators e-acknowledgement changed.
3. Other people were assigned to Complainant's work card on March 25th, 2016, and Randy Walker did not talk to them about progress on that work card.
4. Complainant received a complimentary OLCC from Bill Cusato.
5. Federal Express February 8th, 2014, email from George Hanniff emailed Jim Doty on February 8, 2014, asking, “Can we confidentially check with security and have them direct a camera in that area to observe and record [Complainant’s] behavior?”
6. Respondent posts jobs via the JCATs system.
7. Scott Ogden posted bulletin board messages and wrote emails.
8. Rocky Ruggieri sent a November 6, 2015, email in which he said, “How do we keep [Complainant] from copying the FAA when he sends email such as the one below?”
9. Pam Wheeler sent an email on November 30, 2015 regarding the e-acknowledgements submitted by the Complainant’s counsel.

as a senior safety specialist. He advises both employee and management on specific policies. Part of management’s duties includes checking whether employees are wearing personal protective equipment, which is an item of emphasis at Respondent. Tr. at 344, 351-55; *see also* RX 1.

¹⁸ Tr. at 114, 283, 705.

¹⁹ Tr. at 16, 70, 584.

²⁰ Stipulations of Facts 1 & 3 were proffered on the first day of the hearing. Tr. at 6. Stipulations of Fact 2-9 above were received on the second day of the hearing (Tr. at 192-94) and were also provided by the parties to the Tribunal in writing. This document was marked as ALJ-1. Tr. at 194.

C. Summary of the Documentary Evidence

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

| Exhibit | Description |
|----------------|--|
| 3 | December 17, 2011, Online Complaint and Counseling (OLCC) issued by William Cusato to Complainant. |
| 4 | March 8, 2016, print out of page from Respondent's "People Manual." |
| 5 | March 16, 2015, print out of page from Respondent's "Hangar Maintenance Administrative Guide." |
| 6 | July 14-16, 2014, Haupt comment in Aircraft Maintenance Employee Handbook Meeting Minutes, p. 40, "We (as Maintenance) didn't start using the OLCCs for discipline until fairly recently." |
| 7 | July 14-16, 2014, Haupt comment Aircraft Maintenance Employee Handbook Corrected Meeting Minutes, p. 40. |
| 8 | December 8, 2015, inter-office memo by James Spernak, re: Work Place Violence complaint. |
| 10 | October 27, 2017, Respondent's Memorandum in Support of Motion for Summary Decision, Sect. D, p.9. |
| 11 | October 8, 2015, Complainant email to Krafczik. |
| 12 | November 12, 2015, print out of Respondents' Employee Acknowledgement System" policy of Moving Elevators on the MD 11/10." |
| 13 | May 16, 2017, print out of Respondent's Employee Acknowledgement System home page. |
| 14 | (Not Dated) Print out of Respondent's Employee Acknowledgement System Frequently Asked Questions. |
| 15 | November 5, 2015, Complainant's Maintenance Safety Reports (MSR) #1458, #1455, and #1457. |
| 16 | November 11, 2015, Complaint's email to Osvaldo Tagle, copying Krafczik. |
| 17 | November 11, 2015, Krafczik OLCC issued to Complainant. |
| 18 | August 30, 2017, Forrand deposition, p. 137. |
| 19 | July 27, 2017, declarations of Jean Phillippe Drekman and Jamie De La Cruz. |
| 20 | September 14, 2017, Krafczik deposition, p. 61. |
| 21 | July 27, 2017, declaration of Withbourne Hunter, Reginal Gee, James Hinckley and Jamie De LA Cruz. |
| 22 | October 27, 2014, cab receipt and corresponding Nov. 7, 2017, account deposit from Respondent. |
| 23 | April 12, 2016, Complainant's email correspondence with Les Frank re: Respondent's hostile work environment. |
| 24 | April 27, 2016, Complainant's email correspondence with David Bronczek, President and CEO of FedEx Express and Gary Centrich, FedEx counsel. |
| 25 | May 26, 2016, OLCC issued by Krafczik to Complainant. |
| 26 | August 30, 2017, Forrand Dep. p. 220. |
| 27 | (undated) Complainant's Work Place Violence complaint against Scott Ogden, Rocky Ruggieri, George Hanniff, and Eric Galindo. |

| Exhibit | Description |
|----------------|--|
| 28 | November 7, 2013, Scott Ogden email to Rocky Ruggieri, Edward Lyons, and Bill Cusato. |
| 29 | February 8, 2014, email correspondence involving Eric Galindo, Jim Doty, and George Hanniff. |

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

| Exhibit | Description |
|----------------|--|
| 1 | Respondent's Safety Manual, Safety Observation Policy. |
| 2 | Respondent's "The People Manual," Acceptable Conduct Policy 2-5. |
| 3 | The People Manual, Guaranteed Fair Treatment Procedure Policy 5-5. |
| 4 | The People Manual, Internal EEO Complaint Process Policy 5-6. |
| 5 | Safety Manual, Quality Driven Safety Team. |
| 6 | The People Manual, Employment of Relatives and Significant Others. |
| 7 | The People Manual, Anti-Harassment. |
| 8 | The People Manual, Security. |
| 9 | Respondent's Aircraft Maintenance Employee Handbook. |
| 10 | Job Description for Sr. Aircraft MX ²¹ Technician Position. |
| 11 | Complainant's Employee Acknowledgments. |
| 12 | Emails between Complaint, Krafczik and Doty re: iPad eAcknowledge requirement. |
| 13 | eAcknowledgement for Moving Elevators MD 11/10 Policy. |
| 14 | Email from Doty to Wheeler re: e-Acknowledge and request for wording to be changed. |
| 15 | Email from Wheeler to Doty re: eAcknowledge and exception because of clarification. |
| 16 | Email from Doty to Wheeler re: AMT who refused to sign based on wording. |
| 17 | Email from Jim Doty to Jeffrey Krafczik re: eAcknowledge. |
| 18 | OLCC History for Daniel Forrand. |
| 19 | OLCC for Jaime De La Cruz. |
| 20 | MX Alert #15-0252. |
| 21 | Response to Forrand re: temporary measure and protocol in EACK has been rescinded. |
| 22 | Interoffice Memo re: Complainant's WPV Complaint against Jeffrey Krafczik, including Statements of Krafczik and Leslie Frank. |
| 23 | JCATS posting of Avionics Component Tech position. |
| 24 | Job Description for Avionics Components Tech Position. |
| 25 | Email string among George Murphy, Daniel Forrand, Eric Galindo and Jack Earls re: Explanation Concerning Need for Repairman's Certificate. |

²¹ MX is an abbreviation for maintenance.

| Exhibit | Description |
|----------------|---|
| 26 | FAA Form 8610. |
| 27 | Email from Murphy to Galindo re: Avionics Component Tech, Forrand is not qualified for Avionics Component Tech position. |
| 28 | Email between Murphy and Galindo re: Avionics Component Tech position, continued discussion. |
| 29 | JCATS Profile-Daniel Forrand re: Rejected-Applicant does not meet minimum standards-Avionics Component Tech. |
| 30 | Emails between Forrand and Galindo re: November 25, 2015 WPV Complaint. |
| 31 | FedEx Label and Event Summary of WPV. |
| 32 | Email from Galindo to Forrand confirming that the WPV statement was what he submitted in its entirety. |
| 33 | Emails from Galindo to Spernak re: November 25, 2015 WPV Complaint and request for report. |
| 34 | Emails between Galindo and Jeff Watson re: November 25, 2015 WPV Complaint and request for report. |
| 35 | Emails from Forrand from Hector Chavez re: Best Practices Guide. |
| 36 | Email attachments from Chavez to Jack Earls and Bob Zimney re: Sanding dust clean up. |
| 37 | Work Card for Fillet Panels-A/C N303FE. |
| 39 | Email from Gary Centrich to Forrand re: Completely Closed Out. |
| 40 | Email Beat Practices Course Roster and Policy Acknowledgment. |
| 41 | Email from Forrand to Galindo re: Digital Delusions. |
| 42 | Email from Les Frank to Forrand re: inappropriate email font size. |
| 43 | Emails between George Silverman and Forrand re: response to eAcknowledge policy and procedures questions on the TechOps Q&A BB. |
| 44 | Email from George Silverman to Forrand re: intention of the OLCC is to provide of record. |
| 45 | Email from Jared Klein (OSHA) to Forrand requesting explanation as to what specific actions he believes to be workplace violence. |
| 46 | Email from Pamela Santucci to Daniel Forrand re: Investigation. |
| 47 | Complainant's Responses and Objections to Respondent's First Set of Interrogatories. |
| 48 | Email from Daniel Forrand to Eric Galindo and Les Frank re: Randy Walker's Use of Personal Protective Equipment. |
| 49 | Declaration of James Spernak in Support of Motion for Summary Decision. |
| 50 | Declaration of Eric Galindo in Support of Motion for Summary Decision. |
| 51 | Declaration of Darryl Kimble in Support of Motion for Summary Decision. |
| 52 | Declaration of Randy Walker in Support of Motion for Summary Decision. |
| 53 | Declaration of George Murphy in Support of Motion for Summary Decision. |
| 54 | Declaration of Hector Chavez in Support of Motion for Summary Decision. |
| 55 | Declaration of Leslie Frank in Support of Motion for Summary Decision. |
| 56 | Declaration of Gary Scott in Support of Motion for Summary Decision. |
| 57 | Declaration of Jack Earls in Support of Motion for Summary Decision. |
| 58 | Declaration of Jeff Krafczik in Support of Motion for Summary Decision. |

| Exhibit | Description |
|----------------|---|
| 59 | Declaration of Pamela Santucci in Support of Motion for Summary Decision. |
| 60 | Declaration of Steven Sobczak in Support of Motion for Summary Decision. |
| 61 | Settlement Agreement between Daniel Forrand and Respondent for “all claims and issues that Complainant raised or could have raised in the Complaint through the Effective Date [January 26, 2016]”. |
| 62 | Settlement Agreement between Daniel Forrand and Respondent resolving and terminating all AIR 21 claims that Complainant raised or could have raised as of November 4, 2015. |
| 63 | Work Order Status Report dated January 25, 2016. |
| 64 | Email from John White to multiple recipients at Respondent re: Incorrect hardware. |
| 65 | Email from Daniel Forrand to himself re: WPV. |
| 66 | Email from Daniel Forrand to himself re: Meeting on 12/15/14. |
| 67 | Emails between Eric Galindo and Eric Herzog re: E-Acknowledge. |
| 68 | Respondent’s Communication and Collaboration Tools Support, Subject: Email Best Practices. |

The parties also present the following joint exhibits:

| Exhibit | Description |
|----------------|---|
| A | Complainant’s email chain with Hector Chavez, Jr. and copying Les Frank re: Best Practices Guide. |
| B | Scott Ogden’s email to “All-ACMX-Employees” re: Revised Elevator/Patio Procedure. |
| C | Complainant’s email to Eric Galindo re: November 25, 2015 WPV Complaint #837043. |
| D | Complainant’s email chain with Hector Chavez, Jr. and copying Les Frank re: Best Practices Guide. |
| E | Complainant email to George Murphy re: Avionics Component Tech and Instructions for Completing FAA Form 8610-2. |
| F | Interoffice Memo re: Complainant’s Workplace Violence (WPV) Complaint against Randy Walker, including Statements of Gary Scott, Randy Walker, and Eric Galindo. |
| G | Complainant’s email to V.P. Safety and Airworthiness, Edward Lyons, re: Respondent’s handling of submitted Maintenance Safety Reports. |
| H | Email from Steve Sobczak to Complainant re: Investigation [Burbank Station]. |
| I | Email correspondence with Les Frank re: Concern [Jack Earls]. |
| J | Print out of Respondent’s JCATs Rank Detail. |

D. Summary of Testimony

Complainant works at Respondent’s LAX hangar and has worked for Respondent 25 years, working in the hangar since 2005. He has worked in aviation almost 40 years. He currently serves as a senior aircraft maintenance technician (“AMT”). His job is to repair and

maintain Respondent's aircraft, and to identify safety hazards. Tr. at 29-30. He holds an Airplane and Powerplant certificate ("A&P") but has never held an Inspection Authorization ("IA"). Tr. at 127. In his job, Respondent expects Complainant to report basic concerns and to document discrepancies on a non-routine form as well as service difficulty reports ("SDRs").²² In addition, he is also able to submit confidential maintenance safety reports ("MSRs"), identifying safety concerns he might have. AMTs commonly complete non-routine forms but not confidential MSRs. Tr. at 132-33; *see also* RX 69.

Complainant has been married for 35 years and he has two children. He reports that his life away from work has been tough. He says that he suffers from stress and anxiety. Complainant stated that the most stressful part of his current situation is going to work and thinking that people are surveilling him. He would love to be working at the Burbank facility. Tr. at 31.

Complainant has filed two prior AIR 21 complaints against Respondent. The first complaint alleged threats of workplace violence in retaliation for his reporting of corrosion on an aircraft to the Federal Aviation Administration ("FAA"). The second complaint also alleged threats of workplace violence in retaliation for his FAA reporting of Respondent's failure to generate a service difficulty report for a broken L-1 door chain. The parties resolved both matters by settlement agreements, where Respondent made no admission of liability. Tr. at 33-41, 130-31.

Binocular Issue in 2014

Complainant used binoculars as part of his job when he occasionally needs to see something high up on an aircraft. Tr. at 169, 397, 633. He had received these binoculars from Respondent as a gift. Tr. at 121. However, a fellow employee raised a concern on February 8, 2014 about Complainant's use of the binoculars in the hangar to watch other employees. Mr. Hanniff responded to this complaint by sending an email about Complainant's use of these binoculars to Respondent's managers Mr. Doty²³ and Mr. Galindo.²⁴ CX 29; Tr. at 120-22, 168-71, 350-51.

CX 29 contains the February 2014 emails between managers Mr. Galindo, Mr. Doty, and Mr. Hanniff about meeting on Monday²⁵ to discuss Complainant's alleged use of binoculars to watch employees in other bays. Tr. at 349-51, 397-401. In Mr. Hanniff's opening email, he inquires if the hangar surveillance cameras can be directed in the area where Complainant

²² *See also* Tr. at 568-69 (testimony by Mr. Frank).

²³ Mr. Jim Doty has been described in these proceedings as a Senior Manager, but no other details were provided. *See* Tr. at 436, 472, 512. As far as hierarchy there is an AMT, then manager, then senior manager. Tr. at 512.

²⁴ The case involves two instances where Complainant was concerned about being surveilled, this incident and another incident in 2016 that is separately discussed below.

²⁵ Mr. Galindo's statement in the email about talking on Monday referred to their impending discussion of the incident, not about a plan to surveil Complainant. Tr. at 395-96.

works.²⁶ When Mr. Hanniff met with Mr. Doty and Mr. Galindo, they decided not to ask security to move the cameras and just talk to Complainant directly. Mr. Galindo met with Complainant, who explained that he used the binoculars to look at static wicks on flight surfaces. Tr. at 397. Management asked Complainant to take his binoculars home, which he did. Tr. at 291, 401.

Security cameras monitor Respondent's hangar, but neither management nor human resources ("HR") have any say on where they can be directed. Managers do not even have access to the hangar cameras because they are controlled by security management. Tr. at 400-01, 477. Mr. Hanniff's request about the cameras was never seriously considered.²⁷

In December 2016, Complainant received access to these 2014 internal management emails and testified that—after reading them—he felt threatened, intimidated, and surveilled. Tr. at 287-88. However, Complainant acknowledged that the email only discussed the possibility of surveilling him. He also admitted that Respondent's management had talked to him directly about the underlying employee's complaint regarding his alleged watching of other employees and had asked him to take his binoculars home. Tr. at 288-89. Nevertheless, Complainant filed a workplace violence complaint against Mr. Ogden, Mr. Ruggieri, Mr. Hanniff, and Mr. Galindo on the basis of this email chain alone. Tr. at 287-92, 394.

On-line Documented Compliment/Counselling System ("OLCC")

Respondent uses a progressive discipline policy²⁸ that tracks two components: conduct issues and performance issues. Tr. at 345-46; *see also* RX 2. According to the "Acceptable Conduct" section of Respondent's "The People Manual," after a manager has conducted an investigation and concluded that no policy violation has occurred, the manager "may choose to counsel the employee about acceptable conduct." RX 2 at 2. Respondent's Online Documented Compliment/Counselling ("OLCC") system is an electronic record used for counseling or complimenting an employee. Tr. at 44-51, 360-61; RX 2 at 2. An OLCC becomes part of an employee's permanent employee record. Tr. at 45. According to Mr. Galindo, however, an OLCC may be removed from an employee's record. Tr. at 419, 425.

