

**U.S. Department of Labor**

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**Issue Date: 06 November 2019**

CASE NO.: 2017-AIR-00006

*In the Matter of:*

**HANS K. MORTENSEN,**  
Complainant,

v.

**HAWAIIAN AIRLINES,**  
Respondent.

Appearances: Hans K. Mortensen  
Self-represented Complainant

John S. Rhee, Esq.  
William Lee, Esq.  
for Respondent Hawaiian Airlines

Before: Steven B. Berlin  
Administrative Law Judge

**DECISION AND ORDER**

This case arises under the employee protection (“whistleblower”) provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and its implementing regulations, 29 C.F.R. Part 1979. Complainant Hans K. Mortensen alleges that Respondent Hawaiian Airlines terminated his employment in retaliation for reports he made of unsafe conditions on the job. I will find that, although there is much to criticize about the termination, Complainant Mortensen has not carried his burden to establish that his protected activity was a contributing factor in the termination. I will therefore deny the claim.

Procedural History

I conducted a hearing in Honolulu, Hawaii on August 7 and 8, 2017. Mortensen represented himself. Hawaiian Airlines was represented by its counsel of record. Mortensen testified on his own behalf and called as an adverse witness his former manager, Hawaiian Airlines’ Hilo Station Manager Luana Gibson. Hawaiian Airlines called two witnesses: Doogan Mahuna, one of two human resources managers who conducted Hawaiian Airlines’ internal investigation into a co-

worker's allegations against Mortensen; and Lianne Villaro, who conducted Hawaiian Airlines' disciplinary hearing and made the initial decision to terminate the employment. Tr. 156, 160.<sup>1</sup>

I accepted stipulations of fact. See ALJ Ex. 2; Resp. Post-Hearing Br. at 4 n.3. Complainant offered one exhibit, which I admitted for impeachment purposes only.<sup>2</sup> See ALJ Ex. 1. Hawaiian offered exhibits (R.Ex.) 1-15, each of which I admitted without objection. Tr. 13, 104, 208-09. The parties submitted post-hearing briefs. Each party offered additional exhibits for the record with their post-hearing brief. For the most part, I reject these exhibits as submitted after the record closed and without a motion or a showing of a sufficient (or any) reason to reopen the record.<sup>3</sup> I admit, however, Hawaiian Airlines post-hearing Exhibit A and Mortensen's post-hearing Exhibit 2, as each of these is appropriate for official notice.<sup>4</sup>

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<sup>1</sup> Linda Srabian, Senior Director of North American Stations, conducted an automatic appeal of the termination decision and affirmed that decision. R.Ex. 7 at 3. At the time of the hearing, Srabian was on the U.S. Mainland, far more than 100 miles from the hearing site in Honolulu. Although Hawaiian Airlines initially sought to have Srabian testify by telephone, both parties ultimately agreed that this was unnecessary, and I admitted Srabian's declaration into evidence. See Tr. 11-12; R.Ex. 15.

<sup>2</sup> The exhibit is an email that Mortensen used for impeachment purposes against Gibson. Mortensen had not disclosed the email on a pre-hearing exhibit list. As the applicable rules allow parties to withhold from pre-hearing disclosure exhibits intended only for impeachment, I admitted the exhibit for the limited purpose of impeachment. Tr. 243-44.

<sup>3</sup> "The record of a hearing closes when the hearing concludes, unless the judge directs otherwise." 29 C.F.R. § 18.90(a). To reopen the record, a party must file a motion and show "that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed." See 29 C.F.R. § 18.90(b).

<sup>4</sup> "Official notice may be taken of any adjudicative fact or other matter subject to judicial notice." 29 C.F.R. § 18.84. The rule applicable in this forum thus follows the established law of judicial notice. A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (taking judicial notice of a state court judgment) (citations omitted); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994) (taking judicial notice of an arbitration decision without deferring to it or giving it any weight); *Kurtcu v. U.S. Parking Inc.*, No. C 08-02113 WHA, 2008 WL 2445080 (N.D. Cal June 16, 2008) (taking judicial notice of a San Francisco Superior Court's order confirming an arbitration decision).

Hawaiian Airlines' post-hearing Exhibit A is the decision of the federal arbitration panel on Mortensen's union's grievance on the termination. The panel issued the decision a month after I concluded the hearing in this case. I take official notice of it for the limited purpose of showing that an arbitration panel found just cause for the termination. But, as the arbitration panel was narrowly focused on whether Hawaiian Airlines' termination lacked good cause within the meaning of the collective bargaining agreement, I give no weight to the arbitration decision. The presence of good cause for the termination is irrelevant to whether Complainant's protected activity was also a contributing factor to the termination. Moreover, the presence of good cause does not mean the Hawaiian Airlines *would* have terminated the employment absent the protected activity; rather, it means only that Hawaiian Airlines *could* terminate the employment consistent with the collective bargaining agreement.

Mortensen's post-hearing Exhibit 2 consists of three newspaper articles printed in the *Honolulu Advertiser*. He offered the articles to show that there was publicity about his participation in a community group that sought to mitigate airport noise. Hawaiian did not oppose Mortensen's motion for official notice. As the *Honolulu Advertiser* was Hawaii's largest daily newspaper at the time, I take official notice of the articles for the limited purpose of showing that the articles were published and widely distributed at the time of publication. See 29 C.F.R. § 18.84. I do not admit the articles for any other purpose, such as for the truth of the matters asserted; official notice is unavailable for such purposes. *Continued . . .*

## Findings of Fact

Hawaiian Airlines is a covered air carrier within the meaning of AIR-21. *See* 49 U.S.C. § 42121; R.Br. 4 n.3. It hired Mortensen in 1996 as a part-time cleaner at Honolulu International Airport. Tr. 20. He soon became a lead cleaner. *Id.*

Four years later, in 2000, Hawaiian promoted Mortensen into a line service agent job at Honolulu. *Id.* It transferred him to Hilo in 2002 and eventually promoted him to lead line service agent. Tr. 24, 87. A line service agent oversees aircraft movement on the ground, guides aircraft during “pushbacks,” enforces a “circle of safety” around aircraft that are (or are about to be) in motion, services the aircraft (*e.g.*, cleaning), and provides general maintenance of equipment. Tr. 21. As a lead, Mortensen trained, led, and directed line service agents in these duties and the related safety protocols. Tr. 87-88. He did not have supervisory authority. *See* Tr. 87.

*Mortensen’s history of safety complaints.* In the early 2000s, Mortensen told his management that Hilo’s “power out” procedure was dangerous. Tr. 25-26. “Powering out” occurs when an aircraft uses its own power to pull back from a gate; it is distinguished from a “push back,” in which a tractor pushes the aircraft back from the gate, angling it into an open taxiway where the aircraft begins to move under its own power. *See* Tr. 24-25. Mortensen testified that Hawaiian addressed his safety concern in or about 2005 or 2006, when it stopped using the powering out procedure and switched to push backs. Tr. 26, 28, 93; R.Ex. 13 at 3. Nothing on the record suggests that Hawaiian retaliated at or around the time of these complaints.

In 2010, Mortensen wrote to Hilo Station Manager Luana Gibson about how Hawaiian Airlines was refueling its service vehicles. Tr. 63; *see* R.Ex. 13 at 2. Employees were required to go to a service station, fill five or six containers with gasoline, and return with the filled containers so the service vehicle could be refueled. Tr. 63. Mortensen wrote to Gibson that this was unsafe. Tr. 63. Mortensen concedes that Hawaiian Airlines’ response was “great”: it hired a fuel service company to bring the fuel to the airport. Tr. 63, 92. Again, nothing suggests that Hawaiian Airlines retaliated at or around the time of this complaint. To the contrary, Hawaiian promoted Mortensen into the lead line service agent position.

Also in the early 2000s, Mortensen became involved in a community group that sought to mitigate airport noise. Tr. 30; C.Ex. 2. He made public statements, including in the *Honolulu Advertiser*, the largest distribution newspaper in Hawaii. Tr. 30; C.Ex. 2. Hilo Station Manager

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The remaining exhibits of both parties were not timely offered before I closed the record, and neither party offers a sufficient reason to reopen the record to allow these additional exhibits. *See* 29 C.F.R. § 18.90. Were I to admit all of these exhibits, I might have to reopen the record to allow rebuttal testimony. For example, Mortensen’s post-hearing Exhibit 7 is his calculation of damages. Hawaiian objected to it. Were I to decide in favor of Complainant, I would reopen the record for both parties to submit evidence going to an appropriate remedy. But, if I admitted the calculation of damages, I would have to allow Hawaiian Airlines to cross-examine Complainant on its contents and to offer evidence to rebut it. Complainant was required to prepare this calculation at the time of initial disclosures at the beginning of the case and to supplement with updates. If he wanted to offer it into evidence at the hearing, he should have been able to do so at the time.

Gibson wrote an email at the time, noting that the newspaper had “again disparaged Hawaiian Airlines.” ALJ Ex. 1; Tr. 145-46. At the ALJ hearing, Mortensen read Gibson’s email to suggest that Gibson viewed Mortensen’s giving an interview to the newspaper as improper. Tr. 145-46. But nothing in Gibson’s email criticizes Mortensen or is adverse to him in any way; Gibson’s comment was that the newspaper disparaged Hawaiian Airlines, not that Complainant disparaged the Company or encouraged the newspaper to do so.

In another incident, the Hawaii State Airport manager informed Gibson that Mortensen, while in uniform during his work shift, went to the manager’s office to advocate for airport noise abatement. Tr. 134, 143-44. Gibson counseled Mortensen that it was “inappropriate” to engage in such activity during work hours, but she did not express any concern about his involvement with the community group. Tr. 134, 143-44. I find no evidence of retaliation in response to Mortensen’s involvement with the community group, all of which occurred many years before the termination.

With this background in mind, I turn to a safety concern that Mortensen recurrently and persistently raised and that he contends was a contributing factor in the termination. Mortensen’s concern was with Hawaiian Airlines’ need to enforce the so-called “circle of safety.” Tr. 34, 38. The “circle of safety” is an area encompassed in an imaginary half-circle from an aircraft’s nose to its wingtips. Tr. 117. When an aircraft has been moving, is moving, or is starting into motion, no one and nothing may enter the circle of safety until the employee guiding the aircraft gives a “thumbs up.” Tr. 38.

