



**Issue Date: 01 May 2018**

Case No.: 2017-AIR-00008

In the Matter of

**JOSEPH LEMPA**

Complainant

v.

**HAWTHORNE GLOBAL AVIATION and  
HEARTLAND AVIATION**

Respondent

Appearances: Paul O. Taylor, Esq.                      Geoffrey A. Lacy, Esq.  
Peter L. Lavoie, Esq.                                      For the Employer  
For the Complainant

Before:                      SCOTT R. MORRIS  
Administrative Law Judge

**DECISION AND ORDER DENYING RELIEF**

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

**I. PROCEDURAL BACKGROUND**

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration (“OSHA”). In its January 9, 2017 letter, OSHA concluded that Complainant did not timely file his complaint, noting that the adverse action occurred on or about May 9, 2016, but Complainant did not file his complaint until September 12, 2016. Accordingly, OSHA dismissed the complaint. On January 31, 2017, Complainant objected to OSHA’s findings and requested a formal hearing before the Office of Administrative Law Judges (“OALJ”).

On February 13, 2017, this matter was assigned to the undersigned. The Tribunal issued the Notice of Assignment and Conference Call on February 14, 2017. Complainant responded to the Notice of Assignment by letter dated February 23, 2017 and Respondent responded on March

3, 2017. This Tribunal issued a Notice of Hearing and Pre-Hearing Order on March 22, 2017, and set the hearing to begin July 11, 2017 in Eau Claire, Wisconsin.

On April 12, 2017, Respondent<sup>1</sup> submitted a Motion to Dismiss for Lack of Timeliness. On April 24, 2017, Complainant replied to the motion. On May 10, 2017, the Tribunal issued an Order Denying Respondent's Motion to Dismiss finding that Complainant had stated a claim to relief that was plausible on its face, sufficient to survive the standard set forth in *Bell Alt. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)..

On June 5, 2017, Complainant filed a Motion to Amend Complaint adding Heartland Aviation as an additional named Respondent. Hawthorne Global Aviation, the sole prior Employer/Respondent, did not file an opposition to Complainant's motion.<sup>2</sup>

Complainant submitted prehearing materials on June 28, 2017. Respondent submitted its prehearing statement and proposed exhibit list on June 30, 2017.

On June 30, 2017, following a teleconference addressing the issue, the Tribunal issued an Order Joining Heartland Aviation as a Party to these proceedings.

The Tribunal held a hearing in this matter in Eau Claire, Wisconsin on July 11 and 12, 2017.<sup>3</sup> Complainant, Complainant's counsel, Respondents' representative and Respondents' counsel were present during all of these proceedings. At the hearing, this Tribunal admitted Joint Exhibits ("JX") 1 and 2, Respondent's Exhibits ("RX") 1-6, and Complainant's Exhibits ("CX") 1-11.<sup>4</sup> At the end of the hearing, the Tribunal specifically asked the parties to focus their briefs on certain issues, one being the timeliness of Complainant's complaint. Tr. at 448.

Complainant submitted its closing brief on October 6, 2017, and Respondents submitted their closing brief on November 10, 2017. Complainant submitted its reply brief on December 1, 2017.

On March 26, 2018, the Tribunal issued a Notice of Intent to Take Official Notice of one of the witness's pilot certificates and gave the parties until April 13, 2018 to object. On April 13, 2018 Respondent indicated it had no objection. Complainant did not respond to the Notice.

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<sup>1</sup> At this time, only Hawthorne Global Aviation was a named Employer/Respondent.

<sup>2</sup> During a telephonic conference with the parties on June 30, 2017, the Tribunal specifically asked Respondent's counsel whether he represented both Respondents for purposes of this matter. See June 30, 2017 Hearing Transcript at 6.

<sup>3</sup> The Transcript of the Eau Claire proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 12-20.

<sup>4</sup> Tr. at 8, 9, and 450.

## II. FACTUAL BACKGROUND AND EVIDENCE

### A. Stipulated Facts

At the hearing, Respondents' counsel conceded that Heartland Aviation was subject to the Act but did not concede that Hawthorne Global Aviation ("HGA") was subject to the Act. Tr. at 11; *see also* Resp. Br. at 9. The parties also stipulated that Complainant's termination from employment was an adverse action. Tr. at 11.

### B. Testimonial Evidence

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

#### Joseph Lempa (pp. 308-444)<sup>5</sup>

Complainant is married and has two children, ages 23 and 21. He has been a pilot since 1984. He holds an Airline Transport Pilot certificate, a Certified Flight Instructor-Instrument certificate, a flight engineer certificate, and has over 8,000 hours total flight time with about 7,000 of those hours being in jets. He worked for American Airlines for ten years, the first six months as a flight engineer. The rest of the time he flew the Boeing 727, 737, and Fokker 100; mostly the 727. The training requirements for American Airlines, a Part 121 air carrier, are more stringent than a Part 135 air carrier. At American, Crew Resource Management ("CRM") was constantly discussed and was part of the formal training that does not exist at Part 135 operations. Tr. at 308-314.

In 2001, he left the industry for a number of years to concentrate on family and held a number of jobs including running a successful business. After his children got older, he decided to reenter aviation in 2007. He was hired by Air Wisconsin and worked there for nearly half a year flying the 200 series Canadian Regional Jet ("CRJ"). He left because his legal rest had been disrupted on three occasions and when he attempted to have a proactive dialogue with the chief pilot, the chief pilot pointed out that there were plenty of other pilots who were furloughed that would love to have Complainant's job. Complainant resigned at Air Wisconsin. Between 2007 and 2011 he worked with his wife again as well as odd jobs. On February 7, 2011 he went to work for GoJet. There he served as a first officer on the 700 series CRJ, which is slightly larger than the 200 series. He was employed with GoJet for 11 months. After nearly a year of stellar safety and training, and having been selected for captain, he submitted an internal safety report and was terminated five days later without reason on July 5, 2012. From GoJet he was hired by Heartland Aviation. Tr. at 314-18.

He was hired by Heartland Aviation in January 2015 and then went through his Citation 650 training in Dallas in February 2015. The training lasted a couple of weeks. He was hired by Mr. Haupt, Mr. Jeff Husby, and Mr. Larry Husby. Mr. Biolo was also present at the interview. Complainant was hired as a pilot in command. Once he returned to Eau Claire from his simulator training in Dallas, he began his company specific training with Mr. Haupt.

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<sup>5</sup> At the hearing, the Complainant was the last witness to testify. However, to better understand his complaints, this Tribunal opts to summarize his testimony first.

Complainant took his first flight at the end of February 2015 with Mr. Batterton. Heartland conducts Part 135 on-demand charter operations throughout North America. At times they provide Part 91 flights in the case of some of the aircraft owners. Tr. at 318-21.

At Heartland he was told that he did not need to bother with pre-flight procedures<sup>6</sup> because the maintenance department conducted inspections of the aircraft on a daily basis – but he continued to do preflight inspections because there is no harm and it never interfered with the punctuality of the operation. It was kind of a general understanding there that one did not do preflight inspections and he consistently observed other pilots skipping the preflight. Pre-flight includes checking for NOTAMs<sup>7</sup> and on a number of occasions it was apparent that they needed to file an alternate when one was not accounted for, or a NOTAM that actually raised the minimums for the intended approach. Mr. Biolo's failure to check for NOTAMs on one occasion resulted in him banking the aircraft at 45 degrees, 1500 feet above the ground because the ILS<sup>8</sup> he was using was out of service and he tried to couple the autopilot to that approach, which failed. Tr. at 322-25.

As Complainant had not previously flown the Citation 650, he developed a study aid where he tied limitations and systems knowledge to appropriate instruments and/or switches in the flight desk area. Mr. Husby was so excited and impressed with it that he took pictures of the study aid and forwarded it to the HGA people on the East Coast. Some of the schematics related to the electrical system and described certain conditions and events with lines going to appropriate switches and/or indicators in the flight deck. He followed the General Maintenance Manual for the wiring as far as buses were concerned. It was essentially a Cliff Notes to the CE 650. Complainant did not carry this on flights as it was just a training aide. Tr. at 325-29.

Complainant prepared CX 10. Concerning the November 8, 2015 flight, he was surprised by Mr. Biolo, who said his intention was to navigate to a waypoint<sup>9</sup> on the northeast side of the Eau Claire airport, one of the initial approach fixes or final approach fix, for the approach to

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<sup>6</sup> The minimum requirements for pre-flight procedures is set forth at 14 C.F.R. § 91.103.

<sup>7</sup> A NOTAM is a Notice to Airmen which is a notice containing information concerning the establishment, condition or change in any component in the National Airspace System where the timely knowledge of which is essential to personnel concerned with flight operations. See [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/fs/alaskan/alaska/fai/notam/ntm\\_overview/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/fs/alaskan/alaska/fai/notam/ntm_overview/). It includes, for example, information on whether navigational aids are working, changes to instrument approach procedures, whether approach lights are operating at a given airport and Temporary Flight Restrictions (TFRs).

<sup>8</sup> An ILS is an Instrument Landing System precision runway approach aid based on two radio beams which together provide pilots with both vertical (called the Glide Slope) and horizontal (called the localizer) guidance during an approach to land. See [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/techops/navservices/gbng/ils/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/techops/navservices/gbng/ils/).

<sup>9</sup> In aviation, a waypoint is defined as “A designated geographical location used for route definition or progress-reporting purposes and is defined in terms of latitude/longitude coordinates. FAA-H-8083-24B, PILOT'S HANDBOOK OF AERONAUTICAL KNOWLEDGE, Glossary (2016), available at [https://www.faa.gov/regulations\\_policies/handbooks\\_manuals/aviation/phak/](https://www.faa.gov/regulations_policies/handbooks_manuals/aviation/phak/). FAA established waypoints are depicted on a chart or contained in a navigational database used during the operation of the aircraft. See generally, *id* at Chap. 16.

runway 22. Complainant offered to get a clearance but Mr. Biolo said it was fine. Complainant said it was not fine because they were not cleared to go to that fix. Mr. Biolo went ahead and navigated to the waypoint and the controller queried the apparent change in their direction of travel. Once challenged, Mr. Biolo corrected and went to the originally cleared waypoint. After this happened Complainant intended to discuss the incident with Mr. Biolo, but as soon as they landed Mr. Haupt specifically asked him how Mr. Biolo did on their trips together. When Complainant explained the situation to Mr. Haupt he said that he would talk to Mr. Biolo about it. Tr. at 329-32.

CX 10 addresses a flight that occurred on November 22, 2015. On this flight, after the passengers were aboard, they started the engines and Mr. Biolo began to turn the aircraft to the left, and he pointed out that Mr. Biolo needed to go to the right. But Mr. Biolo continued to go left. Complainant told Mr. Biolo twice that he was going the wrong direction, towards the south end of the ramp which was a dead end. Complainant reported this incident with Mr. Haupt and with Mr. Biolo. Tr. at 332-34.

CX 10, paragraph 4 references a flight that occurred on December 3, 2015. In short, it was an attempt by Mr. Biolo to coerce him into participating in what would have been an illegal visual approach, a subsequent unstable approach, an uncontrolled landing and a hesitation to go around. Complainant was the pilot monitoring and Mr. Clere was the pilot-in-command (“PIC”) and the flying pilot. They were approaching what would be a final approach course for runway 18 at Indianapolis while still above an overcast layer of clouds. At first, Mr. Clere asked Complainant to simply call and request a visual approach; he wanted to avoid being fully vectored for the RNAV GPS approach to runway 18. Complainant responded that they did not have the runway in sight. Mr. Clere pointed to the navigational display and showed Complainant where it was electronically (on the display screen). Complainant did not make any requests of Air Traffic Control (“ATC”), much less one for a visual approach for an airport that they did not have visual contact with. At some point they started to fly over the edge of an overcast sky below them and Mr. Clere said that he had the airport and runway in sight; Complainant did not. However, at that point it was plausible that Mr. Clere could see the runway so Complainant requested a visual approach and were cleared for a visual approach. Once cleared for the approach, Complainant conducted some checklists in addition to still communicating on the radio. When Complainant looked up he realized that they were high on the approach and not lined up with the runway. Mr. Clere then went ahead and engaged in a maneuver to line up with the runway but in doing so, the ground proximity warning system was annunciating numerous terrain alerts. Complainant believed that the passengers could hear that aural alarm. In this process of correcting, Mr. Clere overshot the center line and the left wing of the aircraft was over the grassy area. Complainant’s concern was, if Mr. Clere started to bank right that the left main could make contact with the taxi lights that border the runway, the right wing-tip might drag. So at that point, Complainant requested a go-around “quite emphatically.” Mr. Clere took no action so he again requested a go-around. At this point they were one-half way down the runway and Complainant simply said “go-around power, positive rate”; he literally walked Mr. Clere through a go-around. After going around and landing they arrived at the ramp area. Mr. Clere said he “had this,” immediately vacated his seat and offered the passengers an alternative version of events. When the line person expressed concerns about what happened, Mr. Clere offered them that same alternative narrative. Tr. at 334-39.

Once they were on the ground, he only discussed the approach minimally with Mr. Clere out of deference to the passengers. He thought that only harm could come from addressing that which was painfully obvious, and he did not want the passengers to be alarmed. Tr. at 339-40.

Complainant attempted to contact Mr. Haupt about the incident on December 5, 2015 during the return legs back to Eau Claire. He was going to wait until they returned from the trip; however, Mr. Clere on three occasions “was adversarial” to him on the return trip so while they were deplaning passengers at Indianapolis he attempted to contact Mr. Haupt and he left him a voicemail message to somewhat detail what was occurring. He placed a second call to Mr. Haupt two days later, when he had not heard from Mr. Haupt. He still did not hear from Mr. Haupt which prompted him to go in person the Heartland office on December 7, after he had already engaged in conversation with three people at the Federal Aviation Administration (“FAA”) about the unstable approach. Complainant recounted to them essentially what happened and they said that if he wanted to keep this simple to just deal with it in-house. Mr. Haupt never did return his phone calls. On December 7, he did get to talk at length with Mr. Husby, Respondent’s general manager, in person about the event; this was witnessed by Ms. Carol, the company’s former bookkeeper. Tr. at 340-44.

CX 10 makes reference to a flight that Complainant participated in on December 16, 2015. Mr. Batterton was the PIC. They were returning from Palestine, Texas to Eau Claire and in the process flew through icing conditions. The aircraft had deicing equipment that kept ice off of certain areas of the aircraft. During the post-flight walk around he noticed ice where it should not have been at the alternator generator inlet underneath the right-hand side engine. He pointed this out to Mr. Batterton and asked if Complainant should write it up and Mr. Batterton emphatically said no, he would take care of it. Of note, except for his initial training, he was never allowed to engage in any possible maintenance write-ups at all or in participating in critical phone calls. The ice melted off in short order. He saw two months later that there was a repair entry for this dated February 19, 2016 in the aircraft’s logbook. Tr. at 345-47.

CX 10 references a flight on January 3, 2016. Mr. Biolo and he were taking a group of passengers to a football game in Green Bay. During the approach, ATC asked Mr. Biolo to maintain 250 knots and he failed to do so. He called out “speed” and let it go at that. Mr. Haupt made it a point that Complainant try to be as diplomatic as possible with these types of situations. ATC later queried about their speed but there was no issue after they made the query, except Mr. Biolo could not find the airport and Complainant had to point it out to him. That was one of three times that Mr. Biolo had difficulty finding the airport, let alone the runway. During the departure following the football game, he was surprised that Mr. Biolo accelerated to as much as 278 knots while below 10,000 feet. When Complainant pointed this out to Mr. Biolo at least two times, Mr. Biolo made no apparent effort to correct. This was a problem because when you are below 10,000 feet there is an established airspeed limitation of 250 knots.<sup>10</sup> Mr. Haupt knew of all of these violations, except Complainant purposely did not tell him about the anti-ice failure incident on January 25, 2016 because he did not want to create any awkwardness between himself and Mr. Husby. Tr. at 347-49.

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<sup>10</sup> See 14 C.F.R. § 91.117(a).

The January 25, 2016 incident involved a flight from Las Vegas, Nevada with a lone passenger. When Complainant descended the air stairs after the flight he was surprised to see that there was moderate rime ice buildup on the left-hand engine cowl, indicating a failure of the anti-icing equipment. He took a photograph of the ice build-up. Mr. Batterton called the company and later relayed that he spoke to Mr. Husby who directed Mr. Batterton to chip off the ice so that they could bring the aircraft back as soon as possible to Eau Claire for in-house repairs. But there were icing conditions still present and the flight back to Eau Claire would definitely involve flying into known icing conditions. Complainant told Mr. Batterton that a flight into known icing conditions with known anti-ice failure is forbidden<sup>11</sup> and he would not participate in that. So, Mr. Batterton borrowed a ladder and proceeded to chip the ice off of the cowl. In disbelief, Complainant left the ramp area, went to the FBO lobby and called a friend who was a Boeing 737 captain at American Airlines to express his frustration. The aircraft does have a minimum equipment list (“MEL”),<sup>12</sup> but it requires a functioning engine cowl system if there are known icing conditions. They did not end up flying the aircraft back. CX 1 contains a copy of the photograph that he took of the aircraft that day. Tr. at 349-53.

CX 10 makes reference to an incident with Mr. Biolo and a taxi clearance. Mr. Biolo was both PIC and the flying pilot. They were instructed by ground control to taxi to runway 32 via Bravo 1 and Charlie taxiway. They missed the turn so they had to do a 180 degree turn. Complainant was surprised because this was Mr. Biolo’s home base. Mr. Biolo was very embarrassed by this, so Complainant did not attempt to address it further. Tr. at 353-55.

The next incident referenced in CX 10 occurred March 19, 2016 during a flight with Mr. Husby in Florida. In the midst of a well-established stratus layer 1000 feet below them as they were flying at 40,000 feet, ahead and to the left, there were very well-defined cumulus tops, most likely cumulonimbus, protruding from an overall smooth stratus layer. He heard airliners over the radio experiencing what they described as moderate turbulence so Complainant had concerns because they were a much smaller aircraft. He suggested to Mr. Husby that they come up with an alternative plan, especially deviating to the right. Mr. Husby said he was not concerned because they were topping the weather. ATC offered them an unsolicited option to deviate right of course, but Mr. Husby declined the clearance. As they continued into that area, they were issued a descend instruction. Complainant asked if they could climb instead, ATC approved that option, but Mr. Husby declined and emphatically pointed his finger down repeatedly. Complainant expressed his concern about accepting this clearance, but Mr. Husby was adamant so they descended into the weather. Complainant has been in severe turbulence as a crew member on a Boeing 727 and as a passenger on a DC-10, and he knows the specific definition of severe turbulence. As they descending they began to experience moderate and then eventually severe turbulence, so much so that the autopilot disconnected. CX 2 are snapshots from

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<sup>11</sup> See 14 C.F.R. §§ 91.527 and 135.227

<sup>12</sup> Unless otherwise authorized, no person may take off in an aircraft with inoperable instruments or equipment installed on the aircraft. See 14 C.F.R. §§91.213 and 135.179(a). One way to receive authorization to operate an aircraft with inoperative equipment is to obtain a minimum equipment list (MEL) which is an FAA approved document that allows an aircraft owner/operator to fly with a certain item(s) inoperative. For air carriers, the authorization to use an MEL will be contained in D095 of its Operations Specifications (OPSPECS). See FAA Notice N8900.440 (Oct. 27, 2017). The Federal Aviation Administration produces a Master Minimum Equipment List (MMEL) for most aircraft to use.