CX 4²⁹ is an extract from Respondent's "The People Manual," which states:

²⁶ Mr. Hanniff alleged that he was not asking if the cameras could be pointed at Complainant but to be pointed at the wing stand where Complainant was reportedly using his binoculars. When he made this request, Mr. Hanniff was unsure if this was possible. To his knowledge no manager in the hangar had had the cameras focused on hangar employees. Tr. at 721-28.

²⁷ Mr. Galindo found this question by Mr. Hanniff "ludicrous" and he told Mr. Hanniff that they were not going to do that and it was "not even on the table." Tr. at 400. However, Mr. Galindo also acknowledged that there are protocols in place with security if the company wants to conduct surveillance over a given employee. Tr. at 423.

²⁸ Mr. Galindo later stated that certain actions by an employee could lead to immediate termination. Tr. at 351.

²⁹ *See also* CX 5, para. 6(b) ("The OLCC entry used in lieu of the employee calendar will satisfy the requirement of maintaining a chronological history of employee performance and discipline."). However,

A document of counseling/OLCC is not disciplinary in nature, but it may be considered as a factor when determining whether discipline, i.e. warning letter, performance reminder, termination, et cetera, is warranted. It may also be considered when reviewing an employee's work history to identify patterns of conduct, performance issues, or recurrent problems.

See also RX 2. Mr. Krafczik testified that—according to his understanding—an OLCC cannot be used in future disciplinary decisions. Tr. at 453. Mr. Galindo similarly testified that he has never considered an OLCC when counseling management on whether to issue discipline. Tr. at 356. He believed that an OLCC is a way to memorialize a conversation that has occurred with an employee. Tr. at 314, 360. However, Mr. Galindo conceded that Respondent's manual permits an OLCC to be considered when making disciplinary decisions. Tr. at 422.

RX 18 is the record of Complainant's OLCC history. Complainant has received six complimentary OLCCs³⁰ as well as over 20 counseling OLCCs.³¹ Within the counseling OLCCs, Complainant has never received discipline or even a warning letter. Tr. at 138-39, 361-62. Complainant has also been told that an OLCC is not disciplinary in nature. RX 44; Tr. at 139-40. However, he believes that OLCCs can be used for discipline. Tr. at 45, 317.

Complainant's Refusal to E-Acknowledge Respondent's Policy on Moving MD11/10 Elevators

Respondent uses an e-acknowledgement system to keep employees aware of its policies and procedures.³² It electronically records when Respondent gives employees an opportunity to read updated policies and procedures and tracks whether the employees have acknowledged that they read and understand them. Tr. at 365. Mr. Galindo testified that discipline could result from an employee's refusal to e-acknowledge a policy or an OLCC; however, despite the fact that employees refuse to e-acknowledge "all the time," Mr. Galindo has never seen that occur. Tr. at 367-68.

CX 13 is a screenshot listing items Respondent required Complainant to e-acknowledge.³³ According to Complainant, by clicking the "accept" button an employee is affirming that they agree with the document. Tr. at 59. CX 14 shows the "Frequently Asked Questions" section that pops up when an employee clicks on the "help" button on the e-

on cross-examination it was pointed out that CX 5 pertains to the Indianapolis hangar not the Los Angeles facility. Tr. at 140-42; *see also* Tr. at 363, 584.

³⁰ RX 18; Tr. at 137-38.

³¹ *See* RX 18; Tr. at 138, 361-62.

³² An e-acknowledgement is a business record for Respondent. Tr. at 425. RX 2 is an extract of Respondent's People Manual concerning its acceptable conduct policy and provides "Misconduct is falsification of company documents or records, including, but not limited to, business reports, deliver reports, and time cards." Tr. at 423.

³³ This page states: "Below is a list of items that require your acknowledgement. Click on each item, review the material, then acknowledge your agreement by clicking the 'I accept' button at the bottom of the screen." CX 13.

acknowledgement system's home screen. This section states that a manager, HR representative, or system administrator can request a witness signature in the event that an employee is unable or unwilling to complete a required acknowledgement. Tr. at 60.

Complainant first became aware that he needed to e-acknowledge Respondent's moving elevator policy on October 8, 2015. Tr. at 143. He asserted that the text of the e-acknowledgement he was required to electronically sign is contained in CX 10, which states:³⁴

Prior to moving Elevators on the MD11/10 when the patio has been opened, you must contact your manager or the MOCC duty manager if your manager is not available. Not following proper procedures when moving elevators creates the risk of not having the elevators cleared prior to aircraft movement, resulting in potential damage to the equipment and aircraft.

By clicking "I Accept" below, I am acknowledging that I understand the importance of following proper procedure when moving Elevators on the MD11/10.

CX 10.³⁵ The purpose of this policy was to reduce damage events to aircraft elevators from patio doors, since those repairs are expensive and time-consuming. Tr. at 323, 494. Mr. Krafczik explained that AMTs were required to look up the relevant Aircraft Maintenance Manual ("AMM") policies before doing any work on a plane. Thus, the policy did not contain any AMM citations, because it was only intended to provide duplicate protection by requiring employees to have their supervisors present to ensure the proper AMM policies were being followed. Tr. at 495. Respondent wanted all employees to e-acknowledge this policy by the end of October 2015. Tr. at 497, 592.

Complainant did not e-acknowledge Respondent's elevator moving policy because he did not agree with its language. In his view, Respondent's e-acknowledgement system did not require him to e-acknowledge a document if he did not agree with it, though he did not contest that a policy would be binding on him regardless of whether he e-acknowledged it. Tr. at 144.³⁶ Regarding CX 10, Complainant was concerned with the ambiguity in the second sentence. He explained that the document only vaguely referenced "proper procedures," when it should have

³⁴ CX 10 is an e-acknowledgement, dated October 1, 2015, by one of Complainant's co-workers, John Miner. Mr. Miner did not testify or is otherwise further referenced in this matter, other than being the mechanic that e-acknowledged CX 10 and CX 12. See Tr. at 52, 55.

³⁵ The undersigned notes that the record contains an additional version of this elevator moving policy. In an email explaining that the subsequent change to the policy was only grammatical in nature, the original version is recounted as stating "procedure" instead of "procedures," and "before the aircraft is moved, causing damage" instead of "prior to movement, resulting in potential damage." See JX A.

³⁶ Complainant refused to directly answer Respondent's counsel's questions on this issue despite being asked multiple times. This Tribunal views such evasive answers as an admission that Complainant knew of the policy's binding effect on him regardless of his disagreement with its language and decision not to e-acknowledge it. Tr. at 144. Moreover, Mr. Galindo testified that Respondent's employees were required to follow its policies regardless of whether they e-acknowledged them. Tr. at 365-66.

identified the specific AMM citations for those procedures. Tr. at 53-55. Complainant also asserted that the use of the term “aircraft movement” in the second sentence concerned him, though he admitted on cross-examination that this sentence did not relate to the policy’s directive—contact your manager prior to moving MD11/10 elevators—contained in the first sentence. Tr. at 53-55, 145-47.

On October 8, Complainant wrote to Mr. Krafczik stating that the policy’s “language may be conflicting with its intent,” and suggested that the administrator could change it prior to his e-acknowledgement. CX 11. Complainant believed that the policy was not referring to the proper Aircraft Maintenance Manual (“AMM”) citation. Tr. at 54. Complainant included the text of the policy in his email, but bolded and underlined the word “procedures” and changed the language of the second sentence.³⁷ Complainant did not further explain his concerns or state that the policy should include AMM citations. Tr. at 516. Upon receipt, Mr. Krafczik believed that Complainant’s main concern was his perceived “grammatical errors” in the policy.³⁸ Tr. at 434-35, 498. According to Mr. Krafczik, these errors did not alter the directive for AMTs to contact their managers prior to moving elevators. Tr. at 498-99. Mr. Franks also described Complainant’s concern as grammatical, “[i]t was something about aircraft movement, versus flight control movement.” He maintained that the intent of the paragraph in preventing damage to elevators was clear. Tr. at 592-93.

In response to Claimant’s email, Mr. Krafczik notified his Senior Manager, Jim Doty,³⁹ of Complainant’s concern. Tr. at 498. On October 13, Mr. Doty forwarded Complainant’s email to Respondent’s Engineering System Administrator, Pam Wheeler, asking if the wording of the second sentence of the policy could be altered to eliminate any confusing phrasing. RX 14. Ms. Wheeler responded on October 26, indicating that she had made the changes. She stated: “We don’t normally change content once an acknowledgement is active, but this provided clarification so I made the change.” RX 15.

By the end of October, Complainant was the only AMT working for Mr. Krafczik⁴⁰ that had not e-acknowledged Respondent’s elevator moving policy. Tr. at 511, 515-16. Mr. Doty emailed Mr. Krafczik and Mr. Galindo on November 4, inquiring if Complainant had a reason for not e-acknowledging the patio door and elevator movement policy. Tr. at 500; RX 17. Complainant testified that he reviewed the changes to Respondent’s elevator moving policy on November 11, but still refused to e-acknowledge it. He testified that he still felt the policy was ambiguous, especially in light of a “very good” technical maintenance alert that Les Frank had

³⁷ As typed in his email, the second sentence of the policy read: “Not following proper procedures when moving elevators creates the risk of not having the Elevators cleared before the aircraft is moved, causing damage to the equipment and aircraft.” CX 11.

³⁸ Upon further questioning, Mr. Krafczik acknowledged that Complainant did not describe his concern as grammatical; he viewed it that way based on Complainant’s email. Tr. at 511, 515-16.

³⁹ Mr. Krafczik described Mr. Doty as a senior manager. Tr. at 436; *see also* Tr. at 18 and 35. Complainant also asserted that Mr. Doty previously had threatened him. Tr. at 37, 58, 117, 123, 162-64.

⁴⁰ Mr. Franks testified that, out of 680 AMTs he supervised in Respondent’s Western Region, Complainant was the only AMT that had not completed the e-acknowledgement. Tr. at 592-93.

released on November 5 regarding the same issue. Tr. at 56; RX 20. He was also concerned because the policy had been changed.⁴¹

As Complainant still had not e-acknowledged the policy, Mr. Krafczik created an OLCC on November 11 to document that Complainant had knowledge of the policy and understood the importance of contacting his manager before moving the patio doors. Tr. at 501-02; CX 17. This OLCC merely repeats the language used in the elevator moving policy. *Compare* CX 12 with CX 17. Tr. at 67, 155. Mr. Krafczik recalled that he gave Complainant this OLCC at the direction of upper management—at least Mr. Doty—with Respondent’s legal department also involved in the decision. Tr. at 435-36. Mr. Galindo testified that this OLCC was not disciplinary. Tr. at 368.

Ms. Wheeler, Respondent’s Engineering Systems Advisor, stated that as of November 30, 2015, there were 24 employees that had not yet acknowledged the elevator moving policy. JX A. Complainant asserted that he was the only one that received an OLCC, but on cross-examination he admitted that he did not know whether any of the other 23 employees on the non-compliance list worked at the Los Angeles hangar. Tr. at 70, 152-53. Complainant also asserted that the OLCC he received for not e-acknowledging this policy has not been removed from his personnel record. Tr. at 71. He believed the OLCC was disciplinary in nature because he could be disciplined in the future with reference to it. Tr. at 135. Nevertheless, Complainant acknowledged that, other than the OLCC itself, he had not received further discipline for not e-acknowledging this policy or several other policies. Tr. at 158-63. Further, Complainant acknowledged that he had previously received an OLCC for had refusing to e-acknowledge another policy, as did another employee, but he received no warning letter for refusing to do so. Tr. at 157-60.

Complainant Raises His Concern Regarding the Changed Policy

The same day he received an OLCC to document that he read and understood Respondent’s elevator moving policy, on November 11, 2015, Complainant discovered that the policy presented to AMTs for e-acknowledgement had been changed. Tr. at 55. He asked a co-worker, John Miner, to print out the version that he had e-acknowledged before the change, so he would have a “before and after.” Tr. at 55. Other than Complainant’s magic marker notes, the only difference between CX 10 (“before”) and CX 12 (“after”) is that the word “aircraft” is removed from CX 12. Tr. at 58-59, 322; *compare* CX 10 with CX 12.⁴² According to Complainant, the deletion of this word changed the substance of the policy entirely because the prior policy talked about moving the entire aircraft. Tr. at 149-50. Based on this change, Complainant felt that the integrity of the system had been compromised. Tr. at 55-56. He also believed that it may violate California and Federal e-sign laws. Complainant believes

⁴¹ Complainant did not explain why, after requesting that Respondent change the language before he e-acknowledged the policy (CX 11), he was concerned to find its language slightly changed.

⁴² The magic marker entries on these exhibits are Complainant’s writing. Tr. at 55. The Tribunal also noted that, confusingly, the date and time that was stamped for these documents are identical. *Id.* at 59.

Respondent “falsified” the policy after its employees had already e-acknowledged it. Tr. at 52, 58, 61, 145.

Mr. Eric Herzog is a senior aircraft mechanic that works for Respondent.⁴³ Complainant brought the changed e-acknowledgement documents to his attention, and also informed him that the policy did not have any maintenance manual reference.⁴⁴ Tr. at 325-26. The e-acknowledgement document had been changed after Mr. Herzog had acknowledged it and Respondent had not told him of the alteration.⁴⁵ Tr. at 324, 326. He also maintained that removal of the word “aircraft” completely changed the meaning of the policy, though he admitted that the omission did not alter the thrust of the directive that required employees to talk to a manager before moving the elevators. Tr. at 333-34. The surreptitious change concerned Mr. Herzog because he feared it could be used against him if he did not follow the instructions in the altered document. Tr. at 326. He was also concerned because he thought such a secret change was impossible. Tr. at 339-42. And even after the change, he believed the policy was unsafe because it did not refer to procedures in the maintenance manual. Tr. at 337. Mr. Herzog brought the unannounced alteration to management’s attention and discussed this alteration of an electronically signed document the matter with Mr. Galindo. Mr. Herzog demanded that Mr. Galindo conduct an investigation.⁴⁶ Tr. at 328; RX 68.

According to Mr. Galindo, Respondent conducted an investigation and, as a result, the e-acknowledgement was rescinded. Tr. at 345-46, 356. On November 13, 2015, Mr. Ogden rescinded the elevator moving policy, directing the AMTs via email to follow Mr. Frank’s November 5 technical maintenance alert. JX B; RX 20; Tr. at 65-69, 133, 436. In that email, Mr. Ogden stated that the extra safety measures of requiring AMTs to call a manager before

⁴³ Mr. Herzog holds an airframe and powerplant certificate. He has worked in aviation 25 years—22 for Respondent—and has known Complainant for 20 years. Tr. at 321-22, 332.

⁴⁴ Respondent is a Part 121 air carrier. It complies with its maintenance requirements using a continuing airworthiness maintenance program (“CAMP”). Respondent complies with its CAMP by utilizing an approved General Maintenance Manual (“GMM”) and Aircraft Maintenance Manual (“AMM”). And using the GMM or AMM, task cards are generated that set forth step-by-step procedures that the AMT is to perform a given maintenance activity. While performing maintenance, if an AMT discovers a mechanical irregularity not on the task card, they then document it using a non-routine log entry. In aircraft maintenance everything must be documented and there is a presumption that if it is not documented the maintenance did not occur. When AMTs conduct maintenance for Respondent it has them electronically sign that certain tasks were completed. By that signature the AMT is signing off to the airworthiness of that task. So what Mr. Herzog was expressly concerned with was how someone was able to change a policy, something that he had already signed and which he understood was impossible to change. Mr. Franks acknowledged that when a mechanic signs off on a particular task, he is certifying that the step in that task is complete and the signature on task card says the task is complete and it is airworthy. Tr. at 604.

⁴⁵ To Mr. Krafczik’s knowledge, none of the mechanics under his charge were notified that the document had been changed after they had acknowledged the policy. Tr. at 434.

⁴⁶ However, according to Mr. Herzog, Mr. Galindo did not understand the significance of AMM citation omissions because he does not hold an A&P and did not understand the significance of not having the procedures referenced. Tr. at 328-29, 336.

opening the MD11/10 patios was now unnecessary because Respondent had updated its MX manual procedures to prevent the elevators from hitting the patio when it was open. JX B. He directed AMTs to see their managers for any questions, and stated: “Under no circumstances are you to circumvent the MX manual procedure. If we follow this new procedure, we should not have another elevator/patio strike.” JX B.

