



Issue Date: 24 September 2020

Case No.: 2018-AIR-00019

In the Matter of

MICHAEL NEELY

Complainant

v.

THE BOEING COMPANY

Respondent

DECISION AND ORDER DENYING RELIEF

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

I. PROCEDURAL BACKGROUND¹

Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”) on March 10, 2016 that included allegations of violations of both AIR 21 and the Sarbanes-Oxley Act (“SOX”).²

On July 7, 2016, Complainant filed a complaint in U.S. District Court for the Central District of California. Therein, Complainant alleged violations of AIR 21, SOX, age discrimination, retaliation in violation of Title VII, and breach of contract. Complainant filed an amendment to this complaint on September 14, 2016. The claims alleged in that law suit are essentially the same as those in the case before this Tribunal.

¹ These proceedings required this Tribunal to issue 30 or more orders and notices. This is merely a summary of the key events that occurred.

² SOX contains a “kick-out” provision to allow a complainant to file in U.S. District Court. *See* 18 U.S.C. § 1514A(b)(1)(B). AIR 21 does not have a similar provision.

As a result of Complainant filing suit in U.S. District Court, this Tribunal has no jurisdiction over any SOX allegation in his complaint. *See Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-0138, ALJ No. 2005-SOX-65, slip op. at 5 (Oct. 31, 2015) (holding that once the Complainant filed his SOX suit in federal district court, the ALJ no longer had jurisdiction to enter any order in the case other than one dismissing it.); *Fuqua v. SVOX AG*, ARB Nos. 14-014, 14-069, ALJ Nos. 2013-SOX-46, 2014-SOX-18 (Aug. 27, 2014). Similarly, this Tribunal does not have jurisdiction to adjudicate age discrimination, Title VII or breach of contract claims.

On October 12, 2016, Respondent filed a motion to transfer the Complainant's federal suit to the Western District of Washington. The transfer occurred on November 18, 2016. *See Neely v. Boeing Co.*, 2017 U.S. Dist. LEXIS 152014 (W.D. Wash, Sept. 19, 2017).³ As noted by the Western District of Washington, an AIR 21 complaint must proceed before the Department of Labor and not through the District Court. Thus, the Tribunal retained jurisdiction over the AIR 21 portion of Complainant's complaint. *See Neely v. Boeing Co.*, 2018 U.S. Dist. LEXIS 81771 (W.D. Wash, May 15, 2018) at 7-8. *Accord Bombardier v. U.S. Dep't of Labor*, 145 F. Supp. 3d 21, 25 (D.D.C. 2015); *Hobek v. Boeing Co.*, 2017 U.S. Dist. LEXIS 115343 (Jun. 8, 2017), *adopted by Hobek v. Boeing Co.*, Case No 2:16-cv-3840-RMG, 2017 U.S. Dist. LEXIS 112939 (D.S.C., July 19, 2017); *Williams v. United Airlines, Inc.* 500 F.3d 1019 (9th Cir. 2007).

On January 19, 2017, Complainant received a letter from an OSHA investigator notifying him that it had learned of Complainant's law suit in U.S. District Court and concluded that Complainant had withdrawn his complaint. Thus, the letter purported to dismiss Complainant's OSHA complaint.

On June 2, 2017, OSHA wrote to Complainant informing him that OSHA had "reopened" the AIR 21 portion of his complaint "because our records do not indicate that [you] requested to withdraw the AIR21 complaint."⁴

In its January 19, 2018 letter, OSHA found that the Complainant timely filed his claim and that the parties were subject to the Act, but that Complainant did not engage in protected activity and Respondent did not retaliate against Complainant in violation of AIR 21. Accordingly, OSHA dismissed the complaint.

³ On May 15, 2018, a U.S. District Court dismissed Complainant's SOX claim as well as his claims under Dodd-Frank and for breach of contract. *Neely v. Boeing Co.*, 2018 U.S. Dist. LEXIS 81771 (W.D. Wash., May 15, 2018); *see also* Tr. at 1010-11. Complainant's Motion for Reconsideration on this ruling was denied. *Neely v. Boeing Co.*, 2019 U.S. Dist. LEXIS 83525, 2019 WL 2161564 (W.D. Wash, May 17, 2019). The remaining claims were later dismissed by summary judgment. *Neely v. Boeing Co.*, U.S. Dist. LEXIS 84646, 2019 WL 2178648 (W.D. Wash, May 20, 2019). The district court found that, even if Complainant established a causal link to his retaliation claims, Respondent provided specific nonretaliatory reasons for issuing the written warning and poor performance evaluation and terminating Complainant's employment during the RIF process. This decision was affirmed by the Ninth Circuit. *Neely v. Boeing*, 2020 U.S. App. LEXIS 25573 (9th Cir., Aug. 12, 2020).

⁴ Between November 2016 and January 2018, there was confusion over the status of Complainant's complaint within OSHA. Those events are recounted in the Tribunal's Order Denying Employer's Motion to Dismiss, dated June 22, 2018 and need not be recounted here.

On February 9, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). Subsequently, on February 28, 2018, this matter was assigned to the undersigned. On March 1, 2018, this Tribunal issued the Notice of Assignment and Conference Call. On April 18, 2018, the Tribunal issued a Notice of Hearing and Pre-hearing Order.⁵ At the outset of the proceeding before this Tribunal, Complainant was represented by counsel.

On May 15, 2018, the Western District of Washington issued an Order granting in part Employer's Motion to Dismiss. *Neely v. Boeing Co.*, Case No. C16-1791 RAJ, 2018 U.S. Dist. LEWIS 81771 (W.D. WA. May 15, 2018). In that Order, the District Court granted dismissal, among other assertions, of Complainant's AIR 21 and SOX claims. *Id.*, slip op. at 5-8. In particular, the Court found that it lacked subject matter jurisdiction over the AIR 21 claim.

On June 1, 2018, Employer filed a Motion to Dismiss alleging Complainant failed to object to OSHA's original complaint within the statutorily mandated time period. Complainant responded arguing that OSHA's initial letter did not constitute written findings by the Assistant Secretary. On June 22, 2018, the Tribunal issued an Order Denying Employer's Motion to Dismiss, finding Complainant timely filed his original complaint as the initial OSHA letter was defective for several reasons.

On September 7, 2018, the Tribunal held a teleconference with the parties. As a result of the various discovery disputes raised, the Tribunal agreed to reschedule the hearing to begin January 22, 2019. Therefore, on September 17, 2018, the Tribunal issued a Second Notice of Hearing and Pre-hearing Order.

On September 21, 2018, the Tribunal learned that Complainant had ended his attorney-client relationship with his prior counsel and would thereafter proceed as a self-represented litigant.

The parties' discovery disputes continued. On September 26, 2019, Respondent noticed Complainant to be deposed on October 5, 2018. Complainant filed a motion to defer his deposition but later attended his deposition without counsel. On October 15, 2018, Complainant submitted an Emergency Motion to Compel Respondent to Produce; Complainant requested sanctions. Respondent submitted its opposition on October 26, 2018. On October 30, 2018, the Tribunal issued a Discovery Order granting in part Complainant's Motion to Compel Respondent to Produce, but denied his request for sanction. On November 2 and 8, 2018, the Tribunal held a teleconference with the parties to address several discovery matters. On December 18, 2018, Complainant filed two motions. He filed a Motion for Sanctions alleging that Respondent had not complied with the October 30, 2018 Discovery Order.⁶ He also requested Respondent be precluded from using certain evidence, including his deposition.

⁵ The Tribunal issued an Amended Order on May 1, 2018. Thereafter the Tribunal had to issue a Second Notice of Hearing and Pre-hearing Order on September 17, 2018.

⁶ During the discovery phase of these proceedings Complainant on several occasions sought sanctions against Respondent and or its counsel. For example, Complainant made assertions to this Tribunal that Respondent's counsel violated attorney-client privilege and tampered with and spoliated evidence. *See*

On January 3, 2019, the Tribunal granted another request for continuance and reset the hearing to begin May 2, 2019.

On January 15, 2019, the Tribunal issued an omnibus order adjudicating a number of issues. It ordered Complainant to further respond to Respondent's discovery request no. 34; specifically, it ordered Complainant to produce non-privileged emails that he had forwarded to himself from Respondent.⁷ See Order at 7. In addition, the January 15, 2019 Order prohibited Respondent from using Complainant's October 5, 2018 deposition for any purpose, granted Respondent permission to depose Complainant anew, ordered Respondent to identify what Bates Stamp pages corresponded to specific documents requested by Complainant, granted Complainant leave to depose two witnesses, directed Respondent to show cause why the witnesses identified in its amended initial disclosure should not be limited to impeachment only, and denied Complainant's request for sanctions.

On March 8, 2019, Respondent filed a Motion for Summary Decision. It argued—with reference to attached evidence—that Respondent would have laid off Complainant regardless of his protected activity. Accordingly, Respondent requested that the Tribunal grant summary decision in its favor. Complainant filed a reply to Respondent's Motion for Summary Decision. On April 16, 2019, the Tribunal issued an Order denying Respondent's Motion for Summary Decision.

Respondent submitted its prehearing statement and proposed exhibit list on April 19, 2019. Complainant submitted prehearing materials on April 18, 2019.

This Tribunal held a hearing in this matter in Des Moines, Washington from May 2 to 10, 2019.⁸ Complainant, who appeared *pro se*,⁹ and Respondent's representative were present during all of these proceedings. The Tribunal heard testimony from the Complainant, Vance Hilderman, Dane Richardson, Cloie Johnson, Kelsie DeFrancisco, William Brandt, Christopher Pain, Lee Miller, Anthony De Genner, David Demars, Ellory Cartagena, and William Ashworth.¹⁰ At the hearing, this Tribunal admitted Respondent's Exhibits ("RX") 1 – 83, 88, 89,

Tr. at 1045-46; RX 34. He raised this same issue in his U.S. District Court case and the Court denied his request for sanctions. See *Neely v. Boeing*, 2019 U.S. Dist. LEXIS 68726, 2019 WL 1777680 (W.D. Wash., Apr. 23, 2019), at 6-7. This Tribunal sees no reason to further address these allegations.

⁷ Respondent's discovery request no. 34 asked for all documents, including electronically stored information, that Complainant took with him from Respondent either when he left Respondent's employ or in the two years prior to his termination from employment. Although apparently admitting that he had taken such documents, he objected, arguing that Respondent had not provided substantial evidence of him doing so in its motion to compel.

⁸ The Transcript of the May 2-6 and 9-10, 2019 proceedings will hereafter be identified as "Tr." Respondent made a brief opening statement. Tr. at 130-33.

⁹ At the beginning of the proceedings Complainant had counsel but opted to continue *pro se* beginning in about September 2018.

¹⁰ The Tribunal also consider the deposition testimony of Mr. De Genner (CX 272), Mr. Demars (CX 275), Ms. Cartagena (CX 279), Mr. Miller (CX 307), Mr. Ashworth (CX 308), Mr. Payne (CX 366), Mr.

91¹¹ and Complainant's Exhibits ("CX") 1, 2, 4,5, 7, 8, 8.1, 9 (pages 1-17 and 52-67), 10, 11, 12 (pages 39-42), 13-16, 18-21, 24-27, 30-38, 42, 44, 45, 47, 48, 51, 53, 55-57, 60-63, 65-69, 71-76, 78-81, 82.1, 83, 84, 85 (pages 7 and 8), 88-97, 99, 101, 106, 110-113, 115-119, 123-128, 130-132, 135, 136, 138, 139, 141, 143-146, 148, 149, 152-154, 156, 159-162, 164-170, 172-186, 188-206, 208, 209, 212, 213, 215-218, 220-223 (pages 1-4), 224, 224.1,¹² 225-228 (pages 1-3), 230-233, 235-238, 240, 241, 243-246, 252, 253, 257, 260, 261, 272, 275, 279, 282, 287, 290, 293, 295, 297, 299, 300, 302.1, 304, 306, 306.1, 307, 308, 313, 356, 360¹³-366¹⁴.¹⁵ To facilitate the efficiency of Complainant's presentation of evidence, the Tribunal required him to provide a copy of the questions he would like answered during his testimony to the Tribunal. *See* ALJ 4. The Tribunal was handed Complainant's ten-page list of questions at the beginning of the hearing. The Tribunal read each question Complainant wished to pose and noted on the record what questions the Tribunal would not allow.

During the hearing there arose an issue as to Complainant's actions during discovery. Such conduct, in addition to Complainant's lack of candor toward the Tribunal, resulted in a sanction placed upon Complainant. This will be addressed in the credibility section of this decision.

Complainant submitted its closing brief on August 23, 2019. Respondent submitted its closing brief on September 30, 2019. As Respondent correctly notes in its brief, Complainant's brief makes numerous references to exhibits that were withdrawn or ruled inadmissible at the hearing. *Resp. Br.* at 19-20.¹⁶ The Tribunal will not consider any document not actually entered into the record. Complainant filed his reply brief on October 11, 2019. In this reply Complainant asked the Tribunal to revisit its decision to impose sanctions on Complainant for his discovery conduct and lack of candor before the Tribunal. The Tribunal declines to do so. Complainant attached a recently published document entitled *Boeing 737 MAX Flight Control System Joint Authorities Technical Review* (Oct. 11, 2019) to his reply brief and asked that the Tribunal take judicial notice of the report. The Tribunal declines to do so as the document

Hendershott (CX 282), Mr. Yabut (CX 287), Mr. Currier (CX 290), Mr. Weikart (CX 293), Mr. Fogarty (CX 295), Dr. Banda (CX 297), Mr. McAvoy (CX 299), and Mr. Yun (CX 300).

¹¹ *Tr.* at 80, 223-24, 849, 1079, 1810; *see id.* at 1909, 1921.

¹² CX 361 to 365 are the underlying data for this exhibit. *See Tr.* at 944-45.

¹³ CX 360 is the underlying chart to support the summary chart at CX 31. *Tr.* at 1802-05.

¹⁴ To ensure that the parties understood which exhibits were admitted during the hearing, the Tribunal went to great pains to reviews them in detail at the end of the hearings. *Tr.* at 1918-99. *See also id.* at 136-38, 153-55, 164, 166, 191, 203, 208, 213, 247, 257, 303, 459, 464-65, 482, 489, 497, 500, 502, 508, 519, 521-22, 524, 526, 531-32, 534-36, 540, 546-48, 551, 553, 559-60, 562-63, 565, 567-68, 572, 583, 590, 593, 598, 606-07, 610, 613, 615, 619, 641, 644-45, 648-49, 652, 655-56, 658-60, 662-63, 666, 668-69, 673-74, 676, 679, 681, 686-89, 692, 695-96, 699, 700, 703, 710, 715-6, 718, 721, 724-25, 733, 736, 738-39, 740-42, 748, 753, 755, 757, 760, 766, 770, 772, 774, 777, 780, 784, 787, 803, 806, 809, 810, 814, 817, 826-827, 832, 838, 840, 842, 845, 854, 856, 859, 862-63, 867, 871, 874, 881-82, 884-85, 887, 892, 906, 917, 921, 936, 941, 961, 969, 972, 984, 989-90, 1433, 1497, 1552, 1699, 1753, 1793, 1901, 1903-05, 1915.

¹⁵ There are also seven ALJ exhibits in this case. *Tr.* at 1915. The description of what each of the ALJ exhibits are is found in the transcript. *Tr.* at 1918-21.

¹⁶ Complainant improperly referenced CX 59, CX 64, CX 109, CX 114, CX 134, CX 147, and CX 355.

pertains to a different type certificated aircraft. On October 25, 2019, Respondent filed its surreply brief, one the Tribunal authorized at the close of the hearing. Tr. at 2000.

On February 26, 2020, the undersigned issued an Order calling for the Department of Labor's (DOL) Office of the Solicitor and the Federal Aviation Administration's (FAA) Office of the Chief Counsel to submit *amicus briefs* addressing whether the parties are covered under the Whistleblower Protection Program created by AIR 21. The undersigned asked for briefing on three issues:

1. Can an aircraft manufacturer violate FAA regulations, orders or standards during the development of a transport category aircraft; specifically prior to an aircraft manufacturer's application for the type certificate for this aircraft? If so, at what point in the developmental process of a type certificated aircraft can FAA violations occur, in particular 14 C.F.R. § 25.1309 violations?
2. Is an aircraft manufacturer that produces transport category aircraft considered an air carrier or contractor of an air carrier as defined by the Act, when:
 - a. the information reported by an employee pertains to the safety of a transport category aircraft and
 - b. the transport category aircraft is still under development and that has not been issued a type certificate?
3. Is an employee who works on the development of a transport category aircraft who reports an alleged violation of an FAA regulation, order or standard a covered employee as defined by 29 C.F.R. § 1979.101 when the activity allegedly protected occurs prior to the aircraft manufacturer applying for a type certificate?