Flightaware showing the telemetry of the flight and the altitude deviations. On three occasions the turbulence was such that the aircraft was at its  $V_{mo}$ , never exceed speed, and had to loudly say “speed” because of the noise from the storm activity and turbulence. It was an especially upsetting event because one of the passengers was a teenage girl, who was occupying the lavatory seat. Tr. at 355-60.

After the incident he had a very limited discussion with Mr. Husby because he did not want the passengers to go on their cruise feeling the least bit compromised in the initial experience of a vacation. And once they departed, Mr. Husby’s only concern was getting Complainant to the airport to catch his airline flight to his training in Dallas. Over subsequent months, Complainant discussed the incident with Mr. Haupt a total of three times. Tr. at 360-62.

Following his recurrent training in Dallas, on March 27, 2016, he flew with Mr. Husby with passengers aboard from Florida back to Eau Claire. Complainant still had lingering concerns about the aircraft after the March 19, 2016 flight so he attempted to test as much equipment as he could and engaged in an extreme thorough pre-flight examination of the aircraft. En route, he discovered that the aircraft’s radar was inoperative. Mr. Husby dismissed this finding as a result of humidity and that it was only temporary in nature and that “they” have had this many times before; Complainant had never of that. When they returned to Eau Claire, Complainant verbalized this concern to the mechanic, as well as concern about the overall integrity of the aircraft because of the turbulence event in relation to the aircraft’s zero fuel weigh limitation. Mr. Biolo was there preparing for a flight and Complainant mentioned the severe turbulence incident to him. He asked if the aircraft was ok and Complainant told him that he did not know. Tr. at 362-65.

The following day, he looked at the weather for a flight and noticed convective activity in the area along their routes of flight. Complainant called Mr. Haupt and he agreed that they should utilize another aircraft for that trip. When Mr. Biolo arrived at the airport he seemed very upset that they were to use a different aircraft and raised his voice about how Complainant had no right to bash Mr. Haupt or Mr. Husby during this severe turbulence encounter. Tr. at 365-67.

CX 10 mentions a March 27, 2016 incident where Mr. Biolo was the PIC and flying pilot. During a descent into an airport in Florida they noticed a “flap overspeed” light, but his attention was actually drawn to Mr. Biolo’s hand being at the flap selector for some reason. The “flap inop” warning light was also illuminating, which indicated that the flaps were supposedly deployed somewhere around seven degrees. And the indicator was moving back and forth above and below the seven-degree indices. Two checklists came to Complainant’s mind that would ultimately lead to a third checklist. He verbalized to Mr. Biolo that the aircraft’s speed was exceeding the design limitations of the flap. Mr. Biolo failed to act on Complainant’s first two observations that the aircraft was exceeding the design limitations. On his own initiative, Complainant then exited his seat, after ensuring Mr. Biolo understood that Complainant was going to do that, and verified the condition of the flaps. Upon returning to the cockpit, Complainant asked ATC for vectors so they would work to solve the mechanical issue. During this time, Mr. Biolo’s speed control, or lack thereof, was noteworthy. According to

Flightaware,<sup>13</sup> their speed ranged from 177 knots to 250 knots, which is a significant speed spread. Complainant observed the speed as reflected in the cockpit initially at 210 knots but traveling to 240 knots, well beyond the design limitations. Eventually they diverted to Orlando and the aircraft was repaired there. Following the flight, Mr. Biolo made it very clear by body language, facial expressions, and minimal words that he was not interested in discussing the incident. Tr. at 368-75.

JX 1 is a complaint Mr. Biolo emailed to Complainant on March 31, 2016. This email is the only time that Mr. Biolo has sent Complainant an email complaining about their ability to work together. CX 3 is Complainant's draft response to JX 1 on April 2, 2016. As a courtesy, it was first sent to Ms. Verna Kay, the Vice President of Human Resources for HGA, for her thoughts before Complainant sent it to anyone else at Heartland. She responded and she and Complainant had a couple of conversations about the overall scenario and she essentially told him not to send this to anybody at Heartland in Eau Claire, so he did not. Tr. at 376-77.

On or about April 18, 2016, Complainant had a discussion with Mr. Haupt about his status with the company. During this talk, they discussed among other things the letter from Mr. Biolo to him. At that time, Complainant was only aware of Mr. Biolo not being willing to fly with him. During this conversation, Mr. Haupt asked Complainant if he thought there might be a more professional operation where he might be happier. Complainant spoke with Mr. Haupt again on May 9, 2016 where Mr. Haupt said that Mr. Husby had made a request for Complainant to submit his resignation by May 15, to be effective May 31, 2016. Complainant did not submit his resignation at that time. Mr. Haupt advised not to involve corporate in the situation because "they might not be as generous." Despite this, at the conclusion of the meeting, Complainant contacted Ms. Kay. CX 5 is an email dated May 11, 2016 from Ms. Kay to Complainant (with Mr. Haupt cc'd), where Ms. Kay proposed placing Complainant on inactive status effective June 1, 2016 until Complainant obtained gainful employment. Inactive status meant he was no longer flying and would receive a pay check until June 1, 2016. Complainant's last flight was April 7, 2016. After June 1, 2016, Complainant received \$50 per paycheck (every two weeks) for cell phone reimbursement. Tr. at 377-83.

CX 6 is a series of text emails over a couple of days between Complainant and Mr. Haupt. Complainant had concerns while attending potential interviews about whether he was still in the known crew member system and had other indicators that he was still employed. He discovered while going through an airport that his known crew member badge was disabled and this was contrary to what was agreed to.<sup>14</sup> So he contacted Mr. Haupt, but the badge was not

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<sup>13</sup> Flightaware is a website that provides current and historical flight tracking data. See [www.flightaware.com](http://www.flightaware.com).

<sup>14</sup> On cross-examination he explained that the known crewmember badge is indicative of being an active or somehow employed pilot. Tr. at 407. Mr. Haupt and he discussed the fact that on a practical level it would facilitate potential interviews out of town. Complainant was sending photocopies of the badge in his job applications to show that he was actively in that system. Tr. at 407-08.

The Known Crewmember Program is a risk-based security screening program that "is designed to confirm an airline flight-crew member's identity and current employment status, expedite their access to sterile areas of airports, reduce backlogs, increase throughput at passenger-screen checkpoints, and make

reactivated. Complainant had desired to stay at Heartland and revert back to a fully operational pilot. He did the right thing once before that resulted in a mark on his professional record, so he was very eager to avoid a termination of employment process. Complainant admired Mr. Haupt and enjoyed working for him. Further, he liked working in close proximity to his two daughters. Complainant had a meeting with Ms. Kay on December 9, 2015 in Long Island, New York following the Mr. Clere incident at Indianapolis. Ms. Kay said the whole situation was unfortunate, and Mr. Haupt told him that he disagreed with the decision being made by Mr. Husby for him to tender his resignation or Complainant's employment would be terminated. Tr. at 383-86.

During Complainant's time in inactive status, he contacted Mr. Haupt to learn what type of information Respondent would present to a perspective employer. CX 7 is information he received from Mr. Haupt following a request for a letter of recommendation. Tr. at 387.

On May 9, 2016, after his in-person meeting with Mr. Haupt, Complainant went directly to the local OSHA office in Eau Claire and spoke with an investigator. They had a conversation in their conference room that lasted about one hour. Complainant provided a detailed account of the events at Respondent and the investigator created a written record of his complainant. Complainant relayed a simple chronology to the investigator, as he wanted to just address the major experiences or egregious developments. He provided the investigator with copies of the photographs at CX 1—at least three time/date stamped photographs as well as textual descriptions of the pictures. The investigator attempted to call Complainant back the next day but Complainant was not available. On May 11, 2016 Complainant had a brief conversation with an OSHA investigator regarding the development with Ms. Kay. Tr. at 388-90.

Complainant's employment status designation in HGA's employment database changed in the beginning of September from inactive to no longer employed, with an August 31, 2016 retroactive effective date. It appeared to be related to the resignation of Ms. Kay and the appointment of her replacement. However, he still received his \$50 cell phone reimbursement for September, but they ended after that. Learning of this change, to his employment being terminated, he again contacted OSHA and sent the investigator all remaining information that he had at the time about his other safety concerns and experiences. CX 10 is a written account of his complaints he provided to OSHA; there were certainly other concerns but he had no way of verifying them. Complainant attempted to email them to the investigator on or about September 23, 2016. He then faxed them to the investigator on September 26, 2016. Tr. at 390-91.

Complainant never received any negative written feedback about his piloting skills from Heartland personnel, including Mr. Batterton. To the contrary, Mr. Batterton told him on one particular occasion that he was a model employee and pilot. Mr. Batterton also expressed disbelief that Mr. Biolo had become the assistant chief pilot, and negatively commented about Mr. Biolo's piloting skills. Tr. at 391-92.

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more efficient use of [Transportation Security Administration] screen resource." See <http://www3.alpa.org/portals/alpa/misc/Known-Crewmember-Fact-Sheet.pdf>.

Complainant is currently employed by PSA Airlines as a first officer flying the Canadian Regional Jet (CRJ). PSA Airlines in a regional airline contracted to fly as American Eagle. His salary is \$38,000. He started working for them in October 2016. CX 9 contains pay stubs from PSA Airlines. The financial impact of his termination of employment from Heartland has been dreadful. To begin, his salary went from \$60,000 a year to \$38,000 per year. The change to inactive status also coincided with his wife's absence of income during the summer; she works at school. His family was not able to live at the same level of expense on just her income. This caused him stress, especially in gathering the level of details needed for job applications for he was working long hours on paperwork for job applications. He was irritable and would snap at his wife. Tr. at 393-97.

On cross-examination, Complainant averred the following. RX 6 includes an email Complainant sent to Mr. Haupt on May 10. A portion of RX 6 references April 18, and Complainant did not think that, as of that date, he was no longer going to be employed by Heartland. It was his clear impression from Mr. Haupt that Mr. Haupt was tortured over the situation. Mr. Haupt did send him one or two job announcements, but made no serious effort to look for a job at that point. Later he did have a lead on two jobs and applied for those positions; sometime before May 10, 2016. RX 6 also includes an email from Mr. Haupt stating "[W]e are offering to you the option to resign with a resignation date no later than May 31<sup>st</sup>. If you wish not to provide a resignation letter by May 15<sup>th</sup>, I will direct that your employment be terminated on May 15<sup>th</sup>." Despite this language, Complainant still had questions about the intentions of his employer because the day prior Mr. Haupt told him that he did not agree with Mr. Husby's decision. Complainant acknowledged that he had not flown for Heartland since April 8, 2016. According to Complainant, Ms. Kay had told him that there could be room for him elsewhere in the Hawthorne System. She also told him that she had suspicions about the Eau Claire operation, so he felt that there was still the possibility of somehow turning the situation around. Tr. at 399-405.

CX 10 is a document Complainant prepared. It is not the first written document he presented to OSHA. He has no idea where the textual complainants are located that he offered to OSHA on May 9, 2016. Tr. at 406.

In his email on May 10, he made reference to being considered for several positions. None of those companies offered him a job prior to May 10. Eventually he was offered one of the positions working in Turkey with a \$100,000 salary, but he declined the offer.<sup>15</sup> Then PSA Airlines offered him a position, but the starting salary was \$23,000 so he turned that job down as well. It was later that PSA Airlines made a second offer of employment with a salary of \$38,000, which he accepted. In addition, he received in hand \$14,900 out of a \$20,000 signing bonus. Complainant did not apply for or collect unemployment in the summer of 2016. Complainant started applying for new jobs "to be sure" in May 2016, because he did not know what the outcome of his situation with Heartland, much less HGA, would be. He did not apply for other positions at any other carriers owned by HGA because he was relying on Ms. Kay to facilitate some potential position. Tr. at 408-14.

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<sup>15</sup> On re-direct, Complainant explained that he turned down the position in Turkey because it was with a private entity and involved flying unknown passengers into places like Iraq, Syria, and other hotspots. Tr. at 440-41.

Complainant was asked about the November 8, 2015 incident. To his knowledge, there was never any report filed about the incident with ATC by ATC. As for the November 22, 2015 incident, Complainant spoke twice to Mr. Biolo during his actions. Mr. Clere dealt with Complainant in an adversarial fashion. Mr. Biolo simply did not engage with Complainant; they had a neutral relationship. Concerning the November 2015 incident, the airport that they were flying into was an uncontrolled airport. Mr. Biolo's actions in turning the aircraft the wrong way was not illegal, but he was not engaging in CRM. On the December 3, 2015 approach, Mr. Clere was lying during his testimony. During that flight, they were above the cloud layer and he pointed at the electronic symbol where the airport was located on a navigation display inside the cockpit versus actually seeing the airport outside the cockpit window because of the cloud layer. Complainant did not report to ATC that they had the visual until they actually did. He did report this incident to the FAA but they told him that it would be up to him to deal with it and they recommended that it be done in-house. In the December 16, 2015 incident he identified ice on the generator inlet that he immediately reported to Mr. Batterton and then to maintenance personnel. He did not write it up because he was not allowed; he was never allowed to do so by the pilots in command that he was flying with.<sup>16</sup> Tr. at 414-26.

Concerning the January 25, 2016 incident with Mr. Husby, Complainant acknowledged that he did not report that incident to Mr. Haupt because it would cause problems between Mr. Haupt and Mr. Husby, and he did not want to be the foundation for that to occur. Complainant found Mr. Batterton's testimony about him chipping ice off to prevent unintentional damage to the engine during maintenance interesting because that was inconsistent with what he told Complainant at the time it was occurring. To run the risk of any kind of damage to the left engine cowl by chipping off the ice in lieu of towing the aircraft to the hangar where in a very short period of time the ice would melt away was interesting testimony. However, he acknowledged that he did not participate in the telephone call between Mr. Batterton and Mr. Husby. He agreed that they did not fly after he noticed the ice on the aircraft until it was repaired. Tr. at 427-29.

As for the March 19, 2016 incident in Florida, Mr. Husby did not disengage the autopilot because his hands were not on the controls in any way at the time the autopilot disconnected once they started experiencing pronounced turbulence. When in turbulence, speed and attitude are important and you do not try to prevent altitude changes because that would increase the stress on the aircraft. In that flight, the change in turbulence was abrupt and they went from an absolutely smooth experience to light to severe. It was the following flight that Complainant noticed an issue with the radar. Despite his very extensive pre-flight, there is no way to fully test radar on the ground, and discovered the issue while en route to Eau Claire. However, Mr. Husby disagreed with this assessment. Complainant did not enter this mechanical irregularity in the aircraft's log book, although he acknowledged that he was unsure whether he or Mr. Husby was the pilot in command on that flight. He reported it during the flight to Mr. Husby, who is the company's general manager and to a mechanic once they had landed. Before leaving that night,

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<sup>16</sup> The Tribunal took official notice of 14 C.F.R. §135.65(b) which places the responsibility for entering or having entered in the aircraft maintenance logs each mechanical irregularity that comes to the pilot-in-command's attention during the flight time. Tr. at 426.

he told Mr. Biolo that he had a lot of concerns about the aircraft and that maintenance needed to go over it with a fine-tooth comb. Tr. at 429-35.

Complainant agreed that he was not working as a pilot between 2007 and 2015, with the exception of 17 months. Complainant was told on numerous times that he did not have to preflight the aircraft because it had just come out of maintenance and they do the inspections, and for the most part Heartland pilots did not do preflights. He acknowledged that part of the syllabus for their training program was about the responsibility to do preflight inspections, but what is on paper can be different from the practicality of it. Tr. at 436-38.

Addressing JX 1, Complainant disputed Mr. Biolo's contention that Complainant did not address speed issues during the flight in question and noted that he left his seat to verify the flaps actual positions. Tr. at 438-39.

On re-direct, Claimant said that in a Citation 650 cockpit the pilots are approximately a foot apart. It is very likely that the pilot next to you will hear what you are saying to them, especially since one is wearing a headset and speaking into an intercom system. Mr. Biolo used a noise cancelling headset. In the flight with Mr. Husby from Florida to Eau Claire, Complainant sat in the right pilot seat. Tr. at 441-43.

On further cross-examination, Complainant could not recall if Mr. Haupt had told him that Mr. Husby was not type rated in the aircraft.<sup>17</sup> Tr. at 444.

#### Cory R. Haupt (pp. 20-149)

Mr. Haupt holds an Airline Transport Pilot certificate, single and multi-engine flight instructor certificates and holds type ratings in the Citation 550 and 650. He has in excess of 8,000 flight hours total time, over 6,000 being in jets. Tr. at 145.

Mr. Haupt is the chief pilot for Heartland and has been a pilot since 1990. He's been a professional pilot for 20 years and became Heartland's Chief Pilot in 1997. Complainant was one of his subordinates at one time. He and Mr. Jeff Husby (a former owner of Heartland) made a joint decision to hire Complainant in February 2015. Heartland is owned by HGA. After Mr. Husby sold the company to HGA, he remained as the company's general manager and his father (Mr. Larry Husby) served as the Director of Operations.<sup>18</sup>

The Complainant had a good resume at the time he was hired, but he did have long periods of time where he was not employed in the aviation industry. Complainant did have 10 continuous years with American Airlines, although much of that time was as a flight engineer on a Boeing 727, an aircraft that is fairly sophisticated compared to the aircraft Heartland operates. Pilots at legacy carriers like American Airlines go through frequent flight checks. Pilots at his

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<sup>17</sup> According to FAA records, Mr. Husby holds a type rating in the CE-650, but for SIC privileges only. See Notice of Intent to Take Official Notice, dated March 26, 2018.

<sup>18</sup> Unless otherwise noted, when the Tribunal hereafter refers to Mr. Husby, it is referring to Mr. Jeff Husby.

company are required to go through checkrides to be qualified to fly different aircraft that the company operates. Heartland operates two types of jet aircraft, the Citation 550 series and 650 series aircraft.<sup>19</sup> Heartland provides Part 135 on-demand service to its clients for transportation. Heartland does not own all of the aircraft it uses, but they are all based in Eau Claire, Wisconsin. Back in 2015 and 2016 Heartland operated five aircraft. HGA also owns ExcelAire, another air carrier which is located in New York. Tr. 20-25.