On November 20, 2015, Complainant contacted the Vice President of Aircraft Maintenance, Scott Ogden, about the policy change after AMTs had e-acknowledged it. Tr. at 57; RX 21. About 27 minutes after doing so, Complainant was called into Mr. Les Frank’s office, who is the Managing Director of Respondent’s Technical Operations in the Western Region.⁴⁷ Tr. at 57. Mr. Frank somewhat recalled this meeting with Complainant, where they discussed the differences between two e-acknowledgement documents, CX 10 and CX 12. Mr. Frank told Complainant that Respondent’s legal department had vetted them. Tr. at 546. According to Mr. Frank, the conversation centered on grammatical differences.⁴⁸ Tr. at 546-47. Pam Wheeler changed the second e-acknowledgement after Complainant raised his concerns. Tr. at 547-48. She is the only person that can alter the language that has been set in an e-acknowledgement document. Tr. at 585. Employees are required to log in to acknowledge both vital and technical policies, but Respondent used different systems for e-acknowledgement of those two different types of policies. Tr. at 549.

In a November 30, 2017 email to Complainant, Mr. Ogden, and others, Ms. Wheeler explained that Respondent’s policy was to close an acknowledgement and create a new one if the original language had been changed. JX A. The change to the MD11/10 elevator moving policy was the only change to an acknowledgement that had ever occurred in the history of the system. She asserted that after being alerted to the potentially confusing verbiage, its wording was changed for clarification and “did not change the general intent of the acknowledgement.” JX A.

Workplace Violence Report of Mr. Krafczik’s Allegedly Threatening Comment

CX 8 is a completed workplace violence investigation report, dated November 25, 2015, regarding a complaint Complainant had made concerning an interaction with Mr. Krafczik on November 19, 2015. According to Complainant, during the conversation Mr. Krafczik asked Complainant about some special non-routine maintenance forms he had generated⁴⁹ for an

⁴⁷ Mr. Franks had held that position for three years and worked at Respondent for 12 years. He holds an A&P certificate as well as an FCC license. Mr. Frank has worked in aviation since age 17 and has worked for several air carriers. Tr. at 543-45.

⁴⁸ During this conversation, Mr. Frank’s also assured Complainant that he was not surveilling him. Tr. at 58. Complainant expressed his doubts because Complainant said his manager (Mr. Krafczik) had just told him to be careful because they are watching you. Tr. at 58. These allegations are addressed elsewhere in this decision.

⁴⁹ The non-routine write-ups were for multiple corrosion issues, one being the right-hand main landing gear strut door. Repairing that corrosion was labor-intensive, during which time no other employees are able to work on the aircraft and the aircraft was grounded. Tr. at 202-03, 438.

aircraft's C-check.⁵⁰ Mr. Krafczik never stated that Complainant should not be writing up non-routines, but said "Be careful, they're watching you." Tr. at 72, 175. Complainant asked who was watching him, and Mr. Krafczik simply repeated "I'm just telling you, they're watching you."⁵¹ Complainant perceived this as a threat. Tr. at 71-72.

Mr. Krafczik denied saying "be careful," but he acknowledged mentioning that "they were watching him" earlier in the day when he was briefing the crews and in the context of wearing safety equipment. Tr. at 442. Mr. Krafczik also admitted that later in the day, while Complainant was on the hangar floor, he asked him how his work cards were going and asked him if he had his bump cap on. Tr. at 445.⁵² Mr. Krafczik has had numerous discussions with Complainant about wearing personal protective equipment ("PPE") and has issued an OLCC to Complainant about not wearing PPE. Tr. at 468; RX 18 at 6.

According to Complainant, during this conversation Mr. Krafczik also said "Why don't you transfer to that department over there?", referring to the Quality Control Department. Tr. at 73. Mr. Krafczik acknowledged that he might have suggested to Complainant that he look into transferring to the inspection department because Complainant had a knack for finding stuff. Tr. at 442. However, Complainant perceived this as a threat. Tr. at 73, 206. Complainant stated that another employee involved in Complainant's second AIR 21 complaint (where Complainant alleged this employee threatened him with physical harm via a "blanket party" in August 2014) worked in that department. Tr. at 73, 173, 207.

The following day, November 20, 2015, Mr. Les Frank's—Respondent's Managing Director—called Complainant into his office. Tr. at 551. Mr. Frank recalled that Complainant expressed some concern that Mr. Krafczik had threatened him, saying something like "Be careful, they're watching you." Tr. at 551. At that point he stopped and had his assistant contact Mr. Krafczik to immediately come to his office. Mr. Krafczik arrived minutes later and explained that what he said was not a threat; it referenced the culture Respondent was trying to create where everyone is responsible for safety and should look out for their fellow workers. Tr. at 474, 551. Mr. Krafczik also explained that his comment related to wearing safety equipment,⁵³ but Complainant still believed Mr. Krafczik had referred to somebody watching

⁵⁰ A C-check is heavy maintenance on an aircraft that occurs every two years according to Respondent's maintenance program. C-Check inspections for this aircraft involve about 800 work cards and generate 800 to 1,400 AMT non-routines. During a C check at Respondent, the aircraft is down from 26 to 38 days. Tr. at 439-40; 567; *see generally*, FAA Notice 8900.103 (Mar. 19, 2010), App. A, at 4, available at https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/afx/afs/afs300/afs330/media/n8900.103appa_qanda.pdf.

⁵¹ Tr. at 203. However, on his workplace violence form, he only referenced Mr. Krafczik making this statement once, not twice. RX 31 at 2; Tr. at 205.

⁵² A bump cap is a required safety equipment for AMTs. Complainant wears a hat, and Mr. Krafczik could not see whether he had his bump cap on under his hat. Tr. at 445.

⁵³ Tr. at 475-76. Mr. Frank later testified that a culture change in safety occurred after a mechanic died at one of their facilities when he fell off of a working stand. Since then Respondent has emphasized PPE, and especially the prevention of head injuries. Tr. at 569-72.

him. Tr. at 177-79. Mr. Frank similarly assured Complainant that the comment was about everyone watching everyone to ensure that PPE were being worn on the shop floor.⁵⁴ Tr. at 179.

Mr. Frank did not recall Complainant mentioning that Mr. Krafczik suggested that Complainant should transfer to a different department. Tr. at 552. However, Mr. Krafczik may have said something about how Complainant would be a great inspector.⁵⁵ When they left, Mr. Frank believed that the matter was resolved; Mr. Krafczik and Complainant even shook hands. Tr. at 551-52, 573. Accordingly, Mr. Frank was surprised when five days later a security investigator asked him to provide a statement about the meeting he had had with Complainant. Tr. at 574; RX 22.

Complainant filed a workplace violence complaint against Mr. Krafczik five days later for his alleged “be careful, they’re watching you” comment (CX 8), and both he and Mr. Krafczik were interviewed by corporate security. Tr. at 179, 476. On December 23, 2015, Complainant emailed Mr. Galindo, Complainant’s HR representative, asking for a copy of his November 25, 2015, workplace violence complaint.⁵⁶ See JX C; Tr. at 180. Mr. Galindo responded on December 28, 2015, stating that he has no record of Complainant sending him anything on a workplace violation complaint. JX C; Tr. at 180-81. Eventually Mr. Galindo provided Complainant with the language of his complaint, but Complainant never received the complaint in its original form.⁵⁷ Tr. at 74, 181-82.

On cross-examination, Complainant acknowledged that the employee who allegedly threatened him retired in January 2015. Tr. at 173-74. Complainant asserted that he still had concerns with that department because it still employed persons who worked there when he allegedly had been threatened with a blanket party and had been surveilled. Tr. at 174, 207. Complainant also admitted that he has good attention to detail and had received an OLCC complimenting him on his attention to detail.⁵⁸ CX 3; Tr. at 206. Further, since the alleged

⁵⁴ Complainant acknowledged that when he saw others not wearing their PPE (bump cap, safety glasses) he had informed management in the past about that. And he himself has been informed when he was not wearing PPE. In fact, Complainant has received an OLCC for allegedly not wearing his PPE. Tr. at 176-77.

⁵⁵ According to Mr. Krafczik, Complainant has a knack for finding stuff that may have been missed by an inspection and is above average in spotting safety issues. Tr. at 430.

⁵⁶ According to Mr. Galindo, this is something the security department—not HR—handles. Nevertheless, Mr. Galindo tried to help Complainant, and eventually he was able to locate Complainant’s statement just before Christmas. He attempted to find Complainant to give him a copy, but could not, so Mr. Galindo left Complainant instructions to come pick it up in Mr. Galindo’s mailbox. When he came back to work after Christmas, he was surprised that Complainant’s statement was still in his mailbox. Mr. Galindo again unsuccessfully tried to find Complainant, and believes that he eventually emailed the document to Complainant. Tr. at 347-49, 375-84; *see also* RX 31 – RX 34.

⁵⁷ Complainant asserted that the full complaint would have contained boilerplate language plus other elements he entered into the complaint form, such as witnesses, dates, times, locations, etc. Tr. at 75, 182.

⁵⁸ Respondent has issued six complimentary OLCCs to Complainant during his tenure for his attention to detail and troubleshooting ability. *See* RX 18.

incident back in 2014, nothing had occurred to make him believe that there was any hostility towards him from members of the inspection department. Tr. at 208.

Reports Concerning Missing Main Landing Gear Data Plates

In early November 2015, Complainant discovered that two aircraft had lost their main landing gear data plates. Tr. at 61-64. These data plates were approximately 10 inches long and about three inches wide, and he was concerned that they had broken off of the airplane and may be laying on runways. Complainant was also concerned that the maintenance safety reporting system did not provide a means to record things falling off aircraft, and emailed his quality control manager, Mr. Osvaldo Tagle, on November 3, 6, and 11 to express these concerns.⁵⁹ Tr. at 63-64; CX 16. On November 5, 2015, Complainant also submitted three Maintenance Safety Reports (“MSR”) about these “broken/missing” right-hand main landing gear data plates.⁶⁰ Tr. at 61-62; CX 15; JX G.

Mr. Tagle responded to Complainant’s November 3 email on November 6, stating that the data plate was not considered a primary structure and therefore a reportable discrepancy report was not required. CX 16. Complainant responded via email on November 11 expressing his dissatisfaction with Respondent’s reply (CX 16), and, feeling that Respondent was not taking sufficient action, he eventually took his concerns to the FAA. Tr. at 102-03. Complainant also filed an additional MSR concerning missing data plates on February 10, 2016. JX G at 10.

Sometime in early 2016, Complainant discovered that Respondent had taken additional action on his MSRs, which he believed were already “completely closed.” Tr. at 103-04. He emailed a “lower level guy,” Jack Glowen, on April 1, 2016, asking for clarification as to why his reports were reopened and why he was not notified. Tr. at 103-04; JX G. When Mr. Glowen did not respond, he elevated his concern to Respondent’s Vice President of Technical Operations for Safety, Mr. Lyons, on April 5. Tr. at 104-05; JX G. This was the first time Complainant had elevated a concern to Mr. Lyons. Tr. at 104-05. An Air Operations Safety Manager, Mark Molin, who had been courtesy copied to Complainant’s April 5 email, responded and referred Complainant to Respondent’s process for investigating MSRs as explained in its Safety and Airworthiness Departmental Manual. He also thanked Complainant for his recommendations and encouraged him to continue reporting when he saw hazards. JX G at 10. Complainant responded on April 7, maintaining that Respondent’s Manual did not contain instructions for reopening an MSR once it had been “closed,” and asking what policy permitted Respondent to do so without notifying him. JX G.

Mr. Molin responded to Complainant’s email that day, indicating that he could send him snapshots showing that his MSR had been closed in December 2015 and not reopened. JX G at 5. He invited Complainant to call him if he still had questions. JX G at 5. On April 27, Complainant again emailed Mr. Lyons, stating that he was still waiting to receive an answer concerning the policies that permitted Respondent to “reopen” his MSR after it had been

⁵⁹ Mr. Krafczik, Mr. Galindo, and three other managers were courtesy copied to this email. CX 16.

⁶⁰ This MSR was unrelated to the policy of moving elevators on the MD10/11s. Tr. at 143.

“closed.” JX G at 1-5. He maintained that Respondent’s Manual permitted it to “close” an MSR and email the original submitter to inform him of the status of the MSR and any actions taken in response to it. Complainant copied the full Webster’s Dictionary definition of the word “close” in this email, and stated that he did not understand the use of that word in Respondent’s Manual regarding MSRs. JX G; Tr. at 104. On May 26, 2016, Respondent’s attorney, Gary Centrich,⁶¹ emailed Complainant to inform him that he had investigated his concerns and confirmed with Mr. Molin that these matters were closed. RX 39.

May 2016 Procedure and Email Etiquette OLCC

On May 26, 2016, Mr. Krafczik issued a counselling OLCC to Complainant. CX 25; RX 18 at 4. This OLCC documented that Respondent had advised Complainant on more than one occasion “to contact his manager, senior manager, safety specialist, or human resources advisor first regarding daily operational matters.” It also advised Complainant not to send discourteous and repeated emails to Respondent’s officers about matters that have been closed. Prior to this OLCC, Complainant had received training on email best practices several times,⁶² he had been spoken to by Mr. Galindo about email etiquette, and he had been specifically told by Mr. Galindo that the font in his emails was not appropriate in February 2016.⁶³ Tr. at 261-63, 407-08; RX 40, RX 42 at 1.⁶⁴ Mr. Galindo uses Respondent’s document entitled “Guidelines for Effective Email Use at FedEx”⁶⁵ to train employees in email etiquette, and he provided a copy of this document to Complainant. Tr. at 409; RX 40. These guidelines state: “Style is important. Limit the use of bold, capitals, or red text, as this may be interpreted as shouting.” RX 68 at 2; Tr. at 412. Additionally, these guidelines specify that the standard font used at Respondent is Courier 10. Tr. at 414.

Despite receiving this training in December 2014 (RX 40), Complainant used between 24- and 36-point fonts his May 2016 correspondence with senior management. *See* JX G; RX 39. Complainant acknowledged that he could vary the font size he used when sending emails, but explained that the large font size in RX 39 was due to Respondent’s system not “liking” the email he prepared from home using his MacBook Pro, which made the font size larger. Complainant spoke to Mr. Galindo about it and was sorry about the large font. Tr. at 314-17. After having received two emails about the status of his MSR by a manager that his MSRs were closed, Complainant wrote to Mr. Lyons to ask him why his MSRs were allegedly reopened.

⁶¹ *See* Tr. at 100.

⁶² Tr. at 427. Mr. Krafczik testified that he was aware that Complainant had sent discourteous emails “numerous times” in the past, with his large fonts looking like he was yelling. Tr. at 506. Mr. Frank had mentioned to Complainant more than once that it was extremely difficult to read his messages, when not sitting at his computer, because the font he used was too big. He even directed HR personnel to provide Complainant with e-mail etiquette training. Tr. at 599-600.

⁶³ For the February 2016 email, Complainant attributed the large font due to him preparing the document at home on his MacBook pro computer. Tr. at 263.

⁶⁴ *See also* RX 41; Tr. at 414-17.

⁶⁵ During the hearing, counsel referenced “Exhibit 31-6”; however, the Tribunal asked about this and he was referencing a marking on the document “FXC31-6” that is in RX 68. Tr. at 410-11; *see also id* at 413.

Complainant again used a large font size, 18 or 24, in his email. Complainant included a definition of the word “closed” in his email to Mr. Lyons, who is one of Respondent’s vice presidents. Complainant viewed this OLCC as disciplinary and in retaliation for inquiring about the alleged reopening of the MSR. Complainant says that he was never told why he was given this OLCC. Tr. at 105-10, 251, 256-60, 264.

Hexavalent Chrome Dust Incident

JX D is an email chain from Complainant to Mr. Hector Chavez, the manager for the composites paint shop. On February 5, 2016, personnel were sanding the right-hand wing lower surface, but were not using barriers. The paint contained hexavalent chrome,⁶⁶ a hazardous substance that requires protective gear when sanded. Tr. at 78-79. Respondent has procedures to keep it away from its employees, including use of protective suits and ventilators. Complainant traditionally puts his toolbox underneath the right-hand wing stand, but at that time was working on the other side of the aircraft. Complainant alerted Mr. Frank to the paint dust that was now on his toolbox and to the fact that the sanding crew was supposed to establish a 20-foot radius perimeter around their sanding location. Tr. at 76-79.

