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Issue Date: 17 December 2019

Case No.: 2019-AIR-00003

In the Matter of

DONNIE SCHACKLEFORD
Complainant

v.

EXECUFLIGHT, INC.
Respondent

DECISION AND ORDER GRANTING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. *See* 49 U.S.C. § 42121. The Act includes a "whistleblower" protection provision with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 68 Fed. Reg. 14,100 (Mar. 21, 2003). The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration ("OSHA") on November 10, 2016. In its September 27, 2018 letter, OSHA dismissed Complainant's complaint as it was unable to uncover enough evidence to show that Complainant's engagement in protected activity caused Respondent to take adverse action against him. JX 15. On October17, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

Subsequently, on November 5, 2018, this matter was assigned to the undersigned. On that same day, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated November 13, 2018, and attached his statement, which was originally transmitted as part of his Complaint to OSHA. This Tribunal

issued a Notice of Hearing and Pre-Hearing Order on December 13, 2018, and set the hearing to begin on May 15, 2019 in or near Fort Lauderdale, Florida.[1]

On December 14, 2018, per the Tribunal's Pre-hearing Order, Complainant filed his Pleading Complaint. On January 18, 2019, Respondent filed its Answer to Complainant's Pleading Complaint. Respondent submitted Initial Disclosures pursuant to 29 C.F.R. § 18.50(c)(1)(i) by letter dated January 18, 2019.

On March 13, 2019, Complainant filed a Motion to Add a Party to these proceedings. On April 9, 2019, the Tribunal granted in part Complainant's Motion to Add a Party. The Order allowed the "addition" of Execuflight, Inc. in addition to Execuflight LLC, but required Complainant to show cause as to why the claim against Execuflight LLC should remain given the matter was obviously against Execuflight, Inc.

On April 1, 2019, Respondent filed a Motion for Summary Decision arguing Complainant failed to mitigate his alleged damages, Complainant did not engage in protected activity, and that there was no causal connection between the alleged protected activity and its termination of Complainant's employment. Further, Respondent alleged that Complainant was not one of its employees; rather, he was an employee of an independent contractor hired by Respondent. On April 17, 2019, Complainant filed his opposition to Respondent's Motion for Summary Decision. On April 22, 2019, the Tribunal issued an Order denying Respondent's Motion for Summary Decision ruling there were several material facts in dispute.

On April 5, 2019, Respondent filed a Motion in Limine seeking to preclude Complainant from presenting matters concerning an NTSB investigation into a fatal crash involving one of Respondent's aircraft. On April 23, 2019, Complainant responded to the motion. On April 23, 2019, the Tribunal issued an Order Denying Respondent's Motion finding that the entire NTSB report can be used in these proceedings.

The parties submitted their prehearing statements and proposed exhibit lists on May 3, 2019. The pre-hearing statements contained a list of stipulated facts.

This Tribunal held a hearing on this matter in Miramar, Florida from May 15 to May 17, 2019.[2] Complainant and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Joint Exhibits ("JX") A – S,[3] Respondent's Exhibits ("RX") 1-7, 9, 13, 15, 22, 23, 25-27, 29, 34-37, 39, 40, 43, 45, 48, 51,[4] and

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[1] On April 22, 2019, the Tribunal issued a Notice informing the parties that the hearing location would be in Miramar, Florida.

[2] The Transcript of the May 15 to 17, 2019 proceedings is hereafter identified as "Tr." Both parties provided brief opening statements. Tr. at 20-36.

[3] Although at the beginning of the hearing Tribunal admitted JX T-X into evidence, the parties agreed to withdraw and remove them from the record at the end of the hearing. Tr. at 912.

[4] The following exhibits, although initially admitted at the beginning of the hearing, were withdrawn by Respondent at the end of the hearing: RX 14, 28, 30-32, 38, 41, and 42. Additionally, the follow RX

Complainant's Exhibits ("CX") 1-11 and 13-16.[5] At the end of Complainant's presentation of evidence, Respondent made a motion to dismiss and the parties presented argument. Tr. at 395-402. The Tribunal thereafter denied the motion. Tr. at 402. At the end of the hearing, Respondent renewed its motion to dismiss. Tr. at 902. After hearing argument, the Tribunal again denied Respondent's motion. Tr. at 903-09.

Complainant submitted its closing brief on August 23, 2019. Respondent submitted its closing brief on October 21, 2019.[6] On November 6, 2019, Complainant filed his reply brief.

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

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

Complainant was employed as a Part 135 Hawker 700 captain for Respondent and had been in that position for about two years. On November 6 and 7, 2015, he was assigned to fly a flight from Fort Lauderdale, Florida to Teterboro, New Jersey and return. Renato Marchese was the first officer on that flight. After returning to Fort Lauderdale, Mr. Marchese was tasked to begin a flight to Monterrey, Mexico eventually returning to Fort Lauderdale on November 9, 2015. The first officer was then switched to a different flight and, while operating N237WR, tragically crashed on November 10, 2015. The National Transportation Safety Board ("NTSB") investigated the crash and Respondent assigned Complainant as one of its representatives to that investigation. In July 2016, Complainant had discussions with NTSB investigators about Mr. Marchese's duty times.

On July 27, 2016, the lead NTSB investigator contacted Respondent's owner, Mr. Lewkowicz, about the duty logs recovered at the crash site as well as duty logs provided by Respondent to recount Mr. Marchese's duty hours. Thereafter, a dispute exists as to what Mr. Lewkowicz communicated to Complainant to do about records reflecting Mr. Marchese's duty time. Part of this case involves the subsequent events that occurred in finding information about whether Mr. Marchese exceeded his duty time. In addition to duty time, Complainant had been reporting fuel gauge issues with the crashed aircraft.[7]

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exhibits remained in the record but for identification purposes only: RX 44, RX 49 and RX 50. Tr. at 913-23. *See also* Tr. at 84-85, 560-61.

[5] Tr. at 13-14, 16, 19-20, and 924.

[6] Respondent's brief was originally due October 4, 2019. However, on September 16, 2019, Respondent's counsel submitted an unopposed motion for an extension of time to submit Respondent's brief. On September 22, 2019, the Tribunal granted the motion moving the brief due date to October 18, 2019 and moving Complainant's Reply Brief due date to November 6, 2019.

[7] The Tribunal took official notice of 14 C.F.R. § 135.65 concerning the requirement to report mechanical irregularities. Tr. at 36.

According to Complainant, Mr. Lewkowicz then contacted him and told him that they were going to change the sequence of events that had occurred on November 7, 2015 so the records would no longer reflect that Mr. Marchese had exceeded his duty time limits.

At the time of Complainant's termination of employment, he was told that the company was cutting its losses. Respondent says it terminated Complainant's employment because, after the crash, it only had one Hawker 700 on its certificate and got rid of that aircraft. Thus, it no longer needed Complainant's services. Respondent also asserts that Complainant had some performance issues that were part of its decision to terminate him.

B. Facts Established by the Pleadings or Stipulated to During the Hearing

1. The November 9th flight has [sic] many scheduled stops and at least one overnight so it was critical that the crew get the mandatory rest period required by the FAA regulations. *See* Answer to Pleading Compl. Para. 11.
2. On November 8, 2015, [Mr. Renato Marchese] and chief pilot [ ] flew a trip to Monterrey Mexico. *See* Answer to Pleading Compl, para 17.
3. There was an accident on November 10th, 2015 involving a Hawker 700 plane (N237WR) that belonged to Respondent.[8] Tr. at 708.

C. Facts Stipulated to in the Parties Pre-hearing Statements[9]

1. Complainant was selected by [Respondent] to be its representative for the NTSB investigation in November 2015.
2. Complainant assisted in organizing and attended the NTSB interviews of [Respondent] witnesses on December 2 and 3, 2015.
3. After Complainant reported maintenance issues with the Hawker 700 (N880RG)[10] causing [Respondent] to ground that aircraft, [Respondent] did not have any remaining Hawker 700 aircraft available for Complainant to fly.
4. The Hawker 700 (N880RG) that was flown by Complainant was not flown again by [Respondent] and was sold a few months later in March 2017.
5. Complainant had a contract designating him as an independent contractor.
6. Complainant's contract with [Respondent] did not include sick time, insurance, or a 401K.
7. Complainant's company submitted invoices to [Respondent], for the pay he received,[11] and received an IRS Form 1099 each year.

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[8] *See* RX 48 (NTSB Accident Final Report CEN16MA036 (Oct. 18, 2016), which is available at www.ntsb.gov; *see also* CX 14, CX 15.

[9] Each side submitted a summary of stipulated facts. There are minor non-substantive differences in the wording between them.

[10] Respondent's version of the stipulated facts did not identify the Hawker 700 at issue. Complainant's version of the stipulated facts identifies the aircraft as N800RG. However, during the hearing it became obvious that the Hawker 700 referenced was N880RG.

[11] Respondent's version of the stipulated fact used the phrase "that it received."

8. Complainant did not send any emails or resumes to Florida-based employers, and allowed his subscription to the one job website he used (Climbto350) to expire in late 2016 and never renewed it.
9. Complainant allowed his pilot medical certificate to expire.
10. Complainant received a job offer from Miguel Gomez to fly part time as a first officer on a Gulfstream but turned down the offer because he thought it might impact his cases against [Respondent]. Michael Gomez was the person who called [Respondent] to inform him of his termination.
11. Complainant has been receiving social security benefits at $1,600 per month since at least May/June of 2017.

D. Aviation background of the Witnesses

Jonathan Hart. He holds an ATP certificate and holds type ratings in the Hawker 700/800, Beechcraft BE-400, Cessna C-600 and C-680, Gulfstream G-III and the Mitsubishi MU-300. He has 9,000 hours of flight time in jets. Complainant was his mentor when he first started flying the Hawker 700. Tr. at 298. He has worked for Respondent on two occasions. The first time was between 2012 and 2013, and the second time was late 2014 into 2015. Complainant worked for Respondent during Mr. Hart's second employment with Respondent. While working for Respondent he flew their Hawker aircraft. Tr. at 271-72, 288.

Roberto Adamo. He is Respondent's chief pilot, has an ATP certificate and holds type ratings in the Gulfstream G-III, G-IV, G-V, Beechcraft Hawkers, the Westwind, and Beech 1900. He also holds a mechanics certificate with Airframe and Powerplant ratings and has held an inspection authorization. He is also a certified flight instructor –instruments and multi-engine instructor. He has over 15,000 total flight hours, with about 8,000 hours being in jets. He worked for Respondent from 2011 to 2015 and again from August 2018 onward. In 2014-2015 he was Respondent's Director of Operations. Tr. at 423. He worked for Respondent when Complainant was employed by them. Tr. at 405-06. Mr. Adamo came back to Respondent because he had sold his charter company but wanted to stay in the aviation business and keep current. Tr. at 420. At the time of the hearing he flew Respondent's two Hawker 800s, an 800A, an 800XP and its Gulfstream G-IV. Tr. at 421-22. Mr. Adamo and Complainant have never flown an aircraft together. Tr. at 425.

Mr. Adamo recalled three incidents where Complainant had incidents during flight. He recalled a pitot tube incident when departing Teterboro, a pressurization issue when departing Nassau, and some kind of malfunction with the aircraft's autopilot and the plane wanted to descent. Tr. at 408.

Miguel De Felice. He holds an ATP certificate and holds type ratings in the Citation CD-500, Westwind, Astrotech, Hawkers, the Challenger 600 series and Gulfstream G-IV. He worked for Respondent from April 2016 to April 2019. Tr. at 461-63.

Danny Lewkowicz. He is Respondent's Chief Executive Officer and Director of Operations. He purchased Respondent in 2007. He is also an ATP and holds type ratings in the Hawker, Gulfstream G-II/III, G-IV and G-V, Westwind, Citation 500 and a second-in-command

only type rating in the Falcon 900. He also holds a private helicopter pilot certificate. He has 16,400 hours of total flight time, with 13,800 hours being in jets. Tr. at 509-12.

Complainant has held an Airline Transport Pilot certificate ("ATP") for about 35 years. He is type rated in the Hawker 700 and 800A and has between 18,000 and 19,000 total flight hours, with between 8,500 to 9,000 hours being in a Hawker. Tr. at 38-39.

