U.S. Department of Labor

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Issue Date: 21 December 2020

Case No.: 2018-AIR-00041

In the Matter of
KARLENE PETITT

Complainant

v.

DELTA AIR LINES, 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 June 6, 2016. In its July 13, 2018 letter, OSHA, acting on behalf of the Secretary, found that the parties are covered under the Act, but there was insufficient evidence to establish reasonable cause that a violation occurred. Accordingly, OSHA dismissed the complaint. On August 1, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges.

Subsequently, on August 27, 2018, this matter was assigned to the undersigned. On August 28, 2018, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated September 6, 2018, and attached her statement, which was originally transmitted as part of her Complaint to OSHA. This Tribunal issued a Notice of Hearing and Pre-Hearing Order on September 27, 2018, and set the hearing for March 25-29, 2019 in the Seattle, Washington area. As part of this Order, the Tribunal required Complainant to file a Pleading Complaint.

On October 18, 2018, Complainant filed its Pleading Complaint. On November 20, 2018, Respondent filed its Answer to Complainant's Pleading Complaint. On December 6, 2018, Complainant filed a Motion to Amend her Pleading Complaint. On December 20, 2018, Respondent filed its opposition to Complainant's amendment of the Pleading Complaint. On January 17, 2019, the Tribunal issued an Order granting Complainant's Motion to Amend her Pleading Complaint.

On December 4, 2018, Complainant filed a Motion for Summary Decision on the adverse action element. On December 26, 2019, Complainant filed its opposition to Complainant's motion.

On January 16, 2019, Complainant filed a Motion for Summary Decision. On February 6, 2019, Respondent filed its response to Complainant's motion. On February 14, 2019, the parties submitted a joint stipulation on the issue of protected activity,[1] specifically:

> [Respondent] stipulates that Complainant's January 28, 2016 report (Complainant's "report") – that raised issues concerning: pilot fatigue, pilot training, pilot training record, and [Respondent's] Safety Management Systems (SMS) programs – qualifies as protected conduct under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). [Respondent] further stipulates that it will not challenge that Complainant engaged in protected conduct when she submitted her report to [Respondent] on January 28, 2016, when she offered to forward her report and eventually did forward it to other [Respondent] executives including Ed Bastian, when she discussed her report with Steven Dickson and Jim Graham on January 28, 2016 and thereafter, and when she gave a presentation to [Respondent] executives on April 27, 2016 concerning her report. [Respondent] by this stipulation does not waive any defenses to the Complaint filed by Complainant in this or any forum other than as described herein.

On February 21, 2019, the Tribunal issued an Order denying Complainant's Motion for Summary Decision. In this Order, the Tribunal found the parties subject to the Act, accepted the parties' stipulation concerning protected activity, and found that subjecting Complainant to the Section 15 process was an adverse action.

On February 12, 2019, Respondent filed a Motion for Summary Decision arguing the Railway Labor Act precluded Complainant's claims. On February 20, 2019, Complainant filed its response to this motion. On February 26, 2019, Respondent filed a Motion for leave to submit a reply brief. On February 27, 2019, the Tribunal issued an Order denying Respondent's request to file a reply to Complainant's reply to its Motion for Summary Decision. On March 1, 2019, after

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[1] *See also* Tr. at 8-9, 14, 21, 168, 184, 197.
The Tribunal is aware of—and requests the reader to allow for—the possibility of page number-variances between the two versions of the transcript: paper and electronic. Variances may even exist between two electronic copies of the transcript, as the court reporter provided the electronic version of the hearing transcript in a format that is not guaranteed to preserve the fidelity of page numbers.

addressing in detail whether the Railway Labor Act serves to preempt application of AIR 21, the Tribunal issued an Order denying Respondent's Motion for Summary Decision.[2]

On December 26, 2018, Complainant filed a Motion to Compel the deposition of Respondent's Chief Executive Officer, Ed Bastian. On January 15, 2019, Respondent filed a Motion for Protective Order. On January 26, 2019, the Tribunal issued an Order granting Complainant's Motion to Compel the deposition of Ed Bastian.

On January 31, 2019, Complainant filed a Motion for *In Camera* review of certain documents. On February 15, 2019, Respondent filed its opposition. On February 27, 2019, the Tribunal issued an Order granting in part Complainant's Motion for *In Camera* review. On March 6, 2019, the Tribunal issued an Order finding privileged the documents reviewed *in camera*.

The parties submitted their prehearing statements and proposed exhibit lists on March 18, 2019. Complainant's prehearing materials averred that the sole issue outstanding for adjudication was whether Complainant carried the burden on the issue of whether the protected activity was a contributing factor with respect to one or more of the unfavorable personnel actions.

This Tribunal held a hearing in this matter in Des Moines, Washington from March 25 to March 29, 2019, April 25, 2019 and from May 3 to May 5, 2019.[3] Complainant and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Joint Exhibits ("JX") A – N, Respondent's Exhibits ("RX") 1 – 138, and Complainant's Exhibits ("CX") 1 – 200.[4] In its opening statement, Respondent conceded that Complainant engaged in

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[2] Respondent asked the Tribunal to reconsider this ruling. Resp. Br. at 50. The Tribunal reaffirms its findings that Complainant's claims concerning her alleged protected activities and adverse actions. As discussed, *infra*, the Tribunal also reaffirms its finding that Respondent's alleged retaliatory actions are not preempted by the RLA because AIR 21 creates a separate cause of action, which is independent upon any interpretation of the Pilot Working Agreement. *See Order Denying Respondent's Motion for Summary Decision* (Mar. 1, 2019) (the Tribunal incorporate herein the reasoning found in this Order).

[3] The Transcript of the above referenced proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 14-29.

The April 25, 2019 hearing-day was of brief duration. The parties planned to take Captain Graham's video-teleconference testimony. The Tribunal, Complainant, Complainant's counsel, and members of the public were present at a hearing room in Des Moines, Washington; Respondent's counsel–and presumably Captain Graham—were situated in Atlanta, Georgia. However, Respondent was unable to establish video-teleconference communication with the facilities in Des Moines, Washington. Given this development, the parties stipulated that Respondent would waive redirect or use of Captain Graham as a rebuttal witness, and that his deposition transcript would be admitted fully into the record. Tr. at 1273-74. Captain Graham's deposition is admitted as CX 200.

[4] Tr. at 6, 7, 211, 306, 2120-23. The Tribunal additionally forewarned the parties at the beginning of the hearing that exhibits not identified in their briefs would be considered as either duplicative of other evidence or not particularly relevant or persuasive to their case and accordingly they would be given little or no weight. Tr. at 8. The parties also agreed that the depositions of Mr. Bastian and Captain Dickson would be admitted substantively and in lieu of their live testimony. Later on, the parties also agreed that the deposition of Captain Graham would be considered in lieu of additional testimony from him.

protected activity when she submitted her report to Captain Graham and Captain Dickson on January 28, 2018. Tr. at 20.

During the hearing itself, and after hearing argument from the parties,[5] the Tribunal initially denied Respondent's motion to dismiss the amendments to the complaint concerning alleged retaliatory acts by Respondent's counsel during the litigation itself. Tr. at 505. However, after listening to the evidence presented on those allegations [6] (Tr. at 508-09) and, in response to Respondent renewing its motion to dismiss, the Tribunal granted Respondent's motion to dismiss concerning the alleged actions by Respondent's counsel. Thus, the Tribunal struck the paragraph of the amended complaint that contained those allegations from the record. Tr. at 511-14.

On July 19, 2019, Respondent filed a Motion for Protective Order concerning Complainant's publishing of the videotaped depositions of three of Respondent's witnesses. On July 21, 2019, Complainant submitted its opposition to this motion. On August 20, 2019, the Tribunal issued an Order denying Respondent's Motion for Protective Order. On September 3, 2019, Respondent filed a Motion for Reconsideration of the Order denying the Protective Order. Complainant responded to this motion on September 4, 2019. On September 18, 2019, the Tribunal denied Respondent's Motion for Reconsideration. On September 30, 2019, Respondent filed an interlocutory "Petition for Review" with the Administrative Review Board ("ARB") concerning the Tribunal's denial. On October 7, 2019, Complainant filed with the ARB her response to Respondent's request for interlocutory appeal. On August 26, 2020, the Board denied Respondent's interlocutory appeal. *Petitt v. Delta Air Lines, Inc.,* ARB Case No. 2019-0018 (Aug. 26, 2020).[7]

Complainant submitted a closing brief on August 20, 2019; Respondent on October 11, 2019. Complainant submitted a Reply Brief on November 1, 2019.

On March 5, 2020, Respondent filed a Motion to Admit New Evidence of Arbitration Award and Motion for Brief Stay of Proceedings. Attached to this motion was a System Board of Adjustment ("SBA") opinion and order dated January 27, 2020. The hearing in that matter occurred on October 15, 2019. On March 11, 2020, Complainant filed her response and included, among other documents, a transcript of the October 15, 2019 proceedings. On April 14, 2020, the Tribunal issued an Order Granting Respondent's Motion to Admit New Evidence of Arbitration Award. In this Order the Tribunal informed the parties that it admitted both the January 27, 2020 SBA decision (RX 140) as well as the October 15, 2019 transcript of the SBA hearing (RX 141).

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[5] Tr. at 499-505.

[6] The only evidence presented by Complainant was alleged threats that Respondent would seek sanctions should she give her safety report to anyone else. Tr. at 495, 499. However, the Tribunal had previously and specifically ruled that Complainant was free to distribute her report without fear of sanctions from this Tribunal. *See* Order Granting in Part Complainant's Motion to Re-designate the Dickson Deposition, dated Jan. 28, 2019.

[7] Apparently, thereafter, Respondent petitioned the Secretary for further review of the Board's Order denying interlocutory review. The Tribunal says apparently because the Tribunal's records only contain Complainant's reply to this petition which was filed with this Tribunal on September 14, 2020.

The Tribunal also gave the parties time to submit additional briefing on the issue of whether collateral estoppel should apply in this case. Order at 5. On May 11, 2020, Respondent filed a supplemental brief, and on May 21, 2020, Complainant filed her supplemental brief.

On November 12, 2020, Complainant filed a Motion to Submit New Evidence. Complainant asked the Tribunal to admit the results of a Consent Order of the Department of Financial and Professional Regulation of the State of Illinois relating to Dr. Altman agreeing to being placed in an inactive status following an investigation into his conduct involving his evaluation of a pilot other than Complainant. On November 23, 2020, Respondent filed its objection to this new evidence noting that the consent order was not a finding by regulatory body and that the consent order made clear that Dr. Altman neither admits nor denies the alleged information. On December 11, 2020, the Tribunal denied Complainant's motion.

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

II. FACTS ESTABLISHED PRIOR TO THE HEARING

A. Facts established by the Pleadings[8]

1. Complainant was employed in various capacities as an airline pilot prior to being employed by Respondent.
2. Northwest Airlines, Inc. ("NWA") employed Complainant effective January 17, 1997.
3. On October 29, 2008, NWA and Respondent merged.
4. Complainant is employed by Respondent and currently holds the title of First Officer.
5. Complainant is subject to a collective bargaining agreement ("CBA") called the Pilot Working Agreement ("PWA"), entered into between Delta and the Air Line Pilots Association ("ALPA"), which was negotiated pursuant to the Railway Labor Act, ("RLA"), 45 U.S. Code Chapter 8.
6. Delta and ALPA are parties to the PWA.
7. Complainant complained about Captain Thomas Albain's simulator training on or around March 2011.
8. On or about January 28, 2016, Complainant met with Capt. Dickson and Capt. Graham.
9. During the January 28 meeting, Complainant provided the Respondent with a 43-page written safety report entitled "Assessment of Delta Air Lines 'Flight Operations' Safety Culture" (hereinafter referred to as "Safety Report").
10. A meeting was held at Complainant's request on or about January 28, 2016, where Complainant was provided the opportunity to speak with Capt. Dickson and Capt. Graham about her various concerns on a multitude of topics.
11. Complainant was invited by Respondent to give a presentation on or about April 27, 2016, to discuss ideas as part of its goal of continuous improvement.

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[8] The Tribunal listed these facts as Attachment A to its February 21, 2019 *Order Denying Complainant's Motion for Summary Decision* and neither party challenged the accuracy of this rendition of facts established by the pleadings.

12. In an email dated February 10, 2016, Complainant congratulated Ed Bastian on becoming CEO.
13. On February 10, Ed Bastian responded to Complainant's email "Thanks Karlene. Good to hear from you. Looking forward to many great chapters for us to write. Best. Ed".
14. Complainant emailed Ed Bastian on March 5, 2016.
15. Ed Bastian responded to Complainant's March 5, 2016 email, stating only: "Thanks Karlene. I would appreciate seeing the report and will be sure to follow up."
16. On March 15, 2016, the Complainant had a meeting with Capt. Davis, and discussed the subject of "green slips."
17. Complainant met with Kelley Nabors[9] ("Nabors") on March 8, 2016 to discuss Complainant's equal opportunity ("EO") complaints.
18. Complainant and Nabors met at Nabors' hotel and that interview lasted approximately three hours.
19. Following Ms. Nabors' meeting with Complainant on March 8, 2016, Ms. Nabors contacted Respondent's Legal Department and eventually spoke with Mr. Puckett and Dr. Faulkner regarding her meeting with Complainant.
20. On March 22, 2016, Capt. Davis presented Complainant with a letter dated March 17, 2016, which advised her that she was removed from service pursuant to Section 15.B of the pilots' collective bargaining agreement based on alleged concerns regarding Complainant's mental health and whether she still met the standards required for a First Class Medical Certificate.
21. The Pilot Work Agreement, at Section 15, sets forth a mandatory procedure by which Respondent may evaluate whether a pilot meets the standards established by the Federal Aviation Administration ("FAA") for issuance of an FAA First Class Medical Certificate.
22. PWA Section 15.B.4 requires Respondent's Director of Health Services ("DHS") to confer with the ALPA Medical Advisor prior to sending the pilot for the evaluation, provided the pilot releases per pertinent medical information to the ALPA Aeromedical Advisor.
23. PWA Section 15.B.5 Evaluations are performed by a Company Medical Examiner ("CME") selected by the DHS.
24. PWA 15.B.6 requires that "Medical information provided by the DHS to the CME must be limited to medically relevant information provided by doctors and treating facilities."
25. Dr. Faulkner recommended that Complainant undergo a psychiatric examination pursuant to the terms of the PWA.
26. Prior to Dr. Faulkner's determination, he engaged in no meaningful review or otherwise of Complainant's medical records as provided for by CBA Section 15 B.1 and 2.
27. Complainant agreed to meet with Dr. Faulkner on April 27, 2016.
28. Complainant underwent neuropsychological testing.
29. Dr. Faulkner referred Complainant to Dr. David B. Altman.
30. Respondent provided Dr. Altman with documents pursuant to his requests.
31. Dr. Altman issued a report which deemed Complainant medically non-qualified.

[9] Ms. Nabors is a manager of equal opportunity and pass protection for Respondent.

32. Mayo Clinic served as Complainant's pilot medical examiner ("PME").
33. Complainant filed an AIR 21 complaint on June 6, 2016.
34. The PME determined that Complainant was fit to work as a pilot and Dr. Broyhill emailed Respondent on June 19, 2017.
35. The CME and PME engaged in multiple communications seeking to choose a Neutral Medical Examiner ("NME").
36. Dr. Huff issued a determination that Complainant was fit to work as a pilot.
37. On August 22, 2017, the FAA Medical Appeals Board deemed Complainant eligible to retain her First Class Medical certificate and reinstated her.

B. Additional Facts established by the Amended Pleading

1. Complainant complained about Captain Thomas Albain's simulator training on or around March 2011.[10]
2. Prior to Dr. Faulkner's determination to direct that the Complainant undergo a psychiatric examination, Dr. Faulkner had no contact with the Complainant.[11]
3. In July 2017, pursuant to the terms of the PWA, the CME and PME jointly selected Dr. Andrew Huff as the Neutral Medical Examiner (NME) would resolve the Complainant's disputed diagnosis.[12]

C. Facts established by Requests for Admissions[13]

1. Respondent never terminated Complainant.
2. Complainant was nominated for the Chairman's Club Peer to Peer award in May 2016.
3. Complainant did not violate Respondent's social media policy when she spoke at Euro Control's Flight Safety Conference in Brussels on the structural redesign of pilot training in January 2015.
4. Respondent has an open door policy.
5. Respondent's act of placing Complainant in Section 15 status pursuant to the directive dated March 17, 2016, resulted in the Complainant's loss of jump seat privileges.
6. Dr. Faulkner communicated with Dr. Altman regarding the selection of an NME with respect to Complaint's [sic] fitness for duty review process.
7. Respondent contacted the FAA to advise them of the existence of the CME's report, and requested that the FAA obtain a copy of that report prior to resolution of the Section 15 medical review evaluation process.
8. Complainant received her first class medical after a neutral medical examiner ("NME") evaluated Complainant.

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[10] This was a partial admission by Respondent to Complainant's Amended Pleading Complaint. *See* Respondent's Answer to Amended Pleading Complaint, para. 9.

[11] *See* Respondent's Answer to Amended Pleading Complaint, para. 87.

[12] *See* Respondent's Answer to Amended Pleading Complaint, para. 125.

[13] *Respondent's Objections and Responses to Complainant's First Combined Discovery Interrogatories, Requests for Documents, and Requests for Admissions,* dated Oct. 12, 2018 located at CX 5, as amended on February 12, 2019 (CX 196).

9. Dr. Faulkner asked Complainant about her medical history and Complainant denied that she had received any relevant treatment. As such, Dr. Faulkner did not request any medical records because Complainant indicated that no relevant medical records existed.
10. [Respondent's] policy does not require employees to report their off-duty activities to a Regional Director.
11. Complainant sent [Captain] Davis an email on September 9, 2015 in which Complainant listed her "concerns."

D. Facts established by the Parties' pre-hearing statements[14]

1. Respondent is an "air carrier" as defined in 29 CFR § 1979.101, and is subject to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").
2. Complainant is an "employee" as defined in in 29 CFR § 1979.101 and is protected under AIR 21.
3. Complainant is currently employed by Respondent as a First Officer.
4. On January 28, 2016, Complainant engaged in protected conduct when she met with Capt. Jim Graham (Vice President, Flight Operations) and Capt. Steve Dickson (Senior Vice President, Flight Operations), and presented them with her written report that raised several issues, including Respondent's Safety Management Systems ("SMS") program, pilot fatigue, pilot training.
5. On March 8, 2016, Complainant met with Kelley Nabors (Manager, Equal Opportunity and Pass Protection) in Seattle.
6. On March 17, 2016, Capt. Graham decided to refer Complainant for a mental health evaluation under Section 15 of the Pilot Working Agreement ("PWA"), the collective bargaining agreement between Respondent and Air Line Pilots Association International ("ALPA").
7. On March 22, 2016, Capt. Phil Davis (Chief Pilot, West Region) met with Complainant and presented her with a letter dated March 17, 2016 that notified Complainant of her removal from service pursuant to Section 15.
8. On April 27, 2016, Complainant presented a version of her January 28, 2016 report to Jon Tovani, Ed Sternstein, and William Klein—leaders in Respondent's Flight Operations and Corporate Safety, Security and Compliance ("CSSC") departments.
9. On April 27, 2016, Complainant met with Dr. Thomas Faulkner, Respondent's Director of Health Services ("DHS") regarding her Section 15 referral.
10. On May 4, 2016, Dr. Faulkner sent Dr. David Altman a letter referring Complainant to him for a psychiatric evaluation under Section 15.
11. On May 4, 2016, Dr. Faulkner sent Complainant a letter notifying her of the referral to Dr. Altman as the Company Medical Examiner ("CME") under Section 15.
12. On June 6, 2016, Complainant filed an AIR 21 complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA").

[14] Both parties submitting their pre-hearing statements on March 15, 2019, which contained identical stipulated facts.

13. Complainant met with Dr. Altman on July 6, 2016, July 15, 2016, and September 14, 2016.
14. On December 7, 2016, Dr. Altman issued a 366-page report that concluded Complainant did not meet the standards to hold a First Class Medical certificate.
15. On February 22, 2017, the Mayo Clinic, acting as the Pilot Medical Examiner ("PME") under Section 15, issued its report that concluded that Complainant was eligible to hold a First Class Medical certificate.
16. On September 2, 2017, Dr. Andrew Huff, serving as the Neutral Medical Examiner ("NME") under Section 15, issued his report that concluded Complainant was eligible to hold a First Class Medical certificate.
17. Following Dr. Huff's report, Respondent reinstated Complainant to the line.
18. On August 1, 2018, Complainant appealed OSHA's findings to the Office of Administrative Law Judges.

III. FACTUAL BACKGROUND AND EVIDENCE

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

To understand the significance of the Section 15 process described, *infra*, a brief and general introduction into some of the applicable Federal Aviation Regulations ("FARs") is warranted. Respondent is an air carrier authorized to conduct scheduled operations under 14 C.F.R. Part 121. A Part 121 air carrier can only use properly certificated pilots to conduct its flights. 14 C.F.R. § 121.383(a). For a pilot to be authorized to operate a given aircraft they must possess two types of Federal Aviation Administration ("FAA") issued airman certificates. *See* 14 C.F.R. § 61.3(a). One is a pilot certificate which reflects the types of privileges and limitations the holder possesses concerning their authority to operate a given aircraft. *See* 14 C.F.R. §§ 61.63 and 121.383(a)(2)(ii). Since Respondent is a common carrier, it uses transport category aircraft to conduct its passenger carrying operations; any pilot that it uses to fly such aircraft must also hold an airline transport pilot ("ATP") certificate with the appropriate type rating.[15] 14 C.F.R. § 121.436. The other certificate an airman must hold is an FAA issued airman medical certificate. A pilot can only exercise the privileges of an ATP when they possess a current and valid First Class airman medical certificate. 14 C.F.R. § 61.23(a)(1). A pilot, such as Complainant, who needs a First Class medical certificate to fly under Part 121, must renew their First Class medical certificate at least annually, if not every six months.[16] *Id.* at § 61.23(d). If the FAA determines that a Part 121 pilot has a medically disqualifying condition, they are precluded from operating not only the air carrier's aircraft but also *any* aircraft until such time as the medical condition is addressed to the satisfaction of the FAA.[17] *See generally,* 14 C.F.R. Part 67. Needless to say,

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[15] Type ratings are specific to the individual aircraft. A pilot wishing to fly an Airbus A330 and a Boeing 777, for example, must obtain two separate type ratings.

[16] Under the regulations, depending on the type of flying being conducted or the age of the pilot, a pilot may have to renew their medical certificate every six months. *Id.*

[17] Of importance—and discussed *infra*—is that if the FAA does not know of a potential issue effecting a pilot's medical certificate, it cannot take such precautionary measures to ensure such a pilot does not fly.

retaining one's airman medical certificate is essential not only for a pilot's current job, but for any future flying job.

This matter involves a first officer who at all relevant times worked for Respondent. Complainant provided Respondent's upper management with certain safety concerns (CX 1, RX 16 at 1-2), which she eventually reduced to a detailed Safety Report (JX B). In her Safety Report, Complainant explained her concerns regarding, among other allegations,[18] the following safety-related issues:

- Inadequate flight simulator training because an instructor (Captain Albain) did not follow the appropriate protocol on how to conduct a simulator session;
- Deviation from line check evaluation procedures when Captain Albain later served as a check airman, and use of retaliatory line checks, generally;
- Pilot fatigue, and flight and duty time issues;[19]
- Statements from Respondent's senior flight operations management;
- Issues with A330 pilots' lack of confidence to hand-fly the aircraft;
- Inadequate training and errors in training manuals;[20]
- Falsification of training records;
- Flaws in Respondent's upset recovery training;[21]
- Disparate treatment of employees, including deals for the "Good Old Boys" and management by threat for others; and
- A lack of flexibility because of the existence of a rigid chain of command.

Shortly after providing this document, Respondent referred Complainant for a mental health evaluation following Section 15 of the contract between Respondent and the pilots' union.[22]

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[18] Complainant also asserted that Respondent had singled her out for speaking with the press, for writing a book, and for making public appearances while in Respondent's uniform, and that Respondent had chastised her for using its open door policy instead of following Respondent's chain of command.

[19] The FAA informed Complainant of its findings as to flight and duty time on September 8, 2016. CX 4. Respondent was informed of the findings on July 26, 2016. RX 138.

[20] Respondent informed Complainant's of its position on this assertion on October 25, 2017. RX 126. The Tribunal notes that RX 126 itself is undated and obtained the date from Respondent's Exhibit Index.

[21] Respondent informed Complainant of its position on this assertion on July 7, 2017. RX 120; *see* RX 121.

[22] RX 7.

Respondent maintains that referral to a Section 15 is not to be used as discipline or punishment. Mr. Puckett, who Respondent represented was its "prime expert" on the Section 15 process (Tr. at 1710, 1794), justified this position by noting that the process was "under the control of the director of health services. So, it's taken out of the chief pilot's office." And once the Section 15 process is started the DHS exercises his medical judgment and discretion on how to best run it, and that the DHS is independent of Respondent's chief pilot's offices. Tr. at 1719. He also pointed to the three-doctor system (CME, PME, NME) when reaching a decision (Tr. at 1719-20) and the provisions concerning Respondent's continued salary payments to any pilot subjected to this process (Tr. at 1721-22). Mr. Puckett acknowledged that pilots subjected to this process do not fly (for Respondent), do not get jumpseat privileges, nor have access to any recurrency

Section 15 of the parties' collective bargaining agreement sets forth procedures the parties are to follow if Respondent considers it necessary to conduct a physical or mental evaluation of one of its pilots. The Respondent's Director of Health Services is supposed to provide oversight of this process. Respondent's Director of Health Services, Dr. Faulkner, does not perform a physical examination of the pilot subjected to this process. He conducts an in-take assessment about any underlying conditions the pilot may have.

General outline of the Section 15 process follows. Respondent selects a physician to conduct the initial examination called the Company Medical Examiner ("CME"). As the Director of Health Services, Dr. Faulkner, is responsible for selecting the CME. Tr. at 1056, 1295. Once the CME is selected, Dr. Faulkner, thereafter, is supposed to serve as a facilitator in the process. Tr. at 1296. If the CME finds a medically disqualifying condition—one that prohibits the pilot from holding a medical certificate—Dr. Faulkner will recommend that Respondent remove the pilot from active duty and place them on sick leave. Tr. at 1297, 1302. The pilot can appeal that decision and retain a Pilot Medical Examiner ("PME") at their own expense. This physician should have similar qualifications as the CME. Dr. Faulkner would again act as a facilitator for the PME. Tr. at 1297-98. *See also* Tr. at 1056-58. If the PME found no disqualifying impairment, then the matter is referred to a Neutral Medical Examiner ("NME"). The CME and PME agree upon the doctor performing the NME. The NME's findings represent the process's final decision. Dr. Faulkner plays no role in selecting the NME. Tr. at 1301, 1702; *see* RX 7 at 181.