On May 15, 2020, the Tribunal received the FAA's response to its request for an Amicus Curie Brief; on June 15, 2020, it received the Solicitor's response. On June 30, 2020, Respondent sent an email informing the Tribunal that it would not be filing a separate brief. Complainant's responsive brief was received on July 15, 2020.

This decision is based on the evidence of record, the testimony of the witnesses at this hearing, and the arguments by the parties.

II. FACTUAL BACKGROUND AND EVIDENCE

As previously noted, around September 2018, Complainant proceeded as a self-represented litigant. Accordingly, the Tribunal gave Complainant wide latitude in presenting both testimony and documentary evidence. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-00003 (Jan. 30, 2004); *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-0003 (Apr. 25, 2003). Complainant's allegations are very technical; however, the Tribunal found Complainant's presentation disorganized in general and

his presentation of highly technical information, disjointed and difficult to follow. The Tribunal has done its best to condense the testimony and documents offered in a coherent fashion.

A. Overview of the Events Leading to the Dispute Before the Tribunal

At the time of his discharge, Respondent employed Complainant as a Project Engineer level 5. Tr. at 145. In July 2014, Complainant worked in Respondent's Everett facility and supported the electrical engineers to develop the Systems Requirement and Objectives ("SR&Os") for the electrical subsystem team, which expanded beyond the 777X Electrical Load Management System ("ELMS").¹⁷ Tr. at 1707-08; *see* CX 18 at 8, CX 272 at 14-20. His assignment at Everett concerned the design and implementation of the ELMS for the Boeing 777X. Tr. at 1709, 1789. At all times relevant to the case, the 777X is an aircraft in development; the FAA had yet to issue Respondent an approved certification plan let alone a type certificate. Tr. at 425, 1089. Complainant's duties were to raise concerns about ELMS requirement validations, both to Respondent's ELMS team and the FAA. Tr. at 1087-89. Complainant alleges that Respondent ended his employment because of the safety issues he raised while working on the ELMS project.

Respondent laid off Complainant as part of a reduction-in-force ("RIF") in March 2016. Respondent used its RIF procedure in determining who it would lay off. Complainant was selected for lay off in large measure because his most current evaluation reflected poor interpersonal conduct.

B. Complainant's Complaint

Complainant did not provide the Tribunal with a pleading complaint but relied on the complaint he filed with OSHA. Tr. at 12-13. However, as Complainant proceeds as a self-represented litigant, the Tribunal gives Complainant some leeway in setting forth the crux of his position. Accordingly, at the beginning of the hearing the Tribunal verified that the following represented Complainant's true allegations:

Complainant alleges that Respondent, on or about April 1st, 2015, did not promote him September through November of 2015,¹⁸ gave him negative

¹⁷ A transport category aircraft generally has an electrical system that generates and distributes AC and DC power to other airplane systems. It is comprised of main AC power, backup power, DC power, standby power, and flight controls power. In layman's terms, the ELMS is the nerve center of the electrical system that monitors the electrical power from the primary, backup and standby generating sources on the aircraft. "The ELMS controls multiple electrical power sources and effects the control, management and distribution of electrical power, as well as the switching of electrical loads throughout the aircraft." *Management of electrical power*, AIRCRAFT ENGINEERING AND AEROSPACE TECHNOLOGY, vol. 72, no. 6 (Dec. 1, 2000), available at <https://www.emerald.com/insight/content/doi/10.1108/aeat.2000.12772faf.003/full/html>. In short, the ELMS provides protection to ensure power is available to critical and essential equipment.

¹⁸ This allegation was not raised at the hearing nor briefed by Complainant, therefore, the Tribunal will not further address it in this decision.

performance evaluations from June 2015 through January 22nd, 2016. Subjected him to harassment on or around November 25th, 2016.¹⁹ Terminated his employment and did not rehire him. Complainant alleges that these adverse actions were in retaliation for voicing concerns to Respondent management on or around October 6th, 2015, and November 6th and 7th, 2015, about potential Federal Aviation (FAA) violations, including, in part, violating FAA Order 8110.4c, regarding type certificate procedures and ODA 300064-NM procedures. Complainant, during this time, filed an internal complaint with Respondent about fraudulent concealment and misuse of the RISK System. Complainant claims that these adverse employment actions violate Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; 49 United States Code 42121 (AIR-21),....²⁰

Tr. at 12-13; *see id.* at 101-24; RX 51, ALJ Ex. 1.

The Tribunal also understands that Complainant alleges that Respondent was not complying with the requirements of 14 C.F.R. § 25.1309. This regulation requires that systems whose functions are required for the aircraft's certification must be designed to ensure that they perform their intended function under any foreseeable condition. For electrical systems, a type certificate applicant must show that the electrical system is able to provide continuous, safe service under foreseeable environmental conditions. This can be demonstrated by environmental tests, design analysis, or reference to previous comparable service experience on other aircraft. *Id.* at § 25.1309(e).

C. Stipulated Fact

The parties stipulate Complainant traveled and submitted expense reports. Tr. at 1414.

D. Summary of Facts²¹

Complainant has a total of thirty-three years in the Aerospace Industry and began working for Boeing in 1995. Tr. 135, 1000; CX 4. In 2008, Complainant transferred to Huntsville, Alabama and in 2012 was assigned to the Huntsville Design Center ("HDC"). Tr. at 156. At the time of his discharge, Complainant was employed by Respondent as a Project Engineer level 5, a position he had held for more than a decade. Tr. at 145, 1082-83. Prior to December 2014 Complainant's annual performance reviews were above average. *See* CX 3, CX 8, CX 8.1.

¹⁹ *Id.*

²⁰ As mentioned previously, Complainant also asserted violations of the Sarbanes-Oxley Act, (SOX) (2002), as amended by the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203 [18 USC Section 1514a]. Tr. at 13. However, those matters are before a U.S. District Court. *See Neely v. Boeing*, No. 16-cv-1791 (W.D. Wa. May 15, 2018)(2018 U.S. Dist. LEXIS 81771; 2018 WL 2216093). Accordingly, the Tribunal refuses to address them in these proceedings.

²¹ The Tribunal has reviewed all documents admitted in these proceedings. The Tribunal found any exhibits admitted but not referenced in this decision either cumulative, or of little or no probative value.

Respondent launched a program in November 2013 to develop a new transport category aircraft called the 777X.²² The typical airplane development program for Respondent takes five to seven years. Tr. at 1634. There was never an FAA approved certification plan in place for the 777X during Complainant's employment with Respondent; it was in the development phase the entire time Complainant worked for the ELMS program. Tr. at 1089.

The Boeing 777X is not a completely new aircraft. Its underlying engineering is based upon the type certification of the 777-300 Extended Range. *See generally*, CX 73 at 11, CX 304 at 57, 59. In essence, the 777-300 Extended Range was the 777X's engineering starting point. As such, Respondent is attempting to obtain an amended type certificate. CX 73 at 9. This "new" aircraft required a wide variety of modifications from this base line starting point for its development, including the ELMS.²³ Complainant worked on the early stages of ELMS development. Tr. at 428.

According to Complainant, Respondent started with the baseline of the System Requirements and Objectives ("SR&Os") from the 777-300 ER and bypassed the typical allocation requirements. Tr. at 149; *see* Tr. at 375; CX 293 at 13-14. Complainant says Respondent's senior leadership established 75 percent as a target goal to bypass the allocation process. Tr. at 149, 203-04; CX 14; *see* CX 272 at 21. Complainant says that is not acceptable because one requirement, or failure to validate a set of requirements, can adversely impact the entire system. He calls it an "unknown/unknown."²⁴ Tr. at 149. According to Complainant, an engineer can never achieve 100 percent validation, but there needs to be an evaluation of the risk of continuing forward with the system. Tr. at 149-50. Complainant testified that Respondent did not complete the traceability of its SR&O requirements to the Airplane Design Requirements and Objectives for the 777X ELMS. Tr. at 151.

²² *See* CX 304 at 57-58; <http://www.boeing.com/history/products/777.page>; Boeing Press Release, Boeing Launches 777X with Record-Breaking Orders and Commitments, *available at* <https://boeing.mediaroom.com/2013-11-17-Boeing-Launches-777X-with-Record-Breaking-Orders-and-Commitments>.

²³ Respondent's policies provided "Safety assessments from the baseline airplane design may be utilized as long as the design is unchanged and the safety assessment are validated as complete and correct for the derivative design." CX 19 at 5. As the 777X evolved, the ELMS used for earlier aircraft proved inadequate.

²⁴ As explained in CX 10 at 1 by one of Complainant's fellow Development Assurance engineers: While there can be considerable value gained when integrating systems with other systems, the increase complexity yields increased possibilities of errors, particularly the functions that are performed jointly across multiple systems. Due to the high[ly] complex and integrated nature of modern aircraft systems, the regulatory authorities have highlighted concerns about the possibility of development errors causing or contributing to aircraft failure conditions. Therefore, a process is needed which establishes a level of confidence that development errors can cause or contribute to identified failure conditions have been minimized with an appropriate level of rigor. The benefit henceforth is reference to as Development Assurance process.

See also Tr. at 157-59.

Complainant's duties required him to be very familiar with the requirements of DO-178/254, a document used for developing software and software requirements for aerospace systems. Tr. at 163. It was a core component of his job: he "lived, eat and breathed it." Tr. at 163.

The level of importance of the level of assurance of electronic components in aircraft varies. CX 304 at 20. As described by Mr. Hilderman:

Modern aircraft has [sic] thousands of microprocessors, over 100 different systems. Each of those systems containing microprocessors is classified a design assurance level, and the levels A for "Catastrophic," meaning everyone could die from a single point failure or likely accommodation multi-point failure, all the way down to Level E of "No safety impact."

Tr. at 279.

The Electrical Load Management System ("ELMS") for Respondent's 777X is both complex and a critical component to the aircraft.²⁵ It affects such items as fuel quantity/ refuel control, fuel management, probe heat, cargo fire extinguishing, hydraulic pumps, and passenger oxygen mask deployment. CX 304 at 61. In 2015, the ELMS system was classified as a hazard Design Assurance Level B ("DAL-B").²⁶ A system that is designated a DAL-B is one where "a single point of failure could occasionally happen in the lifetime of the aircraft, but it's mitigatable." Tr. at 370. But in 2015 Respondent's engineers were questioning whether the ELMS level of criticality should be increased to DAL-A.^{27, 28} Tr. at 652-54, 1638-39; CX 93.

²⁵ The first ELMS came from the original 777 back in 1994; however, the support requirements since then have grown, requiring improvements over the decades. Tr. at 1745-46; CX 304 at 61.

²⁶ There are five Design Assurance Levels: Level A (catastrophic), Level B (Hazardous), Level C (Major), Level D (Minor) and Level E (no effect). See DO-254, *Design Assurance Guidance for Airborne Electronic Hardware* (Apr. 19, 2000). The FAA recognizes this document as an acceptable means of compliance to secure FAA approval of complex micro-coded components with aircraft systems for DAL-A, DAL-B and DAL-C. AC 20-152, *RTCA, Inc., Document RTCA/DO-254, Design Assurance Guidance for Airborne Electronic Hardware* (June 30, 2005); see FAA Order 8110.105A, *Simple and Complex Electronic Hardware Approval Guidance* (Apr. 5, 2017).

²⁷ A DAL-A is a level such that a single failure could lead to a catastrophic failure of an airplane. CX 275 at 39. An item identified as Level A (1×10^{-9}) must be 100 times more reliable than an item designated Level B (1×10^{-7}). Tr. at 370, 373; see AC 25.1309-1A, *System Design Analysis* (June 21, 1988); CX 304 at 20.

²⁸ Mr. Hinderman, Complainant's expert, opined that the Developmental Assurance Level for the ELMS system was a Level A or B, depending on the time period for it changed from a Level B to A. Tr. at 280, 310; CX 304 at 43-44.

The decision about elevating the ELMS from DAL-B to DAL-A began as early as January 2015. CX 47 at 1 and 7. In April 2015, a presentation was given about ELMS needing to be elevated to DAL-A. CX 93 ("To meet DAL-A functionality, redundant different Level B systems need to be used to support power to the buses, or ELMS needs to be designed to support a DAL-A."); Tr. at 655; see CX 272 at 75. This discussion occurred again at least in May 2015 (CX 97) and November 2015 (CX 293 at 153). The concern expressed was "IF a single point common mode software failure occurs, THEN loss of a critical

According to Complainant's expert, ELMS was originally designated Level B in the Development Assurance Level ("DAL"), but was later upgraded in importance to Level A. Tr. at 370-72; CX 304 at 79.

A system designated DAL-A is one designed such that "all aircraft of that type should never ever, not ever experience a single point failure that would cause a crash." Tr. at 370. Approval for DAL-B systems can be delegated to a Boeing Employee, who is a representative of the FAA, but the FAA retains approval authority over systems identified as DAL-A. Tr. at 1639. A Respondent employee delegated the approval authority from the FAA for systems deemed less critical than DAL-A received their performance evaluations from their own managers, the same managers tasked with producing a product consistent with Respondent's timeline set forth internally and reflected in contracts with suppliers.²⁹ Tr. at 1641. Additionally, changes in a system's Development Assurance Level have significant impacts in the system's design because of the level of assurity required for that system. The greater assurity requirement adds manufacturing costs. Tr. at 372-73.

General Employment Structure for Complainant

In January 2014, Respondent's HDC began working on the 777X. Tr. at 145, 1622. Respondent was considering alternate sources for the aircraft's electrical power systems, so it started parallel development between an incumbent supplier and a new supplier. Complainant

airplane function leading to a catastrophic event is plausible which violates CFR 25.1309(b)(2)." CX 293 at 73 and 155 (emphasis added).

Complainant's expert, Mr. Hilderman, explained the criticality within DAL as follows:

The criticality level, Development Assurance Level A, B, C, D, E -- Level A, everybody dies, Level C, no one dies, passenger injuries, pilot workload, Level E, nothing. Criticality level is really important and the original ELMS criticality level was Level B. That means their reliability is 1 times 10 to the minus 7, meaning a single port failure could occasionally happen in the lifetime of the aircraft, but it's mitigatable. A Level A, by contrast, is 1 times 10 to the minus 9, which is 100 times more reliable, which means all aircraft of that type should never ever, not ever experience a single point failure that would cause a crash. A failure of a Level A system -- and we've seen aircraft failures in all areas where a Level A failure causes everyone to die. When the single point failure can cause everyone to die -- and there are crashes that have happened -- that is a Level A failure. So, it's really important that the criticality level of such be designated Level A. If we had a system that a single point failure could cause a crash, but it wasn't designated Level A, that would be the most egregious mistake we can make in aviation certification, because Level B failures do happen. And if a system were to be Level B, by Airbus, Embraer, Bombardier, anything, and a single point failure happens and everyone dies, the conclusion is that the Level B designation of that system is incorrect, that is a Level A system, by definition. And it's an egregious violation of a safety process when a Level B system, that kills everybody, has a single point failure and everyone dies, god forbid it should happen twice, okay. It should never happen once.

Tr. at 370-71.

²⁹ These dually-hatted employees also report to an FAA representative if they have any kind of complaint of undo pressure. Tr. at 1640.

was involved in the “tiger” team that ran the parallel development from January until May 2014. Tr. at 1704-05; *see* CX 7, CX 272 at 13. After this assignment he returned to Huntsville. Tr. at 1707. In July 2014, Complainant came to Everett and supported the electrical engineers to develop the Systems Requirement and Objectives (“SR&Os”) for the electrical subsystem team, which expanded beyond the 777X ELMS. Tr. at 1707-08; *see* CX 18 at 8, CX 272 at 14-20.