Mr. Frank also recalled this incident. During one of his tours of the hangar, Mr. Frank came across Complainant who pointed an area under the wing that, in his opinion, was not properly cordoned off. Mr. Frank contacted Mr. Hector Chavez, the manager of the composite shop, and told him to fix the issue if Complainant was correct, and let him know the results. Mr. Chavez addressed it and the email chain at JX D is the result of that event. Tr. at 555-56; *see also* RX 36.

On February 10, 2016, Complainant emailed Mr. Frank and Mr. Chavez about the incident and wrote: “Perhaps both you and your employees require additional training with regards to on-wing surface preparation, paint sanding, and related work practices for the purposes of creating a safer work environment.” JX D at 3; *see also* Tr. at 209-10. Complainant testified that it was not his intent to be insulting; it was a suggestion. Tr. at 80. The following day, February 11, 2016, when he arrived at his workstation, Complainant noticed sanding dust everywhere. At the hearing, Complainant claimed that he had been the only one assigned to work on the left wing that day.⁶⁷ The whole area where the sanding had occurred⁶⁸ should have been taped off 25 feet in each direction and they should have used the correct vacuuming to collect the dust. Further, he should not have been assigned to work there. Prior to this event,

⁶⁶ Complainant agreed that this substance is also known as zinc chromite, a substance well known within the aviation community as being potentially hazardous. Tr. at 78-79. *See generally* https://www.osha.gov/dte/grant_materials/fy11/sh...11/Hexavalent_Chromium.ppt.

⁶⁷ Mr. Krafczik testified that he does not assign what employee gets what task. In their morning meeting, he sets up a plan on what needs accomplished during the day, but AMT leads are the ones that select the particular AMT for a given task. In this instance that would have been Mr. Gary Scott, who supervised 10 or 11 AMTs at that time. Tr. at 480-84.

⁶⁸ Complainant later described the dust being on the left-hand wing, maintenance stand, the left-hand main landing gear tires, and left-hand landing gear assembly—“it was everywhere.” Tr. at 214.

Mr. Krafczik had Complainant turn in his respirator some time prior to this event.⁶⁹ Complainant viewed the amount of dust as exceptional and he sent out another email, courtesy copying Mr. Bob Zimney, a safety process advisor. Tr. at 79-82. Mr. Krafczik learned of the issue from another AMT. Later on, Complainant approached Mr. Krafczik to discuss the matter when Mr. Krafczik went to the area to inspect it. By that time Mr. Krafczik had already called Mr. Chavez to clean up the dust that was out there. Tr. at 478-80.

Complainant viewed his assignment to the left wing area as retaliation for his submissions of the MSRs about the main landing gear and corrosion, as well as for his email to Mr. Chavez the day prior about the need to tape off the regulated area. Tr. at 207-08. However, on cross-examination, Complainant acknowledged that Mr. Krafczik was not part of the email to Mr. Chavez and Mr. Frank on February 10 and was not part of a discussion he had with Mr. Chavez the week prior about a sanding dust issue, nor did he have any knowledge whether Mr. Krafczik was even aware of Complainant's discussion with Mr. Chavez. Yet he maintained that Mr. Krafczik assigned him the left wing work in retaliation for his MSRs about the landing gear and corrosion. Tr. at 208-09. Once notified of the issue, the sand dust on the left wing was cleaned up and then Complainant worked on the left-hand wing spoiler. *See* RX 36.

Mr. Jamie De La Cruz is a senior AMT.⁷⁰ On February 11, 2016, Complainant and he were assigned to work a spoiler on the left-hand wing. Complainant arrived at the work area first, and noticed the presence of sanding dust in their assigned work area. Dust was everywhere; he had never seen that much sanding dust, and the area was not cordoned off. Complainant notified Mr. Krafczik about the dust. The paint and composite crew came and cleaned the area up about one-half hour later. Complainant and Mr. Cruz did not have to work in that area until the dust had been cleaned up. Mr. Cruz did not return to his assigned work area that day because he did not want to go back, but returned the following day. Mr. Cruz recalled that Mr. Scott, the lead mechanic, gave Complainant his work cards that morning. Tr. at 521-27.

Mr. John Dreckmann is another AMT mechanic at Respondent's LAX hangar.⁷¹ He also testified that on February 11, there was chromium sanding dust all over the tool box and around the aircraft, more than usual. Mr. Scott assigned him the work card that morning. The sanding AMTs did not use Respondent's safety precautions for sanding chromium hex dust—a 25-foot radius perimeter. As a result, he was not able to do his own work assignment that day. Tr. at 531-33, 537, 541.

⁶⁹ Mr. Krafczik acknowledged that Claimant did not have a respirator because AMTs on the hangar floor are not required to have a respirator, but noted that there are PPE respirators available to AMTs in the tool crib to protect themselves in some dustier areas. Only composite and sheet metal mechanics that sand on the airplane and sand parts had company-issued respirators. Tr. at 450-51.

⁷⁰ He holds an airframe and powerplant license and FCC certificate, and has worked for Respondent since 1990. Tr. at 520.

⁷¹ He has worked for Respondent about 30 years, and holds an A&P certificate. Tr. at 529-31.

Mr. Hector Chavez is an Aircraft Maintenance Manager for Respondent's LAX hangar.⁷² Sometime before February 5, 2016, Mr. Chavez had a conversation with Complainant regarding on-wing surface preparation, paint sanding, and best practices. During that conversation, Mr. Chavez took Complainant over to the nearest computer, and showed him the procedures for sanding hex chrome paint. Complainant's February 10, 2016 email (JX D at 2) is a follow up to that conversation. Several factors influence whether a 25-foot radius is needed when sanding hex chrome; it is a misconceived notion that there must be a 25-foot radius. A radius as small as ten feet is permitted. Tr. at 639-42, 647-48.

Mr. Chavez stated that on the evening of February 10 to morning of February 11, 2016, a four-AMT team was assigned to sand the aircraft's left wing. Mr. Chavez first learned that there was a sanding dust issue when Mr. Krafczik called him on the phone. About the same time as Mr. Krafczik's call, Mr. Chavez received an email from Complainant stating that he was in a precarious situation because of the hex chrome sanding dust left on the wing. Mr. Chavez immediately went to the hangar to address the problem. He discovered that after his crew had finished the job, they started cleaning up and took down the ropes. However, his crew forgot to wipe off the wing and vacuum the areas that were exposed so it was possible for employees to enter the area without wearing respirator. Mr. Chavez conceded that his crew should have finished the cleanup. Once notified by Mr. Krafczik, his crew immediately addressed the situation. Mr. Chavez summarized these events in an email. *See* RX 36. After the sanding dust was cleaned, Mr. Chavez received no further concerns from Complainant. Tr. at 643-47, 650-55.

March 25, 2016 Work Card and Taxi Ride Incident

Respondent requires that its AMTs identify safety issues and document them on non-routine forms. A non-routine is a discrepancy discovered either while an AMT is performing a base inspection card or while walking around and seeing something out of the ordinary. Once identified, Respondent addresses the discrepancy. Tr. at 463-64; *see also* RX 10.

On March 24, 2016, while working on an aircraft, Complainant discovered that some incorrect screws had been installed. The screws did not provide the correct load to keep a panel secured. Complainant viewed this as a safety issue. He reported it to the quality assurance representative verbally and followed up with him by text. Tr. at 83-84, 219; RX 64.

As a manager of the aircraft hangar, part of Mr. Randy Walker's responsibility was to provide Lead AMTs work cards for them to subsequently assign to AMTs under their supervision.⁷³ Tr. at 665. On March 25, 2016, Mr. Walker was the only manager in bay one that

⁷² He has worked in that position for ten years, and holds an A&P certificate. Tr. at 638.

⁷³ Mr. Randy Walker testified that he is currently the manager of Respondent's Interior Shop and Tool Room at its LAX hangar and has worked for Respondent over ten years. Prior to working for Respondent, he worked almost 17 years for McDonnell Douglas working on avionics, writing technical manuals and as a maintenance representative. In 2016 he was a manager on the hangar floor. He holds an A&P certificate and a FCC license. Tr. at 663-65.

day, covering for Mr. Krafczik. Tr. at 675. Mr. Gary Scott was the lead AMT,⁷⁴ and was reporting to Mr. Walker as his acting manager. Mr. Krafczik is normally Mr. Walker's supervisor. Tr. at 632-33.

Mr. Scott assigned Complainant the task of installing Philips-head panels on Aircraft 303.⁷⁵ According to Complainant, there were two other people assigned to the work card he was working on: Mr. James Hinckley and Mr. Reginald Gee.⁷⁶ This work card detailed the work to which they were assigned.⁷⁷

However, from the start of the shift there were snags because there were a lot of production control stamps preventing Complainant from being able to move forward. Under Respondent's processes, Complainant needed a stamp from the inspection department or the planning department to replace a panel. This is reflected on the work card. *See* RX 37. For mechanics to start installing any panels, they have to get a production control stamp to ensure there is no conflict with other maintenance, and then get an inspector to look at the area for their approval to install the panel. Mr. Scott was aware of these delays. Apparently that day there was nobody in production control to stamp the work cards to move forward. While waiting for approvals to work on his assigned tasks, Complainant stuck his head in the nose gear area and observed a support strut hanging out of the No. 1 air cycle machine exhaust plum. He saw another one missing, so he wrote them up on a non-routine card. Mr. Scott knew he was filling out non-routines because Complainant had entered them into the database and Mr. Scott evaluated them. Tr. at 84-88.

⁷⁴ Mr. Scott holds an A&P certificate, an FCC license, and has worked for FedEx about 35 years. Tr. at 622.

⁷⁵ RX 56 is Mr. Scott's signed declaration as is JX F. Tr. at 623. *See also* Tr. 666; JX J.

⁷⁶ However, Complainant later testified that Mr. Jamie De La Cruz might have been assigned to the work card. *See* Tr. at 217. Mr. Scott recalled that there were a couple of AMTs assigned to the task, possibly Bourne Hunter and Jim Hinkley, but was not 100 percent sure. Tr. at 637.

⁷⁷ RX 37 is a work card for aircraft 303 for tasks that Complainant had been assigned to complete. Tr. at 225. RX 64 is the email with photographs showing where Complainant found a panel installed using incorrect screws. Tr. at 220-21. The work card does not reflect the condition of the work card at the time Complainant was working on the aircraft on March 25, 2016 but reflects entries that were made after all of the work was completed. Tr. at 225-26. An AMT is not to close the panel until after the work card has a production stamp and QC stamp placed on the given task. Once the AMT completes their task, they then place a stamp on the work card next to "closed by". Once the panel is closed, it can be sealed and the AMT then places their stamp and date next to that entry or places a "N/A" is not required. Tr. at 226.

On RX 37, in reference to panel 151-CT, the production control was stamped March 16, 2016, the QC stamped it March 23, 2016, the panel was closed March 23, 2016, and it was sealed March 28, 2016. "DK" is Complainant's stamp identifier. The panel was not sealed on March 25, 2016 because it was common knowledge that this panel cannot be sealed without another panel (151-DT) being sealed first. The 151-DT panel portion of the work card was stamped by production control on March 16, 2016, was stamped ok to close on March 23, 2016, and installed and sealed on March 25, 2016. In all there were eight panels that could have been worked on March 25, 2016. Tr. at 228-38.

Later that day, Mr. Scott updated Mr. Walker on the status of the work cards Complainant was working on. Complainant had been issued work cards to install panels that had already been approved by the planning department. Complainant mentioned to Mr. Scott that there were some items that had to be addressed before he could install the panels. Complainant had also discovered some items the day that he submitted non-routines. Tr. at 625-27.

Mr. Walker was talking to Mr. Scott in Mr. Scott's office. Complainant came in and Mr. Walker asked to speak to him about his work cards in a few minutes. This occurred just before Mr. Walker's 10:40 a.m. meeting. Tr. at 666-67; 89-90.

After Mr. Walker's meeting, around 11:45 a.m.,⁷⁸ Mr. Walker saw Complainant in the tool box area and asked Complainant if he could update him on the status of the Phillips panels. Tr. at 668; RX 37. Certain information about the status of work card cannot be gleaned by simply looking at the work card. Tr. at 694. Mr. Walker asked Complainant if he could speak to Complainant in his office about a work card. Complainant told Mr. Walker that he was not the only one assigned the work card. Tr. at 90. Complainant said that his lead was right over there and knows everything about the task card. *Id.* Mr. Walker again said he wanted to talk to Complainant about the work card, to which Complainant responded that he is not going to Mr. Walker's office until he got his HR rep.⁷⁹ Mr. Walker did not tell Complainant that he wanted to talk about non-routines⁸⁰ nor did Mr. Walker bring up the subject of his non-routines at that time.⁸¹ Complainant responded that he was not talking to him unless he had a Human Resource person present.⁸² Tr. at 91; 668. Mr. Walker explained that was okay but that he just wanted to find out about the progress of the Phillip panels being installed. Tr. at 668. Mr. Walker then went upstairs to Mr. Galindo, an HR representative, and had Mr. Galindo and Complainant meet him in his office. Tr. at 668-69. Complainant testified that was suspicious of Mr. Walker's request to go to Mr. Walker's office because it was the first time Mr. Walker or any other manager had made such a request to discuss a work card. Tr. at 91-92.

After gathering Mr. Galindo, the three of them meet in Mr. Walker's office and were later joined by Mr. Walker.⁸³ During this conversation Complainant believed that Mr. Walker

⁷⁸ Tr. at 90.

⁷⁹ Mr. Scott testified that there is no requirement for a manager to go to the Lead AMT for the status of a work card; they can talk directly to the mechanic. Tr. at 633, 676.

⁸⁰ Tr. at 676

⁸¹ Tr. at 223, 247. *See also* CX 21 where, in a declaration, Withbourne Hunter states that he was working on the work card that day. Also, in CX 21, Reginal Gee only declares that he saw the exchanged between Complainant and Mr. Walker; he does not represent that he was assigned to the work card that day.

⁸² There is no protocol where a manager cannot approach an AMT to find out the status of a work card. Tr. at 676.

⁸³ Mr. Walker testified that when he arrived, those three were arguing about something. Mr. Scott had the impression that Complainant was upset with Mr. Walker about something. Mr. Scott was present in Mr. Walker's office a brief time, maybe five minutes. During the meeting Mr. Scott recalled Complainant mention that he had kept Mr. Scott up to speed on the status of his work. Mr. Scott recalled Mr. Galindo tell Mr. Walker that Mr. Walker had said enough and that Mr. Walker was being rude. Mr. Scott left shortly after that statement was made because it looked like the conversation was getting heated.

expressed concern about Complainant writing stuff up when assigned a work card.⁸⁴ However, they did not actually talk about the non-routines during the meeting. At some point Mr. Galindo told Mr. Walker that he was being rude.⁸⁵ Complainant had the impression that he was being accused of something. Tr. at 93-94, 239.

Mr. Galindo recalled that Complainant had asked him to accompany Complainant to Mr. Walker's office, so he did. At that time, Complainant told Mr. Galindo that Mr. Walker did not want Complainant to write up non-routines. Tr. at 385. Once in Mr. Walker's office, Mr. Galindo asked what was going on and Mr. Walker responded that he was just trying to find out what was going on with an airplane because he was about to go to a turnover meeting before shifts changed. Tr. at 385. Mr. Walker asked Complainant to give him an update on a work card. Tr. at 386. Complainant instead addressed his non-routine write-ups. Tr. at 386. Mr. Walker never did get an answer from Complainant about what was going on with the work card. During the meeting to resolve the miscommunication, Mr. Galindo believed that both Mr. Walker and Complainant were being rude to him by interrupting him. Tr. at 388. It was Mr. Galindo's impression that Complainant did not respect Mr. Walker's authority and was being an obstructionist. Tr. at 389. During this meeting, Mr. Walker did not threaten Complainant either physically or verbally. Tr. at 390. Mr. Galindo ended the meeting without Mr. Walker getting an answer to his question because the meeting was not going in the direction he wanted. In Mr. Galindo's view, Mr. Walker was not going to get any cooperation out of Complainant so he excused him. Tr. at 391-92.

During this meeting, Mr. Walker did have two new non-routine cards on his desk written by Complainant because he reviews them to see what comes up during a day, and he has to brief it to oncoming shift manager. Tr. at 670. Complainant raised the issue of non-routines in his office. Tr. at 677. Mr. Walker agreed that he told Complainant that he welcomed non-routines and that he was not there to talk about non-routines.⁸⁶ Tr. at 674-75. Complainant said there was an issue with one of panels he was installing, but it had nothing to do with waiting for Planning Department approval. The work card covered numerous panels⁸⁷ and Mr. Walker wanted to know why they were not being able to move forward with other panels. After looking at the work card, Mr. Walker saw that there were some panels that could have been installed regardless of whether another panel needed to be installed, and other parts of the job could have been completed as well. Tr. at 678, 682-83. At some point, Mr. Scott joined the meeting and said that one panel had an issue that needed to be addressed before they could install it. Tr. at

However, during his time in Mr. Walker's office, Mr. Scott did not see anything that he would call intimidating or threatening. Tr. at 628-34.