In this matter, Respondent's selected psychiatrist, Dr. Altman, evaluated Complainant and issued a CME report opining that Complainant suffered from bipolar disorder, a diagnosis that precludes issuance of any kind of airman medical certificate. *See* 14 C.F.R. § 61.53. As mentioned, *supra*, FAA regulations prohibit a professional pilot from operating a commercial aircraft without holding a current and appropriate airman medical certificate. In light of the CME –diagnosis, Complainant sought a PME from a team of doctors from the Mayo Clinic. This panel, in turn, opined that Complainant had no mental health impairment. Dr. Huff was selected as the NME and he agreed with the Mayo clinic team, concluding that Complainant has no mental health impairments. After 21-months, Respondent relented and reinstated Complainant to flight status.

B. Basic Background Information about Witnesses that Testified at the Hearing[23]

- Mr. Richard Petitt. Mr. Petitt has been married to Complainant for 37 years and they have three adult children that live on their own. He is not a pilot and worked in the grocery business. Tr. at 32-34, 43.
- Mr. John Nance. Mr. Nance is an aviation analyst for ABC World News and Good Morning America. Prior to that, he was an airline pilot until he retired in 2004. He also served in the Air Force for 23 years. He holds an Airline Transport Pilot ("ATP") certificate with type ratings in the Lockheed L300,

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training. Tr. at 1722. Mr. Puckett specifically recognized that flight proficiency is a perishable skill and one's piloting skills degrade over time. Tr. at 1723.

[23] The testimony of Captains Steve Dickson and Ed Bastian were provided via deposition transcript only. Tr. at 30.

Dassault 20 and Boeing 737. He possesses a bachelor's degree and a degree in law, and has written 17 or 18 books related to the aviation industry. Tr. at 45-50. He has logged about 16,000 hours total flight-time; 13,000 being in jets. Tr. at 61.

- Mr. William Colby. Mr. Colby holds an ATP certificate, and is a certified flight instructor for instruments and a multi-engine instructor. He holds type ratings in the Airbus A320, Boeing 727, 737, 747-400, 757, 767, 777, Beechcraft BE300, Cessna 650, Douglass DC3, DC 9, DC 10, Dassault 50, and has about 32,000 hours total time, 29,000 being in jets. Mr. Colby has about 40 years of airline experience. Tr. at 63-64.
- Captain Kenneth Watts. Captain Watts holds an ATP certificate and is type rated in the Airbus A330, A320, and Boeing 767, 757, 727. He is also a flight instructor and a flight engineer. He has approximately 24,000 hours total flight time with about 20,000 of those being in jets. Tr. at 117. He was hired as a Northwest Airlines pilot in 1983 and became a Respondent-pilot when the two companies merged in 2008. Tr. at 118.
- Captain Corbin Walters. Captain Walters holds an ATP certificates in both single and multi-engine aircraft with type ratings in the Airbus A330, Boeing 747 and Lockheed 18. He also holds a ground instructor advanced instrument certificate. He has over 21,000 hours total flight time with between 18,000 and 19,000 being in jets. He was a former Northwest pilot that transitioned to Respondent in January 2010 as a result of the merger. Between the two companies he has worked for Respondent as a pilot for 37 years. Tr. at 137-38.
- Complainant. Complainant has been flying for almost 40 years.[24] Tr. at 189. She holds an ATP certificate with type ratings in the Boeing 727, 737, 757, 767, 747-200, 747-400, 777 and Airbus A330. Tr. at 175. She has about 4,500 hours as a flight engineer, 6,600 total hours of flight time, and about 14,000 hours as an instructor in a simulator. Complainant was part of the group of pilots that transferred to Respondent from Northwest during the merger in 2008. During this time period she had a hip replacement and when she eventually joined Respondent she was assigned as a first officer on the Airbus A330. She also holds two master's degrees and has earned a PhD in aviation with her dissertation being on aviation safety culture, including the FAA mandated Safety Management System. Tr. at 175-78. She views herself as very knowledgeable about many aspects of aviation safety. Tr. at 748.
- Patrick Harney. Captain Harney holds an ATP certificate with type ratings in the Boeing 727, 757, 767 and Airbus A319, A320. He has about 22,000 total

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[24] CX 142 is Complainant's resume. She has been involved in aviation for 40 years, having started flying at age 16. Tr. at 34. She enjoys mentoring those that want to get into the aviation industry. Tr. at 34.

In describing her aviation background, she mentioned that many times she was the only female pilot working for Respondent and that woman constitute only about seven percent of the pilot community. During her career, she has been exposed to sexual harassment or gender-based discrimination often but she never filed an equal employment or gender-based complaint at any of the airlines she worked for. Tr. at 189-92. According to Complainant, 4.6% of Respondent's pilots are female. Tr. at 195.

flight hours with probably 18,000 being in jet. For 33 years, ongoing, Captain Harney has worked for Respondent. Tr. at 252.

- Dr. Thomas Faulkner. Dr. Faulkner is board certified in family medicine, occupational and environmental medicine, addiction medicine and aerospace medicine. He is trained as an Aviation Medical Examiner. He holds no FAA certificates or ratings. He has worked for or been associated with Respondent since 1998. During the period 2015 through present he has served as Respondent's physician consultant with the designation as Respondent's Director of Health Services. In this capacity he serves as Respondent's representative for Aeromedical Certification issues per the pilot's collective bargaining agreement with Respondent. Tr. at 1283-87. Since 1998, Dr. Faulkner has been involved in the about two dozen Section 15 processes. Tr. at 1289. Of the two dozen or so cases that have proceeded to a CME, only two have thereafter gone to a PME: one concerned drug and alcohol use, and the other being Complainant's referral.[25] Tr. at 1298-99.
- Dr. David Altman. Dr. Altman is board certified in general psychiatry and addiction medicine. He does not hold any FAA certificates nor has he ever been an Airman Medical Examiner. He finished his psychiatry residency in 1975 and started working with pilots in 1983 addressing allegations of substance abuse. His primary focus when dealing with pilots is in the area of substance abuse. Dr. Altman reports that he has done more evaluations of pilots than anyone else at this point in time. He has not published any articles on any psychological or psychiatric disorder. Tr. at 557-59, 637, 732.
- Captain Phil Davis. Captain Davis holds an ATP certificate with type ratings in the Boeing 737, 757/767. He has about 15,000 flight hours in civilian aircraft and another 4,000 flight hours in military aircraft. At the time of his testimony he was serving as a Captain on the Boeing 757/767 series and was a line check airman. He has worked for Respondent since 1989. However, during the events of this matter he was Respondent's Regional Director and Chief Pilot for its Western Region Flight Operations. In this position he had oversight of Respondent's 2100 pilots at its Salt Lake City, Los Angeles and Seattle bases. Tr. at 1984-88. He reported to Captain OC Miller who in-turn reported to Captain Graham. Tr. at 1987.
- Captain James Graham. Captain Graham has worked for Respondent since 1988. He testified both in person and his deposition was admitted

[25] Dr. Faulkner's initial testimony on this point was confusing. He initially testified that, of the two dozen cases he was a part of, maybe up to eight involved mental health issues. Tr. at 1298. But then he tried to clarify that "a good 12 to 15 of those have been a substance abuse concern issue." Tr. at 1290. However, in response to the Tribunal's pointed questioning, he identified only two cases involving mental health issue that proceeded to a PME. Should the CME and PME findings conflict, they would negotiate on an evaluation by a third doctor, the NME. If the PME agreed with the NME, the information would come back to Dr. Faulkner and he would then recommend that the pilot is returned to flight status. Tr. at 1300-01. That factual scenario occurred, in large part, here.

substantively.[26] From early 2007 until September 2018, he was Respondent's Vice President of Flight Operations. At all times at issue, Captain Graham reported to Captain Dickson. Tr. at 1044, 1987; CX 200 at 19, 39-41. Captain Graham succeeded Captain Dickson and was promoted to Senior Vice President of Flight Operations in September 2018. He holds an ATP with type ratings in the Boeing 727, 737, 757, 767. He has also served as a line check pilot.[27] He has approximately 15,000 hours total flight time with approximately 10,000 in jets. Captain Graham was a naval aviator and retired from the Navy reserves in 1998. He thereafter joined Respondent. Tr. at 1039-44. Captain Graham is the most senior executive within Respondent's Flight Operations department. Tr. at 1045. He has been involved in less than ten Section 15 referrals. And, of those, only two involved mental health issues; the instant case being one of those two. Tr. at 1058-59, 1170. At all relevant times, Captain Graham reported to Captain Dickson. Tr. at 1044, 1987; CX 200 at 19, 39-41.

- Captain Steve Dickson. Captain Dickson testified by deposition. CX 199. Captain Dickson retired from Respondent on October 1, 2017. At that time, he was Respondent's Senior Vice President of Flight Operations. He joined Respondent in 1991 as a Boeing 727 Flight Engineer after 11 ½ years in the Air Force. He qualified as a Boeing 767 first officer in 2002 and later became a captain on Boeing models 737, 757/767, and Airbus A320 aircraft. His total flight time as a pilot at Respondent is about 2,500 hours.[28] As the Senior V.P. for Flight Operations he reported to the Chief Operating Officer who in turn reported to the Chief Executive Officer ("CEO"). Captain Graham, the then Vice President of Flight Operations, Respondent's Chief Pilot and its managing director of flight training all reported to him. CX 199 at 13-18.
- Mr. Ed Bastian. Mr. Bastian testified by deposition. CX 198. He is not a pilot. CX 198 at 22; *see also* Tr. at 214. He was announced as Respondent's next CEO in February 2016. Prior to that he was Respondent's president from September 2007 until he became Respondent's CEO. CX 198 at 9-10.
- Mr. Christopher Puckett. Mr. Puckett holds no FAA certificates or ratings. He started working for Respondent in January 2012 as an attorney assigned to its labor relations department. The department has both attorneys and non-attorneys and is part of the Human Resources department.[29] His primary duties

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[26] Captain Graham testified on direct in person (Tr. at 1038-1167) and had begun his in-person cross-examination (Tr. at 1168-1251, 1265-66), but his testimony had not concluded at the end of the hearing-day. After discussion of his availability to continue his testimony when the Tribunal reconvened, the parties later agreed that the Tribunal would consider his December 18, 2018 deposition (CX 200) substantively in lieu of completing the cross-examination. Tr. at 1273-74.

[27] For his description of how Respondent selects, trains and utilizes its line check airman, *see* Tr. at 1049-54.

[28] Captain Dickson later testified that he had about 2,700 flight hours with the Air Force prior to joining Respondent. CX 199 at 32.

[29] Mr. Puckett testified that the labor relations group is separate from Respondent's general counsel's office, but they work closely together.

involved the legal implications of both day-to-day operational issues within flight operations, and supply operations management. He oversaw the grievance and arbitration process at Respondent and administered the Pilot Working Agreement.[30] Tr. at 1683-89.

- Ms. (Claire) Kelly Nabors. Ms. Nabors has worked for Respondent since 1995. Currently she is the senior HR manager in Salt Lake City for Airport Customer Service. Prior to her current position, between 2005 and 2016, she was Respondent's manager of Equal Opportunity and Pass Protection in Atlanta. She does not hold any FAA issued certificates. In 2016 her immediate supervisor was Ms. Melissa Seppings. Tr. at 1476-80.

C. Respondent's Safety Management System and Complainant's Assessment of It.

As Captain Graham put it, "Safety Culture is really a mindset." Tr. at 1059. This mindset starts at the top of an organization beginning with the CEO. Tr. at 1059-60, 1169. The FAA promulgated rules called the Safety Management System ("SMS"). 14 C.F.R. Part 5. These regulations establish a mechanism to execute a safety program and require that air carriers have their implementation programs developed and approved by the FAA. Tr. at 1059; *see* 14 C.F.R. § 5.1(a). The SMS program requires the development of a robust reporting culture.[31] Tr. at 1169. An "open door policy" is a component of such a reporting culture. Tr. at 1209. By 2016, Respondent had applied for FAA certification of its SMS program. Respondent received its SMS certification in 2017 and was one of the first two Part 121 air carriers to receive such certification. Tr. at 1063; CX 200 at 16. Once accepted by the FAA, Respondent is thereafter required to comply with its SMS program. Tr. at 1168.

Complainant became interested in the FAA mandated SMS program following the merger between Respondent and Northwest Airlines in 2008. She observed a cultural difference between the two airlines, so the focus of her PhD dissertation became what she observed at Respondent and its culture concerning aviation safety. Tr. at 178. Complainant described an environment where Respondent's pilots were threatened to do something unsafe, or Respondent would take the pilot's pay.[32] Tr. at 180. She also described cultural differences between Northwest Airlines and Respondent's safety operations.[33]

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[30] Mr. Puckett generally described the disciplinary process contained in the Pilot Working Agreement as well as Respondent's progressive discipline. Tr. at 1690-700; *see* RX 7 at 194.

[31] Captain Graham identified as tools that support this concept: Respondent's Aviation Safety Action Program, Flight Operations Quality Assurance, Flight Crew Reports, its Flight Safety and Corporate Safety Hotlines and its open door policy. Tr. at 1059-64.

[32] Complainant described when she first came to Respondent a need to get vaccinated for yellow fever and not being able to have it administered because she had a cold. It was not that she did not want to get one, but reported the doctors would not give her the shot. However, the Detroit base chief pilot told her that if she did not get the shot Respondent was going to pull her pay for not getting it done. Tr. at 180-81.

[33] She also described a conversation with the Indoctrination (INDOC) scheduling manager telling new pilots "don't ever call in fatigued." That was the "F" word at Respondent. Tr. at 185-86. She described how procedural changes would stay in a bulletin phase for months or years. Tr. at 187. She commented

JX B is Complainant's assessment of Respondent's Flight Operations safety culture that Complainant provided to Captain Dickson on January 28, 2016. Tr. at 195-96; *see also* CX 2. It contains a variety of safety concerns about Respondent's operations, including the adequacy of pilot training and competency. JX B; *see also* Tr. at 304-21. At that time, Respondent's CEO[34] was the accountable executive responsible for its SMS program.[35] The FAA required SMS compliance by January 2018. Tr. at 196; *see* 14 C.F.R. Part 5. According to Complainant, Respondent had an SMS in place, but it had not followed the plan.[36] Tr. at 196, CX 1. In her report, Complainant took the basics of what SMS is and assessed those principles against the safety culture, corporate leadership and flight operations at Respondent. Complainant observed that there was dysfunction occurring in Respondent's flight operations, particularly the training department. Yet, people were not coming forward out of fear of acquiring "a target on your back." Tr. at 198. Complainant views a reporting culture as the most important foundational component of SMS. Tr. at 199. To capture Respondent leadership's attention, she wrote a safety report that assembled real life examples demonstrating a problem with its safety culture. Tr. at 198-99. She submitted the report on January 28, 2016.

D. Respondent's Discipline Policy

Respondent observes a policy of progressive discipline, but it has no document that formalizes this practice nor is the concept of progressive discipline set forth in its collective bargaining agreement with its pilots' union. Tr. at 1818, 1829. Respondent has an open door policy and it is not mandatory that a line pilot first report to a certain level of management. CX 199 at 80–84. Respondent has a progressive discipline policy; it starts with the lowest level of discipline, a letter of warning. If a repeat incident occurs, it would use the prior conduct to increase the discipline up to and including termination of employment. Tr. at 1238.

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how Northwest Airlines had an open-door policy and Respondent supposedly did as well; however, there was an unwritten rule at Respondent that one could not step over the chain of command. Tr. at 188-89.

[34] Complainant erroneously believed that at that time Mr. Bastian was Respondent's CEO; he was not. He was Respondent's President. However, the confusion can be explained by the sequence of events. On February 3, 2016, Respondent's board of directors *announced* that Mr. Bastian, then President of Respondent, would be appointed CEO but that it was not *effective* until May 2, 2016, upon Mr. Anderson's retirement. *See* https://new.delta.com/delta-announces-executive-succession. The Tribunal notes that it informed the parties during the hearing that, as necessary, it intended to reference information from Respondent's website, which Respondent's counsel did not object to. *See* Tr. at 210.

[35] When Mr. Bastian became the CEO he was the designated SMS accountable executive. However, in February 2017 that responsibility was delegated to Respondent's Chief Operating Officer. Tr. at 201, 208-09; CX 124. *See* 14 C.F.R. § 5.25. Despite being the accountable executive, Mr. Bastian testified during his deposition that he had no personal involvement in Respondent's SMS program. CX 198; *see also* Tr. at 211-13. Captain Graham testified that naming the accountable executive was "just a name on a piece of paper." Tr. at 1100. He believed that Mr. John Laugher, Respondent's Senior Vice President of Corporate Safety, Security and Compliance, was the SMS accountable manager because "all the safety programs actually roll up underneath this directorate and he reports directly to the CEO." Tr. at 1099-1100, 1123-24.

[36] Complainant analogized responsibility for Respondent's SMS program as follows: "SMS is the COO's responsibility, not unlike the CRM is the captain['s]." Tr. at 200.

Complainant never received a written warning for any violation of any of Respondent's policies. Tr. at 1239. However, Complainant did receive a letter of counseling on June 30, 2011 signed by Captain Miller.[37] Tr. at 290; JX L at 107. A letter of counseling does not constitute discipline. Tr. at 1696-1700. This is the only letter of counseling that Complainant had received from Respondent and she has never received formal discipline of any kind. Tr. at 1832. Mr. Puckett explained that "a letter of counseling is a shot across the bow to the pilot that they should desist from the conduct referenced in that letter of counsel." Tr. 1813. Use of a letter of counseling during arbitration with the pilots' union is limited to a two-year look-back. Tr. at 1813; RX 7 at 197. A letter of counseling is not considered discipline, but is considered "correspondence of a critical nature."[38] As such, Mr. Puckett said that a letter of counseling should not be used in disciplinary proceedings to increase discipline if the letter occurred two years prior to a follow-on issue. Tr. at 1817-18.

E. Testimony about Complainant's Character[39]

Mr. Nance testified that Complainant's profession demeanor was extraordinary. He has observed her in high-stress situations while not in the cockpit and she has handled such situations very well. Tr. at 50-53, 56. Mr. Nance testified that he has witnessed persons in the aviation industry suffer retaliation for reporting safety concerns. Mandatory simulator training is often used as a retaliatory tool. Tr. at 53-54. Mr. Nance becomes concerned about a company's safety culture and Safety Management Systems ("SMS") when he hears that a pilot like Complainant is referred for a psychiatric evaluation. Pilots generally operate in a fear driven environment because they are responsible for a lot of lives and expensive equipment; they are also constantly under scrutiny for the same reasons. One mistake can cost the pilot their career or to become a persona non grata. It is for this reason that aviation leaders have to be extremely careful not to send the wrong message. Tr. at 54-56. However, Mr. Nance admitted that he has never worked for Respondent, has no personal knowledge of its flight culture, nor did he have personal knowledge of retaliation simulator training being employed at Respondent. Tr. at 56-57. He also agreed that

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[37] This letter of counseling referred to an incident where Complainant allegedly posted on her personal blog information about Air France Flight 447 where she made "several references to your training and procedures" when the "blog makes clear that you are a pilot for [Respondent]." JX L at 107. The Air France accident occurred on June 1, 2009 and involved, an A330 aircraft that crashed three hours into its flight over the Atlantic Ocean after departing Brazil. *See* BEA Final Report On the accident on 1st June 2009 to the Airbus A330-203 registered F-GZCP operated by Air France flight AF 447 Rio de Janeiro – Paris (July 2012) *available at* https://www.bea.aero/docspa/2009/f-cp090601.en/pdf/f-cp090601.en.pdf. On July 13, 2011, in response to this letter of counseling, Complainant sent an email to ALPA objecting to it being placed in her personnel file and requesting counsel for assistance in having it removed. JX L at 109-11. In addition, on August 9, 2011, she sent a formal letter to Captain Miller concerning inaccuracies in the letter. Captain Miller was the person that issued the letter of counseling. JX L at 113.

[38] Mr. Puckett asserted that "correspondence of a critical nature" according to the Pilot Working Agreement could not be used for discipline if the pilot has completed two years of aggregate service since issuance of prior discipline. Tr. at 18117.

[39] The record also contains several letters of recommendation and/or support from other professional pilots and colleagues. *See* CX 129, CX 130, CX 132, CX 133, CX 134, CX 136–CX 140.

if an air carrier has been notified of concerns about a pilot's mental health, it is incumbent upon them to investigate those concerns, even if the pilot is ultimately exonerated. Tr. at 59-60.

Mr. Colby has known Complainant for about 30 years. Tr. at 65, 88. Complainant is passionate about aviation safety. Tr. at 88-89. He wrote a letter of recommendation for her when she applied to work for Northwest Airlines. Tr. at 65. Mr. Colby had flown for Northwest as a first officer, captain, check airman, and instruction in the DC9. He had also been the chairman of the ALPA Training Committee for Northwest for 8 years. Tr. at 69-70. He retired from Northwest in 2006, prior to its merger with Respondent. Tr. at 95. Complainant had come to him wanting to get type ratings in the Boeing 727, 737, and a Flight Engineer license when she only had 472 hours total time. Mr. Colby specifically recalled Complainant's experience because she had such low flight time[40] piloting the aircraft. Tr. at 65. He wondered if he could get such a low time-pilot qualified in transport category jets. So he had her complete an instrument training course and then gave her a chance to take a check ride to earn the type ratings. Tr. at 64. According to him "it was amazing." Tr. at 66. He recalled distinctly the FAA inspector that came to give her the check ride; when the inspector found out how little time she had, the inspector pulled Mr. Colby aside and expressed great reservations because of her lack of experience. After learning that he had to give her the check ride, the FAA inspector gave her a 2 hour and 45 minutes check ride and afterwards commented that, much to his amazement, the "check ride was flawless." Tr. at 68.

In Mr. Colby's opinion, it is very easy for a check airman to manipulate a virtual environment to influence a training simulator event. He noted that he has been involved in four airline mergers where the new airline was trying to merge two different company-cultures. He has several friends that fly for Respondent and other friends that joined Respondent due to its merger with Northwest; persons such as Complainant. Tr. at 71. Mr. Colby explained his views on the clash of cultures that occurs between any two airlines when they merge. Tr. at 74-80. However, he acknowledged that he had no firsthand knowledge of Respondent's use of retaliatory line checks.[41] Tr. at 96-97.

Mr. Colby wrote a letter to Dr. Altman about his interactions with Complainant. CX 133; Tr. at 80-81. He did not provide a similar letter to Dr. Huff because neither Complainant nor Dr. Huff asked him for one. Tr. at 104. Dr. Altman never contacted him, but Dr. Huff did contact him and they discussed Complainant for about 30 minutes. Tr. at 82. He had not talked to anyone at Respondent about why it referred Complainant for a Section 15 evaluation.

Captain Watts has known Complainant for ten years and has flown with her in the A330 aircraft.[42] He finds her to be an excellent pilot. Tr. at 118-19. He last flew with her in 2013 or

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[40] The Tribunal recognizes the term "low flight time" as industry jargon indicating a pilot's flight experience in a particular aircraft of short duration.

[41] A line check is required every 12 months (*see* 14 C.F.R. § 121.440) when the pilot is acting as the pilot in command; a proficiency check need only occur once every two years when the pilot is not acting as the pilot in command. 14 C.F.R. § 121.441(a)(2).; *see also* Tr. at 131-32, 135, 278 and 283-84.

[42] Captain Watts is aware that Respondent's Airbus A350 pilots used green slips to enhance their income. Tr. at 122. A "green slip" is an extra trip not previously listed on a pilot's schedule that needs to be covered;

2014. Tr. at 127. He is familiar with the fact that Respondent referred Complainant to a Section 15 in March 2016.[43] Tr. at 119. Two people for Respondent contacted him after this referral, one was from Human Resources – Mr. Santouci (sic) and Mr. Scott Woolfrey. They asked him about line checks that were coming up. Tr. at 119. Captain Watts told them that he had been subjected to retribution at Respondent and at Northwest. Shortly after testifying for another pilot at Northwest, he felt that Northwest subjected him to three retaliatory line checks and a random drug test, after having recently been qualified on the A330. The alleged retaliation occurred in May 2010 and he had told Complainant about that those events. Tr. at 120-21, 129.

Captain Harney similarly heard reports about retaliatory line checks. Tr. at 276-77. Captain Harney considered line check to be disciplinary because if the pilot failed the line check, they can be fired.[44] Tr. at 277. However, Captain Watts admitted he never notified Respondent's management, other than telling the line check airman, that he felt that these line checks were retaliatory. Tr. at 130-31.

Captain Walters has known Complainant for 20 years, has flown with her in both the Boeing 747 and the Airbus A330, and considers her a trusted friend. He finds her to be very confident, a "good stick" and "knows her stuff." Tr. at 142, 152. In June 2016, he nominated Complainant for the Chairman's Club Award for her professionalism, involvement in the aviation community and focus on assisting Respondent reach its 2018 Safety Management System ("SMS")

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the pilot either requests or is offered to fly such a trip for premium pay. For "green slip" trips the pilot earns double pay. Tr. at 126, 273; CX 199 at 169. In some cases, a pilot would get paid four or five times for the same four-day trip. Tr. at 274. Captain Davis provided an explanation of Respondent's green slip process and commented that "there's quite a few things that have to happen" to get the opportunity for green slips. Receipt of green slip opportunities is also based on seniority and Complainant is "sort of mid level" in seniority on the Boeing 777, but a little more senior on the Airbus A330. Tr. at 2024-28, 2034, 2076-83. Captain Watts also described a "trip buy" where one is scheduled to fly a trip but the company calls and tells the pilot that they are being taken off the trip but they pay the pilot as though they conducted the trip and someone else then flies that trip. So two pilots get paid for flying the same crewmember slot. Tr. at 125, 273, 2098-2100; *see* CX 73; RX 98; RX 81. This information was offered by Complainant to explain lost revenue associated with her being grounded and is addressed further in the damages section, *infra*.

[43] He noted that if a first officer posed a threat to safety during the operation of a flight, it would be considered a level 4 threat, and Respondent's manuals require removal of the first officer from the cockpit. Tr. at 123-24.

[44] Captain Harney explained:

> When you get a line check, you are being looked at by the company. If it's not during the normal 24 months with the regulatory procedure, then it's considered a disciplinary action in my mind. Because you are getting reviewed to find out whether or not your performance -- or if they're looking for something -- as being an instructor, you could almost fail somebody every single time by putting pressure on someone. That's not the role of the instructor, but it can be used as that. I would see a line check, many line checks within that 24-month period as being retaliatory and disciplinary.

Tr. at 278.

goals. Tr. at 147-49; RX 71. Captain Walter's conversation with Complainant typically turn to the subject of flight operations, including training and procedures. Tr. at 150.

Captain Walters and Complainant spoke in the past about her Section 15 referral. Tr. at 151. No one from Respondent contacted him about performance, workplace conduct, or her mental health. Tr. at 153. Captain Walters intimated that Respondent's pilots had little knowledge of SMS and the knowledge he obtained on this topic came largely from Complainant. He did not recall receiving any training from Respondent on SMS but he did harbor safety concerns.[45] Tr. at 161. Captain Walters did not raise them with Respondent's management because, in his opinion after his experiences during Respondent's training,[46] it would not do any good. Tr. at 174-75.