Complainant primarily worked in Everett in 2014 and 2015 but reported directly to two senior managers located at Respondent’s Huntsville Design Center (“HDC”) in Huntsville, Alabama: John Jones until January 9, 2015, and Dane Richardson³⁰ from January 9 until Complainant’s termination. Tr. at 156, 1000, 1188-89. Consequently, Mr. Jones evaluated Complainant’s performance for 2014³¹ and Mr. Richardson evaluated Complainant’s performance for 2015. Tr. at 1000-02, *see* Tr. at 1183-85, 1198. It was the HDC supervisor, Mr. Richardson, who retained responsibility for Complainant’s performance evaluations and formal reviews in 2015.³² Tr. at 1250-51. However, as a practical matter, HDC management had little direct oversight of Complainant’s work in Everett. The ELMS project was overseen by two managers Mr. Anthony De Genner³³ and Mr. David Demars,³⁴ both of whom were located at the Everett facility. Tr. at 1190, 1238, 1706, 1757-59. They provided input to the HDC managers for Complainant’s performance evaluation. Tr. at 1250-51.

In September 2014, Complainant began a temporary travel assignment with Respondent’s 777X subsystems team in Everett, Washington. While at Respondent’s Everett plant, he continued to report to his HDC supervisors. Tr. at 155-56, 1706-07. He was essentially “on loan” from the HDC to Everett for this project, albeit for a long period of time. *See* Tr. at 1707-09; CX 272 at 11-12.

³⁰ Mr. Richardson is an engineer that has worked for Respondent for 32 years holding progressively more responsible duties over that time period. Tr. at 1182-83, 1187-88. From October 2014 until April 2018 he was a senior manager “leader” at the Huntsville Design Center where he supervised about 250 people. Complainant reported to him during this time period. *Id.* at 1183-84, 1186. At the time he started at the HDC in October 2014, Respondent had just started working on the 777X. *Id.* at 1183-84. HDC’s responsibility was to design the 777X’s sections 43 forward, section 47 and section 48 structures. *Id.* at 1184, 1526.

³¹ Complainant’s 2014 performance evaluation is at CX 261.

³² According to Mr. Richardson, it was “a fairly common thing” for him to complete performance evaluations on employees not physically working in Huntsville. Tr. at 1252-53.

³³ Mr. De Genner was the first line manager in charge of ELMS who reported to Mr. Demars. Tr. at 1238. He’s an engineer who has worked for Respondent since 1988. *Id.* at 1701. He has worked on the 777X Electrical Management System since 2013 and has been responsible for the development of the 777X ELMS since 2015. Tr. at 1701-02. His more narrowed focus on ELMS was due to the growth of the scope of work for ELMS. Tr. at 1703. *See* CX 272.

³⁴ Mr. Demars was the senior manager of the 777X ELMS. Tr. at 755; CX 275 at 8-9. He has worked for Respondent since 1987, mostly for Respondent’s Commercial Airplane System. He first became a manager in 1997 and in June 2015 became the senior manager on the 777X Electrical Subsystems team. One of the managers he supervises is Mr. De Genner. Tr. at 1756-57.

On October 8, 2014, Respondent released the 777X Development Assurance Plan (“DAP”) for ELMS.³⁵ CX 16; Tr. at 464. This document provides a procedure for the 777X program to meet validation requirements, and for engineers to generate artifacts³⁶ to demonstrate they had completed development assurance which in turn would later be used for certification.³⁷ Tr. at 464-65; *see* CX 16 at 32. A month later, Respondent released a document called Business Process Instruction (“BPI”) 4890,³⁸ which is referenced in the DAP. CX 24; Tr. at 476. This document shows the steps to be taken to validate the 777X ELMS. Tr. at 477; *see id.* at 477-80.

Complainant Begins Work on the ELMS and Noticed Alleged Shortcomings in Respondent’s Procedures

In mid to late October 2014, Complainant began to work on the 777X ELMS.³⁹ Tr. at 155-57, 449. He reported to Mr. De Genner, the manager of the 777X Electrical Power Systems team. CX 5; Tr. at 145, 1704. Respondent had awarded a 777X ELMS contract to General Electric Aviation (“GE”) to design, build, test and deliver a fully functional ELMS system by using the ARP4754A process. CX 81. According to Mr. Paine, the Director for Respondent’s Airplane System, ARP4754A is guidance material the FAA has reviewed and agreed that, if a manufacturer follows that guidance material, the FAA will recognize the methodical process as an acceptable means that can be used for developing the airplane. Tr. at 1638; CX 366 at 16; *see* CX 275 at 49.

Respondent and GE entered into a Special Business Provision (“SBP”) where Respondent agreed to deliver to GE necessary information, data, artifacts and equipment

³⁵ The document, in part, states:

It describes the planning of activities and the applicable Boeing processes and data that will be used to ensure that proper design development, integration and implementation have been accomplished in a sufficiently disciplined manner to minimize the likelihood of development errors that could adversely affect the aircraft safety. The 777X Development Assurance processes and plans meet the objective of Advisory Circular AC (20-174).

CX 16 at 7.

³⁶ For a general explanation by Complainant of the significance of artifacts, *see* Tr. at 473-75. *See also* CX 16 at 35.

³⁷ CX 16 at 9 mentions that the mapping of the 777X processes and artifact deliverables is necessary to comply with ARP4754A. Complainant contends that the 777X ELMS engineers did not follow the DAP. Tr. at 475, 491-92.

³⁸ The purpose of Respondent’s Business Process Instruction (“BPI”) 4890 is to provide “the process for developing requirements and objectives (R&O) and verification plans for Boeing Commercial Airplanes (BCA) products.... This BPI provides the steps to define, validate, verify, and manage requirements throughout the life of the program. The outputs of this process are a product requirements baseline with which the product must comply, and a set of verification data demonstrating product compliance with the requirements.” CX 24 at 1.

³⁹ Prior to October, Complainant worked on the 777x doing contract and support work and he worked his work involved working on System Requirements and Objectives (SR&Os). Tr. at 155, 157, 196-97. In addition, according to Complainant, in August 2014, Respondent’s auditors identified development errors including issues with the validation and verifications not being completed. CX 13, Tr. at 196-98.

necessary for GE to meet program milestone deliveries. CX 81 at 3. Mr. De Genner wanted Complainant to support the lead ELMS engineer in establishing a plan for validating requirements per the ARP4754A. Tr. at 450. Initially Complainant's engineering duties were more limited than what he was accustomed to because Respondent's engineers on the 777X were unionized. Mr. De Genner did not want Complainant to perform work that was included in the union contract. Tr. at 1080-82. This more limited role continued until Mr. De Genner assigned Complainant as supplier program manager for GE Aviation on April 1, 2015. Tr. at 1082-84.

Complainant testified that within weeks of his assignment he began to witness Respondent engineers not following corporate procedures and Development Assurance Plans, or its underlying procedures. Tr. at 183. Complainant asserted that his concerns about requirement deficiencies continued in January 2015. CX 48; Tr. at 528-32. In November, he and other engineers, including the FAA representative, engaged in correspondence about the project's scheduling. Tr. at 498-503, 507; *see* CX 25, CX 26, CX 30, CX 31.

On December 1, 2014, Complainant's employment conditions changed. After Mr. De Genner released the requirements of the 777X ELMS to GE, Complainant sent an email to Mr. De Genner and other System Integration team members he had been supporting in which he raised concerns about achieving the thousands of outstanding requirements over a 30-day period. Tr. at 492, 509. According to Complainant, Mr. De Genner became upset that the validation of the 777X ELMS requirements was not met as the terms of the contract necessitated a fully validated set of requirements, per ARP4754A, by December 1, 2014.⁴⁰ Tr. at 451-52. Complainant asserts he engaged in protected activity on December 1, 2014 when he raised the issue of Respondent putting itself in a compromising position by releasing a defective set of requirements.⁴¹ Tr. at 507-09. However, Mr. De Genner testified that it was not unusual to submit requirements to a contractor that were not fully validated, or to even have a requirements list sent back from the supplier; it is a commonly understood practice. Tr. at 1743-44. Further, the basis for this requirement was due to a contract requirement between Respondent and GE, not to any FAA Regulations.⁴² Tr. at 1745. Based on communications that occurred thereafter

⁴⁰ CX 81 at 3; CX 111 at 2. The requirement for a fully validated ELMS by December 1, 2014 appears to have been well-known to the ELMS team. *See* Tr. at CX 15 at 3.

Complainant presented documents that as of December 1, 2014, that the department he was supporting had completed 1767 of 8786 requirements. CX 18 at 3. *See also* Tr. at 483-84. According to Complainant, these figures reflect that Respondent was behind its imposed schedule to meet a contract with GE. Tr. at 484-85; *see* Tr. at 518-20 and CX 33 (which reference 8,029 requirements as of November 25, 2014). According to Complainant, this put "immense" pressure on Respondent to get back on schedule. Tr. at 485.

⁴¹ Complainant acknowledged that his alleged protected activity surrounded the same underlying concern that he had about the validation of requirements. Tr. at 1087.

⁴² In essence, there was a contract between Respondent and GE to complete performance by a certain date. For GE to have some certainty on their meeting that date, they required Respondent to do certain things by other dates certain. One of those conditions was for Respondent to provide a list of fully validated requirements per ARP4754A, something Respondent was not able to do by December 1, 2014. Tr. at 1746-47; CX 275 at 103. Mr. Demars agreed with Mr. De Genner's testimony on this point. Tr. at 1792. So this required the parties to set a new deadline. Tr. at 1748. And according to Mr. De Genner Respondent was eventually able to meet its contractual obligations and locked down the baseline around

with Respondent's engineers and GE, Mr. De Genner moved the target date to June 1, 2015. CX 34, CX 35; Tr. at 521-22.

On December 16, 2014, Complainant's then manager, Mr. Jones, completed his performance review of Complainant. CX 8, CX 261; see Tr. at 1000-01, 1254; CX 61. During this time Mr. Jones was at the HDC and Complainant's work was mostly in Everett. He did not ask for Mr. De Genner's input about Complainant for his evaluation. Tr. at 1724, 1729; CX 272 at 24. Mr. Jones assigned Complainant a score of "Exceeds Expectations" for each performance value in his 2014 performance review. CX 8.

Complainant Transitions to a New HDC Supervisor, Mr. Richardson

On January 18, 2015, Complainant received notification that he was being reassigned to Mr. Dane Richardson as his HDC supervisor. CX 42; Tr. at 458. A couple of days later Mr. Richardson reached out to Complainant asking about who he was working for and where they were in his project. CX 45; Tr. at 463; see CX 44. Thereafter, Mr. Richardson rarely interacted with Complainant in person or by telephone, instead it was by email or instant messaging. Tr. at 1190, 1381-83.

Mr. Richardson was immediately struck by Complainant's correspondence.⁴³ As he described it:

his responses to things indicate that everything and everyone was doing something that was meant to cause harm or to -- against his best interest or whatever it might be. I had just not dealt with an employee like that, and I've had hundreds of employees over the years when I've done these sorts of things, I was just not familiar with that.

Tr. at 1191. According to Mr. Richardson, at no time did Complainant complain to him that Respondent was violating 14 C.F.R. § 25.1309 or other Federal Aviation Regulations. Tr. at 1377-78.⁴⁴ Mr. Richardson did not view Complainant's emails as raising violations of Federal Aviation Regulations. CX 115; Tr. at 1380.

On March 3, 2015, Mr. Richardson met with Complainant for a scheduled salary review, during which Complainant was given a salary notice based on his performance in the prior year. Tr. at 549; CX 58, CX 61, RX 69 at 2. Mr. Richardson relied on Mr. Jones's 2014 performance ratings for the salary review. CX 61; Tr. at 1379. Complainant asserts that, during the salary

June 2016. Tr. at 1750. Respondent did not submit its Source Control Documents ("SCD") to begin the type certification process until after all of the validation requirements had been met. Tr. at 1751.

⁴³ Mr. Richardson also commented that Complainant's IMs were very abrupt with lots of "exclamation points, underlines, all caps, things like that." Tr. at 1191.

⁴⁴ However, on December 4, 2015, Complainant sent an email to Mr. Marty Weikart, the FAA authorized software representative, averring that Respondent was not going to meet a major milestone. Tr. at 510-11; CX 209.

review, Mr. Richardson made several negative comments about Complainant. CX 60 (email from Complainant to himself with notes about the salary review).

Respondent issued additional 777X ELMS requirements between December 1, 2014 and March 2015. Tr. at 554. See CX 62, CX 63, CX 65, CX 66 and CX 67. Complainant attributes the changes to Respondent's failure to go back to GE's System Requirements Review ("SRR") to get a pass. Tr. at 557; see *id.* at 536-39. On March 16, 2015, Complainant attended a meeting with 777X ELMS managers and 777X leadership to include executives to discuss release of another set of 777X ELMS requirements. Tr. at 565-66. During this meeting Mr. De Genner asked Complainant if he agreed with the release of the 777X ELMS requirements to GE; he did not agree. Tr. at 566. Respondent's leadership agreed to proceed despite Complainant's dissent. Tr. at 569; CX 68 at 7. Complainant followed-up this meeting by providing a status chart on March 23, 2015 (CX 71) where he explained his concerns.⁴⁵ CX 71 at 3. Complainant maintained that this was protected activity because he was communicating to management that they were not meeting the validation requirements and not in compliance with the Development Assurance Plan. Tr. at 568.

On March 31, 2015, GE released a detailed Gap Analysis Excel spreadsheet summarizing 1,267 requirements associated by a Pass/Fail status, which reflected 361 as failed. Tr. at 574-75. Mr. Hilderman, Complainant's expert, opined that at this stage he would expect two or three percent being failed, not 25 percent.

Respondent released another 777X ELMS requirement to GE on March 31, 2015. Tr. at 574-75. Respondent developed a 777X Preliminary Type Certificate Strategy and revision A of this document was released March 27, 2015.⁴⁶ CX 73.

Complainant Alleges a Change in Employment Conditions

Complainant alleges that, during late March 2015, his conditions of employment changed.⁴⁷ During this time there was a leadership team meeting with GE where GE personnel notified Respondent's personnel that ELMS failed GE's Program Management Review. Tr. at 597. Mr. De Genner asked Complainant if he wanted to be the "program manager" of the 777X

⁴⁵ According to Complainant, 40% the requirements for the 777X ELMS released on March 16, 2015 were not in the SCD (System Control Drawing [or Document]). Tr. at 571-72; CX 68 at 3; see Tr. at 355 and CX 21. A validated SCD is one that meets the requirements set forth in ARP4754A.

⁴⁶ This document is essentially an agreement between the FAA and the 777X Integrated Product Teams on the primary type certification for the 777X program. Tr. at 581. The document delegates accountability down to the Integrated Product Teams ("IPT"); Mr. De Genner is the manager of an IPT that includes ELMS. CX 73 at 12; Tr. at 582.

⁴⁷ Complainant also believes that Mr. Richardson started retaliating against him around this time, but for age discrimination. Tr. at 1013-16. He believes that Mr. Richardson, Mr. De Genner, Mr. Demars, other Respondent managers, Respondent's Human Resource personnel and others including his ex-wife and a former high school associate were part of a conspiracy to retaliate against him. Tr. at 1032-42; see also *id.* at 1061. However, his suspicions have somewhat narrowed since December 2018, based on discovery. Tr. at 1043.

ELMS.⁴⁸ Complainant thought that Mr. De Genner was offering not a management position but to change his classification so he would report to the supplier manager rather than an engineer manager. Tr. at 598. Complainant was receptive to this idea, but said that Mr. Richardson would need to be involved in a transfer to Everett. Tr. at 598. Mr. Richardson testified that he thought it was a great opportunity for Complainant. Tr. at 1266. According to Complainant, on April 1, 2015, Mr. De Genner announced to GE that Complainant was the supplier program manager (“SPM”) but he had not yet been transferred into that position.⁴⁹ Tr. at 599-600, 610; CX 79, CX 80; *see* CX 115, CX 117 at 2, CX 272 at 60. What happened instead, according to Complainant, was Respondent modified the terms of his services during his detail to the Everett facility.⁵⁰ Tr. at 601-03; CX 74. *See also* Tr. at 611-12; CX 82.1. However, Mr. Richardson explained a Project Engineer entails a fairly broad category of skills and they are used for any number of things that support manufacturing. Tr. at 1267. A specific form of this diverse work are SPM who “are largely focused on interfacing with suppliers and developing a particular piece of hardware subsystem.” Tr. at 1267. But it would be unusual to reclassify an employee every time their responsibilities changed. Tr. at 1268-69.