As Heartland's chief pilot, Mr. Haupt supervised Complainant and the eight other pilots at Eau Claire at the time. Mr. Haupt's supervisor was Mr. Jeff Husby during the entire time Heartland employed Complainant. Complainant drew his check from HGA. Mr. Jeff Husby and Mr. Larry Husby were also pilots, so there were a total of ten pilots, but only eight regularly operated the aircraft and for whom he conducted annual reviews. To his knowledge, neither HGA nor Heartland had an official policy for issuing any sort of formal discipline to its employees. Mr. Haupt never issued any sort of written discipline to Complainant during his time with Heartland, but did give him an annual review in December 2015, located at CX 4. The portion entitled Core values was prepared in the spring. Mr. Haupt agreed that he wanted Complainant to report any safety concerns with respect to his co-workers' performance to him; and he did that. However, some of Complainant's coworkers were complaining to Mr. Haupt that Complainant was making them feel as if every time they flew with him they were on a check ride. Mr. Biolo expressed this concern several times in the spring of 2016. Mr. Haupt agreed that, in December 2015, he gave Complainant a satisfactory rating for meeting the core values of HGA and Heartland, and that he collaborated well and had unselfish cooperation as a member of the group to achieve a common vision. Mr. Haupt agreed that, at least as of mid-December 2015, Complainant paid great attention to detail. And when he prepared his evaluation, he believed that Complainant was honest, fair and had straightforward conduct; however, he has since changed his opinion on that. Complainant met expectations on job knowledge, customer service and teamwork. Tr. at 25-38.

Mr. Haupt flew with Complainant extensively. Complainant was always pleasant and worked hard at making passengers feel comfortable and at home. His comment on CX 4 about Complainant's knowledge of Part 135 operations had increased dramatically since he started was based on his observations of Complainant. Tr. at 38-39.

It was not until late March 2016 that Mr. Biolo refused to fly with Complainant. Mr. Clere also refused to fly with Complainant in December 2015. In February or March 2016, the company sent Complainant for some additional training. On CX 4, Mr. Haupt commented that Complainant was an excellent communicator, but he needed to be aware of long-winded responses when something simple would do. Complainant was not fired because he was long-winded. He agreed that if he thought in December 2015 that Complainant was an unsafe pilot, he would not continue to retain him. When Mr. Haupt completed Complainant's annual performance review in December 2015, it was his goal for Complainant to become a fully autonomous pilot in command in 2016. Tr. at 40-46.

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<sup>19</sup> The company operates all of its aircraft using two crewmembers per its General Operating Manual. Tr. at 25.

Mr. Haupt first saw JX 1 on or about March 31, 2016. This is an email where Mr. Biolo informed Complainant that he would no longer fly with him. Mr. Haupt did not know the events that pertained to that email, but he assumed that it related to the trip Complainant and Mr. Biolo took to Florida where they had a flap issue. Complainant and Mr. Haupt had discussed that entire event in detail. Prior to receiving JX 1, Complainant had told him that Mr. Biolo had flown at more than 210 knots with a flap that would not extend (it was retracted), while the checklist called for 210 knots or less. The aircraft flap system sensed movement in one flap but not the other, and it locked the flaps so they could not move. This is done to prevent an asymmetrical flap issue. They had an indication problem, not asymmetrical flaps, as Complainant visually verified the flaps were retracted. If Mr. Haupt were flying the plane, he would have been fine flying the aircraft up to 250 knots below 10,000 feet.<sup>20</sup> Complainant told him that the indicator lights showed that the flaps were extended; but he had visually confirmed the flaps were up. Because of this anomaly, they diverted to Orlando and had the aircraft repaired prior to further flight.<sup>21</sup> JX 1 does not reflect that Mr. Biolo was talking about this incident, but he did later. As JX 1 reflects, Complainant told Mr. Haupt that Mr. Biolo had exceeded 210 knots with the Flap Overspeed annunciator illuminated. Mr. Biolo reflects in JX 1 that ATC had asked them to maintain<sup>22</sup> 210 knots, and if Mr. Biolo felt they could not do so safely, he would have said “unable.” In JX 1 Mr. Biolo recounts that during that trip Complainant was complaining about working nine and ten days in a row. Mr. Haupt did not recall any of the rest of the pilot group complaining about the number of days worked or the working conditions. Tr. at 46-55.

JX 2 is a document Mr. Haupt prepared entirely on his own and without HR reviewing it first. It reflects that, as of April 27, 2016, he found Complainant hard working, conscientious and interested in the success of Heartland, and he was genuinely interested in providing passengers with a safe and enjoyable experience. Complainant was not fired or put on inactive status for complaining. Tr. at 55-56.

Mr. Haupt authored CX 5, dated May 11, 2016, in conjunction with Ms. Verna Kay. In May 2016, Ms. Kay was the Vice President of Human Resources for HGA. Prior to the issuance of CX 5, Mr. Haupt suggested that Complainant look for other work. Around April 18, 2016, Mr. Haupt provided Complainant with a letter of recommendation (JX 2). And that was before the solution to change Complainant’s employment status to inactive, effective June 1, 2016. Tr. at 57-59.

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<sup>20</sup> Per 14 C.F.R. § 91.117(a), no person may operate an aircraft below 10,000 feet MSL at an indicated airspeed of more than 250 knots.

<sup>21</sup> The Tribunal took official notice of 14 C.F.R. § 135.25, which provides, in part, that no certificate holder may operate an aircraft under Part 135 unless it is in an airworthy condition and meets the applicable requirements of 14 C.F.R Chapter I.

<sup>22</sup> The word “maintain” when operating an aircraft is an instruction which is to be executed without delay. Further, “[e]xcept in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.” 14 C.F.R. § 91.123(b). See AERONAUTICAL INFORMATION MANUAL (AIM) (2017), Chapter 4, available at [https://www.faa.gov/air\\_traffic/publications/media/aim\\_10-12-17.pdf](https://www.faa.gov/air_traffic/publications/media/aim_10-12-17.pdf).

Mr. Haupt received CX 3 around April 2, 2016. He gave of copy of CX 3 to Mr. Biolo and possibly Mr. Husby. Mr. Haupt admitted that he shared with Complainant that Mr. Biolo had told him that Mr. Biolo felt as if he was on a checkride when he flew with Complainant. “Checkride” are Mr. Haupt’s words translating or paraphrasing what Mr. Biolo had told him about flying with Complainant. Mr. Biolo felt that he was always under the microscope, that every action he did in the cockpit was being looked at by Complainant with a jaundice eye; like someone looking over your shoulder looking for mistakes. CX 3 also makes reference Complainant alleging that Mr. Biolo willfully violated an ATC clearance and Complainant’s recommendation not to navigate to a noticeably different waypoint that resulted in critical remarks by the controller. Tr. at 59-66. CX 3 states: “transgressions and potential FAA violations occurred under the best possible circumstances which possibly sheds light on why at other times you violated a less than usual Presidential TFR<sup>23</sup> and compromised abnormal checklists.” However, when asked if anything came of this Presidential TFR violation, Mr. Haupt said there was no violation, but there could have been a letter of correction issued.<sup>24</sup> Tr. at 68-70.

RX 1 is an email showing that the company’s ASAP<sup>25</sup> program was operational March 7, 2016. If there was any indication or concern that a regulatory event may have occurred, Mr. Haupt would have assisted in getting those reports into the ASAP program. Tr. at 66-68.

Complainant also expressed concerns to Mr. Haupt about Mr. Husby’s performance in taking aircraft through turbulent weather conditions. Mr. Husby is Mr. Haupt’s boss. This flight occurred around March 19, 2016, near in time to the flight Complainant had with Mr. Biolo to Florida. Complainant informed Mr. Haupt that, while they approached Opa-Locka Executive Airport, he pointed out to Mr. Husby embedded thunderstorms ahead protruding from a stratus cloud layer. Complainant alleged that ATC offered Mr. Husby and Complainant a deviation right of course, but Mr. Husby declined the option and that he wanted to continue navigating directly to the Cypress VOR.<sup>26</sup> Complainant then complained that they experienced severe

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<sup>23</sup> A Temporary Flight Restriction (TFR) is a regulatory action issued to pilots via a Notice to Airman (NOTAM) to restrict certain aircraft from operating within a defined area on a temporary basis. A Presidential TFR is a specific flight restriction whenever the President is traveling. 14 C.F.R. § 91.141. *See* AC 91-63C (May 20, 2004). Violating a Presidential TFR is a serious offense and can be a crime if done knowingly or willingly. 49 U.S.C. § 40103(b)(3). However, the more common consequence is a 30 to 90-day suspension of a pilot’s certificate. *See* FAA Order 2150.3B, App. B (Feb. 2, 2017) thru chg 12.

<sup>24</sup> A letter of correction is a type of lesser administrative action issued by the FAA to an airman. *See* FAA Order 2150.3B, Chapters 2 and 5.

<sup>25</sup> The Tribunal asked Mr. Haupt if the company participated in the Voluntary Disclosure Reporting Program (VDRP) or the Aviation Safety Action Program (ASAP). Mr. Haupt indicated that they participate in both programs. Further, neither of the incidents described above were reported to the company or the FAA under those programs. Tr. at 65-66. In general, under these programs, if a pilot discloses inadvertent FAA violations prior to the FAA discovering them, the FAA may not later suspend their certificate for that incident. *See* FAA Advisory Circular (AC) 00-58B (Apr. 29, 2009) and AC 120-66B (Nov. 15, 2002). At the hearing, the Tribunal took official notice of AC 120-66. Tr. at 68.

<sup>26</sup> A VOR is a very high frequency omnidirectional range. It is a ground based electronic system that provides azimuth information which aircraft can use to navigate. *See generally*, AIM, *supra*, Chapter 1. The Cypress VOR is the name of a specific VOR and has a unique identifier and frequency. The Cypress VOR is part of certain arrival procedures for the Opa Locka Executive Airport. *See, e.g.*, Standard

turbulence that disabled the autopilot, and required Mr. Husby to hand-fly the aircraft. The aircraft's operations manual says to disconnect the autopilot and then take your time to slow down when encountering turbulence. It was shortly after this incident that Mr. Haupt sent Complainant to recurrent training. Tr. at 70-73.

Complainant complained to Mr. Haupt about Mr. Clere, a friend of Mr. Haupt. Complainant alleged that Mr. Clere attempted to coerce him into requesting an illegal visual approach in to the Indianapolis Executive Airport when their aircraft was above an overcast cloud layer. That incident occurred around December 14 or 15, 2015. He claimed that Mr. Clere froze during the process resulting in an uncontrolled landing attempt. Tr. at 73-75.

Counsel asked Mr. Haupt questions referring to CX 10. Mr. Haupt did not recall Complainant relayed to him an incident that occurred with Mr. Biolo on November 8, 2015, where he allegedly violated a clearance<sup>27</sup> from Minneapolis Center<sup>28</sup> as well as Complainant's request to navigate to a different waypoint than what ATC had authorized. Nor did Complainant tell Mr. Haupt about an incident on November 22, 2015 while taxiing at the south end of an uncontrolled<sup>29</sup> airport at Quincy, Illinois. Tr. at 76-77. However, Mr. Haupt did recall Complainant voicing concerns about an incident that occurred on December 3, 2015. He did not recall Complainant mentioning to him the matters referenced in CX 10 that allegedly occurred on December 16, 2015, January 3, 2016, January 25, 2016, or February 25, 2016 during the times they occurred. He thought they discussed the January 25, 2016 anti-icing matter, but that would have been well after they had corrected the item and flown the plane. In that instance, the other pilot was directed to chip the ice off the inlet because they had a scheduled flight and had asked for maintenance to be conducted on the aircraft. The pilot was instructed to do this because they did not want ice to get sucked into the engine should mechanics perform maintenance on the aircraft. Tr. at 75-80.

Complainant did raise with Mr. Haupt the March 27, 2016 incident with inoperative radar prior to his termination of employment. That resulted in swapping the aircraft out for another one on that day. Tr. at 80-81

RX 3 contains notes that are only in Complainant's records. It is not a note that is typically maintained in the rest of the pilot's records and was prepared as part of this litigation process. He prepared the notes and they are based upon his recollection of events and they were

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Terminal Arrival Procedure, Cypress Nine Arrival, which can be located at [www.airnav.com](http://www.airnav.com). See also, FAA Order 7100.9D (Dec. 21, 2003).

<sup>27</sup> A clearance is different than an instruction. See 14 C.F.R. § 91.123. A clearance is permissive whilst an instruction is a command.

<sup>28</sup> A Center is an Air Route Traffic Control Center. This is an ATC facility that provides "air traffic control service to aircraft operating on IFR flight plans within controlled airspace, principally during the en route phase of flight. When equipment capabilities and controller workload permit, certain advisory/assistance services may be provided to VFR aircraft." See [http://www.fly.faa.gov/Products/Glossary\\_of\\_Terms/glossary\\_of\\_terms.html](http://www.fly.faa.gov/Products/Glossary_of_Terms/glossary_of_terms.html).

<sup>29</sup> An uncontrolled airport is one that does not have an operating ATC tower. See generally, [https://www.faa.gov/files/notices/2017/Jun/Non-Tower\\_Airport\\_Comms.pdf](https://www.faa.gov/files/notices/2017/Jun/Non-Tower_Airport_Comms.pdf).

last updated in August 2016. It was created to essentially outline the response to the OSHA complaint. Tr. at 82-85.

CX 6 is a series of text messages between Mr. Haupt and Complainant beginning on July 8, 2016. By then, Complainant was in an inactive status. The July 8, 2016 email exchange is Mr. Biolo asking Mr. Husby to deactivate Complainant's NATA badge which allows him to have security access. Mr. Biolo manages those accounts as the assistant chief pilot. On August 2, 2016, Mr. Haupt sent Complainant an email where Ms. Kay<sup>30</sup> asked Mr. Haupt if she could terminate Complainant's employment as they could not leave the arrangement open-ended. On August 3, 2016, Mr. Haupt wrote Complainant that, according to Ms. Kay, August 31, 2016 was an acceptable date and asked that Complainant forward a letter of resignation and his key. Tr. at 85-90.

CX 7 contains copies of Pilot Records Improvement Act (PRIA) forms that Complainant had asked for. These are forms the company would send to an employer based upon a PRIA request. CX 8 contains screenshots of potentially what an employee would see in the ADP payroll software. It reflects an annual salary of \$59,999.94. Complainant was salaried at a rate of \$60,000 for standard hours. It is within the company's discretion to give annual pay increases based on merit. The other eight pilots have received pay raises since 2016 and they earn anywhere from 60 to 90-ish thousand annually. Mr. Haupt earns less than what their top pilot makes. The initial target for periodic pay increases is five percent per year. Tr. at 90-93.

The decision-maker on whether to discharge Complainant was primarily Mr. Husby, but Mr. Haupt and Ms. Kay also supported the decision. Mr. Haupt relied upon information from all sources, including the information provided by Mr. Biolo. Tr. at 94.

On cross-examination, Mr. Haupt acknowledged that the eight pilots he referenced had different rankings and abilities. HR would numerically rank the pilots and Complainant was at the bottom. The pilot that had the next highest score was also asked to leave the company in the spring of 2016. There are two types of pilots, a pilot-in-command and second-in-command ("SIC"). This is the minimum crew that is required by the regulations to fly the aircraft Heartland operates; the aircraft's type certificate requires two pilots. However, the company operates with co-captain crews where there are two PIC qualified individuals upfront. Their crews practice crew resource management ("CRM").<sup>31</sup> Tr. at 95-97.

The goal when hiring Complainant was to hire him as a PIC and within a short time for him to be fully capable where they could put a junior SIC together with him. After being initially hired, he was required to attend simulator training offered by a third party. New pilots come back and serve as a SIC, and then once Mr. Haupt did a line check<sup>32</sup> with the pilot, they move to being technically a qualified PIC. At Heartland, Mr. Haupt likes to fly with the newly

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<sup>30</sup> Ms. Verna Kay is the human resources officer with HGA. Tr. at 13.

<sup>31</sup> For more details on CRM, *see* AC 120-51E (Jan. 22, 2004).

<sup>32</sup> A line check under Part 135 is a required flight check in the aircraft that a pilot would be flying and consists of various pilot actions, including flying en route, takeoff and landings, and flight under instrument flight rules (if the pilot is going to operate under IFR). 14 C.F.R. § 135.299. *See also id* at §§ 135.293 and 135.297.

hired pilot to judge their skill level, observe how they fly and how they work with other flight crewmembers. He relies upon the input of their senior captains to determine whether a person that comes back from training is capable of functioning at a level that they want as a PIC. There are a lot of things that a PIC does in a Part 135 operation that an airline pilot does not do. For example, they coordinate ground transportation for the clients, react if the client wants to depart early, and clean the aircraft. Tr. at 97-99.

Complainant met the minimum requirement of being a PIC. Normally, after a pilot comes back from simulator training, Mr. Haupt flies with them or some other senior captain does and he will then do a line check with that pilot. In Complainant's case, Mr. Haupt delayed his line check for several months because he was concerned that he could not pass Complainant even at a minimum level for several months. CX 7 reflects the initial and differences training<sup>33</sup> required for the Citation 650. Complainant received his line check on July 9, 2015. Once he passed his line check, he was technically able to perform as PIC. However, the entire time that Complainant worked for the company, he was never allowed to manipulate the controls with passengers on board because Respondent was concerned with his abilities. This was something that they expected Complainant to be able to do early on; typically it occurred within weeks of a pilot's return from simulator training. Tr. at 99-104.

RX 2 is Heartland's Safety Management System (SMS), a program it implemented almost ten years ago and was known to its pilots. Mr. Haupt had multiple discussions about SMS with Complainant, including a previous OSHA complaint Complainant had made against GoJet, and agreed with Complainant that he should not have been fired for reporting those allegations; it is not the way SMS is supposed to work. SMS is supposed to be a forum for employees to enter information into the system without any punitive actions so the company can address safety concerns. To Mr. Haupt's knowledge, Complainant never submitted anything through the SMS system. Nor did he file an ASAP; though other pilots did. Tr. at 104-06.

JX 1 includes a discussion of the flap overspeed incident involving Mr. Biolo and Complainant. It was his understanding that they were descending out of altitude and in the process attempted to extend the flaps, and they would not extend. A flap overspeed light came on. The flightcrew ran the checklist and verified the flaps were up and at that point, if it were him, Mr. Haupt would have no problem flying the aircraft up to 250 knots. After they received the OSHA complainant, he sat down with the company's principal operations inspector<sup>34</sup> and

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<sup>33</sup> Mr. Haupt referenced § 135.227, but he likely meant 14 C.F.R. § 135.347, for §135.227 refers to operating limitations for icing conditions.