Mortensen was particularly concerned because lead ramp agent Bobby Baldado and ramp agent Louie Long frequently entered the circle of safety before the thumbs up. Tr. 35-39, 41-47. He was also concerned because some employees repeatedly left equipment in the circle. Tr. 38. Mortensen brought these complaints to Hilo Station Manager Gibson, and Assistant Station Manager Sheila Baldado (among others). Tr. 34, 37, 42, 117.

Mortensen found making complaints about Bobby Baldado complicated by the fact that Bobby Baldado and Hilo Assistant Station Manager Sheila Baldado were husband and wife. Tr. 34-39, 41-47. Sheila was Mortensen’s direct manager. But Mortensen repeatedly made the complaints about Bobby despite the risk of alienating his wife, Sheila Baldado.

Risk or not, Mortensen conceded that Station Manager Gibson (to whom Sheila Baldado reported) disciplined both Bobby Baldado and Louie Long for violating the circle of safety. Tr. 121-22. Gibson also took other steps in the light of Mortensen’s complaint. She involved Human Resources and Corporate Safety, asking the Company to develop detailed directives for the circle of safety at Hilo. Tr. 123. She sought advice from the Hawaii State Airport manager’s team. *Id.* At some point, Company trainers came to Hilo to discuss the circle of safety with management and the leads. Tr. 46-47. Despite Gibson’s efforts, however, the violations continued. Tr. 43.

On November 14, 2012, Mortensen escalated his complaints about the circle of safety violations. He filed a Ground Safety Improvement Program (GSIP) report. Tr. 43, 95; R.Ex. 12. The GSIP Program is intended to allow employees to report safety concerns confidentially to the Corporate

Safety Department. Tr. 142. Corporate Safety personnel investigate the reports. *Id.* Mortensen stated in his GSIP report that he had repeatedly told Hilo management that Bobby Baldado breached the circle of safety and that, in his view, management had failed to address the issue because of nepotism (apparently referring to Bobby's being married to Sheila Baldado). Tr. 95-96. A Hawaiian Airlines employee, Tricia Miller, responded to Mortensen's complaint. But the record is silent as what she said or what she or Hawaiian Airlines did in response to the complaint.

Nearly a year later, in October 2013, Mortensen reported to Gibson and Sheila Baldado that Bobby Baldado and Louie Long had again breached the circle of safety before the thumbs up. Tr. 39. This was the last time he made such a complaint. *Id.* The record is silent about how Gibson or Hawaiian Airlines responded.

*Complaints of Jaylyn Waiki.* In 2010, Jaylyn Waiki started working for Hawaiian Airlines in Maui. Tr. 48; R.Ex. 10. After about two years, Hawaiian transferred her to Honolulu as a part-time line service agent on a trial basis. Tr. 48. Waiki failed the trial period and was returned to cabin service in Maui in late 2012. Tr. 87-88, 199-200.

Almost a year later, in August 2013, Hawaiian gave Waiki another chance as a line service agent, this time in Hilo, again on a trial basis. Tr. 87-88, 199-200. Mortensen was her lead. Tr. 87. Her managers were Gibson and Sheila Baldado.

Within about six weeks, Waiki was complaining to management about Mortensen. R.Ex. 10. She told Gibson that Mortensen said that line service was not a woman's job and then turned to her and asked, "Right, Jay?" Tr. 53, 129; R.Ex. 10. Consistent with her understanding of Company policy, Gibson reported Waiki's allegation to the Company's human resources department as a sex harassment complaint. Tr. 129, 225. The report led to an investigation, a disciplinary process, and a grievance arbitration.

*Discipline and grievance procedure.* At all relevant times, Mortensen was a member of the International Association of Machinists and Aerospace Workers union. The collective bargaining agreement between Hawaiian Airlines and the Union contains a disciplinary procedure and a three-step grievance process. R.Ex. 5 at 65, 68-70.

Under the disciplinary procedure, the Company must advise any employee being questioned in a matter that could result in discipline that the employee may have a Union representative present. R.Ex. 5 at 69-70. The Company may not discharge or suspend an employee without a hearing at which the Union may represent the employee. *Id.* An employee may be held out of service without pay pending investigation only if the alleged conduct is a major infraction of Company policy, such as fighting or theft; otherwise, the Company must pay an employee held out of service pending investigation. *Id.*

The Company must notify the Union within two hours if it holds an employee out of service, and within 48 hours, the Company must provide the Union and the employee with a written statement "of the exact charges against the employee." *Id.* The Company must conduct a hearing within 5 days after providing the formal written charges, and it must furnish a written

decision to the employee and the Union within 10 days after the close of the hearing. *Id.* If the written decision is not sent within ten (10) days after the hearing and there is no agreement to extend the time limits, the grievance is sustained; no discipline may be imposed. “In assessing discipline, the Company will take into account the gravity of the offense, the employee’s overall work record, and years of service.” *Id.*<sup>5</sup>

The grievance procedure has three steps. Step 1 involves the process when an employee raises a complaint or grievance. R.Ex. 5 at 68. It is displaced here by the disciplinary charge described above. Similarly, the disciplinary process provides Step 2 of the grievance procedure in the form of the hearing described above. When the discipline imposed is a termination of the employment, there is an automatic appeal to a Company Vice-President (or designee), who must schedule a (Step 3) hearing within 30 days and issue a written decision within 10 days after the hearing. *Id.* at 69. As at Step 2, if the written decision is untimely, the grievance is sustained. *Id.*

If the parties cannot resolve the dispute after the three steps, “the case will be referred to the System Board of Adjustment [for arbitration] within forty (40) calendar days of receipt of the written decision [at Step 3].” R.Ex. 5 at 68.

*Hawaiian Airlines’ investigation.* Hawaiian Airlines’ Human Resources Department has two divisions: Labor Relations and Employee Relations. Tr. 181. Typically, Employee Relations conducts workplace investigations. *Id.* In this instance, however, because Employee Relations was “tied up doing other investigations,” Doogan Mahuna from Labor Relations “ended up assisting Rhonda Matthews” from Employee Relations on the investigation. Tr. 181-82, 198.

Mahuna is an experienced workplace investigator and has received some training in investigative techniques. Tr. 183, 186. But, as his job was to assist Matthews, it is curious that he asked all of the questions when he and Matthews interviewed employees; Matthews merely took notes. Tr. 185, 198. (Similarly, the Company called Mahuna to testify at the hearing, not Matthews.) Mahuna had never worked with Mortensen. Tr. 190. He testified that he did not know before or during the investigation that Mortensen had made any safety complaints. Tr. 190-91, 212. Nothing on the record brings this into question.

Matthews also had not met or spoken with Mortensen until she interviewed him during the investigation. Tr. 89. As to Matthews’ knowledge of Mortensen’s safety complaints, the record contains no statement from her about this. Mahuna testified that, given Matthews’ job title, she would not have known of Mortensen’s GSIP report or any other GSIP reports. Tr. 198, 212. I give this testimony little weight because job titles do not reliably reflect any particular incumbent’s actual job duties. Mahuna did not testify that he knew Matthews’ job duties; he knew only the duties generally associated with her (non-descriptive) job title: “business partner.” Who would assume, for example, from Mahuna’s title—“senior contract administrator”—that he would be an experienced workplace investigator or have any particular

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<sup>5</sup> To the extent required by law, the Company must supply to the Union before the hearing “pertinent matter” in the employee’s records; the Company must also supply the employee, on request, with a copy of his service record. R.Ex. 5 at 70. On grievances arising from disciplinary action, both the Union and the Company are entitled, before the hearing, to review any witness statements and documentary evidence that the other side has. *Id.* at 68.

expertise in investigating sex harassment allegations, especially when he didn't work for the part of the Human Resources Department that generally conducted workplace investigations?

Still, the record evidence does not establish that Matthews knew anything about Mortensen's GSIP report or any of his other safety reports. Mortensen suspected Matthews knew about his report because of comments fellow line service agent, Carl Palea, made to him. Tr. 56-57, 96-99, 106-08. Palea had filed GSIP reports similar in content to Mortensen's. Tr. 36-37, 97. Tricia Miller, a Hawaiian Airlines employee, responded both to Palea's GSIP reports and to Mortensen's GSIP report. Tr. 106. When Mortensen and Palea discussed this, Palea said that Miller told him to speak directly with Matthews and another manager about his GSIP reports. Tr. 106-07. This left Mortensen thinking that Matthews also would have been involved in his GSIP report.

But Mortensen did not testify or even suggest that Miller also advised him to talk to Matthews about his GSIP report. If anything, the logical inference is that Miller worked on Mortensen's report, and Matthews worked on Palea's. Mortensen could have or perhaps did take discovery into Matthews' knowledge, if any, of his GSIP report. He could have taken Miller's deposition and asked her. As it is, the record contains nothing beyond Mortensen's testimony about Palea's statements. That testimony is speculative and an insufficient basis to infer that Matthews knew of Mortensen's GSIP report at any relevant time.

The employer's knowledge of the protected activity is relevant to any showing that the protected activity contributed to the adverse action that the employer took. If a manager does not know of the protected activity, the protected activity could not have contributed to that manager's decision.<sup>6</sup> It is part of complainant's burden to establish contributing factor causation. I conclude that the record evidence is insufficient to establish that either Mahuna or Matthews knew of Mortensen's GSIP or other safety reports at any time they were involved in Mortensen's disciplinary process.

I find much wanting in Hawaiian Airlines' disciplinary investigation. A curious feature of the employee interviews that Mahuna and Matthews conducted is that Gibson and Sheila Baldado were present for at least a portion of seven of the nine interviews.<sup>7</sup> See R.Ex. 10 (Matthews' notes). As Mahuna described it, Gibson and Sheila Baldado just "popped in and out during the interview process" and were not permitted to ask any questions. Tr. 216-17.

Mahuna and Matthews interviewed nine employees. They were: the complaining employee Waiki; Mortensen; three line service agents; a customer service agent; and two ramp agents, one of whom was a lead. R.Ex. 10.

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<sup>6</sup> An exception can occur under so-called "cat's paw" causation. This occurs when the person making the adverse employment decision has no knowledge of the protected activity, but someone with knowledge of the protected activity influences the decisionmaker to take the adverse action. There is no evidence that anyone with knowledge of the protected activity influenced Matthews or Mahuna to find against Mortensen in the investigation.

<sup>7</sup> Matthews did not note Gibson and Sheila Baldado as present for the interviews of Mortensen and one line service agent (Chung).