E. Findings of Fact

Complainant first met Mr. Danny Lewkowicz around 2005 when he has hired by him to fly a Hawker 700. After that he worked for Air Taxi, a certificated operator, for about five years flying the Hawker 700, leaving in 2011. Tr. at 40, 512-13; RX 1 at 2. In 2011, he was schedule for training to obtain a Challenger 600 type rating, but while in the course he had a mild stroke. Tr. at 41, 207. This grounded him for two years, but was able to regain a FAA First Class medical certificate. Tr. at 41-42.

In December 2013, Complainant came to work for Respondent as a captain for a Hawker. Tr. at 42, 513. Mr. Lewkowicz recalled Complainant being grateful and emotional that he offered him a job. Tr. at 514. Respondent thereafter provided Complainant the recurrent training necessary for it to use him as a pilot for its Hawker operations. This training included differences training in the Hawker 800.[12] Tr. at 516-17; *see* JX A. Thereafter, Complainant flew both Hawker 700 and 800 aircraft for Respondent. Tr. at 517.

Respondent did not permit its pilots to fly for other operators while they worked for it.[13] Tr. at 61. To get time off, Complainant had to obtain permission from either the chief pilot, the director of operations or Mr. Lewkowicz. Tr. at 61. His initial annual salary was $65,000 with no benefits but that was later increased to $80,000. His pay was every two weeks and for the same amount each pay period. Tr. at 62. Complainant was not allowed to select the flight he flew, they were assigned to him. Tr. at 63.

As part of the training Complainant had to obtain recurrency training in the Hawker 700. He also received the differences training that would qualify him to fly Hawker 800s and received it again in 2015. Tr. at 45, 322-23; JX A. The recurrency training enabled him to fly both the Hawker 700 and 800 aircraft. Tr. at 665. There are some differences between the Hawker 700 and 800. The Hawker 800 is a little heavier, carries a little more fuel, the wings are a little longer, has more powerful engines, and is a part glass cockpit.[14] Tr. at 54-58.

After the training, Complainant started flying for Respondent in January or February 2014. Tr. at 46. *See* JX B. During this time period Respondent operated two Hawker 700s: N880RG and N237WR. Tr. at 47, 49, 51; JX B (logs for 2004), JX D (logs for 2015), JX F (logs

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[12] Mr. Lewkowicz thought that the differences training that he paid for "is a joke" because it was all classroom instruction. Tr. at 517-19.

[13] This is called "moonlighting."

[14] Instead of just analog instruments, the aircraft had a mixture of analog and electronic instruments. Tr. at 55, 274-76. For a list of additional differences, *see* Tr. at 695-99.

for 2016). Complainant also flew Respondent's Hawker 800 (N355FA) during this time period, starting as early as April 2, 2014. Tr. at 48, 50, 666; JX C (logs for 2014), JX E (logs for 2015), JX G (logs for 2016). Complainant flew Respondent's Hawker 800s on at least twenty-seven occasions in 2014,[15] at least thirty-seven times in 2015, and at least seventeen occasions in 2016. Tr. at 666-76; JX C, JX E, JX G. Although Complainant flew both the Hawker 700 and 800,[16] Respondent preferred that Complainant fly the 700. Tr. at 63-64.

Complainant received notices of assigned flights by either getting a telephone call or an email, normally from the sales department.[17] Tr. at 58. Complainant needed to be at the departing airport one hour prior to the flight to get the airplane ready. Tr. at 58. The crews were normally selected by the chief pilot. Tr. at 61.

During his time with Respondent, Complainant encountered mechanical problems with Respondent's Hawker 700 aircraft. On a trip in N880RG that started on July 29, 2014 and ended August 3, 2014, he had problems with the radar and entered it into the aircraft's logbook.[18] Tr. at 64-65; CX 9 at 1. On September 12, 2014, he again entered a radar discrepancy into N880RG's logbook.[19] Tr. at 66; CX 9 at 2. On February 27, 2015, while operating N237WR, Complainant had an issue with low pressure indication in a right hydraulic pump. Tr. at 72, CX 9 at 3. During a trip from March 3 through March 10, 2015, Complainant was the pilot in command of N880RG when an engine fuel computer failed. They landed in Columbus, Ohio where it was repaired. Tr. at 73; CX 9 at 4. On a trip in N880RG from March 29 to April 1, 2015, the aircraft's right fuel gauge became inoperative. Tr. at 75; CX 9 at 6. On a trip from July 4 to July 5, 2015, Complainant entered into N237WR's log that the FMS[20] was inoperative in the nav mode on number two altimeter. Tr. at 76; CX 9 at 8. On a flight on June 27, 2016, Complainant entered into N880RG's log that the aircraft's fuel overflow switch was stuck and "Please DO RVSM A/P". Tr. at 81-82; CX 9 at 10. An aircraft cannot fly in reduced vertical separation minimum ("RVSM") airspace without an operative autopilot.[21] Tr. at 83.

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[15] The logbooks at JX C were only those produced by Complainant as he retained copies for himself while employed by Respondent. Tr. at 667.

[16] Mr. Hart testified that he flew with Complainant between six and fifteen times. In his opinion Complainant was able to adapt to differences between the Hawker 700 and 800 avionics, and he flew the aircraft the same, whether it was in the Hawker 700 or 800. Tr. at 276-78, 290. In his opinion, Complainant was competent to serve in the left seat in the Hawker 800. Tr. at 306.

[17] The sales department consisted of Sal Matteis and Nicholas Brown. Tr. at 58, 281.

[18] During the testimony, the Tribunal noted that the exhibit had been signed-off approving the aircraft for return to service but no indication that corrective action had been taken on the radar discrepancy. Tr. at 68-69. However, in later testimony the Tribunal learned that the log pages were Complainant's copies that he retained and not those from Respondent who would have had to have taken action upon their entry. Tr. at 79. Therefore, the Tribunal cannot tell one way or the other if the mechanically irregularity was addressed. These logs only show that Complainant entered them into the log book.

[19] For this entry the radar was placed on the Aircraft's minimum equipment list ("MEL"). Tr. at 69. For an operator to utilize a MEL, its use must be approved in a Part 135 operator's Operations Specifications ("OpSpec"), specifically OpSpec D095. *See* FAA Order 8900.1, vol. 3, chap. 18 *available* at http://fsims.faa.gov/. *See* 14 C.F.R. § 1119.5(g) and (l).

[20] Flight Management System.

[21] RVSM airspace is above 29,000 feet MSL. *See* 14 C.F.R. Part 91, Appx. G.

On June 12, 2014, while over the Atlantic departing out of Nassau on a flight in N237WR and at a high altitude, the aircraft lost cabin pressure and Complainant had to do an emergency descent to 15,000 feet with thunderstorms in the area landing at Fort Lauderdale Executive airport, which is Respondent's base. Tr. at 86-89. Complainant followed the "Depressurization" and "Emergency Descent" procedures contained in the aircraft's operating handbook. Tr. at 90-92; CX 4. After deplaning the passengers, he had maintenance look at the aircraft to see if they could find any problems. Tr. at 92-93. Mr. Lewkowicz, Mr. Adamo, and Mr. Rocco Mamone (Respondent's Director of Maintenance) were all there when the plane arrived. Mr. Lewkowicz was the first person in the aircraft after the passengers deplaned. Tr. at 609. According to Mr. Lewkowicz, the aircraft did not lose pressurization, they just were not making pressurization. Tr. at 609-10. Mr. Lewkowicz later learned that there was nothing wrong with the aircraft but the sock to the aircraft's air cycle machine likely froze over. Tr. at 610-18. After this incident Mr. Adamo instructed Complainant to write the letter, dated July 3, 2014, (JX P) explaining what happened. Tr. at 94, 320. According to Complainant, he was pretty much told what to say in the letter by Respondent's Director of Operations.[22] Mr. Adamo did not require the first officer of that flight to prepare a statement. Tr. at 437.

Following this incident, Mr. Adamo – Respondent's Director of Operations, had concerns about Complainant's ability to competently fly the plane. Respondent had the airplane thoroughly looked at and found nothing wrong with the aircraft. He determined that it was probably pilot error. He suspected that Complainant had used maximum cooling while on the ground and the water sock in the pressurization system had probably frozen over causing the pressurization problem. Tr. at 409-10. In looking at his written statement about the incident (JX P) one of the concerns Mr. Adamo had was Complainant mentioning he asked the first officer to set a higher pressurization setting, which would actually exacerbate the problem. Tr. at 413.

On October 2, 2014, Complainant's first officer conducted the pre-flight for N355FA, a Hawker 800. Complainant was flying out of Teterboro.[23] When departing, Complainant heard a noise coming from the outside of the aircraft after takeoff. Complainant says that he suspected that something got caught on the aircraft between the fuselage and the wing. Complainant opted to turn around and land to see what the problem was. A firetruck followed the aircraft back to the fixed base operator ("FBO"). According to Complainant, after stopping the aircraft in front of the FBO, the first officer exited the aircraft and came back allegedly reporting that there was a rag that had gotten caught on the pitot tube. Tr. at 98-101. At some point, Complainant entered into the aircraft's logbook for that flight for corrective action of the noise he heard: "returned to land at TEB + noticed rag caught on AOA. Removed and called Cl for re-release." Tr. at 105; CX 9 at 2. At the hearing, Complainant acknowledged that this was a false entry in the log book, a document required to be kept by the FAA.[24] Tr. at 105-06.

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[22] Mr. Lewkowicz denied that anyone told Complainant what to write. Tr. at 616.

[23] However, on his October 7, 2014 he wrote: "I completed my preflight and found no defects on my walkaround." JX Q.

[24] *See* 14 C.F.R. § 61.59. The fact that this ATP pilot would falsify a logbook directly and adversely impacts his credibility. In aviation, the integrity of certificate holders is the keystone to safety. Truthfulness goes to the heart of the integrity of the aviation system so much so that moral character is a

A day or so later, the first officer told Complainant that it was not a rag on the pitot tube, but the pitot tube cover had been left on. Tr. at 101, 104; *see also* Tr. at 296-97. Complainant then reported it to Respondent's Director of Operations, Mr. Adamo. Tr. at 415. But before Complainant reported this, Mr. Adamo had received a telephone call from a fireman from Teterboro who had told Mr. Adamo that the pitot cover was still on the aircraft. Tr. at 414-15. Mr. Adamo directed Complainant to write a statement about what happened, which he did. JX Q. In his statement, Complainant said that a rag became entangled in the Angle of Attack vane, which is different than a pitot tube.[25] When asked about this inconsistency at the hearing, Complainant said that he was trying to protect the first officer. Tr. at 103-04. Complainant also admitted that the events in the letter were not true. Tr. at 104. Mr. Adamo testified that he knew that Complainant had lied to him and "they" discussed it internally about what appropriate action to take, but he did not think Respondent took any action against Complainant. Tr. at 451. When asked why, Mr. Adamo could not remember why Respondent did not take action against Complainant, other than possible remedial training. Tr. at 452.

From November 6 to 7, 2015, Respondent assigned Complainant a charter in N335FA, a Hawker 800, to Teterboro, New Jersey and back. Mr. Marchese was his first officer. Tr. at 120-21, 709; JX K, JX L. They were supposed to depart out of Fort Lauderdale at 0900 and arrive at Teterboro at 1100. Tr. at 12, 711-12. They actually departed at 0913 and arrived at 1154. Tr. at 122-23, 712; JX K. Upon arrival, they worked on the aircraft after the passengers departed, and then had the Signature FBO move the aircraft to where it was going to be parked. Tr. at 124. JX N. Complainant and Mr. Marchese later discussed that they would leave the hotel the next day at 1300 as the scheduled departure the following day was at 1600. Tr. at 126.

The following day, Complainant and Mr. Marchese checked out of the hotel at 1300 hours[26] (CX 14 at 2-3 (computer print screens at bottom of each page), CX 3 at 1; Tr. at 129-32),

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specific trait a pilot must possess to obtain an airline transport pilot certificate. *See* 14 C.F.R. § 61.153(c). An ATP certificate is the only aviation certificate that contains this requirement. As a result, if any certificate holder misrepresents or falsifies a required document, it is considered a very serious offense. Such falsification can result in the revocation of all of an airman's certificates. *See* FAA Order 2150.3B w/ chg 12 (Feb. 2, 2017). The NTSB has repeatedly held that a single instance of falsification is grounds for revocation of all certificates held by a particular individual. *See Administrator v. Dillmon*, NTSB EA-5413, 2008 NTSB LEXIS 92 (Oct. 28, 2008), *Administrator v. Culliton*, NTSB Order No. EA-5178 (2005). It is commonly known in the aviation community that falsification of records is "a big no-no." Tr. at 454.