Differences training for Part 135 operations is defined as "training required for crewmembers who have qualified and served on a particular type aircraft, when the Administrator finds differences training is necessary before a crewmember serves in the same capacity on a particular variation of that aircraft." 14 C.F.R. § 135.321(b)(4).

<sup>34</sup> This person is an FAA Aviation Safety Inspector (ASI) assigned to provide oversight of the air carrier's flight operations. Generally, for Part 135 operations, there are three ASIs assigned to each carrier: a principal operations inspector (POI), a principal maintenance inspector (PMI) and a principal avionics inspector (PAI). Most times an ASI will be assigned to oversee several air carrier certificates. See [https://www.faa.gov/jobs/career\\_fields/aviation\\_careers/media/ASI\\_Fact\\_Sheet.pdf](https://www.faa.gov/jobs/career_fields/aviation_careers/media/ASI_Fact_Sheet.pdf). See generally, FAA Order 8900.1 (as of Mar 2, 2018), available at <http://fsims.faa.gov/>.

reviewed the incident, and she did not object that the plane was operated in that manner. After the overspeed light came on, the crew elected to divert to Orlando and the aircraft landed without incident. There is a Citation Service Center there where they coordinated to have the aircraft repaired. Mr. Haupt noted that the aircraft has a supplement<sup>35</sup> that allows the aircraft to be flown with the flaps retracted, so technically they could have brought the aircraft home with passengers, but they did not. The company never received a notification from ATC of a potential violation for the incident, or from their POI, which is what he would expect if a violation had occurred. Tr. at 106-112.

CX 10 references an incident that occurred on January 25, 2016 where a pilot was asked to chip off ice from the aircraft's engine in-let because the leading edge anti-ice was inoperative on the airplane. He received a call from that pilot, Mr. Batterton, and Mr. Haupt immediately conferenced in their Director of Maintenance ("DOM") and Mr. Husby. They decided to have the aircraft repaired there in St. Paul. Mr. Husby directed Mr. Batterton to chip the ice off the inlet as best he could because if the engine shop were to test run the engine before they removed the ice, he did not want any ice to get sucked into the engine. Complainant was not on that telephone call, but was one of the two pilots on that flight. Tr. at 112-14.

Mr. Clere is one of their senior pilots and he has complained about flying with Complainant. His concerns were primarily about getting in touch with Complainant when things would change during a charter trip. Because in their business things change quickly, pilots need to be able to be reached on short notice. That complaint was early on in Complainant's employ. Mr. Clere did not refuse to fly with Complainant at that point but there came a point where he asked not to be paired with Complainant, which the company tried to accommodate as best they could. There was a subsequent event where Mr. Clere said that he would no longer fly with Complainant, and after that incident they honored his request. Mr. Clere's announcement came shortly after the Indianapolis Executive flight. Tr. at 114-16.

The decision to send Complainant back for recurrent training occurred in late December 2015, early January 2016. Any time a pilot is scheduled to go back for recurrent training, Mr. Husby and he will have had a discussion about how well the pilot was doing and whether they should they send the pilot back for recurrent training. They considered it a borderline decision, but eventually they elected to send Complainant to the training. The hope was they could improve upon what Complainant was doing and get him to the point that he could be a PIC for them. But eventually it became apparent that Complainant was never going to be a fully functional PIC for the company. CX 7 reflects his simulator training was completed on March 24, 2016. It was shortly after Complainant's recurrent training that the Mr. Haupt received Mr. Biolo's refusal to fly with Complainant. At that point Mr. Haupt's hands were tied; they had so few pilots that it became impossible to schedule people. Mr. Haupt would expect crewmembers to have a discussion between themselves at the time events were occurring and should have come to an agreement; that is what you do in CRM. It appeared to Mr. Haupt that Complainant was acting as some outside observer rather than a participant in a flight. Whether you are the PIC or SIC of a flight, you are part of the crew. Tr. at 120-23.

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<sup>35</sup> The Tribunal infers that he is referring the aircraft's minimum equipment list (MEL). See discussion about an MEL, at footnote 12, *supra*.

Following Mr. Biolo's email, Mr. Husby and he had a discussion about scheduling. Once two out of three primary people that Complainant flew with could no longer fly with him, they made the decision to ask him to move along and told Complainant to take some time to do that. This conversation occurred in April 2016. RX 5 is a list of potential opportunities that Mr. Haupt provided Complainant when Mr. Haupt and Complainant had the discussion about Complainant moving on. One of Complainant's primary concerns was that he not have a gap in his pilot record because of the PRIA request,<sup>36</sup> so what they did to accommodate Complainant was avoid closing his pilot records until he got a new job. Second, to achieve this Complainant had to stay on the payroll. For the payroll software, it needed to show that either the pilot was active, inactive or was terminated. Much of Mr. Haupt's efforts went into making sure that Complainant showed continuous employment for that period. The fact that Complainant had made complainants about the performance of other pilots definitely did not cause him to decide to terminate Complainant's employment; it was not a contributing factor at all. Tr. at 123-26.

In Mr. Haupt's 20 years with Heartland, this was the first time that he had a situation where pilots were refusing to fly with another pilot. With Mr. Biolo and Mr. Clere unwilling to fly with Complainant, the only pilots that could be paired with Complainant for Part 135 flights were himself and Mr. Batterton. But Mr. Haupt has a lot of office duties so he is not one of the pilots that flies regularly, which really left just Mr. Batterton. For Part 91 flights he could be paired with Mr. Jeff Husby, or Mr. Larry Husby who only flies about once a quarter. The other pilots were assigned to a different type of aircraft, the Citation 550 group, which was distinct from the Citation 650 group, so they were not capable of flying the 650. Mr. Haupt was the only pilot currently qualified to fly both types of aircraft. Tr. at 126-27.

Mr. Haupt received the OSHA complaint document in early October 2016. At that point the only action he took was to close Complainant's pilot records and match the termination date in his pilot records with the date listed in ADP, the payroll. CX 6 references talking about ADP, the date that was going to be listed in ADP as the termination date for Complainant. Early on they had agreed in communication with Ms. Kay to leave his pilot records open and to show his inactive status in ADP. Then Ms. Kay decided to leave the company and at that time she asked Mr. Haupt what they were going to do with Complainant. Ms. Kay and Mr. Haupt decided that, with a new Vice President of Human Resources coming in, that it would be cleaner if Complainant's status was moved to terminated in ADP. RX 6 is a response to an email Complainant had sent to Mr. Haupt dealing with the details associated with Complainant moving on. This document references job openings and Mr. Haupt did stop sending him job openings at that point. The last time Complainant flew for Heartland was prior to April 18, 2016. Tr. at 128-32.

JX 2 is a letter of recommendation Mr. Haupt prepared for Complainant. It is an honest assessment, but does not address his capabilities as a pilot. Mr. Haupt tried to walk a line between what was reality and what he could positively say about Complainant. Mr. Haupt's

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<sup>36</sup> PRIA stands for the Pilot Records Improvement Act of 1996 which is codified at 49 U.S.C. § 44703(h),(i) and (j). PRIA requires that air carriers adequately investigate a pilot's background before allowing that pilot to conduct commercial air carrier flights. See AC 120-68G, Pilot Records Improvement Act of 1996 (Jun. 21, 2016), *available at* [https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC\\_120-68G.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_120-68G.pdf).

assessment of Complainant's piloting skills is he certainly meets the standards as an SIC. It was just always a lot of work working with Complainant for he did not mesh well in CRM. As a PIC, their assessment was that he was never going to be someone that could manipulate the controls with passengers on board, take care of all of the other items, and perform all of the decision-making that goes along with executing a trip. Tr. at 133-36.

On re-direct, Mr. Haupt acknowledged that JX 1 shows that he found out that Mr. Biolo would not fly with Complainant on March 31, 2016. It was his impression from Mr. Biolo that over time Mr. Biolo concluded that he could not safely fly with Complainant any more. When pressed, Mr. Haupt agreed that JX 1 does not mention that Mr. Biolo did not believe it was safe to fly with Complainant. Complainant did continue to fly for several weeks after JX 1 was sent by Mr. Biolo to Mr. Haupt, Complainant, and others. He agreed that he would not put an unsafe pilot in the air. Mr. Haupt learned from Complainant about the GoJet complainant in the first couple of months of Complainant's employment, after Mr. Haupt was having difficulty get records from GoJet and Mr. Haupt asked why Complainant if he knew why he was having difficulty getting those records. Tr. at 136-41.

On re-cross Mr. Haupt was directed to CX 4, page 5. At the time he authored that document, he did not view Complainant as a fully autonomous pilot. Mr. Haupt viewed the trust between pilots to be an important element of CRM and as JX 1 says, Mr. Haupt did not and could not trust him as a colleague. Tr. at 143-44.

In response to the Tribunal's question, Mr. Haupt explained why he viewed Complainant as a poor hands-on pilot. For one thing, he had difficulty with the tiller, which is what the pilots uses on this particular aircraft to steer the aircraft while it is on the ground. In other instances he would be unable to see the runway during the approach to line the aircraft up to land. As for the flap incident, maintenance determined that it was indeed a failed flap sensor which they replaced. They did not let Complainant hand-fly the aircraft even en route, the autopilot typical flies that segment. Complainant did not have problems programming the aircraft's flight management system. Tr. at 146-48.

#### Mark W. Biolo (pp. 150-200)

Mr. Biolo has been an employee of HGA for three years and operates Heartland aircraft. Prior to working for Heartland and HGA, he worked one year for Ameriflight. Before that he was an oral and maxillofacial surgeon for 30 years. During his time as an oral surgeon he flew as a hobby and it was not in jets. Tr. at 151, 153. He holds an Airline Transport Pilot multi-engine land certificate, a commercial single engine land certificate and has about 3,000 hours total flight time, probably 2,000 being in jets. Tr. at 194.

Mr. Biolo knows the Complainant and knows that Complainant worked for American Airlines for ten years when much of that time was as a flight engineer. Mr. Biolo is the assistant chief pilot for Hawthorne. He is primarily a line pilot. His duties as assistant chief pilot are administrative; he looks after things such as pilot training and duty records and aircraft documentation. Tr. at 152.

JX 1 is a document he authored on his own. He showed the document to Mr. Husby, the general manager, before sending it because he was concerned that it would stir up a hornet's nest and he wanted to make sure that he was not putting the company in a bad light. In this document, Mr. Biolo informs Complainant that he will not fly with him anymore. The "constructive criticism" from a third party he referenced in paragraph 3, concerned Complainant going behind the pilot's back, not saying a word at the time, to raise an issue rather than addressing his concerns in the cockpit directly with the pilot. The third party Mr. Biolo was referencing was the chief pilot, or it could be anybody really because Complainant talked about people behind their back. This contributed to his mistrust of Complainant. Tr. at 153-58.

Mr. Biolo learned that Complainant had gone to the chief pilot when the chief pilot told him. He believes that Complainant reported to the chief pilot concerns alleging he made a wrong turn on a taxiway, and "for sure" flying with the flaps overspeed light on. Mr. Biolo could not recall if the chief pilot had informed him of several incidents reflected on CX 10. But he did recall an incident referenced on CX 10 that occurred March 27, 2016 that involved an aircraft that was originally to go to Titusville, Florida that had inoperative radar. Complainant requested a switch of aircraft and Mr. Biolo concurred with that request. He also recalled the flight where there was a problem with a flap indicator light. During the flight, Complainant did not complain to him in flight or on the ground about the aircraft's speed. At the time Mr. Biolo sent his March 31, 2016 email he understood that Complainant had complained to Mr. Haupt about Mr. Biolo's aviator skills on March 27, 2016. Tr. at 159-64.

Mr. Biolo complained at one point to Chief Pilot Haupt that he felt as if when he flew with Complainant that he was going for a checkride. During a checkride, an examiner evaluates the pilot's performance, submits a critique and gives them a grade. When he flies with other pilots Mr. Biolo does not critique their performance but observes whether or not they are exhibiting inappropriate aviator skills. Mr. Biolo saw CX 3 in April 2016 when Mr. Haupt shared it with him. Tr. at 164-65.

On cross-examination, Mr. Biolo stated the aircraft requires two crewmembers and there is a reason for that; they have divided duties and they tend to help each other out. With Complainant, it was like he was waiting for you to fail and then he could have that in his pocket and put that arrow in his quiver. If you are the pilot and the other pilot says something in flight that you did wrong or you need to correct, the usual response is correcting it or having a discussion if the pilots disagree. They ultimately come to what they concur is the best course for that aircraft. Mr. Biolo does not get upset when somebody questions something they are doing in the cockpit; he expects it as that is what they call crew resource management. Tr. at 166-67.

CX 10, page 3 references an incident where he was descending the aircraft below 10,000 feet and they noticed a flap overspeed indicator. They were fairly low, being vectored on the approach for the airport for they were almost straight in for the runway. Around 6,000 feet, the first thing he saw was a flaps overspeed light which is directly in front of the pilot. He verified that the flap selector was in the up position; it was. There is a flaps inoperative switch light there as well which can be used to reset the flap controller, so he pushed that switch light; it did not

reset. He called for the flaps inoperative checklist, which is very short;<sup>37</sup> probably a half dozen things on that checklist. He told Complainant to advise approach control<sup>38</sup> they need “the lane vectors” to run the checklist.<sup>39</sup> Mr. Biolo also sent a text<sup>40</sup> to maintenance and maintenance wanted them to do some things to see if they could get the flaps to move. The flight did not have passengers aboard so Complainant offered to go back and make sure that the flaps were retracted. Complainant went back and came back to the cockpit, telling Mr. Biolo that all flap panels were fully retracted. At that point they had a flaps inoperative aircraft. This is really a non-event except the speeds on landing are a lot higher, so you need a longer runway. Mr. Biolo then wanted to divert to Orlando International for that reason and there is a service center there. Approach Control diverted them to Orlando International, and they were given a clearance. ATC asked if they wanted to declare an emergency, but Mr. Biolo declined. Approach Control asked if they could maintain 210 knots, he said yes and they proceeded to Orlando International at that speed. ATC expects you to maintain an assigned speed within plus or minus 10 knots. The flap configuration speed and extended speed for that aircraft is 210 knots; that’s where the light will come on. In the course of turning and descending and climbing, they exceeded 210 knots a few times so the flap inoperative light was off and on intermittently, but he was not concerned because Complainant had visually verified the flap position. Complainant was having difficulty finding the reference speed for landing with no flaps which is  $V_{ZF}$ . Complainant had just come back from recurrent training and this is a speed one looks at all the time in school.<sup>41</sup> Eventually Complainant came up with the speed so he briefed the approach. Their landing speed was going to be high and he did not want to blow a tire. Complainant did call out the speeds during the landing and the landing was uneventful. Not once during that time that the flaps overspeed light was on did Complainant say anything at all about flaps overspeed. Complainant’s recitation of events contained in CX 3 is not even close to what happened— he wondered if they were in the same airplane. It indicates that Complainant took control of the situation and Mr. Biolo just sat there and did nothing, when in fact it was the opposite. Tr. at 168-72.

Mr. Biolo learned that Complainant had raised this flight with the chief pilot the morning after they had returned to Eau Claire. It was the last time that Mr. Biolo flew with Complainant. Tr. at 173.

Concerning the inoperative radar incident, he was in the pilot preparation area with Complainant. He asked Complainant how his trip to Miami went and he said horrible as they were in severe turbulence. Complainant pulled out his cell phone but it had nothing but white on

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<sup>37</sup> Mr. Biolo was likely referring to the Quick Reference Handbook (QRH), which contains a flight control section and there is a checklist for flaps inoperative. Tr. at 171.

<sup>38</sup> Approach control is another type of ATC facility, more properly called terminal radar approach control or TRACON. In general, these facilities handle air traffic in a 30 to 50 nautical mile radius from a busy airport. *See generally,* [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/air\\_traffic\\_services/tracon/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/air_traffic_services/tracon/).

<sup>39</sup> The Tribunal does not recall the use of this term, has not previously heard this term in the context of aviation, nor does it understand its meaning. The Tribunal suspects that this is a transcription error and should read “to delay vectors” so the flight crew can resolve a problem in the cockpit.

<sup>40</sup> Mr. Biolo testified that the aircraft had Wi-fi aboard.

<sup>41</sup> Mr. Biolo also said that both the Aircraft Flight Manual (AFM) and the QRH contains the landing speeds for no flaps. Tr. at 171. Both manuals were aboard the aircraft during the flight. *Id.* at 172.

it. He said there was a spot where they could have descended through, but Mr. Husby chose to descend through the stuff and there was severe turbulence. Mr. Biolo asked if they were out of control and Complainant said no but they were up and down plus or minus a couple of hundred feet and the autopilot disconnected. Mr. Biolo asked if the aircraft was ever out of control, because that is the definition of severe turbulence.<sup>42</sup> Complainant said no, but the passengers really got knocked around back there. They then talked about the same airplane the next day, and Mr. Biolo asked twice if there were any issues with the plane. Complainant said no. The next morning he was at his desk at home looking at weather and Mr. Haupt called saying he had just talked to Complainant and Complainant was concerned about the weather in the Florida Panhandle. The weather looked to Mr. Biolo as typical air mass cells that build up in Florida every afternoon and they should be able to work around them. Then Mr. Haupt said that the aircraft's radar was inoperative. Mr. Biolo found that interesting because the day prior he had discussed that very aircraft with Complainant and he specifically asked Complainant twice if there were any issues with it and he said no. The flight was a Part 91 flight so the radar was not needed legally, but because there were thunderstorms forecasted, Mr. Haupt and he discussed it and elected to just swap airplanes. Tr. at 174-76.

Mr. Biolo went to the hangar starting the paperwork for the flight and was looking at the aircraft logbook in the pilot prep area. Complainant came in and said in a loud voice that he never said there was anything wrong with that plane. Mr. Biolo responded that not 24 hours ago he had asked Complainant twice about it. Complainant then started talking about how he had just gotten back from recurrent training on four days' notice and how everybody there thought he was awesome and that he has been revered every place that he had been. Mr. Biolo responded with "what does that have to do with anything that we are doing today"; he thought Complainant's shift in topic was odd. Fortunately, Mr. Husby came in because Mr. Biolo did not know where their conversation was going to go. Mr. Biolo went upstairs with Mr. Husby and vented. After this incident, Mr. Biolo and Complainant flew together to Florida and the flaps inoperative incident happened. For that incident, he reiterated that Complainant never mentioned anything about his concerns about that flight either during the flight or once they were on the ground. Tr. at 177-79.