At the end of each interview, Matthews presented her notes and asked the interviewee to sign to confirm that the notes were accurate. The interviewee was allowed to sign the notes as “correct without changes” or to make corrections and then sign the notes as “correct with changes.” See R.Ex. 10. Of the nine employees interviewed, three (including Waiki) made changes.

I infer from the fact that at least three interviewees revised Matthews’s notes that the notes (as corrected) are generally an accurate reflection of whatever Mahuna asked, the answers he received, and whatever Matthews chose to note. Of course, I must weigh the notes for what they are. The interviewees generally answered Mahuna’s questions and did not volunteer long narratives of their own. There were a number of leading questions. As I discuss below, the investigators interviewed Mortensen last, and it appears that they likely had largely decided the matter before they interviewed him. That could have affected the questions Mahuna chose to ask the other interviewees. At the least, by waiting to interview Mortensen last, the investigators did not seek to confirm Mortensen’s statements with any of the employees whom they interviewed. Nor did they add to the interview list persons Mortensen identified as having relevant knowledge.

I turn to the nine interviews. Mahuna and Matthews interviewed Waiki first. R.Ex. 10. The interview was on October 6, 2013. *Id.* Waiki stated: (1) that Mortensen made the discriminatory comment about line service work being men’s work; (2) added for the first time that on another occasion Mortensen said that he was hiring someone for his landscaping business, that he’d offered the job to a woman, that she’d decided to work for her uncle instead, and that he was “glad” he wouldn’t “have to put up with her” and “didn’t have to baby her because she is female”; (3) that Mortensen told Waiki and Nishimura that they should not assist ramp agents with bags or gate checks; and (4) that Mortensen delayed flights because wing walkers did not have lighted wands and because he wanted to upset Sheila Baldado. *Id.* Beyond these allegations, Waiki raised another complaint against Mortensen, a complaint that proved to be crucial in the termination decision.

In particular, Matthews notes Waiki as stating: “When Tamashiro wing walks, whatever side [of the aircraft] he is on, [Mortensen] will turn the aircraft toward [him]. [¶] [Tamashiro] basically had to step away from the tug because the wing went over the tug. [¶] I have heard [Mortensen] say, ‘You want to stand there, I teach you a lesson . . . You’ll never come close again.’ This concerns me [*i.e.* Waiki]. [Mortensen] only does this to Tamashiro.” R.Ex. 10 (quoting Matthews’ notes; the notes do not directly quote Waiki).

I will discuss in detail below what a wing walker’s duties were at Hilo Station at the relevant time. Among those duties, however, was that, when a line service agent was using a tractor to push an aircraft back from the gate across a roadway and into an active taxiway for departure, one wing walker stood on either side of the aircraft to help guide the movement of the aircraft. Waiki’s allegation is serious: It implies that Mortensen repeatedly and intentionally put Tamashiro in danger of serious bodily injury, not to mention the possibility of property damage from a collision between the aircraft and any vehicle Tamashiro was operating. According to Waiki, Tamashiro had to move; otherwise (such as if he wasn’t paying attention), the wing of moving aircraft would have hit him or the vehicle he was using (or at least passed directly over them).

Mahuna found Waiki “very credible.” Tr. 186. He described that Waiki was “very emotional,” “very specific,” and “very quick with her responses” during the interview. *Id.* He explained that “she had nothing to lose or nothing to gain by making the complaint” as a new line service agent. *Id.* He stated, “[W]hen you’re new, everything is seniority, you’re at the bottom of the list . . . She simply did what she did because she felt that was correct, the right thing to do.” Tr. 186-87.

The second interview was of lead ramp agent Brian Almarza. R.Ex. 10. When asked whether he’d heard anyone tell another employee not to help ramp agents, Almarza denied having heard that. He added that Waiki told him that Carl Palea had told her not to help ramp agents with gate checks.<sup>8</sup> Leading, Mahuna asked whether he heard either Palea or Mortensen say not to help ramp agents. Almarza returned to discussing Waiki and said that he’d told her that if a lead told her not to help ramp agents, the lead was wrong. *Id.* In all, Almarza never confirmed that he’d heard anyone tell another employee not to help ramp agents; all he heard was Waiki’s rumoring that Palea (not Mortensen) had made the comment to her.

The investigators next interviewed Kai Chung, who had been a line service agent at Hilo and had transferred to Honolulu. R.Ex. 10. According to Chung, “Palea and Mortensen would say ‘help [the ramp agents] if you want but that’s not our job.’” *Id.* He also stated that Mortensen tried to delay a flight once to demonstrate that line service was understaffed, but the delay was later attributed to a lavatory issue. *Id.* He offered nothing else relevant and did not otherwise corroborate Waiki’s allegations.

On October 9, 2013, line service agent Paul Perry told the investigators that Mortensen had delayed flights. *Id.* When Mahuna asked, “Are you aware of anyone making the comment ‘Line service is not a job for females?’ or any similar comment?” Perry replied, “I heard it. . . . But I cannot recall who the person was that said it.” [Had the investigators interviewed Mortensen before the other witnesses, they’d have known that Bobby Baldado was said to have made the comment; they could have asked Perry about that. They would also have learned of another employee with direct knowledge of Bobby Baldado’s making the statement, Quinsaas (see below). Mahuna and Matthews learned of this from Mortensen but again did not follow up.] *Id.*

Mahuna then asked Perry, “Are you aware of or have you seen any Line serviceman push the aircraft in the direction of a wing walker?” *Id.* Perry said that Waiki told him Mortensen would “sometimes purposely push the aircraft wing tip close to the wing walker,” but that he’d personally never seen a line serviceman push an aircraft in the direction of a wing walker. *Id.* Perry noted that he rarely worked with Mortensen. *Id.* On the issue of assisting ramp agents, Perry said that Palea questioned him for trying to help ramp agents with gate checks. *Id.* Perry said nothing about Mortensen on this issue.

In the interview of customer service agent Wayne Goya, Mahuna asked if Goya had heard someone say or a transmission in which someone said, “Stand there and I’ll teach you a lesson.” Goya answered that he had heard it but didn’t know who said it. *Id.* On assisting ramp agents, Goya said he’d overheard Palea tell Perry not to assist ramp agents with gate checks. *Id.* Goya

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<sup>8</sup> Gate checks involve passengers who present luggage at the gate for checking.

also reported that Waiki told him that Mortensen had told her not to assist with gate checks, but he said nothing to suggest that he'd personally heard Mortensen say that. *Id.*

Ramp agent George Murashige told the investigators that Mortensen and Palea did not help with gate checks, but he said nothing to suggest that Mortensen told others not to help ramp agents. *Id.* He reported that Waiki told him that Palea had told her not to assist with gate checks. *Id.* He said nothing about Waiki reporting that Mortensen had made any similar comment.

Line service agent Mark Nishimura told Mahuna and Matthews that no one had told him not to assist ramp agents with gate checks. R.Ex. 10. What he'd been told was that it wasn't a line service agent's job to do that. *Id.* He said he'd never heard anyone say that line service was not a job for women but that Waiki told him that Mortensen made that statement a couple of times. *Id.*

But, when it came to the incident about directing an aircraft at Tamashiro, Nishimura was the only witness who corroborated Waiki's allegations. When Mahuna asked if Nishimura was aware of any line service agent pushing aircraft in the direction of a wing walker, Nishimura said he was aware that Mortensen did that. *Id.* Nishimura said that he'd been unaware of this until Waiki told him about it. *Id.* Then he saw it two or three times himself. *Id.* He stated that Mortensen cut "it shorter than usual instead of pushing straight out past the roadway then turning the aircraft." *Id.* On these two or three occasions, Tamashiro was the wing walker involved. *Id.*

Louie Long told the investigators that Mortensen does not assist ramp agents with gate check bags, but he said nothing to suggest that Mortensen told others not to assist ramp agents. *Id.* Long denied hearing anyone say that line service was men's work. *Id.*

Having completed Waiki's and these witnesses' interviews, Mahuna and Matthews interviewed Mortensen on October 21, 2013. R.Ex. 10. Mortensen had union representation. *Id.*; Tr. 188. He initially thought Mahuna and Matthews were investigating allegations against Palea because the questions seemed to relate to safety concerns and things in which Mortensen knew Palea had been involved. Tr. 56. But after a while, Mortensen began to realize that he was the one being investigated. *Id.* At some point, Mahuna told Mortensen about Waiki's allegations. Tr. 58-59, 182-83. Mortensen was surprised by the "feeling of disgust" Matthews appeared to hold against him and the "very confrontational" nature of the interview. Tr. 56, 108. Mortensen's union representative considered the interview "intense" for an investigation. Tr. 108.

Mortensen disputed and denied Waiki's allegations. R.Ex. 10; Tr. 52-53, 66. He denied saying that line service is men's work. R.Ex. 10. He explained that Bobby Baldado told Ashlyn Quinsaats' boyfriend that "a ramp job is for men not women" at a party outside of work in the presence of Quinsaats. *Id.*; Tr. 53. At work, it was Quinsaats who repeated the story, telling Mortensen about Baldado's comment. R.Ex. 10. Mortensen denied that he turned to Waiki and asked, "Right, Jay?" *Id.*

Mortensen disputed Waiki's account of the conversation about his landscaping business. R.Ex. 10; Tr. 52-53. When asked whether he was "glad" the job applicant accepted a different job so he "didn't have to babysit" her, Mortensen said Waiki had misconstrued his comment and that, if

he didn't want to hire a woman, he wouldn't have offered the job to a female applicant or even have interviewed her. R.Ex. 10.

Mortensen admitted that he did not assist with gate checks. *Id.* He explained that baggage and gate checks weren't part of a line service agent's job. *Id.* But he denied telling new line service agents not to assist with gate checks. *Id.* Rather, he told them to prioritize the line service work and assist ramp agents as "a second choice." *Id.*

Mortensen denied aiming an aircraft at Tamashiro to "teach [him] a lesson" or at all. R.Ex. 10; Tr. 66. He explained that he conducts pushbacks "in the angle because we have a lot of room." R.Ex. 10. The pushback procedure at Hilo differed from that at Honolulu because the gate areas were more crowded at Honolulu. *See* Tr. 174. Most of Waiki's experience in line service was her (failed) trial period in Honolulu, where aircraft had to be pushed straight back onto the taxiway to avoid any possible collision with aircraft parked at the adjoining gates. For the many years he was a line service agent at Hilo, Mortensen had always angled the aircraft toward the taxiway earlier than is done at Honolulu, and neither any manager nor Tamashiro had ever commented on this or urged Mortensen to do it differently. Tr. 61-62, 176; R.Ex. 10.