Captain Harney has known Complainant over 40 years and has served as one of her flight instructors. At some point, Captain Harney became aware of Complainant's May 2011 blog post about Air France Flights 447.[47] The issue with Complainant's blog post, was her identifying herself as one of Respondent's pilots.[48] Tr. at 287. At the time Captain Harney was serving as a pilot union representative and represented her at a meeting between Complainant, Captain OC Miller[49] (who was the chief pilot at the time), and Steven Lee (who was the assistant chief pilot and the regional director). At the meeting he attended, Complainant was presented with a Letter of Counsel signed by Captain Miller[50] (JX L, page 107) and the chief pilots, despite Complainant immediately deleting the blog post once she was informed that it violated Respondent's policy; Complainant also apologized.[51] Letters of counsel are not considered formal discipline under the

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[45] Complainant elicited testimony from Captain Walker about safety issues with operating the A330 with a high gross weight and long-range fuel issues out of Los Angeles, Attitude Upset Recovery Strategy training. Tr. at 161-72.

[46] At one point during his testimony he described the transition training he received going from the Northwest 747 fleet to Respondent's A330 flight as "Stop asking questions, be the monkey, hit the lever, get the banana." Tr. at 136. This was in the context that Respondent's trainers did not feel it necessary for the flight crews to understand what happens when they pull the lever or why they need to pull the lever. *See* Tr. at 134-38.

[47] *See* JX L, pages 91 to 101; Tr. at 340-44 (concerning Complainant's explanation as to why she wrote this blog post and what she relayed to Ms. Nabors concerning same during the March 8, 2016 meeting discussed, *infra*).

[48] According to Captain Harney, there was a Respondent policy that specifically says that one cannot identify themselves as an employee or pilot when exercising social media events. Tr. at 287.

[49] Captain Harney described OC Miller who was a regional director and was "the number three guy" for Respondent when he retired. Tr. at 258. Mr. Puckett identified him as the managing director of flying operations. Tr. at 1841.

[50] Tr. at 276.

[51] Captain Harney has represented pilots in disciplinary matters on several occasions and has been active in the pilots' union. *See* Tr. at 253, 255-56. In Captain Harney's opinion, Respondent's handling of this matter was not consistent with his past experience working with Respondent in disciplinary matters:

> Normally, if a pilot is disciplined, does something wrong, it usually falls into different categories, in my experience. If you do something wrong and you're unaware, and someone brings it to your attention and they correct the situation immediately, normally

pilots' working agreement. Tr. at 275. Complainant has received no other discipline[52] from Respondent. Tr. at 292.

Following this meeting Captain Harney told Complainant: "[t]hey're gunning for you. This is heavy-handed, you have a target on you back, keep your head below the ridge line." Tr. at 258." No member of Respondent's management ever contacted him to discuss what he said to Complainant. Tr. at 270.

Captain Harney has reported safety events to Respondent concerning Respondent's 737 flight operations manual concerning a flap check. Tr. at 264-68. He found the issue so serious that it was the first time that he had to write to Respondent leadership about the safety implications involved. Tr. at 269.

Neither Dr. Altman nor Ms. Nabors contacted Captain Harney about Complainant. Tr. at 271.

F. Timeline of Events and Findings of Fact

1. Events Leading to the January 28, 2016 Meeting with Captains Dickson and Graham

On September 9, 2015, Complainant wrote an email to Captain Davis[53] concerning various issues she viewed as harassment. Tr. at 765-66; CX 61 at 16; JX B at 35. Complainant wrote the September 9, 2015 email in part because Respondent had asked her to report her non-work activities to Captain Davis.[54] Tr. at 766. She had been advised by one of Respondent's captains to use the phrase "hostile work environment" in the email because it would stop the requirement

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> there's just a discussion. Having a letter thrown in a box seemed a little heavy-handed, in my opinion.

Tr. at 257. It was his opinion that Complainant continued "to have a target on her back" for years after this incident; he warned subsequent union representatives about this. Tr. at 260-62, 270.

[52] According to Complainant, she wanted to file a grievance over issuance of the letter but was erroneously told that she could not. Tr. at 340.

[53] Captain Davis testified that his first interactions with Complainant occurred around the first part of 2015. Tr. at 1992. Captain Davis had received a request from Captain Miller to contact Complainant regarding her requests to various entities within the Flight Operations organization regarding permission to use a picture of one of Respondent's aircraft on the cover of her book. Tr. at 1992. Captain Miller wanted to consolidate her requests and to have them go through Captain Davis. Tr. at 1992-93. Captain Miller also wanted Complainant to submit her request for approval of media and public speaking events to him rather than her chief pilot. Tr. at 2046. No other pilot in the West Region was instructed to bypass their chief pilot with respect to these issues. Tr. at 2046.

[54] Captain Davis, Complainant's direct supervisor, denied instructing Complainant to report items in her personal life. He said he did tell her to report through him the types of matters that she had been requesting of Corporate Communications and other entities at Respondent's corporate headquarters in Atlanta. Tr. at 1994-95.

for her to have to produce her report to Captain Davis and to tell him what she was doing on her days off, and it would require Respondent to investigate her concerns. Tr. at 835-36. No equal employment investigation occurred in response to this email from the time of its submission until after Complainant submitted a safety report to members of Respondent's management on January 28, 2016. Tr. at 1021-22. On September 10, 2015, Captain Davis responded to Complainant's email indicating that there may be some kind of misunderstanding about what he wanted Complainant to submit through him, and thought that it would be a good idea to discuss it once he returned from an overseas trip. CX 140 at 17; Tr. at 1994, 1996.

On September 18, 2015, Complainant, as part of a flight crew,[55] was subjected to a line check; a check Complainant viewed as retaliatory.[56] Tr. at 386-94, 773-74, 782; CX 61 at 18; *see* JX L at 125-27; CX 61 at 18*; see also* Tr. at 277-80, 427. She emailed Captain Davis expressing her concern about getting this line check immediately following Complainant telling him that she was being treated unfairly. Tr. at 1997; CX 140 at 18. At this point, Captain Davis and Complainant had not met to discuss the concerns Complainant expressed in her September 9, 2015 email. Tr. at 1997. But Captain Davis did have a meeting with Complainant shortly after the September 18, 2015 email, around September 22, 2015. In addition to Captain Davis, Complainant, Jud Crain (Complainant's union representative), and Rip Johnson (Respondent's chief pilot in Seattle) attended the meeting. Tr. at 1998. During the meeting, Captain Davis explained that it is basically impossible to call somebody and get a particular person to give a line check, and that he had nothing to do with assigning a particular check airman to the line check that occurred. Tr. at 1998.

In early November 2015, Complainant attended the International Airline Safety Summit; Richard Anderson, Respondent's then CEO, was the keynote speaker.[57, 58] Tr. at 203, 2005; RX

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[55] Complainant acknowledged that line checks are normally for the captain but explained:

> Why I say "normally," is because they do line check blitzes, which are more observation -- still a line check -- but it's not a line check -- if you did something serious, then they're probably going to have some questions, but normally on the line check blitzes they're just looking at how a crew is operating, and writing a report. It's an information data collection versus a regular line check in your 24-month window, which is this is betting your job.

Tr. at 284.

[56] The check airman involved in this line check, Captain Albain, was a person Complainant had personnel-issues with during a previous simulator check ride. Tr. at 2039-41. Respondent investigated these allegations and obtained a statement from the captain of the flight involved. RX 18; CX 58; *see* Tr. at 1999-2002. However, Complainant was never informed that Respondent investigated her concerns and contacted the captain involved in the line check, who provided Respondent with a statement; a statement Complainant did not learn of until she saw it in Dr. Altman's medical report in January 2017. Tr. at 778-79, 785-86.

[57] CX 148 is a copy of that speech. Tr. at 203-04; *see also* CX 60 at 1. According to Dr. Altman's report the conference went from November 1-4, 2015. JX L at 38.

[58] Complainant testified that following Mr. Anderson's November 2015 keynote speech, she sent him an email requesting to quote him in a paper she was writing; permission which he granted. Tr. at 207. She then reached out to him requesting a meeting where there were two or three email exchanges with Mr. Anderson's secretary to find a date. *Id.*

16 at 4; *see* RX 16 at 1; CX 140 at 21-22. What struck Complainant was his representation that any employee at Respondent could shut the airline down if needed for safety reasons and that its employees had the responsibility to bring anything safety related forward to management. Tr. at 204; CX 1.

On November 3, 2015, Complainant sent to Captain Davis an email where she referenced the contents of Mr. Anderson's keynote speech, especially as they relate to safety.[59] CX 1; RX 16

Complainant had interacted with Mr. Anderson when they worked together at Northwest Airlines and, according to Complainant, he encouraged her to contact him if needed. One such encounter occurred after the merger with Respondent and involved her seeking his assistance to get a hotel room for a Christmas party for the pilots working the holiday out of Honolulu in 2010. Tr. at 215-17, 225; CX 8 at 2. However, Complainant alleged that she was accused of jumping Respondent's chain of command and was directed to write a letter of apology to Barry Wilbur, Captain Graham and Captain Dickson. Tr. at 218; RX 12 at 1. At that time Mr. Wilbur was a regional director within Respondent's Flight Operations division. Tr. at 348. In 2010, Captain Dickson wrote "Incredible as it may seem, this request went to the CEO. Pretty embarrassing to contemplate that one of our pilots would actually…boggles the mind." CX 8 at 1. The emails at the time of this incident also tend to support Complainant's claim that upper management was not pleased with her writing directly to the CEO.

Then, on January 21, 2016, just one week prior to Complainant's meeting with Captains Graham and Dickson, Captain Davis wrote an email to Captain Miller with the subject line "[Complainant's] History." CX 21. There are two entries of note:

> NOV/DEC 2010: This is hazy but Steve [Lee] remembers [Complainant] emailing Richard Anderson directly asking if he would support and pay for a [Respondent] Christmas party in either Hawaii or Narita. Richard forwarded this email to Steve Dickson who forwarded this email to OC [Miller]. This email is what started the dialogue between the [Seattle Chief Pilot's Office] and [Complainant] about using *the Chain of Command*. CX 21 at 1-2 (emphasis added).
>
> January 18, 2011: [Seattle Chief Pilot's Office] meeting with OC [Miller], Steve [Lee], [Complainant] and ALPA to discuss *proper chain of command* for communications, proper tone and content of those communications and [Respondent's] Social Media Policy. CX 21 at 2 (emphasis added).

Despite Respondent's witnesses' statements that there is no written chain of command policy (*see, e.g.,* Tr. at 1208), the record supports Complainant's assertion about Respondent's expectation in following a chain of command.

[59] A copy of this email was attached as Appendix R (page 40) to her January 28, 2016 Safety Report. Tr. at 203-05. Complainant explained her thought process about this email as follows:

> [A]s I started writing it, I started thinking about all the other events that were going on over the years, and how they're violating the Safety Culture and violating what our SMS program means, violating our rules -- we have rules of the road and most guiding principles, and under our SMS program it identifies those to be a significant component. And so as I started looking at all these behaviors, I thought, no, this is wrong. I need to take this to the next level, because we need to stop.

at 1-2. At that time Captain Davis was Respondent's regional director for its western domiciles. Tr. at 202; CX 199 at 28-29. In this email, Complainant claimed that inconsistencies existed between the safety culture Mr. Anderson spoke about at the convention and her perception of her treatment at Respondent. CX 1. Although Complainant's safety concerns blended at times with ancillary HR matters, the November 3, 2015 email concerned air safety, generally, and included Complainant's allegations of Respondent's violations of FAA rules related to air safety. Complainant complained, specifically, that Respondent's actions undermined Mr. Anderson's vision for "leadership, support and accountability." Complainant specifically raised the "open door policy" that Mr. Anderson discussed, telling Captain Davis that the policy "actually creates a punitive response if you go through it." Complainant wanted "accountability," and wanted "to create the organization that Mr. Anderson believes we have by putting a stop to this inappropriate behavior, as this type of fear based tactics . . . are not part of SMS, or any safety culture." CX 1 (where Complainant referenced SMS three times in the November 3, 2015 email). Complainant concluded the email, requesting to schedule a meeting with Captains Dixon and Graham.[60, 61] CX 1 at 2; RX 16 at 2. Captain Davis forwarded Complainant's email to Captain Miller. Tr. at 2006. Captain Miller, in turn, forwarded the email to Captain Graham on November 9, 2015. CX 11-002–03.

On two occasions, Jud Crain cautioned Complainant that he was concerned about how Respondent would react if she provided her Safety Report to Captains Dickson and Graham. Tr. at 247-48. Complainant's husband, Mr. Pettit, corroborated that fact. He testified that around this time in November 2015,[62] Complainant had mentioned to him that she had been told by a Seattle based pilot named Jud Crain that she was putting herself in harm's way and risked being subject to the Section 15 process[63] if she submitted her Safety Report. Tr. at 36-40. On a separate occasion, Mr. Petitt overheard one of these discussions, which occurred on a speaker phone in Complainant's office. He recalled Captain Crain warning Complainant about "the possibility of a Section 15." Tr. at 41-42.

Tr. at 235-36.

As discussed, *infra*, Complainant's testimony further demonstrates her subjective belief that the November 3, 2015 email constituted protected activity.

[60] She wrote to Captain Davis with this request because she was under the belief that Captain Davis had given her a directive to write to him and tell him what she was doing on her days off. Tr. at 235. Accordingly, she reported that she was attending this conference.

[61] Complainant first interacted with Captain Graham in 2010, where he had received an email from her apologizing for writing an email to Mr. Andersen. Tr. at 1065; RX 12. In December 2010 Complainant had attempted to obtain approval for a Christmas party for the flight crews in Honolulu and wrote directly to Respondent's then CEO Richard Anderson. CX 8 at 2, RX 12. For writing directly to the CEO she was directed to write letters of apology to Captain Graham and Captain Dickson. RX 12 at 2. However, at that time Captain Graham was not aware that she was directed to do this. Tr. at 1067.

Several years later, in 2014, Captain Graham became aware of another matter concerning Complainant. This matter concerned Complainant's violation of Respondent's Social Media policy. Tr. at 1068-69.

[62] Tr. at 42-43.

[63] Mr. Petitt mistakenly called it an Article 15.

Complainant did not hear back from Captain Davis about her request to meet with Captain Graham, so on the following Monday (November 9, 2015), she emailed Captain Graham herself.[64] Tr. at 236 804, 787, 1069-70; RX 16 at 3, CX 62. Around this same time, Captain Miller sent Captain Graham an email giving him a heads up about Complainant's forthcoming request to meet with Captains Graham and Dickson. In his email to Captain Graham, Captain Miller included a copy of the email message that Complainant had sent to Captain Davis on November 3, 2015.[65] Captain Graham promptly responded to her email. Tr. at 791, 1071. RX 16 at 2. This was followed by a cordial telephone conversation between Complainant and Captain Graham that lasted about 45 minutes where they discussed issues such as SMS and Safety Culture.[66] Tr. at 795, 1074. They also discussed Captain Miller's interactions with Complainant that she viewed as objectionable. Tr. at 794-96. At that time, Captain Miller was Captain Davis' supervisor. Tr. at 221, 243. Captain Graham recalled that the discussion also included Complainant feeling that she was being given a set of parameters different than anyone else and was being censored. Tr. at 1074. Following their discussion, Complainant forwarded to Captain Graham the November 3, 2015 email that she had sent to Captain Davis. RX 16 at 1-2. That email references actions by both Captain Davis and Captain Miller. RX 16 at 1-2. Captain Graham read that email and viewed the issue as a personality conflict possibly escalating to a possible harassment or unequal treatment situation. Tr. at 1078.

Captain Graham then reached out to Captain Miller[67] to have Captain Miller fill him in on what details he knew about the situation. Tr. at 1071. He also contacted Captain Dickson and Human Resources ("HR"). Tr. at 1080. Captain Miller informed Captain Graham that Complainant had attended a conference where Mr. Anderson was the keynote speaker, and that Complainant had issues with the way Captain Miller had treated her when he was her regional director. Tr. at 1072-73; *see* CX 11 at 2. Complainant also attempted to meet with Respondent's then CEO, Mr. Anderson, but never did get a meeting with him. Tr. at 220. However, Captain Graham was aware that Complainant had attempted to meet with Mr. Anderson without also notifying her regional director or chief pilot. CX 20 at 1.

On November 9, 2015, the same day that Complainant wrote directly to Captain Graham, Captain Graham sent an email to Captain Miller. Tr. at 288-89; *see* Tr. at 1844. In this email, Captain Graham wrote: "Maybe she didn't understand that the IAAAS [sic] conference she was

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[64] Complainant refers to documents Dr. Altman referenced in his report and averred that her communication to Captain Graham generated a lot of behind the scene emails where Captain Davis emailed OC Miller who in turn emailed Captain Graham with a warning and his concern that Complainant "might have recorded Richard Anderson's speech." Tr. at 237; CX 11 at 2; *see* CX 200 at 118. She concluded that, during this period, Respondent first considered giving her a Section 15.

[65] Captain Miller's email to Captain Graham occurred November 9, 2015 at 10:07 a.m. Complainant's request directly to Captain Miller to meet with him and Captain Dickson was sent November 9, 2015 at 11:28 a.m.

[66] Captain Graham did not view a conflict with a supervisor as being a safety culture issue, for in his view it did not "drive to the operational concern." Tr. at 1092.

[67] At that time Captain Miller was the Managing Director of Flying Operations. Tr. at 1071. The leadership hierarchy at that time was Captain Davis reported to Captain Miller who reported to Captain Graham. *Id.*

attending was a safety conference?" CX 11 at 2. The meeting he referred to was the International Aviation Safety Symposium. Tr. at 289. It then continued

> Glad to meet with her anytime, probably good to engage HR again, at this point, given this latest e-mail to Phil, as I believe we could find ourselves being accused of inappropriate wrongdoing by her and we need to start tracking for this phase. I also think *we should consider whether a Section 15 is appropriate*, while I'm sure she would find issue with that course of action, if she cannot embrace and understand the reasons behind our actions it stands to reason she might not be able to make appropriate decisions for the safe operation of a flight as a crew member.

CX 11 at 2 (emphasis added); Tr. at 289-90. Captain Miller forwarded this email to Mr. Puckett that afternoon. CX 11 at 2.

At this point in November 2015, Captain Graham acknowledged that he was considering referring Complainant for a Section 15 process because, according to Captain Miller, she had had multiple meetings with her chief pilot and regional director about Respondent's Social Media policy, but time and again she did not follow their directions.[68] Captain Graham viewed Complainant's perceived inability to follow directions as demonstrative of a chance that similar issues could arise in the cockpit. Tr. at 1180-82. However, when asked specifics, Captain Graham could only identify two prior concerns about Complainant's actions: one being the blog-related violation and the other for posting a page from Respondent's Quick Reference Handbook ("QRH") on an internet forum not sponsored by Respondent. Tr. at 1183-85. Neither of those incidents resulted in discipline.[69] Tr. at 1185.

Between November 10 and 16, 2015, Captain Graham called Complainant and she informed him about safety related matters and that she felt that it was inappropriate that Captain Davis directed her to write to him and tell him what he was doing on her days off, nor was she to speak to her chief pilot without going through Captain Davis.[70] Tr. at 294, 327-28. Captain Graham offered to discuss these topics over the telephone but Complainant thought that the topics warranted a face-to-face meeting. Tr. at 295.

On November 16, 2015, Complainant wrote to Captain Davis attempting to coordinate a meeting with Captains Graham and Dickson on December 1, and she requested positive space[71]

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[68] Captain Graham testified during his deposition that it is not typical to have a mental health evaluation and that they normally come "as a result of what we see in operational performance or training performance." CX 200 at 28. Captain Graham said he had been involved in less than ten Section 15 referrals, only two being for concerns about mental health issues and this case was one of those two. CX 200 at 29.

[69] Although, Complainant did get a non-disciplinary letter of warning in June 2011 for her blog posting in 2010. *See* Tr. at 290, 353-56. According to Captain Graham, such a letter is supposed to stay in the pilot's records for only two years then removed, and not to be used for any reason. Tr. at 1186.

[70] The Chief Pilot reports to Captain Davis, who at that time was the Regional Director.

[71] The Tribunal understands this to mean an actual reserved cabin seat on a given flight as opposed to being on stand-by.

from Seattle to Atlanta and a hotel for the evening of November 30. Captain Graham replied noting that Complainant could jump seat instead and meet the afternoon of December 1 or after December 17. CX 7 at 3; RX 17 at 2; Tr. at 804, 806, 1081, 1098. In Complainant's response back to Captain Graham that day, Complainant wrote in part: "As you know, the reason I requested to have this meeting is that I feel I am being singled out and harassed by a senior VP, in violation of company policy." CX 7 at 2; RX 17 at 3; Tr. at 806-07. This sentence prompted separate responses from Captain Graham; one to Complainant and to another to Captain Dickson. In his email to Complainant, Captain Graham noted that Complainant had "highlighted a significant difference than what you conveyed to me on the phone last week. There is a big difference if you are saying you are, or have been harassed." And that, if her email is a formal accusation, she would need to have a discussion with an HR representative on a way forward, and that it would be necessary for HR to become involved prior to meeting with him and Captain Dickson. CX 7 at 1-2, RX 17 at 2; *see* Tr. at 1083. Complainant replied that she wanted "to table the personal issue" and proceed with the meeting with Captain Graham and Dickson to bring the safety culture issues to their attention. CX 22 at 2, RX 17 at 2; *see* Tr. at 1092.

Captain Graham sent two emails to Captain Dickson. On November 16, 2015, he wrote:

> Here we go… just FYI, I will brief HR and handle this with kid gloves. *She could be a candidate for a Section 15 after this goes through*, if she continues to see herself as the victim and refuses to accept that she cannot just use Delta proprietary information as her own, as well as Delta pictures (Aircraft QRH Volume 1, et cetera) and intellectual knowledge. Will keep you informed. JG.

CX 7 at 1 (emphasis added); Tr. at 290-91. Captain Graham testified that he wrote the first sentence of this email because "there was certainly a threat of escalation past harassment to possibly a lawsuit. Tr. at 1084. He wrote the second in consideration of what Captain Miller had told him. Tr. at 1084-85. When asked why he referenced Section 15 in this email Captain Graham explained:

> Section 15 is just -- it's an assessment to understand whether or not you're fit to fly the airplane. And I didn't have any indication that there was an operational issue, however, if you're not able to process this -- what is really a pretty simple doctrine, a pretty simple policy -- then would that transfer to the airplane or not? So, there was a question in my mind about that, but I didn't see any operational issues. So, even though I wrote this at the time, I really didn't think much of it after that.

Tr. at 1085-86.

Captain Graham maintained that Complainant's inability to appreciate Respondent's position about its social media policy and other HR issues, which had been relayed to her, went to her predictability in the cockpit and thus her fitness for duty. Tr. at 1086. Captain Graham relayed

that Captain Miller[72] informed him that "every time she left the office, and after meeting with her supervisor, she understood the policy, but then continued to not be able to follow that later on. So, that's really where the basis was." Tr. at 1088. When asked, Captain Graham denied that his statement about her being a candidate for a Section 15 related in any way to Complainant's safety complaints. Tr. at 1089.

Captain Dickson wrote Captain Graham back asking which VP Complainant was referring to. The following morning Captain Graham wrote back to Captain Dickson explaining that the VP she was referring to was Captain Miller and commented that she "[d]oesn't even know his title." CX 7 at 1

On November 18, 2015, Captain Graham emailed Complainant telling her that he is looking forward to meeting Complainant on December 1, 2015 to understand her safety culture concerns and told her to contact Captain Davis to coordinate a jumpseat to come to Atlanta the evening of November 30 and to return on a jumpseat after the meeting. CX 22 at 1; RX 17 at 2–4; Tr. at 809.

Later that same day Captain Graham sent an email to several Respondent-employees, including Captain Dickson, Captain Miller and Captain Davis. CX 22 at 1; Tr. at 292-93, 1090.

> After conferring with Mike,[73] Brendan[74] and Meg,[75] we have decided to give [Complainant] her requested audience the morning of December 1st. I will ensure Steve[76] is briefed up that we do not see any harassment substantiation in her correspondence, so we find no basis to start an investigation into her singular claim. We also do not find any identified safety threat to the company or the operation, only her assertion there is a Safety Culture concern.

Tr. at 291–93. Immediately prior to the foregoing November 2015 exchanges with Complainant—and about Complainant—Captain Graham took no further action at that time to initiate the Section 15 process. Tr. at 1096, 1148.

Complainant had been trying to meet with Captain Dickson [77] since around November 2015. The purpose of the meeting was to review Complainant's report and to hear her concerns.

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[72] And Captain Graham could not recall receiving this information from any person other than Captain Miller.

[73] Mike was identified as Mike Coquel "a corporate communications or marketing type person." Tr. at 292; CX 200 at 129.

[74] Brendan was identified as Brendan Branon, one of Respondent's counsel. Tr. at 293; CX 200 at 129.

[75] Meg was identified as Meg Taylor, one of Respondent's corporate attorneys. Tr. at 292; CX 200 at 120.

[76] This is Captain Dickson. CX 200 at 129.

[77] As the Senior Vice President for Flight Operations, Captain Dickson "was responsible for the training and standardization of [Respondent's] pilots and the planning and resources and scheduling of the flight crews to execute the network schedule." He was the chief labor negotiator with the Airline Pilots Association. He also had responsibility for pilot training and pilot performance issues. CX 199 at 40-44, 106. However, in most cases, it was not brought to his attention pilots who were having performance issues. CX 199 at 44-45. According to Captain Dickson, Mr. Bastian's role was to be on the board of directors of

CX 199 at 86. Captain Dickson said he read Complainant's entire report and it raised some important issues, but he made no notes on it. CX 199 at 87-88. No party recorded the meeting. CX 199 at 194. Captain Dickson agreed that pilot fatigue is a risk that has to be continuously mitigated. CX 199 at 90-95.

On January 14, 2016, Captain Graham had correspondence with Complainant setting up the time-frame for their meeting and asking who would be invited. RX 19. Also on this date, Complainant forwarded to Captain Graham two documents, titled *Pilot Training in a Safety Culture: SMS and NextGen Demands* (CX 173) and *Structural Redesign of Pilot Training* (CX 175), that she wanted to discuss during the upcoming January 28, 2016 meeting. RX 20 at 1-2; Tr. at 295-97, 1101; CX 173, CX 175. Captain Graham, at Complainant's request, forwarded the Complainant-authored documents to Captain Dickson. RX 20 at 1.