Mr. Biolo reached the conclusion that he would no longer fly with Complainant after they got back from the Orlando trip. Just before he was to leave the building after the flight, Complainant said that "in the interest of transparency, I understand that you feel every flight with me is a checkride." Mr. Biolo acknowledged this and then Complainant started talking about every pilot in the group and their transgressions. Tr. at 179-85.

The day after they had returned from Florida, Mr. Biolo relayed the conversation where Complainant referenced transparency to the Chief Pilot, Mr. Haupt. Mr. Haupt relayed that the night prior Complainant had called him and told him that Mr. Biolo was flying around with the flaps overspeed light on. At that point, Mr. Biolo told Mr. Haupt that, if Complainant felt that he endangered the aircraft, Complainant should have spoken up during the flight. Mr. Biolo went to

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<sup>42</sup> Severe turbulence is defined as "turbulence that causes large, abrupt changes in altitude and/or attitude. It usually causes large variations in indicated airspeed. Aircraft may be momentarily out of control." AIM, chap 7, Table 7-1-10. See AC 120-88A, Preventing Injuries Caused by Turbulence, App. 1 (Jan. 19, 2006).

his office and stewed about what he had been told for a while. He then went to Mr. Husby's office and Mr. Haupt was there and told them "I never wanted to be the guy who said he couldn't work with somebody, but I can't." At that point Mr. Biolo decided that he no longer felt safe with Complainant; he could not depend on him to be resource or member of the team. Complainant is the only person, let alone pilot, that Mr. Biolo has refused to fly with. Tr. at 185-87.

On re-direct, Mr. Biolo acknowledged that he had received the email dated March 7, 2016, located at RX 1. That was the first time that the Heartland ASAP program was operational. It was his understanding that, at that time, pilots did not have the ability to enter events directly into the ASAP program, but they had to contact Mr. Haupt to discuss how to get the information into the program. Complainant informing Mr. Haupt about the flap overspeed incident was the culminating event to Mr. Biolo's decision to no longer fly with Complainant. Mr. Biolo did think that Complainant's concern over flying an aircraft without operating radar was reasonable. As for the flap overspeed incident, they did discuss the landing speed in the cockpit for landing with zero flaps. Mr. Biolo served as second in command of Heartland aircraft for about a year before becoming a pilot in command for their aircraft. Tr. at 188-93.

In response to the Tribunal's question, Mr. Biolo said during the flap overspeed incident he could have flown at 200 knots versus 210 knots because that was way above the aircraft's stall speed. The  $V_{ref}$  (landing reference speed) for the aircraft with no flaps is about 155-165 knots indicated air speed. Part of one's normal training in the flight simulator is to conduct landings with no flaps. Hawthorne follows the flight and duty time limitations for crews. The 14-hour crew rest limitations of the flap overspeed incident flight did not apply because the flight was conducted under Part 91; they never had passengers on the airplane. During the entire flap overspeed incident Mr. Biolo was the pilot in command and the flying pilot. Tr. at 195-98.

Jeffrey L Husby (pp. 201-38)

Mr. Husby is one of the former owners of Heartland Aviation, Inc., the other owner being his father Larry. It was sold to HGA for stock and Heartland is a wholly owned subsidiary of HGA. HGA does not own "several" air carriers, but does operate Fixed Base Operations<sup>43</sup> out of Eau Claire, New York, Chicago, Atlanta, Tuscaloosa and just recently added one in Sioux City. The operation out of New York also has ExcelAire, which is a maintenance facility and has a charter department. He is the general manager for Heartland, and is paid by HGA. He has also been a professional pilot for almost 30 years. Tr. at 201-03, 207-08.

Mr. Jeff Husby knows Complainant and was one of the persons who interviewed Complainant and made the decision to hire him. He has only flown with Complainant about

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<sup>43</sup> Mr. Husby described an FBO as "basically a place for general aviation and corporate planes to come at the airfield where terminal buildings are the airline traffic." Tr. at 208. The FAA defines an FBO as "[a] commercial business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc." AC 150/5190-7, Minimum Standards for Commercial Aeronautical Activities (Aug. 28, 2006), at App 1, para. 1.1(i).

three times. At the time they hired Complainant, Heartland had five aircraft, three of which it owned. Tr. at 203-06.

In the spring of 2016, Mr. Husby was one of the persons involved in making the decision that Complainant should move on. That decision was made after discussions between himself, Chief Pilot Haupt and Ms. Kay from the human resource department. At the time that they made the decision for Complainant to move on, Mr. Jeff Husby was aware that Complainant had had a satisfactory job evaluation the preceding December. He likely first read JX 1 on March 31 or April 1, 2016. Based on his prior practice, he believed that the first person he discussed this matter with was Mr. Haupt. Complainant does not have to clear it with anyone if he wanted to complain to the chief pilot about Mr. Biolo or any other pilot. Mr. Husby had heard that Mr. Biolo had complained to the chief pilot about Complainant going to the chief pilot, but he was not aware at the time they made the decision for Complainant to move on that Complainant had voiced concerns about Mr. Biolo. Tr. at 206-13.

CX 10 pertains to a flight that occurred on March 19, 2016. During the flight Mr. Husby and Complainant talked about embedded thunderstorms while in the cockpit. It is entirely possible that Jacksonville ATC offered a deviation right of course, direct Cypress<sup>44</sup> when able. Mr. Husby acknowledged that he declined the option to deviate that was offered by the Jacksonville ATC. He felt no need to take that offer because they were on top of all the bad weather. Mr. Husby does not recall Complainant disapproving of his decision not to take ATC's suggestion. He could not recall many details of the flight because it was another routine flight for him. They did experience light to moderate turbulence, not just chop. Prior to entering the area of turbulence, he turned about and told the passengers that it was going to get bumpy and to buckle up. Mr. Husby did not hear any yelling or screaming from the passengers during the turbulence. He took the autopilot off and hand flew the aircraft at 40,000 feet which is challenging to start with. They landed without incident. There was no discussion about the approach after the flight between himself and Complainant. Mr. Husby was aware that Complainant had reported to Mr. Haupt his actions during the flight and he and Mr. Haupt talked about it a week or more later. That conversation had to have occurred prior to Mr. Biolo's March 31, 2016 email. Tr. at 213-18 and 228-29.

Decisions concerning a pilot's wages are made by Mr. Haupt and himself. If the corporation allows it, a pilot will receive a salary increase from time to time. The highest paid pilot that works at Eau Claire makes \$85,000 per year. Since Complainant has left Eau Claire they have hired a new pilot and he makes \$60,000 per year. Tr. at 221-22.

On cross-examination, Mr. Husby said that, if a pilot has a serious safety concern during operation of the aircraft, he would expect a pilot to raise it in the cockpit. Mr. Biolo was the first pilot that communicated to him that he would not fly with Complainant. Mr. Clere also reported that he would not fly with Complainant, but that was prior to Mr. Biolo's March 31, 2016 email and before Complainant was sent to recurrent training. Mr. Husby and Mr. Haupt had had multiple conversations concerning Complainant's employment. They were concerned about the crew resource management part because their ultimate goal is safety in the cockpit. When you have issues where the person next to you is not helping you, that is when Mr. Haupt and he sit

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<sup>44</sup> Cypress is the name of a VOR in that vicinity used for navigation en route to the airport.

down and start weighing their options. Mr. Haupt and Mr. Husby discussed if they should spend the money for recurrent training on Complainant for him to be around for another year, or whether they should look to employ someone else. Mr. Husby was on the fence with that decision. But Mr. Husby and Mr. Haupt thought, if they kept working with Complainant, they could get him to be a perfect part of the group with the rest of them. But after Mr. Biolo's email, it was to the point where they had three out of their five pilots that refused to fly with him. Tr. at 223-27.

As for the three times he flew with Complainant, Complainant never raised any safety concerns in the cockpit; all the flights were routine. During his 30-year career he has seen where pilots refuse to fly with another one of their pilots; it is more of a personality conflict than anything. To maintain a certain safety standard, Mr. Husby and Mr. Haupt are really careful about who they pair people up with. Complainant's recurrent training cost the company \$10,000. Tr. at 231-32.

On re-direct, Mr. Husby acknowledged that sometimes pilots just do not mesh. The only two remarkable events in Complainant's employment after he returned from recurrent training was Mr. Biolo's March 31, 2016 email plus his complaint about his [Mr. Jeff Husby's] deviation from the ATC suggestion into the Opa-Locka airport. Tr. at 233-37.

The Tribunal asked about his comment that three of the company's five pilots would not fly with Complainant. Mr. Husby said Mr. Batterton was the third pilot, who did not refuse to fly with Complainant but stated that he would rather not. Tr. at 237.

Troy E. Batterton (pp. 239-56)

Mr. Batterton holds an Airline Transport Pilot multi-engine certificate and a commercial single engine certificate. He holds type ratings in the Citation CE-650, CE-500 and CE-560XL. His total flight time is 8,800 hours, with 7,000 hours being in jets. Tr. at 250-51.

He has been employed by Heartland twice as a pilot, the first time was from 1996 to 2006 and then from 2013 to present. He also trains new pilots that join the company to show them how the company does things and communicates to the Chief Pilot how the new pilot is doing. He conducted flights with Complainant. It was his assessment that Complainant's flying ability was at times below par and he was never going to make left seat, the Captain's position.<sup>45</sup> He communicated this observation to Mr. Haupt. Complainant was not permitted to manually fly the aircraft with passengers and this was a decision he agreed with. Tr. at 239-41.

CX 1 references an incident where he was requested to chip ice off an aircraft's engine. After getting the passenger on his way, Mr. Batterton called the DOM and Mr. Haupt, and Mr. Husby was on the call. Mr. Husby said, before Mr. Batterton started that engine, to get that ice off so it did not go thru the engine when he started it. Complainant was not on that telephone conversation, but Mr. Batterton did tell Complainant after the call that they were going to get the ice off. Mr. Batterton first learned that Complainant had an issue with this was when he read the OSHA complaint that Mr. Haupt had shown him. Despite this incident, he was still willing to

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<sup>45</sup> In fixed wing aircraft the pilot in command traditionally sits in the left seat of the cockpit.

continue to fly with Complainant. He did not communicate to either Mr. Husby or Mr. Haupt an unwillingness to do so, but did express a desire or preference not to. He had no involvement in the decision to terminate Complainant's employment, but he agreed with the decision. Tr. at 241-46.

On cross-examination, Mr. Batterton agreed that he would not fly with another pilot who he believed was an unsafe pilot. He has no reason to dispute that he flew 23 times with Complainant between March 25, 2015 and March 4, 2016. He would not necessarily dispute testimony from Complainant that Complainant's performance evaluation, which was completed at the end of 2015, noted his knowledge of Part 135 operations had dramatically increased since he started working for the company. Ice on a plane is a problem because it degrades the aircraft's performance, and aircraft's minimum equipment list requires that the anti-icing equipment be working in known or forecasted icing conditions. Tr. at 246-49.

The Tribunal asked why Complainant was never going to make the left seat. Mr. Batterton said Complainant was always kind of "behind the airplane," meaning that he was reactive in the cockpit, not proactive and anticipating the aircraft. Tr. at 251-56.

Loren M. Clere (pp. 262-307) (appeared telephonically)

Mr. Clere holds an Airline Transport Pilot certificate and commercial single engine certificate. He is also a Certified Flight Instructor-Instruments and Multi-engine instructor. He holds type ratings for the Citation 650, Airbus 320, Embraer 145, the ATR 42 and ATR 72. Tr. at 301.

He has been a pilot with Heartland for approximately five and a half years. He's been a professional pilot about 23 years, and has been flying jets since 1998 or 1999. Mr. Haupt is his immediate supervisor. He has known Mr. Haupt since 1992 and they are close friends. He knows the Complainant from their work together at Heartland. Tr. at 262-64.

After Complainant's counsel read CX 10, Mr. Clere acknowledged that there was discussion between him and Complainant in the cockpit regarding the approach into Indianapolis. Mr. Clere did not recall hearing anything about an illegal visual approach until he read or heard of the complaint filed, but he did hear about Complainant voicing concerns about the stability of the aircraft to Mr. Haupt and Mr. Husby. Mr. Haupt spoke to Mr. Clere about that about a week after that flight. Tr. at 264-66.

There was a point in time where he told Mr. Haupt that he preferred not to fly with Complainant. The first time was on May 25, 2015. After that he was given a break from flying with Complainant, but then was asked to be paired with Complainant again for a trip over the July 4 holiday. He said on May 25, 2015 that he would not fly with Complainant, but was told that Complainant had been talked to about certain problems and responsibilities and Mr. Clere was asked if he would fly with him again. Tr. at 266-67.

Mr. Clere estimates that he has flown with Complainant on 30 flights. When asked if Complainant was ever hands-on with the controls during those flights, Mr. Clere relayed that

Complainant expressed that he was not interested in flying the airplane, saying “I’m in no hurry.” But Complainant did handle the controls when he flew with Mr. Batterton. A few months later Mr. Haupt was flying a trip with Complainant and urged Complainant to take the controls to evaluate his skill level. After that, Mr. Haupt informed the pilots to not allow Complainant to manipulate the controls and that he would take it upon himself to build Complainant’s skill level to a safe level before anyone else was to allow Complainant to handle the aircraft. Tr. at 267-70.

On cross-examination, Mr. Clere said on the May 25, 2015 flight he tried to contact Complainant because the passengers wanted to leave early. On the way to the airport Complainant gave an excuse that someone was trying to call him and he did not want to talk to that person. There was an angry exchange between them during the drive to the point that Mr. Clere called Mr. Haupt at the airport, and put him on speakerphone so he could act as a mediator to come to a decision whether he and Complainant were safe to fly back; it was the first time he had talked to Mr. Haupt that way. Tr. at 270-73. Eventually, they calmed down and both felt it safe to go ahead and continue with the flight back to Eau Claire. Once they got back, he called Mr. Haupt and told him that he still did not feel comfortable and did not want to fly with Complainant. After that he did not have to fly with Complainant the rest of May or in June 2015. And then, due to scheduling necessity, he was asked to attempt to work with Complainant again beginning the first week of July 2015. Between July and December 2015, he flew about eight to ten times with Complainant. Tr. at 275-77.

During his first overnight trip with Complainant, which occurred toward the end of March 2015, Complainant told Mr. Clere that Complainant had filed a whistleblower complaint at GoJet. Tr. at 267-69. Mr. Clere did not refuse to fly with Complainant after he learned about Complainant’s prior complaint against GoJet, they continued to work together. Tr. at 274-75.

His assessment of Complainant’s piloting skills is his pilot monitoring duties were largely acceptable, though occasionally they were not. He could be unresponsive to his duties like entering navigational waypoints or providing proper responses to ATC instructions, and this caused some problems. Tr. at 277-80.

Mr. Clere disputes Complainant’s assertion that he froze during the December 3, 2015 flight. A go-around was performed and Mr. Clere was flying the aircraft. He was waiting for Complainant to make the proper callouts, which he did not do. He has no idea what Complainant is talking about concerning this allegation. As they arrived at Indianapolis, they picked up weather which indicated that it was good enough for a visual approach, but Mr. Clere clearly briefed Complainant that he would prefer the RNAV 18 instrument approach. As they got closer, he was surprised that Complainant requested a visual to runway 18. He told Complainant to request direct to Sicle intersection for the RNAV 18 approach. He had to show Complainant where the intersection was on the approach plate. They flew to Sicle but the request for the RNAV did not get transmitted. At that point they were going to be flying the full procedure and not going straight to the airfield. As they crossed Sicle they were at 3,000 feet. Between the initial and final approach fixes they descended below the clouds. He again asked Complainant to request the RNAV because he wanted to make sure that they would have clearance to descend lower once reaching the final approach fix. The controller got busy talking

to other aircraft and next thing you know they passed the final approach fix and could see the field. He told Complainant that he had the airport in site. Complainant hesitated and did not call it so they could descend lower. Complainant paused again, but then keyed his mic and reported the field in sight and canceled the IFR clearance. As he descended, he realized that he was aligned with the taxiway, the runway being to the left, which was his mistake. He vocalized this to Complainant; Complainant did not respond. When it became apparent that the aircraft would not be touching down on the touchdown zone,<sup>46</sup> Mr. Clere initiated a go-around, flew a visual pattern and landed without incident. After that December flight, Mr. Clere stopped flying with Complainant. He communicated his decision to Mr. Haupt on December 5, 2015. In his 23 years as a pilot he has never before refused to fly with anyone. Tr. at 281-96.

On re-direct, Mr. Clere disagreed that between July 4, 2015 and December 2015 those flights went off without any sort of incident or significant dispute between himself and Complainant. He denied being above the cloud cover when he said that he saw the Indianapolis airport on December 3, 2015. He did not think that it was unreasonable for Complainant to mention that incident to Mr. Haupt. Tr. at 296-300.

In response to the Tribunal's questioning, Mr. Clere clarified that Complainant was never allowed to manipulate the controls with passengers on board. In July 2015 he was allowed to manipulate the controls on empty legs, maybe three or four times. Tr. at 302-03.

### C. Facts in Dispute

#### 1. Complainant's Statement of Facts<sup>47</sup>

In its brief, Complainant asserts that Heartland is an air carrier subject to the regulations in 14 C.F.R. Parts 91 and 135. It operates five jets and owns three of them. HGA is the parent company of Heartland and it owns one other air carrier, ExcelAire. Tr. at 25, 202. HGA employs and pays the Heartland's pilots and handles the human resource matters for Heartland. Tr. at 207. Mr. Haupt is Heartland's Chief Pilot and makes the decisions with respect to pay rates of its pilots. Mr. Biolo is Heartland's Assistant Chief Pilot, but is primarily a line pilot. Mr. Jeff Husby is a former owner of Heartland and currently it's General Manager. He flew with Complainant three times and had "no issues in the cockpit with him." Tr. at 203, 231. Mr. Batterton is a line pilot that has worked for Heartland twice, and flew with Complainant on 23 occasions between Mar 25, 2015 and March 4, 2016. Mr. Batterton trained Complainant but made no written evaluations of Complainant's performance. He also preferred not to fly with Complainant, but never refused to do so. Mr. Clere is another Heartland pilot and has been friends with Mr. Haupt since 1992. Mr. Clere preferred not to fly with Complainant, but never refused to do so.

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<sup>46</sup> The touch down zone is defined as a point 500 to 3,000 feet beyond the runway threshold not to exceed the first one-third of the runway. AC 91-79A, Mitigating the Risks of a Runway Overrun Upon Landing (Sept. 17, 2014) at App. 1. The runway is marked to show the touch down zone and further marked in 500 foot increments.

<sup>47</sup> See Compl. Br. at 1-20.