Finally, Mortensen denied during the interview that he intended to create a flight delay by leaving a flight without a wing walker. Tr. 61-62. He explained that he excused a wing walker because he thought another wing walker, Nishimura, was available. *Id.* It turned out, however, that Nishimura was busy. *Id.*

At the ALJ hearing years later, Mahuna questioned Mortensen's credibility because Mortensen "glared" at him and Matthews during most of the interview, misinterpreted a question, and did not answer one question. Tr. 188-89. Matthews's contemporaneous interview notes, however, do not show Mortensen misinterpreting or failing to answer a question. *See* R.Ex. 10. Of course, there is no note about whether Mortensen "glared" at the interviewers.

Mahuna also testified that, when the interview concluded, Mortensen requested a copy of the notes that he'd been asked to sign. Accordingly to Mahuna, Hawaiian Airlines generally does not give interviewees copies of the notes. *Id.* But Mahuna and Matthews stepped out of the room and allowed Mortensen and his union representative an opportunity to review the notes. *Id.* When Matthews returned, she found them photocopying the notes. *Id.*

Either at the end of the interview or later that day, Mahuna gave Mortensen a "Notification of Internal Investigation and Held Out of Service" letter. R.Ex. 9; Tr. 183. The notification summarized the allegations. *Id.* at 21. It stated that Mortensen was being held out-of-service without pay, pending the result of the investigation. *Id.* This triggered the requirement in the collective bargaining agreement that the Company provide the Union within 48 hours a written statement of the charges against Mortensen, conduct a hearing within 5 days, and provide a written decision within 10 days following the hearing. *See* R.Ex. 5 at 69-70.

*Charge letter.* Mahuna and Matthews discussed the investigation with Vice-President of Employee and Labor Relations Karen Berry. Tr. 222-23. The three concluded that there was sufficient evidence to issue the charge letter and proceed to a disciplinary hearing. Tr. 221-22.

Mahuna signed the charge letter, which is dated October 23, 2013. R.Ex. 9; Tr. 221. Mahuna provided it to Mortensen and copied the Union, Gibson, Baldado, and Matthews (among others). R.Ex. 9 at 8. In the letter, the Company charges Mortensen with violating its “Discrimination and Harassment-Free Workplace” policy section 1; its “Workplace Violence” policy sections 2 and 4;<sup>9</sup> and several “House Rules.”<sup>10</sup> R.Ex. 9 at 7; Tr. 217, 221. As Mahuna testified, the only basis for the charges was the interviews that he and Matthews conducted (as described above). Tr. 219. The letter advises that Mortensen was entitled to a hearing and states that the Company would schedule the hearing. R.Ex. 9 at 7.

*Credibility and reliability of Matthews and Mahuna’s investigation.* I find Hawaiian Airlines’ investigation ill-conceived and inadequately executed. It produced what I find to be materially incomplete information on which the Company misplaced its reliance to reach what, in my view, were unsubstantiated conclusions about Mortensen’s conduct.

At the outset, I find the accuracy and professionalism of the investigation reduced by Matthews and Mahuna’s decision to have Gibson and Sheila Baldado “pop in and out” of at least seven of the nine employee interviews. I refer to it as their “decision” because the repeated appearances of Gibson and Sheila Baldado were too orchestrated to have come as a surprise to Mahuna or Matthews. It appears that they never stayed throughout an interview; they always interrupted the interview while it was in progress; they never asked any questions; they did not take notes; and they did not attend the interview of Mortensen. That takes planning.

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<sup>9</sup> Section 2 of the Workplace Violence policy prohibits (as relevant here) “[a]ny threat or act of violence occurring on Company premises or with fellow employees . . .” (subsection 2.1). R.Ex. 2 at 117. It requires that employees “immediately report incidents of violence and other forms of prohibited conduct to their immediate supervisor or other management personnel; and to Safety and Security and/or to Human Resources.” *Id.* at 118 (subsection 4.2).

<sup>10</sup> The House Rules provide, in relevant part, that the following conduct may result in discipline, including discharge:

- 5.1 Sexual harassment or harassment on the basis of . . . sex . . . . Any violation of the Company’s Discrimination and Harassment-Free Workplace policy.
- 5.3 Violation of any Company safety/security policies, procedures, standards and/or guidelines.
- 5.10 Any conduct which physically harms, or threatens to damage or harm, any person or any property. This includes threatening . . . or engaging in any act of physical aggression . . . . Any violation of the Workplace Violence policy.
- 5.16 Failure or refusal to work with others. Failure or refusal to work cooperatively with co-workers, customers or management. This also includes interference with the work of others.
- 5.20 Unprofessional, immoral, indecent or other inappropriate behavior during working hours, on the premises of Hawaiian Airlines, while in all or part of a Company uniform, or while representing Hawaiian Airlines. Discourtesy to customers. Improper conduct at any time or place which adversely affects the employee’s relationship with his/her job, fellow workers and/or supervisors, or which is detrimental to Hawaiian Airlines’ reputation and/or goodwill among its customers and/or in the community as determined by the Company.
- 5.31 Unauthorized work stoppage, slowdown, or other interference with Company operations.

R.Ex. 3, *see* R.Ex. 9.

It is intrusive, disruptive, and irregular to have people—any people—“popping in and out” during an investigative interview. With nearly 40 years’ experience in employment litigation (including 15 years as an ALJ), I have never heard of an internal investigation in which people regularly and repeatedly popped in and out during most of the witness interviews. To obtain complete and accurate information, the investigators must earn at least a modicum of trust from the interviewees. The intrusion of additional managers while the interview is ongoing would tend to disrupt whatever trust was building and reduce the extent to which the interviewees would answer candidly. The picture of a line employee seated across from four managers during an investigative interview is inherently intimidating.

Second, Gibson asserted that she was not involved in the investigation or the discipline, but this obviously is not correct; attending seven of the nine employee interviews is involvement. Tr. 133. The Company’s effort to depict the investigation as conducted solely by disinterested, outside human resources managers is unconvincing. Unlike Matthews and Mahuna, Gibson and Sheila Baldado, as the top two managers at Hilo Station, knew everyone being interviewed, and everyone knew them to be their bosses.

Moreover, having the top two local managers present could intimidate at least some of the witnesses and reduce their level of candor. Witnesses whose bosses are listening to what they are saying likely would take care not to criticize or offend their managers. The particular circumstance was worse because Sheila Baldado was married to Bobby Baldado, about whom Mortensen had raised repeated complaints and who apparently was involved in the comment about line service being “men’s work.” Assuming that all or most of the interviewed witnesses knew of Mortensen’s disagreements with Bobby Baldado, some of the witnesses might have been reluctant to support Mortensen while Sheila Baldado was present at the interviews. This is why employers who are investigating complaints of discrimination generally rely on investigators who are not part of the relevant employees’ management chain; many even bring in outside investigators.

The “popping in and out” not only reduces the overall credibility of Hawaiian Airlines’ internal investigation; it also reflects poorly on Mahuna and Matthews’ skill at conducting investigations of this kind. Gibson’s denial of any involvement makes her direct involvement all the more of concern.

Next, I find Mahuna’s evaluation of the credibility of Waiki and of Mortensen questionable at best. The investigators almost certainly exaggerated Waiki’s credibility and undervalued Mortensen’s. Waiki likely did have motive to discredit Mortensen. She had failed an opportunity for a line service job in Honolulu. She had to wait nearly a year for another opportunity, and that was at the much smaller airport in Hilo. If Waiki was concerned that she was failing again and that, as lead, Mortensen might not give her a supportive evaluation, she would want to discredit him before he had a chance to comment on her performance.

Also, unknown to Mahuna, Waiki would later testify at the union grievance arbitration that she promptly reported the Tamashiro incident to Sheila Baldado and that Sheila told her to report it to Gibson. R.Ex. 8 at 32. This is important because Company policy requires employees who

witness workplace violence to report it immediately. R.Ex. 8 at 117. But Waiki's account that she reported this to Sheila Baldado likely is untrue.

At the ALJ hearing, Gibson testified that she knew nothing about Waiki's allegation that Mortensen directed an aircraft toward Tamashiro. Gibson also testified that, if Sheila Baldado had received a report like this, she surely would have told Gibson. Tr. 131.

I accept that Sheila Baldado would have told Gibson of a report like Waiki's. Waiki was alleging a serious safety violation: essentially that Mortensen intentionally acted to frighten Tamashiro with potentially serious bodily harm, not to mention the property damage if a moving aircraft was pushed into a vehicle nearby Tamashiro. Given that Mortensen had repeatedly complained about Sheila Baldado's husband Bobby, Sheila would, if anything, be all the more inclined to report such a serious safety violation to Gibson. I accept that Gibson did not know of Waiki's allegation, that Sheila Baldado never reported it to Gibson, and most importantly, that Waiki never reported any such incident to Sheila Baldado (who otherwise would have told Gibson). I find, more likely than not, that Waiki did not raise her allegations about Tamashiro until Mahuna and Matthews interviewed her almost a month later.<sup>11</sup>

The investigators noted that Waiki alleged Mortensen told both her and Nishimura not to assist ramp agents, but they drew no inferences about Waiki's credibility when Nishimura denied this. They neglected that almost all of the witnesses (other than Waiki) identified Palea as the line service agent who told his co-workers not to help ramp agents, not Mortensen. A number said that Waiki discussed this issue with many of them, but she consistently said that it was Palea who said this to her. Waiki was not reluctant to criticize Mortensen. If she'd also heard Mortensen telling line service workers not to help ramp agents, Waiki would have attributed this to both Palea and Mortensen, not just Palea.

Mahuna and Matthews made no effort to look into Mortensen's explanation for a flight delay—that Mortensen had let the assigned line service agent leave because he mistakenly thought another agent was available for the flight. Further investigation of that question could have bolstered Mortensen's credibility.

Another significant weakness in the investigators' evaluation of witness credibility was that they relied far too heavily on demeanor evidence. I question that, as Mahuna reported, Waiki was both "very emotional" and also "very specific" and "very quick with her responses," and that this demonstrated that she was credible. It's possible that Mahuna's observation of Waiki (as he recalled it at the ALJ hearing four years later) was generally accurate, but I doubt it. Usually people who are "very emotional" do not give quick, well-phrased, specific responses.

Of more concern is that Mahuna concluded that Mortensen was not credible because he "glared" at him and Matthews during the interview. There are many ways an employee with 17 years' seniority might react to surprise allegations that threaten his long-term employment and, in the employee's view, are false or based on a greatly distorted construction of what he'd said or done.