On January 19, 2016, Complainant emailed Mr. Anderson, Respondent's CEO, two articles. She informed him of her upcoming meeting with Captains Graham and Dickson on January 28, 2016 and asked if there was any chance that she could meet with him, as well. CX 20 at 10. On January 21, 2016, in response to a request from Captain Miller, Captain Davis forwarded to him a history of Respondent's dealings with Complainant. This information included the letter of counsel Complainant had received in 2011. Tr. at 2064. On January 22, 2016, Mr. Anderson responded to Complainant's email thanking her for sending him the articles, but he declined her request to meet because he was fully booked on January 27 and 28, 2016. Mr. Anderson then forwarded Complainant's request and articles, and his response, to Captain Graham, who in-turn forwarded them to Captain Davis, Captain Miller and Mr. Puckett. CX 20 at 1 and 7-9; CX 65.

2. The January 28, 2016 Meeting

On January 28, 2016, Complainant had a meeting with Captain Dickson and Captain Graham. CX 199 at 85-86; Tr. at 811, 1102. Up to that point, Captain Graham was not aware of any pilot performance issues in her work-history. Tr. at 1210. At the time of the January 28, 2016 meeting, Respondent had already adopted an SMS program, and the FAA required Respondent to comply with it. CX 199 at 102. According to Captain Dickson, the manager of the SMS program reported to Respondent's Director of Quality Assurance and Compliance. CX 199 at 201.

The meeting was scheduled to last 90 minutes. Tr. at 1102; CX 20 at 5. Captain Graham testified that, given there was "a conflict between an employee and the senior supervisor," both he and Captain Dickson needed to attend the meeting. Tr. at 1103-04. Complainant described the meeting as initially combative. Tr. at 822. Shortly after the meeting began, Captain Graham told Complainant that if she had a problem, to call her chief pilot. Captain Dickson stated during the meeting, "[s]ome people like to sit in the back of the room and throw spit wads."[78] Tr. at 302.

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the safety and security committee, and in his role as the CEO, he is the safety leader of the company. CX 199 at 106-07.

[78] Captain Dickson could not recall telling Complainant this; however, he admitted that it is something that he has said before. CX 199 at 195-96. Complainant testified that at the end of this meeting she told Captain

Captain Dickson and Captain Graham then proceeded to tell Complainant what they were doing with the company and where it was going. At some point a secretary came in and told Captain Dickson and Captain Graham that the board room was filling and their meeting there was about to begin. Complainant asked about her meeting, which was supposed to last 90 minutes and Captain Graham responded that they did not need that much time. She pulled out her reports, handed the reports to them and said "Yes, we do" and telling them that the company had a serious problem, conveying several issues.[79] Captain Graham and Captain Dickson were taken aback. Tr. at 303. The meeting lasted another 20 minutes so Complainant could explain the contents of her reports. Captain Graham agreed that Complainant walked them through her report with particular detail in certain areas. Tr. at 1106-07. During the meeting Captain Graham concluded that "we have to investigate everything in this report." Tr. at 1107. During the meeting Captain Graham found Complainant credible and found her cognitive abilities were in no way impaired. Tr. at 1108.

Towards the end of the meeting either Captain Dickson or Graham stated, "[m]aybe we should make [Complainant] part of the Ambassador Program" and the other said "[w]e should make her an instructor." Tr. at 301, 813-14; RX 24 at 1. At the end of the meeting Captain Graham thanked Complainant for her report and said that he would "read the report tonight, I'll get back to you." Tr. at 30, 815, 1112; RX 24. However, Complainant believed that they were not going to do anything with her report. Tr. at 815-16. They also invited her to present her report to a larger group of Respondent's safety-employees. Tr. at 822. The meeting concluded with Captain Graham telling Complainant that Ms. Seppings from HR would be reaching out to her. Tr. at 905.

3. Respondent's Actions After the January 28, 2016 Meeting

Following the January 28, 2016 meeting with Complainant, Captain Dickson and Captain Graham established a line of follow up activity to investigate Complainant's allegations. "Captain Dickson and [Captain Graham] agreed that [Captain Graham] would be the one to investigate everything in the report"; Captain Graham would report back to Captain Dickson. CX 200 at 138. Thereafter Captain Graham would brief Captain Dickson orally about the investigation. CX 200 at 138-39.

Captain Graham came back to Captain Dickson with a proposal to divide the follow-up activity into safety issues Complainant had raised, matters regarding harassment and unequal treatment and activity associated with Respondent's policies and procedures.[80] CX 199 at 75, 197,

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Dickson that "not even in the third grade did I sit in the back room and throw spit wads. I sat in front and paid attention." Tr. at 302.

[79] Captain Graham understood that many of the incidents she referenced in her report pertained to events that happened to her. Tr. at 1201-02. It struck him as odd that so many things could happen to a particular pilot. Tr. at 1202-03.

[80] Captain Graham described these as three bucket items, specifically: (1) safety concerns, (2) individual accusations, and (3) items in Complainant's report concerning policies. Tr. at 1116-17; JX C. Mr. Puckett understood the three buckets to be EO complaints, which included employment-based issues, harassment, retaliation, discrimination; safety complaints; and a miscellaneous bucket. Tr. at 1727-28.

Tr. at 1118-20; JX D.[81] Captain Graham also sent a copy of Complainant's Safety Report (JX B) to Mr. Puckett and Respondent's legal department, asking them to look at it. Tr. at 1725-26. Mr. Puckett and Ms. Meg Taylor, a member of Respondent's legal department, met and discussed the contents of JX B. Tr. at 1726, 1850. Captain Graham advised Mr. Puckett and Ms. Taylor to address JX B using this three-bucket concept. Tr. at 1727, 1850. After this meeting Captain Graham drafted an action plan (JX D) and sent it to Ms. Taylor and Mr. Puckett. Tr. at 1737-38. In response to Complainant's concerns, Respondent sought the assistance of an outside auditor. CX 199 at 78, Tr. at 1122; RX 101. Following Complainant's report, Respondent made certain changes to its policies and training manuals. CX 199 at 176-78.

A week or so after the January 28, 2016 meeting, Complainant learned that Mr. Bastian was becoming Respondent's new CEO. She attempted to contact him because, at the time, Mr. Bastian was Respondent's SMS accountable executive. Tr. at 220. The first interaction between the two occurred on February 10, 2016,[82] shortly after it was announced that Mr. Bastian was becoming Respondent's CEO. Tr. at 221-22; CX 122. Complainant sent an email to Mr. Bastian congratulating him on his selection. Tr. at 221-222, 226-27; CX 198 at 10. On March 5, 2016, Complainant invited Mr. Bastian to a presentation she was giving on SMS.[83] RX 34 at 3. She extended this offer because as the CEO, Mr. Bastian was the accountable executive of Respondent's SMS program. Tr. at 224-25, 657-58; JX L page 231. Mr. Bastian responded that he would like to see her report once finalized. CX 6 at 1. Mr. Bastian then asked Captains Graham and Dickson to brief him about the report Complainant had provided them on January 28, 2016. CX 6 at 2. Captain Graham acknowledged that he was aware that Complainant had reached out to Mr. Bastian and indicated that Mr. Bastian would be briefed "on our interactions concerning [Complainant's] concerns both as to SMS and the individual accusations noted in the document."[84] RX 37.

On one or two occasions, Mr. Bastian referred emails from Complainant back to Captain Dickson and Graham to make sure they were being handled appropriately. Mr. Bastian requested that he be briefed about issues that Complainant was raising and Captain Dickson did so "in a very general way." CX 199 at 23-24; RX 34 at 3. Captain Graham said that he received the emails from Mr. Bastian, but averred he never did brief him.[85] Tr. at 1209. Captain Dickson denied ever mentioning Complainant's name to Mr. Bastian; he said, generally, that they were working through

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[81] During the hearing the parties stipulated with respect to JX D, "the 'Petitt Action Plan,' was the company's outline or frame-work for an investigation of issues raised by [Complainant], after her meeting on January 28th with Captains Graham and Dickson." Tr. at 332-33. Further, under the subtitle "Harassment and Unusual Treatment Concerns" were the issues that Ms. Nabors "was authorized to cover with [Complainant] during her March 8th interview with [Complainant]." Tr. at 333.

[82] Complainant testified to an earlier interaction with Mr. Bastian but it had nothing to do with this matter. *See* Tr. at 222-23; CX 198. At 11-12.

[83] The presentation Complainant gave was based on her Ethnographic Study, JX K. Tr. at 658.

[84] The document he was referencing was Complainant's Safety Report, which she handed to him and Captain Dickson during the January 28, 2018 meeting. RX 37.

[85] The record indicates otherwise. On March 9, 2016, Mr. Bastian had a meeting with Captain Graham and one of Respondent's counsel concerning Complainant. The subject of the meeting was "[Complainant] Update." CX 126.

a performance issue with one of Respondent's pilots.[86] Captain Dickson testified that he did not specifically mention a Section 15 evaluation. CX 199 at 25-26. Mr. Bastian's testimony supports Captain Dickson's recollection. CX 198 at 13-14. Captain Dickson could not recall if his conversations with Mr. Bastian occurred before or after Complainant had been referred to her Section 15 evaluation. CX 198 at 27.

On February 5, 2016,[87] Complainant received an email from Captain Graham to call him, and so she did. Tr. at 827-28, 1112, 1115; RX 24 at 1; RX 19 at 3. He asked if Complainant would be willing to provide a presentation to a group of divisional leaders, to which she agreed. Tr. at 113-14, 1125-26; RX 24 at 2. On February 17, 2016, Complainant had another telephone call with Captain Graham; they spoke for ninety minutes. Tr. at 828–29; *see* RX 27. At the end of that call, Captain Graham asked Complainant if she would be willing to talk, as Complainant understood it at the time, with an HR safety investigator to clear up a few things.[88] Complainant agreed to this as well. Tr. at 328-29, 407, 409, 453, 831; RX 24 at 2, RX 26 at 1. Captain Graham did not tell Complainant that he was separating out her report into different categories for Respondent to address.[89] Tr. at 830-31.

On February 7, 2016, Captain Graham forwarded a copy of Complainant's Safety Report (JX B) to Mr. Puckett and other senior Flight Operations managers. RX 37. In this email, Captain Graham informed the recipients that he would forward a list of items he discussed with Complainant that he believed were particularly necessary to address. Tr. at 1118; JX D. On February 19, 2016, Mr. Puckett emailed Ms. Seppings, Ms. Taylor, and Ms. Nabors a copy of Complainant's Safety Report (JX B); Ms. Seppings had already assigned Ms. Nabors to conduct the investigation. Tr. at 1730-31; RX 29.

On February 26, 2016, Complainant wrote to Captain Graham and mentioned that she had not heard from Ms. Seppings or anyone else in HR related to any meeting. Tr. at 831, 906-07; RX 24 at 2; RX 26 at 1. Shortly thereafter, Ms. Seppings contacted Ms. Nabors about Complainant's concerns and forwarded to her another copy of Complainant's Safety Report (JX B). Tr. at 1489,

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[86] The statement about there being a "performance issue" directly contradicts Captain Graham's testimony that he knew of no performance issue prior to March 15, 2016. *See* Tr. at 1087, 1169, 1207-08.

[87] This was also the day that Mr. Bastian was announced as Respondent's CEO. Tr. at 833.

[88] As demonstrated, *infra*, Ms. Nabors had little experience or knowledge of the safety issues Complainant asserted in her protected activity.

[89] In an email from Captain Graham to Captain Dickson on March 5, 2016, he indicated that he talked to Complainant on "March 26" to explain that Respondent needed a two pronged reply to her document; one being an independent review of the accusations and the other being a presentation to its core group of leaders for Complainant to present her concerns from a culture standpoint. RX 34 at 2-3. During his testimony, Captain Graham corrected the date saying the March 26 date in the email should have been February 26. Tr. at 1133. However, there is no evidence that Captain Graham had a conversation with Complainant on February 26. In fact, Complainant wrote to Captain Graham on the morning of February 26 as if the date and time had been confirmed for their upcoming meeting. RX 31 at 1. Captain Graham wrote back that evening stating that he had been in NRT all week and that other members of his staff were working coordinating the players for her presentation. RX 31 at 1. The Tribunal understands NRT to be Narita, Japan. There is no mention whatsoever of a conversation with Complainant.

1493, 1598. Ms. Seppings told Ms Nabors to contact Mr. Puckett about Complainant's complaints that involved Equal Opportunity concerns and then meet with him in person wherein he shared with her Complainant's Safety Report (JX B). Tr. at 1490-92. Although Ms. Nabors had conducted many EO investigations in her career, this was the first involving a flight operations employee, like Complainant. Tr. at 1577. Consequently, Ms. Nabors did not understand several terms and issues raised by Complainant in her report. *See* Tr. at 1613-1615.

Mr. Puckett and Ms. Nabors then sat down and reviewed Complainant's Safety Report and determined what portions of it Ms. Nabors would investigate. Tr. at 1492-93, 1575. The two of them discussed the topics she would address, and then Mr. Puckett prepared an outline of questions for Ms. Nabors to ask Complainant and emailed it to her and Ms. Taylor (JX E at 3 to 9). Tr. 1806, 1822; *see id*. at 1494-97, 1542; 673-74. It was Mr. Puckett's idea to include the "Safety Complaint" portion of the outline. Tr. at 1739; JX E at 3-4.[90] Mr. Puckett also included on this outline comments about certain conduct by Complainant.[91] They also discussed Complainant's prior behavior, including social media usage and trademarking, "[a]nd that there was – she wasn't necessarily stopping it or she continued to ask." Tr. at 1599-1600. At some point, Mr. Puckett provided Ms. Nabors with copies of emails where Complainant was representing herself as a Respondent-employee and conducting book signings. Tr. at 1601.

On February 29, 2016, Ms. Nabors called Complainant, and left a message on Complainant's answering machine, to let her know that she was in receipt of her complaints and asked Complainant to return her call. Tr. at 1500; RX 32. Ms. Nabors thereafter contacted Mr. Puckett to let him know that she had reached out to Complainant and for Mr. Puckett to provide to her the EO related issues he wanted Ms. Nabors to focus on with Complainant. Tr. at 1502-03; RX 32. Mr. Puckett responded by providing Ms. Nabors an outline of topics (JX 3 at 3-9) to address with Complainant. Tr. at 1734.

On March 7, 2016, Complainant and Ms. Nabors exchanged emails about scheduling their meeting. Tr. at 1504; RX 35. During this exchange, Ms. Nabors wrote that "there is space here at the Crown Plaza that we can meet and talk." This was the hotel Ms. Nabors was staying at during her trip to Seattle for the interview.[92] Tr. at 1505; RX 35. On March 2, 2016, Captain Graham

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[90] When asked why he did not just give Ms. Nabors the document Captain Graham had prepared (JX D), Mr. Puckett could not provide a reason. Tr. at 1740. In response to Respondent counsel's questioning, Mr. Puckett offered that he was not sure that he had JX D at that point. Tr. at 1741. However, given Captain Graham's testimony about the sequence of events and his desire to investigate these "buckets", the Tribunal doubts that Mr. Puckett did not have this document by this time, almost one month later.

[91] Tr. at 1743-44; *see, e.g.,* JX E at 4 ("[reasonably certain it was 2010]", *id.* at 6 (commenting "[multiple times]" when Ms. Nabors is to ask questions about Complainant commenting on aviation industry or not to use Respondent's trademarks on published materials).

[92] Ms. Nabors testified that Complainant did not want to meet for the interview at the airport for the interview because Complainant alleged was concerned that someone would see them talking there. Tr. at 1502. The Tribunal questions this statement. It makes little sense for Complainant not to want to be interviewed at the airport out of some sort of concern that somebody from Flight Operations might see her talking. First, Complainant had already submitted her report to upper management, so they already knew who she was and what she would say. Second, the very people that she might be concerned about were the

wrote to Ms. Seppings asking her to let him know once someone from her staff had made contact with Complainant as he felt "certain she is tracking our time to respond." RX 33; Tr. at 1129.

4. The March 8, 2016 Interview[93]

On March 8, 2016, Complainant met with Ms. Nabors at the Crown Plaza hotel, located approximately two miles from Complainant's home. Tr. at 321, 329. Tr. at 35. Ms. Nabors had to travel to Seattle for the meeting. RX 34 at 2. Prior to the meeting Complainant had communicated with Ms. Nabors and had sent her a copy of her Ethnographic Study. Tr. at 904-05, 1507; RX 35 at 2, RX 36. Ms. Nabors suggested they meet away from the airport.[94] Tr. at 404, 885. They met at the lobby ten or fifteen feet away from the front desk in the Crowne Plaza which is near the Sea-Tac airport. Tr. at 403, 1506, 1618; RX 35 at 1. Ms. Nabors brought with her a copy of Complainant's January 28, 2016 Safety Report (JX B).[95] Tr. at 329. Ms. Nabors had read JX B prior to the meeting,[96] and took physical notes on it during the interview. Tr. at 1539-40. According to Complainant, "[t]he entire focus was only on [the] safety report, and on the elements that I identified as being adverse to a positive Safety Culture." Tr. at 397. The report did reference harassment and unequal treatment concerns but Complainant did not intend to raise equal opportunity or gender harassment issues. Tr. at 334, 339. Complainant did not view any of items in Captain Graham's EO action plan[97] to be actual EO items. Tr. at 397. Further, Complainant was under the mistaken belief that Ms. Nabors was an HR safety investigator. Tr. at 407.

During this meeting, which lasted over three hours, Complainant's focus was on the safety-culture allegations contained in the Safety Report, including specific scenarios concerning Respondent's SMS. Tr. at 334-38, 351-82, 453-67, 471-79, 1512, 1618-19.[98] Complainant emphasized to Ms. Nabors how these issues pertained to Respondent's safety culture. Tr. at 377. Ms. Nabors reviewed Complainant's Safety Report and picked out sections that she wanted to discuss. Tr. at 904.

Complainant estimated that she did 85 percent of the talking during the meeting. Tr. at 904. Ms. Nabors testified essentially that Complainant dominated the conversation. Tr. at 1507,

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ones that had facilitated the meeting by sending Ms. Nabors to Seattle for the interview. Third, Complainant only lives two miles from this hotel so it is just more convenient to travel to the hotel, and having the interview in the lobby certainly was convenient from Ms. Nabors.

[93] This section contains competing narratives of the specific occurrences at the March 8, 2016 meeting. The Tribunal reiterates here that it perceived Complainant's credibility much higher than Ms. Nabors'.

[94] Complainant testified that Ms. Nabors wanted to meet away from the airport (Tr. at 404) while Ms. Nabors testified that it was Complainant that wanted to meet off airport grounds. Tr. at 1501; JX J at 1. Ms. Nabors testified that she has used a conference room at the Sea-Tac Airport in the past, which is not near Respondent's flight operations area. Tr. at 1485-86. However, she also stated that, in the past, she would meet individuals in hotel lobbies. Tr. at 1486.

[95] Ms. Nabors did not have with her JX D, the Captain Graham-authored "action plan." Tr. at 336.

[96] Tr. at 1599.

[97] JX D at pages 3 to 5.

[98] Complainant addressed in detail the bullet points contained in JX D and addressed in JX B.

1621. Complainant admitted that her eyes watered up at the beginning of the meeting, but nothing more,[99] and it was a result having gone through so much to get someone's attention at Respondent to take the matters she was raising seriously, nothing more.[100] Tr. at 450.

Complainant also told Ms. Nabors that she had been warned by other pilots that by submitting her report to Respondent, she opened herself to retaliation and that she would have a target on her back, but not that she feared being physically harmed. Tr. at 452-53, 1640-41. She was not being physically threatened; the threat was to her professional reputation. Tr. at 870. During this meeting, Complainant never said that there was a threat to her life or that she was going to be physically assaulted. Ms. Nabors only recalled Complainant telling her that she thought somebody was going to harm her. Tr. at 1623. Combining Complainant's statement about somebody was going to harm her with her statement that she had provided documents to her mother for safekeeping Ms. Nabors "inferred that Complainant was concerned about her physical safety and well-being." Tr. at 1623. Complainant relayed to Ms. Nabors that she felt that Respondent had engendered an unsafe workforce, and because of that, Complainant felt as though her personal safety was at risk. Complainant also relayed to Ms. Nabors that someone had told Complainant that Respondent was out for more than just her job; Ms. Nabors took that to mean somebody was going to harm her. Tr. at 1627-28. Ms. Nabors denied that Complainant had told her that she was afraid of retaliation and that she had a target on her back. Tr. at 1628. The two things that stuck with Ms. Nabors about the interview were: Complainant telling her that she gave the report that she had given to Captain Graham to her mother,[101] and her concern over the possibility of an aviation accident occurring at Respondent. Tr. at 1638. Ms. Nabors concluded from the information Complainant provided that Complainant was unrealistically concerned about the safety of Respondent's operations. Tr. at 1639.

Complainant further addressed with Ms. Nabors her September 9, 2015 letter alleging a hostile work environment due to Captain Davis' order that she only communicate to him, and to report to him her activities when not working. Tr. at 384; JX B at 35. According to Complainant, within days of sending Captain Davis this letter, she was subjected to a line check with an instructor with whom she had prior inter-personal issues. Tr. at 386-91; *see* JX L at 125-27.[102]

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[99] Complainant adamantly denied that she was crying throughout the meeting. Tr. at 450-51.

[100] Ms. Nabors testified that Complainant "became tearful during a number of different conversations or topics" during their conversation. Tr. at 1619. "[Complainant] never asked me to move the meeting," even though Ms. Nabors recalled she was crying in a hotel lobby. Tr. at 1619.

[101] Complainant credibly explained that she gives most of her writing to her mother – to line edit. Tr. at 406-10; *see also id.* at 400, 812-13.

[102] Complainant testified that she first learned of this letter in January 2017 when it was contained in Dr. Altman's medical report. Tr. at 392.

Complainant adamantly disagreed with Captain Albain's rendition of events in the January 8, 2016 letter (RX 18) noting that if Complainant was alleged to have been emotionally unstable during a flight, that represents a security threat that, under Respondent's policy, would have dictated having her removed from the flight desk and possibly diverting the flight. Tr. at 392-93. Further, she noted that this incident was never raised by Respondent's leadership after it allegedly occurred, nor was it ever raised by Dr. Altman during his interviews of Complainant. Tr. at 393-94.

Complainant recognized only one of Ms. Nabors' questions as an EO question. Tr. at 398. At some point during the meeting it became clear to Complainant that Ms. Nabors lacked the requisite experience in aviation safety to understand the substance of what Complainant was sharing. Tr. at 405, 903. Complainant relayed that she had been warned by another pilot not to provide her Safety Report and that she had a target on her back. Tr. at 406. In response, Ms. Nabors asked if Complainant had contacted the police. Tr. at 406. Complainant did mention that she had given her report to her mother to line edit, as she read all of her writings. Tr. at 406-07. According to Complainant, Ms. Nabors never told her that she could not respond to issues of safety because she lacked expertise in that area and that others would be reviewing those issues. Tr. at 904.

By contrast, Ms. Nabors—who the Tribunal did not find as credible as Complainant—testified that as soon as Complainant "kind of put everything down and started to talk," she "really just kind of took over," such that Ms. Nabors had to interject and introduce herself as the manager of the Equal Opportunity Department and she was there to discuss the EO portions of her report. Tr. at 1506-08. Ms. Nabors found Complainant difficult to follow within the questions that she had asked. Tr. at 1508. Ms. Nabors testified that Complainant was "a little bit frazzled. She was tearful and very emotional during our conversation…." Tr. at 1508-09.[103] At one point Complainant described that she was concerned about Respondent's safety and her safety. She recalled Complainant telling her that she gave the documents that she had provided to Respondent to her mother with instructions that, should anything happen to her, to take the documents to news outlets.[104] Tr. at 1510. Further, she testified that Complainant told her that she was not going to give that responsibility to her husband because he would need to take care of their children[105] if something happened to her. Tr. at 1510, 1660. Ms. Nabors tried to understand why Complainant felt threatened and asked if Complainant had gone to the police. Tr. at 1510. What Complainant had described to her, the detail for a plan of action if something were to happen to her, and the emotion she observed from Complainant all concerned Ms. Nabors. Tr. at 1510-11.

After the meeting, Complainant was perplexed that Ms. Nabors did not appear to understand the substance of her safety concerns. Tr. at 408. She went home and expressed this frustration to her husband. Complainant then got on to the computer, went to Respondent's

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[103] Yet, Captain Davis who has interacted with Complainant on many occasions, testified that Complainant did not cry when she received her Section 15 letter on March 22, 2019, nor has he ever seen her cry. Tr. at 2115.

[104] Captain Graham was aware that Complainant had given a copy of her report to her mother; she had told him as much. Captain Graham "didn't really think much of it at the time." CX 200 at 37; Tr. at 1204-05. However, he also testified that he learned this fact from Complainant after the discussion he had with her following her April 26, 2016 presentation. CX 200 at 37. If that was the case, Captain Graham learned of this information *only after* Complainant's meeting with Ms. Nabors where it allegedly was the focus of concern. Further, Ms. Nabors says she made a point to tell Captain Graham about this when recapping the details of the March 8, 2016 interview. The foregoing places into doubt Captain Graham's testimony as to the timing of when he first heard that Complainant had given documents to her mother.

[105] At all relevant times, Complainant's children were adults. Complainant is an eight-time grandparent. Two of her three children have advanced degrees. Tr. at 32-33. The Tribunal questions the accuracy of Ms. Nabors' testimony.

website and discovered that Ms. Nabors was the manager of the Pass Travel Complaint Department, not an HR safety investigator. Tr. at 408. When Complainant returned from that meeting, Mr. Petitt did not notice Complainant being emotional and he recalled that the meeting did not go quite as well as Complainant thought it would. Mr. Petitt saw no indication that Complainant had been crying in the last 10 to 15 minutes. Tr. at 35-36. As discussed, *supra*, the Tribunal found Complainant's testimony generally credible, and expressed doubts about the accuracy and veracity of Ms. Nabors' testimony. The Tribunal therefore finds Complainant's rendition of events and her explanation about her thoughts and actions during this meeting more credible that Ms. Nabors'. To wit: Complainant did not become overly emotional at the meeting and did not share a paranoid sense of concern for her personal safety.

5. Actions Taken Between the March 8, 2016 Interview and the Decision on March 17, 2016 to Subject Complainant to the Section 15 Process

On March 9, 2016, the morning following her meeting with Complainant, Complainant attended the Women's Aviation Conference. Tr. at 321. Also, on March 9, 2016, Ms. Nabors discussed with Ms. Taylor, a Respondent-employed employment lawyer, the details of her meeting with Complainant. Tr. at 1512. On March 10, 2016, Ms. Nabors met with Mr. Puckett, Ms. Taylor and Ms. Seppings in person and relayed to them the details of her meeting with Complainant. Tr. at 1512-13, 1751. Mr. Puckett recalled Ms. Nabors being very concerned about Complainant's mental wellbeing; specifically, she relayed that Complainant had taken affirmative steps to protect from harm her safety report and other documents. Tr. at 1752. During this meeting Mr. Puckett said that he wanted to talk with Ms. Nabors and Dr. Faulkner, Respondent's Director of Health Services, about the concerns that arose from her meeting with Complainant because it sounded to him "very much like there were mental fitness issues in play." Tr. at 1753; *see id.* at 1513, 1752-53.