Heartland offered Complainant employment in January 2015. Subsequently, Complainant attended two weeks of training in Dallas on the Cessna Citation 650 and earned his type rating in the aircraft. After training he went through company specific training at Heartland's facility in Eau Claire, Wisconsin. Complainant showed a commitment to learning the aircraft's systems and created a study aid for the aircraft he was learning to fly. Both Mr. Husby and Mr. Haupt praised him for his system synopsis and study aid. Tr. at 326. Complainant was excited about his new job because he would be in close proximity to the university his daughter was attending. Heartland hired Complainant to be a PIC and uses the co-captain concept where both pilots in the aircraft collaborate to achieve a safer flight. Tr. at 321. Complainant first flight as a Heartland crewmember occurred near the end of February 2015; Mr. Batterton was the other crewmember.

Complainant always conducted preflight inspections consisting of a physical examination of the aircraft, and review of the aircraft's airworthiness records. Other Heartland pilots told Complainant that he "didn't need to bother with" preflight procedures because the maintenance department conducted daily inspections of the aircraft. Tr. at 322. He observed other pilots fail to conduct preflight inspections and procedures, including on one occasion Mr. Biolo failed to review NOTAMs which caused him to be unaware that a runway's ILS was out of order. This resulted in Mr. Biolo overbanking the aircraft manually to align with the runway. Tr. at 323-24.

Complainant filed a series of complaints. On November 8, 2015, Complainant and Mr. Biolo flew from Moline, Illinois to Eau Claire, Wisconsin. During the flight, Mr. Biolo told Complainant that he was going to navigate to a waypoint northeast of the Eau Claire airport. Complainant asked Mr. Biolo to wait to do so until he obtained an ATC clearance to do so. Mr. Biolo chose to proceed regardless of their clearance and proceeded towards the waypoint without ATC authorization. However, following an ATC query, Mr. Biolo headed to the originally cleared waypoint. Mr. Haupt approached Complainant following this trip and asked Complainant how the trip went. Complainant recounted the flight and explained his assessment of Mr. Biolo's performance. Complainant filed a complaint with Mr. Haupt about Mr. Biolo's violation of the ATC clearance.

On November 22, 2015, Mr. Biolo and Complainant operated another flight together. After boarding passengers, Complainant noticed that Mr. Biolo turned the aircraft to the left. Complainant informed Mr. Biolo that they needed to go right but Mr. Biolo continued left towards "essentially a dead-end area" away from the departure runway. Complainant believed that this was a reckless mistake and poor CRM. Complainant filed a complaint with Mr. Haupt about this incident but received no response to the complaint.

On December 3, 2015, Complainant was assigned to fly a trip with Mr. Clere. Mr. Clere would be PIC. Mr. Clere was late for this flight. Consequently, Complainant completed the preflight inspection and the aircraft was fully prepared for the flight by the time Mr. Clere arrived. At some point thereafter, Mr. Clere expressed that he wanted to avoid being fully vectored for the GPS 18 approach, and he was hoping they could just get a visual approach. Tr. at 336. Before the airport was in sight, Mr. Clere asked Complainant to request a visual approach from ATC. Complainant responded that he could not yet do so legally because he did not have a visual of the airport. Mr. Clere responded that the navigation display showed where

the airport was electronically. Complainant again stated that they did not have the necessary actual visual from the cockpit so he did not make the request to ATC. As they approached the edge of the cloud layer below, Mr. Clere announced that he had the airport and runway in sight. Complainant could not see the airport and runway at that time from his position in the cockpit, but he could see two hangars so he took Mr. Clere's statement to be plausible and requested a visual approach. During the approach, Complainant started conducting checklists and communicating with the tower. When he looked up he realized that the aircraft was still too high and that Mr. Clere had not lined up with the runway. Complainant pointed this out to Mr. Clere a number of times. Complainant was disappointed by Mr. Clere's descent for it may have caused the passengers alarm because the ground proximity warning was emitting an audible alert "Terrain, Terrain" which they likely heard. Tr. at 339. During the landing attempt, Mr. Clere overshot the center line such that the left wing was over the grassy area and in his compensation by banking to the right caused Complainant concern about the possibility that the right wing might drag on the runway. Complainant quite emphatically requested a go around and Complainant literally had to talk Mr. Clere through a go-around. Tr. at 337-38. While taxiing after the go-around and subsequent successful landing, Complainant could see a ramp person running toward their aircraft apparently out of concern. Mr. Clere told Complainant "I've got this, don't say anything", then immediately exited the cockpit and told the passengers and then the lineman an alternative narrative of events. Tr. at 338. Complainant did not bring this incident up with Mr. Clere later because it was painfully obvious and did not see any good coming from bringing it up. Tr. at 339-40. Later, Complainant called various supervisors to express his concerns about this incident, including Mr. Haupt and Mr. Husby.

On December 16, 2015, Complainant was SIC on a flight with Mr. Batterton where they knowingly had flown through icing conditions. Upon landing, Complainant observed ice buildup on the alternator-generator inlet. Complainant asked Mr. Batterton if he should write it up but was told Mr. Batterton would take care of it. Complainant knew that the ice would melt in the heated hangar and the problem would go unfixed so he mentioned the issue to maintenance. After Complainant complained to Mr. Batterton about the icing problem on the aircraft, it underwent serve and was not flown again until the anti-ice system was fixed. Complainant asked the DOM why the repair had been delayed so long, and the DOM just chuckled and walked out of the room.

On January 3, 2016, Complainant was SIC on a flight with Mr. Biolo from Eau Clair to Green Bay, Wisconsin. ATC asked Mr. Biolo to maintain 250 knots, but he flew at 225 knots. On the return flight, Mr. Biolo accelerated to as much as 278 knots below 10,000 feet. Complainant indicated their airspeed to Mr. Biolo.

On January 25, 2016, Complainant was SIC on a flight with Mr. Batterton. Following the flight, Complainant noticed a buildup of rime ice on the portside engine cowl. Complainant believed that the anti-ice system was not functioning properly and took a photograph of it. CX 1. Mr. Batterton called Mr. Husby about the issue and Mr. Husby directed Mr. Batterton to chip off the ice so they could fly the aircraft back to Eau Claire for repairs. Complainant said that was forbidden because they would be flying into known icing conditions with a known anti-ice failure and refused to participate.

On February 25, 106, Complainant was SIC on a flight where Mr. Biolo missed the intersection they were assigned by ground control to take while taxiing, necessitating that Mr. Biolo make a U-turn. Up to that point, Complainant would not have been able to file an ASAP because Heartland's ASAP system was not operational at Heartland until the spring of 2016.

On March 19, 2016, Complainant was the PIC and Mr. Husby was the SIC, but the flying pilot, on a flight to Florida. Near Sarasota, Florida, Complainant identified to Mr. Husby to cloud structures indicating an embedded thunderstorm and suggest they deviate around them. ATC offered an option to the West, but Mr. Husby declined both suggestions. The aircraft was then cleared to descend lower. Complainant negotiated with ATC to climb instead but Mr. Husby refused and headed into the clouds. Complainant has been in "severe" turbulence three times, this being the third. The turbulence was sufficiently severe to automatically disable the autopilot and to cause the aircraft to rise and fall at least 500 feet multiple times, causing the passengers to yell out in alarm. The changes in altitude are verified by telemetry presented by FlightAware. CX 2. Complainant reported this incident to Mr. Haupt three times over the subsequent months.

On March 26, 2016, Complainant and Mr. Husby were on a flight returning from Florida. Complainant had recently completed recurrent training in Dallas. While en route to pick up the family, Complainant observed that the aircraft's weather radar was inoperative, and mentioned this to Mr. Husby who dismissed Complainant's concern. Complainant also verbalized his concerns to a Heartland mechanic once they returned to Eau Claire. He also warned Mr. Biolo that the aircraft would need to be inspected with "a fine-toothed comb" because he had concerns of the aircraft's structural integrity following the severe turbulence. He did not mention the inoperative radar because Mr. Husby had assured him that it was not a concern.

On March 27, 2016, Complainant received weather reports indicating thunderstorm activity along their planned return flight. He was to fly with Mr. Biolo that day. Complainant call Mr. Haupt and filed a complaint informing him the aircraft's broken weather radar and the weather activity along the path of their itinerary. Mr. Haupt agreed with Complainant that the defective radar was a concern. Complainant refused to operate that aircraft in a March 27, 2016 conversation with Mr. Haupt and Mr. Haupt arranged to use another aircraft. While Complainant was conducting his preflight inspection of the substitute aircraft, Mr. Biolo approached Complainant very upset that Complainant had not disclosed the inoperative radar. Complainant explained that he told Mr. Biolo the day prior of his concern about the aircrafts integrity. Mr. Biolo raised his voice claiming that Complainant was "bashing" a senior officer by complaining about the turbulence.

While flying, on March 27, 2017, with Mr. Biolo, the flap-overspeed and flap-inop warning lights both illuminated as they approached their destination. The flap indicator also showed varying indications of partial flap deployment. Mr. Biolo was the PIC. Mr. Biolo did not respond to the failure so Complainant took command by requesting delaying vectors from the controller, initiating three checklists, and leaving his seat to get a visual of the flap failure. Instead of doing anything to rectify the problem, Mr. Biolo continued to fly well beyond the maximum flap extension speed of 210 knots multiple times. This speed was in excess of the manufacturer's design limitations and would have been common knowledge to anyone with

experience in a Cessna Citation 650. After the flight, Complainant filed a complaint with Mr. Haupt.

On March 31, 2016, Mr. Biolo sent Complainant an email with a number of complaints, a draft of which Mr. Biolo first sent to Mr. Haupt, where Mr. Biolo informed Complainant that he would no longer fly with him. He wrote that "I don't appreciate constructive criticism coming from a third party." This was in reference to Complainant's report to Mr. Haupt about some of Mr. Biolo's mistakes. JX 1. Mr. Biolo stated that Complainant's reports to maintenance concerns "made the company sound like a bunch of orges." Mr. Haupt could have overruled Mr. Biolo but chose not to do so. Mr. Biolo refused to fly with Complainant because of the complaints Complainant made about safety-related issues.

Complainant prepared a response to this letter and sent it only to Ms. Kay who told him not to send the email to anyone else in Heartland in Eau Claire. So he did not send his response to anyone else.

On about April 2, 2016, Mr. Husby saw a copy of Mr. Biolo's email on his desk, which included his complaints about Mr. Biolo and Mr. Clere's attempted illegal visual approach on December 3, 2015.

On April 18, 2016, Complainant met with Mr. Haupt. During this meeting, they discussed Mr. Biolo's March 31, 2016 email (JX 1). Mr. Haupt asked Complainant if he was happy working for Heartland, and suggested that Complainant might be happier working in a more professional operation. Not from this meeting communicated to Complainant that he was no longer going to be employed by Heartland and Hawthorne. However, Complainant took Mr. Haupt's suggestions under advisement and began to explore a few other positions. The only job offer Complainant received during this exploration was work for a private entity in Turkey. Complainant did not accept any job offer from that company.

Around May 9, 2016, Complainant had another conversation with Mr. Haupt in Eau Claire. At that meeting, Mr. Haupt explained that Mr. Husby had made a request for Complainant to submit his resignation by May 15, 2016 to be effective May 31, 2016. Mr. Haupt expressed his view that he did not agree with the decision. Initially Complainant did not take the request seriously. After the meeting, Complainant contacted Ms. Kay and she responded in an email proposing a change in Complainant's status to inactive effective June 1, 2016, and that he would remain on inactive status until he could find gainful employment. CX 5.

Later, in the course of applying for a job, Complainant learned that his known crew member badge had been deactivated. Complainant contacted Mr. Haupt about this, who stated that the deactivation was done in error, and that Mr. Husby had instructed Mr. Biolo to deactivate his account. CX 6.

While in an inactive status, Complainant intended to stay with Heartland and get his status changed back to a fully operational pilot. He liked working for Mr. Haupt, the area, and the position allowed him to be close to his daughter. Further, he did not want to be terminated simply for expressing safety-related complaints, and according to Ms. Kay there were other

potential positions within the Hawthorne system if he could not reconcile with Heartland personnel.

On May 9, 2016, Complainant contacted the local OSHA office in Eau Claire, Wisconsin, and spoke with an investigator. During that meeting, Complainant provided at least three time/date-stamped photographs with textual descriptions of safety infractions to the investigator. Complainant relayed that Mr. Biolo had refused to fly with him because of Complainant's internal complaints, and the fact that Complainant wanted to avoid the risk that his complaints would jeopardize his continued employment with heartland. The investigator created a written record of his verbal complaint. Complainant communicated with the investigator again on May 11, 2016.

Complainant last flew for Respondents on April 7, 2016. He was paid a regular paycheck through June 1, 2016. His annual salary was \$60,000. CX 8. HGA usually awards pay increases of two to five percent to pilot who perform their jobs well, and received favorable annual job reviews.

On August 2, 2016, Mr. Haupt sent Complainant a text message if Ms. Kay could terminate his employment, expressing that she cannot leave their agreement open-ended. On August 3, 2016, Mr. Haupt asked for Complainant's resignation and "that the 31<sup>st</sup> is fine." CX 6. At the beginning of September 2016, Complainant's inactive status was retroactively changed to reflect August 31, 2016 as his termination of employment date. However, his employer continued to provide him cell phone expense reimbursement into September 2016.

When Complainant discovered that his status had been changed to discharged, he contacted OSHA to update his complaint. He submitted a written statement to OSHA stating that he had been discharged and provided further details about his protected activity, and Complainant faxed a supplemental complaint to OSHA on September 26, 2016. CX 10.

Mr. Haupt, Mr. Husby and Ms. Kay made the decision to discharge Complainant, but Mr. Husby was the primary decision maker. Mr. Haupt never issued any form of discipline towards Complainant. In fact, Complainant's performance review was complete in December 2015 and indicated that Complainant had a satisfactory rating in meeting the Respondents "core goals," and Mr. Haupt commended Complainant for his attention to detail and his communication of safety-related concerns.

While Mr. Biolo refused to fly with Complainant, Mr. Clere and Mr. Batterton did not; Mr. Clere "expressed a preference" not to fly with Complainant. Mr. Batterton never told Mr. Husby or Mr. Haupt that he was unwilling to fly with Complainant.

Complainant is currently employed as a first officer by PSA Airlines, a regional airline contracted to fly as American Eagle. This has been his only employment since working for Respondents and he has a \$38,000 annual salary. CX 9. Complainant began his employment on October 10, 2016. Ever since Respondents fired him, Complainant has experienced a significant decrease in his quality of life because his annual income has decreased by more than \$20,000.

He has suffered stress because of his discharge, and has become more irritable, which affects his relationship with his wife.

## 2. Respondent's Statement of Facts

In its brief, Respondent addresses paragraph by paragraph Complainant's Statement of "Facts" noting that many of the statements are not facts but opinion and argument. It further notes that several of the assertions are not borne out from the records. For example, it asserts that Mr. Clere asked that he not be paired with Complainant on May 25, 2015, and later, in December 2015, he refused to fly with Complainant. (Tr. 40; 115; 266-67). Resp. Br. at 3. Mr. Biolo refused to fly with Complainant because he could not trust him as a crew member (Tr. at 156-57; 166-67). Resp. Br. at 5.

Respondents note that HGA does not hold a Part 135 certificate. Complainant was hired in January 2015 by Heartland to be a PIC, and was offered the position by Mr. Haupt and Mr. Husby. Complainant did successfully complete training required by Heartland and was qualified to fly as PIC for Heartland Aviation. Heartland requires all new pilots to fly with one of the experienced pilots until the new hire is cleared by a senior pilot to fly independently. Complainant was never cleared to fly by any of its senior pilots and was only ever permitted to manually manipulate the controls while the aircraft was being flown without any passengers.

Mr. Biolo refused to fly with Complainant beginning on March 31, 2016 because he did not trust him. Mr. Clere requested that he not be required to fly with Complainant on May 25, 2015. Mr. Clere did fly with Complainant again after Mr. Haupt advised him that Complainant had been spoken to about prior problems; but later refuse to do so at all beginning in December 2015. As a result, Complainant was only able to fly with one out of the three primary pilots.

Despite extensive efforts to allow him to get up to speed and investment in Complainant, on April 18, 2016, Mr. Haupt informed Complainant that it was time for him to move on and leave the company. The was a joint decision between Mr. Haupt, Mr. Husby, and Ms. Kay due to the fact that two of the three senior pilots refused to fly with Complainant, and Complainant had not progressed to the point of being capable of fulfilling the PIC role. Complainant last flew for Heartland on April 7, 2016. He was notified of his termination of employment on April 18, 2016 and was moved to inactive status as a favor to him to assist in his transition to a new position (RX 6). Complainant's last paycheck was issued on June 10, 2016 for the period through May 31, 2016. As of August 31, 2016, Complainant was informed that he would no longer be maintained in their system as inactive (RX 4).

Complainant filed his complaint with OSHA on September 12, 2016.

Heartland has had a Safety Management System (SMS) for reporting of safety concerns for almost ten years (RX 2). The availability of SMS was discussed with Complainant and he filed no reports in Heartland's SMS. Heartland also had an ASAP system which Complainant never used.

D. Summary of the Documentary Evidence

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

<b>Exhibit</b>	<b>Description</b>
1	Photograph of left engine cowling. Document contains the date Jan. 25, 2016 and a narrative. (1 page)
2	FlightAware Data for Mar. 19, 2016 for aircraft N583SD. (1 page)
3	Letter from Complainant to Mark Biolo, dated Apr. 2, 2016. (3 pages)
4	Undated performance review of Complainant by Cory Haupt. (5 pages)
5	Email from Verna Kay to Complainant, Re: follow-up your discussion with Cory, dated May 11, 2016. (1 page)
6	Text messages between Complainant and Cory Haupt, between July 8 and Aug 29 [year not provided]. (5 pages)
7	Email from Cory Haupt to Complainant, dated July 8, 2016 and a copy of Complainant's Flight Training Record from Feb 25, 2015 "to present". (3 pages)
8	Complainant's June 5, 2016 and August 28, 2016 earning statements from Hawthorne, and a snapshot of Complainant's employee profile from a Hawthorne database, date unknown. (3 pages)
9	Complainant's PSA Airlines Statement of Earnings and Deductions during the period Oct. 31, 2016 to February 28, 2017. (9 pages)
10	Complainant's Complaint Statement on OSHA letterhead (unsigned and undated). (4 pages)
11	Complainant's Objection to Secretary's Findings and Order, dated Jan. 31, 2017, including OSHA's Jan. 9, 2017 findings. (7 pages)

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

<b>Exhibit</b>	<b>Description</b>
1	Email from Cory Haupt to all employees [including Complainant] concerning Heartland Aviation's ASAP program, dated Mar. 7, 2016. (1 page)
2	Heartland Aviation, Inc. Safety Management System (rev. 1), dated Aug. 17, 2010. (30 pages)
3	Heartland Aviation Employment notes for Complainant, updated Aug. 31, 2016. (1 page)
4	Text messages between Cory Haupt and Complainant between May 23, 2016 and September 24, 2016. (3 pages)
5	Three emails from Cory Haupt to Complainant Re: Opportunity, My favorite job board as an employer (2), all dated Apr. 19, 2016. (3 pages)
6	Email correspondence between Complainant, Cory Haupt and Verna Kay regarding allowing Complainant's employment status to remain active while he seeks employment, dated May 10-12, 2016. (3 pages)

The parties also present the following joint exhibits:

Exhibit	Description
1	Email from Mark Biolo to Complainant, dated Mar. 31, 2016 Re: Transparency. (2 pages)
2	Letter of recommendation by Cory Haupt for Complainant, dated Apr. 27, 2016. (1 page)

### III. ISSUES

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

#### A. Complainant's Position

Complainant asserts that his is a covered employee under the Act and that Respondents were subject to the Act. HGA is subject to the Act for it employs Heartland's pilots and its Human Resources Vice-President, Ms. Kay, participated in the decision to fire Complainant. Complainant acknowledges that HGA does not hold an air carrier certificate but neither the statute nor the implementing regulations require an entity hold an air carrier certificate to be subject to the Act. He notes that the definition of a person in 29 C.F.R. § 1979.101 includes "partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Further, the Act and implementing regulations extends to contractors or subcontractors of an air carrier subject to the Act. He argues that HGA was a contractor for its subsidiary in that it provided pilots to Heartland, paid the pilots, and provided human resource services.