It was during this same time that Respondent authorized GE to proceed with its design despite delivering 777X ELMS requirements to GE that did not meet validation standards. Tr. at 621, 650; CX 88, CX 89. Respondent’s Tagging Safety Requirements document indicates that the aircraft level safety analysis had not been performed and thereafter was allocated down to the system and item level of the 777X ELMS. CX 89 at 28. According to Complainant, Respondent failed to go through the proper safety analysis, such as safety tagging, so it did not meet the requirements at 14 C.F.R. § 25.1309. These are items required to meet the validation practices to ARP4754A. Tr. at 626-31, 645; *see generally id* at 632-43. According to Complainant, the problems with ELMS continued through the summer and into the fall of 2015.

From April 1, 2015 until early July 2015, Mr. Demars commended Complainant’s work on the program. CX 118; Tr. at 1775. However in July, Mr. Demars sent an email announcing that he was reducing Mr. De Genner’s managerial responsibilities and that he also noted that “the ELMS engineers did not understand the planning, the work that [he] was supporting, to execute what they were doing.” CX 118 at 1; Tr. at 758-59. It is at this point that Complainant “truly

⁴⁸ However, Mr. De Genner testified that Complainant advocated that he be considered for the position. Tr. at 1708.

⁴⁹ Mr. De Genner explained that a manager would expect at a Level 5 engineer would have transferable skills to perform different tasks and that it was not unusual to assign someone at that skill level different responsibilities. Tr. at 1708. He also denied there being a need to formally change Complainant’s position to supplier program manager because his duties were going to be for a short period of time and such work was in line with the role that Complainant had been asked to perform throughout the project. Tr. at 1708-09.

⁵⁰ Complainant offered this as evidence of retaliation “because Mr. De Genner is now job-shifting my responsibilities. All of this has to do with when it came around for my performance evaluation” wherein Mr. De Genner “was attempting to shift my responsibilities and then hold me accountable in areas that I was not either qualified for or never worked in that classification.” Tr. at 605-06. However, Mr. De Genner disputed any notion that he assigned Complainant this position as a fall guy. To the contrary, he maintained that Complainant advocated for that role and it was a role critical to the performance of the development. Tr. at 1734.

began noticing that Mr. De Genner began retaliating against [him] by making statements about [his] performance”. Tr. at 723.

Complainant's ECAM

On May 14, 2015, Mr. Richardson sent Complainant an email concerning Complainant's reimbursement requests for meals and alcohol while traveling for Respondent. Respondent's Huntsville facility maintains a meal and alcohol reimbursement policy that limits employees to expensing one glass of wine or one beer as part of reimbursable meal costs, and requires its employees to provide an itemized receipt and separate the cost of alcohol from the cost of food on an expense report. RX 2 at 2, RX 4, CX 99; Tr. at 735-36, 1194-97.⁵¹ Complainant received a copy of this policy. Tr. at 1025-28. While working on the 777X project, Complainant often had to travel and during his travels he consumed alcohol.⁵² Complainant did not always comply with the policy and was informed of his non-compliance on at least one occasion. Tr. at 1200. Specifically, Mr. Richardson informed Complainant of a recent expense containing “multiple alcoholic beverages in a single day” and “\$50.00 and \$60.00 of alcohol charges over two consecutive days.” Tr. at 1201; RX 5. He rejected the voucher and required that it be corrected before approving it - minus the excess alcohol charges. RX 5; RX 69 at 3; Tr. at 1201, 1212, 1217-18. Complainant alleges that Mr. Richardson intentionally rejected his expense report. Tr. at 740, 1012. *See also* CX 139; Tr. at 776-77.

Despite this admonition from Mr. Richardson, following a business trip in July 2015, Complainant submitted receipts for four alcoholic drinks in a single meal and for at least \$72.91 in expenses for a hotel minibar, which violated the meal and alcohol reimbursement policy. RX 6 at 3; Tr. at 1206-08. Although Mr. Richardson provided similar notifications to a few other employees during his time as a manager at the Huntsville facility, Complainant was the only one to violate the policy a second time. Tr. at 1203, 1219. When Mr. Richardson asked about what recourse to take, Respondent's human resources department recommended that Mr. Richardson issue a written warning, called an employee corrective action memo (“ECAM”) and suspend Complainant for one day without pay for his repeated violations of the reimbursement policy. Tr. at 1216. On September 3, 2015, Richardson elected to issue Complainant only an ECAM. CX 153, RX 8; Tr. at 795, 1217; CX 279 at 19, Tr. at 781-82. This is the only “discipline” Complainant has ever received while working for Respondent.⁵³ Tr. at 811. Mr. Richardson did disclose Complainant's receipt of this ECAM to Mr. Demars and/or Mr. De Genner prior to

⁵¹ *See* RX 4 (an email Mr. Richardson sent to all HDC employees in November 2014 about expensing alcohol charges while traveling), Tr. at 1197-99; *see also* CX 279 at 17.

⁵² According to Complainant, it was normal for the administrative staff to transfer alcohol expenses from the company card to a personal card if there was an excess charge, and Complainant had his personal credit card on file with Respondent. Tr. at 736; *see* CX 108, CX 143, CX 144. However, that was not done with this voucher.

⁵³ Complainant appealed this ECAM. CX 160; Tr. at 824. *See generally*, CX 162. However, according to a HR generalist Ms. Cartagena, per Respondent's policies, such a warning letter need not be reviewed by Respondent's Employee Corrective Action Review Board (ECARB). Tr. at 1819-21; RX 91.

September 24, 2015. Tr. at 1553; *see* CX 170. Complainant believes that the ECAM was retaliatory and coordinated with 777X ELMS management.⁵⁴ Tr. at 820-22; *see* RX 7.

Complainant Raises Concerns About his Role on the 777X Program and ELMS Issues

In June 2015, Complainant wrote to Mr. Richardson listing a series of issues in his new role on the 777X program; he also raised 777X ELMS issues. Tr. at 741-42, 1530-39; CX 115. Mr. Richardson did not respond to Complainant's concerns. Tr. at 743. Complainant viewed this non-response to his concerns as retaliation against him.⁵⁵ Tr. at 744.

On or about July 1, 2015, Complainant again raised concerns about his changed duties during a mid-year performance review and how his duties were unachievable.⁵⁶ CX 117 at 2; CX 116; Tr. at 756-57. On July 31, 2015, Mr. Richardson asked Complainant to sign his mid-year review. RX 40, CX 127. On August 2, 2015 Complainant wrote back to Mr. Richardson strongly objecting⁵⁷ to changes made to his personnel records and accusing Mr. Richardson of

⁵⁴ Complainant also alleges that this retaliation was for age discrimination, something beyond the jurisdiction of this Tribunal. *See* Tr. at 821, 1009.

⁵⁵ On June 30, 2015, Complainant submitted a complaint to Respondent's ethics department, alleging that Richardson had made negative age-related comments to Complainant during his salary review; he later amended the complaint to assert that Richardson had retaliated against Complainant by issuing the ECAM. CX 117; Compl. Br. at 32 and 39. Respondent investigated the claim and concluded that it was unsubstantiated. CX 171. As an age discrimination complainant is not within the purview of this Tribunal it need not address it further.

⁵⁶ As the Tribunal informed Complainant during the hearing, the Tribunal did not consider CX 117's allegations outside the scope of its jurisdiction. Tr. at 748.

⁵⁷ Complainant wrote:

I'll have to decline the mod you've done to my Jan PM.

I have some concerns with mgt changing past PM to correct mgt mistakes that impact me as an employee. The employees PM is leveraged to evaluate employees (sic) annual performance and also "should" be a part of the equation in annual salary consideration.

Unfortunately, I've had to endure past years of bad experiences surrounding mgt mis-use of performance evaluations! Once again 2014 performance evaluation was another slap in the face to include you voicing my age/performance abilities vs other younger employees capable (sic) to perform my job didn't sit well with me, unacceptable and quite frankly crosses the final line of my tolerance.

The trust in appropriate use of PM to manage and establish "my" performance is gone!

I don't think it's ethical to go back in time and change a [sic] employees [sic] PM to correct mgt mistakes, then ask the employee to sign to cover it up! This is perceived as altering the PM with mal-intent against the employee! I certainly know HR would not allow me to go back in time and change my PM, right?

After consulting with others I think the appropriate action would have been to change the mid-year to correct mistakes you made in initial PM. My recommendation is to request the original PM changed back to original state and then change the mid-year which

misconduct. CX 127 at 1; Tr. at 762-65, *see id.* at 1262-64, RX 7 at 2. At this point Complainant says he believed that his performance was going to be attacked for he was working in a skill set that he was not even assigned to. Tr. at 767. However, according to Mr. Richardson, there are two components to a Performance Review: the Business Goals and Objectives (“BG&O”) are tailored to the duties assigned to the employee and thus can change, while the Performance Values section of the performance review are the characteristics every Respondent employee is expected to meet, are used to accomplish tasks, and are the same for each employee so they do not change. Tr. at 1256-57. Since HDC employees move from one assignment to another, it is not unusual for the BG&Os to change within a given performance review period. *Id.* at 1259-60.

On August 20, 2015, in response to Mr. Richardson’s attempt to have a meeting with Complainant about his performance review, Complainant wrote another strongly worded email.⁵⁸ CX 149. This email to his supervisor included 21 exclamation points. When asked “Do you understand how that could be perceived as someone yelling at the recipient”, Complainant’s response was “No”. Tr. at 775.

In September 2015, Respondent brought in Dr. Banda, (a Ph.D, PE and Associate Tech Fellow), who was versed in the ELMS system to evaluate its development for the 777X. Tr. at 690. He noted that issues with ELMS still had not been corrected. A September 21, 2015 email by Dr. Banda notes numerous issues with the ELMS development process and includes such comments as: “Seems every rule in Systems Engineering has been broken.” “Fact that submittal was made before without a complete SRR...problematic!!!” and FSD started at risk...systems

unfortunately, you and I have already signed which raises more questions/suspicion.
[sic]

I’ll action HR for further guidance! Vivian

Have a great weekend.

Mike

⁵⁸ This email included the following statements:
Probably don’t need to meet if:

1) keep Jeff and ADaps out of my way! ADaPs doesn’t even report to HSV, they report to California. I’m building HSV/HDC. As I’ve mentioned many many times over the last 1.5y working for 777x, Jeff has intentionally never comm [sic] with me! If site has an issue tell Childers to call me I’ll tell him the real story!

...

3) ADaPs employees that support the area of my RAA need to take direction from me per 777x mgt. End subject!

...

5) your HR rep was “out of line” with related discussion to #4....that’s my last comm [sic] with her! I’ll work with appropriate focal with any future HR needs. If site has an issue tell Childers to call me I’ll tell him the real story!”

CX 149.

(21 functional teams) not mature....trades are open” and “if FSD not complete how can definition of requirements be conducted: CX 167 at 3;⁵⁹ Tr. at 690-93. By October 2015, there was the realization that the target dates for the 777X program would skip up to 11 months. Tr. at 719; CX 176. And the issue with requirements validation and stability persisted into mid November 2015. Tr. at 705-07; CX 192, CX 356. It was during this time period that there were discussions of elevating ELMS design assurance level from B to A. CX 192 at 15; Tr. at 706. This had systematic implications because it would raise the visibility of a risk from the Team level to the Airplane level.⁶⁰ Complainant alleges that this system’s visibility should be at the program level. Tr. at 707; *see* CX 192 at 15 and CX 192 at 17(“IF a single point common mode software failure occurs, THEN loss of a critical airplane function leading to a catastrophic even is plausible which violates CFR 25.1209(b)(2).”)

Complainant’s 2015 Performance Evaluation

Complainant’s conduct while at Everett was not the model of professionalism. Complainant at times came across as abrasive, if not rude. Tr. at 1709-10, 1759-60, 1190-92. His interactions with his colleagues and with one of Respondent’s contractors came to the attention of his Everett supervisors. Tr. at 1234-36. 1711-14, 1715-16, 1759, 1771, 1714, 1472-73; CX 149,⁶¹ RX 31,⁶² RX 35. Complainant’s manner of email communication was not typical of engineers at Respondent. Tr. at 1233. Complainant had difficulty dealing with views different than his own, often resulting in him making personal attacks on those that disagreed with him. Tr. at 1710, 1759-60. In all, Mr. De Genner received at least a dozen complaints from Respondent’s employees about Complainant’s interactions with them.⁶³ Tr. at 1711-13. Mr. De Genner described Complainant’s actions as follows: “I’ve never had such a terrible phase in my

⁵⁹ *See also* CX 173, CX 174, CX 177.

⁶⁰ Complainant described the hierarchy for the work being Airplane Level to System Level to Item Level. Tr. at 189-90, 472-73.

⁶¹ *See also* Tr. at 1235-36. Mr. Richardson testified that Complainant’s response in this case prompted him to forward it to HR personnel, for as he described it “I’ve not dealt with a person who responds in the way he does to things. And it was just an unusual thing.” *Id.* at 1236-37.

⁶² *See also* Tr. at 1228-32.

⁶³ The Tribunal heard about such conduct through the testimony of Ms. Kelsie DeFrancisco. She has worked for Respondent for nine years. She was a combined role procurement agent responsible for managing the GE Aviation Systems contract and the ELMS development that GE Aviation was performing for Respondent for the 777X. She interacted with Complainant at the Everett plant in this capacity from late 2014 through early 2015; they were peers and she interacted with him on a daily basis. Tr. at 1450-53. Ms. DeFrancisco found Complainant technically proficient in his job, but there were “a lot of demoralizing scenarios going on. There was a lot of frustration.” Complainant give the team “a lot of very negative comments, a lot of demeaning comments.” Tr. at 1454. Complainant would weekly, if not daily, use demeaning names, sent harassing messages or just disrespect people who were subject matter experts for their portion of the system. Tr. at 1455. Ms. DeFrancisco found some of Complainant’s emails unprofessional. They were belittling or demeaning and used inappropriate language. Tr. at 1473-74. His conduct was not typical of other engineers and “I’ve never seen anybody behave the same way that [Complainant] behaves.... I’ve never had such a terrible phase in my work career as I did while [Complainant] was with our team.” Tr. at 1455. Members of GE complained a couple of different times about his behavior. She expressed those concerns to Mr. De Genner and Mr. Demars. Tr. at 1456-57, 1471.

work career as I did while [Complainant] was with our team.” Tr. at 1455. He described Complainant’s emails as relentless, demeaning and “downright inappropriate.”⁶⁴ Tr. at 1473-75. Even during his actions with Mr. Richardson, Complainant’s emails and instant messages were abrupt and he unnecessarily used emphasis tools such as exclamation points, underlines and capitalization. Tr. at 1191-92; RX 5, RX 31, RX 72 at 2-3.

Respondent’s management, in particular Mr. De Genner, attempted to address Complainant’s questionable interpersonal skills by counseling throughout 2015. Mr Demars recalls starting to counsel counseling Complainant about his interpersonal skills in the August-September 2015 timeframe. Tr. at 1770. However, Complainant blamed others for his conduct and did not change his behavior. *See* Tr. at 1720-21, 1727, 1769-70. In September 2015, Mr. De Genner and Mr. Demars counseled Complainant in a more formal setting and gave Complainant information on methods to improve his workplace communication skills. Tr. at 1771; *see id.* at 1769. Within a short period after this counselling, Mr Demars and Mr. De Genner continued to receive reports about Complainant’s interactions with his colleagues and Respondent’s contractor personnel. RX 21; Tr. at 1714-18, 1760; *see also* RX 74. Complainant’s instant message writing were such that a supervisor for Respondent’s contractor raised concerns about

⁶⁴ Examples of Complainant’s inappropriate emails include the following:

- On December 12, 2014, Mr. Neely emailed his co-worker Peter Palatini—in all-caps, and very large red font—stating, “I DON’T LIKE THE CHART..... REPLACE THE CHART WITH A ‘BY ATTRIBUTE’ LOGICFLOW!!!!!!!!!!!!!!!!!!!!!!” RX 9; Tr. at 1761-62.
- During a March 13, 2015 IM conversation with a 777X colleague, Mr. Lin, concerning Mr. Lin’s description of changes made to the document, Complainant wrote “HOW THE HELL AM I SUPPOSE [sic] TO KNOW THAT.” Complainant then referred to Mr. Lin as “stupid.” RX 17; Tr. at 1762-63.
- In a June 19, 2015 email to another member of the 777X team, Complainant wrote: “Based on your ELMS PM comments in leads meeting this morning throwing the blame on me for lack of GEA IMS, let’s get it out in the open! I’m tired of finger pointing! If you have any issues and need information to ‘get in the know’ email, IM or pick up the phone and contact me!” RX 11; Tr. at 1753-65.