[25] An angle of attack vane is connected to an angle of attack instrument in the cockpit indicating whether an aircraft is near a stall. *See* FAA-H-8083-3B, Airplane Flying Handbook (2016), at p. 4-2 to 4-6. A pitot tube is part of an aircraft's pitot/static system which can be used to reflect in the cockpit the aircraft's airspeed, altitude, and rate of climb. *See* FAA-H-8083-15B, Instrument Flying Handbook (2012), at chap. 5.

[26] The evidence about this charter flight used to establish the timeline references both Eastern time zone time and Coordinated Universal Time, commonly called Zulu time. This Tribunal has converted all times referenced in this paragraph to the Eastern time zone but using a 24-hour format common in aviation or the military. For a time zone converter, *see* https://www.onlineconverter.com/time-zone.

and arrived at the Teterboro airport between 1400 and 1430 hours.[27] Tr. at 129; *see* JX O at 2, Tr. at 778. At the time that they showed up at the airport, Complainant and Mr. Marchese knew that there was another trip using the aircraft after their upcoming flight so they were pressed to get back for that trip. Tr. at 257-58; RX 47 at 26. Both pilots started their duty time at 1500 hours local time. CX 13[28]; *see* Tr. at 722-24. At that time, they did not know who was going to pilot that later trip because their schedule had changed several times. Tr. at 258; RX 45 at 26. Once Complainant and Mr. Marchese arrived at the Signature FBO, Complainant had Mr. Marchese perform the aircraft pre-flight, as Complainant was not feeling well. Tr. at 129-30; *see also id.* at 125, 253. It normally takes an hour to an hour and a half to get the aircraft ready for departure. Tr. at 253; *see also id.* at 361-62. The duty time on the flight logs reflects that their duty began at 1500.[29] Tr. at 126; JX K.

The passengers arrived around 1600 hours.[30] Tr. at 129. After the passengers are aboard the aircraft, at 1653 hours Complainant sent a text to Respondent's dispatch letting it know that the door is closed and they are ready to taxi. Tr. at 134; CX 1; *see* CX 3 at 2.[31] They departed Teterboro for Fort Lauderdale at 1726.[32] Tr. at 134-35. Complainant, Mr. Marchese and their passengers arrived back in Fort Lauderdale at 2100 hours. Tr. at 747, 749; JX K. After arriving back in Fort Lauderdale, Respondent's chief pilot (Rich Ruvido) greeted them as soon as the passengers deplaned and informed Mr. Marchese that, as soon as they could get the aircraft fueled and turned around, he and Mr. Marchese would be flying the aircraft to Orlando to pick up some passengers and then fly to Monterrey, and spending the night in Monterrey.[33] Tr. at

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[27] According to Mr. Adamo, Respondent's General Operations Manual provided that the flight crews were to arrive at the airport one hour prior to commencement of the flight and their time terminated thirty minutes after arriving at their destination. Tr. at 448.

[28] Mr. Lewkowicz acknowledged that a captain has a duty to accurately record the duty time for themselves and their first officer. Tr. at 787-88. Mr. Lewkowicz also admitted that Respondent had no documents establishing when the flight crew started the duty day other than what is reflected on the flight log. Tr. at 817-18.

[29] Complainant testified that the flight log reflects 2000 hours (which is Zulu time, Tr. at 127) and that converts to 1500 hours Eastern time. Tr. at 126-28. Mr. Lewkowicz confirmed this. Tr. at 747. For a time zone converter, *see* https://www.onlineconverter.com/time-zone.

[30] *But see* JX O. The Tribunal finds the weight of the evidences supports a finding that the passenger arrived around 1600 hours.

[31] However, for some reason, CX 3 page 2 is marked CX 3-1.

[32] 2226 – 0500 = 1726.

[33] Mr. Lewkowicz testified that two other pilots were going to take this trip other than Complainant and Mr. Marchese. But then he explains that "he may have said that he was sick, or I don't know what the problem may have been with [Complainant], but [Mr.] Ruvido said that [Mr. Marchese] said that he would be able to do the second trip." Tr. at 535. He asserted that originally it was going to be a different crew but, once they learned that the flight coming from Teterboro was going to be delayed from a 4:00 p.m. departure to a 6:00 p.m. departure, the schedule was changed to use the same crew (Complainant and Mr. Marchese) for the new charter from Orlando to Monterrey. Tr. at 535-37. Mr. Lewkowicz further testified that because of this change he told Mr. Marchese to change his report time to 5:30 p.m. for a 6:00 p.m. departure. Tr. at 539. However, Mr. Marchese's cell phone records reflect he received no call from Mr. Lewkowicz the morning of November 7 flight. Tr. at 726-28; CX 15 at 2. When confronted with this information Mr. Lewkowicz then speculated that maybe he had Sal Matteis get the hotel number so he could then call Mr. Marchese in his hotel room. Tr. at 729. However, Mr. Lewkowicz had already

136. Complainant recalled Mr. Marchese being tired. Tr. at 136-37. And he mentioned to Mr. Marchese that Mr. Marchese could pilot the Orlando-Monterrey flight as long as they spent the night in Monterrey, otherwise he would be over duty time. Tr. at 138. Complainant went off duty at 2100 hours. Tr. at 128. Thereafter he went to a hotel and spent the night in Fort Lauderdale for he was not feeling well. Tr. at 139. Complainant ended up going to a doctor who grounded him for four days. Tr. at 140. On November 8 at 1107 hours, Complainant sent a text to the company informing them that he was grounded. Tr. at 140; CX 1.

On November 9 and 10, 2015 there was another charter flight scheduled. Complainant could not make that flight due to his illness. Tr. at 140. Mr. Oscar Chavez replaced him as a pilot for that trip and Mr. Marchese was the other pilot. They used N237WR for this trip. Complainant monitored the flight on flightaware.[34] That charter made several stops and involved an overnight stay — the aircraft departed the next morning. On the evening of November 9, 2015, Complainant spoke with Mr. Marchese. Tr. at 142, 145; CX 3. During their conversation Complainant asked Mr. Marchese about whether they were having any fuel gauge issues. Tr. at 145, 260. Complainant had previously experienced problems with the fuel gauges being off 500 pounds or more on one wing, and had reported it to Respondent's maintenance personnel. Tr. at 146-47, 260-61. Mr. Marchese remarked that they were having an issue with the fuel gauge again, and Mr. Marchese and Complainant discussed how to remedy the issue on the trip. Tr. at 148; CX 3.

On November 10, 2015, Complainant continued to track the charter flight where Mr. Marchese continued on as the first officer.[35] He observed their descent into Akron, Ohio, and thought it a little odd because they were going faster than they should have been. They got

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testified that he had Mr. Marchese's cell phone number already stored in his own cell phone. Tr. at 715, 732. He attempted to explain this by saying that he would call the hotel if the pilot did not answer his cell phone. Tr. at 729-30. When the Tribunal asked why he did not just call the captain, Mr. Lewkowicz said that he already knew that were not going to be using the captain for the follow on flight. Tr. at 732-33.

Mr. Lewkowicz further testified that the flight was supposed to depart at 5:00 but the passengers arrived early so Mr. Marchese clocked in at 5:15 and they departed at 5:26. When the Tribunal asked about it being only 11 minutes to board passengers and conduct a preflight between checking in departure, Mr. Lewkowicz said "it's plausible." Tr. at 540. He further testified that it was Complainant, who was acting as the captain, pre-flighted the aircraft before the arrival of the first officer as [t]hat is the story that I told [Complainant] of the information that we were going to – that I had provided to [Mr. Marchese]." Tr. at 541-42. According to Mr. Lewkowicz, he had no reason to know that Mr. Marchese had not followed his instructions prior to sending his email detailing the duty time events to the NTSB. Tr. at 544. But this begs the question, if those events were true, why would the flight crew falsify their duty time on the aircraft log? It is Mr. Lewkowicz's failure to address this basic question that makes his entire testimony about his rationale for reporting the timeline as he did incredible.

[34] *See* www.flightaware.com. Complainant later said he followed the November 10, 2015 flight that crashed on flightplan. Tr. at 149. This is a different flight tracking tool. Complainant also testified that it was not unusual for him to track flights when he was home and he tracked the flight because the two pilots on that charter had not flown together much. Tr. at 391. He also said that he was concerned about the fuel gauge issue on that aircraft. Tr. at 392. Mr. Lewkowicz testified that Respondent also used flightaware and flightplan to follow the progress of Respondent's aircraft when on a charter. Tr. at 699-700.

[35] *See* www.fltplan.com (a flight tacking software Claimant testified he used).

within a couple miles of the airport and then all the updating from flight plan quit. Tr. at 149. Complainant initially thought that it was a problem with the website. Tr. at 150. And then he saw on the news that a plane had crashed in Akron, Ohio, and that caught his attention. However, on the news they were reporting only two killed and he knew that the flight had two crewmembers and seven passengers. Later he learned that it was Respondent's aircraft when he received a telephone call from a friend of his. Tr. at 150-51. Mr. Lewkowicz learned of the crash in Akron when news media started to call him asking him to tell them about the crash. Tr. at 706.

Several days later, Mr. Ruvido, who at the time was Respondent's chief pilot,[36] contacted Complainant letting him know that the NTSB would be calling. Later, NTSB Investigator Lawrence contacted Complainant requesting that he help them in the investigation on behalf of the company. Tr. at 152. As part of this, Investigator Lawrence sent Complainant a non-disclosure agreement to sign, which he did.[37] Tr. at 152; JX H. As part of Complainant's participation in the accident investigation, Investigator Lawrence asked Complainant to set up interviews with Respondent's pilots, former pilots, and other personnel who worked for Respondent. Complainant selected a number of pilots for them to interview. Tr. at 153-54; JX I.[38] Before he sent the list of people that he had gathered and scheduled for interviews to the NTSB, Compliant sent a copy to the people on his list, including Mr. Lewkowicz and the chief pilot. Tr. at 155. Mr. Lewkowicz responded by telling Complainant "by no means was [he] to use John Hart."[39] Tr. at 155, 220. Given this guidance, Complainant revised the interview schedule (JX I). Tr. at 155, 221-22, JX I at 5. Complainant thereafter participated in NTSB interviews in December 2015. Tr. at 152-53; *see* Tr. at 26. As part of the investigation, Complainant did discuss with Investigator Lawrence N237WR's fuel gauge problems. Tr. at 156. In July 2015 Complainant also discussed with NTSB Investigator Lawrence Mr. Marchese's duty times during discussions about possible contributing factors to the Ohio crash. Tr. at 157-61; CX 16 at 7, CX 10 at 6.

On November 29, 2015, Complainant wrote to Investigator Lawrence informing him that he had been summoned to a meeting with Respondent's attorney the following day. JX I at 5. Actually, Complainant and other Respondent pilots met with Respondent's attorney at a company meeting.[40] Tr. at 228. However, it was Complainant's impression at that time that Respondent's counsel and Mr. Lewkowicz were not happy about him not disclosing information about the NTSB investigation to them.[41] Tr. at 229.

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[36] Tr. at 523.

[37] Mr. Lewkowicz testified that he and Mr. Ruvido also signed NTSB confidential disclosure forms and also were company representatives. Tr. at 522-23, 677-78.

[38] Complainant testified that JX I at 2 shows Jon Hart, whose name was on his initial email but not on the list of witnesses he ultimately sent to Investigator Lawrence. Tr. at 219.

[39] Mr. Lewkowicz denied this occurred. Tr. at 515.

[40] Mr. Lewkowicz denied summoning Complainant to a meeting with Respondent's attorney. Tr. at 526.

[41] Mr. Lewkowicz testified that at no time before the interviews with the NTSB investigation witnesses did he ask Complainant what his discussion with the NTSB were. Tr. at 525-26.

Complainant recalled a flight in a Hawker 800, on March 29, 2016. Tr. at 314; *see* JX G at 15. Mr. Gomez was his first officer and they had departed Opa-locka and were flying to Brownsville, Texas. After takeoff, Complainant had an issue with the number one (left pilot's)[42] instrument screen. Tr. at 115. So they opted to land at Opa-locka and then spoke with Mr. Lewkowicz on how to fix the screen. After being able to get the screen back, but not working correctly,[43] and after talking with his first officer, they opted to take off and continue the flight. After five to ten minutes of flying, Complainant could not get the radar to display, the autopilot was not working, and they were approaching weather over the Gulf. They therefore decided to turn around and land. Tr. at 116-18.