Complainant maintains that his complaint was timely filed citing to 29 C.F.R. § 1979.103 which references that any person on the employee's behalf may file a complaint and it need not be in any particular form. Specifically, he asserts that the written account made by the OSHA investigator during the May 9, 2016 interview is sufficient to meet the timeliness requirement for at that time Complainant detailed his various safety complaints and provided photographic and documentary evidence to the investigator. He argues that OSHA's failure to record the complaint at that time should not deprive Complainant of his right to due process.

Further, Complainant references Ms. Kay's May 11, 2016 email about the change of his employment status to inactive effective June 1, 2016. CX 5. He asserts that Ms. Kay overruled Mr. Haupt's demand that Complainant resign by May 15, 2016 and instead informed him that he would remain an employee of Respondents until he found other work; his last day of work was left open.

On September 2, 2016, Respondent terminated Complainant's employment effective August 31, 2016. This involuntary termination of employment was another discrete adverse action and Complainant provided OSHA with additional documentation and photos related to his complaints against Respondent. On September 26, 2016, Complainant submitted a written statement further detailing his protected activities.

Even if the Tribunal was to find that Complainant did not file a complaint until September 12, 2016, the September 2, 2016 involuntary termination was clearly an adverse action and Complainant's supplemental complaint on September 26, 2016 were made well within the 90-day limitations period.

Complainant engaged in protected activity on numerous occasions when he filed complaints with his supervisors for they involved purported violations of regulations and Complainant had a subjective belief that the violations occurred. The specific violations that occurred were Mr. Biolo's ATC clearance violation during the November 8, 2015 flight. This violated 14 C.F.R. § 91.123(a). It was objectively reasonable because Complainant heard the clearance from ATC and Mr. Biolo deviated from that clearance without obtaining an amended clearance. As the PIC, Mr. Biolo was responsible for compliance with the regulation.

On November 22, 2015, Complainant engaged in protected activity when he complained that Mr. Biolo taxied the wrong direction at the Quincy Regional Airport and placed the aircraft in a dangerous position relative to incoming aircraft. He filed a complaint stating the operation was unsafe and it was objectively reasonable because he directly observed Mr. Biolo's navigational errors on the taxi way.

On December 3, 2015, Complainant engaged in protected activity when he filed complaints with Mr. Clere concerning Mr. Clere's improper visual approach to Indianapolis Executive Airport. His action violated 14 C.F.R. § 91.151. Complainant later filed his concerns about the approach with Mr. Haupt. His belief of a violation was subjectively and objectively reasonable because he observed Mr. Clere's visual approach. It concerned Complainant enough that he discussed the incident with two FAA investigators who reviewed their database for the flight and told Complainant that it did not look good. This information was also reported to Mr. Husby on December 7, 2015.

On December 16, 2015, Complainant filed complaints with Mr. Batterton, the flight's PIC, stating that the assigned aircraft's anti-ice system was defective. He cites 14 C.F.R. § 91.7. He argues that complaint was subjectively and objectively reasonable because, following his complaints, the aircraft underwent service of the anti-ice system before further flight, and the anti-ice cowl is an essential piece of equipment when operating in winter condition.

On January 3, 2016, Complainant filed complaints with Mr. Biolo, stating that Mr. Biolo operated the aircraft in violation of applicable airspeed regulations. He cites 14 C.F.R. § 91.117. He asserts his complaint was objectively reasonable because he was present in the cockpit and observed the airspeed violations.

On January 25, 2016, Complainant refused to operate an aircraft with a faulty anti-ice system, and filed his complaint with the PIC, Mr. Batterton who in-turn telephonically relayed the complaint to Mr. Haupt. He cites 14 C.F.R. § 91.7 because the system was malfunctioning and Complainant was aware that during icing conditions a functional anti-ice system was essential for safe operation of the aircraft.

On February 25, 2016, Complainant filed complaints with Mr. Biolo stating Mr. Biolo's operation of the aircraft on the runway violated a taxi clearance from ATC, citing 14 C.F.R. §§ 91.13 and 91.123. His complaints were made to his supervisor concerning objectively reasonable concerns about the operation of the aircraft.

On March 19, 2016, Complainant filed complaints with Mr. Husby, the company's General Manager, concerning severe weather in the flight path, and complained that Mr. Husby disregarded the offered course change by ATC. He cites to 14 C.F.R. § 91.13, for Mr. Husby's actions took the aircraft into dangerous weather conditions, resulting in severe turbulence scaring the passengers and placing the aircraft in an unsafe situation.

On March 27, 2016, Complainant filed a complaint and refused to operate an aircraft with inoperative radar. He cites 14 C.F.R. § 135.175. Complainant was aware that operable radar was required under the then-present flying conditions.

On March 27, 2016, Complainant was flying with Mr. Biolo when a flap failure developed as they were approaching an airport in Florida. Mr. Biolo was the PIC. Complainant observed that Mr. Biolo's speed was excessive in comparison with the manufacturer's design limitations. Complainant filed a complaint with Mr. Haupt stating that he observed "flap overspeed" and "flap in-op" warning lights simultaneously illuminated. He cites 14 C.F.R. § 91.13 and argues that his complaint was objectively reasonable because he was present in the cockpit, he observed the illuminated warnings, and Mr. Biolo admitted that his speed exceeded the manufacturer's recommended parameters.

Complainant maintains that placing him on an inactive status was materially adverse because it resulted in a loss of pay and his firing effective August 31, 2016 was in retaliation for protected activity.

He asserts that his protected activities contributed to his firing because Respondent had a motive to place him on inactive status and to fire him because several pilots had complained about his protected activities. Mr. Biolo refused to fly with him while Mr. Clere and Mr. Batterton preferred not to fly with him. Mr. Haupt intimated that keeping Complainant would create scheduling difficulties and work pressures, and he was the new kid on the block. Animus toward Complainant's safety complaints is evidenced by Mr. Biolo's March 31, 2016 email.

Respondents' reason for discharging Complainant is a pretext for retaliation. Only Mr. Biolo refused outright to fly with Complainant; neither Mr. Batterton nor Mr. Clere refused to fly with him. Further, Complainant's annual performance review completed in December 2015 and the letter of recommendation by Mr. Haupt that Complainant "as a second in command ... certainly meets the standard..." Mr. Haupt testified that Complainant was difficult to work with

due to his pacing and CRM, but he never testified that he was fired due to pacing or deficiency in CRM, nor do any of these deficiencies appear in his annual review.

Since Complainant has shown that his protected activities contributed to his placement on inactive status and his discharge, Respondent cannot show by clear and convincing evidence that they would have discharged Complainant in the absence of protected activity. There is no evidence that proves that Respondents would have placed Complainant on inactive status or fired him absent his protected activity. In fact, Complainant had never been disciplined prior to him being placed on inactive status.

As for damages, Complainant took reasonable steps to find substantially equivalent employment. Taking the air carrier job in Turkey would have required him to be away from his family for long periods of time and from a very long distance. Further, he had no obligation to relocate outside the United States. Complainant seeks reinstatement to his former job with the same pay and terms and privileges of employment. He seeks loss wages of at least \$49,158.91, including interest, \$100,000 for mental pain and emotional distress, attorney fees and costs, and abatement of the violations.

In Complainant's reply brief he maintains that HGA is a covered contractor or subcontractor subject to the Act. It asserts that Heartland employed the supervisors but HGA employed the pilots citing to the fact that Complainant is paid by HGA. Complainant cites to *Fullington v. Avsec Services, LLC*, ARB No. 04-019, ALJ No. 2003-AIR-30 (Octo. 26, 2005) for its position. He argues that it was HGA—not Heartland—that controlled his employment.

As for the timeliness of his complaint, Complainant notes that his testimony about the investigator documenting his complaint is undisputed, credible, and Respondent could have just as easily produced the investigator to dispute his claim as could Complainant have produced the investigator. He reiterates that while the complaint must be in writing, it can be made by any person on the employee's behalf. Complainant further argues that he did not receive "final, definitive and unequivocal notice" of an adverse employment action by Respondent until he discovered on September 2, 2016, that his employment was terminated effective August 31, 2016. He argues that while Respondent's may have wanted Complainant gone from their employ back in April 2016, they did not give him final, definitive and unequivocal notice until early September 2016.

Complainant argues that, even if the Tribunal finds that Complainant's oral statements to the investigator in May 2016 was not a filing of a complaint, Respondent's actions on August 2, 2016 requesting Complainant's resignation and then terminating him on August 31, 2016 were the subject of his timely amended complaint on September 12, 2016.

Complainant reiterated the protected nature of his activities on the November 8, 2015 (ATC clearance deviation),<sup>48</sup> November 22, 2015 (taxiing incident), December 3, 2015 (go-around incident), December 16, 2015 (anti-ice incident), January 3, 2016 (overspeed incident), January 25, 2016 (anti-ice incident), March 19, 2016 (turbulence incident), and the two March

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<sup>48</sup> Complainant notes that the focus of the complaint concerns his complaint about the incident to Mr. Haupt, not his communications during the incident with Mr. Biolo. Compl. Reply Br. at 8.

27, 2016 incidents (inoperative radar and flap incidents). He asserts that these incidents contributed to his firing and Respondent's claims about his poor piloting are not credible given his December 2015 performance evaluation and Mr. Haupt's letter of recommendation provided to him. Further, Respondent's completely ignore the temporal proximity of the chain of events that precipitated Complainant's termination of employment. In short, "[i]t was easier to get rid of a whistleblower who was new to the employer than to get rid of others." Reply Br. at 16. Finally, Respondent has not shown by clear and convincing evidence that it would have discharged Complainant in the absence of his protected activity. As for damages, Respondent has offered no evidence that comparable jobs were available to Complainant. In particular, the PSA offer of \$23,000 annually was not substantially equivalent to the \$60,000 per annum he was earning at Heartland. And his refusal to leave the country to take the job in Turkey was reasonable as it would take him away from his family.

#### B. Respondent's Position

Complainant has not established that HGA is a covered employer subject to the Act. Complainant has made merely conclusory statements that it is a contractor for Heartland, that it provided pilots to Heartland, paid the pilots and provided human resource services. Complainant produced no contracts to substantiate his claim and the testimony at the hearing established that Heartland Aviation—not HGA—employs the pilots. Complainant testified that he was hired by Heartland Aviation in January 2015, the letter of reference is on Heartland Aviation letterhead, and Mr. Haupt, Mr. Batterton, Mr. Clere and Mr. Husby all testified that they were employed by Heartland. Complainant presented no evidence of a contract under which HGA performs safety-sensitive functions for Heartland Aviation. Further, there is no evidence that HGA's human resources and accounting functions are "safety-sensitive functions" or that a contract exists regarding the same. The evidence established that Heartland Aviation alone is the proper party.

Complainant's complaint is untimely. "The time limit for filing a complaint "begins when the employee knew or should have known of the adverse action, regardless of the effective date." *McAllister v. Lee County Board of County Comm.*, ARB No. 15-011, ALJ, No. 2013-AIR-8 (May 6, 2015). Complainant failed to meet its burden of proof that he filed a complaint on May 9, 2016. Respondents noted that in his response to its Motion to Dismiss Complainant represented that there was email communication between he and the OSHA investigator, yet none was produced at the hearing. Resp. Br. at 12. Further, Complainant did not produce the investigator. The only evidence is Complainant's statement that he met with the OSHA investigator in person on May 9, 2016 and that the investigator "created a written record of my verbal complaint and account." Tr. at 406. Complainant recalled providing CX 1 to the investigator, but could not recall what other photos and textual descriptions he provided. Complainant did not even offer any testimony about what complaints he purportedly relayed to the investigator. Resp. Br. at 12.

Further, Complainant's May 9, 2016 complaint does not meet the requirements of 29 C.F.R. § 1979.103(b). Complainant contends that the investigator's written "chronology" satisfies this requirement, but Complainant failed to produce any evidence that such written "chronology" ever existed. Further, the complaint should include a full statement of acts and

omissions which are believed to constitute violations. However, no statement has been provided, let alone one containing the level of detail required by the regulation.

Respondent questions whether a May 9, 2016 meeting ever even occurred because there is no evidence it resulted in the production of anything in writing. It notes that the Department of Labor did not treat this meeting as a complaint under the Act and cites to 49 U.S.C. § 42121(b)(1) that contains notification procedures that the Secretary must follow once a complaint has been filed. No such notice occurred for any May 9, 2016 meeting. Nor is there evidence that OSHA conducted an investigation within 60 days as required by the Act. Finally, the complaint that ultimately was filed in this case makes no reference to a meeting with OSHA on May 9, 2016 (CX 10). Resp. Br. at 13.

Complainant filed to meet his burden to establish that his September 12, 2016 complaint was timely filed. Complainant knew of the adverse action as of April 18, 2016 when Mr. Haupt met with Complainant and expressed to him that he needed to move on and leave the company. Mr. Haupt provided Complainant with a letter of recommendation on April 27, 2016. This was one of many efforts that Mr. Haupt made to assist Complainant in his transition. Complainant last flew for Respondents on April 7, 2016, and he noted in his complaint that he had a scheduled May 4, 2017 flight rescinded. Mr. Haupt met with Complainant on May 9, 2016 to discuss Complainant's exit strategy. Complainant sent an email to Mr. Haupt on May 10, 2016, in which he acknowledged that he was being asked to "move on" since the week of April 18. On May 10, 2016, Mr. Haupt wrote "We have reached the time limit of what is considered reasonable accommodations given the circumstance...we are offering you the option to resign with a resignation date no later than May 31<sup>st</sup>. If you wish not to provide a resignation letter by May 15<sup>th</sup>, I will direct that your employment be terminated on May 15<sup>th</sup>." RX 6. Further, Complainant testified that at that point he had a lead on two jobs. After May 10, 2016, Respondents accommodated Complainant's request to avoid closing his pilot's records until the point that he got another job as Complainant was concerned that his pilot records would show a gap in response to a PRIA request. Respondent's changed Complainant's status to "inactive" effective June 1, 2016 and Complainant no received salary payments as of June 1, 2016. And Complainant's testimony and argument that he "did not take seriously" that his employment was terminated, or we be overruled by Ms. Kay has no credibility. Complainant knew or should have known of the adverse employment action had occurred no later than May 10, 2016, and as his complaint was not filed until September 12, 2016, it was untimely. Finally, the change in status made in Respondent's payroll processing software as of August 31, 2016, does not qualify as a separate adverse employment action.

Respondent asserts that these facts are akin to the cases of *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-14 (Sept. 28, 2010) and *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-9 (Apr. 3, 2007).

Complainant filed to prove by a preponderance of evidence that he engaged in protected activity and that the Respondents knew that he engaged in protected activity. Respondent notes that Complainant failed to provide any evidence concerning the November 8, 2015, ATC incident with Mr. Biolo other than his own testimony. The purported complaint was Complainant stating that they were not cleared to go to that fix and they re-corrected going to the

originally cleared waypoint. Therefore, his concern was addressed and resolved in the cockpit, in a manner expected in a co-piloting situation. Further, Complainant admitted that after the incident he did not discuss it with Mr. Biolo. Tr. at 331. Mr. Haupt testified that he did not recall discussing that incident with Complainant. Tr. at 76. No evidence was presented of a report being filed by ATC about the incident.

Complainant failed to prove that he engaged in protected activity regarding the alleged November 22, 2105 incident. Complainant's own testimony establishes that he did not reasonably believe that a violation occurred. Complainant testified "I suppose to some ridiculous degree you could say that there's a reckless and careless operational issue, but not on any realistic level." Tr. at 418-19. Further, Mr. Biolo testified that Complainant did not operate as a crew member and failed to engage in CRM. Finally, Mr. Haupt testified that Complainant did not share the incident with him or submit anything to SMS.

Complainant failed to prove that he engaged in protected activity with respect to the alleged December 3, 2015 incident involving an improper visual approach into Indianapolis Executive Airport. Complainant alleged that he reported the incident to two FAA investigators. However, Complainant offered no evidence beyond his own testimony, which is contradictory to Mr. Clere's. Mr. Clere testified that he was waiting for Complainant to make the proper call-outs and that he "clearly stated" that he preferred the RNAV 18 instrument approach and brief it to Complainant. However, it was Complainant that told ATC that they were requesting a visual to runway 18. It was Complainant who hesitated to make timely calls. During the approach, Mr. Clere mistakenly aligned with the taxiway and the runway was relatively short. Mr. Clere vocalized this to Complainant who did not respond so he did a go-around and landed. There is nothing unlawful about taking corrective measures when the misalignment was identified. Further, Complainant did not file any complaint with Mr. Clere, and did not reasonably believe in the existence of a violation. As for the alleged FAA investigators, Complainant did not produce any evidence of them beyond his own testimony. Further, even according to Complainant, the FAA investigators told him that it needed to be addressed in-house which suggests at least that the FAA investigators did not have serious concerns.