Following this meeting, Mr. Puckett and Ms. Nabors went to Mr. Puckett's office and had a telephonic conversation with Dr. Faulkner. Tr. at 1754, 1511. The telephone call lasted about 30 minutes. Tr. at 1754. At some point during the call Mr. Puckett left and Ms. Nabors continued to speak with Dr. Faulkner. Tr. at 1514. Ms. Nabors discussed her recent interaction with Complainant. Ms. Nabors expressed concern about Complainant's behavior. Tr. at 1302-04. Ms. Nabors relayed that, during her interview with Complainant, Complainant was anxious, very tearful and very stressed. Ms. Nabors reported that Complainant felt threatened and was concerned for her health and safety because of information Complainant had about Respondent. Ms. Nabors relayed she had not experienced anything like this before. Tr. at 1304-05. This information raised in Dr. Faulkner a general concern about an employee-pilot being "paranoid, feeling threatened, feeling that they were out to get her for what she knew." Tr. at 1306. The comment about physical harm for knowing something was unique and something Dr. Faulkner said he does not often see. Tr. at 1306. In response to Ms. Nabors' statements, Dr. Faulkner asked her to provide a verbatim account of what happened during the three-hour meeting. Tr. at 1306, 1414, 1755.

Mr. Puckett and Ms. Taylor thereafter had a separate telephone conversation with Dr. Faulkner. Tr. at 1755. They discussed with Dr. Faulkner about "perhaps" consulting a doctor with a psychiatric background. Tr. at 1756. They made the decision to contact Dr. Altman, given his

background and experience; Mr. Puckett had worked with Dr. Altman before.[106] Tr. at 1757. It was Mr. Puckett—not Dr. Faulkner—that thereafter reached out to Dr. Altman. Tr. at 1757-58; RX 40.[107] At some point, Ms. Nabors summarized her interview with Complainant and gave her summary to Mr. Puckett. Tr. at 1515, 1518; JX E at 10-11. Mr. Puckett in-turn physically handed Ms. Nabors' summary to Dr. Faulkner.[108] Tr. at 1806. Ms. Nabors' next involvement with Complainant occurred when Mr. Puckett notified her about a meeting on March 17, 2016 that occurred in a conference room in Respondent's flight operations area; Ms. Nabors attended this meeting in-person. Tr. at 1518.

On March 10, 2016, Mr. Puckett sent Dr. Altman an email, copying Ms. Taylor, inquiring as to his availability over the next couple of day for a telephone call to discuss a pilot that had "made a few statements that have raised some mental fitness concerns…." CX 3, RX 40; Tr. at 560. Thereafter, Mr. Puckett sent Dr. Altman some documents that included Complainants Safety Report (JX B) and her Ethnographic Study (JX K). Tr. 614, 665; CX 3 at 5-6.

On March 11, 2016, Mr. Puckett called Dr. Altman and followed up his call with an email. CX 3 at 3. The email reflected that agents of Respondent would call him on March 16, 2016, to plan about an hour for the telephone call, and that Mr. Puckett would send him some materials to give him some background on the issue to be discussed. CX 3 at 4. During the March 16, 2016 call, agents of Respondent told Dr. Altman about Ms. Nabors' meeting with Complainant, including details like Complainant's concern that Respondent would in some way harm her. They also represented to Dr. Altman that Complainant had memory problems;[109] the chief pilot's office had multiple contacts with her over the years and they felt they had communicated information to her, yet she kept raising the same topics again and again. Tr. at 561-63. Based upon this information, Dr. Altman said the situation rose to the level of requiring a psychiatric evaluation, inclusive of neuro-psychological testing because of Complainant's alleged memory problems. Tr. at 563, 663.

Several weeks later, Ms. Nabors prepared a summary of her interactions with Complainant, including a written description of their meeting.[110] Tr. at 410; JX J at 1-9, JX L at 47-53. However, Complainant did not learn of the existence of Ms. Nabors' summary until nine months later, when

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[106] Two years prior, in 2014, Mr. Puckett, Dr. Faulkner and Dr. Altman had worked together in another case involving a Section 15 mental health inquiry. This inquiry concerned a Captain [P]. During this inquiry Dr. Altman sent a copy of his Psychiatric Report to the FAA. ALPA wrote to Mr. Puckett asserting that contacting the FAA prior to completion of the Section 15 process "clearly violated the PWA and wholly undermines the integrity of the Section 15 process." CX 92. This was followed by several letters to Mr. Puckett and Captain Dickson about Respondent not following the Section 15 process when the matter involved a mental health evaluation. *See* CX 94, CX 95.

[107] *See also* Tr. at 1389-92.

[108] He actually handed him a copy of JX E (pages 3 to 11). Tr. at 1806.

[109] Dr. Altman later explained that the "memory issues" he evaluated included Complainant's use of her uniform in public when giving presentations and a letter of counseling Complainant received back in 2011 that related to Respondent's social media use policy. Tr. at 636.

[110] Dr. Faulkner was not even certain if he had ever seen this document. Tr. at 1418.

on January 20, 2017, she read Dr. Altman's medical report.[111] Tr. at 449. Thus Complainant averred she had no opportunity to challenge its contents contemporaneously. Tr. at 486.

Ms. Nabors' written recollection of the three-hour meeting with Complainant consisted of four paragraphs. Tr. at 1414; JX E at 10. After receipt of Ms. Nabors' statement, Mr. Puckett suggested to Dr. Faulkner that he should involve Dr. Altman's services,[112, 113] as Mr. Puckett had worked with Dr. Altman in another case involving psychiatry. Tr. at 1309-11, 1390-91, 1393. This is despite the fact that Mr. Puckett testified that his only role in the Section 15 process was to provide advice and counsel on Respondent's compliance with the Section 15 process. Tr. at 1701-02. Thereafter, on March 15, 2016, and without asking Dr. Faulkner what information should be sent, Mr. Puckett emailed to Dr. Altman Ms. Nabors' statement that she had just provided him that day[114] as well as Complainant's two articles. CX 3 at 7; Tr. at 1312 1394-95; JX E at 1-3; *see* Tr. at 1889. On March 16, 2016, Mr. Puckett provided Dr. Faulkner with Ms. Nabors' statement (JX E at 3-11).[115] Tr. at 1308-09, 1311-13, 1413; RX 42. There was also a telephone conversation that occurred on March 16, 2016, between Mr. Puckett, Dr. Faulkner and Ms. Nabors about her concerns.[116]

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[111] Complainant first learned of Ms. Nabors' summary when seeing it included in Dr. Altman's medical report. According to Complainant, Dr. Altman never mentioned this during his three interviews with her and thus was never given an opportunity to rebut anything Ms. Nabors said in her report. Tr. at 410-11. During her testimony, Complainant listed several inaccuracies about Ms. Nabors' report. Tr. at 411-13.

Complainant said that her having no knowledge of Ms. Nabors' report and version of events was significant because she could have addressed any concerns therein when responding to the Section 15 referral. Specifically, Complainant testified that she would have gone to the hotel and located the two people at the front desk to obtain statements about her emotion condition, or requested surveillance tapes of the lobby where she met Ms. Nabors. Tr. at 481.

[112] However, Dr. Faulkner recalled that it was Mr. Puckett who reached out to Dr. Altman to involve him in this matter. Tr. at 1388-89.

[113] Complainant resides in Seattle, Washington. Dr. Altman is located in Chicago, Illinois. During cross-examination, Dr. Faulkner acknowledged that there were board certified psychiatrists in Seattle, and that at least one that is on the FAA psychiatrist list is located in Los Angeles, California. Yet Dr. Faulkner did not contact any of them for Complainant's evaluation and only contacted Dr. Altman. Tr. at 1387-88. He testified that he considered one other psychiatrist that Respondent had used previously, Dr. Gitlow, but he never contacted him about this matter. Tr. at 1426-27.

[114] Tr. at 1761.

[115] During his testimony, Mr. Puckett indicated that JX J was the report Ms. Nabors put together after providing them with her preliminary report (JX E); it just had more details. However, this exhibit has custody issues: to wit, it is unknown what content was added, when and by whom. As Ms. Nabors herself explained it was a "living document" subjected to editing during this process. *See* Tr. at 1493, 1521-22. All that the Tribunal does know is JX J was printed on May 27, 2016. How this document was changed from its inception until that date is unclear. Accordingly, the undersigned gives the contents of JX J very little weight.

[116] Ms. Nabors' testimony conflicts on this point. During her testimony, Ms. Nabors said that her reference to March 16 in her report (JX J at 7)—generated sometime between March 16 and May 27, 2016 (the date printed on JX J)—and during her deposition, was a mistake. Tr. at 1524. However, Ms. Nabors not only identified the date but the day of the week that this telephonic conversation occurred: Wednesday. March 16, 2016 was a Wednesday. She also only mentioned that this was a telephone conversation with Mr.

On March 15, 2016, Complainant attended a Seattle-based meeting and after that meeting she had an impromptu meeting with Captain Davis. Captain Davis was in his office and she asked about Respondent's recently imposed policy about lanyard wearing. Captain Davis authorized Complainant to wear the one she was using. She also raised her concern about Respondent's policy on deadheading pilots into base to get a trip as a workaround for FAR Part 117 compliance. Captain Davis disagreed with her view that there was a non-compliance issue.[117] Tr. at 322-23, 2010-13, 2072-77; CX 121. Captain Davis testified that he did not know about any contemporaneous discussions within Flight Operations about subjecting Complainant to the Section 15 process. Tr. at 2014.

On March 15, 2016, Complainant emailed Captain Graham about the upcoming presentation. Tr. at 853-54; RX 43. Captain Graham wrote back to Complainant that same day. Tr. at 855.[118] According to Captain Graham he had no idea that there was going to be a meeting two days later to discuss a potential Section 15 evaluation, but he did know that there was going to be a meeting on March 17. He was moving forward with trying to set up the presentation Complainant was going to give. Tr. at 1155.

Also on March 15, 2016, Mr. Puckett provided Dr. Altman with Complainant's Safety Report (JX B). CX 3 at 4-7, RX 41; Tr. at 634. The following morning, Mr. Puckett provided Dr. Altman with Ms. Nabors' statement (JX E at 1-2 and 10-11). Tr. at 564, 740, 868, CX 12; *see* Tr. at 1759-60. Around this same time, Mr. Puckett personally handed Dr. Faulkner a copy of Ms. Nabors' report. Tr. at 1761. Following this, Dr. Altman received another telephone call saying that he would be patched into a conference call and that Respondent-personnel wanted him to tell Respondent's management that a psychiatric evaluation was warranted for Complainant. Tr. at 566. The conference call occurred the day after[119] and Dr. Altman informed the participants that a psychiatric evaluation was indicated. Tr. at 566-67.

Puckett and Dr. Faulkner. This too is significant because the weight of the evidence, including Ms. Nabors' own testimony, establishes that both Mr. Puckett and Dr. Faulkner participated in-person at the March 17, 2016 meeting, and that Captain Graham was also present. *See* Tr. at 1518-20. She made no mention of Captain Graham when referencing this telephone call. This is significant because of his position within Respondent and because of the import of the meeting itself on March 17. Finally, when asked again about the March 16th date by Respondent's counsel she admitted that "I may very well have talked to Dr. Faulkner again on the 16th, yes." Tr. at 1530. The conflict in Ms. Nabors' testimony further establishes her as a less-than-credible witness.

[117] On September 8, 2016, Complainant received a letter from the FAA that substantiated her reporting that Respondent's deadheading practices were a violation of an aviation safety regulation. Tr. at 323; CX 4, RX 138.

[118] Complainant speculated in her testimony that Captain Graham had to have known at this point about the meeting scheduled the following day concerning whether to refer Complainant for a Section 15 evaluation. "An executive does not show up to a meeting without knowledge of what the meeting is about." Tr. at 856-57.

[119] The parties stipulated during Dr. Altman's cross this occurred on March 16, but the totality of the evidence suggests that it occurred on March 17. *See* Tr. at 610, 612.

On March 16, 2016, a teleconference occurred between Mr. Puckett, Ms. Taylor and Dr. Altman.[120] Dr. Faulkner was not on the call. Tr. at 1759; *see* RX 40 at 2. Dr. Altman talked about different mental fitness standards and, based on the statements he was reading, expressed his concerns over Complainant's behavior. Tr. at 1762.

On March 16, 2016, Captain Graham received word from Respondent's Labor Relations and Legal departments that Ms. Nabors had received some very troubling comments from Complainant. Tr. at 1136, 1316. Captain Graham called a meeting to get the information from Ms. Nabors directly, which she provided. This conversation occurred on March 17, 2016 at approximately 5 p.m. Tr. at 1137-38. Prior to the meeting, Captain Graham knew that lawyers, doctors and Ms. Nabors would be attending. Tr. at 1166. And he had an "inkling" that there was going to be something serious discussed. Tr. at 1167. Persons physically present at this meeting[121] were Captain Graham, Ms. Nabors, two of Respondent's lawyers,[122] Mr. Puckett[123] and Dr. Faulkner.[124] Tr. at 1314, 1518-19; *see* RX 45. There is no indication in the record that Complainant's Chief Pilot or Captain Davis were even invited to this meeting.[125] Further, Captain Davis was never asked about his interactions with Complainant during this decision process.[126] Tr. at 2115.

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[120] It is curious that Dr. Altman does not include this conversation in his report's chronology. *See* JX L at 41. In fact, Dr. Altman's report makes no mention of his interactions with Respondent's personnel concerning Complainant until after the Section 15 letter was issued.

[121] Dr. Faulkner thought that Captain Miller might have been present at the meeting but was not sure. Tr. at 1314-15.

[122] Ms. Taylor and Mr. Peter Carter.

[123] Tr. at 1763.

[124] Captain Graham testified that Dr. Faulkner physically entered the meeting after Respondent's two employment-lawyers departed. Tr. at 1141. Dr. Faulkner recalled Ms. Nabors, Mr. Puckett, Captain Miller and Captain Graham were present in this meeting, with Dr. Altman participating by telephone. Tr. at 1315, 1395-97, 1399. Dr. Faulkner testified that he participated telephonically, but others like Ms. Nabors recalled him being physically present. Tr. at 1315. The Tribunal finds that Dr. Faulkner was actually present at the meeting. Dr. Faulkner may have confused his telephonic meeting with Mr. Puckett and Ms. Nabors on March 16, with this meeting.

[125] Captain Davis—Complainant's direct supervisor and the witness with the most interaction with Complainant–testified that he had never even given consideration to referring Complainant for a Section 15 evaluation. Tr. at 2064. It seems odd that the person with the most information and interaction with the Complainant would not even be invited or asked for his input into a decision as serious as this, especially when the only interaction which is used by Respondent to base its action is one interaction with a non-pilot over a relatively short period of time. Captain Davis did provide a summary of interactions (CX 21) but he had no idea the context in how this information was going to be used. Tr. at 2064. And Captain Davis testified that up through March 17, 2016, Complainant had been a reliable pilot for Respondent. Tr. at 2072.

[126] In fact, neither Respondent nor Dr. Altman asked Captain Davis about his interactions with Complainant until sometime after he was required to hand Complainant her Section 15 letter on March 21, 2016. Furthermore, he testified that it was only through observing the actual hearing that he became aware of Ms. Nabors' rendition of her March 2016 meeting with Complainant. Tr. at 2115.

At some point Respondent's employment-lawyers left the meeting. Tr. at 1519. Dr. Altman participated telephonically. Tr. at 1314, 1519. During this meeting Ms. Nabors recapped the events of her March 8, 2016 interview of Complainant.[127] Tr. at 1520, 1763-64. During her rendition of her meeting Ms. Nabors referenced the fact that Complainant had left documents with her mother as evidence of Complainant's concern about her personal safety. Tr. at 1625. Captain Graham recalled Ms. Nabors conveying to him that Complainant was worried that she had a target on her back. CX 200 at 89. During this entire process no one from Respondent reached out to Complainant to allow her to provide her version of what transpired during the March 8 interview. Tr. at 1874.

Captain Graham found Ms. Nabors' recount of events at her meeting with Complainant very clear, concise and detailed. Tr. at 1138; *see* CX 200 at 35. Based on what Ms. Nabors' told him, Captain Graham testified that he had operational concerns over Complainant's mental health. Tr. at 1139. He said that he had a question in his mind as to Complainant's mental stability that created a potential for a Section 15, prior to receiving recommendations from Dr. Faulkner.[128, 129] Tr. at 1167. Thereafter there occurred a discussion amongst the meeting participants where other members of the group brought up issues relating to Complainant's social media use, uniform usage and interaction with the press. CX 200 at 34. At that point in the meeting the lawyers left and the Director of Health Services, Dr. Faulkner came in to the meeting.[130] Tr. at 1141.

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[127] Captain Graham spuriously testified that Ms. Nabors told him that "she didn't feel that [Complainant] should be returned to the cockpit at this time because [Ms. Nabors] felt there were significant issues that needed to be resolved in [Complainant's] mind." CX 200 at 36. First, no other participant in this meeting testified similarly to corroborate Captain Graham's testimony. Second, even assuming this testimony is true, Ms. Nabors' statement, as an HR person with no cockpit experience, no FAA ratings, and no specialized training about mental health issues, represented to Captain Graham, at most, layperson-hearsay. It begs credulity that someone in Captain Graham's position would rely upon such a representation without first talking to a single person other than Ms. Nabors about Complainant's conduct in or out of the cockpit. Captain Graham's testimony is of dubious credibility.

[128] As he stated: "[T]here's really no way to hear Ms. Nabors' testimony and not think that there could be an issue. And really, the only way to solve that would be a Section 15." Tr. at 1167.

[129] Captain Graham acknowledged that a request for a mental health evaluation "comes as a result of what we see in operational performance or training performance." CX 200 at 28.

[130] The Tribunal asked Captain Graham the following:

> JUDGE MORRIS: Wait a minute. So I'm understanding your testimony, is in November you sent an e-mail where you were thinking about a Section 15, before this e-mail from Ms. Nabors. And you're saying that you didn't even ask or suggest about a Section 15 after hearing what Ms. Nabors had to say?
> THE WITNESS: That's correct.
> JUDGE MORRIS: Okay.

Tr. at 1145-46. After a couple more questions by counsel, the Tribunal asked the following:

> JUDGE MORRIS: And you, being the senior person in this meeting, never made a suggestion to Dr. Faulkner -- maybe we should do a Section 15?

Prior to him joining this meeting, Dr. Faulkner had had a conversation with Respondent's Labor Relations and Legal Departments,[131] and as he came in[132] to the meeting he said that he would like to get a subject matter expert on the telephone, Dr. Altman. Tr. at 1141-42. In the interim, "Dr. Faulkner asked if there were any issues prior to this point with [Complainant], and [Captain Graham] gave him a recount of what the interactions there had been with Captain Miller and Captain Davis." CX 200 at 34; Tr. at 1201.[133] After Ms. Nabors presented her information, she left the meeting. Tr. at 1764, 1517.

Once Dr. Altman joined the meeting telephonically, a medical discussion ensued between Dr. Faulkner and Dr. Altman around whether an assessment would be appropriate. Dr. Altman was asked for his opinion about whether a Section 15 referral was appropriate. Tr. at 1215, 1764-65. Dr. Altman agreed that there were concerns present. Tr. at 1319, 1765. Dr. Faulkner identified to Captain Graham that "the biggest concern really was the concern that Flight Operations was actually out, in some way, to harm [Complainant]." CX 200 at 30; Tr. at 1177. However, Captain Graham understood that Ms. Nabors conveyed something to the effect that the Flight Department had placed a target on Complainant's back; that revelation contributed to his Section 15 determination. Tr. at 1228-29; CX 200 at 89. According to Captain Graham, he asked Dr. Faulkner point blank: "Do I have a reason to believe that she doesn't meet the medical standards?" Tr. at 1764. Dr. Faulkner responded, according to Mr. Puckett, "Yes, I think she needs to be placed in a Section 15 process." Tr. at 1765; *see* Tr. at 1143, 1319-20; *see id.* at 1903. However, Dr. Faulkner testified that he did not recall Captain Graham directly eliciting an opinion from either himself or Dr. Altman. Tr. at 1403-04. Dr. Faulkner said he based his recommendation on the

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> THE WITNESS: Your Honor, that's not my place. And I have to say that we follow our director of Health Services' guidance, that's the reason that we had him there.
> JUDGE MORRIS: I understand that. But you were thinking about it in November, before this egregious conduct, and you're saying that in this meeting, where you're informed about this information with a doctor, you did not even suggest that -- as the leader of this group -- is that your testimony?
> THE WITNESS: Yes, sir it is.
> JUDGE MORRIS: All right.

Tr. at 1146.

[131] During his deposition Captain Graham recalled that, prior to this meeting, Dr. Faulkner had interactions with Captain Miller and Captain Davis about Complainant. CX 200 at 30; Tr. at 1196-97. However, during his hearing testimony he said his deposition testimony was incorrect, but could not explain how Dr. Faulkner obtained information that would have originated from these two. Tr. at 1197. Captain Graham also attempted to correct his deposition testimony that he discussed Complainant's prior history with Dr. Faulkner. Tr. at 1199-200; *see* CX 200 at 33-34.

[132] Captain Graham recalled Dr. Faulkner being at the meeting, but Dr. Faulkner recalled participating telephonically. Tr. at 1401.

[133] However, at the hearing, Captain Graham said his deposition testimony was inaccurate and he did not recall Dr. Faulkner asking him that. Tr. at 1201.

behaviors and statements made by Complainant during her interview with Ms. Nabors.[134] Tr. at 1320. Captain Graham said he based his decision, in part, on his recollection of Complainant's comportment during their January 28, 2016 meeting.[135] Immediately following this meeting, Mr. Puckett called Captain Davis and informed him that Complainant was being placed into the Section 15 process due to statements she made to Ms. Nabors during her investigation, and that they would get him the appropriate paperwork to get the process started. Tr. at 1766, 2014-15. Thereafter, on March 22, 2016, Captain Davis had Complainant removed from the CASS[136] system whereby she lost her jump seat privileges. Tr. at 1808, 2019; RX 51. Captain Graham took steps immediately after the March 17 meeting to ensure that Complainant would not be assigned a trip because during that time period she was on reserve duty. Tr. at 2018; CX 200 at 68-70. At his deposition, Graham testified that he reflected on Ms. Petitt's pre-March conduct while contemplating the Section 15 referral and that it "solidified [his] decision that we should go ahead and have the Section 15." CX 200 (Graham Dep. at 81). Also, at least through the pendency of the CME's findings, Complainant remained in a pay status; she could not operate Respondent's aircraft, however. Tr. at 1874.

According to Captain Graham, he had no choice but to follow Dr. Faulkner's recommendation. Tr. at 1144. Plus, he "accepted it from face value, he had no reason not to, and certainly it was the safe course of action for the airline." Tr. at 1148. Captain Graham testified that it was about ten minutes after Ms. Nabors made her report to the group that Dr. Faulkner made his recommendation. Tr. at 1145. And that recommendation came without Dr. Faulkner interviewing Complainant. Tr. at 1191. At the end of the meeting, Captain Graham made the decision to refer Complainant to the Section 15 process for a psychiatric evaluation. CX 200 at 76; Tr. at 1216-17, 1412. About a week and one-half later, Dr. Faulkner appointed Dr. Altman to perform a psychiatric assessment as the CME. CX 200 at 76-77; Tr. at 1217-19.

Captain Graham testified that it was Complainant's behavior during November 2015 that led him to consider beginning the Section 15 process; his earlier email had nothing to do with the

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[134] During his deposition, Captain Graham said that Dr. Faulkner brought to his attention three areas of concern to him: (1) the concern that flight operations was actually out to in some way harm Complainant; (2) her lack of understanding of simple policies and procedures; and, (3) the harboring or inability to release things that happened in the past that drove a "behavioral anomaly." CX 200 at 30, 33. Tr. at 1189. However, when pressed, Captain Graham said he did not know Dr. Faulkner raised the issue of harboring an inability to release things in the past until after Dr. Faulkner talked with Complainant. CX 200 at 35.

[135] Dr. Faulkner testified that he participated in this conversation telephonically and it was his recommendation to Mr. Puckett that they proceed with the Section 15 process. Tr. at 1319. However, the only conversation where Dr. Faulkner was listening in telephonically occurred prior to March 17, 2019; specifically, the meetings between Mr. Puckett, Ms. Nabors and himself on March 10, 2016 and March 16, 2016. And the only meeting were Mr. Puckett and Dr. Altman were telephonically on the same call as he was the March 16, 2016. This leads this Tribunal to question whether the Section 15 discussion occurred prior to the meeting with Captain Graham.

[136] CASS is an acronym that stands for Cockpit Access Security System. Tr. at 2018. "The CASS is a network of databases hosted by participating part 121 air carriers that contains employment and security information for individuals authorized by the FAA to occupy an aircraft's flight deck jump seat during normal operations." FAA Order 8900.1, vol. 3, Ch. 2, para. 3-46(C). *See generally* 14 C.F.R. § 121.547 and 121.548.

events in March 2016. In November he had "put away any concern" over a potential Section 15. Tr. at 1147. He explained:

> [T]hey were apples and oranges. I mean when you're talking about your behavior in an extracurricular activity versus someone who is now saying that they think someone is out to get them, and do them bodily harm, those are drastically different. And I can say, without a doubt, that in November I absolutely put away any concern that I had for a Section 15.

Tr. at 1147.

Captain Graham denied that his decision to accept Dr. Faulkner's Section 15 recommendation had any connection to Complainant's January 28, 2016 report, with safety or an attempt to discredit the issues Complainant raised about safety. Tr. at 1154.

Between the time Captain Graham made his decision on March 17, 2016, to subject Complainant to the Section 15 process and the time Respondent issued the Section 15 letter on March 17, 2016, there Respondent conducted no additional investigation as to whether it should issue a Section 15 letter. Tr. at 1213. Further, no member of Respondent's management contacted Complainant to hear her account of what transpired between she and Ms. Nabors. Tr. at 1213-14, 1874; CX 200 at 62. Dr. Faulkner testified that he had not made a decision on whether to refer Complainant to a CME until April 27, after meeting with Complainant and hearing her version of events. Tr. at 1353, 1385-86, 1415, 1418. However, he also testified that he started looking for a psychiatrist for the Section 15 process prior to even hearing Complainant's version of events. Tr. at 1426-27. Although he testified that he considered other psychiatrists, he ultimately only contacted Dr. Altman, who lived in Chicago, to serve as the CME in this matter, despite the existence of other qualified psychiatrists located in Seattle and on the West Coast. Tr. at 1385-86. Further, Dr. Faulkner offered Dr. Altman the CME position before he had even had a conversation with Complainant on April 27, 2017. Tr. at 1444.

Captain Dickson was aware that Ms. Nabors interviewed Complainant. CX 199 at 49. Between March 9 and March 17, 2016, he participated in discussions with Captain Graham concerning Complainant and the concerns expressed by Ms. Nabors arising from her meeting with Complainant.[137] Captain Graham relayed concerns to Captain Dickson about whether Complainant should be flying Respondent's aircraft at that point. Captain Dickson recalled being told that Ms. Nabors' interview was "kind of uncharted territory" for her. Ms. Nabors felt that Complainant had expressed concerns that someone was out to get her. CX 199 at 56-57. Captain Dickson gave guidance to Captain Graham to ensure Respondent was being fair and that they followed the process. CX 199 at 58. The prospect of a Section 15 referral was raised but Captain Dickson did not recall if it was in his initial discussion with Captain Graham. CX 199 at 58.