Respondent thereafter had the avionic discrepancies looked at. Tr. at 590. The avionics personnel discovered the radar controller was set to minimum gain so they changed it to maximum gain. RX 13. Complainant explained that his first officer, Mr. Gomez was addressing the radar and radio issues in flight so it would have been Mr. Gomez that left the radar controller in that position. Tr. at 368. The avionics personnel could not replicate the reported ADI failure or radio comm issue. However, Complainant testified that the ADI[44] failed again after takeoff immediately following the avionics work. Tr. at 369. As for the discrepancies with the compass system, the avionics shop discovered that the #1 AHRS[45] was inadvertently selected to DG[46] mode and they fixed the problem by putting the switch back in the slave mode. RX 13; *see* Tr. at 314-17.

On April 9, 2016, Complainant piloted a flight from El Paso to Fort Lauderdale in a Hawker 700. Tr. at 318; JX F at 5. Prior to the flight, Complainant sent the flight's weight and balance calculations to Mr. Lewkowicz (RX 35 at 2-3) who then discovered that there was an improper weight and balance calculation and called Complainant about it. Complainant could not recall what the issue was but it was corrected prior to the flight. Tr. at 120, 319; s*ee* Tr. at 32. Mr. Lewkowicz recalled the first issue he noticed was the flap position set for the takeoff. Tr. at 578; *see* RX 35 at 3. However, when asked, the 15 degree flap position he had concerns about is for a normal takeoff.[47] Tr. at 582. The second thing he noticed was the amount of fuel Complainant had for the departure. Tr. at 580-81. Mr. Lewkowicz agreed that when he called Complainant said that he would fix it. Tr. at 581; *see id.* at 317-19.

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[42] In fixed wing aircraft, the captain sits in the left seat and the first officer sits in the right seat.

[43] Apparently, when operating properly it would interface with the aircraft's autopilot and that was not happening on this flight. Tr. at 116-17.

[44] Attitude Direction Indicator.

[45] Attitude and Heading Reference System.

[46] Directional Guidance.

[47] Mr. Lewkowicz also testified that one is to use 15 degrees of flaps for a short field takeoff and this particular airport had an 11,000-foot runway. Tr. at 582-83. Later, the Tribunal verified that the runway length was 9,025 feet and the airports elevation is 3,962 feet. Tr. at 589. Mr. Lewkowicz asserted that the calculations showed that the aircraft was climb limited but he did not explain why. Tr. at 583.

On July 10, 2016, Complainant captained N335FA, a Hawker 800 departing Monterrey, Mexico. Tr. at 108, 466. JX G at 17; *see* JX R.[48] The aircraft had 8,400 pounds of fuel on board[49] but was not topped off, the temperature was hot, and the aircraft was heavy; they were at maximum takeoff weight for altitude and the temperature.[50] Tr. at 111. Complainant taxied to the end of the runway,[51] applied brakes,[52] added full power, then released the brakes to start the takeoff; it was not a rolling start. After the aircraft rotated,[53] the left (captain's side) instrument screen went blank.[54] Complainant gave control of the aircraft to the first officer, Mr. De Felice.[55] Complainant then turned off his screen, let it set for a few minutes, then turned it back on and the screen came back up. Complainant then took back control of the aircraft so they continued the flight. Tr. at 106-08, 483-84.

The day after this flight Mr. De Felice contacted Mr. Gomez about the flight to express concern about Complainant's lack of judgement on this particular takeoff. Tr. at 467. It was his view that given the airport's elevation, temperature and length of runway, they took off fairly overweight. Tr. at 467. However, Mr. De Felice never saw the weight and balance calculations Complainant performed prior to the flight, nor did he ever ask Complainant about those calculations. Tr. at 480-81. Mr. Gomez wrote a memo about this incident shortly after Mr. De Felice reported it to him. JX R. According to Mr. De Felice JX R accurately reflects what he told Mr. Gomez about the takeoff. Tr. at 470. However, Mr. Gomez (then the chief pilot) never discussed anything about this flight with Complainant. Tr. at 116, 470.

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[48] Complainant testified that many of the statements about the events that occurred that are contained in JX R were not true. Tr. at 265, *see* Tr. at 314. Further, Complainant had not even seen this exhibit prior to him commencing this action. Tr. at 108.

[49] JX G at 17.

[50] Both factors impact the takeoff performance of any aircraft. *See* Tr. at 109. Mr. De Felice testified that the aircraft was topped off, meaning the 8400 pounds of fuel on board was in the wings. He had no idea how much fuel was in the rear center tank. Tr. at 468. The flight log supports Complainant's assertion that the aircraft departed with less than full fuel. The aircraft log reflects that they departed with 8,400 pounds of fuel. JX G at 17; *see* Tr. at 267. The testimony is maximum fuel for this aircraft, a Hawker 800, is 10,000 pounds of fuel. Tr. at 267, 364, 476. According to the Hawker 800 type certificate data sheet, the maximum fuel capacity is 9,960 pounds. *See* TCDS A3EU Rev. 44, *available at* http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/5871ef1c07fe2cfc862581d300724b70/$FILE/A3EU_Rev_44.pdf; *see also* Tr. at 364 (Tribunal notified the parties that it would take official notice of the aircraft's TCDS).

[51] Mr. De Felice testified that they departed using Monterrey's longer runway which is 6,598 feet long. Tr. at 489-90.

[52] Mr. De Felice testified that they briefed doing a static takeoff, but Complainant actually did a rolling takeoff. Tr. at 468-69.

[53] Mr. De Felice testified that Complainant attempted to rotate the aircraft before V_1 so he pushed the yoke forward to keep the nose on the ground. Tr. at 470.

[54] Complainant called this an ADI, aircraft deviation indicator. Upon the Tribunal's questioning, Complainant described this as essentially an attitude indicator. Tr. at 119.

[55] Complainant denied giving control of the aircraft to the first officer during the take off. Tr. at 113-14. He also denied that chief pilot later reviewed the takeoff with him. *Id.* at 114, *see id.* at 472.

Complainant spoke to Investigator Lawrence regarding Mr. Marchese's duty times sometime in July 2016.[56] CX 16 at 7; Tr. at 157, 160, 325. On July 27, 2016 an NTSB investigator wrote Mr. Lewkowicz asking him to verify the timeline of events for Mr. Marchese's duty times. This email included a chart that depicted the investigator's understanding of Mr. Marchese's duty time in the days prior to the accident. CX 16 at 7; JX J at 1-2; *see* JX K. According to Mr. Lewkowicz, this was the first communication that he received from the NTSB concerning questions of duty time for the accident flight crew. Tr. at 530, 533, 781. On July 30, 2016, Mr. Lewkowicz contacted Complainant by text asking Complainant to call him. JX S; Tr. at 548-49. On August 1, 2016, Mr. Lewkowicz responded to the investigator telling him that he would contact their chief pilot and look into the issue the next day. JX J at 1.

Beginning on or about 2 or 3 August 2016, while the NTSB investigation was on-going, Complainant had two telephone calls with Mr. Lewkowicz over duty issues. Tr. at 234.[57] During one of the phone calls, Mr. Lewkowicz told Complainant that he thought that the investigation was over, but the NTSB had caught on to something about duty issues, and that "they were going to have to come up with something to say to the NTSB and we all needed to be in agreement."[58] Tr. at 161. Mr. Lewkowicz noticed that certain information about Complainant's and Mr. Marchese's November 6-7, 2015 flight raised an issue about duty time and suggested to Complainant that they had to come up with what time Complainant had left the hotel. Mr. Lewkowicz suggested that Complainant say he arrived at the airport before Mr. Marchese. Mr. Lewkowicz wanted to put a timeline in an email and provide it to the NTSB.

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[56] During his deposition in March 2019, Complainant did not think that he talked to Investigator Lawrence about duty times prior to August 3, 2016, but also said "I don't remember." RX 40 at 151; *see* Tr. at 327. However, Investigator Lawrence's responses to interrogatories says Complainant disclosed this to him in early July. CX 16 at 7. The Tribunal finds the testimony of Investigator Lawrence more credible on this issue.

[57] During cross-examination, Respondent pointed out that Complainant in a sworn affidavit stated "At no time between July 27, 2016 and August 4, 2016, did anyone from [Respondent], including [Mr.] Lewkowicz,, asked [sic] me about the sequence of events that occurred on November 7, 2015 in Teterboro NJ prior to the departure of the return flight with [Mr.] Marchase as first officer." RX 39 at 4; Tr. at 235-36. When asked to explain this discrepancy, Complainant testified "[m]aybe I didn't understand what I was doing there. I don't – it wasn't intentional." Tr. at 236.

[58] Mr. Lewkowicz testified at his deposition as follows:

> Talking with Donnie, what I recall telling him is that, Donnie, they're asking about duty times for [Mr. Marchese].
>
> Unfortunately, [Mr. Marchese] was the only person that could provide any duty times for his flight, and he's dead. So he's not here to provide his duty times.
>
> But, based on what we scheduled him and based on what we see, that if he was to have to appear in front of the FAA and explain to us how this trip was legal, based on the given facts of the duty times, this is what we came up with by doing this.
>
> Now, we're not sure because of the fact that he's dead, but doing graphs based on what we've told him and what it can be, he would have been able to do it. So this is what I'm telling the NTSB, even though [Mr. Marchese] is not here to do that because he's dead.

RX 44 at 83-84; Tr. at 851; *see also* Tr. at 853.

Complainant realized that what Mr. Lewkowicz was proposing was not true. Complainant told Mr. Lewkowicz "you tell them what you want to", and "as long as they didn't ask, fine, but if they ask[] [I am] going to tell the truth. Tr. at 161-63, *see id.* at 166.

On August 3, 2016 at 7:22 p.m.,[59] Mr. Lewkowicz sent the NTSB an email (CX 2) setting forth a timeline for the November 7, 2015 flight that was inaccurate.[60] CX 2; Tr. at 162-64, 254. In particular, Mr. Lewkowicz wrote to the NTSB investigators that Mr. Marchese's duty time began at 5:15 p.m. on November 7, 2015. The flight log for that flight reflects that he started at 3:00 p.m.[61] Five minutes later, on August 3, 2016 at 7:27 p.m., Mr. Lewkowicz forwarded his email to the NTSB to Complainant indicating that he kept his response "short and simple" without adding in certain details until the NTSB inquires further. CX 2.

On August 4, 2016 at 8:50 a.m., the NTSB investigator wrote to Mr. Lewkowicz about whether there was written documentation that supported Mr. Lewkowicz's August 3 email claiming that Mr. Marchese's duty time started at 5:15 p.m. Less than four hours later, on August 4, 2016, at 12:42 p.m., Mr. Lewkowicz sent the NTSB investigator a second email indicating that he had spoken to Complainant about the timeline of events on November 7, 2015 and reasserted that that Mr. Marchese did not start his duty time until 5:15 p.m. JX N; *see* Tr. at 830-36. Mr. Lewkowicz forwarded this email to Complainant four minutes later at 12:46 p.m., August 4, 2016.

When Complainant read this email he was upset about Mr. Lewkowicz's representations, and made an effort to talk to Mr. Lewkowicz about what he wrote to the NTSB. Tr. at 166. At 1:09 p.m, August 4, 2016, Complainant sent Mr. Lewkowicz a text message acknowledging receipt of this email indicating that he would meet him at Mr. Lewkowicz's office at 2:30 p.m., a meeting that Mr. Lewkowicz had already requested.[62] After sending the text, Complainant turned off his cell phone for the drive to the office. Tr. at 243. But when he went to the office to discuss it with Mr. Lewkowicz, he was not there. Tr. at 166-68, 243-45; *see* JX S. Unbeknownst to Complainant, at 1:10 p.m., Mr. Lewkowicz texted back: "if you got the email and understand you do not need to come in." JX S at 1. Complainant did not see this text until he arrived at Mr. Lewkowicz's office and waited for him until Mr. Matteis from Respondent's sales department informed him that Mr. Lewkowicz was not coming into the office. Tr. at 244, *see id.* at 169. Complainant thereafter talked to Investigator Lawrence a couple of days later and told him that the email was not the truth. Tr. at 169. Mr. Lewkowicz denies this occurred. Tr. at 553-55. Mr. Lewkowicz claims that the first time he suspected that Complainant had spoken to the NTSB

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[59] The Tribunal notes with interest that the two copies of this particular email in the record have two different sent dates. One copy reflects the email was sent "August 03, 2016 6:22 PM". RX 22 at 1 (bates stamp EXECUFLGITH 00507). The other copy reflects that the mail was sent "August 03, 2016 **7**:22 PM." (emphasis added). CX 2 at 1 (but also marked RX-20, bates stamp EXECUFLIGHT 00508). Neither party explained how this could occur.