See also RX 25 (“idiotic”), RX 27 (“DAM [sic] NEW PROCESS”); RX 18, RX 19, RX 20, RX 24, RX 28, RX 31, RX 32 and CX 149.

As for the email at CX 149, the Tribunal asked Complainant the following:

Q: Do you normally refer to people: “Keep Jeff and ADAPS out of my way!” [?]
A: Yeah, I do, in that kind of discussion, and I have with other employees, as well, and more will be testified. . . .
Q: In this e-mail I see 21 exclamation points. Do you understand how that could be perceived as someone yelling at the recipient?
A: No.
Q: You don’t see that as e-mail etiquette --
A: No.

Tr. at 774-75.

Complainant's behavior to Mr. Demars. Tr. at 1716-23. Mr. Demars referenced several other email or instant messages exchanges by Complainant that were unprofessional. Tr. at 1762-69; RX 9, RX 11, RX 17, RX 25, RX 27, RX 28.

On September 16, 2015, Mr. Richardson was in Everett and sent an email to Mr. Demars and Mr. De Genner introducing himself and inquiring into Complainant's work in Everett. RX 36, CX 166 at 2. Mr. Richardson received a note from a different manager that Complainant was beginning to tax their management abilities, but they were still getting good work out of him. Tr. at 1239-40. On September 17, 2015, Mr. Richardson met with Mr. De Genner and Mr. Demars in person to discuss Complainant's job performance. RX 69 at 4. He received negative feedback about Complainant's interpersonal skills.⁶⁵ *Id.* He relayed this feedback to Complainant. RX 36 at 1; Tr. at 839, 1240-43. Complainant wrote to Mr. Demars and Mr. De Genner on September 22, 2015 about his displeasure with learning this. RX 37; CX 168.

On October 15, 2015, Mr. Currier, a Respondent-employee, who is also a designated authorized representative for the FAA,⁶⁶ wrote an email to persons working on ELMS that "if we conducted a validation review for most systems at this point, we would not pass." Tr. at 309-12; CX 304 at 45. According to Complainant, this reflects a contemporaneous view that Respondent was not complying with the validation requirement.⁶⁷

In October 2015, Mr. Demars was informed that the 777X ELMS project's budget would be reduced by approximately 20 percent beginning in March 2016, which necessitated a reduction in staffing on the project. Tr. at 1779; RX 70 at 3. Complainant's temporary assignment with the 777X ELMS project was eliminated in part because, "persistent travel" assignments, such as Complainant's, are more expensive than standard positions that do not involve frequent travel. RX 70 at 3. When Complainant's role on the 777X project ended he was scheduled to return to the HDC. *Id.*

⁶⁵ Mr. De Genner testified that Complainant had some strong project management skills but he had interpersonal challenges throughout the time that he was with the ELMS project and it got worse over time. Tr. at 1709-10. He had received several complaints from engineers within and outside of his organization about Complainant's professional behavior. Tr. at 1711-14. Mr. De Genner referenced an incident in early October where Complainant berated a supplier-employee. Tr. at 1714-20; RX 21. Mr. Demars described Complainant as technically competent and that he had a fair amount of project management background, but Complainant had interpersonal skills that made it difficult for the team. "[E]very other week, it seemed like we were constantly having to smooth over some interaction or some issue that [Complainant] had with somebody.... [They] ranged from some of the aggressive belligerent e-mails to IM interactions, to, you know, just very disrespectful of individual's opinions when they differed from his." Tr. at 1759-60.

⁶⁶ Fourteen C.F.R. Part 183 addresses the authority and manner in which the FAA delegates its oversight responsibility to non-federal persons or businesses. *See also* RX 62 at 13 and 18-19.

⁶⁷ According to Mr. Hilderman, validation and verification is very important in this engineering process. Tr. at 348. In this process "verification is irrelevant without the validation of having good requirements." Tr. at 347. After reviewing documents he was presented, it is his opinion that Respondent did not follow its own engineering validation process in the 2014-2015 time period, and thus did not comply with § 25.1309. *See* Tr. at 350-51 and 353.

Also in October 2015, budgetary and workload constraints at Respondent's HDC facility required eliminating two Project Engineer 5 positions. CX 178, CX 179; Tr. at 1331-32. Complainant was included in this pool of RIF candidates because he was still permanently assigned to HDC, but detailed to the 777X project in Everett. Further, because of this temporary assignment he was designated as providing critical skills to program requirements. Tr. at 1339. During this RIF, Complainant's 2014 performance review was used because the 2015 review was not completed. Complainant was not selected for that RIF because he was not the lowest-scoring employee. Tr. at 1360-61.

On October 21, 2015, Mr. Richardson contacted Mr. De Genner and Mr. Demars seeking input for Complainant's performance review. CX 180 at 3⁶⁸, RX 38; Tr. at 1270-71. Mr. De Genner and Mr. Demars responded to Mr. Richardson's request for information on October 28 and October 30, respectively. RX 38; Tr. at 1272-73, 1724-33. Both Mr. De Genner and Mr. Demars wrote that they were dissatisfied with Complainant's interpersonal skills and his ability to work with others.⁶⁹ RX 38. Mr. De Genner opined that Complainant "Met Some Expectations" in the "Communication" category because of his challenging interactions with team members. He also opined that Complainant "Met Some Expectations" in the "People Working Together" category. RX 38. Mr. Demars' opinion was even more unfavorable, opining that in the category of "People Working Together" he believed Complainant warranted a "Does Not Meet" rating. RX 38; Tr. at 1730, 1776-77, *see also id.* at 1772-74. Mr. Richardson incorporated their comments in to Complainant's 2015 performance review⁷⁰ and assigned Complainant the following overall scores: Business Goals & Objectives – "3 Met Expectations" (RX 41 at 3; Tr. at 1277) and Performance Values – "2 Met Some Expectations" (RX 41 at 3-5, Tr. at 1279, 1298-99).⁷¹ Within the Performance Values subcategory "People Working Together" Mr. Richardson assigned Complainant the rating "1 Does not meet." RX 41 at 4; Tr. at 1285.⁷² Such a rating is "a very rare thing." Tr. at 1295. Mr. Richardson concluded Complainant's performance evaluation as follows: "[Complainant's] inability to work together with the rest of the team and his communication skills relative to interactions with team managers and program managers impeded his performance of the team's goals." RX 41; Tr. at 1299.

On November 10, 2015, Mr. Richardson meet with Complainant and Mr. DeMars in Everett, Washington and conducted Complainant's performance review and provided

⁶⁸ Mr. De Genner forwarded Complainant's performance feedback to Mr. Richardson on October 29, 2015. CX 180 at 1.

⁶⁹ Mr. De Genner testified that he spoke to Complainant about his interpersonal behavior on several occasions but Complainant was not receptive to his feedback. Tr. at 1720-22. Rather, Complainant's conduct continued to accelerate the further they got into 2015. *Id.*

⁷⁰ Mr. Richardson testified that he used their input nearly verbatim in the performance document. Tr. at 1273, *see id.* at 1280-90. *Compare* RX 38 with RX 41. *See also* RX 69 at 5.

⁷¹ Complainant testified that in his 31 years with Respondent he had never received less than a "met expectations." Tr. at 874.

⁷² For examples of his inappropriate workplace communications during the rated period, *see* RX 17 – RX 31. *See also* RX 72 – RX 74.

Complainant with a copy of the performance review.⁷³ Tr. at 868, 1274; RX 41, CX 216. Mr. Richardson could not recall Complainant making any comments about the evaluation during this meeting until the end. Tr. at 1310. Mr. Richardson concluded by asking Complainant if he had any questions and Complainant responded “This will be dealt with appropriately.” Tr. at 1313, 1559. Complainant maintains that his poor performance review was in retaliation for raising 777X ELMS complaints. Tr. at 875. Mr. Richardson gave Complainant an overall rating of “3, Met Expectations” for his BG&Os for 2015. Tr. at 1277

After receipt of Complainant’s performance review, Mr. Demars reassigned him to work on a mitigation plan called “Safety of Flight.” With this assignment Complainant was able to work independently and, according to him, fully utilize his PE-5 skills. At the conclusion of that assignment, in early December 2015, he received an award for his performance from Mr. Richardson, Mr. Demars and Mr. De Genner. Tr. at 875-77, 1062; CX 3 at 40. Mr. Richardson physically handed the award to Complainant. According to Mr. Richardson, Complainant looked at him, turned and tossed the award into the trash can next to his desk, then looked at him and said nothing – so Mr. Richardson turned around and left. Tr. at 1567.

Complainant is Subjected to the January 2016 RIF

Towards the end of 2015, the 777X program faced budgetary cuts that impacted many areas of the program, including the ELMS program. Tr. at 1779. Respondent opted to reduce costs by downsizing personnel, which it calls “offloading.” Tr. at 1780-81. Mr. Demars decided to end the job assignments of several employees⁷⁴ and he informed Mr. Richardson that he anticipated no longer needing the services of Complainant on the 777X ELMS project. Tr. at 1351-52.

Further, there was not enough work available at HDC for an employee that held a Project Engineer 5 classification.⁷⁵ Tr. at 1313-1314; RX 69 at 5, RX 68 at 2. Therefore, another RIF event occurred between January 13 and 15, 2016. Tr. at 1343. Respondent followed its RIF process guide.⁷⁶ CX 225. For this RIF, Complainant’s 2015 Performance Review had been

⁷³ Complainant had submitted a self-evaluation of his performance prior to this meeting. Mr. Richardson had read Complainant’s self-evaluation prior to this meeting. CX 188; Tr. at 870, 1307, 1560-61. Mr. Richardson did not have a conversation with Complainant about his self-evaluation. Tr. at 1563-64. But he did ask Mr. Demars and Mr. De Genner to comment on it and, according to Mr. Richardson, they felt that Complainant had overrated his performance. Tr. at 1312, 1563.

⁷⁴ Mr. Demars identified at least three other persons who were impacted by his decision to offload. Tr. at 1781-82.

⁷⁵ The record reflects that there were at least two other RIFs of the Project Engineer, Level 5 classification in 2015. *See, e.g.*, RX 68 at 2.

⁷⁶ Complainant maintained that Respondent did not provide him with advance notice so he could transfer to other jobs. Tr. at 942. However, in his case, his “at risk” identification notice (CX 3 at 6) occurred almost simultaneous with his 60 Day Advance Notice of Layoff (CX 3 at 5). Though what Respondent did may not be the best human resource practice in this instance, it was still compliant with its policy. *See* CX 225 at 2.

Ms. Ellory Catagena, a HR Generalist at the HDC, supported the RIF process. Tr. at 1812-13; CX 279 at 6. She denied Complainant’s contention that she was hired to terminate Complainant’s employment,

completed and was included in this RIF determination. Tr. at 1343. Complainant's performance score from his 2015 performance evaluation lowered his overall weighted assessment. This placed Complainant at the bottom of the assessment which led to his layoff.⁷⁷ RX 43; Tr. at 1337-61.

At some point, Mr. Richardson went into Respondent's Enterprise Skills Planning Tool and learned that Complainant's work with the 777X would complete at the end of March 2016, and he had no work beyond that. Tr. at 1313; *see id.* at 1788. So he needed to start planning for Complainant's next assignment.⁷⁸ If no work became available 90 days prior to that it initiates a RIF cycle. Tr. at 1317.

Respondent has a company-wide procedure it follows when implementing a RIF. RX 3, RX 68 at 2; Tr. at 1316-17. A RIF cycle involves all the managers for the affected employees in that skill, in this case those who managed P-5 project engineers at the HDC. Tr. at 1391. The managers then follow Respondent's RIF guidelines. RX 3; *see* Tr. at 1320-30. As part of this process, the individual managers sit down and enter their assessments of their own employees' skills. Tr. at 1323. Under this process, the manager of each impacted employee provides numerical ratings for that employee based on annual performance management scores and additional skill assessments. RX 3, RX 68; Tr. at 1317-20, 1581. An employee's score in this process is based on certain weighted criteria. An employee's most recently available prior annual performance review accounts for forty percent of the RIF assessment; the BG&Os is 20 percent and the Performance values is 20 percent of the total score. RX 3; Tr. at 1329, 1332-33, 1346. The remaining sixty percent of the assessment is based on additional core competencies specific to the job position. Tr. at 1329. The individual assessments are then pooled with the other managers' assessments of their employees. The managers then gather and essentially create an order of merit list for the employees subject to the potential RIF.⁷⁹ RX 3. *See* Tr. at 1320-21, 1326-28. Part of the reason for this meeting is to ensure that the supervisors apply their scores with some consistency. Tr. at 1324. Then, once the rating for each employee is finalized, the person or persons with the lowest cumulative score is laid off.⁸⁰ Tr. at 1324-26; RX 3.

but was the responsible HR focal to process his RIF termination. Tr. at 1815. Complainant was treated no differently than other employees who were laid off as part of a RIF. Tr. at 1816. Complainant was given the opportunity to appeal his RIF selection in January 2016. *See* RX 44. However, Complainant did not reach out to her about a potential RIF appeal. Tr. at 1818.

⁷⁷ Respondent notes that even if Complainant had received a higher Performance Value score, and his Influencing Others score had not decreased, Complainant still would have been the lowest-rated Project Engineer 5 in the RIF exercise. Resp. Br. at 15 (citing to Tr. at 1347, 1357-58).

⁷⁸ RIF for project engineers in Huntsville applies to workers reporting to the HDC as well as those engineers reporting to other managers in other work location or programs in Huntsville. Tr. at 1189. RIFs are done with specific job classifications and skill code levels. In this case, the RIF was for Project Engineers, Level 5 ("P-5"). Tr. at 1190.

⁷⁹ CX 178 and CX 179 are RIFs for project engineers that occurred in October 2015 (prior to the January 2016 RIF process that impacted Claimant). *See* Tr. at 1344-45. In those prior RIFs, Complainant's 2014 performance evaluation was used to establish his overall score because his 2015 performance evaluation performance cycle had not concluded and thus it was not available to be used in the process. Complainant's 2015 performance evaluation was not final until December 2015. Tr. at 1346.

⁸⁰ In this process, the system they use for the decrement order has a tool that reviews the attributes of the people at risk, to verify that Respondent is not violating "any kind of EEO considerations and adverse

Employees affected by the RIF usually go down to the bottom of the list and receive notice that they are being laid off 60-days prior to the potential end date. Tr. at 1327-28; RX 68 at 3. Another notice is given to the employee 14 days prior to a lay off date and if work is not found for them during that time they leave Respondent's employ. RX 3; Tr. at 1330, 1327-28.

The RIF that impacted Complainant occurred on January 18, 2016 and included 33 employees in the Project Engineer 5 classification. RX 43, RX 68 at 3; CX 224. For this RIF Complainant's 2015 Performance Evaluation was used to determine where he fit in the order of merit list.⁸¹ Tr. at 1347-48; see RX 41 at 3, 5 and RX 43. His performance evaluation lowered his overall score on the RIF order of merit list that he had in the October 2015 RIF analyses. Tr. at 1357. His January score for the remaining RIF criteria assessed by Mr. Richardson, which constituted 60 percent of his overall score, remained the same or even went up in some factors.⁸² Tr. at 1358-61. However, Complainant received a score of 61 out of 100, which was the lowest out of the affected employees. RX 43, RX 68 at 3; Tr. at 1363; see RX 69 at 5, Tr. at 1580-81.