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<sup>11</sup> At the ALJ hearing, Mahuna could not remember whether he first learned about the safety-related complaint before starting the interviews (*i.e.*, referred for investigation) or while interviewing Waiki during the investigation. Tr. 220.

Glaring at the managers who surprised him with these allegations would seem to be a reasonably controlled example of one such response; it does not demonstrate that the accused employee is a liar. Truthful people who are wrongfully accused often are indignant. What emotion could Mortensen have manifested that would have convinced Mahuna and Matthews that he was telling the truth?

I am not concluding that Mortensen was or was not truthful based on this demeanor evidence; I am finding that Matthews and Mahuna could well have drawn an erroneous inference from the demeanor evidence they observed and should have developed more reliable evidence. Generally, observations of witness's emotional state or eye contact can be more misleading than helpful. And here Mahuna and Matthews neglected the evidence they had or they should have developed and they instead relied on who was "glaring" and who was "very emotional" yet "very specific" when answering the investigator's questions.

Among the neglected investigative work, a breathtaking inadequacy is that Mahuna and Matthews did not interview Tamashiro. According to Waiki, Tamashiro was essentially the victim of repeated criminal assaults that Mortensen perpetrated against him and that Nishimura also saw. Although sex harassment can be a very serious allegation, much depends on what is alleged, and the allegations here were not severe. Company policy states of the conduct alleged: "Derogatory comments or slurs . . . based on a person's sex . . . may constitute harassment when such conduct unreasonably interferes with a person's work performance or creates an intimidating, hostile or offensive work environment." R.Ex. 4 at 114. Mortensen's two alleged comments, even if he made them as Waiki alleged, while inexcusable and offensive, almost certainly do not amount to a pervasively intimidating, hostile, or offensive environment. Mahuna admitted at the ALJ hearing that, in his experience as a human resources manager, he had never heard of an employee being terminated from employment for making a comment along the lines of "this is men's work." Tr. 221.

What threatened Mortensen's employment was the allegation Waiki newly raised during the investigation; namely, that Mortensen intentionally aimed a moving aircraft so that it might have hit Tamashiro had Tamashiro not moved. Workplace violence such as what Waiki alleged, if it occurs, is plainly a terminable offense. Indeed, without that incident, the discipline likely would have been less severe than a termination. Tr. 222; R.Ex. 8 at 121.

It was Tamashiro's job as a wing walker during a pushback to watch how the aircraft was moving and to be certain its path was safe as it was moved from its parked position at the gate until it was under its own power on the taxiway. Given that his job was to make these observations, he certainly should have noticed if—on repeated occasions with Mortensen operating the tractor each time—the aircraft was being pushed in a manner that threatened his own personal safety. Waiki alleged that Tamashiro had to move out of the way because the wing would have passed right over his location had he not moved. It is almost certain that Tamashiro did not move out of the way of the aircraft by coincidence; if Waiki's allegation is true, Tamashiro moved because he saw the aircraft coming.

Had Matthews and Mahuna interviewed Tamashiro, he likely would have stated, as he testified at the arbitration, that Mortensen never purposely pushed an aircraft toward him. R.Ex. 8 at 26-27,

52. He would have explained that wing walkers stood at the taxiway to block traffic in 2013, and that he stood at an angle, not in direct alignment with the wing tips so that he would have more space and a better view of the tractor operator's signals. *Id.* at 30, 35-36. He would have disputed Waiki's allegation that the wingtip of an aircraft went over a tug near him during a pushback. *Id.* at 43-44.

In short, if Mortensen was repeatedly pushing (or even once pushed) aircraft at Tamashiro in a manner that threatened to harm him, Tamashiro would have known it and would have been the best witness to verify it. Yet, at the ALJ hearing, Mahuna could not recall whether he interviewed Tamashiro. Tr. 226. He admitted that "if we did not interview him, I'm not sure why, but I'm almost certain we would have." Tr. 226.

But, in fact, Matthews and Mahuna did not interview Tamashiro. Matthews' notes show without question that there was no such interview. Mahuna and Matthews' failure to elicit information from Tamashiro had a direct and material effect on their findings from the investigation.

Matthews and Mahuna should also have interviewed Gibson and Sheila Baldado, especially on the allegation that Mortensen intentionally aimed an aircraft at Tamashiro. Matthews and Mahuna are not line service agents and are not trained in that work. They both were stationed in Honolulu; there is no evidence that either knew the pushback practices at Hilo. Mortensen told Matthews and Mahuna that, for all the years he was a line service agent at Hilo, he always angled the aircraft early on the pushback because there was plenty of room to do that (unlike in Honolulu). Tr. 61-62; R.Ex. 10. Before rejecting that statement because Mortensen "glared" at them, Matthews and Mahuna needed to ask Gibson and Sheila Baldado about the pushback practices at Hilo.

The investigators might have discovered from Gibson and Sheila Baldado that, as Mortensen testified at the ALJ hearing, Hawaiian Airlines positioned wing walkers closer to aircraft during pushbacks in Honolulu (at its inter-island gates) than in Hilo. Tr. 45-46. This is because, as Villaro testified, the space for a pushback is "tighter" in Honolulu. Tr. 175-76. In Honolulu, the aircraft sit closer to the taxiway than in Hilo. Tr. 45. Wing walkers in Honolulu stand by the roadway, but because the roadway is close to the aircraft, wing walkers end up standing at the rear of the aircraft. *Id.*

Matthews and Mahuna might have learned that, after switching from powering out to pushbacks in 2005 or 2006, Hilo's management had varying views on where the wing walkers should stand. Tr. 45-46. As Mortensen summarized at the ALJ hearing: "Should they be behind the wing, should they walk with the wing of the aircraft, [or] should they be outside by the roadway . . . ?" Tr. 45. But there was no question that wing walkers at Hilo could stand farther back because of the greater distance to the taxiway; most of them stood well beyond the rear of the aircraft parked at the gate. This would tend to explain why it was safe to angle the aircraft sooner on a pushback at Hilo than at Honolulu, although Waiki might not have understood this because most of her experience was at Honolulu, and she was new to Hilo. It could also explain why Tamashiro did not perceive the aircraft being pushed back as aimed at him; Tamashiro, had he been interviewed, would have stated that wing walkers stood on or near the roadway to stop traffic in 2013. R.Ex. 8 at 29-30.

At the least, Mahuna and Matthews should have considered that Waiki was new to Hilo and might not have understood that practices at Hilo differed from those on which she was earlier trained (unsuccessfully) at Honolulu. As Tamashiro was an experienced line service agent at Hilo, he might have anticipated that on each pushback (and certainly each pushback that Mortensen did), the aircraft would be angled well before it reached the taxiway; he would have routinely moved out of the way because he understood the local practice and did not feel threatened. But Mahuna and Matthews were satisfied without talking to Tamashiro.

Mahuna's analysis neglects that Gibson and Sheila Baldado should have known better than most what the approved practices were for a pushback and whether Mortensen's description of how he angled the aircraft was consistent with Hilo practice. Baldado could have confirmed whether Waiki reported the pushback incidents at the time they allegedly happened and how Baldado responded to any such report. Mortensen's statement that no manager at Hilo advised him not to angle an aircraft as he did during a pushback directly implicated Gibson and Sheila Baldado: Mahuna and Matthews could have asked each of the two managers if they knew how Mortensen pushed back aircraft, if they had a problem with it, and if they told Mortensen they had a problem with it. Matthews and Mahuna should have involved Gibson and Sheila Baldado on the allegation about Tamashiro if for no other reason than that the two direct managers needed to know without delay about such a serious event occurring at Hilo Station. But Matthews and Mahuna did not ask Gibson or Sheila Baldado any substantive questions or interview either of them.<sup>12</sup>

Matthews and Mahuna also should have interviewed Quinsaas. Quinsaas could have confirmed who said what about Bobby Baldado's sexist "joke" at an off-work party. *See* R.Ex. 8 at 8. They could have learned, as Quinsaas later testified at the arbitration, that she worked the afternoon shift with Mortensen and that Mortensen's account of his conversation about Bobby Baldado's comment about "men's work" was accurate. R.Ex. 8 at 6, 8. Quinsaas testified at the arbitration that Baldado said that "the ramp is made for men and not girls"; that, in the break room at work, she told Mortensen about Baldado's comment; that she never saw or heard Mortensen treat a woman disrespectfully; and that she never saw Mortensen deliberately push an aircraft toward a wing walker. *Id.* at 6-8.

But, having concluded that Waiki was credible and Mortensen was not, Matthews and Mahuna concluded that Mortensen made the comment to Waiki about line service agent jobs being men's work. Mahuna's explanation for not interviewing Quinsaas or Bobby Baldado was that they didn't happen to be present and that he and Matthews were on a strict timeline. Tr. 235.

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<sup>12</sup> Mahuna testified that generally he would interview the station manager or assistant station manager if their names appeared in the complaint or came up during an interview. Tr. 189. He testified that he did not interview Baldado or Gibson because their names did not come up in Waiki's complaint or interview. Tr. 189. Contrary to Mahuna's testimony, Matthews' notes indicate that Waiki mentioned Sheila Baldado several times during her interview. *See* R.Ex. 10. Also contrary was Mortensen's testimony that the managers at Hilo never advised him not to angle the aircraft on pushback. Really, Mahuna offered no viable excuse for the failure to interview Tamashiro.

But the investigators had no timeline under the collective bargaining agreement. They could have interviewed the four or five more needed witnesses before deciding how to proceed.<sup>13</sup> Gibson and Sheila Baldado were available on all the days Matthews and Mahuna were interviewing; that's how they were able to attend seven of the nine interviews. Matthews and Mahuna could have talked to them throughout that time. Even if Matthews and Mahuna had to return another time to Hilo, both of them worked for an airline that has multiple flights daily between Honolulu and Hilo. Both worked at the airport in Honolulu and could have walked directly onto an aircraft, and all of the persons to be interviewed worked at the airport in Hilo, where Matthews and Mahuna would have landed. These were easy day trips free of expense to an airline that was flying aircraft between these locations anyway.

It was the investigators' decision to put Mortensen out-of-service that triggered the tight timeline for the charge document, the disciplinary hearing, the decision, the appeal, the decision on appeal, and the arbitration. *See* R.Ex. 5 at 70. Nothing on the record established that the investigators were under time constraints that prevented them from following up on what they learned in the interviews and supplementing with five or six additional interviews before taking Mortensen out-of-service.