[137] Captain Dickson later testified that during the period January 1, 2016 to March 31, 2016, the only person he talked to about the safety issues Complainant raised was Captain Graham. CX 199 at 174.

A second conversation between Captain Dickson and Captain Graham occurred concerning Complainant a day or two prior to issuance of the March 17, 2016 Section 15 letter. CX 199 at 58, 64-65; *see* JX F. During his discussion with Captain Graham, a Section 15 was a potential outcome but, according to Captain Dickson, Captain Graham had not made a decision at that point.[138] CX 199 at 61. Captain Dickson made a determination during his discussion with Captain Graham that it was a sound course of action for Respondent to proceed with a Section 15 evaluation. This was after Captain Graham had consulted with EO, HR, and labor relations. CX 199 at 62, 122-24. Captain Dickson did not specifically know what facts these Respondent-entities were basing their recommendation upon. CX 199 at 63. Captain Graham only gave Captain Dickson the general context of the interview that had led to Complainant's psychiatric evaluation.[139] CX 199 at 64. Captain Dickson never received a copy of Ms. Nabors' report. CX 199 at 198. Captain Dickson said that the ultimate decision to conduct a Section 15 evaluation lies with flight operations. CX 199 at 69.

Captain Dickson was aware that Dr. Faulkner was Respondent's Director of Health Services but did not know the extent of Dr. Faulkner's participation in Complainant's Section 15 process prior to March 17, 2016. CX 199 at 67. He was aware that once the process began, Dr. Faulkner needed to select the company medical examiner. CX 199 at 71

Captain Dickson was not aware of anything in terms of Complainant's flight performance or work-conduct that warranted a Section 15 referral. CX 199 at 68-72. Nor did he observe anything in her comportment during his meeting with Complainant in January 2016 that warranted a Section 15 referral. CX 199 at 72.

6. Events Surrounding Complainant's Receipt of the Section 15 Referral Letter

On March 18, 2016, Mr. Puckett sent Captain Davis the Section 15 referral letter (JX F) to issue to Complainant. Tr. at 1768, 2016-17; RX 47. Although the Section 15 letter was dated March 17, 2016, Captain Graham delayed having it issued to Complainant to make it possible for Captain Davis to hand-deliver it to her. Tr. at 1234.

On March 21, 2016, Complainant had three telephone conversations with Ms. Nabors. Tr. at 879; JX J at 7-8. During the first telephone call by Ms. Nabors to Complainant,[140] Captain Davis called her as well so she had to interrupt the call with Ms. Nabors. Tr. at 1007. In her telephone

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[138] Captain Graham testified that that decision was not his to make, but it was that of the Director of Health Services – Dr. Faulkner. Further, Dr. Faulkner in his capacity as Director for Health Services did not report to him but to then Senior Vice President for Flight Operations, Captain Dickson. Tr. at 1096-97.

[139] However, Captain Graham testified that he was "quite sure" that he had related to Captain Dickson the reasons that Dr. Faulkner had provided, and also discussed with him Ms. Nabors' concerns. CX 200 at 41-43.

[140] Tr. at 1522-23.

conversation with Captain Davis, he invited her to meet. When Complainant asked about the substance of the meeting Captain Davis would not tell her. Tr. at 889-90; JX J at 9.[141]

Complainant then called Ms. Nabors back shortly thereafter and relayed to Ms. Nabors the contents of Complainant's call with Captain Davis. Tr. at 891-92. During the second telephone conversation, Ms. Nabors informed Complainant that she was concerned about Complainant's wellbeing since their last conversation and had contacted Dr. Faulkner about it.[142] Tr. at 894; JX 8 at 8. At that time Complainant did not know of Dr. Faulkner or his relationship with Respondent. Tr. at 880. Complainant thought Ms. Nabors was calling because Complainant had not provided to Ms. Nabors certain documents she requested during their prior meeting.[143] Tr. at 881.

After the second call with Ms. Nabors, Complainant reached out to her captain's representative and asked him who Dr. Faulkner was. He responded: "[t]hat's what I was worried about."[144] Tr. at 885, 1526; *see id* at 894-95. Then Complainant had a third telephone conversation with Ms. Nabors. Tr. at 894; JX J at 9. At the time of this third call, Complainant was bothered that Dr. Faulkner had become involved. She was also frustrated and disappointed that her safety report had "turned into this." Tr. at 895-98; *see also id.* at 1008-09.

On March 22, 2016, Captain Davis met with Complainant and presented her with a letter dated March 17, 2016 that notified Complainant that she was being placed into the Section 15 process. Tr. at 41, 873, 900-01, 2018; CX 18, RX 50 at 2; *see* JX F. The Section 15 letter is on Flight Department stationary because it is a flight department decision to make the referral to the

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[141] Complainant adamantly denied the characterizations found in Ms. Nabors' statement, Ms. Nabors' representations of what Complainant said during the telephone conversations, as well as her description of Complainant's emotional state. *See, e.g.*, Tr. at 895-900, 939.

[142] Complainant initially testified that this occurred during the first telephone conversations with Ms. Nabors (Tr. at 879), but corrected the sequence of events later in her testimony.

[143] Ms. Nabors noted in her more polished report (JX J at 9), generated sometime before May 27, 2016, that Complainant "was crying." However, she made no reference to this during her hearing testimony other than affirming the accuracy of the entries concerning her March 21, 2016 calls. Tr. at 1525. Complainant admitted that she was upset and angry about what was going on, but adamantly and credibly denied that she was crying during either of the telephone calls with Ms. Nabors on March 21, 2016. Tr. at 890-91, 895. In viewing how Complainant conducted herself during the nine days of hearing, her conviction in her denials that the crying incidents occurred, and considering the testimony of her character witnesses, her husband and even Captain Davis, the Tribunal simply does not believe that Complainant cried either during the March 8, 2016 meeting or during the telephone calls with Ms. Nabors on March 21, 2016. It begs credulity that this pilot would demonstrate such a display of emotion in the presence of a relative stranger, especially in light of Complainant's lack of any betrayal of similar emotions in front of those that have interacted with her over long periods of time, and in even more stressful situations. Even if Complainant exhibited emotion during the conversation, the record does not preponderantly establish that Complainant's display of emotion went to an extremity wherein a layperson like Ms. Nabors could reasonably doubt Complainant's mental fitness and wellbeing based on such a display of emotion.

[144] According to Complainant, when she had mentioned to Captain Jud Crane (Complainant's ALPA rep) in November 2015 that, when she was going to provide her report to Respondent's management, he advised against it, expressing concern that they would utilize Section 15 against her. Tr. at 244, 300, 406 479-80; *see id.* at 38, 40, 42.

Director of Health Services. Tr. at 1214. Captain Davis believed that the gravity of the situation warranted the presence of a union representative as he understood that this had career ending implications. Tr. at 2115-16. During this meeting he told her that the letter had something to do with her meeting with Ms. Nabors, but he did not know more. Tr. at 873. He also told her to contact Captain Graham as he still wanted her to give her presentation to divisional leaders. Tr. at 414, 872, RX 52. Receiving the letter had shocked Complainant. Tr. at 873, 2018, 2035. Complainant clearly understood the significance of the letter. Tr. at 2116-17. That evening Complainant wrote to Captain Davis asking to speak to Captain Graham the next day if that was still possible. RX 49. On March 23, 2016, Complainant did call Captain Graham and during this telephone call Captain Graham asked Complainant to come to Atlanta and present her safety report to his divisional leaders. Tr. at 414, 872. Complainant followed up with an email. Tr. at 872, 1155-57; RX 52.

On March 23, 2016, Complainant had another telephone call with Ms. Nabors. During this call, Complainant asked pointed questions to Ms. Nabors about her job title. Tr. at 902, 1527; *see* JX J at 10. Following this call, Ms. Nabors never completed her investigation because, among other reasons, she was transferred to a new position in Salt Lake City, Utah. Tr. at 1529.

Per Complainant's request, Respondent agreed to hold off further contacting her about the Section 15 process until she had finished her college examinations, occurring through March 2016. Tr. at 877-78; RX 50 at 1.

Events Occurring after Respondent's Provision of the Section 15 Referral Letter

On April 27, 2016,[145] Complainant gave a safety culture presentation and provided the audience with an article she had written on the topic.[146] Tr. at 418, 871; JX K. Captain Graham did not attend the presentation, but he did show up initially to introduce her. Tr. at 419, 1159-60. Complainant found his introduction condescending and during the presentation two of the captains appeared unreceptive to her presentation. Tr. at 1011-12. Immediately following her presentation to Respondent's division managers (that Captain Graham requested[147]) Complainant met face-to-

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[145] CX 198 at 31 establishes Complainant gave the presentation on April 4 and her testimony is she flew in the day prior.

[146] *See also* Tr. at 420-23.

[147] Captain Graham testified that immediately after this meeting Complainant came to his office and they started to discuss the presentation. She handed him a copy of the presentation and a sealed envelope. When he asked what the envelope contained, she said "It's a bill" to which he responded "That's really not appropriate." Captain Graham testified that Complainant then commented that she "should never work for free and other pilots have been brought off the line to do reviews like that and been paid for it." Tr. at 1161.

Complainant testified similarly. She said that, given that she was being subjected to a Section 15, she was trying to lighten the mood a bit and told him that pilots do not work for free and she put a lot of effort in her presentation, and that she was fighting for her sanity and did not want anyone to think she was crazy to do that much work for free. Tr. at 423. Captain Graham did not take the comment lightly and retorted that the presentation is not something she would be compensated for. Tr. at 1160-61. Complainant asked him to open the envelope, but Captain Graham refused because "then I would have knowledge." Tr. at 423. According to Complainant, the sealed envelope actually was a thank you note. Tr. at 423.

face with Dr. Faulkner. Tr. at 416, 876, 1323, 1325, 1386, 1422-23. During this meeting, Dr. Faulkner took notes (JX G). Tr. at 1326. Complainant denied she ever made claims of harassment or that she had suffered gender or sexual based harassment. Tr. at 1452-53. Dr. Faulkner observed no indicators of Complainant having a mental health issue. Tr. at 1428. However, he never made his own determination about whether Complainant had a mental health issue. Tr. at 1431.

Complainant recalled Dr. Faulkner telling her that he thought that the whole Section 15 process was a misunderstanding.[148] Tr. at 413, 417. Dr. Faulkner had Complainant explain her version of the meeting with Ms. Nabors. Tr. at 1327. Complainant relayed that Ms. Nabors got the wrong impression; Complainant was not anxious or tearful but enthusiastic. Tr. at 1328. Given the diverging view of events, Dr. Faulker did not stop the Section 15 process, explaining:

> I [had] one employee put it in writing, saying this is what she observed, this is what she heard. I had the employee, themself, saying that didn't occur, that was misinterpreted. And I had to -- while that's both of their opinions, with someone who flies the aircraft up there, we don't want an accident, we don't want a smoking hole, and someone coming back and say why don't you give more attention to this, you know, statement that someone put out in writing and signed, that this is what they observed.

Tr. at 1328-29.

Captain Graham said that he was so taken aback by this that he documented the discussion (RX 54). Captain Graham testified that this was the first time that he had an idea that she thought that the Section 15 was retaliatory. Tr. at 1161.

Based upon this testimony the Tribunal asked the following:

> JUDGE MORRIS: I have a question. You made contemporaneous notes when you met with her and Captain Dickson in -- was it January of 2016?
> THE WITNESS: Yes.
> JUDGE MORRIS: And you made contemporaneous notes in this meeting in March of 2016. Did you make any contemporaneous notes about the meeting where the decision was made to refer her to a Section 15?
> THE WITNESS: No, I did not.
> JUDGE MORRIS: Any reason why you didn't make notes [on] that occasion?
> THE WITNESS: Well, I don't specifically recall. I was taking input from the director of Health Services and the subject matter expert doctor on the phone.
> JUDGE MORRIS: Did anybody take contemporaneous notes, that you recall?
> THE WITNESS: I don't recall.
> JUDGE MORRIS: Continue.

Tr. at 1162-63.

[148] When asked if he told Complainant "that the whole situation was the result of a misunderstanding," Dr. Faulkner answered "I'll take that right as it was, it was out of context." And he had not reached a conclusion that it was a misunderstanding at that point. Tr. at 1341. On cross-examination Dr. Faulkner acknowledged that he discussed with Complainant that this situation could very well end up being a result of a misunderstanding. Tr. at 1441-42; *see* CX 44 at 1 (email from Dr. Faulkner to Dr. Altman, dated Jan. 3, 2017 where he wrote: "I did inform her that the evaluation could very well end up being the result of a misunderstandings between Complainant and the HR rep….").

Complainant also shared that she had attempted to give Captain Graham a thank you note, but told him it was a bill so Captain Graham would not open it.[149] Dr. Faulkner also gave Complainant Dr. Jon Riccitello's contact information in the hope that he might be able to assist her.[150] Tr. at 418, 425, 1340. Dr. Faulkner asked Complainant for her medical records, including any previous counseling, recommendations or treatment for mental health issues. Tr. at 1331. Complainant told Dr. Faulkner that there were no medical conditions of note, no history of substance abuse or mental health issues and no pending referrals by any physician or healthcare providers. Tr. at 1331. Following his meeting with Complainant, Dr. Faulkner emailed Mr. Puckett and one of Respondent's lawyers regarding his meeting with Complainant. Tr. at 1335-36; RX 56.

Dr. Faulkner also told her that he would call her the following day, which he did. Tr. at 425-26, 1326, 1386. Prior to calling Complainant on April 28, 2016, Dr. Faulkner had emailed Dr. Altman informing him that he would like to refer Complainant to him for evaluation. RX 57; Tr. at 1341-42, 1443-44. Dr. Faulkner had worked with Dr. Altman on about half a dozen prior occasions with airmen. Tr. at 1338.

During a call that occurred the following day, Dr. Faulkner told Complainant that he was going to send her to speak with Dr. Altman.[151] Tr. at 426. Mr. Petitt, who was listening to the conversation via speaker phone,[152] overheard the telephone conversation between Complainant and Dr. Faulkner. Dr. Faulkner conveyed a belief that it was all a misunderstanding, but he could not stop the flow of events and, therefore, Complainant was going to have to see Dr. Altman.[153]

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[149] Complainant explained that this was an ill-faded attempt at humor:

> I was trying to lighten it a little bit, but I told him that pilots don't work for free and I put a lot of effort into this, and that I was fighting for my sanity and I didn't want anyone to think I was crazy to do this much work for free. But he would not open the envelope. I said: 'No, just please open it.' 'No, I can't open it, then I would have knowledge.'

Tr. at 420; *see also id.* at 423-24. She testified that it was not a bill, but was instead a thank you note. *Id.* at 421.

[150] Complainant did contact Dr. Riccitello who told Complainant to just go through the process. Dr. Faulkner also told Dr. Altman and the psychologist administering the Complainant's neuro-psychologic testing results to send the results to Dr. Riccitello as Dr. Faulkner believed that he was her aeromedical advisor. Tr. at 1357; JX I. She also called him after her first meeting with Dr. Altman because she found odd Dr. Altman's questions (Tr. at 426-27), and occasionally thereafter because the evaluation was taking so long. In November 2016 she did receive a message from Dr. Riccitello saying that he understood she had bipolar disorder, but she had still not heard anything from the company.

[151] Dr. Faulkner testified that he alone was responsible for selecting Dr. Altman as the CME and no one influenced that decision. Tr. at 1339. As discussed, *infra*, the record belies that statement as Mr. Puckett suggested Dr. Altman's services to Dr. Faulkner. Tr. at 1309-11, 1390-91, 1393

[152] Tr. at 426.

[153] Mr. Petitt testified that Dr. Faulkner referred to Dr. Altman as his good friend, which perked Mr. Petitt's interest. Tr. at 38, 41.

Dr. Faulkner expressed concerns about his own professional welfare in that if he were to stop the process now and something happened down the road, he would be responsible for it. Tr. at 37-38, 40; *see* Tr. at 1328-29.

On May 4, 2016, Dr. Faulkner wrote a letter to Dr. Altman appointing him as the CME in this case. JX H, CX 35; Tr. at 1342. Thereafter, Dr. Faulkner notified Complainant on May 4, 2016 that she would be required to be subjected to neuro-psychological testing on May 10, 2016. Tr. at 429, CX 36. Dr. Altman had requested that Complainant have this testing performed. Tr. at 1344. Complainant's neuro-psychological testing lasted one day.[154] Tr. at 432. Complainant requested a delay in the testing to prepare, but Dr. Faulkner "received word" from Mr. Puckett not to change the appointment.[155] Tr. at 1445-46; *see id.* at 1352; JX I, CX 55. In response, Dr. Faulkner later emailed Complainant stating that one cannot prepare for such testing and denied her request.[156] CX 55; Tr. at 429-30, 1350-51. Complainant later learned that his response was not accurate. Tr. at 430-31. Complainant passed the neuro-psychological testing. Tr. at 1350.

In gathering the information for the Section 15 evaluation Dr. Faulkner did not interview Complainant's normal Airman Medical Examiner, gather her medical records, contact Embry-Riddle concerning her grades, or contact anyone in her family, or anyone that she had worked with. Tr. at 487-88.

7. Events Surrounding Dr. Altman's Evaluation

Subsequent to the March 17, 2016 conference call, Dr. Altman received an email from Dr. Faulkner advising him that he would be appointed as Respondent's Company Medical Examiner ("CME").[157] Tr. at 567; RX 57. However, even prior to his appointment, Dr. Faulkner was emailing Dr. Altman about Respondent's arrangements to schedule Complainant for psychological testing. Dr. Altman thereafter received a letter from Dr. Faulkner, dated May 4, 2016, outlining his task and commenting that the neuro-psychological testing was scheduled per Dr. Altman's request. Tr. at 568; JX H, CX 35. The letter reflects Dr. Altman's request that the evaluation include neuro-psychological testing. JX H, para. 3.

As part of his evaluation, Dr. Altman requested and received from Mr. Puckett, Dr. Faulkner and Captain Davis certain documents and information and documents concerning

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[154] Complainant testified that when she disclosed the duration of Dr. Altman's testing neurological testing to one of the Mayo Clinic's psychiatrists, they expressed surprise. Tr. at 438.

[155] Dr. Faulkner believed that he also talked about this request from Complainant with Captain Miller -- but could not be certain. Tr. at 1447-48.

[156] There is some testimony and CX 55 itself suggests that Respondent opposed delaying the testing. Tr. at 435; CX 55.

[157] However, Complainant believes that Mr. Puckett actually selected Dr. Altman for the evaluation. Tr. at 958-63.

Complainant. Tr. at 571–72. Dr. Altman made numerous requests for information with these individuals.[158] Dr. Altman described his rationale for seeking these documents:

> [T]he question is, does the person have a medically disqualifying condition? So, does the -- then the question will be, would there be other examples, beyond that Kelley Nabors' report? Basically, looking at Kelley Nabors' report, there were -- in my opinion -- significant symptoms which would lead to, potentially, to a medically disqualifying condition diagnosis. Now, in order to see whether that is actually true, I wanted to have more background regarding her and what she had written, and so on. In my opinion, the best data is the interview. The second best are contemporary notes that people have taken at the time, which is Kelley Nabors is an example of that. But there would also be notes by Dr. Faulkner. And the third is material which the individual has written, e-mails, those reports and so on, because that also reflects their thinking and their behavior.
>
> So, those were the major things I was seeking. And I kept -- then -- based on items which was in each one of these documents, I wanted to be sure as possible whether or not that actually did imply a medically disqualifying issue or not.

Tr. at 572.[159]

In Mr. Puckett's view, they knew that Dr. Altman was going to have lots of questions, and he did. Mr. Puckett viewed Dr. Altman as a very detailed and thorough individual; he believed it would just be easier to sit down face to face with him to address his questions. Tr. at 1775-76. Therefore, Mr. Puckett and Captain Davis agreed to fly to Chicago to address his questions in person. Tr. at 1777.

On May 24, 2016, Mr. Puckett emailed Dr. Altman about their upcoming in-person meeting between him, Dr. Altman and Captain Davis in Chicago. CX 97; *see also* CX 99. The meeting was to give Dr. Altman background information on Complainant. Dr. Altman's focus at this point was the concerns relayed to him by Respondent about Complainant having a memory issue. Tr. at 626. Mr. Puckett and Captain Davis volunteered to travel to Chicago, explaining that the matter was so complicated that they needed to meet in person. Tr. at 624-25, 662. Prior to their meeting, it was either Mr. Puckett or Captain Davis who sent Dr. Altman a binder of information concerning Complainant. Tr. at 652. CX 98 contains a list of items Respondent placed into a binder and sent

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[158] Tr. at 622; *see, e.g.*, CX 11, CX 12, CX 14, , CX 21, CX 25, CX 27, CX 57, CX 59, CX 63, CX 64, CX 65, CX 67- CX 79, CX 81-CX 86, CX 88, CX 89, CX 101 – CX 115, CX 121, RX 73, RX 76, RX 77, RX 78, CX 79, RX 80, RX 81, RX 82, RX 84, RX 85, RX 86, RX 88, RX 89, RX 90, RX 91, RX 94, RX 95, RX 97, RX 98, RX 100, RX 107; Tr. at 2085-2113.

[159] Dr. Altman later reiterated that, in his view, he considered three categories of information provided the most accurate data: "if you're going to make a diagnosis about a person, based on what the person tells you, what the person wrote, and what other people did, contemporaneous notes on what happened, that that's the best data." Tr. at 701-02. So the most important data was his interview with Complainant. The second was what she wrote and the third is what people wrote contemporaneous to the events. Tr. at 702.

to Dr. Altman;[160] it was Dr. Altman's understanding prior to this meeting that the documents concerned the alleged memory issues. Tr. at 628, 651. The meeting with Mr. Puckett and Captain Davis occurred the Tuesday after Memorial Day (June 2, 2016) and lasted all day; they reviewed each tab with Dr. Altman. Tr. at 652-53, 741, 1778-79. During this meeting Dr. Altman asked, among other topics, about an explanation of Respondent's SMS protocol. Tr. at 1798, 2021. However, after his meeting with Mr. Puckett and Captain Davis, Dr. Altman recalled that the "the whole memory thing just changes," meaning that Respondent was less concerned with Complainant "not remembering" being counseled about HR matters. Tr. at 626-27. Thereafter he received documents from Respondent both that he had requested and those Respondent just provided.[161] Tr. at 629-30; *see id.* at 2022. However, he never met with Ms. Nabors. Tr. at 662. Nor did he recall whether Ms. Nabors was even on the telephone conference call in March where he recommended a psychiatric evaluation and neuro-psychological testing. Tr. at 665.

After Respondent appointed him as the CME, Dr. Altman requested a variety of documents from Respondent. Rather than having Dr. Faulkner act as the intermediary, Respondent decided to have Mr. Puckett reach out to Dr. Altman to help facilitate his review. Tr. at 1770. Mr. Puckett did not provide Dr. Altman with any of Complainant's medical records. Tr. at 1773-74. Mr. Puckett assembled documents and provided them to Dr. Altman. CX 98 includes the table of

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[160] The table of contents identified the following documents in each Tab:

A. Correspondence and dealings with the SEA Chief Pilot Office (2011-2012)
B. Verbal counseling re: her blog and documentation re: the 2011 Letter of Counsel
C. Selling her book in uniform
D. 2015 harassment claims
E. Correspondence re: setting up a meeting with Captain Jim Graham and Captain Steve Dickson in ATL
F. Document [Complainant] provided to Captains Graham and Dickson containing safety and EO allegations
G. Communications from [Complainant] directly to [Respondent] CEOs Richard Anderson and Ed Bastian
H. Interview notes from EO investigator Kelly Nabors
I. Correspondence between Captain Graham and [Complainant] re: her meeting with Delta safety leaders to voice her safety concerns
J. Section 15 letter
K. Notes from Captain Graham re: conversation with [Complainant] after she made her safety presentation
L. Correspondence between Captain Graham and [Complainant] after her safety presentation
M. "Safety Culture" paper/speaking notes from safety presentation. Slides contained in [Complainant's] safety presentation (sent electronically)
N. Blog post on picking up First Officer on 777. LinkedIn posts advertising books and identifying self as [a Respondent] pilot

[161] For example, Respondent provided on its own initiative information about Complainant's correspondence to Respondent's CEOs Mr. Anderson and Mr. Bastian, union related activities and her alleged participation in a job action. Tr. at 629, 631. Both Respondent and Complainant informed him of Complainant's participation in her AIR 21 action. Tr. at 632.

contents of those documents.[162] On May 31, 2016, Mr. Puckett emailed Dr. Altman additional documents by Complainant addressing safety culture. Tr. at 640-41; CX 25, JX K.

Dr. Altman was aware that Complainant had spent 21 years training pilots to fly Boeing aircraft and developing training programs, had worked for a multitude of airlines, was type rated in a variety of aircraft and was pursuing her doctorate in Aviation Safety at Embry-Riddle. Tr. at 642-43. Dr. Altman focused on whether Complainant had symptoms of grandiosity, like being prone to exaggeration. Tr. at 643-44. In Dr. Altman's report (JX L) he referenced Complainant's Ethnographic Study (JX K) to support his conclusion of grandiosity[163] because he believed Complainant inflated the extent of her expertise. Tr. at 647-48.

Complainant met with Dr. Altman on three occasions: July 6, July 16 and September 14, 2016.[164] Tr. at 428, 571. The first interview lasted six hours, non-stop. During this interview, Dr. Altman asked questions about Complainant's past. Tr. at 426-27; 580. On the second visit, Dr. Altman primarily focused on the safety related documents that Complainant authored. Tr. at 489;

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[162] CX 98 is a May 30, 2016 email.

[163] As support for his conclusion, in his report (JX L) Dr. Altman wrote:

> On 4/27/16, she made a speech at Delta Headquarters and presented a document entitled: "Safety Culture." On page 4 she wrote:
>
> > Subject Matter Expert
> > Petitt is an employee who has a unique combination of extensive experience in operating aircraft, pilot training, authoring training programs and manuals, managing processes and creating FAA approved publications.
>
> This data would not support the position that F/O Petitt has extensive experience in operating aircraft.

JX L at 29. In JX L at 354 Dr. Altman wrote:

> During the period of 2010 to 2016, First Officer Petitt presented herself as an authority and/or expert in the following areas:
> - Safety
> - Being a CEO of Delta
> - Training
> - Marketing
> - Psychological and Psychiatric Assessment
>
> I would conclude that these beliefs are consistent with an expansive mood and grandiosity, the idea that you could be everything.

Tr. at 644-46.

[164] Transcripts of these interviews are supposed to be contained in CX 150, CX 151 and CX 152 respectively. However, the transcripts contained in CX 151 and CX 152 are identical so the record does not have a copy of the transcript for one of Dr. Altman's interviews with Complainant.