[60] Of interest, Complainant is not included as a recipient of this email, although Complainant did obtain a copy a day or so later. Tr. at 166.

[61] *See* discussion about the November 6-7, 2015 timeline, *supra* and JX K.

[62] Tr. at 167-68, 241; Complainant forward this text and Mr. Lewkowicz's August 4 email to Investigator Lawrence (one of the NTSB investigator) at 5:38 p.m., August 24, 2016. RX 23 at 1.

about the duty time issue was during his deposition on September 20, 2016. Tr. at 555; RX 43. He confirmed his suspicions once the NTSB provided him with a copy of Complainant's deposition to them. Tr. at 556.

On August 15, 2016, Complainant identified that the windshield heater and an ITT gauge in Respondent's last Hawker 700 (N880RG) were not working and entered them into the aircraft's log as a mechanical discrepancy. Tr. at 865-866; JX F at 14. Given the costs associate with the repairs needed[63] and the anticipated costs for an upcoming 48-month inspection,[64] Respondent opted not to repair the aircraft and subsequently sold the aircraft.[65]

Complainant's last flight for Respondent occurred on August 20, 2016. Tr. at 171, 178-79, 564, 572; *see id*. at 856. The next day, August 21, 2016, Respondent terminated Complainant's employment.[66] Tr. at 564, *see also id.* at 249. Mr. Lewkowicz recalled he and Mr. Gomez were on the ramp that day discussing what to do with the only remaining Hawker 700 on Respondent's certificate. Mr. Gomez was referencing Respondent's one remaining Hawker 700 that required a window replacement which would cost $22,000. Tr. at 568. Mr. Lewkowicz recalled saying that between the Akron accident and the age of the aircraft and its equipment, including gauges that one could not even repair, he was done with Hawker 700s. Tr. at 566-68. Mr. Lewkowicz decided not to repair the aircraft, later selling it "as is" in March 2017. Tr. at 569-71; RX 34. Given the decision to not repair the Hawker 700, Mr. Lewkowicz and Mr. Gomez talked about what do with Complainant and Mr. Lewkowicz testified that he and Mr. Gomez decided that they did not want Complainant to fly Respondent's Hawker 800s as they did not feel comfortable with Complainant flying the company's two Hawker 800s. Tr. at 572-77 and 583. The two of them walked to Mr. Lewkowicz's office and Mr. Gomez called Complainant. Tr. at 574. Mr. Gomez, Respondent's then chief pilot, notified Complainant that Respondent was terminating his employment. Mr. Gomez told Complainant that, due to financial situations with the company, they were going to have to let him go. Tr. at 172, 574. Mr. Gomez offered to continue to pay Complainant thru the end of August 2016. Tr. at 574-75. Mr. Lewkowicz denied that Complainant's participation in the NTSB investigation had anything to do with his termination of employment. Tr. at 558.

Prior to receiving this call, Complainant had made an entry into the logbook of the last Hawker 700 on Respondent's certificate. The entry concerned a mechanical irregularity to its windscreen. Tr. at 172. During his phone call terminating Complainant's employment, Mr. Gomez told Complainant that Complainant had grounded the aircraft and that it was going to

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[63] Mr. Lewkowicz indicated that the repair cost for the windshield alone would be $30,000-$40,000. Tr. at 626.

[64] Mr. Lewkowicz indicated that this inspection would cost approximately $50,000-$60,000. Tr. at 625-26.

[65] RX 34; Tr. at 577-79 and 658-59, 865-66.

[66] At the time Respondent hired Complainant, it had five or six pilots employed to fly its Hawkers. Tr. at 521. Mr. Adamo testified that in 2015 Respondent employed four or five pilots, some full-time and a couple part-time. Tr. at 448-49.

cost too much[67] to replace the window. Tr. at 263-64, 568. However, it was also during this time that Respondent was in the process of acquiring two additional Hawker 800s to place on to its certificate. Tr. at 173. As of the hearing, Respondent still operated two Hawker 800s. Tr. at 884. Mr. Lewkowicz testified that they hired Complainant to fly the Hawker 700 and "we noticed that he had diminishing capabilities, even with the Hawker 700." Tr. at 634-35.

On August 25, 2016, Complainant writes to Investigator Lawrence representing that the email that Mr. Lewkowicz had sent him about the duty time for the November 7-8, 2015 charter was false. JX O; Tr. at 177-79. The email mentioned his duty times at Teterboro in November 6-7, 2015 and his discussions with Mr. Marchese about the Monterrey trip on November 9-10, 2015.[68] *Id.* He followed this up with an additional email on August 28, 2016, about the Teterboro trip and Mr. Marchese's Monterrey trip on November 8, 2015. Tr. at 179-80; CX 3. Complainant asked that Investigator Lawrence defer taking action upon the information he provided about Mr. Lewkowicz's email until September 1, 2016, which is after Respondent is to provide Complainant his last pay check. RX 27, RX 29, RX 37. Complainant testified that the reason he did not tell Mr. Lewkowicz about his emails with Investigator Lawrence was because he did not want to do anything that would end up causing him to lose that last paycheck. Tr. at 246-49; RX 29, RX 37.

During the NTSB investigation, several of Respondent's personnel asked Complainant about what was going on with the investigation. Those persons included Mr. Matteis, Chief Pilot Ruvido and Mr. Lewkowicz. Tr. at 170. Although Complainant told them that he could not discuss the investigation with them they kept asking about it. Tr. at 171.

Complainant, at one point, opted to pay his own taxes rather than have Respondent collect them from him. Tr. at 193, 212-13. To accomplish this, Respondent and Complainant executed a service agreement on January 31, 2014 (CX 11).[69] Tr. at 194-95. The contract provides that Respondent agrees to place into service Complainant "as a Captain [or First Officer] on the following one or more aircraft HS125 also known as Hawker 700." CX 11; Tr. at 209; *see* Tr. at 217, RX 5. Initially, Complainant's salary was $65,000, but later it was raised to $80,000.[70] Tr. at 196-97. Respondent did not provided health care benefits, a 401(k) or sick time. Tr. at 216-17. Complainant had Respondent pay his salary to a subchapter S corporation he created. Tr. at 210; *see* RX 4. Respondent paid Complainant the same pay every two weeks. Tr. at 197.

Complainant has been out of work since August 2016. Tr. at 198. As a result of these events, Complainant testified that he has had issues with stress including sleep issues and was on Ambien for a while, but he has never sought counseling. Tr. at 200-01. Complainant has not

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[67] Complainant testified at his deposition that Mr. Gomez told him the cost to replace the window was going to be $14,000. RX 45 at 57.

[68] Complainant also forwarded emails to an NTSB investigatory on August 24, 2016. *See* JX 23 at 1.

[69] Respondent also asked Complainant about an unsigned subcontractor service agreement purported effective Decembers 2014 (RX 2). Tr. at 208.

[70] RX 4 shows Complainant's pay as $3,333.66. This figure times 26 pay periods equals $86,675.00. *See also* Tr. at 216.

gone to a doctor for stress issues nor has he been diagnosed with a personality disorder. Tr. at 345, 350-51. He has suffered anxiety attacks that resulted in him going to the emergency room. Tr. at 201, 347. However, he never reported on his applications for airmen medical certificates that he had a mental health issue. Tr. at 346-47, *see* Tr. at 379-80

After Respondent terminated Complainant's employment, Complainant made efforts to look for work flying another Hawker aircraft. Complainant's was current to fly the Hawker through March 2017. Tr. at 181; JX A. The cost for recurrency training after that was between $10,000 and $12,000.[71] Tr. at 182.[72] Since his termination of employment, Complainant has flown on only four days in the right seat of jet aircraft for Mr. Gomez, the same person that notified Complainant that Respondent had fired him,[73] and then that was in the months just prior to the hearing earning $500 each day. Tr. at 187, 334. In January or February 2015, Mr. Adamo testified that he left Respondent and started his own certificate.[74] Around late August 2016, he had a conversation with Complainant about Complainant flying a Hawker 700 based in Sanford, Florida, on Mr. Adamo's certificate that he had purchased in June or July 2016. Tr. at 417-18, 444-46. Complainant lives in Boynton Beach, which is 200 miles away from Sanford. Complainant did not want to relocate for this position and, given the distance to the position, he did not accept the job. Tr. at 188-89, 192. Complainant told Mr. Adamo that he was getting out of flying. Tr. at 418. Complainant acknowledged that had contemplated retiring as he was 65 years old at the time of these events. Tr. at 189. Complainant has since started collecting social security benefits. Tr. at 190, 339-40. Complainant earns $1,500 - $2,000 per year from his photography hobby. Tr. at 342-43.

III. ISSUES

- 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 asserts that his participation with the NTSB investigation as Respondent's representative is protected under AIR 21. Compl. Br. at 9-10. Further, he contends that Respondent knew or had reason to know of his actions while working with the NTSB on Respondent's behalf. Compl. Br. at 14-20. Citing the Board's recent opinion in *Yates v.*

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[71] Complainant's First Class medical certificate was valid until June 30, 2016. RX 6; *see* Tr. at 183-85. The case for a new medical examination is about $185 to $200. Tr. at 186.

[72] Mr. Lewkowicz testified that the cost for recurrency training was somewhere around $12,000 - $13,000. Tr. at 894.

[73] Tr. at 337; RX 40 at 27-28.

[74] The Tribunal infers from the context of his testimony that Mr. Adamo was referring to obtaining a Part 135 air carrier certificate. *See* Tr. at 416.

Superior Air Charter LLC dba Jetsuite Air, ARB No. 2017-0061 (Sept. 26, 2019), Complainant asserts that his participation in the NTSB investigation was protected activity, and that circumstantial evidence establishes that Respondent knew of Complainant's reporting of the duty time issue to the NTSB. Reply Br. at 1-5. Complainant also maintains that his employment as an independent contractor does not deprive him of those protections against discrimination. Compl Br. at 10-11. He maintains that his reporting to the NTSB issues about Respondent's operations was a contributing factor to his termination of employment. Tr. at 20-27. He claims that Respondent's reliance on memorandums of Complainant's performance are merely post hoc rationalizations entitled to no credit. Reply Br. at 12-13. Complainant claims that Respondent has failed to establish a same action defense. Tr. at 28-31. For damages, Complainant seeks back pay (approximately $262,000), the cost for recurrent training to fly the Hawker 700/800 ($10,000), non-economic compensation for mental anguish of $75,000 and reimbursement for attorney fees and costs. Tr. at 33-36.

B. Summary of Respondent's Position

Respondent argues that Complainant's report to the NTSB about the duty time discrepancies is not protected because he did not report them until after Respondent terminated his employment. Resp. Br. at 13, 18-20. It asserts that Complainant's testimony lacks credibility. Resp. Br. at 14-18. Respondent maintains there is no causal connection between the alleged protected activity and its termination of Complainant's employment. Resp. Br. at 20-23. Respondent also argues that, even if Complainant did succeed on his burden, its evidence is more than enough for it to prevail as Respondent put forth ample evidence to demonstrate that it would have taken the same action towards Complainant in the absence of the alleged protected activity. Respondent provides the grounding of the only Hawker 700 remaining and its legitimate concerns about Complainant's performance in the Hawker 800 as support for its contention. Resp. Br. at 14, 23-24. Alternatively, even if he has established discrimination, Complainant has failed to establish damages for emotional distress and failed to mitigate his damages and is at most entitled to four to five months of back pay. Resp. Br. at 14, 24-27.

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

A. Credibility

In deciding the issues presented, this Tribunal considered and evaluated the rationale and consistency of all the witness testimony 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 has attempted to analyze and assess its cumulative impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

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

Regrettably, the key actors involved in this matter -- on both sides -- have demonstrated a willingness for situational candor. Such conduct does little to enhance the safety or reputation of the Part 135 charter service community. However, even a Complainant that demonstrates a willingness to perpetrate situational truthfulness can still be discriminated against.