In Mahuna's opinion, the termination was principally justified because Mortensen intentionally pushed aircraft toward Tamashiro, which Mahuna described as "an extremely egregious safety violation." Tr. 191. He based this conclusion on Waiki's statement that Mortensen said he'd teach Tamashiro a lesson (as he pushed the aircraft toward him), which Mahuna viewed as confirmed by Goya. *Id.* In fact, Goya confirmed no more than he once a comment like that, but he did not know who said it; Goya never confirmed that it was Mortensen who made the comment. R.Ex. 10. Although several employees would have heard the same transmissions Goya heard, no one else heard anything like what Waiki alleged Mortensen said. Having reached his conclusion, Mahuna believed that Mortensen would pose a safety risk to others if he remained employed; after all, according to Mahuna, Mortensen had pushed the aircraft toward Tamashiro "a number of times." Tr. 192.

While testifying that he had terminated the employment of others for violating workplace safety rules, he admitted that he had never terminated employment because someone referred to a job as "men's work." Tr. 193-94, 221. He admitted that he might not have recommended termination were it not for the pushback incident. Tr. 221-22. But, still, he did take all of the issues into account when he recommended termination. Tr. 222.

*Step 2 hearing.* On November 19, 2013, there was a "Step 2" hearing before then-Honolulu Station Administration Manager Lianne Villaro to determine the disciplinary action. R.Ex. 6 at 9.<sup>14</sup> At the time, Villaro had not known or heard of Mortensen. Tr. 158. Villaro began doing disciplinary hearings in 2013 and, by the time of the ALJ hearing in 2017, she had presided at 12

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<sup>13</sup> Matthews and Mahuna interviewed only three of the six line service agents at Hilo. They should have interviewed the other three. Instead, they focused too heavily on the ramp agents (and a customer service agent), who would not know what Mortensen said to line service agents about whether to help ramp agents and likely would not know as much as line service agents how Mortensen conducted a pushback.

<sup>14</sup> The hearing was conducted weeks after the deadline. As the Union made no objection, I infer that the Company and the Union agreed to the postponement.

to 15. Tr. 159. I infer from this that the Mortensen hearing was one of the first disciplinary hearings at which Villaro presided.

Two Union officials represented Mortensen. R.Ex. 6 at 9. Two senior contract administrators represented Hawaiian Airlines. *Id.* Both parties submitted documentary evidence. Tr. 158-59. Hawaiian Airlines relied on Matthews' notes from the investigative interviews of employees; the union presented a video, a petition, and employee statements. R.Ex. 6 at 10-12. There was live witness testimony, although Villaro does not state in her written decision who testified, and the record is silent on the question.

Hawaiian Airlines argued that the employment should be terminated. *Id.* at 11. It presented its allegations in three parts: (1) "Failure or refusal to assist with gate checks/deliberate work stoppage or slowdown"; (2) "Gender discrimination"; and (3) "Pushing an aircraft in the direction of a Co-Worker." R.Ex. 6 at 10-11.

The Union disputed all of the charges. It argued that Mortensen never told employees not to assist with gate checks; he told employees they could only help after completing their line service duties. R.Ex. 6 at 11. It argued that another employee, not Mortensen, made the "men's work" comment at a social gathering outside of work; that many employees were there; that employees later discussed the comment at work; and that some employees at work might have overheard that conversation and thought Mortensen was making the comment. R.Ex. 6 at 11-12. The union argued that, as a business owner, Mortensen had the right to hire whomever he wanted for his landscaping business; he had no obligation to hire a woman. *Id.* at 12.

Finally, the Union argued that Mortensen did not push an aircraft at Tamashiro with an intent to hit Tamashiro or to guide the wings over his tug. R.Ex. 6 at 12. The Union submitted a statement from Tamashiro, who denied that Mortensen had tried to hit him with or to pass the wing over a vehicle Tamashiro was operating. *Id.* The Union presented a video showing an aircraft pushback in Honolulu to demonstrate the close proximity between the wingtip of an aircraft and wing walker. *Id.* It then presented a clarifying statement from Nishimura, who stated that roughly ten to fifteen feet separated Tamashiro from the aircraft's wingtip during pushbacks, apparently no closer than is routinely done in Honolulu. *Id.* The Union also submitted a petition that nineteen of Mortensen's co-workers signed, stating that they'd never seen or thought that Mortensen was intentionally pushing an aircraft toward a wing walker. *Id.* The Union submitted three character references for Mortensen. *Id.*

Villaro issued a written decision dated December 4, 2013. R.Ex. 6. Other than summarizing the arguments above and the evidence offered, Villaro concluded, that the Company had not sustained its allegation that Mortensen was responsible for a flight delay.<sup>15</sup> The entirety of Villaro's findings and conclusions on the remaining charges was:

The Company did provided [sic] sufficient evidence to show violation of each remaining charges [sic]. Therefore, just cause exists to terminate your

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<sup>15</sup> As Villaro opined: "There was only one delay in the past six months that was attributed to Line Service and no verification that the employee was in any way responsible for that delay. Therefore, this violation should not be sustained."

employment with Hawaiian Airlines effective immediately. Your final check is enclosed. If you are covered under the Company's medical and/or dental plans, information on continuation of coverage under COBRA will be provided to you under a separate cover. ¶¶ This decision is issued on a non-binding, non-precedent setting basis. ¶¶ I thank you for your service to Hawaiian Airlines and wish you well in your future endeavors.

R.Ex. 6 at 12-13. Although the Union put Mortensen's employment history on the record, Villaro did not discuss, as the collective bargaining agreement requires, Mortensen's spotless disciplinary history or the length of his employment. She did not resolve the inconsistencies in the evidence. She did not evaluate the credibility of the witnesses, the sufficiency of the investigation, what in particular justified a termination, or any other aspect of her findings, analysis, or conclusions. She did not, for example, discuss Tamashiro's denial that Mortensen pushed an aircraft toward him. Nor did she discuss whether the movements of aircraft during pushbacks in Honolulu showed that 10 to 15 feet of separation from the wing walkers was enough to establish safety. She did not discuss Nishimura's statement that the aircraft Mortensen was moving never were closer to Tamashiro than that distance.

Instead, she offered what explanations she had nearly four years later at the ALJ hearing. She testified that she weighed the conflicting testimony when concluding that there was just cause to terminate the employment. Tr. 160, 162. She said she relied on Matthews' interview notes and the employee statements. Tr. 160. She said she decided to terminate the employment primarily because of the pushback and the sex harassment. Tr. 160. She was aware of Tamashiro's denials, but she placed more weight on the employees who reported that Mortensen expressed an intent to teach Tamashiro a lesson for standing in the wrong place. Tr. 162. She had found Waiki credible on that point because other employees "heard similar verbiage or similar words" from Mortensen about teaching a lesson. Tr. 162-63. She said she'd concluded that Tamashiro was "probably oblivious to where he was supposed to be and also, therefore, oblivious as to whether or not the aircraft was actually being pushed closer to him than it should have been." *Id.*

Villaro's level of apparent recall at the ALJ hearing of the evidence adduced at Hawaiian's Step 2 hearing (at which she presided) is somewhat surprising. She was testifying some four years after the hearing she'd conducted and doing so without the benefit of any documentation or specific findings in the written decision she wrote. But even assuming that she was faithfully testifying only to what she recalled, Villaro's testimony is unpersuasive.

Why would an experienced wing walker like Tamashiro not know what a safe distance is for a passing aircraft on a push back? Of course he would have noticed if an aircraft was approaching him too closely: his entire function as a wing walker during a pushback was to guide the maneuver to make sure it was done safely. Villaro's statement that other employees corroborated Waiki is at best an exaggeration. Goya said he heard a comment about teaching a lesson, but he didn't know who said it; that is partial corroboration but no more than that. No one else corroborated the statement at all. As to Waiki's other allegations, all of the other would-be corroborating statements during the investigation consisted of no more than other employees' reporting of stories Waiki told them, and almost all of the interviewed employees remembered Waiki's complaining about Palea, not Mortensen. Nishimura did witness the

pushbacks, but Villaro seems to have ignored his further statement that the aircraft wing was never closer than 10 to 15 feet from Tamashiro. That is not corroboration that Mortensen intentionally aimed the aircraft at Tamashiro, especially with Mortensen's explanation of how he angled the aircraft toward the taxiway because there was room to do that in Hilo. None of the other people whom Mahuna and Matthews interviewed saw Mortensen push an aircraft toward anyone, and nineteen co-workers signed a statement that they'd never seen Mortensen push an aircraft at anyone. Together, the level of corroboration was scant at best.

At the ALJ hearing, Villaro denied that Mortensen's safety reports played any role in her decision. Tr. 163. She does not refer to the safety reports in her written decision, but then she didn't discuss any of the evidence. *See* R.Ex. 6. She could not recall whether anyone mentioned a safety report during the Step 2 hearing, but she did not deny it. Tr. 162. She testified that no one submitted any safety reports or complaints as an exhibit. Tr. 163. But I reject that testimony and find the opposite for two reasons.

First, Villaro signed a declaration on April 10, 2014, in which she stated:

*4. Prior to Hans Mortensen submitting his "CS/Ground Submitter GSIP Report 484" at the hearing on November 19, 2013 [i.e., Villaro's Step 2 hearing], I was not aware of Mr. Mortensen reporting any ground operations safety issues, air safety issues, or submitting any Ground Safety Improvement Program ("GSIP") report. To my knowledge, those reports are always kept confidential by the Event Review Committee ("ERC") and not provided to Hawaiian Airlines management.*

*5. As I was not aware of Hans Mortensen ever reporting any ground operations or air safety issues or ever filing any GSIP report or complaint, any such reports played no role in my decision that there was just cause to terminate Hans Mortensen's employment with Hawaiian Airlines. In fact, in my more than ten (10) years of employment with Hawaiian Airlines, I have no knowledge of any disciplinary action ever being initiated or taken against any Hawaiian Airlines' employee for submitting a GSIP report, complaint or safety issue.*

Hawaiian Air, motion for summary decision (emphasis added).<sup>16</sup>

The declaration is internally inconsistent, and I reject the conclusory statements in the second paragraph. I discuss this in more detail along with a similar (almost identical) declaration that the Step 3 hearing officer signed. I give more weight to the italicized language in the first paragraph, which I read to be a concession that Mortensen submitted the GSIP report at the Step 2 hearing. I give less weight to the conclusory statement in the second paragraph that Villaro knew nothing of the GSIP report.