580. During the third visit, Complainant testified that they discussed drug and alcohol abuse and Complainant's political and religious views. Tr. at 490. Dr. Altman said this interview was to go over specific symptoms. Tr. at 580.

As part of his evaluation, Dr. Altman did not contact Dr. Greenblatt, Complainant's long time Airman Medical Examiner[165] for her First Class medical certificate.[166] Tr. at 487. Had he inquired, Dr. Greenblatt would have told him that Complainant had no evidence of any mental or physical health disorders. CX 128. Dr. Faulkner also did not contact Dr. Greenblatt. Tr. at 487. Dr. Altman never interviewed Ms. Nabors, the author of the report upon which he relied so heavily. Tr. at 592. Nor did he ever give Complainant a copy of Ms. Nabors' report during his interviews to give her an opportunity to explain her version of events during their meeting. Tr. at 593-94.

As a basis for his diagnosis of mania, he referenced Complainant's March 5, 2016 email interaction with Respondent's CEO, Mr. Bastian. Specifically, he found that Complainant addressing Mr. Bastian as "Ed" exhibited undue familiarity, which is associated with mania. JX L at 231; Tr. at 658. However, he never asked Complainant why she used his first name in the correspondence. Tr. at 659. Dr. Altman admitted that he assumed the use of first names with the CEO was limited to upper management. Tr. at 659.

Dr. Altman addressed the handing of a note by Complainant to Captain Graham following her presentation concerning her Ethnographic Study (JX K); he thought it was also indicative of mania. *See* JX L at 212. When Complainant attempted to hand the note to Captain Graham she commented (in jest) that it was a bill for $39,000. Tr. at 675-76, 718. Based upon this comment, Captain Graham refused to accept the envelope. Tr. at 719; JX L at 212. Complainant testified that the envelope actually contained a thank you note. Tr. at 417; *see* Tr. at 721; JX L at 213. Dr. Altman talked to Dr. Faulkner about this incident and it was his impression that Complainant changed her story as to whether the envelope contained a bill or a thank you note. Tr. at 674, 720; JX L at 213. Dr. Altman never talked to Captain Graham about this incident. Tr. at 675.

According to Dr. Altman, his opinion about Complainant's mania had little to do with the content of Complainant's communication about safety subjects; it was the form of the communication and her behavior that he focused upon. Tr. at 704-05. Dr. Altman discussed two incidents, although not enough individually to make a diagnosis, as prominent examples supporting his diagnosis. Tr. at 711. He first cited to Complainant's application to be the Seattle assistant chief pilot. When he asked Complainant if she could have worked with the people there given her negative feelings about them, she replied, "[s]eriously, I could be the CEO of the airline" and mentioned she could be the head of training and that she could do anything at the airline. That sounded grandiose to Dr. Altman. Tr. at 712.

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[165] Dr. Greenblatt is the Airman Medical Examiner that Complainant had consistently used when being evaluated for issuance of an airman's First Class Medical certificate. Tr. at 529-30.

[166] An Airman First Class Medical examination includes a mental evaluation component. 14 C.F.R. § 67.107.

The second major example was her elevated energy and her ability to engage in activities "which are well beyond normal." Tr. at 713. Dr. Altman commented that Complainant and her husband at one point had three children under three while Complainant attended night school earning a 3.7 GPA, and she worked at her husband's business. Dr. Altman then said "I don't know any woman who could do that. I don't know any woman with three under three that isn't exhausted, let alone going to school." Tr. at 713. Dr. Altman opined "that's well beyond what any woman I've ever met could do." Tr. at 713. When the Tribunal asked if Complainant could be just gifted or if Dr. Altman knew the Complainant's IQ, he opined that he did not know if IQ mattered and that three under three is exhausting and "if you can show me a large cohort of women – or ever talk to a woman who was able to do that and not be wiped out – then we have different cultural experiences." Tr. at 714.

Dr. Altman agreed that the phrase "I have a target on my back" could be mis-interpreted. Tr. at 738.

The only person Dr. Altman interviewed for his report was Complainant. Tr. at 740. Dr. Altman never contacted Mr. Petitt as part of his evaluation. Tr. at 38. Nor does his report make reference to the numerous letters of support submitted to him on Complainant's behalf.[167] CX 130, CX 133, CX 137, CX 154.

On or about October 26, 2016, Mr. Puckett and Dr. Altman exchanged emails (CX 112) which was followed up by a teleconference between himself, Mr. Puckett and Captain Davis.[168] Tr. at 1953-54. During this teleconference, Dr. Altman told Mr. Puckett and Captain Davis that he had made a determination that Complainant was medically unfit as he had diagnosed

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[167] On June 13, 2017, Dr. Altman emailed Mr. Puckett and Dr. Faulkner a portion of a chapter "from the book [Complainant] considers to be authoritative." RX 119. But then he went on to say that the author of this chapter "is the most experienced psychologist in evaluation pilots. Note the last paragraph on page 71." RX 119 at 1. The last paragraph on page 71 of that chapter provides:

> To overcome the minimization of symptoms that underlie the referral, the mental health practitioner needs to rely upon collateral sources of information. In addition to a review of the records provided by the FAA, employer, or other medical practitioners, it is advisable to work with the commercial pilot's airline flight department, the employer's human resources and/or EAP, the pilot's AME, treatment providers, spouse, and/or significant others who may have information which is critical for an understanding of the referred pilot's conditions.

RX 119 at 8-9. While Dr. Altman certainly worked with Respondent's flight department and HR department, the record demonstrates a noticeable absence of Dr. Altman's reaching out to Complainant's AME, spouse, or others that regularly interacted with her. In fact, Dr. Altman failed to even reference the letters of support he received from friends of Complainant.

[168] Mr. Puckett recalled that this telephone conference occurred on October 31, 2016. Tr. at 1796-97.

Complainant with bipolar disorder. Tr. at 1954; *see id.* at 1796-97. Dr. Faulkner was not present on that call.[169] Tr. at 1954.

JX L is Dr. Altman's initial medical report and diagnosis. Tr. at 223, 586. However, Dr. Altman testified that his evaluation and report was not finalized until approximately December 2016. Tr. at 586-87, 1976. Dr. Altman explained the methodology of his report[170] and opined that Complainant was medically disqualified because of a diagnosis of a bipolar disorder. Tr. at 603. Respondent paid Dr. Altman $73,000 for his report.[171] Tr. at 529, 950.

On December 7, 2016, Dr. Altman forwarded to Dr. Faulkner his medical report concluding that Complainant was unfit for duty. Tr. at 1358; CX 39. Dr. Faulkner did not thereafter make an independent determination, but deferred to Dr. Altman's opinion. Tr. at 1358. At that point Dr. Faulkner did not contact the FAA to report these findings. Tr. at 1360. According to Dr. Faulkner, "the FAA is not involved until we go through the complete Section 15 evaluation process." Tr. at 1360-61.

On Christmas Eve 2016, Complainant received Dr. Altman's letter, dated December 21, 2016, notifying Complainant of the results of his evaluation and that Complainant could no longer fly for Respondent.[172] CX 43 at 3; *see* CX 44 at 4, Tr. at 38. However, this packet did not include the actual report. Tr. at 440. Complainant believed that Respondent had received the report in October, but she did not receive official notice of the results until Christmas Eve. Tr. at 440. Complainant had to go to the AMS group[173] itself to get a copy. Given the holidays and a granddaughter's birthday, Complainant testified that she did not actually open and review the report until mid-January 2017. Tr. at 441. It took Complainant about two weeks to review the report because reading it was so distressful. Tr. at 441. Because of the CME decision, Complainant was placed in a sick leave status and, to continue to get paid, Complainant was required to use her sick leave allowance. Tr. at 1824. Once her sick leave was exhausted she had to transition to disability pay, which amounted to 50% of her normal earnings. Tr. at 1824; *see* RX 116 at 3.

8. Referral to the Mayo Clinic for a PME

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[169] According to Dr. Faulkner, he did not learn of Dr. Altman's diagnosis until December 2016. Tr. at 1454-55.

[170] Tr. at 587-602.

[171] Dr. Faulkner believed the fee was $60,000. Tr. at 1378. It was actually in excess of $73,000. Tr. at 1458; *see* CX 45 (Dr. Altman's initial bill was $60,263.45) and CX 50 (an invoice for an additional $13,660.00).

[172] A diagnosis of bipolar disorder is a medically disqualifying condition which precludes a pilot from holding or being issuance any airman certificate absent a Special Issuance. *See* 14 C.F.R. §§ 67.107, 67.207, 67.307 and 67.401; GUIDE FOR AVIATION MEDICAL EXAMINERS (2017).

[173] According to Dr. Faulkner, AMAS is the Air Medical Advisory Services, which is an assembly of physicians used by ALPA who are trained as AMEs, and advise the union about this process. Tr. at 1294, 1298.

In response to Dr. Altman's findings, Complainant selected the Mayo Clinic to serve as her Pilot Medical Examiner ("PME").[174] Dr. Altman forwarded his report to the Mayo Clinic sometime after Complainant permitted him to do so on January 3, 2017. CX 44. Her PME consisted of nine medical doctors from the Mayo Clinic's Aviation Medical Department. Tr. at 434; JX M at 3-4. Complainant was interviewed by four doctors in mid-February,[175] and the remaining doctors reviewed the materials in her case, including Dr. Altman's report. Tr. at 437-40, 493, 942. The Mayo Clinic panel of doctors consisted of a HIMS[176] Aviation Medical Examiner, a HIMS psychologist, two psychiatrists—one with a subspecialty in mood-disorders—and occupational medicine specialists. Complainant was subjected to more testing, including the Minnesota Multiphasic Personality Inventory ("MMPI") (CX 172). Tr. at 952. They also spoke to members of Complainant's family.[177] Tr. at 943. On February 16, 2017, the Mayo Clinic produced a report, and provided it to Dr. Faulkner on February 22, 2017. It was the unanimous opinion of the panel that Complainant:

- Did not have bipolar disorder;
- Did not have and has never had any other psychiatric disorder;
- Did not have a personality disorder; and
- Should be granted a First Class Airman Medical Certificate.

CX 15; *see* JX M at 1; CX 53. The Mayo Clinic charged Complainant $3,300 for the report. Tr. at 529.

On February 19, 2017, three days after release of the Mayo Clinic Report, Mr. Puckett emailed Dr. Altman about a blog post Complainant had just made about a fatal Air France accident. CX 110; Tr. at 1955-56.

After issuance of both Dr. Altman's report and the Mayo Clinic's report, Mr. Puckett continued to be involved in completing the Section 15 process. Tr. at 1783. Mr. Puckett recalled Dr. Altman having difficulty getting someone from the Mayo Clinic to work with him on procuring the NME. Tr. at 1784-85.

Dr. Altman and the Mayo Clinic doctors (Steinkraus and Altchuler) had difficulty agreeing on an NME provider. On February 28, 2017, the Mayo Clinic doctors had reached out to Dr. Altman to see if they could find another psychiatrist which they could agree upon to serve as the NME. They offered to Dr. Altman the names of three psychiatrists. Dr. Steinkraus emailed Dr. Altman again on March 2, 2017, asking him to contact him about a third evaluation needed "per

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[174] Complainant initially contacted Dr. Gitlow, a forensic psychiatrist, to serve as her PME. However, after talking to him at length and providing him with a copy of Dr. Altman's report, Dr. Gitlow sent Complainant an email asked her to call him, which she did. During that telephone call Dr. Gitlow said that he was sorry but he had a conflict of interest and could not serve as her PME. Tr. at 490-94.

[175] Complainant testified that one of the Mayo Clinic doctors was a bipolar disorder-specialist. Complainant was also subjected to blood analysis and additional neuro-psychological testing. Tr. at 981.

[176] Human Intervention Motivation Study. *See* GUIDE FOR AVIATION MEDICAL EXAMINERS (2017).

[177] However, they did not interview Ms. Nabors, Captain Graham or Dr. Altman. Tr. at 942-43.

ALPA and [Respondent]." CX 47, CX 48 at 2. On March 3, 2017, Dr. Altman forwarded the February 28, 2017 letter from the Mayo Clinic to Dr. Faulkner. CX 49. As of March 9, 2017,[178] Dr. Altman had not responded to their inquiry so the Mayo Clinic notified Complainant of such. CX 144. On March 16, 2017, Drs. Steinkraus and Altman spoke. Following their conversation, Dr. Steinkraus sent Dr. Altman an email and proposed three additional doctors to conduct the NME. CX 48 at 1. On March 28, 2017, the Mayo Clinic doctors wrote to Complainant updating her on the status of selecting the NME. The Mayo Clinic doctors disagreed with Dr. Altman's proposed NMEs and offered three other psychiatrists, knowledgeable about aerospace medicine. CX 143, CX 162. They also noted that the HIMS program was created to treat airmen with substance use disorders, which was not the case with Complainant. On May 20, 2017, Mr. Puckett sent Dr. Altman a draft email for Dr. Altman to in-turn send to Drs. Altchuler and Steinkraus. The email insinuated that the Mayo Clinic was not cooperating in the selection of the NME. CX 113. On May 19, 2017, Captain Graham sent Complainant a letter with subject line: "Notice of Failure to Participate in Section 15 Process." CX 24, RX 118. Captain Graham concluded the letter with the following statement: "If you fail to direct the PME to participate in good faith in the Section 15 process within the next thirty (30) days, [Respondent] will assume that you have abandoned the exclusive procedure available to you under Section 15.B.8.d. and the determination of the CME becomes final." RX 118.

On June 7, 2017, Dr. Altman sent Drs. Steinkraus and Altchuler an email instructing them to begin the process of selecting an NME provider. CX 115 at 2. The parties continued to exchange emails from June 7 to June 13, 2017 attempting to schedule a telephone call. CX 115. On June 13, 2017, one of Respondent's counsel and Mr. Puckett prepared a draft letter for Dr. Altman to send to the Mayo Clinic doctors which indicated that he had selected two doctors for the NME. The letter acknowledged that Drs. Steinkraus and Altchuler had suggested three other doctors, but none of the proposed doctors possessed the qualifications Respondent sought in an NME. CX 116. Dr. Altman wanted a doctor who was both a HIMS psychiatrist and forensically trained.

On June 20, 2017, Dr. Steinkraus contacted Dr. Huff about the possibility of providing a third psychiatric opinion for an unnamed Respondent-pilot. JX N. On June 21, 2017, Dr. Altman drafted a letter to Dr. Steinkraus, but first sent it to Mr. Puckett. In this draft letter, Dr. Altman mentioned that Dr. Steinkraus had proposed Dr. Huff as a possible NME. He noted that Dr. Huff possessed the qualifications Dr. Steinkraus previously said were not needed. And then he commented, "[t]his appears to be another example of a pattern which reoccurs in [Complainant's] case. Information is stated as an absolute, and then a short time later her position has completely changed. It is as if the initial information never happened. My question would be: Did [Complainant] personally interviewed [sic] Dr. Huff?" CX 117 at 2. On June 26, 2016, Dr. Altman sent an email to Mr. Puckett and Dr. Faulkner informing them that he had scheduled a telephonic meeting with Dr. Steinkraus for July 3, 2017. He also wrote: "Regarding additional candidates for NME both Drs. Shugarman and Huff would be excellent." CX 119. On the morning of July 3, 2017, Mr. Puckett sent an email to Dr. Altman providing him with a list of three additional doctors to consider as an NME. His guidance to Dr. Altman follows: "Going into your call, the only point

[178] The area where the date of this letter to Complainant is very dark, but the date is readable.

I would emphasize is that ultimately picking an NME is your call and if you feel uncomfortable with the choices then you should not feel any pressure to pick anyone you do not believe will act as a true neutral (i.e., the exact opposite of Dr. Steinkraus)." CX 120.

After addressing some differences, Dr. Altman and Dr. Altchuler agreed to use Dr. Huff as the NME. Tr. at 1374. On July 27, 2017, Dr. Faulkner sent an email to Dr. Huff introducing himself as Respondent's point of contact for Complainant's NME evaluation. CX 56; Tr. at 1375.

9. Respondent's Disclosure of Dr. Altman's CME Report to the FAA

Complainant obtained a first class medical certificate on February 22, 2017, the same day that the Mayo Clinic issued its findings.[179] CX 156; *see* CX 135. Shortly thereafter,[180] Dr. Faulkner learned that Complainant had obtained a First Class Medical[181] (CX 156) when Complainant emailed him a copy of it. Tr. at 1362; *see id.* at 1714-15. Prior to Complainant's case, neither Mr. Puckett nor Dr. Faulkner could recall a situation where, after being referred to a Section 15 evaluation for mental health reasons, Respondent had ever returned a pilot to flying status. Tr. at 1914, 1301–03. At this point, Dr. Faulkner had Dr. Altman's December 2016 diagnosis of bipolar disorder (JX L), and the competing finding of no psychiatric disorder in February 2017 by the Mayo Clinic panel (CX 15). Yet, Complainant had not finished the Section 15 process; specifically no decision had been reached by the NME. Tr. at 1364. Dr. Faulkner said he was shocked because there was conflicting information and the FAA had issued a medical certificate; he did not believe that the FAA knew of Dr. Altman's diagnosis. Tr. at 1361, 1364-65. Dr. Faulkner consulted with Mr. Puckett about this and Mr. Puckett told him that he was free to communicate the CME's determination to the FAA.[182] Tr. at 1915. Therefore, he contacted one of the FAA's regional flight surgeons, expressing concerns that Respondent had information about a permanently disqualifying condition. Tr. at 1368. Of note, neither Dr. Faulkner nor anyone else for Respondent initially contacted the FAA to report Dr. Altman's diagnosis of a medically disqualifying condition. Tr. at 1787. It was only after Dr. Altman's finding was in jeopardy that Respondent reported this matter to the FAA. Mr. Puckett explained, in Respondent's view, it was under no obligation to report Complainant's condition "until we went all the way through the process." Tr. at 1716-17. Once

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[179] During the entirety of the Section 15 process, Complainant never was without a First Class Medical Certificate. Tr. at 429. Prior to February 2017, the record shows Complainant's application for her August 2016 First Class medical certificate. CX 51. And as she was required to do, Complainant disclosed on her application for her first class medical certificate the identities of the mental health doctors she met with during this process. CX 52 at 6.

[180] Dr. Faulkner testified that he learned about Complainant's First Class Medical Certificate sometime in the summer, possibly in August (Tr. at 1361), but CX 156 clearly establishes that he knew of this by May 2017.

[181] On her First Class Medical Certificate applications, Complainant did disclose "Labor Relations Safety Report AIR-21 medical". Complainant did identify Dr. Altman specifically, but not his report. CX 170; Tr. at 1369-74.

[182] Mr. Puckett provided this advice to Dr. Faulkner, notwithstanding the fact that the pilot's union, in a different pilot's Section 15 mental health evaluation, wrote to Mr. Puckett directly and objected to Dr. Altman disclosure of his findings to the FAA prior to the completion of the Section 15 process. CX 92; *see also* CX 94.

reported, the FAA wanted more information, which Dr. Faulkner provided to him. Tr. at 1368. At the FAA's request, on April 24, 2017, Complainant provided Dr. Wyrick the requested records. CX 52 at 8.

On March 3, 2017, Dr. Wyrick, the FAA Regional Flight Surgeon, sent Complainant a letter informing her that, upon review of her medical records "concerning possible psychiatric or behavioral issues," he determined that she was eligible for a first-class medical certificate. CX 135. However, on April 14, 2017, the FAA's Northwest Regions Regional Flight Surgeon Dr. Wyrick sent a letter to Complainant notifying her that it had reviewed the Mayo Clinic psychiatric evaluation and requested additional information from her. CX 52. In this letter, Dr. Wyick requested Dr. Altman's complete evaluation and for permission for FAA physicians to speak to Dr. Altman directly. This prompted Complainant to write to Dr. Wyrick inquiring as to what had transpired since his March 3, 2017 letter that had closed the matter. CX 52 at 8. On May 6, 2017, Complainant discovered that Dr. Faulkner had discussed Dr. Altman's findings with the FAA, and notified it of the existence of the initial-CME's medical report.[183] RX 122 at 2-3. The FAA thereafter requested a copy of that report.

Following receipt of this report, Respondent sent Complainant's medical packet to the FAA, and that, according to Complainant, violated the CBA. Tr. at 952. According to Complainant, the FAA Medical Appeals Board reviewed the material and found she was not bipolar. Yet, Respondent still would not return her to flight duty. Tr. at 952. On August 21, 2017, after reviewing Complainant's medical records regarding her recent mental health evaluation, the FAA's Northwest Regional Flight Surgeon sent Complainant a letter informing her that he had determined that she was eligible for a first-class medical certificate. CX 153, CX 179. The Federal Air Surgeon sent a similar letter to Complainant the following day. CX 155, CX 180.

10. Events Surrounding the Neutral Medical Examiner and Beyond

Following the Mayo Clinic's findings, per the union contract, the parties negotiated to select a Neutral Medical Examiner ("NME"). The parties agreed to use Dr. Huff. Tr. at 531, 945. On July 27, 2017, Dr. Faulkner reached out to Dr. Huff to explain his role in the process in an email reviewed by Mr. Puckett prior to Dr. Faulkner sending it. Tr. at 1461. The email indicates that Dr. Huff should have access to any information he wants for his evaluation, and to discuss the cost of his evaluation. CX 54, CX 56; Tr. at 1376-78. Dr. Huff interviewed Complainant twice for a few hours each time. Tr. at 945. According to Complainant, Dr. Huff initially cleared her to fly on August 5, 2017. *See* CX 192. However, Dr. Faulkner asked for further evaluation, which Dr. Huff did, and he again cleared Complainant on September 2, 2017.[184] Tr. at 531; JX N. His fee for his first evaluation was $2,500 and for the second evaluation was just over $4,900. Tr. at 529, 946; CX 149 at 7. Complainant paid for this evaluation, but Respondent ultimately

[183] There are indications that, by May 5, 2017, Dr. Steinkraus was aware that the FAA was involved in Complainant's medical status. *See* CX 131, para. 2.

[184] Dr. Faulkner recalled receiving Dr. Huff's report but did not recall asking for a second report. Tr. at 1379, 1381.

reimbursed her for the cost.[185] Tr. at 946-47. Following receipt of Dr. Huff's evaluation (JX N, CX 16), on or about September 25, 2017, Respondent reinstated Complainant to flight status. Tr. at 532. Instead of being returned to fly the A330, Respondent opted to switch her to the Boeing 777. Tr. at 488-89. This would require additional flight training. Although initially scheduled for this training in October, for personal and medical reasons, her scheduled training on the Boeing 777 was delayed until January 2018. Tr. at 533-35. Respondent provided Complainant with a letter in September 2017—after returning her to service—saying it appreciated the recommendations offered in her safety report. RX 126; Tr. at 1022-24.

Since Complainant has returned to flying, she has had to explain her case to fellow pilots.[186] Tr. at 520. For example, when she ran for ALPA Master Executive Council (MEC) chair position, her Section 15 referral was brought up as an issue. Tr. at 521.[187] Complainant also maintained that Respondent has not made her whole with respect to pay and benefits. Although Respondent did reimburse her average line value, her period of suspension denied her the opportunity to get green slip pay, and the extent of her profit sharing was reduced. Tr. at 535-36. Further while in company administrative status during that time period, Respondent required her to use all of her sick leave and accumulated vacation days. Complainant testified that this amounted to about $52,000. Tr. at 537. Complainant also incurred over $14,000 in personal expenses related to this litigation. Tr. at 538-39. Complainant lost her business relationship with a company that works with airlines that trains and speaks about Safety Management Systems. Tr. at 539-41; CX 136. Complainant alleges that this matter has damaged her opportunities for work within Respondent and believes that she will never be given a management position. Complainant said "[t]here is no way to even explain what the stress is to go through this…."[188] Tr. at 542.

Complainant additionally asked as compensation the pay difference between her salary and Captain Dickson's. Tr. at 972.

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[185] Complainant testified that when it came to paying for the NME, Dr. Faulkner informed Dr. Huff that it would be a shared expense. Tr. at 953. This concerned Dr. Huff such that he had Complainant sign a release that she was in no way buying a medical opinion. Tr. at 954.

[186] Complainant believes that Respondent's actions were intentional and premeditated, and "they gave me something that would destroy my career forever." Tr. at 972-73.

[187] Complainant described this position as akin to the local leader for Respondent's pilots to ALPA which is a larger international organization. Tr. at 523. *See generally* https://www.alpa.org/dal.

[188] She explained:

> There is no way to even explain what the stress is to go through this, unless you go through it, but -- not only to myself, but to my family -- the hours they've taken from me, not knowing if you're going to have a career or not. I had to be able to survive this. I had to convince myself that they very well may get away with it, and I may lose my career forever. But my life wasn't going to be over, it would just be different. And that's what held me through, is I'm just doing it. But the sleepless nights -- I went for 20 years of my career without a sick call and I've had multiple sick calls now. So, it impacts your health

Tr. at 542.

IV. ISSUES[189]

- Does the doctrine of collateral estoppel (*i.e.*, issue preclusion) preclude this Tribunal from rendering a decision in this matter?
- 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 asserted that Respondent engaged in adverse employment actions when it referred and subjected her to a biased and abusive psychiatric evaluation. Complainant noted that the Tribunal has already found that the referral to a Section 15 mental health evaluation was an adverse action. She maintained that the temporal proximity of these actions alone would satisfy the prima facie showing of causation. Complainant averred that, at the hearing, Respondent's "sole purpose" defense[190] quickly evaporated. Complainant pointed to Captain Graham's and Captain Miller's November 9, 2015 emails, raising the prospect of a Section 15 months before Complainant's meeting with Captains Graham and Dickson in late January 2016 or her meeting with Ms. Nabors in March 2016. Respondent argued that Complainant's comportment during these meetings demonstrated its reasoning for its Section 15 referral. Compl. Br. at 3-4.

She continued that Respondent could not establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of her protected activity. Compl Br. at 1-3, 45-50. Complainant observed that the "EO" topics given to Ms. Nabors to inquire about during her interview included falsification of pilot training records, failure to conduct the required oral portion of a Line Oriented Evaluations, using line checks as a form of retaliation, forcing Complainant to fly while fatigued, improper use of a personal computer on an aircraft's flight decks, and the withholding of supplemental training. Compl. Br. at 6. Complainant pointed to the extensive involvement of Mr. Puckett leading up to, during and after the decision to place Complainant in the Section 15 process. Compl. Br. at 11-15. The sheer volume of communications in which he interacted with Dr. Altman demonstrated evidence of a partnership.

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[189] The parties specifically acknowledged at the beginning of the hearing that Respondent and Complainant are covered under the Act, and that Respondent's referral of Complainant to a medical evaluation was an adverse action. Tr. at 8-9. The Tribunal has limited to a large extent its Discussion herein to those issues for it has already ruled that Complainant engaged in protected activity, Respondent had knowledge of that protected activity and Respondent took unfavorable personnel actions against Complainant. The Tribunal is not, however, limited to those prior rulings and, indeed, expands upon them herein.