The evidence establishes that the Complainant falsified an aircraft flight log and made a false statement to Respondent's management thereafter in an attempt to "cover" for his first officer. However, Respondent knew that Complainant made these false statements to its management and tolerated it. On the other hand, it is clear to this Tribunal that Mr. Lewkowicz made material misrepresentations to the NTSB during its investigation into a fatal crash. The evidence jumps out to the most casual reader that Mr. Marchese's duty time began at 3:00 p.m. on November 7, 2015. This fact is a key fact when attempting to establish the deceased pilot's duty time. The Tribunal finds Mr. Lewkowicz's rationalization for how he came to misrepresent the beginning of Mr. Marchese's duty time uniformly unconvincing. However, these underlying matters are within the purview of the NTSB, not this Tribunal.[75] Rather, this Tribunal is tasked with how to weigh the credibility of the airmen testimony before it and this Tribunal approaches the testimony of both Complainant and Mr. Lewkowicz with a skeptical eye because of their prior misrepresentations to another aviation regulatory body.

After considering the testimony and documentary evidence before this Tribunal, the Tribunal finds Complainant's version of events concerning his conversation with Mr.

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[75] The NTSB accident report documents the "conflicting information" in its report. RX 48 at 5 and 5 n. 24. The record also notes Respondent's "casual attitude toward compliance with standards." *Id.* at 83 and 85; *see also id.* at 88-89 (Board Member Statement).

Lewkowicz in early August to provide inaccurate information to the NTSB investigators credible. Complainant definitely had an axe to grind by his termination but his testimony is backed by the flight log itself. Mr. Lewkowicz's contorted explanation for why he reported Mr. Marchese's duty beginning at 5:15 p.m. flies in the face of the flight log and the practicalities of preparing an aircraft for departure. However, his explanation reveals his motivation to utilize Mr. Marchese for the follow-on flight and thereafter to conceal the duty time violation following the crash where Mr. Marchese was potentially a fatigued pilot. It also conveniently makes Mr. Marchese "legal" to fly the fatal flight thereby potentially shielding Respondent from claims of using fatigued pilots in the inevitable litigation that follows aircraft accidents involving fatalities.

The Tribunal found Mr. Hart's testimony credible. However the scope of his testimony involved a narrow time window, a year prior to the protected activity, so in many respects it is of limited value.

Mr. Adamo's testimony warrants normal weight. Much of what he testified to concerning two of those events was generalized information not directly related to the Complainant's protected activity, and in many instances the basis of his information was hearsay. However, he credibly testified about his interaction with Complainant surrounding the pitot tube incident that occurred in Teterboro. The Tribunal also found his testimony about Complainant's desire to retire from professional flying, including Complainant turning down employment from him to fly a Hawker 700 under his Part 135 certificate, credible. That offer to fly for Mr. Adamo occurred after Respondent terminated Complainant's employment.

The Tribunal finds Mr. De Felice's testimony to be of little probative value. His testimony concerned an incident that occurred on a flight departing from Monterrey Mexico where he served as the first officer and Complainant was the captain. Mr. De Felice was critical of the take-off but he admitted that he never saw Complainant's performance calculations for the departure. As Complainant was the captain of the flight, he was responsible for those calculations and the Tribunal gives deference to a captain's performance calculations absent contrary information. He also testified that Complainant attempted to rotate before reaching V1 and he stopped him. This contradicts Complainant's testimony that what happened was shortly after rotation he lost instrumentation in front of him and transferred control of the climb to Mr. De Felice. The rest of the evidence concerning this incident is a hearsay writing by Mr. Gomez which contains speculation that the aircraft "likely" exceeded its performance limitation. However, Mr. Gomez took no action in this matter other than to prepare a memo. JX R. He did not even address the issue with Complainant.

B. Complainant's *Prima Facie* Case

1. Covered Employer

The whistleblower provision of AIR 21 is set forth in 49 U.S.C. § 42121(a). In relevant part, it provides that "[n]o air carrier or contractor or subcontractor of an air carrier may discharge . . . or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . ." filed a proceeding relevant to a violation of federal law. "Air carrier" is defined in 49 U.S.C. § 40102(a) as "a

citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." (Emphasis added.) "Air transportation," is in-turn defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5) (emphasis added).

To be subject to the Act, the employer must be either an air carrier or a contractor or subcontractor of an air carrier. 49 U.S.C. § 42121(a). The evidence clearly establishes that Respondent is a Part 135 air carrier. Further, the aircraft logs establish that the flights discussed above were all conducted under 14 C.F.R. Part 135. JX B, JX C, JX D, JX E, JX F, JX G. *See* Tr. at 61, 690-92, 787. Accordingly, the Tribunal finds that Respondent is a covered employer.

2. Protected employee

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from "discharg[ing]" or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in the air carrier safety-related activities the statute covers. The governing regulations define the term "employee" as:

> an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

29 C.F.R. § 1979.101 (emphasis added).

Here, Complainant worked for Respondent as a pilot. However, Respondent continues to assert that Complainant was not an employee because he was never discharged by Respondent, the air carrier, but rather the contract with Complainant's company (S/A aviation)[76] to which Complainant is the sole proprietor. *See* Resp. Br. at 3, n. 3. Respondent's position is meritless.

For purposes of the Act, Complainant is still protected by the Act whether he is an employee or an employee of a contractor of an air carrier (i.e. a employee of SA Aviation -- the pilot services company he created for tax reasons). The only possible difference could be that as an independent contractor,[77] and not a direct employee, Complainant must also perform a safety sensitive function for the air carrier. Here, Complainant acted as a pilot for Respondent. A pilot performs a safety sensitive function any time he operates an aircraft. A Part 135 operator cannot conduct its operations without qualified pilots. Pilots obviously are charged with the safety and lives of Respondent's passengers as well as its property.

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[76] RX 3.

[77] Here, the unrebutted evidence is Complainant established this company for tax reasons. Tr. at 193. The only assets this company apparently had were Complainant's skills. Complainant's company provided an invoice for Complainant's piloting services. RX 4.

The Board has long held that an employer need not be the complainant-employee's immediate employer, but may be liable if it exercised control over the terms, conditions, or privileges of the complainant's employment. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009); *Fullerton v. AVSEC Services*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 6-7 (ARB Oct. 26, 2005). Here, the unrebutted evidence is Respondent selected the flights and the aircraft which Complainant was to operate. And Respondent paid Complainant the same pay every two weeks for his services. When an issue arose about his flights, it was Respondent that directed Complainant to write letters explaining his actions. Furthermore, Complainant was an integral part of Respondent's pilot operations, at least for the Hawker 700 aircraft, that they had him represent them during an investigation into an aircraft accident involving one of Respondent's aircraft. It is this last point that makes Respondent's assertion specious. Respondent attempts to distance itself from their relationship when it was Respondent who selected Complainant to represent it in an NTSB investigation. For the above reasons, the Tribunal finds by the preponderance of evidence that Complainant was an employee covered under the Act.

3. 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 law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C. § 42121(a)) (emphasizing that "an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement") (emphasis in original)). Thus, the "complainant must prove that he reasonably believed in the existence of a violation," which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan.

21, 2016). To prove subjective belief, a complainant must show that he "held the belief in good faith." *Id.* To determine whether a complainant's subjective belief is objectively reasonable, an ALJ must assess his belief "taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (internal quotation marks omitted) (evaluating the reasonableness of a pilot's belief in light of his training and experience).

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

The communication of safety related issues to "other authorities" can also constitute a protected activity. *Seward v. Halo-Flight, Inc.*, ARB No. 13-098, slip. op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C. § 42121(a)). Further, to be protected, a complainant need not have to have actually communicated with the FAA. The Act extends protection to those that are *about to provide* information relating to any violation of the FAA. *See* 49 U.S.C. § 42121(a)(1). Those protections extend to communications to the NTSB during an accident investigation, making them protected activity. *See* 49 U.S.C. § 42121(a)(4); *Yates v. Superior Air Charter LLC d/b/a JetSuite Air*, ARB Case No. 2017-0061, ALJ Case No. 2015-AIR-00028 (Sept. 26, 2019).

Discussion of Protected Activity

Complainant was one of Respondent's representatives assisting the NTSB investigating the cause of crash involving one of Respondent's Hawker 700s at Akron, Ohio on November 10, 2015. Complainant spoke to NTSB Investigator Lawrence about Mr. Marchese's duty time concerning the November 7-8, 2015 flight and subsequent flights in November 2015. Tr. at 157, 169; CX 16 at 7. Mr. Marchese was the first officer on that fatal flight. The FAA regulates the amount of duty time for pilots conducting Part 135 operations. *See* 14 C.F.R. § 135.267; *see also id.* at §§ 135.263, 135.273. Since pilot fatigue is a frequent contributing factor to aircraft accidents, duty time and reducing pilot fatigue related accidents was on the NTSB 2016 Most Wanted List and continues to be on its list of most wanted improvements.[78]

Sometime in early July 2016, Complainant spoke to NTSB Investigator Lawrence about Mr. Marchese's duty times because he was concerned that Mr. Marchese would be tired from the following trip to Mexico which was just prior to the accident. Tr. at 157. On July 27, 2016, NTSB Investigator Silliman sent Mr. Lewkowicz an email seeking more information about Mr. Marchese's duty time from November 6 to 10, 2015. JX J at 1. Mr. Lewkowicz then began to gather information and had a conversation with Complainant about the version of events and what Mr. Lewkowicz was going to telling the NTSB. During one of the phone calls, Mr. Lewkowicz told Complainant that "they were going to have to come up with something to say to

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[78] *See* NTSB Most Wanted List Factsheet *available at* https://www.ntsb.gov/safety/mwl/Documents/MWL_2016_factsheet01.pdf and 2019-2020 NTSB Most Wanted List *available at https://www.ntsb.gov/safety/mwl/Documents/2019-20/2019-20-MWL-SafetyRecs.pdf*MWL-Associated Open Safety Recommendations

the NTSB and we all needed to be in agreement."[79] Tr. at 161. Mr. Lewkowicz suggested to Complainant that they had to come up with what time Complainant had left the hotel suggesting that Complainant had arrived at the airport before Mr. Marchese. Prior to Mr. Lewkowicz sending the NTSB his email, Complainant told him that he could report what he wanted to but, if he was asked, he would tell the NTSB the truth.[80]

The communication to Mr. Lewkowicz was protected activity because Complainant communicated to Mr. Lewkowicz that, if contacted, he would report facts supporting the duty

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[79] Mr. Lewkowicz testified at his deposition as follows:

> Talking with [Complainant], what I recall telling him is that, [Complainant], they're asking about duty times for [Mr. Marchese].
>
> Unfortunately, [Mr. Marchese] was the only person that could provide any duty times for his flight, and he's dead. So he's not here to provide his duty times.
>
> But, based on what we scheduled him and based on what we see, that if he was to have to appear in front of the FAA and explain to us how this trip was legal, based on the given facts of the duty times, this is what we came up with by doing this.
>
> Now, we're not sure because of the fact that he's dead, but doing graphs based on what we've told him and what it can be, he would have been able to do it. So this is what I'm telling the NTSB, even though [Mr. Marchese] is not here to do that because he's dead.

RX 44 at 83-84; Tr. at 851; *see also* Tr. at 853.

[80] Respondent asserts that Complainant's statement that if asked he would tell the truth to the NTSB was not the kind of statement the Act was designed to cover. It posits that there had to be "a threat to go to the NTSB or other affirmative manifestation." Resp. Br. at 19-20. The Tribunal disagrees. The language of the Act merely requires that the protected employee is *about to provide* (with knowledge of the employer) information to the NTSB. It is not even required that the employee actually give the information to an agency for the activity to be protected. Given the fact that the NTSB Investigators were looking into the duty time timeline of Mr. Marchese, it is eminently reasonable to believe that Complainant would be asked by the NTSB about the timeline of events surround his flight with Mr. Marchese just days prior. If Respondent had no reasonable expectation that Complainant intended to speak to the NTSB after the August 4 email (Resp. Br. at 20), it was because Mr. Lewkowicz mistakenly believed that Complainant would remain silent about the timeline proposing. As he wrote in his text to Complainant, "If you got the email and understand you do not need to come in." JX S at 1.