⁸⁴ The Transcript uses the words "work hard" instead of "work card". The Tribunal recalls the testimony being about Complainant being assigned a "work card". See Tr. at 94, line 9.

⁸⁵ Mr. Scott testified that he did not think that Mr. Walker was being rude. Tr. at 634.

⁸⁶ Mr. Walker testified that when Complainant writes up a non-routine, it is usually a legitimate non-routine. Tr. at 677.

⁸⁷ Mr. Walker recalled there were eight panels on the work card that still could have been addressed. Tr. at 678. See also *id.* at 680-83, 687-92.

671-72. Mr. Walker also admitted that at some point Mr. Galindo told him that he was being rude to Mr. Galindo. Tr. at 678-79.

As a result of this meeting, Complainant filed a workplace violence complaint. Tr. at 240. As part of that complaint, Complainant prepared a written statement (RX 65). Tr. at 245-46. At some point, Mr. Walker learned that Complainant had filed a workplace violence complaint against him. Mr. Walker was totally surprised by this because he did not make any intimidating remarks or hold Complainant accountable for anything. He was later interviewed by security about this allegation. Tr. at 683-84.

Request for a Taxi

Complainant felt angry from this meeting so he went to his locker, undressed, and clocked out prior to the end of his shift. He went upstairs and asked for a taxi ride home as he had gotten to work that day in a van pool. Tr. at 392. Respondent had provided Complainant a taxi on one prior occasion when he was not feeling well.⁸⁸ However, there is no policy in place requiring that Respondent reimburse taxi rides for employees who fall sick at work.⁸⁹ Mr. Galindo telephoned Mr. Sobczak, Complainant's senior manager, and let him know that Complainant was going home and that Complainant had requested a reimbursed taxi ride home.⁹⁰ Tr. at 393-94.

Complainant lives 46 miles from the hangar. Tr. at 96-97. Respondent did not offer Complainant a taxi fare but another manager, Mr. Steven Sobczak,⁹¹ offered to give him a ride home. Tr. at 559. After having a conversation with Mr. Frank about Complainant's request for a taxi and at Mr. Frank's suggestion,⁹² Mr. Sobczak offered to give Complainant a ride home from work after reporting that he was not feeling well.⁹³ Tr. at 700. Complainant declined because he did not want to be around Respondent's management. Tr. at 97, 701, 711-15. Instead, he walked off the airport property and eventually called the van pool driver to pick him up at the end of the shift. Tr. at 94-98, 249-50.

⁸⁸ CX 22 is a picture of a cab fare receipt for this prior occasion that occurred on October 22, 2014. Tr. at 96. In later testimony, Complainant agreed that Mr. Krafczik actually has approved a taxi ride for Complainant on two occasions, one in October 2014 and one relating to his recent workers' compensation claim. Tr. at 250. The date of the later taxi ride authorization was not provided to the Tribunal.

⁸⁹ Tr. at 518, 718.

⁹⁰ He later went to Mr. Sobczak's office to see about the status of Complainant. He was told that Mr. Sobczak offered Complainant a ride home and Complainant refused. Tr. at 303. Mr. Walker also testified that he too contacted Mr. Sobczak about Complainant requesting cab fare home. Tr. at 672-73.

⁹¹ Mr. Sobczak was not in the meeting with Complainant, Mr. Walker and Mr. Galindo. Further, Complainant does not know whether Mr. Sobczak was aware of any discrepancies Complainant submitted that day. Tr. at 247.

⁹² According to Mr. Sobczak, Mr. Frank said there was not a reason to give Complainant a cab ride home. Tr. at 701.

⁹³ Mr. Sobczak denied declining Complainant's request for a taxi ride home because he completed non-routines, issued safety complaints, or to harass him in any way. Tr. at 713-14.

*Complainant's Application for Respondent's Avionics Technician Position*⁹⁴

In April 2016, Complainant applied for an internal job posting with Respondent as an avionics technician. The position required candidates to possess a repairman certificate and 36 months of avionic component technician experience. RX 23, RX 24; Tr. at 401-02. *See also* RX 26. Complainant was told that he did not get the position because he did not meet the minimum qualifications for the position.⁹⁵ Complainant admitted that he did not hold a repairman's certificate and was not qualified for that position. However, Complainant believed that other departments, like the sheet metal shop, hired AMTs from the hangar facility without any formal training or practical experience, though Complainant did not know if the same was true for the avionics department. Tr. at 41-44, 294-301, 307.

Mr. George Murphy has been the Respondent's Hangar Maintenance Manager, Structures Department for about four years and has worked for Respondent since April 1990. He holds an A&P certificate and a FCC license. Tr. at 728-29. In April 2015, he oversaw Respondent's instrument shop at the LAX hangar. Respondent posted the avionics technician opening on the JCATS system, an internal program where Respondent's employees can bid on a position, if they qualify, anywhere in the country. Hiring is then based on seniority. AMTs that bid that job did not have the experience required to hold the repairman certificate. Tr. at 730-33.

Complainant bid on this position. He was on the seniority list for those that applied for the position, and Mr. Murphy would have offered him the job, if he met the criteria. In an email, Mr. Murphy explained that an A&P license does not meet the announcement criteria because it required a repairman certificate.⁹⁶ *See* RX 25. Complainant did inquire if he could receive the requisite training for the repairman certificate at the avionics shop; however, the training had to occur prior to obtaining the repairman certificate. Tr. at 734-36. At some point, Mr. Galindo became involved on whether Complainant was qualified for the position. Tr. at 736-37. *See* RX 27; RX 28. Ultimately, Mr. Murphy rejected Complainant's application because he was not qualified for the position. Out of all the bids he received, nobody carried the required training or experience. Tr. at 740.

April 2016 Burbank Facility Incident

On April 4, 2016, Complainant was on a family medical leave of absence (an unpaid leave status) due to not feeling well, stress, and anxiety. He went to visit his wife's mother's gravesite, which is located across the street from Respondent's Burbank facility. Complainant knew that his first mechanic co-worker had bid on a job there and so he went to visit him and another man that he had worked with for many years. While there, he happened to need five

⁹⁴ This Tribunal granted Respondent's motion for summary decision on this issue by Order dated November 3, 2017. These events are recounted for background information only.

⁹⁵ Mr. Galindo testified that, according to Respondent's aircraft maintenance employee handbook (RX 9), Complainant should not have even applied for the job because he did not meet the minimum qualifications. Tr. at 404-05.

⁹⁶ Mr. Murphy also cited to 14 C.F.R. § 65.81.

documents to supplement one of his DOL AIR 21 complaints, so he printed them out using Respondent's printer. Complainant had no business purpose for being at the Burbank facility. He was aware that management for the facility was located at the Los Angeles hangar, not at the Burbank facility. Complainant asserted that Respondent found out about his visit after he filed his amended OSHA complaint, but acknowledges that he has no proof of this belief. Tr. at 278-79.

On August 17, 2016, Complainant's lead told him that Mr. Sobczak wanted him to go to the Human Resources office. When Complainant entered the HR office, Mr. Sobczak and Ms. Pamela Santucci,⁹⁷ the HR advisor was there. When asked, Complainant admitted that he had been at the Burbank facility three to six months prior. Mr. Sobczak and Ms. Santucci only asked about the purpose of the visit, and Complainant told them it was to access Respondent's database. Ms. Santucci appeared relieved by his response, and then he was excused. Respondent has a policy prohibiting employees from working off the clock. Complainant is an hourly employee and was not clocked into work that day. Following this meeting Respondent took no disciplinary action against Complainant. Tr. at 113-15, 282-85.

Mr. Sobczak recalled that the meeting lasted about 45 minutes. Tr. at 716-17. He initiated the meeting because he had learned from another manager that Complainant had visited the Burbank facility,⁹⁸ and to ask Complainant the reason for his visit.⁹⁹ Mr. Sobczak referenced a piece of paper when he asked Complainant questions, which contained about six prepared questions. Tr. at 715. Complainant was asked questions only related to his visits to the Burbank facility. Mr. Sobczak and Ms. Santucci wanted to ensure Complainant was not performing off-the-clock work as that could open Respondent to liability if Complainant was injured. Mr. Sobczak was also concerned because Respondent would be required by law to pay him for that time if he had been working. Tr. at 707. Respondent's legal department had asked Mr. Sobczak and Ms. Santucci to report back Complainant's answers. Ms. Santucci was not told to take any action against Complainant as a result of the information obtained at that meeting. Tr. at 611-620, 705-09, 715-16.

Alleged Camera Surveillance of Complainant during 2015/2016

Complainant also testified about his concern that Respondent was using its security cameras to surveil him. He stated that he became concerned after a manager allegedly threatened him with surveillance in 2009 over the PA system. Tr. at 116-19. On cross-examination, Complainant also stated that his concern emanated from a comment back in 2009 about an employee threatening him with a blanket party, but when pressed he admitted that this alleged

⁹⁷ Ms. Santucci works at Respondent's LAX maintenance hangar as a Human Resources advisor and has worked for Respondent for two years. She has 22 years of human resource experience prior to joining Respondent. Tr. at 609-10.

⁹⁸ Mr. Sobczak had heard that Complainant had visited the Burbank facility on multiple occasions to use a company computer. Tr. at 706. He denied that the purpose of the meeting was to retaliate against Complainant for raising safety concerns or for submitting non-routines. Tr. at 716.

⁹⁹ Mr. Sobczak also told Complainant via email that this was the purpose of the meeting. JX H.

threat did not relate to surveillance. Further, Complainant acknowledged that he was not aware that Respondent had actually surveilled him. Tr. at 162-65. Nevertheless, due to his surveillance concerns, Complainant testified that he has feelings of dread. He parks his toolbox underneath the right-hand wing of aircrafts on which he works to prevent Respondent's alleged camera surveillance. Tr. at 128-29. Complainant expressed these concerns to Mr. Franks in a December 2015 email, stating that a senior manager, Mr. Jack Earls, frequently views Respondent's security camera footage and recounting Mr. Krafczik's "be careful, they're watching you" comment. *See* JX I; Tr. at 116.

In support of his surveillance concerns, Complainant called as a witness Mr. John Dreckmann. Mr. Dreckmann is an AMT that works at Respondent's LAX hangar. Tr. at 530. At some point, he had lost his cellphone so he went and talked with a manager, Mr. Cusato. Mr. Dreckmann testified that he went into Mr. Cusato's office, where Mr. Cusato showed him a video on his computer of Mr. Dreckmann going through security. The video included footage of the outside and inside of the security area, which was inside the hangar. Tr. at 534.

However, Mr. Dreckmann's testimony was contradicted by Mr. Frank and Ms. Ferris. Mr. Frank replaced Mr. Cusato when he retired and moved into his office. Mr. Frank uses a newer computer than the one Mr. Cusato used, but still uses the same computer port and jack. Mr. Frank did not believe it was possible for Mr. Cusato to have access to security video footage. The security system is separate from Respondent's normal computer system, and Mr. Frank cannot access it from his computer. Mr. Franks described the security system as antiquated. Tr. at 564-65, 603.

When he received Complainant's December 2015 email, Mr. Frank immediately responded. JX I. He informed Complainant that only security officers—not senior managers like Mr. Earls—have access to the security camera system. JX I. Mr. Frank told Complainant that Mr. Earls went into the security office often because he supervised the entire hanger and "[was] expected to tour often ensuring all is OK." JX I; *see also* Tr. at 552-53 (Mr. Frank's testimony). Mr. Frank thought that his response to Complainant resolved the issue. Tr. at 579. Mr. Frank also testified at the hearing that Complainant's concern about Mr. Earls was unwarranted because he did not report to him, so there would be no reason for Mr. Earls to surveil Complainant. Tr. at 554. Mr. Frank acknowledged that there are security cameras at the hangar, but noted that management did not have access to them for oversight of hangar activities. Tr. at 552-54, 578-79.

Ms. Theresa Ferris works for Respondent as a senior security specialist located at the Los Angeles Service Facility and has worked for Respondent for 25 years. Her duties cover Respondent's Los Angeles Service Facility and the LAX hangar. Tr. at 743-45. Ms. Ferris maintains Respondent's security cameras, arranges for their repair, and archives video of the camera system. She and another co-worker, Mr. Jim Spernak, are the gatekeepers of this information. Tr. at 745. Per Respondent's protocol, she would be aware of any requests made to view any video. Managers are required to show good cause to view security footage and can only get a copy of a security video from herself or Mr. Spernak. Examples of good cause include

suspicion of a time clock violation, an injury or accident, a work place violence incident, or vandalism.¹⁰⁰ Tr. at 746-52.

All of the hangar camera feeds run into the security office. Mr. Earls would occasionally come in to the security office and ask to look at security footage, but would not be allowed to do so without sufficient justification. Access to the system requires a password that only security personnel possess. The quality of the video footage from the hangar cameras is medium to poor. Since 2008, management has never asked Ms. Ferris to surveil any employee—including Complainant—in real time. Tr. at 750-58.

Alleged Psychological Impact of these Incidents on Complainant

Complainant asserts that the harassment from his protected activities had impacted his physical and mental well-being. Complainant briefly saw a psychologist in 2009, but has not seen that psychologist or any other psychologist or counselor since 2014. Nor has he received any kind of psychological diagnosis. Complainant testified that “I don’t operate the way I used to at home,” that he used to work out all the time and now has “a disconnect” with his wife. There are positions available at the Burbank station, a location to which he would like to be reassigned, but he did not apply for them in 2014 or 2016 because he believed that he would not get the position. Tr. at 129, 301-04, 310-11.

If his complaint is found meritorious, Complainant wants reimbursement for sick days missed under FMLA and unpaid leave, removal of his OLCCs, and emotional damages. Tr. at 311.

III. ISSUES¹⁰¹

- Did the Complainant engage in protected activity?

¹⁰⁰ Respondent has a policy for safety observation. Tr. at 171; RX 1. Complainant was not aware of this policy.

¹⁰¹ No issue has been raised as to the timeliness of Complainant’s complaint or of his appeal, except for the 2013 and 2014 emails. Additionally, the parties stipulated that they are subject to the Act. Therefore, this Tribunal will not further address these potential issues (except for the 2013 and 2014 emails) and finds that the complaint and request for hearing were timely filed and the parties are subject to the Act.

Given the two prior settlement agreements between Complainant and Respondent, which purport to release Respondent of all liability for AIR 21 claims that Complainant “raised or could have raised” as of November 4, 2015 and January 26, 2016 (RX 61; RX 62), the Tribunal also directed the parties to brief whether the allegations in this case were subject to the earlier agreements this issue. Tr. at 195-98; *see also* Tr.at 201-02. In reviewing the parties’ arguments and the documents offered to this Tribunal for its consideration, this Tribunal is unable to determine whether the prior settlement agreements incorporated the allegations in this case. The settlement agreements say nothing about what was settled; they are devoid of factual allegations and the reasons for settlement. *See also* CX 9 at 6-7 (a general description of the prior proceedings’ history). But more importantly, even assuming *arguendo* that the present complaint would be subject to the terms of prior settlement agreements, jurisdiction to enforce the terms of AIR 21 settlement agreements rests with a United States district court—not this Tribunal. *See* 49 U.S.C. § 42121(b)(5); 29 C.F.R. §§ 1979.111(e), 1979.113.

- Did the Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would the Respondent have taken the same adverse action?

A. Summary of Complainant's Position¹⁰²

At the outset of Complainant's brief, he argues that his two prior settlement agreements with Respondent for AIR 21 claims do not preclude a finding of liability in the present claim. In these two prior claims, the parties agreed to settle and entered into settlement agreements dated November 4, 2015 and January 26, 2016. Section three of these agreements provides only that the Complainant waived such claims as he raised or "could have" raised in his complaints. RX 61; RX 62. These agreements did not purport to waive future complaints concerning Respondent's post-settlement conduct. Compl. Br. at 3-4. Instead of the brazen retaliatory conduct alleged in his earlier claims, Respondent has shifted to more subtle forms of intimidation—such as the issuance of OLCCs. According to Respondent's internal documents, OLCCs may be used to justify subsequent discipline. *See* RX 2. This new form of retaliatory conduct—not previously settled matters—furnishes the ground for the current complaint. Compl. Br. at 4.