On January 21, 2016, Mr. Richardson provided Complainant with two documents, one was the formal Reduction in Force Notice and the other was the At Risk Notice.⁸³ Tr. at 1595. The former was a sixty-day advance notification of layoff which included information about the appeal process. CX 223, RX 44, RX 68 at 4; Tr. at 907, 1361-63, 1578, 1606. Complainant did not appeal.⁸⁴ RX 44 at 2; Tr. at 1817-88.

Following Complainant's selection to be laid off, Mr. Richardson was unable to find another position for Complainant and authorized Complainant up to 20 work hours to engage in job search activities. Tr. at 1367-69; see RX 45. During the ensuing 60-day period, Mr. Richardson worked with other employees of Respondent, including Ms. Cartagena and Mr. Hendershot, to attempt to find Complainant alternative employment with Respondent. RX 69. Complainant was unable to obtain a new position at Respondent during the 60-day window and his employment was terminated on March 25, 2016. RX 68 at 4.

At the time that Complainant was terminated he held a security clearance. Tr. at 975; CX 245. The clearance remained active for two years from the date that Respondent terminated

impact and that sort of thing. And if it comes back and say: 'Adverse impact complete' and it finds nothing, then we're good to go." Tr. at 1327-1330.

⁸¹ The evidence suggests that even if Complainant's performance evaluation score was somewhat higher, it would not have impacted the fact that Complainant was ultimately subject to the RIF. See Tr. at 1350-53.

⁸² Complainant's score increased within two criteria and decreased within one criterion. Tr. at 1360-61. Compare CX 179 with RX 43. Complainant does not know whether Mr. Richardson considered Complainant's ECAM when he assigned Complainant his scores during the RIF process. Tr. at 1003. Nor is he aware of how Mr. Richardson decided to rate Complainant on his 2015 performance evaluation. Tr. at 1003.

⁸³ Mr. Richardson testified that at the HDC, they had gone through the RIF process multiple times over the years and it was their practice to give the At Risk Notice and the 60-Day Notice at the same time. Tr. at 1603

⁸⁴ Complainant asserted during the hearing that he was not given the process on how to appeal nor the opportunity to appeal his termination. Tr. at 951.

Complainant's employment. Tr. at 946. A security clearance enhanced a Respondent's employee's retention potential. *Id.* at 945. Later, when applying for jobs within Boeing after the two years expired, Complainant was denied a job opportunity because he did not have a government clearance. Tr. at 978; *see* CX 253.

After being laid off, Complainant filed a complaint with the FAA alleging Respondent failed to follow Federal Aviation Regulations, FAA Order 8110.4C, Type Certification requirements, and industry guideline standard ARP4754 during the 777X's development. RX 59. The FAA found that, as the 777X was in the early stages of development, there could be no violation of any FAA order, regulation, or standard. RX 81.

Expert Witness Testimony

Mr. Vance Hilderman testified as an expert witness for Complainant.⁸⁵ Tr. at 237-39. He holds a Master's degree in computer engineering and is the author of the world's best-selling book on Avionics Certification. Tr. at 242. He evaluated the merits of Complainant's complaint relating to the 777X ELMS aviation system. He wrote a report about this system. CX 304. He opined that since Respondent opted to follow ARP4754A to show compliance with the requirements of 14 C.F.R. § 25.1309, Respondent had to have underlying documentation to show overall compliance. Tr. at 253-54. Normally, once a company identifies the method of compliance a company is going to use, and that method has been deemed acceptable, the company cannot thereafter deviate from it without the FAA's approval. Tr. at 259-60; *see* CX 257. However, some companies, including Respondent, have been delegated the authority by the FAA to approve an alteration of a previously approved procedure. This is called an ODA designation.⁸⁶ Tr. at 255; *see* 14 C.F.R. Part 183.

⁸⁵ At the end of Mr. Hilderman's testimony, there was an expectation that he would return for further cross-examination. However, later in the hearing, Respondent waived further cross-examination if Complainant would forego any redirect. Complainant agreed and therefore, the Tribunal permanently excused Mr. Hilderman from participating further in the proceedings. *See* Tr. at 526-27.

⁸⁶ Forty-nine U.S.C. § 44702(d) authorizes FAA to delegate certain certification functions to private entities, including aircraft and aircraft component manufacturers and aircraft repair facilities. In 2003, Congress via P.L. 108-176 directed FAA to develop a process for issuing "design organization certificates." In response, the FAA developed the Organization Designation Authorization ("ODA") process, which provides the framework under which approved organizations are delegated certain certification responsibilities on behalf of FAA. ODA responsibilities may include authority to issue airworthiness certifications, production certifications, and type certifications, which are granted separately to specific ODA certificate holders. Specifically, 49 U.S.C. § 44704 allows FAA to rely on ODA holders to certify compliance for type certification of aircraft, aircraft engines, propellers, aircraft instruments and equipment, and certifications to mass-produce and issue airworthiness certificates for production aircraft and aircraft components. The statute, however, specifies that FAA is to include in an ODA holder's certification specific terms that it requires of the organization in the interest of public safety. Those terms are specified through the ODA certification process detailed in FAA Order 8100.15B, *Organization Designation Authorization Procedures*. Respondent has authority to perform both type certification and production certification work, in addition to airworthiness certification on behalf of FAA. Most of this background information comes from Bar Elias, *Delegation of Federal Aviation Administration*

After reviewing Boeing-documentation concerning the development of the ELMS system for the 777X, Mr. Hilderman acknowledged Respondent's policies at the corporate level are excellent. However, in the case of the 777X, Respondent is not in compliance with its own process or safety standards, or its own supplier management processes as they pertain to GE. Tr. at 392. However, on cross-examination he acknowledged that he did not receive certain pertinent documents and the lack of those documents influenced his conclusion. Tr. at 419. As Respondent's counsel pointed out, Mr. Hilderman testified that certain documents should have been present for him to review to form his opinion. Tr. at 418-19. Also, Complainant never received those documents because Complainant never asked for them.⁸⁷ *Id.*

Mr. Christopher Paine is an engineer who is currently the director for Respondent's Airplane System and has been since 2015. He's been employed by Respondent since 1991. He leads the core engineering team that consists of about 1,300 engineers. Tr. at 1627-29, 1633; *see* CX 366. Part of his responsibility includes the 777X's ELMS team. Tr. at 1630. Employees are encouraged to report safety concerns either through the anonymous process, to peers or to one's management chain. Tr. at 1631. Respondent uses a "gated process" to develop aircraft. There are twelve "gates" (phases) Respondent goes through when developing an aircraft and these contain checklists along the way for each gate to ensure they are getting the work done. Tr. at 1632; CX 366 at 21. Typical development for an aircraft is five to seven years. Tr. at 1634. In late 2014 through 2015, the 777X was in the Preliminary Design Review ("PDR") phase of the development of the aircraft. Tr. at 1634. The gate after the PDR is the Critical Design Review ("CDR"). Tr. at 1635. FAA certification of an aircraft does not come until the very end and that certification process takes many months. Tr. at 1636. The FAA works with the manufacturer along the development. Tr. at 1637. ARP4754A is guidance material the FAA has reviewed and agreed that, if a manufacturer follows that guidance material, the FAA will recognize the methodical process as an acceptable means that can be used for developing the airplane. Tr. at 1638; CX 366 at 16; *see* CX 275 at 49. In his experience, it is very common for Respondent to submit a list of only partially validated requirements to a supplier. Tr. at 1651. A manufacturer does not know all of the requirements for aircraft being developed ahead of time because a manufacturer has no idea what the design of the system is going to be. "You have to work back and forth to figure out how to ... get to a point ... where you've got validated requirements and you verified them, but it goes on for a very long length of a program." Tr. at 1657-58.

Mr. William Ashworth testified for Respondent. He has a degree in Aeronautical Engineering with specialties in Electronics and Engine Control Systems. He has previously served as a design and test engineer for the Department of Defense and spent 15 years with the FAA as a type certification engineer, ending his time there as the Manager of the Seattle Aircraft Certification Office. Tr. at 1824-25; *see* RX 63. At Respondent's request he prepared a report concerning the certification of the ELMS system on the 777X airplane. RX 62. Mr. Ashworth opined that Complainant's allegations given the early stages of the ELMS development "are

Certification Authorities to Aviation Manufacturers, Cong. Res. Svc (Mar. 25, 2019)(IF11145), available at <https://fas.org/sgp/crs/misc/IF11145.pdf>.

⁸⁷ The documents he expected to see but were missing from those provided included engineering checklist reviews, independent reviews, Quality Assurance, ODA and AD. Tr. at 420.

objectively unreasonable and irrational.” Tr. at 1829; RX 62 at 8. Mr. Ashworth noted that the documents referenced by Complainant in his allegations are advisory only in nature. Tr. at 1830-32. In his opinion, someone with Complainant’s background “should clearly have understood that industry standards and internal FAA orders, during the early part of a development process, could never be held as a violation of FAA regulations.” Tr. at 1835. In his view, the requirements of Part 25 become applicable to Respondent once the FAA approves the certification basis which is somewhere mid-stream in the project. Tr. at 1836-37. The information he reviewed indicated that the FAA and Respondent were still developing the certification basis. Tr. at 1837. Indicators of where Respondent would be in the certification bases are reflected in FAA Issue papers and the Project Specific Certification Plan “PSCP”). Tr. at 1837-38. According to Mr. Demars, the PSCP for the ELMS was submitted to the FAA in October 2016. Tr. at 1893-94. In Mr. Ashworth’s view, the date the type certificate is signed determines when there can be a violation of the regulations because at that point, the situation involves a product that has been approved by the FAA. Tr. at 1845. At the time of Complainant’s allegations, the FAA had not approved the aircraft’s type certificate.

III. ISSUES

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

A. Summary of Complainant’s Position

Complainant contends that he engaged in protected activity as early as December 1, 2014 and his protected activity continued until his termination on March 25, 2016. Compl. Br. at 28. Specifically, he says he engaged in protected activity:

- In December 2014 when he started reporting non-compliance with the ELMS requirements to Mr. De Genner after Mr. De Genner authorized the release of incomplete and incorrect 777X ELMS requirements (*see* CX 31, CX 272 at 47-48, Tr. at 508, CX 218).
- In March-April 2015 when he raised complaints that Respondent was releasing non-compliant 777X ELMS requirements and Mr. De Genner thereafter attempted to coerce him to releasing the requirements to GE again, which he refused to do. CX 65; Tr. at 560-62; CX 272 at 57. Complainant maintains that his managers were looking for a fall guy for the issues Respondent was having with the 777X ELMS design requirement. Compl. Br. at 31. Complainant asserts that he engaged in protected activity again when he confided in his Huntsville manager, Mr. Richardson, about the issues he was facing on the 777X ELMS. Compl. Br. at 31 citing Tr. at 743-45, 1261-63.

- Complainant filed his first formal complaint to Respondent's internal ethics on June 30, 2015. CX 117. Complainant maintains that Respondent subjected him to a hostile work environment.
- When he disclosed of employment issues to HR representatives in July 2015. Compl. Br. at 32.
- When he filed three formal complaints in October and November 2015 regarding Respondent's management release of defective 777X ELMS requirements. CX 182, CX 183, Tr. at 861-63 and 1918. Compl. Br. at 33.
- When he provided forty pages of information to Respondent's investigator. CX 217; Tr. at 854-56. Compl. Br. at 33.

Complainant maintains that Respondent took unfavorable adverse actions against him by altering and reducing his work assignments to a lesser skill level than his job classification skill code; placing him in a spurious job classification with no authority; altering historical performance goals; administering formal corrective action; administering him an adverse annual performance review; assigning a HR generalist to discredit him and terminate his career; and terminating his employment. Compl. Br. at 34.

Complainant alleges that Respondent modified his scope of work in October 2014 to support the 777X to include ARP4754A. He informed Mr. De Genner that completing the 777X ELMS requirements development to meet ARP4754A was a high risk and an unachievable task; at best only a cursory review could be achieved. After informing Mr. De Genner of this Complainant alleges Mr. De Genner's actions towards him changed. Compl. Br. at 34-35.

In his reply, Complainant asks the Tribunal to apply the "two-step burden-of-proof framework in *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (Sept. 30, 2016). Compl. Reply at 1-3. He asserts that his job was to report safety issues during the ELMS project but Respondent's management took no action to mitigate the safety issues he raised, and that Respondent actions violated 14 C.F.R. § 25.1309. Compl. Reply at 5. He maintains that Respondent fabricated Complainant's "adverse behavior pattern" after he filed suit against Respondent, that Respondent's evidence is largely hearsay, and that its witnesses have "questionable motives." Compl. Reply at 5-8. He references the Tribunal to document where his work was commended. Compl. Reply at 9 (CX 52; CX 119, CX 165 CX 356). Complainant describes Respondent's claim of travel expense irregularities as "bogus." Compl. Reply at 10-11. Complainant rebuffs the notion that the RIF process Respondent followed was normal. Compl. Reply at 11. He maintains that Respondent cannot show by clear and convincing evidence that Respondent would have terminated him despite his protected activity. Compl. Reply at 12. He also asks that the adverse inference sanction imposed at the hearing not be applied in this matter. Compl. Reply at 12-13. Complainant asked the Tribunal to take official notice of a publically available document.⁸⁸ Compl. Reply at 14.

⁸⁸ Complainant is correct that the Tribunal informed the parties that it would consider publically available documents. However, the document Complainant requests that the Tribunal consider concerns the Boeing 737Max. The Tribunal will consider this document but only for the very limited purpose of understanding the FAA guidance pertaining to the type certification process, especially FAA Order 8110.4C. The Tribunal will not consider any references, recommendations or conclusions made

B. Summary of Respondent's Position

Respondent argues that Complainant's selection for layoff had nothing to do with any alleged protected activity. Rather he was selected because of his poor evaluations which reflect his poor interpersonal skills. Further, Complainant failed to prove that he engaged in protected activity. Complainant's job was to report issues and risks with the Electrical Load Management System to an aircraft in development, the Boeing 777X. It contends that it is subjectively and objectively unreasonable to believe that Respondent violated any Federal Aviation Administration ("FAA") orders, regulations or standards, or any other laws relating to air carrier safety. It points out that the 777X was in the early development phase and the FAA had not issued any Type Certification or related planning approval.

Respondent reiterates that, despite Complainant's conspiracy claims there is no support for it in the record, and his layoff was entirely lawful and for non-retaliatory reasons. It notes that Complainant misconstrued the reasons the Tribunal sanctioned Complainant, and that he changed his version of events again in his reply brief about his lack of disclosure during discovery as well as he attempted to raise new allegations and arguments not presented at the hearing or in his opening brief. Respondent noted Complainant attempted to reference another type of aircraft. It also asserted that Complainant conceded that he has not proven that the alleged protected activity contributed to his layoff. Respondent maintained that Complainant's excuses for his abusive workplace behavior are unsupported by the evidence.

IV. CONCLUSIONS OF LAW

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

Complainant appeared before the Tribunal *pro se*, and therefore should recognize that—unlike the Tribunal's determination in its denial of Respondent's Motion to Dismiss, which viewed the evidence in a light most favorable to the Complainant as a nonmoving party—the law provides no such special burdens at this stage of the adjudicatory process. The Tribunal will simply review the evidence of record to determine whether the evidence shows that Respondent violated the Act.

associated the accidents that prompted this report. Complainant himself admitted to the Tribunal that he did not work on the 737Max. Tr. at 28-31.

Equity demands this Tribunal to construe liberally the complaints and papers filed by self-represented litigants “in deference to their lack of training in the law and with a degree of adjudicative latitude.” *Jenkins v. CSX Transp., Inc.*, ARB No. 13-029, slip op. at 10-11 (May 15, 2014) (internal quotation marks omitted). See *Wyatt v. Hunt Transport*, ARB No. 11-039, slip op. at 2 (Sept. 21, 2012); *Williams v. Nat’l R.R. Passenger Corp.*, ARB No. 12-068, slip op. at 3 (Dec. 19, 2013). Here, after his counsel’s withdrawal, Complainant has elected to proceed as a self-represented litigant. This Tribunal has kept a deferential mind when considering Complainant’s dealings with the Office. Although the Tribunal has considered Complainant’s self-represented status in its procedural dealings with the parties, as illustrated in the discussion that follows, the Tribunal has not extended such deference to the weight it accords to the admitted evidence. In accordance with the Tribunal’s statements at the hearing (Tr. at 4-5, and 11), the Tribunal will determine the appropriate weight to the parties’ evidence based on the value of the contents therein, without deference to the parties’ status.