It was Villaro's duty at Step 2 to review the evidence before her and decide whether discipline should be imposed and, if so, what level of discipline. As the GSIP report was part of the

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<sup>16</sup> I take official notice of this declaration that Hawaiian Airlines submitted in support of its motion for summary decision. It is part of this Office's files and records on this case.

evidence at Step 2, I find that Villaro reviewed it and considered it when she decided to terminate the employment.

*Step 3 hearing.* When the Company decides at Step 2 to terminate the employment, there is an automatic appeal to a Step 3 hearing. R.Ex. 5. The Step 3 hearing officer must be a vice-president or a designee of a vice-president; she is usually a higher ranking manager than the Step 2 officer. Tr. 165-66. The Step 3 officer reviews only the evidence that the parties submitted at Step 2; no new evidence is received. Tr. 165-66. Mortensen's Step 3 hearing was on February 14, 2014. R.Ex. 7 at 1. Linda Srabian, Senior Director of North America Stations, was the hearing officer. *Id.* The Company and the Union both presented arguments. Tr. 165.

On March 3, 2014, Srabian issued a written decision. *See* R.Ex. 7. She affirmed Villaro's findings and she sustained the decision at Step 2 to terminate the employment. R.Ex. 7 at 3.

Srabian found that Waiki and Nishimura's statements supported the charge that Mortensen's behavior was inappropriate, threatening, and in disregard of safety. R.Ex. 7 at 2. As Srabian cited the statements of Waiki and Nishimura, she appears to have been referring to the allegation that Mortensen intentionally moved an aircraft toward Tamashiro. Srabian quoted from those statements. She noted Waiki as stating that, "When Tamashiro wing walks, whatever side he is on, Hans [Mortensen] will turn the aircraft toward . . . [him]." She found corroboration in Nishimura's statement, which she quoted, that Mortensen "cuts it shorter than usual instead of pushing straight out past the roadway" and he "[o]nly does it with one person" and "[u]sually only does it toward one guy . . . Tamashiro." *Id.*

As to Mortensen's intent, Srabian noted Waiki's statement that, "You want to stand there, I teach you a lesson . . . you'll never come close again." *Id.* Srabian considered "the union's position that directing an aircraft towards an individual was not inherently unsafe," but she noted that Mortensen's action "does not forgive the fact that [Mortensen] acted in a manner to 'teach (a subordinate) a lesson.'" *Id.* She also noted Nishimura's statement that Mortensen did this only when Tamashiro was the wing walker. Srabian thought Mortensen's conduct was "even more egregious" because he was a lead line service agent. *Id.* at 3.

On April 11, 2014 (about five weeks about she issued her written decision on termination), Srabian signed a declaration. She stated, in part:

4. *Prior to Hans Mortensen submitting his "CS/Ground Submitter GSIP Report 484" at the hearing on February 14, 2014 [i.e., Srabian's Step 3 hearing], I was not aware of Mr. Mortensen reporting any ground operations safety issues, air safety issues, or submitting any Ground Safety Improvement Program ("GSIP") report. In addition, to my knowledge, those reports are always kept confidential by the Event Review Committee ("ERC") and not provided to Hawaiian Airlines management.*

5. *As I was not aware of Hans Mortensen ever reporting any ground operations or air safety issues or ever filing any GSIP report or complaint, any such reports*

played no role in my decision to sustain Hawaiian Airlines' decision to terminate Hans Mortensen's employment.

R.Ex. 15 (emphasis added).

Villaro signed her declaration on April 11, 2014; Srabian signed hers the next day. Much of the language in the declarations is verbatim identical. I conclude from the timing of and the language in the declarations that someone other than Srabian and Villaro drafted both declarations, probably a person with expertise in defending the Company, such as a human resources director or an attorney. While that does not mean either declaration is false, it does mean that I should construe any ambiguity in the text against the experienced drafter who wrote the declarations on behalf of the Company.

Much as with Villaro's declaration, Srabian is expressly stating, first, that she had Mortensen's GSIP report at the time of the Step 3 hearing, and second that she knew nothing of the GSIP report at the time of her decision. The words, "Prior to Hans Mortensen submitting his [GSIP report] at the [Step 3] hearing . . ." expressly acknowledge that Mortensen submitted the GSIP report at the hearing. The second paragraph, which suggests Srabian was unaware of the GSIP report at any time before she decided there was just cause to terminate is inconsistent with the beginning of the first paragraph.

I interpret any ambiguity against the drafter and conclude from both declarations that the Union submitted the GSIP report at the Step 2 hearing and that it remained in the record at the Step 3 hearing. Even without the presumption against the drafter, the conclusory language in the second paragraph recited cannot overcome the specific facts stated in the opening sentence.

Moreover, Mortensen testified that he submitted the GSIP report with the petition of his [nineteen] co-workers (which Villaro noted that she received at the Step 2 hearing). Tr. 60; R.Ex. 6. As Mortensen explained, the GSIP report supported his argument (and the opinions of his co-workers) that he would never intentionally do something so unsafe as to aim a moving aircraft at anyone. *Id.* If the GSIP report was on the record at the Step 2 hearing, it was also on the record at Step 3; the records are identical. I give substantial weight to Mortensen's testimony; it conclusively resolves any ambiguity in the declarations of the two hearing officers.

*Arbitration.* Consistent with the collective bargaining agreement, *see* R.Ex. 5, a System Board of Adjustment heard Mortensen's grievance arbitration on February 22 and 23, 2017. R.Ex. 8. The parties submitted videos of typical pushbacks, drawings, statements, and other evidence. *See e.g.*, R.Ex. 8 at 26, 28-30, 45-50. At issue was whether Hawaiian Airlines terminated Mortensen for just cause within the meaning of the collective bargaining agreement. *Id.* at 6. When the record of this hearing closed, the arbitrator had not yet issued a decision. As Hawaiian Airlines' decision to terminate the employment was final at the Step 3 hearing, the arbitration is not relevant to determine the elements and defenses on Mortensen's complaint. Evidence adduced at the arbitration might add a gloss about what could have been discovered during Hawaiian Airlines' investigation, but if the evidence was not adduced by the conclusion of the Step 3 hearing, the Company could not have considered it at the time it decided to impose the adverse employment action (the termination).

## Discussion

As AIR 21 provides:

No air carrier . . . may discharge an employee . . . because the employee . . . (1) provided to . . . the employer . . . information relating to any violation or alleged violation of any order, regulation, or standard . . . of the Federal Aviation Administration or of any other provision Federal law relating to air carrier safety . . .

49 U.S.C. § 42121(a)(1).

The Act establishes a two-step burden-of-proof framework. *See* 49 U.S.C. § 42121(b)(2)(B). First, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) the employer took an adverse personnel action, and (3) the “protected activity was a contributing factor in the unfavorable personnel action.” 49 U.S.C. § 42121(b)(2)(B)(iii); *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Jan. 6, 2017) (*en banc*), PDF at 9 (Federal Rail Safety Act case applying the AIR 21 burdens). That is, “did the employee’s protected activity play a role, any role, in the adverse action?” *Palmer v. Canadian Nat’l Ry./Ill. Cent. R.R.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (*en banc*) (Federal Rail Safety Act case applying AIR 21 burdens), PDF at 52.

Second, if the complainant prevails at step one, he or she is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Powers*, ARB No. 13-034, PDF at 11. The second step “involves asking a hypothetical question”: “In the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway?” *Palmer*, ARB 16-035, PDF at 52. This defense requires a showing that the employer “would” have taken the same adverse action, not merely that it could have done so consistent with its policies and any collective bargaining agreement. *Id.* at 56-57.

*Complainant’s required showing.* The parties stipulated that: Hawaiian Airlines is an air carrier that falls within the scope of the Act; Mortensen engaged in protected activity when he filed a GSIP safety complaint in November 2012 and made complaints about the circle of safety; and Hawaiian Airlines discharged Mortensen. E.Br. 4 n.4, 19.<sup>17</sup> To establish liability, Mortensen

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<sup>17</sup> Mortensen argues that he engaged in protected activity when he was on the Noise Abatement Committee and that this activity was a contributing factor in his termination. As discussed above, Mortensen has provided insufficient evidence to establish protected activity or contribution. I am not satisfied that this is a safety-based activity within the meaning of the statute. But, even were this protected activity, Complainant’s activity occurred around 2004 to 2008—at least five years before the termination. At the time it occurred, there was no indication that the Company opposed Mortensen’s activity; Gibson’s email was commenting on the *Honolulu Advertiser*, not criticizing Mortensen. During the five years following Mortensen’s activity, Hawaiian took no retaliatory action; on the contrary, it promoted Complainant into the lead position. “A substantial time lapse between the protected activity and the adverse employment action ‘is counter-evidence of any causal connection.’” *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398 (7th Cir. 1999) (quoting *Johnson v. Univ. of Wisconsin*, 70 F.3d 469, 480 (7th Cir. 1995)).

must show only that his protected activity was a contributing factor in the discharge. *See Palmer*.

“A contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’” *Palmer*, ARB No. 16-035, PDF at 53. “[T]he level of causation that a complainant needs to show is extremely low.” *Id.* at 15. This standard is “broad and forgiving.” *Id.* “Any factor really means any factor.” *Id.* “The protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.” *Id.*

“[A]n ALJ may consider any and all relevant, admissible evidence to determine whether the protected activity did in fact play some role – was in fact a ‘contributing factor’ – in the adverse action.” *Palmer* at 29. The Act “contains no limitations on the evidence the factfinder may consider at all.” *Id.* at 15. “[N]othing in the statute precludes the factfinder from considering evidence of an employer’s nonretaliatory reasons for its adverse action in determining the contributing-factor question.” *Id.*

“‘[W]here the employer’s theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer’s evidence of its nonretaliatory reasons’ along with the employee’s evidence to determine whether protected activity was a contributing factor in the adverse action.” *Palmer* at 15. Because of the extremely low level of causation that complainant needs to show, the ALJ “should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Id.* Because in the majority of “cases the employer’s theory of the facts will be that the protected activity played *no* role in the adverse action, the ALJ must consider the employer’s nonretaliatory reasons, but only to determine whether the protected activity played any role at all.” *Id.*

“If the ALJ believes that the protected activity *and* the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.” *Palmer* at 15. Thus, considering “the employer’s nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the *only* reasons for its adverse action.” *Id.* As complainant “need only show that the [protected activity] played some role,” complainant “prevails at step one if there was more than one reason and one of those reasons was the protected activity.”<sup>18</sup> *Id.*

As often occurs in whistleblower cases, Complainant here offered no direct evidence of retaliation. No Company witness admitted that the GSIP report contributed to the termination; each Company witness who testified about this denied it; and there were no documents reflecting that Complainant’s protected activity was a contributing factor in the termination. Tr. 163, 190-91, 198, 212; R.Ex. 15. But a complainant “may meet her burden with circumstantial evidence.” *Palmer*, ARB No. 16-035, PDF at 55.