Complainant failed to prove that he engaged in protected activity regarding the alleged December 16, 2015 incident concerning the allegedly defective anti-ice system on the aircraft. The evidence was limited to Claimant's testimony, which was contradicted by Mr. Batterton's testimony. Mr. Batterton testified that the mechanics found the heating element failure in the routine maintenance. Further, Mr. Batterton did not observe ice during the flight and Complainant did not communicate any concerns to him about the aircraft. When Mr. Batterton found out that Complainant knew about the equipment issue, he was upset that Complainant did not report it or write it up. Mr. Haupt does not recall discussing this incident with the Complainant. Complainant did not submit a SMS report, and Complainant even acknowledged in his brief that the aircraft underwent service before being operated again (Compl. Br. at 28). Resp. Br. at 26. It is not a violation of any regulation for a part on an aircraft to fail.

Complainant failed to prove that he engaged in protected activity regarding the January 3, 2016 incident for violation of applicable air speed regulations. Complainant only provided his own testimony; no records pertaining to the event and his testimony is contradicted by Mr. Haupt

and Mr. Biolo. Mr. Haupt testified that Complainant did not share any of his concerns regarding the incident with him and Complainant did not submit anything to SMS.

Complainant failed to prove that he engaged in protected activity concerning the alleged January 25, 2016 incident involving a faulty anti-ice system. Complainant failed to proffer any evidence verifying the weather conditions that existed on the date or any evidence of filing of a “complaint.” Complainant was not even a party to the telephone conversation that related to the issue. Both Mr. Haupt and Mr. Batterton testified as to the incident and they had firsthand knowledge of what occurred. The purpose of removing the ice was in case the engine shop was to run the engine, and they did not want ice to get sucked into it. The equipment failed, it was discovered, and it was fixed before it was flown again. Complainant did not reasonably believe in the existence of a violation. Further, Complainant admitted to not telling Mr. Haupt about the matter (Tr. at 348-49) and Mr. Batterton did not know about the Complaint until after he read the OSHA complaint (Tr. at 243). Respondent relies on *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 (July 2, 2009).

Complainant failed to prove that he engaged in protected activity concerning the alleged February 25, 2016 incident involving Mr. Biolo supposedly violating a taxi clearance from ATC. Complainant’s own testimony shows that he did not reasonable believe in the existence of a violation. He testified that before the ATC controller operating the ground frequency noticed the situation, they simply made a left-hand 180 degree turn. Further, Complainant acknowledged that he had a “very limited conversation” then and “there was no reason to bring it up after the flight.” Tr. at 354. To the extent Complainant mentioned the issue at all, it was addressed real time at the moment. Further, Mr. Haupt testified that Complainant did not discuss the incident with him.

Complainant failed to prove that he engaged in protected activity with respect to the alleged March 19, 2016 incident involving the flight into severe weather in Florida by Mr. Husby. Mr. Husby testified that it was just another routine flight dealing with Florida thunderstorms and he described the turbulence as light to moderate. He disconnected the autopilot and hand flew the aircraft, as called for in the manual. He testified that when ATC gave them the option to deviate, being on top at 40,000 feet he saw where he could see the build-ups, he saw no reason to deviate. And contrary to Complainant’s testimony, he testified that the passengers were quiet and there was no yelling. Further, Complainant offered no evidence to support his testimony; no weather reports, condition reports, or passenger statements. The fact that there was evidence of altitude deviations shows that proper procedures were following in the situation.

Complainant failed to prove that he engaged in protected activity concerning the alleged March 27, 2016 incident concerning his refusal to operate an aircraft because of inoperative radar. Mr. Haupt testified that Complainant called him in the morning about inoperative radar in an aircraft Complainant was scheduled to fly and Mr. Haupt swapped out the aircraft. Complainant never filed a written report regarding the equipment issue despite the fact that he was pilot in command and, according to Mr. Biolo, even told Mr. Biolo the night before that the aircraft was fine. Complainant acknowledged that he has a duty to report equipment failures, and the aircraft did not fly once the inoperative equipment was identified. There is no regulatory

violation and Complainant's belief was not objectively or subjectively reasonable that there was. In fact, what happened was exactly what is supposed to happen when defective equipment is identified.

Complainant failed to prove that he engaged in protected activity concerning the alleged March 27, 2016 flap incident. Complainant contends that he filed complaints with Mr. Haupt regarding Mr. Biolo's excessive speed when the flap overspeed and flap in-op warning lights were illuminated. Complainant failed to provide any evidence except his own testimony. Mr. Biolo, in response, testified "I wonder if we were in the same airplane." Tr. at 172. Mr. Biolo recounted how they completed the checklist, determined that the flaps were inoperative, asked approach to divert to another airport, and landed. Mr. Biolo acknowledged exceeding 210 knots maybe three or four times, but also said that he was not concerned because Complainant himself verified that the flaps were fully retracted so he knew that there was no chance of hurting the aircraft. Further, Mr. Biolo testified that not once did Complainant say anything during the incident about flaps overspeed, and they followed the checklist for landing speeds for no flaps. Respondent maintains what is at issue is a disagreement between two pilots about how an event unfolded in which, ultimately, the procedure was followed. It was a sensor malfunction and there was no safety concern. Complainant did not have a reasonable belief in the existence of a violation.

Respondent also asserts that Complainant's complaint was untimely, and they have shown that they would have taken the same action in the absence of protected activity. Complainant's employment was terminated due to his poor performance and inability to function as a crew member, resulting in two of Respondent's three pilots with whom he could be regularly paired refused to fly with him. During the discussions with Complainant about him needing to leave the company, there were no discussions about complaints he made about other pilots, FAA violations, or OSHA complaints. He was terminated from employment because he did not meet performance expectations. Of the eight pilots Mr. Haupt reviewed, Complainant scored the lowest. Further, the next lowest scored pilot was also asked to leave the company. Tr. at 96. Mr. Haupt delayed Complainant's checkride for several months because of his concern that Complainant would not pass. And during his employment, Complainant was not permitted to manipulate the controls with passengers on board out of concern for his pilot abilities. Eventually, it became apparent that Complainant was never going to be a fully functioning pilot for Heartland. And then several pilots refused to fly with Complainant, which tied Mr. Haupt's hands. So the Complainant's discharge had nothing to do with FAA violations. Respondents have shown by clear and convincing evidence that they would have taken the same action in the absence of any protected activity.

To the extent Complainant is entitled to relief, Complainant failed to mitigate damages. Complainant had a very lucrative offer of employment for \$100,000 per year but declined the offer. In addition, he was first offered a position with PSA in July 2016 but initially did not accept a position with them. Further, Complainant failed to prove that he was entitled to compensatory damages.

#### 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)). However, even before an analysis of these elements is to occur, the Complainant must first establish the timeliness of his complaint.

##### A. Timeliness of the Complaint

To be timely, an AIR 21 complaint must be filed within 90 days of the date on which the alleged violation occurred; i.e., when the discriminatory decision was both made and communicated to the complainant. 29 C.F.R. § 1979.103(d); *McAllister v. Lee County Board of County Commissioners*, ARB No. 15-011, ALJ No. 2013-AIR-8 (ARB May 6, 2015). This 90-day period begins to run the day that an employee receives “a final, definitive, and unequivocal notice” of an adverse employment action. *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-14 (ARB Sept. 28, 2010) (citing *Swenk v. Exelon Generation Co.*, ARB No. 04-028, ALJ No. 2003-ERA-030, slip op. at 4 (ARB Apr. 28, 2005)); *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ Case No. 2004-AIR-9 (Apr. 3, 2007). “The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date.” *Peters*, slip op. at 5. It is the date that a complainant discovers that he has been injured by a discriminatory act—not the consequences of that act—that starts the 90-day period in which an AIR 21 complaint must be filed. *Id.*

In addition, “[n]o particular form of complaint is required, *except that a complaint must be in writing* and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” 29 C.F.R. § 1979.103(b) (emphasis added). For the reasons that follow, this Tribunal finds that Complainant’s complaint was untimely because (1) he received unequivocal notice of his termination at least by May 31, 2016, and (2) he failed to file a written complaint with OSHA until September 12, 2016.

First, the evidence shows that Complainant received final, definitive, and unequivocal notice of his termination by at least May 31, 2016. On May 10, 2016, Chief Pilot Haupt wrote an email to Complainant, stating: “I am sympathetic to your situation, but the time has come for us to part ways.” RX 6 at 1. He told Complainant that he needed to tender his resignation by May 15, 2016 or he would be terminated effective May 31, 2016. *Id.*<sup>49</sup> After Complainant

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<sup>49</sup> This email represents an unequivocal communication that Respondent was terminating Complainant’s employment despite Mr. Haupt’s stated desire to give Complainant “reasonable accommodations” and

requested relief from these “hard dates,” Ms. Kay informed Complainant on May 11, 2016 that he would be placed on inactive status effective June 1, 2016. She wrote: “Once you have a new job lined up, please provide us with a formal resignation letter stating your last day of work.” RX 6 at 3, 6; CX 5. After May 31, 2016, Heartland was no longer paying him a salary. Tr. at 404. These emails abundantly show that Respondent had communicated the *de facto* termination of Complainant’s employment. These emails also demonstrate that the parties understood that Complainant’s continued employment with Respondent was purely symbolic. Respondent agreed to that arrangement for Complainant’s benefit, since he was not comfortable resigning from Respondent until he had secured other employment. RX 6 at 2.

In addition to Respondent’s direct communication with Complainant, other evidence also establishes that Complainant knew Respondent had effectively terminated his employment by May 31, 2016. Respondent had not utilized Complainant for flights since April 7, 2016,<sup>50</sup> stopped paying him a salary after May 31, 2016,<sup>51</sup> and provided him with a generic letter of reference.<sup>52</sup> JX 1. Mr. Haupt even provided Complainant with the names of potential employers. Tr. at 124; RX 5. Complainant was actively looking for a new position by May 10, 2016, and testified that “at that point in time, I had a lead on two jobs . . . .” Tr. at 401. In fact, he testified that a different company, PSA, offered him a position as early as July 12, 2016. Tr. at 394. In sum, therefore, the evidence overwhelmingly demonstrates that Complainant knew that Respondent had effectuated a *de facto* termination of his employment, notwithstanding the symbolic employment relationship that the parties intended to maintain on paper to assist Complainant in finding another job.<sup>53</sup>

Complainant argues that the May 2016 emails from Respondent to Complainant did not constitute final, definitive, and unequivocal notice of his termination. *See* Compl. Reply Br. at 4-7. Complainant suggests that because Mr. Husby was the principle decision-maker, Mr. Haupt’s decision on May 10, 2016 to “part ways” with Complainant “was subject to change.” Similarly, Complainant argues that Ms. Kay’s May 11, 2016 email shows that the date of Complainant’s resignation was left open by Respondent, a reading confirmed by Respondent’s agreement to delay Complainant’s formal termination until August 31, 2016. These arguments are unavailing, and elide the distinction drawn by the Board between the date an employer communicates its adverse actions to an employee and the effective date of those actions.

As explained by the Board in *Peters*, “[t]he time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date.” *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-14, slip op. at 5

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“the best possible opportunity, within reason, to move to a position of where you will thrive and be happy.” *Id.*

<sup>50</sup> Tr. at 382 and 403.

<sup>51</sup> Although there is some evidence that he was receiving a monthly cell phone stipend.

<sup>52</sup> JX 1.

<sup>53</sup> The Tribunal notes that Complainant likely had unambiguous notice of Respondent’s adverse action on May 10, 2016, the date Mr. Haupt informed Complainant that “the time has come for us to part ways.” RX 6 at 1. However, Respondent’s cessation of Complainant’s salary on May 31, 2016 marks a point beyond which no reasonable fact-finder could conclude that he did not have notice of the finality of his termination.

(ARB Sept. 28, 2010). In other words, the 90-day period in which an AIR 21 complaint must be filed begins when a complainant discovers that his employment has been injured by a discriminatory act, not when he experiences the effects of that act. *Id.* Applied here (and as explained above), Complainant unambiguously knew that Respondent had effectively terminated his employment by May 31, 2016. That the formal, paper date of that termination occurred much later does not change the date of Respondent’s adverse employment action for determining Complainant’s time for filing under 29 C.F.R. § 1979.103(d). And while it was certainly possible that Respondent could have changed its decision from May 10 to August 31 and decided to keep (or effectively re-hire) Complainant as an employee, no such ambivalence was communicated to Complainant.<sup>54</sup> Accordingly, for purposes of determining Complainant’s time for filing an AIR 21 complaint, Respondent’s alleged discriminatory decision occurred on May 31, 2016.<sup>55</sup>

Alternatively, Complainant argues that Respondent’s formal termination of Complainant on August 31, 2016 constitutes a separate and discreet adverse employment action. On this date, Respondent removed Complainant from its payroll database. Tr. at 141. As noted above, however, the Board distinguishes between adverse employment actions and the effects of those actions. Thus, a ministerial act that effectuates a prior communicated termination—such as formally removing Complainant from Respondent’s payroll—is not a separate and discrete adverse employment action. *See Peters*, slip op. at 5 (holding that an employer’s “processing” of an adverse employment action after the action had occurred did not extend the limitations period for filing a complaint under 29 C.F.R. § 1979.103(d); *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ Case No. 2004-AIR-9 (Apr. 3, 2007) (holding that the date of an employer’s letter informing an employee of his impending termination began the 90-day period began, not the date on which his actual termination was effectuated). Accordingly, Respondent’s formal severance of the vestiges of Complainant’s courtesy employment relationship does not constitute an additional adverse employment action.<sup>56</sup>

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<sup>54</sup> During his testimony, Complainant alleged that Ms. Kay communicated to him that she was looking to see if there were other positions within the HGA system. Tr. at 386. Complainant also alleged that Mr. Haupt indicated that he disagreed with Mr. Husby’s decision to terminate Complainant. Tr. at 399-405. However, these allegations run contrary to Mr. Haupt’s and Ms. Kay’s emails at that time, both of which evidence a clear understanding that Complainant’s employment with Respondent was being terminated. Other than his testimony concerning these unrecorded conversations with Mr. Haupt and Ms. Kay, Complainant provided no evidence his employment with Respondent could have continued into the future.

<sup>55</sup> This Tribunal believes that by delaying Complainant’s formal termination, Respondent went out of its way to help a transitioning employee find new employment, keeping Complainant on its so he could represent to potential employers that he was still an active pilot. To rule that such an action extends the time of filing would incentivize companies to be cold and callous in the termination practices, something this Tribunal is unwilling to promote. Having said this, this Tribunal has concerns about Respondent allowing Complainant to continue on the Known Crewmember Program for convenience sake, as it appears counter to the program’s security purposes. However, that is something this Tribunal need not further address.

<sup>56</sup> This same conclusion holds for Respondent’s (Mr. Haupt’s) August 2, 2016 request that Complainant specify the date on which Respondent could formally terminate his employment. *See CX 6* at 15.

Second, this Tribunal finds that Complainant did not file a written complaint with OSHA under 29 C.F.R. § 1979.103(b) until September 12, 2016. Complainant maintains that he went and discussed his allegations with an OSHA investigator on May 9, 2016, who allegedly documented his allegations. If true, this would be considered a written complaint under 29 C.F.R. § 1979.103. However, Complainant—who bears the burden of proof—has produced no evidence other than his own self-serving statement that this occurred. He did not call the investigator as a witness, produce the purported notes that the investigator took during his meeting, obtain a statement from the investigator that this meeting occurred, or provide a copy of the notice OSHA is required to provide him upon receipt of a complaint.<sup>57</sup> Inexplicably, there is no indication that Complainant even attempted to contact the OSHA investigator or obtain his notes. Further, in adjudicating Complainant’s case, OSHA did not recognize that Complainant had filed a complaint until September 2016. CX 11, page 5. Surely, had such notes existed or such an interview had occurred, it would have been addressed in OSHA’s timeliness findings when it dismissed Complainant’s complaint.<sup>58</sup> In short, this Tribunal finds that Complainant has not met his burden to establish that he filed a written complaint with OSHA on May 9, 2016 as he asserts.<sup>59</sup> Rather, this Tribunal finds that Complainant filed a written complaint with OSHA on September 12, 2016.

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<sup>57</sup> See 29 C.F.R. 1979.104(a).

<sup>58</sup> The Tribunal takes notice of OSHA procedures when handling complaints, which should have provided Complainant with some evidence of his visit. An OSHA official who receives an oral complaint will reduce the complaint to writing. 67 Fed. Reg. 15,454, 15455 (Apr. 1, 2002). “As a matter of policy, OSHA does acknowledge receipt of the complaint in writing back to the complainant.” 68 Fed. Reg. 14,100, 14,103 (Mar. 21, 2003).

<sup>59</sup> Although not raised by either party in their briefs, the Tribunal has also considered whether equitable tolling could be applicable in this case; it does not. The Tribunal finds no evidence to support any type of equitable tolling. The ARB has articulated four instances in which tolling may be proper:

- (1) the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights,
- (3) the complainant has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum, or
- (4) the employer’s own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights.

*Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 4 (Jan. 28, 2011). Further, Complainant bears the burden of justifying the application of equitable tolling. *McAllister v. Lee County Board of County Comm.*, ARB Cast No. 15-011, ALJ Case No. 2013-AIR-008, slip op. at 5 (May 6, 2015).

Here, there is no evidence that Respondent actively misled Complainant about its decision to terminate Complainant. Complainant has not been prevented from asserting his rights. Complainant did not raise his claim in the wrong forum. He has asserted that he reported the matter to OSHA but, as discussed above, has provided no evidence of this other than his self-serving statements. Further, OSHA itself did not identify the filing of any complaint until September 12, 2016. Finally, there is no evidence that Respondent was making any type of promise about Complainant being used to fly its aircraft again. In fact, Heartland had stopped using Complainant as a pilot a month prior to Mr. Haupt’s May 10, 2016 email informing Complainant that it was time for Heartland and Complainant to part ways. The overwhelming weight of the evidence presented demonstrates a steady, but slow, march towards cutting all ministerial ties with Complainant. Finally, although at the hearing Complainant referenced some conversation with Ms. Kay where she stated she might find him employment elsewhere within

In conclusion, the evidence shows that Respondent's alleged discriminatory decision had been made and communicated to Complainant at least by May 31, 2016. Therefore, he had until August 29, 2016 to file a timely complaint. Complainant did not file a written complaint with OSHA until September 12, 2016. Accordingly, Complainant's complaint is time barred.

### **CONCLUSION**

As Complainant's complaint was filed after the 90-day statute of limitations set forth in 49 U.S.C. § 42121(b), it is time barred and must be dismissed.

### **ORDER**

For the reasons stated above, Complainant's complaint is hereby DISMISSED with prejudice for untimely filing.

**SO ORDERED.**

**SCOTT R. MORRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

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Respondent HGA's employ (Tr. at 414), there is no credible evidence that such employment was offered to him, or that any HGA official with hiring authority even hinted that was a possibility.

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov). Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party’s legal brief of points and authorities in opposition to the

petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).