A. Credibility

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

The ARB has stated its preference that ALJs “delineate the specific credibility determinations for each witness,” though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the proceedings, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge about the subject matter of the witnesses’ testimony, and the extent to which the testimony was supported or contradicted by other credible evidence.⁸⁹ *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness’s testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

This Tribunal finds Complainant’s credibility wanting. The Tribunal warned Complainant at the beginning of hearing about representations made to the Tribunal. Tr. at 14-15. Complainant clearly represented to Respondent in discovery and to the Tribunal that he “did not take any documents from the Boeing Company, I’ve stipulated that several times in several documents.” Respondent’s counsel then specifically asked Complainant: “Just to be clear on this

⁸⁹ Based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence.

record, you're saying you did not forward yourself any e-mails or instant message exchanged from Boeing." Complainant's response essentially was no but, if he did, he had deleted them. Tr. at 90-93.

During the hearing, the Tribunal learned that Complainant's representations concerning his use of email was at best inaccurate, at worse, a knowingly false statement. At the outset of the hearing, the parties discussed whether Complainant possessed certain emails that he forwarded to himself before his termination of employment but had not produced to Respondent, as well as the failure to produce other documents in Complainant's possession that Respondent learned of through a FOIA request Respondent apparently made to the FAA. *See* Tr. at 80-82; *see also id.* at 83-88. Complainant, in explaining his failure to provide the documents Respondent learned of pursuant to its FOIA request told Respondent's counsel "I did not take any documents from the Boeing Company, I've stipulated that several times in several documents." Tr. at 88. This prompted Respondent's counsel to ask "So, you never forwarded yourself any materials for the purpose of using them in his litigation -- yes or no -- because it relates to an active discovery dispute?" Tr. at 90. Complainant replied "No, not that I recall" later explaining "To his question, did I e-mail myself something for the purposes of this litigation and use? The answer is no. Did I e-mail myself something in the relevant time period, and did I do it mistakenly? I would have to say yes, I did, but I deleted those e-mails during that period." Tr. at 91.⁹⁰

Complainant also acknowledged that he denied taking any documents from Respondent during his December 2018 deposition. Tr. at 1069-70. However, during cross-examination, Respondent showed evidence to the contrary. Tr. at 1072-76; RX 88, RX 89. Respondent then moved for sanctions for violations of discovery and discovery orders recounting the events leading up to its request. *See* Tr. at 1137-41. After hearing from Complainant⁹¹ and Respondent's counsel,⁹² and considering the procedural history of this case,⁹³ the Tribunal informed the parties that Complainant made misrepresentations to the Tribunal about two

⁹⁰ Based upon this interaction the Tribunal stated the following:

Well, Mr. Neely, I will tell you that I am troubled, at best, by the actions of your counsel not turning this over. And [Respondent's counsel] is correct, that the actions of your counsel, or former counsel, are imputed to you. You may not like that, but that is the consequences of your counsel.

I don't know if this information was critical, but it is, in my view, it is a discovery violation. And frankly, I've got to think about a remedy. I'm not going to dismiss the case, but I am going to stew over what the appropriate remedy is in this case.

Tr. at 94.

⁹¹ Tr. at 1141-1148, 1159-61, 1165-66, 1174-75, 1179.

⁹² Tr. at 1148-54, 1162-73, 1177-78.

⁹³ Respondent's counsel summarized a portion of one of the teleconference transcripts the Tribunal had with the parties that occurred prior to the hearing during argument on this issue. *See* Tr. at 1156-58. He also provided excerpts of Complainant's October 2018 deposition for the limited purpose of addressing the sanction issue. Tr. at 1166-73; ALJ 7.

documents. Tr. at 1155, 1176. The Tribunal informed the parties that it would draw an adverse inference as to the credibility of Complainant's testimony in this matter. Tr. at 1179-81.

The Tribunal found the testimony of Mr. Richardson and Mr. Ashworth particularly credible. Mr. Richardson's testimony about the reasons for his actions were supported by the testimony of Mr. DeMars and Mr. De Genner as well as documentation relating to his testimony. Mr. Ashworth's expert testimony addressed Respondent's practices during the development of an aircraft and applied his experiences with the FAA to cogently explain his understanding of the regulations applicable. While the Tribunal makes the final determination about the applicability of the regulations, the reality is aviation is one of the most highly regulated businesses and an understanding of how the regulations interact with the practice of a given aviation event by persons that are part of that process is essential to not only compliance, but in attempting to achieve the highest level of safety for air commerce.

The Tribunal also found Ms. DeFrancisco's testimony about Complainant's interpersonal skills credible. Ms. DeFrancisco's demeanor indicated that she was not comfortable testifying about the events because of how long ago they occurred. Tr. at 1474-75. Yet her testimony presented the Tribunal with key evidence about Complainant's conduct with peers during that time period, by a fellow peer and not a manager involved in addressing Complainant's lack of tact.

The Tribunal found Mr. Paine's explanation about Respondent's processes when developing an aircraft generally credible. The Tribunal found Ms. Cartagena's testimony credible as it too was corroborated by the testimony of Mr. Richardson, Mr. Demars and Mr. De Genner.

As for the Mr. Hilderman and Mr. Ashworth, both persons were well qualified to render expert opinions. The Tribunal gives more credit to Mr. Ashworth because it became clear during the hearing that Mr. Hilderman had not been provided information that existed, but Complainant's inartful discovery request resulted in Complainant not providing them to him. Because his opinion is based, in part, on missing documentation, his opinion about Respondent's non-compliance with its development process is less persuasive.

B. Timeliness of the complaint

To be timely, an AIR 21 complaint must be filed within 90 days of the date on which the alleged violation occurred; i.e., when the discriminatory decision was both made and communicated to the complainant. 29 C.F.R. § 1979.103(d); *McAllister v. Lee County Board of County Commissioners*, ARB No. 15-011, ALJ No. 2013-AIR-8 (ARB May 6, 2015). This 90-day period begins to run the day that an employee receives "a final, definitive, and unequivocal notice" of an adverse employment action. *Peters v. American Eagle Airlines, Inc.*, ARB No. 08126, ALJ No. 2007-AIR-14 (ARB Sept. 28, 2010) (citing *Swenk v. Exelon Generation Co.*, ARB No. 04-028, ALJ No. 2003-ERA-030, slip op. at 4 (ARB Apr. 28, 2005)); *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ Case No. 2004-AIR-9 (Apr. 3, 2007). "The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date." *Peters*, slip op. at 5. It is the date that a complainant

discovers that he has been injured by a discriminatory act—not the consequences of that act—that starts the 90-day period in which an AIR 21 complaint must be filed. *Id.*

In addition, “[n]o particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” 29 C.F.R. § 1979.103(b) (emphasis added). For the reasons that follow, this Tribunal finds that Complainant’s complaint was timely.

Complainant filed his OSHA complaint on March 10, 2016. Therefore, in this case, absent application of equitable tolling or evidence that the discriminatory decision was not contemporaneously communicated to the complainant,⁹⁴ any alleged violations of the Act’s whistleblower protection provision that occurred prior to December 11, 2015 is time barred. Complainant has alleged several actions as retaliatory prior to this date. The Tribunal agrees with Respondent that many of Complainant’s allegations are untimely filed⁹⁵ and will limit its analysis to alleged discriminatory acts that occurred December 11, 2015 forward.

C. Complainant’s Preponderance of Evidence Case

1. Complainant and Respondent are covered under the Act

At the beginning of the hearing, the Employer stipulated that the Employer is subject to the Act and the employee (Complainant) is covered by the Act.⁹⁶ Tr. at 6. Accordingly, the Tribunal finds that Complainant has established this element by a preponderance of evidence.

⁹⁴ The Tribunal finds no reason to apply equitable estoppel given the facts of this case, nor has evidence been presented that any alleged decision was not contemporaneously communicated to Complainant.

⁹⁵ See Resp. Br. at 21-22 (Complainant being placed into an “improper” position interacting with GE Aviation in early 2015; Mr. Richardson’s alleged retaliation against him throughout 2015 including his midyear performance review and proposed revisions of Complainant’s 2015 performance goals, as well as Mr. Richardson’s issuance of a written warning for improper expense reporting).

⁹⁶ Given the fact that these events pertain to work performed on, and statements that were made about, an aircraft that was not yet in production—and an aircraft for which the FAA had not even issued a type certificate—the Tribunal has great reservations about whether this conclusion is accurate. The Tribunal was so concerned about this issue that it took the rare step of seeking amicus briefs from both the Solicitor and the FAA. Even after reading these briefs the Tribunal continues to have reservations about whether the Act—as currently written—extends to an *aircraft manufacturer’s* employee’s actions taken *prior to* the aircraft earning its type certificate.

The Tribunal questions whether a violation of any order, regulation or standard of the FAA *relating to air carrier safety* can exist prior to the point in time when a manufacturer submits its application for a type certificate. All guidance Respondent receives from the FAA prior to the point when a manufacturer submits the application for a type certificate is just that: guidance.

To conduct its operations, the FAA requires air carriers to use standard type-certificated aircraft. See 14 C.F.R. §§ 121.157 and 135.169. An aircraft cannot receive a standard airworthiness certificate unless it has been issued a type certificate. 14 C.F.R. § 21.175. Further, an air carrier cannot place into service an aircraft unless that aircraft has both a current airworthiness certificate, and is in an airworthy condition. See 14 C.F.R. §§ 121.153(a), 125.91(a), 129.13(a) and 135.25(a). An airworthiness certificate is a certification that the aircraft conforms to its type design and is in a condition for safe flight. See 14 C.F.R. § 3.5(a); Tr. at 1863-64. A type design consists of the entire product, in this case the airplane.

New aircraft manufactured under a production certificate are entitled to an airworthiness certificate without further showing. 14 C.F.R. § 21.183(a). The issue, then, is whether an aircraft can be related to air carrier safety when the very item being addressed has not even been placed into service nor even been approved for use by any air carrier.

The aviation regulations that pertain to the development of aircraft are performance *standards*. See, e.g., 14 C.F.R. Parts 21 and 25. Prior to submitting an application for the Type Certificate, a company is free to develop and change any aircraft design as it desires; it is essentially experimenting and developing the aircraft for possible application. No violation of the aircraft's design or assembly can exist until the FAA fixes in place all of the materials and drawings that define what is an approved 777X type design for the aircraft. Mr. Ashworth, Respondent's expert, best summarized the conundrum when developing new aircraft, if a manufacture were not allowed to carry risk through the development phase:

It would be literally impossible, especially on a complex design. You don't know where you are at the beginning of a program, you don't know what's going to pop up as a need. And as a result, something that happens very close to the end of the program, could change the design process that you've already been through.

Tr. at 1855.

And then he gave an example:

Well into the design process of the 777X, almost at the end of the process, the airlines went to Boeing and they said, you know, the wings are too long on this airplane, we need to -- you need to come up with a design that allows the wingtips to fold, so that we can fit into the gate boxes at the average airport. It wasn't in the original certification plan, it wasn't in the original design, but Boeing came up with that design and they incorporated it into the design of the 777X. That included power systems, warning systems, changes to the manuals, a variety of different things that had to be then backtracked into the design and the certification process and, therefore, were considered risks that they didn't know about at the beginning of the program.

Tr. at 1855.

The remedy for an aircraft that does not meet the performance requirements of the Federal Aviation Regulations ("FARs") is for the FAA to refuse to issue the type certificate. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 804 (1984) (citing 49 U.S.C. 42121(a)(2); 14 C.F.R. 21.21(a)(1) (1983))("If the FAA finds that [a] proposed aircraft design comports with minimum safety standards, it signifies its approval by issuing a type certificate.").

Finally, while no administrative or judicial body has addressed this issue in an aviation manufacturing context, the Tribunal is aware that it has been addressed in other safety-focused whistleblowing contexts. In *Barcomb, v. General Motors LLC*, Case No. 4:16-cv-01884, 2019 U.S. Dist. LEXIS 10652, 2019 WL 296479 (E.D. Mo. Jan. 23, 2019), the District Court granted a motion for summary judgement. In that case the issue was the scope of whistleblowing protection afforded to employees in the automotive industry. The *Barcomb* plaintiff's allegations pertained to repairs after assembly of the vehicle because of errors made during the earlier manufacturing process. Plaintiff was concerned about repairs actually not being done because falsified repair information was placed into the company's repair tracking system. The plaintiff in that case filed suit under the Moving Ahead for Progress in the 21st Century Act (MAP-21), alleging retaliation for reporting concerns about the possibility that cars entered into the stream of commerce with defects caused by employees falsifying repair information prior to departing the plant. In

2. Protected Activity

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

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

49 U.S.C. § 42121(a)(1)-(4).

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

Barcomb, the district court granted summary decision finding that MAP-21 pertains only to information related to defects in *manufactured* motor vehicles after they have left the plant and in the hands of consumers, not to defects to motor vehicles being repaired prior to them even being placed on the market.

Apparently some in Congress share this concern and have recently introduced Senate Bill S.3337-116th Cong. in apparent recognition of there being a potential gap in the protections afforded to aviation industry whistleblowers. However, given Respondent’s concession in this case, the Tribunal will not address this issue further and leaves a thorough vetting of this issue for another day and another complainant.

Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). However, the Board observed, an employer’s “mere words do not create an FAA violation when the parties’ actual conduct does not violate FAA regulations.” *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, slip op. at 6 (June 30, 2010).⁹⁷

Discussion of Protected Activity

The parties essentially agree that Complainant’s job was to report issues and risks associated with the development of the 777X ELMS. Tr. at 1092-95; *see* Compl. Reply Br. at 4. However, Complainant maintains that his management took no action to mitigate the safety issues he raised. Complainant cites to 14 C.F.R. § 25.1309 as the regulations he believed Respondent violated. Compl. Reply Br. at 5.

Complainant, as a member of the ELMS team, was required to ensure compliance with the regulations associated with this system. The Boeing 777X was being designed under Part 25. One of the primary regulations applicable to such an aircraft’s electrical system is 14 C.F.R. § 25.1309. This regulation requires that aircraft systems “must be designed to ensure that they perform their intended functions under any foreseeable operating condition.” *Id.* at § 25.1309(a). For electrical generation, distribution, and utilization equipment, the ability to provide continuous safe service under foreseeable environmental conditions must be established. *Id.* at § 25.1309(e). This is accomplished by utilizing the fail-safe design concept, CX 12 (AC 25.1309-1A), which is set forth in ARP4761 and means a loss of function or a malfunction of a system. The focus is on the functional significance of the aircraft system and determining the risks to flight safety should a failure occur. Under this concept, a manufacturer’s engineers use probability distributions to determine the frequency of an occurrence of failure and its effects on the overall system function. *See* CX 12 at 16-18. The requirements of 14 C.F.R. § 25.1309 are accomplished during the design of requirements for the system itself.

As mentioned above, Complainant asserts a variety of alleged protected activities. Those activities are as follows:

- In December 2014 when he started reporting non-compliance with the ELMS requirements to Mr. De Genner after Mr. De Genner authorized the release of incomplete and incorrect 777X ELMS requirements (CX 31).
- In March-April 2015 when he raised complaints that Respondent was releasing non-compliant 777X ELMS requirements, and thereafter refused to assist Mr. De Genner in doing so.
- When he confided in Mr. Richardson about the issues he was facing on the 777X ELMS.

⁹⁷ *See also Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, slip op. at 9 (June 30, 2008); *Williams v. U.S. Dep’t of Labor*, 157 Fed. App’x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, slip op. at 1 (Nov. 12, 1996).

- Complainant filed his first formal complaint to Respondent's internal ethics board on June 30, 2015. Complainant maintains that Respondent subjected him to a hostile work environment.⁹⁸ (CX 117 at 2; CX 171).
- When he disclosed employment issues to HR representatives in July 2015. (Tr. at 749-51; CX 136).
- When he filed three formal complaints in October and November 2015 regarding issues on 777X ELMS where Respondent's management allegedly released defective 777X ELMS requirements. (CX 185, 182, 183; Compl Br. at 43).
- When he provided forty pages of information to Respondent's investigators about EEO/ethics allegations. (CX 217, CX 218; Tr. at 854-59).
- Complainant's disputes with Mr. Richardson over the changes to the description of the Business Goals and Objectives portion of his performance evaluation are not protected activities. Tr. at 749-51; *see* CX 136; Compl. Br. at 32, 38-39.