In his brief, Complainant argues that the evidence produced in this matter compels the conclusion that Respondent retaliated against him for numerous instances of protected activity. Complainant summarized the events in October/November 2015 surrounding the alleged alteration of documents signed electronically citing CX 10 – CX 13. Compl. Br. at 5-6. He recounted the events surround him filing MSR reports about metal data plates fall off landing gear and receipt of an OLCC allegedly in retaliation for Complainant's filing of MSRs on November 4 and 7, 2017. Compl. Br. at 6.

Complainant asserts that Respondent threatened Complainant for filing non-routine reports on November 19, 2015 related to significant maintenance discrepancies where Mr. Krafczik warned Complainant, "Be careful, they're watching you." Compl. Br. at 7, citing to Tr. at 449-50.

Complainant maintains that Respondent threatened and intimidated Complainant for reporting dangerous working conditions in February 2016 related to surface preparation (sanding) of hexavalent chromium paints. On February 11, 2016, Complainant found that his assigned work area was covered in this hazardous sanding dust. Compl. Br. at 7-8.

Complainant summarized another incident that occurred on March 25, 2016. Shortly after completing the non-routines on an aircraft Complainant was working on, Mr. Walker, a manager, approached Complainant and directed him to report to his office. It was the first time

¹⁰² This summary omits a discussion of Complainant's arguments for remedies because the Tribunal finds that he has not established that Respondent violated the Act. *See* Compl. Br. at 43-46; Compl. Reply Br. at 14-15; Resp. Br. at 30-31, 45-47.

Complainant had been asked to go to somebody's office to discuss a work card when other people were assigned to it. Given the unusual nature of the demand and Respondent's history of retaliatory conduct, Complainant believed this was an attempt to intimidate him and discourage him from engaging in further protected activity. Thus, he asked Mr. Galindo from Human Resources to be present during the meeting. Compl. Br. at 8-9.

Present in Mr. Walker's office for this meeting was Mr. Galindo, Mr. Scott, Mr. Walker, and Complainant. Mr. Walker accused Complainant of neglecting his work assignment. Upset by the encounter, Complainant said that he was not feeling well and requested a cab ride home. This request was denied, but another manager for Respondent did offer to drive Complainant the 46 miles to his home. Complainant declined the offer rather than spend additional time with another of Respondent's managers. Comp. Br. at 10-11.

Complainant next addressed events in April/May 2016. In April 2016, Complainant sent numerous emails to Respondent's management elevating his concerns regarding various safety-related issues. The subject matters of Complainant's emails included Respondent's failure to follow its own policies related to closing MSRs and his subsequent attempts to reach a resolution (JX G); Complainant's communication with Mr. Frank regarding two encounters with Mr. Walker, and Complainant's discussion of an article written by Respondent's CEO. Complainant maintains that in all of his communications he remained polite and respectful. On April 1, 2016, Complainant sent an email to various managers that contained both versions of the MSR that was closed and now reopened. After receiving no response, he elevated his concerns to Mr. Lyons, the Vice President of Safety and Airworthiness. On April 27, 2016, Complainant again wrote to Mr. Lyons and at the end of the email added a Webster Dictionary definition of the word "closed." Compl. Br. at 13-14. Complainant also reference two other email chains in April 2016 involving encounters with Respondent's management and correspondence with Respondent's upper management. Comp. Br. at 15-16. One month later, on May 26, 2016, Mr. Krafczik, issued Complainant on OLCC for Complainant's use of email, with input from upper management. Compl. Br. at 17-18.

Complainant claims retaliation for events that occurred on August 17, 2016, when Complainant was summoned to the Human Resources offices for a meeting with Mr. Sobszak, a manager, and Ms. Santucci, a Human Resource advisor, and was questioned about his April 4, 2016 visit to Respondent's Burbank facility. Compl. Br. at 18-19.

Finally, Complainant alleges retaliation based on two email chains he recently discovered. CX 27. One email chain included an October 30, 2013 email by Complainant to management officials about his concern that Respondent was not using the proper tag on removed aircraft parts. In subsequent emails between management, management asks how to prevent Complainant from going to the FAA, and there is a comment about threatening to take his license if the investigations come back unsubstantiated and included the statement "I think we should offer him an Inspection job! ☺". CX 28. This later comment allegedly demonstrates that Respondent's management thought that going to the inspection department was an adverse action. Compl. Br. at 20-21. The second email he discovered was written on February 8, 2014, where, in response to a complaint that Complainant was using binoculars in the hangar to watch other AMTs in other bays, Mr. Hanniff inquired if management could "confidentially check with

security and have them direct a camera in that area to observe and record this behavior.” CX 29. Compl. Br. at 21.

Complainant asserts that the following were protected activities:

- his February 10, 2016 email about best practices;
- his March 25, 2016 non-routines;
- his April 2016 emails to upper management following unresolved safety issues;
- printing of documents during his April 4, 2016 visit to Respondent’s Burbank facility; and,
- copying the FAA, referenced in 2013 email that were newly discovered in November 2016

Compl. Br. at 29-35.

Complainant asserts that he was subject to multiple adverse actions:

- Assignment on February 10, 2016 to a hazardous work area;
- Being singled out for interrogation in a manager’s office on March 25, 2016;
- Issuance of a disciplinary OLCC on May 26, 2016;
- Respondent’s August 17, 2016 investigation of his visit to Respondent’s Burbank facility; and,
- Discovery in 2016 of Respondent’s email discussions from 2013 and 2014

Compl. Br. at 35-39.

Complainant argues that his February 10, 2016 email contributed to his assignment to the hazardous work area. He asserts that his completion of non-routines on March 25, 2016 caused Respondent to interrogate him that same day. He maintained that his April 2016 emails to upper management resulted in a disciplinary OLCC being issued on May 26, 2016. Complainant claims that his April 4, 2016 protected activities contributed to the adverse action of being subjected to questioning on August 17, 2016. Finally, Complainant argues that his contacting the FAA and using binoculars resulted in 2013 and 2014, and then his discovery of them in 2016 served to threaten and intimidate him. Compl. Br. at 39-43.

In his reply brief, Complainant asserts that his previous AIR 21 cases provide context to the actionable claims currently before this Tribunal. Complainant maintains that they are relevant as to motive and historical maintenance practices, and shows a pattern of a hostile work environment that continued from the prior matters to the current claim. *See* Compl. Reply Br. at 2-5. Complainant maintained that his assignment to an area covered in potential hazardous sanding dust and being singled out for interrogation for filing out non-routines on March 25, 2016 were attempts to intimidate him. Compl Reply Br. at 5-10. He reiterated his view that the OLCC Complainant received for his email conduct was disciplinary and an adverse action. Compl. Reply Br. at 10-12. Complainant reinforced his argument that he had a reasonable subjective belief that the investigation into his visit to Respondent’s Burbank facility was retaliatory. Compl. Reply Br. at 12-13. Finally, Complainant argues that the two recently discovered email

chains could not have been part of his prior AIR 21 claims, and are direct evidence of Respondent's animus. Compl. Reply Br. at 13-14.

B. Summary of Respondent's Position

Complainant proffered no evidence to support his claims of retaliation and instead relies heavily on the factual occurrences that had been settled in his two prior AIR 21 claims. Not only did he abandon these earlier claims, but he further released all claims he could have brought through January 26, 2016. Resp. Br. at 1.

Respondent not only requires, but welcomes, AMTs to report any repairs or safety concerns; AMTs are expected to "see-it, write-it, and fix-it." However, Complainant views any management oversight or supervision as retaliatory. When a manager asked Complainant about the status of his work on a work card, Complainant refused to speak to the manager without HR being present. Resp. Br. at 1-2. As for the left wing sanding dust incident, the testimony established that Complainant's lead, not a manager assigned him that work card and that Complainant was not the only person assigned to work in that left-hand wing spoiler area. Also, Complainant's lead had no knowledge of Complainant's best practices email sent to the day prior. Finally, when the issue was brought to management's attention it was immediately addressed and he did not work in that area until the area was cleaned. Resp. Br. at 1-3.

The OLCC Complainant received on May 26, 2016 regarding discourteous and repetitive emails was non-retaliatory and was given to remind Complainant not to send such email on closed matters. Complainant admitted that he had been counselled previously for sending inappropriate and repetitive emails, unrelated to his continued inquiries on the closed MSRs. The evidence demonstrated that the OLCC was unrelated to the closed MSRs and was solely issued because of Complainant's persistence in sending discourteous and repetitive emails. Resp. Br. at 3.

The Burbank facility meeting was to discuss Complainant's purpose for being there. Testimony established that AMTs at Burbank notified management of Complainant's visit and informed them that Complainant had logged into a work computer and printed documents. Respondent meet with Complainant to find out why he was at the Burbank station. Complainant is an hourly employee and had no business reason for being at the station and management needed to verify whether he was working off of the clock. Further, Complainant admitted that once he confirmed he was not at the Burbank station for business reasons, the meeting concluded. Resp. Br. at 3.

Complainant obtained two internal management emails from 2013 and 2014 which he claims were harassing and in retaliation for his safety complaints to the FAA. Management was concerned about Complainant copying the FAA on emails without first providing Respondent an opportunity to resolve the issue. Even so, testimony established that this discussion never resulted in any action against Complainant and the emails were not directed at Complainant. Since he was not aware of them until separate litigation, the issues were resolved and they could not have created an abusive working environment. The same conclusion applies to the query from a manager about whether it was possible to survey Complainant's use of binoculars in the

hangar. The request was never acted upon; instead, management asked Complainant about the binoculars, and Complainant removed them from the premises. Resp. Br. at 4.

Respondent's brief sets forth proposed findings of fact. Resp. Br. at 5-30. Respondent then argues that the February 11, 2016 work assignment was not an adverse action nor was there any protected activity that was a contributing factor to the work assignment. Resp. Br. at 32-35. Further, Respondent showed by clear and convincing evidence that Complainant would have been given the same work assignment in the absence of any alleged protected activity. Resp. Br. at 36.

Respondent maintains that Complainant's submission of his non-routines were not protected activity because he proffered no evidence to establish that he believed that the subject matter of the specific non-routines violated federal law relating to air carrier safety. Further, the non-routines were not a contributing factor to any adverse action, and Respondent would have asked about the information on the work card in the absence of any alleged protected activity, noting that there is no requirement that a manager go to a lead to find out the status of a work card. Resp. Br. at 36-37.

Respondent denies that it retaliated against Complainant by issuing the May 26, 2016 OLCC. The record reflects that the MSRs were resolved as they were closed and not reopened. The OLCC was not an adverse action given the facts of this incident. Management had legitimate concerns about Complainant's repetitive, discourteous, and unprofessional emails, despite having received training and counseling on email etiquette and the use of large font in his emails. Despite this, Respondent continued to send emails about matters that had already been resolved. It was the manner in which Complainant sought answers from upper management about his MSR submissions that was the issue, not his MSR submissions themselves. Resp. Br. at 36-40.

Conducting an inquiry into the reasons Complainant was at Respondent's Burbank facility was not an adverse action. The purpose of the meeting was to find out whether Complainant was there conducting business, and there is no evidence that the person who interviewed Complainant were aware that Complainant was printing out documents to supplement his AIR21 complaint. Complainant provided no evidence that Respondent had knowledge of his purpose for being at the Burbank station prior to the interview, and therefore cannot establish his alleged protected activity was a contributing factor to any adverse action. Further, even if Complainant engaged in protected activity, Respondent clearly and convincingly provide that it would have requested the meeting in any event to confirm that Complainant had not conducted any off the clock work while at the Burbank facility. Resp. Br. at 41-43.

Finally, Respondent's internal email discussions between members of management were not intended to be retaliatory, intimidating, or threatening. Complainant alleges that he engaged in protected activity when he copies the FAA on an email regarding a part tag and possible surveillance. But Complainant has failed to establish that he was intentionally harassed, and Complainant himself acknowledges that he has no knowledge of what happened after the discussions between management personnel. Resp. Br. at 43-44.

IV. CONCLUSIONS OF LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

A. Credibility

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

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

As explained below, this Tribunal finds the testimony of Mr. Galindo, Ms. Santucci, Mr. Chavez, and Mr. Walker to be highly credible. The Tribunal found the testimony of Mr. Krafczik and Complainant generally credible with certain exceptions. The Tribunal did not find Mr. Krafczik's explanation about his comment "be careful, they are watching you" particularly credible. The Tribunal found Complainant's testimony, in general, credible, but found his conclusions based upon events unreasoned, with one notable exception. This Tribunal finds his concerns about the e-acknowledgement credible.

B. General Overview of Part 121 Air Carrier Maintenance

Respondent holds a Part 121 air carrier certificate.¹⁰³ As part of the issuance of the certificate, the air carrier agrees to include terms, conditions, and limitations necessary to ensure safety in air transportation.¹⁰⁴ Those are contained in operations specifications (“OPSPECS”) tailored to the operations of that particular air carrier. They are in essence a set of rules based upon the regulations in Parts 119 and 121. An air carrier may not conduct operations either without OPSPECS or in violation of their OPSPECS.¹⁰⁵ OPSPECS are approved by the FAA and can be amended by the FAA.¹⁰⁶ The FAA has developed standard templates for use in developing an air carrier’s OPSPECS.¹⁰⁷

Air carriers are responsible for the airworthiness of the aircraft they use to conduct their operations. 14 C.F.R. §121.363. Maintenance¹⁰⁸ related OPSPECS are located in Part D of the OPSPECS.¹⁰⁹ OPSPEC D072 is used to authorize an air carrier to utilize a Continuous Airworthiness Maintenance Program (“CAMP”).¹¹⁰ As part of its CAMP, the air carrier must use manuals that contain the programs listed in § 121.367 and its maintenance manuals must include, among other items, the method of performing routine and nonroutine maintenance and the methods of performing various inspections.¹¹¹ 14 C.F.R. § 121.369(b)(1)-(7). Maintenance must be performed in accordance with its manuals. 14 C.F.R. § 121.363(a)(2). An air carrier’s maintenance manual can permit the use of work cards.¹¹² While not a regulatory requirement, they have evolved as a best practice and are considered part of the air carrier’s maintenance manual and program.¹¹³ These are checklists with step-by-step instructions referencing the maintenance manual on how to perform a specific maintenance task or series of tasks. These work cards are also used to document the maintenance activities.¹¹⁴

¹⁰³ See 14 C.F.R. §119.5(a).

¹⁰⁴ See 49 U.S.C. § 44701; 14 C.F.R. § 119.7(a)(1).

¹⁰⁵ 14 C.F.R. §§ 119.5(g), (l); 119.33(a); 121.1(a). OPSPECS can be more restrictive than those contained within 14 C.F.R. Part 121 but cannot be less restrictive. Changes to OPSPECS require approval by the FAA.

¹⁰⁶ 14 C.F.R. §§119.1(b)(1) and 119.51; *see also* FAA Order 8900.1 Vol. 3, Ch. 18, sec. 8. However, the FAA does not approve the air carrier maintenance program because there is no regulation that requires its approval.

¹⁰⁷ FAA Order 8900.1, Vol. 3, Chapter 18, available at fsims.faa.gov.

¹⁰⁸ “Maintenance means inspection, overhaul, repair, preservation, and replacement of parts, but excludes preventative maintenance.” 14 C.F.R. § 1.1.

¹⁰⁹ *Id.* at Ch. 18, section 6. *See generally*, 14 C.F.R. § 119.49

¹¹⁰ *See* FAA Order 8900.1, Vol. 3, Ch. 43

¹¹¹ *See also* 14 C.F.R. §§121.133 and 121.135(b)(17). The air carrier must make copies of the maintenance manual available to maintenance personnel. *Id.* at § 121.137(a)(1).

¹¹² Also called task cards.

¹¹³ FAA Order 8900.1, vol. 3, Ch. 43, ¶ 3-3870(D)(3)

¹¹⁴ “The air carrier’s work cards provide detailed, concise procedural instructions that organize and control its maintenance activities while providing a means to ensure that its maintenance activities comply with its air carrier maintenance manual. It is an easy way for the air carrier to make sure that its maintenance and other personnel are following its procedures. The air carrier must document its process

The air carrier is also responsible for its employees that perform maintenance on its aircraft. 14 C.F.R. § 121.1(b). It must provide competent personnel to perform maintenance on its aircraft.¹¹⁵ 14 C.F.R. § 121.367(b). One way to establish that person's competency,¹¹⁶ although not required, is for that person to hold an airframe and powerplant certificate such as the Complainant holds issued under 14 C.F.R. Part 65.¹¹⁷ When one of Respondent's Aircraft Maintenance Technician's performs maintenance he does so under the authority of the air carrier, not his personal certificate. And when he signs off on the work he has performed, he is approving only that portion of the maintenance was fully performed. Ultimately, it is the air carrier and not the mechanic that approves the aircraft for return to service after maintenance has been performed. 14 C.F.R. §§ 121.379(b) and 121.709.