It appears that Complainant was willing to feed the NTSB Investigator's information, while at the same time attempt to remain silent about facts being fed to the NTSB by Mr. Lewkowicz, so long as his name was not placed into the fray. This is another example of Complainant's situational candor. Once Mr. Lewkowicz invoked Complainant to the NTSB Investigators as representing information contrary to the flight logs, Complainant either had to come clean or face the consequences of the inconsistency between what Mr. Lewkowicz told the NTSB and what is contemporaneously reflected in the aircraft logs. As mentioned above, the aviation community and its regulatory agencies take a hard stance on falsified records, and what Mr. Lewkowicz essentially told the NTSB is that Complainant made a false entry in the aircraft's log book. For the sake of his airman certificates, the Tribunal reasons that Complainant had no choice but to come forward. The reasons for this is obvious. As a practical matter, Complainant would likely be able to find another job in aviation, but not if his certificates had been revoked for falsification of official records.

time violation.[81] *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ Case No. 2011-AIR-012, slip op. at 7 (Nov. 26, 2014). Complainant as well as Respondent had every reason to believe that, as Complainant was a pilot that only days prior to the crash had flown with Mr. Marchese and was representative of Respondent for the investigation, the NTSB investigators would contact him. This qualifies as protected activity under 49 U.S.C. §42121(a)(1) and (a)(4).

After seeing the email Mr. Lewkowicz sent on August 4, 2016, Complainant reported to the NTSB that it contained inaccurate representations. Tr. at 167. The emails he provided to the NTSB also qualify as protected activity under 49 U.S.C. § 42121(a)(1) and (a)(4). Respondent terminated Complainant's employment on August 21, 2019, although it continued to pay him until August 31, 2016. On August 24, 2019, Complainant sent an email to an NTSB Investigator detailing the false information in Mr. Lewkowicz's August 4, 2019 email. JX O. The fact that the report occurred after Complainant's termination of employment does not alter the protected nature of that activity. The implementing regulations explain that a protected employee includes those that formerly worked for an employer subject to the Act.[82] In fact, a protected employee need not even have ever be an employee but someone merely applying for employment. 29 C.F.R. § 1979.101. Therefore, Complainant's reports to the NTSB Investigators that occurred after Respondent terminated his employment, but pertained to events while employed are also protected activities. To rule otherwise would provide an incentive to Employers to immediately terminate whistleblowers to preclude the use of the post-employment statements from being used against Respondent in establishing their discriminatory actions.[83]

Complainant was fully aware that Respondent had concerns about whether the first officer of the accident aircraft had sufficient crew rest. He had expressed these concerns himself to Mr. Lewkowicz during one of the phone calls. Complainant is a seasoned Part 135 captain who actually flew with Mr. Marchese just days prior to the fatal accident and even remained in contact with him via text until the day of the crash. Any seasoned Part 135 pilot knows the importance of complying with the flight time limitations and rest requirements. The Tribunal finds that Complainant had both a subjective and an objective belief that a duty time violation occurred. The timeline provided by Respondent was materially inaccurate and all indications are that Respondent attempted to fix the duty time violation by adjusting the reporting dates. Complainant knew this and reported these inaccuracies.

Respondent was put on notice as of July 27th when NTSB Investigator Silliman, the investigator in charge for the NTSB, forwarded an e-mail containing a chart that detailed the duty times for the first officer, Mr. Marchese. *Occhione v. PSA Airlines*, ARB July 2017. Respondent thereafter took affirmative steps to address the problems that the NTSB chart

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[81] The evidence establishes that by August 4, 2016, Mr. Lewkowicz knew that evidence surrounding Complainant's flights on November 6-7, 2015 were an issue for the NTSB.

[82] "Employee means an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier." 29 C.F.R. § 1979.101 (definition).

[83] It would also encourage miscreant employers to pressure employees into silence and to "go along" prior to any termination action.

presented for Respondent. Respondent's assertion that it had no reasonable expectation that the NTSB investigators would not reaching out to flight crews that flew with the deceased crew days prior to the accident strains the bounds of credulity. *See* Resp. Br. at 20.

Complainant's actions in July and August 2016 (reporting to NTSB investigators both orally and in email about possible duty time violations) and the inaccuracies of Respondent's version of events that directly relate to calculating duty time, qualify as assistance or participating in a proceeding relating to carrier safety as described in 49 U.S.C. §42121(a)(4). *Yates v. Superior Air Charter LLC d/b/a Jetsuite Air,* ARB Case No. 2017-0061, ALJ Case No. 2015-AIR-00028 (Sept. 26, 2019).

Conclusion: The record contains several instances of protected activity: Complainant's conversations and emails to the NTSB Investigators in July and August 2016, and Complainant's conversation with Mr. Lewkowicz on August 4, 2015.

4. Adverse Action

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

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, "Under this standard, the 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.[84] Accordingly, the

[84] *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

Board views "the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter 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

There can be no doubt that Respondent terminating Complainant's employment (or the contract for pilot services) constitutes an adverse action. *Douglas v. SkyWest Airlines, Inc.*, ARB No. 08-70, ALJ Case No. 2006-AIR-14 (Sept. 30, 2009). And neither party argues in their briefs that Respondent's termination of Complainant's employment was not an adverse action.

Adverse Action: Conclusion

Complainant has successfully established that Respondent committed adverse action when it terminated Complainant's employment.

5. Contributing Factor Analysis

Complainant successfully established that Respondent committed an adverse action by 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).

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.*

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

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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").

has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian National Railway,* ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). The ARB has characterized the contributing factor requirement as a "low standard," which is "broad and forgiving." *Palmer,* ARB No. 16-035 at 53. 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).

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).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.,* ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.,* ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); *see also Powers,* ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.,* ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer,* ARB No. 16-035, slip op. at 56.

Discussion of Contributing Factor Analysis

The record contains circumstantial evidence that Respondent retaliated against Complainant when it terminated his employment. The short period of time between Complainant telling Mr. Lewkowicz that he would not lie to the NTSB Investigator when asked about Mr. Marchese's duty time, the NTSB Investigator thereafter immediately questioning Mr. Lewkowicz's representation of Mr. Marchese's duty time (which was in response to Complainant's prior disclosures to the NTSB), and Complainant's termination of employment shortly thereafter provide circumstantial evidence of retaliatory motive. Consistent with *Palmer v. Canadian National Railway,* ARB No. 16-035, ALJ Case No. 2014-FRWS-154, slip op. at 56

(Sept. 30, 2016), under the facts of this case and considering the entire record, the Tribunal infers a causal connection between Mr. Lewkowicz's knowledge of the protected activity and he decision to terminate Complainant's employment.

The Tribunal finds it reasonable that Respondent acted out of retaliatory intent due to the short period of time that elapsed between Complainant reporting an unwillingness to vouch for Mr. Lewkowicz's proffered timeline on August 4, 2016 and Complainant's termination less than three weeks later. *See Svendsen 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). Here, once Complainant told Mr. Lewkowicz that he would not participate in providing the NSTB investigator the timeline Mr. Lewkowicz proposed, and would tell the NTSB the truth if asked, Respondent was on notice, at a minimum, that Complainant was about to provide information of an FAA violation. Even assuming Respondent's contentions that it had concerns about Complainant's ability to competently operate its Hawker 800s, the Tribunal finds that Complainant's unwillingness to participate in Respondent's misrepresentation of Mr. Marchese's duty timeline to the NTSB investigator was a contributing factor in Respondent's decision to terminate Complainant's employment.

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

To summarize the findings above: Complainant and Respondent are subject to the Act, Complainant's communications with the NTSB Investigators about Mr. Marchese's duty time as well as his reporting to Mr. Lewkowicz that he would not misrepresent that duty time to the NTSB were protected activities. Respondent's termination of Complainant was an adverse action and Complainant has established that his protected activities were a contributing factor to Respondent's decision to take adverse employment action against him. Thus, after evaluating all relevant evidence, Complainant has established a *prima facie* case of retaliation. The burden now shifts to the Respondent to show that it would have taken the same adverse employment action in the absence of Complainant's protected activities.

C. Respondent's Case-in-chief

1. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant's Protected Activity

After Complainant establishes a *prima facie* case, the Act provides, "relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(iv). "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11 (May 26, 2010). The Board further explained, "thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Id.*

However, where an employer proffers shifting explanations for its adverse action, or engages in disparate treatment of similarly situated employees, the employer's "explanations do not clearly and convincingly indicate that it would have" taken the same unfavorable action absent the protected activity. *See Negron*, ARB No. 04-021 at 8; *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (Sept. 30, 2009). "An employer's shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason." *Douglas*, ARB Nos. 08-070 and 08-074, at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees are disciplined in different ways. *Id.* at 17; *see also Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the administrative law judge's credibility determinations and "factual findings regarding temporal proximity, pretext, and shifting defenses . . . preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity").

Discussion of Respondent's Same Decision Defense

Respondent asserts that it had legitimate reasons for parting ways with Complainant. In particular it cites to the fact that its only remaining Hawker 700 was grounded because of a maintenance discrepancy Complainant entered into that aircraft's log. For financial reasons, Respondent did not thereafter operate the aircraft, and subsequently sold the aircraft in March 2017[85] due to the cost to repair the plane and expected future expenditures. Resp. Br. at 22; *see* Tr. at 865-66, 577-79, 625-26. However, Respondent continued to operate Hawker 800s during its operations and even hired two new pilots in the same month that it terminated Complainant's employment. Tr. at 173, 898. Respondent also points to three incidents with Complainant's operation of its aircraft in the five months prior to Complainant's termination of employment that made its management uncomfortable with his ability to operate the Hawker 800 aircraft that remained. Resp. Br. at 22.

The Tribunal finds that these were factors Respondent considered when it opted to terminate Complainant's employment, but that it has not established *by clear and convincing evidence* that, in the absence of Complainant's protected activity, Respondent would still have terminated his employment.

Respondent's own actions demonstrate that its alleged concerns about Complainant's degradation in performance was not as serious as it wants this Tribunal to believe. Complainant's last flight for Respondent occurred on August 20, 2016, the day prior to Respondent terminating him. On that flight Complainant was operating a Hawker 800. Tr. at 171. The record shows Complainant flew for Respondent numerous flights in both the Hawker 700 and 800. Of note, in 2016, the record reflects that Complainant flew Hawker 700s on thirteen trips (JX F) and Hawker 800s on at least seventeen charter trips. JX G. It is inconsistent with Respondents assertion about concern for using Complainant as a pilot in the Hawker 800 when it actually used him more frequently in the 800 than the 700. Furthermore, Respondent cites to a degradation of performance but was willing to continue to use Complainant's services

[85] RX 34.

in the Hawker 800 to day prior to his termination of employment. Respondent even sent Complainant to refresher training for the Hawker 800 in March 2016. *See* JX A.

Respondent cites to three incidents as examples of Complainant's alleged degradation in flying ability. Those incidents occurred March 29, April 9 and July 10, 2016. The March 29 and July 10 incidents involve a Hawker 800 and both involved the loss of the use of a key piece of navigation equipment. For the March 29 incident the Complainant opted to return to land when the crew experienced a problem with the aircraft's avionics, an anomaly an avionics shop could not later replicate. The fact that the avionics shop could not replicate the problem does not mean that prudence did not dictate a cautionary landing. As for the July 10 incident, even after the first officer wrote to the chief pilot about what happened, Mr. Gomez (then the chief pilot) never thought the incident was serious enough to even discuss it with Complainant. Tr. at 116, 470. The April 9 incident involved a weight and balance issue in Hawker 700 that was corrected prior to the aircraft even departing. There is no evidence that Respondent so much as gave Complainant retraining or a warning letter for the incidents upon which it now relies as an independent basis to terminate Complainant's employment. When asked to explain Complainant's continued use, Mr. Lewkowicz's response was he would use him if he had a first officer "that could carry him." Tr. at 895. It does not escape the Tribunal's attention that these incidents could be easily explained by an unexpected mechanical failure or an oversite by the pilot. Neither aircraft nor pilots are infallible. Yet these venial sins pale in comparison to the pitot tube incident where Complainant falsified a record. If Respondent was not willing to discipline Complainant for such a serious violation for which it had actual knowledge, it smacks of temerity for it to find a conscious about safety that happens to coincide with its own attempts to misrepresent the NTSB.

The Tribunal is also cognizant of Mr. Hart's testimony, and found him to be a credible witness. He testified that he flew with Complainant between six and fifteen times. In his opinion Complainant was able to adapt to differences between the Hawker 700 and 800 avionics, and he flew the aircraft the same, whether it was in the Hawker 700 or 800. Tr. at 276-78, 290. In his opinion, Complainant was competent to serve in left seat in the Hawker 800. Tr. at 306. However, Mr. Hart flew with Complainant between 2014 and 2015 so he would not be in a position to observe an degradation of Complainant's skills in 2016. But what his testimony does show is that Complainant possessed the skill set to operate either the Hawker 700 or 800 competently.