The Tribunal finds that most of these actions are not protected activities. Merely raising concerns about the process being utilized in the ELMS program is not a protected activity. It was Complainant's job to review, evaluate and report Respondent's requirement validation, as well as Respondent's compliance with its process, in particular ARP4754A. Tr. at 1092-95. Courts have held that an employee whose job it was to review matters for compliance with Agency regulations does not engage in protected activity under a similar whistleblower statute. *See Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 780 (6th Cir. 2005)(WPA); *see also Taylor v. Fannie Mae*, 65 F. Supp. 3d 121, 126 (D.D.C. 2014)(SOX); *Willis v. Dept of Agriculture*, 141 F.3d 1139, 1145 (Fed. Cir 1998).

The Tribunal does find that Complainant's refusal to assist Mr. De Genner to release the 777X ELMS release to GE in March 2015 was a protected activity. The testimony here is, following a meeting held with multiple executives, Mr. De Genner attempted to get Complainant to release the ELMS requirements to GE again, and Complainant refused and informed senior leadership of the ELMS requirements. CX 65; Tr. at 560-62; CX 272 at 57. This appears to be protected activity because Complainant is reporting actions after being told to do something otherwise.

However, in the alternative and for purposes of the rest of this decision, the Tribunal will assume that these are protected activities. Complainant reported what he believed were potential FAA violations to his management. Such reports need not be provided directly to the FAA. *See Bondurant v. Southwest Airlines, Inc.*, ARB No. 14-049, ALJ No. 2013-AIR-7 (Feb. 29, 2016).

The Tribunal finds that Complainant's concerns about potential FAA violations was objectively reasonable and the Tribunal sees no reason to question whether Complainant had a good faith subjective belief in the existence of these potential violations. His persistence in reporting his concerns demonstrates his subjective belief in the existence of Respondent's non-compliance with the guidance to be used when developing this aircraft.

⁹⁸ This allegation concerns Complainant's age discrimination allegation and is beyond the scope of this Tribunal's authority. Therefore, the Tribunal finds this is not activity protected under the Act.

3. Adverse Action

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

The Board has held “that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions.” *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, “Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20.⁹⁹ Accordingly, the Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)).

Discussion of Adverse Action

⁹⁹ *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: “To settle any lingering confusion in AIR 21 cases, we now clarify that the term “adverse actions” refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term “discriminate” is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress”).

Complainant argues the following adverse actions occurred:

- Altering and reducing his work assignments to those inferior to his job classification skill code;
- Placing him in a spurious job classification with no authority;
- Altering historical performance goals;
- Administering formal corrective actions;
- Providing him with the worst annual performance review of his career;
- Hiring a HR generalist to scheme a plan to discredit and terminate him; and
- Wrongfully terminating his employment on the pretense of “no work” and “funding.”

Compl. Br. at 34.

The Tribunal limits its decision to those adverse actions that occurred on or after December 11, 2015, because older adverse actions are time barred. The Tribunal finds that Complainant suffered two adverse actions during this period: selection for possible termination resulting from the RIF in January 2016 followed by the 60-day advance notification of layoff, and his ultimate termination of employment in March 2016. The Tribunal also views the poor score on the 2015 performance evaluation likely constitutes an adverse employment action, but Complainant’s complaint is untimely as to this action.¹⁰⁰ The Tribunal need not address Complainant’s allegations about alleged retaliation for travel vouchers, his change of duties beginning in April 2015,¹⁰¹ his ECAM,¹⁰² his allegations concerning the changes to his mid-year performance review,¹⁰³ or Respondent using an HR generalist to discredit or terminate his employment¹⁰⁴.

¹⁰⁰ Although Complainant has not pointed to any detrimental effect the 2015 performance evaluation had on his day-to-day employment, it led to Complainant’s poor score in the RIF, and thus contributed to his eventual termination. The Tribunal finds such because Respondent utilizes an employee’s performance review when determining its decrement list for employees subject to a RIF in January 2016. Thus, a poor performance review enhances the possibility that an employee’s employment will be terminated in part because of the rating they receive.

¹⁰¹ Complainant was not a union employee and thus the variety of his work was not limited by a collective bargaining agreement. Mr. Richardson and Mr. Demars credibly testified that placing Complainant in his role as interfacing with Respondent’s supplier, GE, was a positive thing, not a negative one. Further, a Level 5 engineer like Complainant was expected to have a skill set that would allow him to perform this job. There was even testimony that Complainant sought this position. The Tribunal finds no credible evidence that Respondent’s managers placed Complainant into this position for any improper purpose.

¹⁰² The Tribunal finds that the ECAM was not an adverse action. The ECAM was merely a written warning documenting his failure to follow the company’s policy. Furthermore, there is no credible evidence that it contributed in any way to either Complainant’s adverse performance rating or his termination. *See West v. Kasbar, Inc.*, ARB No. 04-155, ALJ Case No. 2004-STA-34, slip op. at 4 (Nov. 30, 2005).

¹⁰³ Even if the Tribunal was to consider these events, the Tribunal finds no merit to Complainant’s assertion that this was an adverse action. Complainant apparently also takes umbrage with changes to the goals and expectations portion Mr. Richardson made on his performance review. But this is a living

Adverse Action: Conclusion

In sum, the Tribunal finds Complainant being selected for possible termination during Respondent's RIF in January 2016, which ultimately lead to his termination of employment an adverse action was an adverse action, as was the termination itself in March 2016.

4. Contributing Factor Analysis

Complainant successfully established that Respondent committed an adverse action by selecting him from a RIF selection process and terminating his employment. Accordingly, the Tribunal must determine whether Complainant's protected activity was a contributing factor in that unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The Board has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's non-retaliatory reasons." *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, USDOL Reporter, page 52 (emphasis in the original).

"[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Acosta v. Union Pacific Ry. Co.*, ARB Case No. 2018-0020, ALJ Case No. 2016-FRS-00082 , slip op. at 6 (Jan. 22, 2020)(quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)). A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). "Also, where an employer has established one or more

breathing document and it is perfectly proper for those to change as circumstances change during one's employment. There is no indication from the record that the changes had any adverse impact on the performance evaluation he received. To the contrary, the evidence from Mr. Richardson and Mr. De Genner suggests that this was viewed as a great opportunity for Complainant. *See* Tr. at 1266; *Delao v. VT San Antonio Aerospace, Inc.*, ALJ Case No. 2016-AIR-22, slip op. at 55 (Aug. 16, 2018). Further, the subjects about which he was rated lower had nothing to do with the changes proposed during the mid-year review, or that occurred on the performance form.

¹⁰⁴ There is no credible evidence concerning Complainant's allegation about Respondent using Ms. Castagena, or any other HR generalist, for a nefarious purpose.

legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer*, ARB No. 16-035, slip op. at 56.

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

Discussion of Contributing Factor Analysis

Assuming, *arguendo*, Complainant engaged in protected activity, the record contains no direct evidence that Respondent retaliated against Complainant when Mr. Richardson issued an ECAM in September 2015 or gave Complainant a poor performance evaluation in November 2015. Further, there is no direct evidence that Respondent retaliated against him when Complainant was selected during the RIF process in January 2016 or when Respondent terminated his employment in March 2016. However, there is evidence that Mr. Richardson considered Complainant's intemperate actions not only to him but to other managers and subordinates. This is a separate issue. The ECAM was for a repeated instance of misconduct. While it could have been considered when evaluating Complainant's overall performance, the evidence establishes that it played no factor in the performance review many months later. The focus of the performance review was Complainant's interactions with other employees, not the filing of travel vouchers. It is important to note that even if a complainant has engaged in protected activities, that does not insulate them from being required to conduct themselves in an acceptable manner in the workplace. *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969-70 (8th Cir. 2017) ("An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer's belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action.").

The evidence before this Tribunal establishes that Mr. Richardson received input from Mr. De Genner and Mr. Demars about Complainant's job performance. Part of his job performance included his interactions with others. Complainant has provided no evidence to rebut Mr. Richardson's credible explanations for why he scored Complainant the way he did on Complainant's 2015-performance evaluation. In addition, how an employee conducts him or herself in the workplace is a legitimate factor to evaluate, and one's conduct in the workplace can have positive or negative consequences. There is abundant evidence that ELMS team members raised concerns to management about Complainant's interactions with them.

It is also evident from the evidence that Respondent's management was well aware of the challenges it faced during the ELMS development. The Tribunal has not found, nor does

Complainant proffer, evidence that Respondent's management attempted to conceal the problems it faced either internally or with GE in the development of the ELMS. *See Yadav v. L-3 Communication Corp.*, 462 F.App'x 533, 537 (6th Cir. 2012)(denying a petition for review from ARB No. 08-090, ALJ No. 2006-AIR-16 (Jan. 7, 2020)).¹⁰⁵

Of import, Complainant alleges that his report of FAA violations had been on going and of a similar nature since December 2014. Tr. at 1086. Yet, no action was taken against him for his complaints for at least a year.¹⁰⁶ The real focus here lies on what happened between when Complainant received his 2015 performance evaluation in November 2015 and his termination of employment in March 2016. *See Robinson v. Northwest Airlines, Inc.*, ARB Case No. 04-041, at *9 (Nov. 30, 2005) (finding, in part, that a six month gap between the protected activity and the adverse action severed the complainant's proximity argument); *Svendson v. Air Methods, Inc.*, ARB No. 03-074, p. 8 (Aug. 26, 2004) (holding in dicta that a nine-day period between the complainant's protected activity and his firing would support the complainant's theory of temporal proximity). The intervening event was Respondent's need to reduce its P-5 engineers. Respondent provided a credible explanation for why that occurred and Complainant provided no credible evidence that the RIF was not a legitimate business decision. Furthermore, Complainant presented no credible evidence that the manner in which the January 2016 RIF occurred was improper, or that his selection following Respondent's guidance was improper. Essentially, Complainant complains that his selection to be laid off was because of his adverse performance evaluation rating. He asserts that rating was for a retaliatory reason, but the overwhelming evidence suggests otherwise. The mere temporal proximity of receipt of his 2015 evaluation in November 2015 to his RIF selection in January 2016 is merely a coincidence. "The mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two." *Acosta v. Union Pacific Railroad Co.*, ARB Case No. 2018-0020, ALJ Case No. 2016-FRS-0082, slip op. at 8 (Jan. 22, 2020)("The limited causal value of temporal proximity is especially prominent in a whistleblower case where most of a complainant's job may consist of protected activity.")

There is a difference between what the allegations of protected activity are and how the allegations are conveyed. Mr. Richardson's performance evaluation must be looked at in its totality. Mr. Richardson credibly testified why he gave Complainant laudatory ratings in some areas, but adverse ratings on other criteria. He gave Complainant a "3" Met Expectations for the

¹⁰⁵ Yadav oversaw L-3's development of and compliance with the engineering requirements for "SmartDeck," an airplane navigation system. Yadav came to believe that, instead of first planning, designing, and then building SmartDeck, L-3 seemed to "reverse engineer" the product. *Id.* at 534. In these emails, Yadav expressed his continuing concern about the alleged misrepresentations made by L-3 to the FAA. *Id.* at 535. Following an investigation into Yadav's allegations, L-3 terminated Yadav's employment. L-3 gave Yadav a four-page "Termination Memo," citing forty-five examples of his conduct falling below company expectations. Yadav filed an AIR-21 complaint. The parties agreed that the Yadav's complaints regarding a development process constituted protected activity. The court found that the emails sent among Yadav's supervisors reflected pervasive concern about his inadequate performance. Further, there was no evidence that the employer's leadership was engaged in any effort to conceal the problems with the development protocol Yada raised. *Id.* at 537.

¹⁰⁶ The Tribunal understands that Complainant alleges age discrimination actions in March 2015, but even Complainant believed these were unrelated to protected activities under the Act. *See* Tr. at 1013.

Business Goals & Objective criterion and a “2” Met Some Expectations for the Performance Values criterion. RX 41. He gave Complainant an overall performance value score of “Met Some Expectations” reflecting the importance of interpersonal skills as a senior engineer. As Mr. Richardson explained, such skills are as critical to a senior engineer as are their technical skills. Tr. at 1302. This strengthens Respondent’s argument that the focus of performance evaluation was on how Complainant conducted himself in dealing with others rather than his technical knowledge and competence. Here, the alleged whistleblowing focused on technical matters not interpersonal matters, and again a whistleblower’s reporting of protected activity does not insulate him from being accountable for other conduct that is not protected.

The evidence establishes that Respondent evaluated Complainant using the RIF criteria in a pool of other similarly situated engineers. Respondent evaluated all engineers under the same criteria. There is a lack of evidence to support a conclusion that Mr. Richardson knew that a RIF of engineers was about to occur or how many engineers were going to have to be let go. Granted, a manager could foresee some impact of an adverse performance evaluation, but Complainant wants this Tribunal to infer some sort of improper motive related to purported protected activity. Complainant’s assertion fails when viewing how Mr. Richardson actually scored the Complainant and the evidence justifying Mr. Richardson’s giving Complainant a lower score. The testimony of Ms. DeFrancisco, as well as the written statements of other members of the ELMS team provide convincing evidence that Complainant’s interpersonal skills were rightly subject to the adverse ratings Mr. Richardson applied.¹⁰⁷ It is also noteworthy that Mr. Richardson contemporaneously explained his scoring by concluding the evaluation: “[Complainant’s] inability to work together with the rest of the team and his communication skills relative to interactions with team managers and program managers impeded his performance of the team’s goals.” RX 41 at 5. It is unreasonable to infer malicious motive after receipt of such an evaluation.

Respondent presented compelling evidence that it followed its RIF guidelines during the January 2016 RIF process. The Tribunal especially credits this process given Complainant was included in the pool of engineers during the October 2015 RIF; one where two engineers were impacted and Complainant was not one of them. *See* Tr. at 1337-39, 1360; CX 178, CX 179. Complainant argues that he was conducting protected activities and was the target of animus and retaliation by Mr. Richardson and Mr. De Genner during this time period, yet if such existed it is not reflected at a time when they had an opportunity to do so.

5. Conclusion: Complainant has failed to meet his burden of proof

Complainant and Respondent are subject to the Act. Complainant’s refusal to assist Mr. De Genner with the 777X ELMS release to GE in March 2015 constituted a protected activity. Respondent selecting Complainant during its RIF selection process and subsequently terminating his employment as an engineer was an adverse action. Complainant has failed to establish that

¹⁰⁷ The Tribunal is mindful that the ARB has stated on many occasions that an ALJ should not sit as a super-personnel advocate when viewing the employer’s decisions for an adverse action. *See Acosta v. Union Pacific Railway Co.*, slip op. at 11.

any of his alleged protected activities were in any way a contributing factor in his selection to be part of the RIF, the evaluation process during the RIF, his selection as the engineer to be laid off following the RIF, or his ultimate termination. The Tribunal specifically finds that Complainant's lower score on his performance evaluation was caused solely by his poor interpersonal skills as represented by colleagues and observations, and failure to remedy those skills given opportunity, counsel, and instruction by the Respondent and had nothing to do with the substance of his reports about problems during the ELMS development. Thus, Complainant's complaint fails and this Tribunal must dismiss it.¹⁰⁸

V. ORDER

Complainant's complaint is **DISMISSED** with prejudice.

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

¹⁰⁸ Furthermore, even if Complainant had met his burden of establishing his case by a preponderance of evidence, Respondent has demonstrated by clear and convincing evidence that Complainant engaged in inappropriate workplace behavior that warranted the scores given by Mr. Richardson on his 2015 performance review. It was that conduct which lowered his score, not any protected activity, which placed him at the low end of the decrement lists thereby causing him to be terminated through the RIF process. The overwhelming evidence not only established that Complainant had interpersonal challenges, as credibly testified to by Ms. DeFrancesco, but that his managers attempted to correct this shortcoming. *See, e.g.*, Tr. at 1728. In short, Respondent established by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity.

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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