Because there is such reliance on the documentation of maintenance, throughout the regulations there is repeated reference to the consequences of falsifying or alteration of records, not only upon the individual that perpetrated the act,¹¹⁸ but upon the air carrier itself. 14 C.F.R. § 121.9. Falsification is one of the most serious allegations a certificate holder can face.¹¹⁹ The FAA enforcement guidance provides that the penalty it would seek for falsification is revocation of all of any airman's certificates.¹²⁰ The NTSB has repeatedly held that a single instance of falsification is grounds for revocation of all certificates held by a particular individual. *See*

for developing and controlling work cards in its manual. If the air carrier develops its own work cards based on a manufacturer's instructions, it must ensure that they have transcribed the information completely and accurately. *Id.*; *see* Advisory Circular 120-6F, *Air Carrier Maintenance Programs* (Nov. 15, 2012) at 10. *See also* 14 C.F.R. § 121.380

¹¹⁵ The air carrier must also have a training program to ensure that its mechanics are properly trained and competent to perform their duties. 14 C.F.R. § 121.375.

¹¹⁶ Another avenue is for the air carrier to utilize a certificated repairman. 14 C.F.R. § 65.103.

¹¹⁷ The regulations specify that each person who is directly in charge of maintenance must hold an appropriate airman; however, that person need not physically observe and direct each worker. 14 C.F.R. § 121.378.

¹¹⁸ *See* 14 C.F.R. §§ 43.12; 61.59, 67.403 and 65.20.; *see also id.* at §§ 3.5 and 145.12.

¹¹⁹ Intentional falsification is a "knowing misrepresentation of a material fact." *Cassis v. Helms*, 737 F.2d 545, 546 (6th Cir. 1984). To prove intentional falsification, the FAA must establish that a certificate holder (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of its falsity. *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976). The FAA need not, however, prove that the certificate holder specifically intended to deceive or that someone relied upon his misrepresentation—those are elements of the distinct offense of fraud. *Cassis*, 737 F.2d at 546 ("Fraud and intentional falsification are distinct concepts for purposes of this regulation."). *Lawson v. Huerta*, 692 Fed. Appx. 790, 793 (6th Cir. 2017). The NTSB has held that intentional falsification is sufficiently damaging as to pose a substantial threat to aviation safety and to demonstrate lack of qualifications on the part of the person who falsified . . . the application or record." *Administrator v. Berry*, 6 N.T.S.B. 185 (1988). Furthermore, a "[d]eliberate falsification, even in relatively small matters, can undermine the effectiveness of the system, with adverse effects on airline safety." *Twomey v. N.T.S.B.*, 821 F.2d 63, 68 (1st Cir. 1987).

¹²⁰ FAA Order 2150.3B, w/ chg 12, *Compliance and Enforcement*, at page 7-2 and App. B, at B-13 (Feb. 2, 2017).

Administrator v. Dillmon, NTSB EA-5413, 2008 NTSB LEXIS 92 (Oct. 28, 2008), *Administrator v. Culliton*, NTSB Order No. EA-5178 (2005).

Because a person cannot perform maintenance on an aircraft without holding a certificate, the authority to sign for work performed goes to the heart of a mechanic's livelihood. When a mechanic signs off on a document he is certifying that the work they performed was performed per the maintenance manual. If he signs such a document when he, in fact, did not perform exactly what the document calls for, he is exposed to falsifying a document. If a mechanic had his certificates revoked or suspended, an air carrier could not use that mechanic to perform maintenance. Thus, it would be likely that a mechanic would also lose their job as a consequence of having their airman certificate revoked. Therefore, a mechanic is particularly attuned to the accuracy of documents he signs when it pertains to aircraft maintenance. And a mechanic's awareness as to the importance of his signature is not limited to his signature on paper. The consequences of a false representation extend to entries they make using electronic signatures.¹²¹ The FAA recognizes and specifically addresses electronic signatures,¹²² including in its enforcement order.¹²³

C. Complainant's *Prima Facie* Case¹²⁴

1. Protected Activity

¹²¹ In this case there was testimony that the mechanics in the LAX hangar did not use iPads to retrieve their work cards, but they did occasionally use desktop computers. Tr. at 159-62. However, iPads were used in line maintenance and each line mechanic was issued an iPad to reference when performing maintenance. Tr. at 368-70. What is unclear from the testimony is whether the mechanics actually signed-off on maintenance performed using an iPad or desktop.

¹²² FAA Order AC 120-78A, *Acceptance and Use of Electronic Signatures, Electronic Recordkeeping, and Electronic Manuals* (June 22, 2016). Approval for air carriers to use electronic signatures would be located in OPSPEC A025. FAA Order 8900.1, vol. 3, Ch. 18, Sec. 3, Pt. A. Part of the criteria for accepting electronic signatures is "the signature must be permanent and the information to which it is attached must be unalterable without a new signature." AC 120-78A, ¶ 2-1c(6).

¹²³ FAA 2150.3B, at page 4-22 provides:

(33) Electronic signatures. During an investigation, FAA investigative personnel may need to gather evidence to prove the authenticity of an electronic signature. The most common enforcement action that might involve an electronic signature is falsification of an application for a certificate. In these cases, FAA investigative personnel include as items of proof a printed copy of the application with the electronic signature, as well as written statements from all witnesses who had a role in processing the application (for example, recommending flight instructor, designated examiner). FAA investigative personnel also identify as a possible witness a representative from the office responsible for the electronic application system to explain the process and the security of the system. FAA investigative personnel obtain a written statement from this representative and include it in the EIR as an item of proof.

¹²⁴ As noted previously, the parties have stipulated that they are subject to the Act. This Tribunal agrees; accordingly, Complainant has established this element of his *prima facie* case.

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

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, “As a matter law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee’s belief of a violation is subjectively and objectively reasonable.” *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C. § 42121(a)) (emphasizing that “an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement”) (emphasis in original)). Thus, the “complainant must prove that he reasonably believed in the existence of a violation,” which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). To prove subjective belief, a complainant must show that he “held the belief in good faith.” *Id.* To determine whether a complainant’s subjective belief is objectively reasonable, an ALJ must assess his belief “taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (internal quotation marks omitted) (evaluating the reasonableness of a pilot’s belief in light of his training and experience).

Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009).

The employer’s response to a complainant’s communication of perceived FAA violations is irrelevant to the question of whether the complainant had engaged in protected activity. That “management agrees with an employee’s assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee’s disclosure was objectively reasonable.” *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, slip op. at 5-6 (Nov. 5, 2013); *Sewade*, ARB No.

13-098 at 8 (“When an employee makes a protected complaint, the employer’s response (positive or negative) does not change that AIR 21 protected activity has occurred”).

For the reasons that follow, the Tribunal finds that many, but not all, of Complainant’s beliefs in the existence of actual or potential FAA violations were held in good faith and were objectively reasonable. For ease of discussion, this Decision and Order discusses both subjective and objective components together with the specific safety concerns expressed by Complainant.

Discussion of Protected Activity

As discussed below, Complainant asserts that several of his actions constituted protected activities, namely:

- His February 10, 2016 email regarding on-wing paint sanding and best practices;
- His March 25, 2016 non-routine reports regarding incorrect screw installations;
- His April 2016 emails to upper management about unresolved safety issues;
- Printing of documents during his April 4, 2016 visit to Respondent’s Burbank facility; and
- Copying the FAA on an email regarding the serviceable part removal reinstallation tag, referenced in 2013 email that were newly discovered in November 2016.¹²⁵

Compl. Br. at 29-35

The February 10, 2016 Email about Best Practices

On the morning of February 10, 2016, Complainant sent an email to Mr. Chavez about sanding procedures used by Mr. Chavez’s crews while sanding the lower surfaces of an aircraft’s right wing. Tr. at 76. Complainant expressed concern that the greenish substance was hexavalent chromate, a hazardous material. JX D at 3. Given the facts presented in this case, the Tribunal finds that reporting possible mechanic exposure to hazardous material during maintenance activities is not a protected activity. The Tribunal notes that hexa chromium is well known to the aviation community as a hazardous material, and OSHA regulates worker exposure to this substance.¹²⁶ But Complainant has not linked his exposure to hexa chromium to air carrier safety. Although it directly relates to the safety of the mechanics performing a critical function in maintaining the airworthiness of aircraft operated in air commerce, absent additional facts, a mechanic’s exposure to hazardous material during the course of his employment does not implicate air carrier safety.¹²⁷ Accordingly, Complainant’s reporting of this exposure does not constitute protected activity under AIR 21.

¹²⁵ The discussion on this alleged prohibited activity is addressed in the Timeliness section of the decision above and will not be addressed further.

¹²⁶ 29 C.F.R. § 1910.1026. See https://www.osha.gov/Publications/OSHA_FS-3650_Aerospace_Paint.pdf.

¹²⁷ The handling, marking, labeling, loading, and transport of hazardous materials does relate to air carrier safety, but those are not the facts here. See 14 C.F.R. § 121.1001, App’x O; 49 C.F.R. Parts 171,

The March 25, 2016 Non-Routines

While performing maintenance on one of Respondent's aircraft, Complainant observed potential mechanical discrepancies and reported them on a non-routine form. The Tribunal finds that reporting potential mechanical defects on an aircraft is a protected activity. A mechanical irregularity places the issue of whether an aircraft continues to conform to its type design,¹²⁸ and thus it raises the issue of the aircraft's airworthiness. To be airworthy an aircraft must conform to its type design and be in a condition for safe flight. 14 C.F.R. § 3.5(a). And an air carrier is prohibited from operating an aircraft that is not airworthy. 14 C.F.R. § 121.153(a)(2). Here, the testimony is undisputed that Complainant had a keen eye for potential maintenance defects and, as Mr. Krafczik testified, "when [Complainant] writes up a non-routine, it's usually a legitimate non-routine." Tr. at 677, 695. No evidence disputes that Complainant submitted these non-routine forms with a good faith, objectively reasonable belief in the validity of the reported discrepancies therein. His submission of these non-routines therefore constitutes protected activity.

Complainant's April 2016 Emails

Complainant sent emails to upper management in April 2016 concerning three topics. First, Complainant sent emails to Respondent's management about his discovery of, and filing of, a maintenance safety report ("MSR") for missing plates on aircraft main landing gear in November 2015. He also had questions about what he viewed as Respondent's failure to follow its own policies relating to closing MSRs and his attempts to get clarification on this issue. *See* JX G. Second, Complainant raised in his emails encounters with Mr. Walker, including being interviewed in Mr. Walker's office following Mr. Walker asking him about the status of his work card.¹²⁹ CX 23. Third, Complainant wrote to Mr. Bronczek, Respondent's President and CEO, about how Mr. Bronczek's article related to his own experiences where Respondent had not adhered to safe maintenance practices. CX 24.

The Tribunal finds that Complainant reasonably believed that the loss of main landing gear data plates created a safety issue when these plates departed the aircraft, including being a potential hazard to aircraft while on a runway. Tr. at 64. In addition, it is reasonable for a mechanic to have concerns about a missing data plate because the part no longer conforms to its

172, 175. The only evidence presented was the use of a hazardous material as part of aircraft maintenance. Further, had there been evidence in the record about restricting exposure that was imbedded in the aircraft manufacturer maintenance documents and those instructions were the basis of the air carrier's continuous airworthiness maintenance program (CAMP), those provisions would be binding under Operations Specification D072. Violation of an air carrier's operations specification would relate to air carrier safety. *See* 14 C.F.R. § 119.5(g), (l). However, no such evidence was presented.

¹²⁸ Conformity to type design occurs when the aircraft configuration and the components installed are consistent with the drawings, specifications, and other data that are part of the type certificate, which includes any supplemental type certificate (STC) or other approved alterations.

¹²⁹ Complainant's email also referenced an incident in November 2015 where Mr. Walker told Complainant to put on his PPE when Mr. Walker himself was not wearing his safety glasses. CX 23.

design. In either case, a piece missing from a main landing gear is a potential safety issue. Complainant is a certificated mechanic and reported his safety concerns to management. Respondent's management itself acknowledged that it expected its AMTs to submit a maintenance *safety* report when they spot a safety issue. Tr. at 466, 503. Therefore, the underlying MSR was a protected activity. However, his MSR occurred in November 2015 so the question becomes were these follow-up emails also protected; this Tribunal finds that they were.

Complainant's concerns about the main landing gear data plates extends to his attempts to get clarification on the issue when it appeared to him that his MSR was closed and later reopened. These emails related to his earlier protected activity and specifically referenced the MSR. In fact, the body of his emails contained the MSR. It is reasonable for an employee to elevate a safety relate inquiry when they receive no response from his immediate supervisor. It would be illogical to protect an employee for raising a safety issue but not protect them should they follow-up on that same safety issue.¹³⁰ Accordingly, this Tribunal finds Complainant's emails in April 2016 about the MSR to be protected activities.

Complainant's email to Mr. Frank on April 12, 2015 (CX 23) about Complainant's various interactions with Mr. Krafczik in November, 2015 and Mr. Walker on March 25, 2016 was also a protected activity. Complainant was communicating information related to his perception that his immediate management was pressuring him because of him reporting mechanical irregularities.

Finally, Complainant claims protected activity for his communication to Mr. Bronczek about "Placing safety above all at FedEx Express." CX 24. He reports to Mr. Bronczek about incidents that occurred in November 2015 regarding his reporting safety discrepancies and the alleged warning by Mr. Krafczik to "Be careful, they are watching you." He recounts being asked to go to Mr. Walker's office "under a false pretense" after documenting discrepancies and asserted that the CEO's vision of "Placing safety above all at FedEx Express" was not embraced at the facility where he worked. This email similarly is a protected activity because Complainant is again providing information to a manager, here the CEO, of information relating to an aviation safety related matter, to wit: an issue of airworthiness and the recording of this potential mechanical irregularity.

Printing of documents during Complainant's April 4, 2016 visit to Respondent's Burbank facility

Printing documents while off-duty at Respondent's facility was not a protected activity. Complainant provided un rebutted testimony that he printed these documents for the purpose of supplementing his AIR 21 complaint. Complainant testified that he printed five documents and provided those documents to DOL on April 4, 2016, as part of his AIR 21 complaint. Tr. at 112,

¹³⁰ However, while the request relating to the earlier protected activity can also be protected, that does not mean that an employee is immune from discipline in the manner in which they convey that information. For example, if an employee asks a supervisor in person about a protected activity and in the process yells at and pokes him in the chest, the employee's query may still be protected but the manner in which he asked the question and his assault on the supervisor would not be protected.

284-85. However, even if, at the time he printed these documents, Complainant was “about to provide” information to the FAA under 49 U.S.C. § 42121, his specific actions in furtherance of that goal do not constitute discreet instances of protected activity under the Act. Rather, the Act protects employees who “provided, cause to be provided, or [are] about to provide” information relating to airline safety. Complainant’s filing of an AIR 21 complaint with OSHA, which these documents were intended to supplement, was certainly protected activity. However, the individual steps taken during the process of filing or supplementing an AIR 21 complaint are not in and of themselves protected.¹³¹

Protected Activity: Conclusion.

In sum, the Tribunal finds that Complainant’s February 10, 2016 email about best practices; his March 25, 2016 completion of a non-routines; his April 2016 emails about missing data plates on aircraft landing gear, and his follow-up queries to the MSR and his e-mails to upper management about his safety reporting of maintenance questioned by his immediate management were all protected activities.

2. Adverse Action

The Act provides, “No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, “An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis.” ARB No. 09-118, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sept. 13, 2011) (explaining that use of the “tangible consequences standard,” rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board has clarified, “*Burlington*’s adverse action standard, while persuasive, is not controlling in AIR 21 cases,” but that it is “a particularly helpful interpretive tool.” *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held “that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions.” *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, “Under this standard, the

¹³¹ To hold otherwise would mean that an employer could never discipline an employee for violations of its code of conduct (e.g., restrictions on employee access to certain facilities, prohibitions on using company printers for personal use) so long as the employee had been in the process of filing a complaint. The Act does not demand such an absurd result. Even assuming, *arguendo*, that the Tribunal was to find that this was protected activity, Complainant would still fail to establish a prima facie case because he did not establish a causal link between this printing and the single adverse action that Respondent took against him (see discussion about contributing factors, *infra*).

term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20.¹³² Accordingly, the Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)).