Respondent's failure to take any type of corrective action for Complainant's perceived deficiencies ways against Respondent's contention the Complainant exhibited a degradation of piloting skills. Also, as a general proposition, captains make more than first officers. Tr. at 897. So why "carry" a captain when Respondent could just fire Complainant and promote one of the first officers that was allegedly carry him?

The Tribunal must also address the fact that in August 2016 Respondent stopped using Hawker 700s on its certificate. In the absence of other information, the reason could be compelling combined with the fact that Complainant's service contract only mentions the

Hawker 700 aircraft.[86] CX 11. However, it is the practice of Respondent that again undercuts this argument. As explained above, the Hawker 700 and 800 are very similar aircraft and handle similarly. The training for certification in one aircraft typically included training to operate the other aircraft. It is undisputed that for years Respondent used Complainant to fly both the Hawker 700 and 800. The aircraft logs in evidence do suggest that Complainant flew the Hawker 800. Had Complainant only been current in the Hawker 700 and only flew the Hawker 700 for Respondent, the Tribunal would find this argument persuasive. But that was not the case here.

V. CONCLUSION

For the reasons provided, the Tribunal finds Complainant has established a *prima facie* case of retaliation and Respondent has failed to show that it would have taken the same adverse action in the absence of Complainant's protected activities to escape liability. Only the question of relief remains.

VI. RELIEF

The Office of Administrative Law Judges "Rules of Practice and Procedure, 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. §1979.107(a). Under those rules, the complainant is obligated, within 21 days of entry of an initial notice or order acknowledging the case has been docketed (29 C.F.R. §18.50(c)(i)(iv)), and without awaiting a discovery request (29 C.F.R. §18.50(c)(1)(i)), to disclose to Respondent, *inter alia*:

> A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under §18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

29 C.F.R. §18.50(c)(1)(i)(C). Furthermore, under 29 C.F.R. §18.53, the complainant has a continuing duty throughout the litigation to supplement or correct that disclosure if, at any time, the complainant learned it has become incomplete or incorrect in some material respect.

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[86] The Tribunal notes that the January 31, 2014 service contract between Respondent and Complainant provides: "Company agrees to place into service pilot in the position of Captain/FO (as required by company) on the following one or more aircrafts HS125 also known as Hawker 700 aircraft for a period of no less than two (2) years with an annual salary of Sixty Five (US $65,000). CX 11 at 1. There are a couple of issues with this provision. The HS125 consists of more than Hawker 700 aircraft and one could reasonably argue that the Hawker 700 reference was illustrative. Second, it provides that Complainant would serve as either a captain or first officer. In Respondent's explanation for why it terminated Complainant's appointment, there is only reference to Complainant serving as a captain. Given its assertion that Complainant's skills had diminished, Respondent never explained why Complainant could not serve as a first officer.

AIR 21 provides that if a violation is found, the administrative law judge shall order the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. 49 U.S.C. § 42121(b)(3)(B); see also *Evans v. Miami Valley Hospital*, ARB No. 07-118 (Jun. 30, 2009), slip op. at 19; 29 C.F.R. § 1979.109(b).

A. The Parties' arguments

Complainant maintains that he is entitled to back pay of at least $260,000, as he has been unable to find subsequent employment since he was certified to fly Hawker HS-125 series aircraft. Compl. Br. at 33. He argues that he cannot afford the approximate $10,000 to attend recurrent training and that he has suffered non-economic mental anguish worth $75,000. *Id.* at 33-34. Complainant asserts that Respondent has failed to establish a mitigation of damages defense.

Respondent argues that if damages are warranted, they are much less than Complainant asserts as he has failed to minimize his damages. Resp. Br. at 24-28. It notes that Complainant rejected substantially equivalent positions and failed to use reasonable diligence in seeking these positions. *Id.* at 25. Respondent also contends that Complainant has not shown emotional distress related to his termination that warrants compensation. *Id.* at 26-27.

B. Reinstatement

Although the Act envisions reinstatement as an automatic remedy, neither party raised this as a remedy at the hearing or in their briefs. In fact, during Complainant's opening the Tribunal specifically asked if he was seeking reinstatement as a remedy and counsel's response was "I don't think [Complainant] would trust flying for [Respondent] again." Tr. at 25. Therefore, this Tribunal finds that reinstatement is not a desirable remedy to either party. However, the Tribunal will order back pay as follows. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11 (May 26, 2010).

C. Back Pay

Complainant has the burden to prove the back pay he has lost. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

While a non-working employee has the duty to mitigate his damages by seeking suitable employment, it is well established that the employer has the burden of establishing that the backpay award should be reduced because the employee did not exercise diligence in seeking

and obtaining other employment. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (Mar. 29, 2000).

There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with "unrealistic exactitude." *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (Jun. 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628. Back pay awards are not reduced by the amount of income and social security taxes that would have been deducted from the wages the complainant would have received. *Id.* at 627. Interim earnings at a replacement job are deducted from back pay awards. *Id.* at 623. Although a terminated employee has a duty to mitigate damages by diligently seeking substantially equivalent employment, the respondent bears the burden of proving that the complainant failed to properly mitigate damages. *Id.*; *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 32 (Feb. 9, 2001).

Complainant seeks $262,000 in back pay, although he testified that his wage-based damages were $220-230,000. Tr. at 199. The service contract which the parties signed indicates a salary of $65,000 per year (CX 11), but Complainant testified that at some point his salary was increased and at the time of his termination of employment his salary was $80,000 per year. Tr. at 196-97. *See id.* at 213-14. His pay ended August 31, 2016. Complainant asserts that he has been unable to find work because he is only type rated in the Hawker, his wife does not want him to relocate, he is 66 years old and faces competition from much younger pilots. Further, Complainant claims he cannot afford the cost to attend recurrent training to fly the Hawker. Compl. Br. at 33.

However, Complainant has a duty to attempt to mitigate damages and there is evidence that Complainant failed to mitigate his. *See Douglas v. SkyWest Airlines, Inc., supra,* slip op. at 20. Complainant bears the burden to establish that he used reasonable diligence in efforts to obtain other work. The record establishes that Complainant ceased what efforts he was making to obtain employment around May 2017. Complainant did not send any emails or resumes to Florida-based employers. He allowed his subscription to the job website he used (Climbto350) to expire in late 2016 and never renewed it.[87] Complainant's currency in the Hawker lapsed in March 2017. Tr. at 181. Of note, on May 23, 2017, Complainant dissolved his pilot contract services company that he used to receive pilot services payments. Tr. at 210; RX 3. In short, the record is lacking in evidence as to Complainant's efforts to seek work. Moreover, when he was offered employment by Mr. Adamo and Mr. Gomez, he turned the work down. Tr. at 333-38, 417-18. Ultimately, Complainant did take a job with Mr. Gomez just prior to the hearing.[88] Additional facts weigh against finding Complainant exercised diligence is looking for work. He let his airman's medical certificate expire and he let his subscription to the one job search site he utilized expire within months of his termination of employment. Tr. at 181, 183, 186, 333-39,

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[87] This is one of the parties' pre-hearing stipulations of fact listed above.

[88] The Tribunal also notes that the parties stipulated that Complainant received a job offer to fly part time as a first officer on a Gulfstream but turned down the offer because he thought it might impact his cases against [Respondent] to work with Miguel Gomez, the person at [Respondent] who informed him of his termination.

341-42. Even then, Complainant testified that he only "looked through there to see if there was any possible things that were local in nature that I could get, and I couldn't find anything." Tr. at 181. He admitted that during this time he did not send out resumes to potential air carrier operators. Tr. at 191. However, Complainant also testified that he flew right seat on a Gulfstream IV for some Part 91 flights. Tr. at 187-88. He also made statements about a desire to retire. Complainant told Mr. Adamo that he was going to retire as he "just wasn't interested" in flying any more. Tr. at 418. *See id.* at 189. Complainant acknowledged that he is collecting social security benefits. Tr. at 190.

Given the above, the Tribunal finds that Complainant ceased efforts to seek full-time employment in May 2017 and thereafter intended to retire from flying. It is at this point that his back pay ends. Complainant's unrebutted testimony is his salary increased from $65,000 to $80,000 at some point prior to his termination of employment. Therefore, the Tribunal uses this figure for its calculations. Respondent paid Complainant through August 2016. Therefore, the back pay to which Complainant is entitled goes from September 1, 2016 to May 31, 2017, or nine months in salary. $80,000 divided by 12 months equals $6,666.67 per months. Therefore, Complainant is entitled to $60,000 in back pay.

D. . Compensatory Damages

"Compensatory damages are designed to compensate discriminates not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby*, ARB No. 98-166. Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Evans v. Miami Valley Hospital*, ARB Case Nos. 07-118, -121, ALJ No. 2006-AIR-22, slip op. at 52 (Jun. 30, 2009) (citing *Crow v. Noble Roman's Inc.*, ALJ No. 95-CAA-8 (Feb. 26, 1996)); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09033, 08-091, ALJ No. 2006-STA-032 (Sep. 24, 2010)) (affirming ALJ's award of $50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based solely upon the employee's testimony. *Ferguson*, ARB No. 10-075, slip op. at 7-8. Nonetheless, a key step in determining the amount of non-economic compensatory damages is a comparison with awards made in similar cases. *Hobby*, ARB Nos. 98-166, -169, slip op at 32. Complainant seeks non-compensatory damages in the amount of $75,000 for emotional distress.

A determination of non-economic damages is a subjective one. *Evans*, ARB Nos. 07-118, -121, slip op. at 51. The Tribunal acknowledges that other Tribunals have awarded damages between $3,000[89] and $250,000 for emotional distress, but each case hinges on its unique facts. In *Hobby*, ARB No. 98-166 ALJ Case No. 1990-ERA-30, slip op. at 31, the Board acknowledged that there is no upward limit that can be awarded for compensatory damages. It must be equally true that there is no downward limit. This explains the wide range of awards. Here, Complainant has provided no evidence to support this claim for emotion distress except for

[89] *See Brian v. American Airlines*, 2007-AIR-004 (Oct. 23, 2008), at 61, *remanded on other grounds*, ARB No. 09-018 (Dec. 29, 2010). This case ultimately settled following the remand.

his own testimony. He testified that he has not been given any medication for his stress and that, while he takes blood pressure medication, he has been on that medication since he had his stroke years prior- thus prior to his termination. Tr. at 201. He admitted that he could not say whether his difficulty sleeping, which apparently began six months prior to the hearing, or anxiety attacks were because of the termination or his prior heart condition. Further, he claims suffering from mental anguish because he was not the pilot for the accident flight and feels like he could have avoided a crash. Tr. at 202-03, 345-50. However, those are stressors unrelated to the discrimination by Respondent. There is also credible evidence that Complainant was in the twilight of his flying career and was already contemplating retiring from commercial flying. While unlike Part 121 pilots, Complainant could continue to fly past age 65, there is evidence that he told Mr. Adamo that "he was getting out of flying, he just didn't want to do it anymore. Retiring, I guess, or just wasn't interested". Tr. at 418. However, it is plausible that whenever a person loses their job, particularly for a discriminatory reason, unexpected emotional distress can occur. Given the facts of this case and the minimal evidence provided, this Tribunal finds that damages for emotional pain and suffering are warranted but only at the very lowest end of comparable cases. Accordingly, this Tribunal awards $ 3,000 in damages for emotional pain and suffering.

E. Interest

A prevailing complainant is entitled to interest on an award of back pay. *See EEOC v. Ky. St. Police Dept*., 80 F.3d 1086, 1098 (6th Cir. 1996); *Doyle v. Hydro Nuclear Servs*., ARB Nos. 99-041, 99-042, 00-012, slip op. at 17-19 (May 17, 2000).[90] Compounding interest is calculated quarterly, and the proper rate is the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points. *Doyle*, slip op. at 17-19 (citing 26 U.S.C. §6621(a)(2)). Complainant shall also receive post-judgment interest on his back pay award, which is calculated by the identical formula set forth in Doyle.

F. Attorney Fees and Costs

Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have twenty-one (21) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have fourteen (14) days within which to file any reply to Respondents' response.

VII. ORDER

Respondent shall provide Claimant with the following:

- $60,000 in back wages, plus interest;

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[90] *See also Cefalu v. Roadway Express, Inc.*, ARB No. 09-070 (Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051 (Apr. 10, 2010); *Murray v. Air Ride, Inc*., ARB No. 00-045, slip op. at 9 (Dec. 29, 2000).

- $3,000 in emotional damages; and,
- Reimburse Complainant's counsel for their attorney fees and costs.

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

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).