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<sup>18</sup> Hence, complainant need not “disprove the employer’s stated reasons or show that those reasons were pretext.” *Palmer*, ARB No. 16-035, PDF at 53. But showing they are pretext may be sufficient for complainant “to show protected activity was a ‘contributing factor’ in the adverse personnel action.” *Id.* at 53-54.

*Decisionmakers' knowledge of protected activity.* There were six Hawaiian Airlines managers involved in the termination: Mahuna, Matthews, Villaro, Srabian, Gibson, and Sheila Baldado. Nothing in the record shows that Gibson or Baldado participated beyond “popping in and out” of the employee interviews during Hawaiian’s internal investigation. From this, I inferred that each of these managers had some discussions with Mahuna and Matthews. But I know nothing about those discussions other than that they extended to orchestrating Gibson and Baldado’s participation in the interviews.

There is no evidence to suggest that Mahuna and Matthews interviewed Gibson or Baldado on the underlying facts; they should have, but more likely than not, they did not. Gibson testified that she received a copy of the charging letter and was “shocked,” but she was not interviewed; she knew only what she read. Tr. 131, 139. Nothing brings that testimony into question, and I accept it. If anything, a number of Gibson’s answers to Mortensen’s questions at the ALJ hearing left me with the impression that Gibson supported Mortensen throughout the time they worked together. This includes, for example, all the efforts she made to improve compliance with the circle of safety and her selection of Mortensen for the lead position. Both of these are inconsistent with retaliation. Considering this evidence, I find no basis to conclude that Gibson or Baldado had involvement beyond “popping in and out” of the witness interviews; I find no basis to conclude that either of them told Mahuna or Matthews about Complainant’s protected activity or that either Gibson or Baldado influenced the Company’s decision to terminate the employment.

Mahuna and Matthews conducted the investigation, suspended Mortensen without pay, and it appears more likely than not that Mahuna recommended Mortensen’s termination. But I have found that neither Mahuna nor Matthews knew of Complainant’s protected activity.

Whether knowledge of the protected activity is viewed as a separate element of a complainant’s burden or as a necessary component for a showing of contributing factor causation, the absence of knowledge of the protected activity negates a conclusion that the protected activity contributed to the actions of these managers.<sup>19</sup> Thus, as inadequate and unprofessional as the investigation was, I find no basis to conclude that Mortensen’s protected activity contributed to the investigator’s report, conclusions, decision to issue the suspension without pay and the charging letter, or the recommendation for a termination.

That leaves the two principal decisionmakers: Villaro, who conducted the Step 2 hearing and decided that the Company should terminate the employment; and Srabian who conducted the automatic appeal and upheld Villaro’s decision. I have found that both of them knew of Mortensen’s GSIP report when they took their actions. Mortensen submitted the report at Step 2 in an effort to demonstrate his commitment to workplace safety. Neither knew of the report before they presided at the hearings, but the report was on the record at both steps of the disciplinary procedure.<sup>20</sup>

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<sup>19</sup> As I stated above, there is no evidence of cat’s paw causation that affected the activities of Matthews or Mahuna.

<sup>20</sup> There is no evidence that Srabian, Villaro, Matthews, or Mahuna knew of Mortensen’s other circle of safety-related complaints.

### *Timing.*

An ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

*Palmer, supra*, at 56.

As the Ninth Circuit held in a Sarbanes-Oxley whistleblower case, temporal proximity should not be considered “without regard to its factual setting.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009). There is no “per se knowledge/timing rule” for AIR-21. *Palmer*, PDF at 37-51, 56. *See also, Pattenau v. Tri-Am Transp., LLC*, ARB No. 15-007, ALJ No. 2013-STA-37 (ARB Jan. 12, 2017), PDF at 27 (“From ‘close temporal proximity,’ the factfinder may infer a causal connection between the protected activity and the adverse action. But the factfinder also has to consider all the other relevant evidence. Temporal proximity, in other words, *can* be enough, but if it is, the ALJ must state explicitly that it *is* enough *on the facts of the specific case.*”) (Desai, J., concurring).

Srabian and Villaro each denied knowing of Mortensen’s GSIP report before each did her respective disciplinary hearing. I have found, however, that each learned of the report when each presided at her respective hearing. Mortensen’s GSIP report is dated November 14, 2012. Villaro conducted her hearing a year later, on November 19, 2013. Srabian’s was three months after that, on February 14, 2014. Thus, both hearing officers learned at the hearing for the first time of a protected safety report that Mortensen had submitted to Hawaiian a year or more earlier.

This differs from an adverse action taken on the heels of protected activity in two ways, one more consequential than the other. First, Mortensen submitted the safety complaint more than a year before the hearing officers saw it. Although the safety complaint was new to the hearing officers, it raises safety concerns about events said to have occurred more than a year earlier—events that the Company would have already addressed (or not addressed). In that sense, this differs from a classic temporal proximity case, where the employee makes a safety complaint to her manager, and the next day the manager terminates the employment.

But the greater distinction from a classic case of contributing factor established by temporal proximity arises out of the context; namely, that the hearing officers were deciding a series of charges of violations of work rules under the collective bargaining agreement, some of which could justify a termination. The Company had received allegations related to sex harassment, delaying aircraft, and refusing to assist co-workers. Human Resources investigated and received an additional complaint of sex harassment plus the significant new allegations about Mortensen’s

aiming an aircraft at Tamashiro. The Human Resources investigators interviewed nine employees (including the accuser and the accused), suspended Mortensen without pay, discussed their findings with a corporate Vice-President, issued a charging letter, and recommended termination. They did all this without knowing of Mortensen's protected activity. Villaro was conducting a hearing to make findings and conclusions and issue a disciplinary decision about those disciplinary charges. Srabian was reviewing Villaro's decision. That is a context in which a decision whether to impose discipline was required. The GSIP report was one piece of evidence that was submitted in the disciplinary hearing.

But the timing of the discipline was entirely controlled by the timing of the disciplinary hearing. Each hearing officer had to provide a written decision within 10 days after the hearing; otherwise, the collective bargaining agreement provided that Mortensen's grievance would be sustained, and the Company would be unable to impose discipline. The result is that I am unpersuaded that the proximity in time of the disciplinary decision to the hearing officers' review of the GSIP report is sufficient to establish that the GSIP report was a contributing factor in the disciplinary decision. The timing was entirely the result of a requirement in the collective bargaining agreement; had the Company not complied with that requirement, it would have been unable to impose any discipline. That explains the timing. At the least, it leaves the proximity in time between the hearing officers' discovery of the protected activity and the date of the disciplinary decisions insufficient, standing alone, to establish contributing factor causation.

The question therefore must be whether, given all of the circumstances, Mortensen presented persuasive evidence (by a preponderance) that his GSIP report was at least a factor (even if a minimal or insubstantial factor) in Villaro's and Srabian's decision to terminate the employment. I find that he did not.

Mortensen and his Union had an opportunity to offer evidence at the Step 2 hearing. They submitted material that provided a more complete picture of the facts relevant to each of alleged violations. I understand that Villaro had only ten days to write her decision. I can appreciate that she had other duties during those ten days. The fact that Villaro decided one of the four charges in favor of Complainant demonstrates some level of substantive analysis unrelated to any protected activity. But Villaro offers no explanation in the written decision for the charges on which she found for the Company; her decision is conclusory.

I could give more weight to Villaro's testimony at the ALJ hearing, in which she explains her analysis, if she had at least stated a generally similar (even if more skeletal) explanation in her written decision. But she did not. I therefore give Villaro's trial testimony less weight. Nonetheless, I did find convincing Villaro's hearing testimony about the central and most important allegation: that Mortensen pushed the aircraft toward Tamashiro to teach him a lesson.

Villaro had to weigh Mortensen's and Tamashiro's denials against Waiki's and Nishimura's statement that they had observed Mortensen pushing the aircraft toward Tamashiro. She had weigh Mortensen's denials against Waiki's statement that Mortensen said he was teaching Tamashiro a lesson and Goya's statement that he heard someone say this, though he did not know who that was. Having heard evidence about the manner in which pushbacks were done at

Hilo and having reached a different conclusion about Waiki's credibility, I might well have reached a conclusion different from Villaro's. But the question before is not whether I would have concluded differently; it is whether Complainant's protected activity was a contributing factor in Villaro's decision to terminate the employment. I find credible that Villaro considered the evidence presented at the Step 2 hearing and gave more weight to Mortensen's accusers than to him and his defenders. I am persuaded, more likely than not, that Villaro based her decision solely on the evidence going to Waiki's allegations and Mortensen's denials and that Villaro did not consider the GSIP report as a factor in her decision to terminate the employment.

I more readily reach the same conclusion as to Srabian. Srabian's written decision included a substantive statement of her findings and reasoning. Srabian quoted the statements that convinced her that Mortensen intentionally aimed the aircraft at Tamashiro. She explained why she gave those statements more weight than Mortensen and Tamashiro's denials. She explained that she was especially concerned because the Company had entrusted Mortensen as a lead; he was supposed to show others how the work was to be done. If he pushed an aircraft at someone, that is not something the Company would want to support as an example to other employees of how to do a pushback or how to do safety training (*i.e.*, teaching Tamashiro a lesson).

Again, I might have reached a different conclusion, but that is not the question. Rather, I find that Srabian affirmed Villaro based on a careful reconsideration of the evidence and a reweighing of the appropriate level of discipline, considering what message a lesser level of discipline might send to other Company managers and employees. I find no indication that Mortensen's GSIP report contributed to her decision, even in a minimal way.

#### Conclusion and Order

My authority is limited to a determination whether Hawaiian Airlines violated the whistleblower protection provision in AIR-21. I conclude, based on the evidence before me, that

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Complainant's protected activity was not a contributing factor in Hawaiian Airlines' termination of the employment. Accordingly,

Complainant's complaint is DISMISSED as without merit. Complainant shall take nothing by reason of his complaint.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge

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

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

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](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).