Discussion of Adverse Action

Complainant alleges the following were adverse actions taken against him:

- Issuance of an OLCC for his failure to e-acknowledge the elevator policy.
- Assignment on February 10, 2016 to a hazardous work area;
- Being singled out for interrogation in a manager’s office on March 25, 2016;
- Issuance of a disciplinary OLCC on May 26, 2016;
- Respondent’s August 17, 2016 investigation of his visit to Respondent’s Burbank facility; and,
- Discovery of Respondent’s email discussions from 2013 and 2014 in 2016¹³³

Compl. Br. at 35-39.

Issuance of an OLCC for his failure to e-acknowledge the elevator policy

While this Tribunal believes that an OLCC could be considered an adverse action (Tr. at 760), as used in this instance it was not. The Tribunal is persuaded that the purpose of the OLCC

¹³² See also *Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: “To settle any lingering confusion in AIR 21 cases, we now clarify that the term “adverse actions” refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term “discriminate” is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress”).

¹³³ This alleged adverse action is discussed in the Timeliness section of the decision above.

entry in this instance was merely to document that Complainant had been informed of the elevator policy. It is perfectly appropriate for an employer to want to document that an employee had been informed of a company policy. While Complainant asserts that OLCCs can be used or considered in future disciplinary action, the weight of the evidence in this instance demonstrates otherwise. Both the testimony from Respondent's witnesses¹³⁴ as well as Respondent's disciplinary policies persuade this Tribunal that the OLCC in dispute in this instance was not an adverse action.¹³⁵ In particular, the Tribunal notes that the language of the OLCC mirrored Respondent's elevator moving policy, serving as documentation that Complainant had read and understood the policy.

Having said that, this Tribunal is most concerned that the electronic documents electronically signed (or at least ascribed to) by the mechanics that pertain to the elevator were changed after obtaining their signature.¹³⁶ Given the importance that the aviation community places on the accuracy of record entries, this Tribunal finds it astonishing that documents would be altered after acknowledgements were obtained from Respondent's mechanics without their knowledge or prior consent. Whether Respondent believed the changes were merely grammatical or not, it altered documents after mechanics ascribed to them. Even assuming the computer systems were totally separate from one another, the mere optics of such act places into question whether Respondent would be willing to act similarly for documents required for conformity to an aircraft's properly altered condition and required to be maintained.¹³⁷ In the light most favorable to Respondent, its decision to change documents that relate to maintenance procedures after they were ascribed to by its mechanics was incredibly poor judgment. The Tribunal finds it totally reasonable for Complainant to object to this document after becoming aware that the personal records of others had been altered.

Assignment on February 10, 2016 to a Hazardous Work Area

The Tribunal finds no evidence that Complainant's assignment to work on the left wing of an aircraft in the hangers on February 10, 2016 was an adverse action. The preponderance of evidence shows that Complainant was assigned his duties in the normal course of business.

¹³⁴ The Tribunal found the testimony of Mr. Galindo about Respondent's use of OLCCs very credible. See, e.g., Tr. at 356, 361, 367-70.

¹³⁵ Complainant argues that the fact that this OLCC remains in Complainant's records is suspect, given that the policy was rescinded two days later. Reply Br. At 4. While its continued existence causes pause, the Tribunal is not a super personnel department that reexamines an entity's business decisions. *McCoy v. WGN Cont'l Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute "was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;" statute cannot protect employees "from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated").

¹³⁶ A signature not be an actually penned signature but is frequently a mechanics initials or a particularized personnel identification numbered used to identify them as the mechanic that performed a given task.

¹³⁷ The Tribunal is very troubled that even the date and time stamps for these electronic documents remained the same as the originally signed documents.

There is no evidence that Respondent's management intended to place him in harm's way. He was not singled out in any fashion as demonstrated by the fact that at least two other employees were assigned duties in the same area. If anything, his earlier reported concerns to Mr. Chavez about best practices was justified because of the contamination of his work area near the time he discussed this issue with Mr. Chavez. There is no evidence that Mr. Chavez had animus towards Complainant. The Tribunal found Mr. Chavez's testimony about the events and his immediate corrective actions once informed of the issue to be compelling. Tr. at 643-47, 650-55. Accordingly, the Tribunal finds that the Respondent's assignment of Complainant's work location on February 10, 2016 was not an adverse action.

Discussion in Mr. Walker's Office on March 25, 2016

The Tribunal finds that management had every right to inquire into the status of the work assigned Complainant and this inquiry was not an adverse action. The Tribunal finds that when Complainant refused to answer the question by Mr. Walker while on the hangar floor, it was perfectly appropriate for Mr. Walker to direct Complainant to discuss the matter in his office. Complainant refused to provide basic information to a manager. Though Mr. Walker could have asked another mechanic or the lead about that status of the work card, there is no evidence that somehow Complainant was targeted by the query. Rather, Complainant just happened to be in the area and was working on the work card. Further, it was perfectly appropriate for a manager to want to have a discussion away from the hangar floor once Complainant said that he would only talk to Mr. Walker with an HR representative present. Tr. at 668-69. By contrast, it is unreasonable for Complainant to object to providing information without an HR representative being present, and then object when management provides him that opportunity, but away from others. Complainant alleges the purpose of the inquiry was about the non-routine he prepared, but this is pure speculation. Mr. Walker provided a perfectly reasonable and credible explanation for why he would have non-routines on his desk. The Tribunal gives full credit to Mr. Walker and Mr. Galindo's testimony concerning this event and it fails to see how this event is an adverse action in any respect.

Issuance of an OLCC on May 26, 2016.

The Tribunal finds that this particular OLCC is an adverse action. Respondent issued this OLCC in response to Complainant's conduct in connection with his email communications to upper management after he had received remedial training and warned about his use of emails, including his use of large fonts. It is clear from the content of this OLCC that it was intended to document conduct Respondent viewed as unacceptable and could be used for further discipline should Complainant continue with his email practices that were inconsistent with Respondent's guidance.

Respondent's August 17, 2016 Investigation of Complainant's visit to Respondent's Burbank Facility

The Tribunal does not find that Respondent's investigation into Complainant's visit of its Burbank facility was an adverse action. The evidence overwhelmingly shows that Respondent inquired into Complainant's visit out of concern that Complainant was conducting work while at

the Burbank facility. If he had performed work there, Respondent's witnesses credibly testified that it would have exposed Respondent to liability due to unpaid wages. In addition, this Tribunal credits Respondent's concern that such unauthorized work would engender additional risks of worksite injury and subsequent workers' compensation liability. Complainant speculates that Respondent somehow knew that he was downloading documents for his retaliation claims, but there is no evidence to support his speculation. Frankly, the Tribunal finds it a frivolous contention that this was an adverse action.

Adverse Action: Conclusion

Complainant has not established by a preponderance of evidence that the OLCC for his failure to e-acknowledge Respondent's elevator policy, his work assignment location on February 10, 2016, his discussion with Mr. Walker in his office on March 25, 2016, or the investigation by Respondent of Complainant's visit to its Burbank facility were adverse actions. However, Complainant has established that the OLCC issued to him on May 26, 2016 for his email communications to upper management was an adverse action.

3. Contributing Factor Analysis

Complainant successfully established that Respondent took adverse action against him when it issued an OLCC to him for the manner in which he sent emails to management. Accordingly, the Tribunal must determine whether Complainant's protected activity was a contributing factor in that unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The Board has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, USDOL Reporter, page 52 (emphasis in the original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily

dispositive.” *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). “Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). “The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity.” *Palmer*, ARB No. 16-035, slip op. at 56.

To succeed in a whistleblower action, a complainant must also show that the employer had knowledge of the protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). This requirement stems from the statutory language prohibiting employers from taking adverse action against an employee “because” the employee has engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(a)). Accordingly, a complainant bears the burden of showing that the person making the adverse employment decision knew about the employee’s past or imminent protected activity. *Id.*

Discussion of Contributing Factor Analysis

As discussed above, the Tribunal finds that Complainant’s protected activity consisted of his March 2016 completion of a non-routines, his April 2016 emails about missing data plates on aircraft landing gear, and his follow-up queries to the MSR and his e-mails to upper management about his safety reporting of maintenance that was questioned by his immediate management. The Tribunal has also found that the only adverse action taken against Complainant was Respondent’s issuance of the May 26, 2016 OLCC.

Complainant’s May 26, 2016 email did concern safety matters, but this Tribunal finds that Respondent issued an OLCC not because of the safety issue raised in the email, but because of Complainant’s tone, and the size of font used, and his repeated emails to upper management which was clearly inappropriate.¹³⁸ Respondent had made prior attempts to correct Complainant’s errant email practices by providing him remedial training, and warned him about his use of emails—in particular, the font size used when communicating with management. Complainant appears not to have heeded that advice and it would be only logical that

¹³⁸ The May 26, 2016 OLCC written by Mr. Krafczik states:

Dan. You have been advised on more than one occasion to contact your manager, senior manager, safety specialist or human resources advisor first regarding daily operational matters. You have been advised not to send discourteous and repeated emails to officers and other FedEx Express team members about matters that have been closed. You have been advised People Manual Policy 2-6, Acceptable Conduct states: FedEx Express expects all employees to demonstrate the highest degree of integrity, responsibility and professional conduct at all times. This includes all of your communications with members of the FedEx Express team. As a FedEx Express employee it is your responsibility to follow these directives and policy.

CX 25.

Respondent would want to document this event. The Tribunal has reviewed the email at issue and agrees that the fonts used, whether intentional or not, could be interpreted as shouting or corresponding in a hostile tone.¹³⁹

Employer has the right to expect that its employees conduct themselves in a reasonable fashion, and here the Respondent took steps to ameliorate future issues with Complainant's email practices. While an employee has the right not to be retaliated against for reporting safety issues, a Respondent has the similar right to expect and correct correspondence that could be viewed as intemperate or insubordinate. In an age where email communication is as common as talking directly to another in person or by letter, certain protocols or norms have developed.¹⁴⁰ Such conduct is not protected even when the context of the communication otherwise relays information protected from discrimination. The question on whether there is an overlap between the two is a question of fact and in this case, the Tribunal finds that the corrective action of providing Complainant an OLCC was proportionate to the email indiscretion, was not a subterfuge to retaliate against him because of the information being conveyed and the OLCC had no relation to the substance of the email. The evidence supports that Respondent was attempting to correct Complainant's email practices even prior to the protected activities raised here. Pure and simple, Respondent issued the OLCC for the sole purpose of documenting Complainant's inappropriate email use. As such, none of Complainant's protected activities were a contributing factor to the OLCC admonishing him the manner in which he submitted emails at work.

Complainant also argues that the totality of the above actions, as well as the two prior AIR21 cases demonstrate a hostile work environment. Compl. Br. at 11 and 16; Reply Br. at 3. To prevail on a hostile work environment theory, a complainant must show that: (1) he engaged in protected activity; (2) he suffered intentional harassment related to that activity; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 10-11 (ARB Jan. 31, 2006) (citations omitted). See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Such conduct must create an environment that is abusive at an objective level—to

¹³⁹ See *Svedsen v. Air Methods, Inc.*, ARB No. 03-074, 2002-AIR-16 (Aug. 26, 2004). In his reply brief, Complainant takes issue with comparing his case to *Svedsen* because in that case complainant was loud and belligerent resulted in his termination. Reply. Br. at 11. However, the Tribunal finds that the size, font and tone of Complainant's email sufficiently analogous to warrant not termination, but documentation of his actions. For example, for Complainant to include a Webster's Dictionary definition of the word "closed" to a Respondent Vice President could easily be viewed as condescending, if not insubordinate. JX G at 2.

¹⁴⁰ According to at least one news article, "US employees spend, on average about a quarter of the workweek combing through hundreds of emails." Jacquelyn Smith, *15 email-etiquette rules every professional should know*, The Business Insider (Feb. 1, 2016), available at <https://www.businessinsider.com/email-etiquette-rules-every-professional-needs-to-know-2016-1> (recommends use of 10- or 12-point type and easy to read font such as Arial, Calibri, or Times New Roman).

a reasonable person— and subjectively to the party alleging its existence. *Harris*, 510 U.S. at 21-22. Courts may consider a number of factors in determining the existence of a hostile work environment, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* at 23. However, allegations of a hostile work environment consisting of “petty slights, minor annoyances, and simple lack of good manners” that often take place at work and that all employees experience” will not suffice as adverse action in the context of SOX. *Allen v. Stewart Enters., Inc.*, No. 06-081, slip op. at 16-17 (ARB July 27, 2006) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

If a party successfully proves a series of acts constituted a hostile work environment, then a court may consider acts comprising that environment but falling outside of a specified limitations period in analyzing such a party’s claim. *See Morgan*, 536 U.S. at 117. However, acts outside of the statutory period must have some “relation” to those within it. *See id.* at 118; *Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003). Courts use the “continuing violation theory” to analyze harassment under a hostile work environment theory allegedly extending beyond the limitations period. *See Morgan*, 536 U.S. at 115-16; *Cherosky*, 330 F.3d at 1246. This theory focuses on whether the alleged hostile work environment consists of “a series of related acts against a single individual” or acts falling into groupings that “represent a separate form of alleged employment discrimination.” *Green v. L.A. County Superintendent of Schs.*, 883 F.2d 1472, 1480-81 (9th Cir. 1989) (quoting *London v. Coopers & Lybrand*, 644 F.2d 811, 816 (9th Cir.1981)). If the acts falling outside of the limitations period do not demonstrate sufficient relation to some “anchoring event” within it, then an employee’s claim, if based solely on allegations of a hostile work environment, must be dismissed. *See Foster v. Nevada*, 23 Fed. App’x 731, 733 (9th Cir. 2001); *Green*, 883 F.2d at 1480-81.

Here, Complainant has established protected activity, but he has failed to establish the remaining elements. Complainant asserts ill will at every corner but seems not to consider reasonable alternatives to Respondent’s alleged ill intent. For example, while on family medical leave,¹⁴¹ he shows up at another facility and does some sort of work-related activity. Ultimately, Respondent learns the reason, but one could hardly say that Respondent did not have a right, indeed a duty, to inquire. Complainant might have a stronger argument if Respondent charged him for the use of its paper and ink for printing documents ultimately obtained to be used against it, but it did not. Respondent could have inquired further as to why he was in Burbank when he was supposed to be on family leave, but they did not. Respondent accepted the reasonable explanation he provided.

Yet Complainant is unwilling to extend that same standard to Respondent. Complainant clocked out early after being angered over the alleged non-routine incident. Respondent was under no obligation to provide him transportation but offered it anyway. The fact that Respondent did not provide it in the manner that Complainant desired is not evidence of a hostile work environment. To the contrary, it shows a willingness to support an employee despite

¹⁴¹ Tr. at 111.

accusations against Respondent. Complainant objects because of an OLCC he received after writing to a company vice president using unacceptable font size, after having been provided remedial training. Further, one could easily conclude that the email was condescending in tone. Instead of taking more robust action, Respondent opted to document the action and not take more formal action. Respondent's responses to his actions are not the types of actions one equates with harassment or creating of an abusive environment. Holding an employee accountable to the standards expected by an employer is what one would expect of a responsible employer. Merely disagreeing with that standard does not create a hostile work environment. Absent more, merely being subjected to corrective action when an employee deviates from that standard is certainly not a hostile work environment.

4. Conclusion: Complainant's *Prima Facie* Case

Complainant and Respondent are subject to the Act. Complainant's March 25, 2016 completion of a non-routine, his April 2016 emails about missing data plates on aircraft landing gear, and his follow-up queries to the MSR and his e-mails to upper management about his safety reporting of maintenance that was questioned by his immediate management were all protected activities. Of the adverse actions alleged, only Respondent's issuance of an OLCC to Complainant on May 26, 2016 was an adverse action. However, Complainant has failed to establish that any of his protected activities were a contributing factor to Respondent's decision to issue this OLCC for improper email etiquette. Nor has he established a hostile work environment. Thus, Complainant's complaint fails and must be dismissed.¹⁴²

V. ORDER

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

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

¹⁴² Further, assuming *arguendo*, that Complainant had met his burden of establishing a prima facie case, the Tribunal finds that Respondent had established by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity. It is highly probable that, given the email fonts Complainant used, the upper management to whom the email was sent, and after having been trained and warned about his use of large fonts, that Respondent would have issued an OLCC to document his actions, regardless of the substance of the email itself.

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).