[190] Prior to the hearing, Respondent maintained that the sole purpose for directing the Section 15 evaluation was due to Complainant's statements to Ms. Nabors on March 8, 2016. *See* (CX 5 – Response to Interrogatory No. 16). The Tribunal's Order Denying Complainant's Motion for Summary Decision at 9 (Feb. 21, 2019) stated "the Tribunal must accept as fact that the sole purpose for directing the Section 15 evaluation was due to [Ms. Petitt's] statements and conduct during her interview with [EO Investigator] Ms. Nabors on March 8, 2016."

Compl. Br. at 43. She argued essentially that Dr. Faulkner's control of the Section 15 process was in title only and that Mr. Puckett was coordinating the process. Compl. Br. at 16-17.

She additionally noted several problems with Dr. Altman's evaluation and report. Compl. Br. at 16-20. Complainant argued that Ms. Nabors' report and its temporal proximity to the Section 15 referral provided direct evidence of causation. Compl. Br. at 24-28. Specifically, Ms. Nabors' negative reporting of the interview derived from Complainant's handling of the safety report (giving it to her mother to edit), and her continued assertion that Respondent's chronic noncompliance with the safety issues presented in her report could result in an air disaster. Compl. Br. at 25. She also claimed that the rationale for the Section 15 referral was withheld from her, that Respondent provided shifting rationales for its adverse action, and that Respondent demonstrated hostility and indifference to her protected activity. Compl Br. at 28-40. Complainant specifically noted that Captain Graham's testimony was incredible. Compl. Br. at 40-42.

As for damages, Complainant averred that she now had a permanent record creating special FAA reporting requirements because of her "history of mental health evaluations. (CX 153)." Compl. Br. at 53. Complainant posited that she will work in apprehension for the remainder of her career because of these events. Compl. Br. at 54. Because of the extent of the claimed harm, Complainant sought $30 million in compensatory damages, as well as an award of attorney's fees, reimbursement for her litigation expenses, and payment for flight pay loss, lost vacation pay, lost profit sharing and 401K contributions, front pay, and removal from "QHCP" status. Compl. Br. at 55-60.

In her reply brief, Complainant maintained that the only issue that remained for adjudication was whether her protected activity contributed to Respondent's adverse actions. She noted that despite Respondent's position during the motion for summary decision, the evidence establishes that Ms. Nabors' interview was not the sole basis for its adverse action. Compl. Reply Br. at 3. Complainant maintained that she engaged in protected activity prior to January 28, 2016. She noted that she needed to prove neither animus nor motive to provide causation as long as the protected activity contributed in any way to the adverse action. Compl. Reply Br. at 5 (citing *Petersen v. Union Pacific Railroad*, ARB No. 13-090, ALJ No. 2011-FRS-17 (Nov. 20, 2014)). She maintained that there was no intervening event that did not involve Respondent's consideration of her protected activity, and that her protected activity contributed to Ms. Nabors' interview and the adverse report she drafted. She reiterated Ms. Nabors' lack of knowledge about flight operations yet she was armed with questions, prepared by Mr. Puckett, about flight safety matters. Complainant asserted that she feared of retaliation. Captain Graham knew or should have known about her reasonable fear of retaliation because he knew that the threats to her career were real. Yet, it was Captain Graham that pressed for the Section 15 option and his own emails and testimony tied the rationale to her protected activity. Complainant asserted that the doctors' input in this process confirmed that her protected activity contributed to the Section 15 referral. Compl. Reply Br. at 9-10. Further, Dr. Altman's evaluation relied, in part, on Complainant's protected activity where he "mined" her safety report and Ethnographic Study for information that contributed to his adverse diagnosis. Compl. Reply Br. at 16-17. Complainant asserted, essentially, that the Section 15 decision was intertwined with her protected activity. In essence,

Respondent partnered with Dr. Altman in the diagnostic process. Complainant reiterated that Respondent failed to satisfy the clear and convincing affirmative defense standard and reasserted that the Railway Labor Act issue had already been decided by the Tribunal and need not be addressed yet again. Compl. Reply Br. at 23. As for damages, Complainant noted that she had been subjected to far more egregious harm because the referral not only impacted her job, but potentially her career, and that substantial compensatory damages are, therefore, warranted. She sought flight pay loss, loss of profit sharing, lost vacation pay, front pay, a sick leave remedy, as well as injunctive relief and attorney's fees.

In Complainant's response to Respondent's supplement brief to apply collateral estoppel,[191] Complainant noted that the same person who subjected her to the psychiatric examination, Captain Graham, rejected her grievance. He essentially sat in judgment of himself. She averred that the process she was subjected to violated the collective bargaining agreement and involved no discovery, no testimony under oath, no right to cross-examine witnesses, and no application of the rules of evidence. Complainant argued that the SBA-decision addressed the propriety of initiating the Section 15 mental health examination and only in dicta characterized Captain Graham's decision as final and binding. Complainant noted that Respondent never pled collateral estoppel as an affirmative defense nor even raised the argument until ten months after the hearing before this Tribunal. Complainant also emphasized that the parties agreed in the arbitration process that they would not address the issues "presented and are still under adjudication" before this Tribunal. Comp. Suppl. Br. at 4 (citing RX 141 at 6-9 and 26) and 6.

B. Summary of Respondent's Position

Respondent agreed that Complainant engaged in protected activity on January 28, 2016, but not prior to that time. It noted Complainant's stipulation that the January 28, 2016 meeting with Graham and Dickson represented protected activity. It asserted that her protected activity was not a contributing factor in Respondent's decision to initiate the Section 15 process; it based the decision on legitimate concerns about her mental state at that time. Resp. Br. at 24-27 ("[Respondent's] decision to initiate a Section 15 referral was based on Nabors' contemporaneous report regarding concerns about Petitt's mental state."). It further claimed that Ms. Nabors' March 8, 2016 meeting with Complainant was an intervening event that provided the sole basis for the Section 15 decision; at that point "Nabors and others at [Respondent] developed legitimate concerns based on [Complainant's] statements during that meeting." Respondent recognized Mr. Graham's "contemplat[ion]" of instituting the Section 15 process against Graham in the November 9 and November 16, 2015 emails. Additionally, although Graham referred Complainant to a Section 15 evaluation, Dr. Faulkner's recommendation of same formally started the Section 15 process. Dr. Faulkner acted entirely because of Ms. Nabors' report. Resp. Br. at 27-33. Respondent was merely adhering to the terms of the Pilot Working Agreement. Respondent maintained that Complainant's arguments were incorrect and disingenuous and that neither the initiation of the Section 15 process nor Dr. Altman's diagnosis were adverse employment actions. Resp. Br. at 46. Respondent claimed that it clearly and convincingly established that it would have

[191] For clarity, Complainant captioned its response as Complainant's Opposition to Delta's Motion to Apply Collateral Estoppel. However, Respondent identified its document as a supplemental brief.

taken the same actions in the absence of Complainant's protected activity. It also argued that Complainant's claims are precluded by the Railway Labor Act. Resp. Br. at 50. Respondent denied that Complainant was entitled to any of the relief she requested. Resp. Br. at 51-60.

In Respondent's Supplemental Brief on Collateral Estoppel, it asserted the Complainant's grievances, filed under a collective bargaining agreement called the Pilot Working Agreement, is dispositive of the claims brought before this Tribunal. It maintained that Complainant's failure to appeal Captain Graham's finding and the subsequent SBA Award should collaterally estop Complainant from raising these matters before this Tribunal.

V. CONCLUSIONS OF LAW

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

Jurisdiction

At the outset, the Tribunal finds that the SBA award does not preclude a merits decision of Complainant's complaint under the Act. "Collateral estoppel" or "issue preclusion" refers to "the preclusive effect of a judgment in foreclosing relitigation of issues that have been actually and necessarily decided in earlier litigation. *Frank v. United Airlines, Inc*., 216 F.3d 845, 850 n.4 (9th Cir. 2000), *cert. denied,* 532 U.S. 914 (2001); *United Parcel Service, Inc. V. California Public Utilities Commission*, 77 F.3d at 1178, 1184-85 & n.6 (9th Cir. 1996). When an administrative agency acts in a judicial capacity, claim and issue preclusion apply. *Muino v. Florida Pwr & Light Co.,* ARB Case Nos 06-092, -043, ALJ Case Nos. 2006-ERA-002, -008, slip op. at 9 (Apr. 2, 2008). *Paynes v. Gulf States Utilities Company*, ARB No. 98-045, ALJ No. 1993-ERA-00047 (Aug 31, 1999). Further, the doctrine of issue preclusion can apply to arbitration decisions. *Hydra-Pro Dutch Harbor Inc. v. Scanmar AS,* 2010 WL 3730183, at *3 (W.D. Wash, Sept. 20, 2010).[192] Issue preclusion is a defense that may be deemed waived if not raised in the pleadings or if the party attempting to invoke the defenses failed to timely object to the prosecution of dual proceedings.

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[192] However, on appeal, the Ninth Circuit reversed and remanded this matter to the district court for its improper application of the test for issue preclusion. *See Hydra-Pro Dutch Harbor v. Scanner AS,* 533 Fed. Appx. 767 (2013).

As an initial matter, the Tribunal notes that Respondent listed several defenses in its responsive pleadings; the defense of issue preclusion or collateral estoppel is not among them. Further, it is noteworthy that Respondent did not raise this issue until ten months after the hearing, and only then when it received a favorable decision from the arbitrator. Respondents at best misled Complainant when it represented to her that the matters raised during the earlier arbitration hearing did not pertain to the matters before the arbitrator. RX 141. At this late stage of the proceedings, it would work a substantial injustice on Complainant to summarily dismiss her current, ready-for-decision claim, for a less than fully litigated one. *See Clements v. Airport Auth.*, 69 F.3d 321, 328 (9th Cir. 1995). Accordingly, the Tribunal finds that Respondent's estoppel defense has been waived. However, in the interests of providing a full adjudication of all issues, the Tribunal will analyze the elements Respondent must establish for issue preclusion to apply here.

Issue preclusion applies when: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.[193] *Abbs v. Con-way Freight, Inc.,* ARB Case No. 08-017, ALJ Case No. 2007-STA-037 (July 27, 2010). *See Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042, 1150 (2008) (citing *United States Internal Revenue Service v. Palmer (In re Palmer),* 207 F.3d 566, 568 (9th Cir. 2000)).

Respondent fails the first element because Respondent represented to the Arbitrator that it would not be "getting into any of the merits of Grievance 16-11, or the events leading up to it, *which we concur are not before this Board*." RX 141 at 26 (emphasis added). Respondent never addressed its motives associated with the Section 15 referral. Instead it relied upon the procedural posture to argue that Captain Graham's decision was in force because Complainant never appealed it. This is similarly reflected in the arbitration board's decision itself wherein it noted that the sole basis for dismissing the two grievances then before it were that they were not filed in a timely manner. RX 140 at 9-10.

The Tribunal also finds that the arbitration hearing itself was not fully and vigorously litigated, let alone fully and vigorously litigated concerning the issues before this Tribunal.[194] In

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[193] Complainant cited to a four-part test set forth in *Paynes v. Gulf States Util. Co.,* ARB No. 98-045 (Aug. 31, 1991). Compl Br. at 6. Respondent cited to a similar, but slightly different three part test: "1) the same issue has been actually litigated and submitted for adjudication; 2) the issue was necessary to the outcome of the first case; and 3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination." Resp. Br. at 7 (citing to *Muino v. Fla Power & Light Co.,* ARB Case No. 06-092, -143 (Apr. 2, 2008)).

[194] Respondent cites to the proposition that arbitration can serve as prior litigation that has a preclusive effect on a later proceeding. Resp. Br. at 8. However, the Ninth Circuit reversed and remanded Respondent's cited-decision specifically because of the district court's findings concerning issue preclusion. *See Hydra Pro Dutch Harbor Inc. v. Scammar AS,* 2010 WL 3730183, 2010 U.S. Dist. LEXIS 98765, *rev'd and remanded, Hydra Pro Dutch Harbor Inc. v. Scammer,* 533 Fed. Appx. 767, 2013 U.S. App. LEXIS 14460 (July 17, 2013).

contrast to the seven days of hearing before the Tribunal encompassing 2000 pages and over three hundred exhibits, the arbitrator's hearing was perfunctory,[195] focusing on procedural rather than substantive issues and none of it concerning the precise safety allegations raised before this Tribunal. Not a single witness was called at that proceeding, although Complainant was given an opportunity to make a brief statement; she did so but mostly about the procedural events leading to her filing of grievances. RX 141 at 83-92. The issue before the arbitrator was strictly a contractual matter. RX 140 at 8-9; *see* RX 141 at 93. And apparently, the earlier grievance proceeding that *did* involve a safety issue was held before the very person, Captain Graham, intimately involved in the discriminatory actions alleged. As discussed, *infra*, Captain Graham's central role in the narrative helps Complainant establish the causal connection necessary to establish her prima facie case.

Respondent also maintained that, because Complainant withdrew her appeal to the arbitration, and because such withdrawal occurred after the adverse action, it is entitled to a finding that its medical review process was not done as retaliation for Complainant reporting alleged safety violations. RX 140 at 7. But this ignores the history of the Act itself. The Act provides an independent basis to raise—in an environment safe from reprisal—safety issues; issues not concerning contractual labor disputes, but rather disputes concerning the very safety of the flying public.

> [B]y enacting the provisions of AIR 21, Congress manifested the clear intent not to delegate protection of whistleblowers in this industry to an informal, private union/management employment grievance process. The legislative enactment protects not just the employee whose personal interests are at stake; AIR 21 triggers a Congressional mandate to foster the public interest in whistleblower activities involving commercial aviation safety issues. As such, deference to private process is unwarranted.[196]

Szpyrka v. American Eagles Airlines, Inc. 2002-AIR-9 (Order Deny Sum. Dec.)(ALJ, July 8, 2002). And, as will be discussed later, the Tribunal is most troubled by the existence of PWA/CBA terms concerning the Section 15 process that served to hide from the FAA potentially disqualifying information.

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[195] The arbitration transcript is 93 pages of discussion. There were three exhibits presented at this hearing, all were extracts from the collective bargaining agreement. RX 140 at 17, 22 and 31. The hearing began at 9:10 a.m. (RX 140 at 1) and included a break for an "Executive Session" involving a separate confidential manuscript not provided the Tribunal. RX 140 at 79. The provided transcript does not identify whether Complainant or her counsel participated in this "Executive Session", what was discussed or how long it lasted. The arbitration adjourned at 1:23 p.m. DX 140 at 93. So at most, this hearing lasted just over 4 hours.

[196] The courts have addressed this election of remedies argument in the context of Federal Rail Safety Act cases. Even assuming *arguendo*, that Complainant's arbitration was essentially the same claim, that would not preclude Complainant from pursuing the same claim under AIR 21. *See Ray v. Union Pacific Railroad Co.,* 971 F.Supp.2d 869, 878-81 (S.D. Ia. 2013).

Further, the arbitrator's decision was based upon the procedural posture of the grievance only. The SBA did not make, nor was it required to make, a determination concerning the merits of Complainant's allegations currently before this Tribunal.[197] After reviewing the arbitrator's decision as well as the transcript of the hearing, and considering the substantial evidence presented in these proceedings, the Tribunal finds that to hold Complainant bound by the SBA decision would cause substantial harm to her, and undercut the very protections that Congress chose to engender when drafting the Act.

Notwithstanding the above, there is another reason for the Tribunal not to be bound by the SBA decision. Respondent is essentially attempting to reassert its argument under the Railway Labor Act for a third time. Respondent first raised the issue of the collective bargaining agreement contract terms being preemptive in its February 12, 2019 Motion for Summary Decision. The Tribunal explained its reasoning as to why the provisions of the Railway Labor Act did not apply to these proceedings in its March 1, 2019 Order Denying Respondent's Motion for Summary Decision. *See also Willbanks v. Atlas Air Worldwide Holdings, Inc.,* ARB Case No. 14-050, ALJ Case No. 2014-AIR-010 (Mar. 18, 2015). Respondent again raised the issue in its initial post-hearing brief. Resp. Br. at 50. Now, for a third time—albeit without making specific reference to the RLA—Respondent seeks to bind this Tribunal to a decision based upon CBA arbitration procedures that emanate from the Railway Labor Act. For all of the above reasons, the Tribunal finds that issue preclusion does not apply in this case.

A. Credibility

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

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other

[197] The Arbitrator stated: "[T]his Board would not have jurisdiction to hear and decide any of those claims under the AIR21 process, unless the parties had deferred to this Board that jurisdictional capability, which I understand was not done. So as I sit here today, we, this Board, has no jurisdiction to decide the AIR21 claims, whatever they may be, whenever they arose, whatever time limits might be embedded in the AIR21 process." RX 141 at 51.

credible evidence.[198] *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 that the judge finds credible. *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).

Based on the foregoing considerations, the Tribunal makes the following credibility findings.

Mr. Colby's recollection of his experience with Complainant during her training was very credible. The Tribunal also found the testimony by Captain Walters and Captain Harney about Complainant's character credible and persuasive. The Tribunal also credits Captain Harney's testimony about his concern from 2011 that Complainant "had a target on her back." The Tribunal found Mr. Nance's testimony generally credible, especially as it related to the scrutiny that pilots face in their careers and the importance of a safety culture in aviation.

Although the Tribunal did not find any reason to question the credibility of his testimony, the Tribunal did not find Captain Watt's testimony particularly probative or relevant to the issues it must decide and gives his testimony little weight. The Tribunal found his testimony about line checks too collateral to the issues to be of any value.

The Tribunal gives Dr. Altman's testimony and opinion very little weight. He was appointed a Respondent's medical examiner tasked with conducting a mental health evaluation. In its brief, Respondent referred to Dr. Altman as a subject matter expert. *See, e.g.*, Resp. Br. at 6, 16, 47 n.37 ("Although the majority of Dr. Altman's evaluations have concerned drug-and-alcohol-related issues, that is not his exclusive area of expertise. (Tr. at 730:9-17 (Altman)".). Although Dr. Altman reported that he has a large amount of experience dealing the pilots, it was clear to the Tribunal that the vast majority of that interaction dealt with pilots in the context of drugs and alcohol related matters, and not other aviation related psychiatric issues like the serious accusations levied against Complainant. This is not to say that Dr. Altman, as a board certified psychiatrist, does not have expertise in dealing with mental health issues in general, indeed he does. However, his particular expertise is more focused in the area of drug and alcohol addiction. Further, the Tribunal asked him the basic question if he knew where to find the medical regulations in Federal Aviation Regulations, and he could not identify it. Tr. at 638. Yet, it is common knowledge to anyone at all familiar with the requirements to hold an airman medical certificate that such regulations are contained in Part 67. And here, the very basis under which one can opine that a person has a medically disqualifying medical condition is contained within 14 C.F.R. Part 67. Granted, Dr. Altman was conducting a psychiatric evaluation, but to not know such a basic piece of information undermines his general credibility.

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

The Tribunal was further troubled by how Dr. Altman aggressively sought information from Respondent's representatives Mr. Puckett and Captain Davis, but made little effort to gather similarly detailed information from Complainant.[199] And much of the information requested (or provided without prompting)[200] seemed to have little bearing on Complainant's interactions with Respondent's representatives; it had more to do with attempted rebuttal of Complainant's assertions about the safety culture at Respondent. Although Dr. Altman interviewed Complainant, he did not interview those who interacted with her on a day to day basis or even ask her to directly address the concerns posed resulting in the Section 15. The Tribunal was struck by Dr. Altman's comment about how Complainant's ability to have a career and raise small children was suggestive of mania. Tr. at 713. Dr. Altman appeared to confuse an industrious mother—not an uncommon trait in modern society—with a manic one. Also Complainant's children are grown adults. It is unclear how Complainant's ability to raise in the distant past "three under three" related to her present mental wellbeing or fitness to fly. The Tribunal also found it curious that Dr. Altman discounted or did not consider Complainant's intellect when reaching his conclusions. Further, there is a stark dichotomy between his findings and the findings of a panel of doctors from the Mayo Clinic and then Dr. Huff that reflect that not only does Complainant *not* have bipolar disorder, but she has no mental health issue whatsoever.

The Tribunal further questions the candor of Captain Graham's testimony at various points, and occasionally found his testimony to be incredible. In particular, the Tribunal gives little credit to his statements that Complainant's safety report had no bearing on his decision to refer Complainant for a Section 15 evaluation. The temporal proximity between Complainant's submission of her November 3, 2015 email and Graham's November 9, 2015 reaction to that email, which included his "consider[ation]" of the Section 15 process, establishes substantial doubt as to the veracity of that assertion. Complainant's counsel notes—and the Tribunal accepts as proven—the many inconsistencies in his testimony between his deposition and his hearing testimony. Compl. Br. at 40-42. The sequence of events left the Tribunal with the impression that Captain Graham harbored little if any tolerance for criticism of the organization he ran, especially criticism from a line pilot like Complainant.

The Tribunal also questions the candor and veracity of Ms. Nabors' testimony. Her recollection of events during the hearing was vague and lacking in detail, even evasive at times, especially during cross-examination. The transcript confirmed the Tribunal's impression at the hearing. For example, she used the term "I don't know" 17 times during her direct examination and 54 times during cross examination. Ms. Nabors also testified "I don't remember" on 52 occasions during cross-examination but only nine times during direct examination.[201] Many of these responses surrounded the issue of who prepared portions of documents, especially one providing her with questions to ask Complainant at the March 8, 2016 interview. The Tribunal recognizes that many of these responses could be the result of poor questioning and a legitimate lack of recall, but the disparity was noticed by the Tribunal. Moreover, the Tribunal recognizes

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[199] *See, e.g.,* Tr. at 576, 652, 695, 710, 739-41.
[200] *See* Tr. at 629-30; CX 76.
[201] She also used the phrase "I don't recall" on eight occasions and "I don't specifically remember" on four occasions during cross-examination.

that the March 2019 hearing was not so far removed temporally from Ms. Nabors' March 2016 interview with Complainant to ascribe all of Ms. Nabors' evasive testimony to lapses of memory reasonably caused by the passage of time. Further, her hesitancy to be definitive in her responses reduced her credibility, especially when it came to the level of involvement Mr. Puckett had in this matter. Throughout litigation of the case, Respondent has attempted to understate Mr. Puckett's role in the matter. On the other hand, this lack of detail tends to support the notion that what Complainant communicated to Ms. Nabors during their meeting was different in meaning and effect than what Ms. Nabors communicated to Respondent's management when recounting their meeting. In all, Ms. Nabors made for a poor witness; her credibility was lacking.[202]

The Tribunal found the Complainant generally credible. The Tribunal observed Complainant closely during the entire hearing, not only when she was on the stand. The Tribunal found her to be candid, articulate, and displayed a learned command of the topics she addressed. However, the Tribunal also noticed that, at times she would stray off topic. She was intensely focused, bordering on cockiness, but not out of proportion to the disposition of other professional pilots when discussing aviation matters. During the nine days of hearing, including lengthy cross-examination, the Tribunal observed nothing indicative of the concerns Ms. Nabors allegedly observed during the March 8, 2016 meeting.[203] There is little question that Complainant is passionate about aviation, but the Tribunal found professional her presentation and comportment. The Tribunal also found her rendition of events generally credible and finds no reason to question them upon further study of the file.

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[202] The Tribunal was also troubled by Respondent's lack of follow up to questions pending in Ms. Nabors' investigation following the interview with Complainant. Tr. at 1568-74; *see* JX J at 11. Granted, Ms. Nabors left her position in July 2016, but there was a noticeable lack of follow-up to questions that could have supported or rebutted Complainant's claims in her safety report during the three months after Complainant was removed from flight status. The lack of follow-up combined with the types of questions lingering that were supposedly EO rather than flight operations matters causes the Tribunal to wonder why the allegations that Respondent claimed were EO related were not fully vetted. Even Ms. Nabors acknowledged that some of the EO issues that she was assigned to ask questions about were intertwined with flight safety issues. Tr. at 1580-81.

[203] The Tribunal commented on the record at the end of the hearing about Complainant's demeanor as follows:

> I want to note for the record I paid close attention during these nine days, particularly I want to talk about the demeanor of the Complainant. My observation is that -- my impression was that she was alert, bright, engaging, confident, in some cases one could even perceive as being cocky. However, I, at no time, saw any type of emotion that would indicate anything consistent with what Ms. Nabors observed. Now, I want to state that specifically for the record, because this is one point that bothers me in this case. Everything I've seen in this file, with the exception of Ms. Nabors' report is not what was being reported by Ms. Nabors. I don't know how to resolve that, but it is diametrically opposed to everything I've heard from witnesses and my observations of the Complainant during these proceedings.

Tr. at 2123.

The Tribunal did not find Mr. Puckett's testimony credible in certain key aspects. As demonstrated, *infra*, Mr. Puckett's professed deprecation of his involvement in the Section 15 process lies in sharp contrast to what actually occurred. Despite his testimony, the Tribunal finds that he, in large measure, orchestrated the events leading up to and throughout the Section 15 process.[204] It was he who for all intents and purposes selected Dr. Altman, not Dr. Faulkner. It was he who provided Dr. Altman with materials related to Complainant, even prior to the meeting where the Section 15 process was initiated. It was he (and Captain Davis) who gathered the information for Dr. Altman's investigation into Complainant's past. It was he who addressed the contentions about finding an NME after the Mayo Clinic report exonerated Complainant. It is clear to this Tribunal that Mr. Puckett was an effective advocate for his client's position; he effectuated that goal by injecting himself into Complainant's Section 15 process to a greater extent than his testimony would suggest. Consequently, the credibility of his testimony suffered.

Dr. Faulkner's testimony was, at times, credible. The Tribunal found his statements credible about how Respondent intended for the Section 15 process to work. However, the Tribunal also found less than credible Dr. Faulkner's stated independence in the process, at least as it concerns Complainant's case.

The Tribunal found Captain Davis' testimony candid and credible. The Tribunal was left with the impression that he was trying to be a good company-man in a situation he was not particularly happy to be in – caught between actions of upper management and having to be the bearer of bad news to Complainant. Captain Davis' testimony about his interactions with both Complainant and Dr. Altman were credible.

The Tribunal finds less than credible Captain Dickson's deposition testimony (CX 199) as it found many of his responses evasive; most of his testimony was very general, vague and of limited value concerning the issues this Tribunal must decide. For example, Captain Dickson acknowledged talking to Captain Graham about Complainant during the period March 9 to March 17, 2016, but he was unable to recall any specific details. He also testified that the decision for the Section 15 referral was ultimately a flight operations decision. CX 199 at 56-60. However, he essentially relied upon the decisions made by and the actions of Captain Graham, and had little involvement in this matter. *See* CX 199 at 75, 174-75. His testimony was of value in understanding the leadership culture at Respondent and its understanding (or lack thereof) of Respondent's management's role in its safety management program. His emails make it clear that Respondent's much touted "open door policy"[205] was not as open as portrayed. *See* CX 8. This less-than-open door policy was again reflected just a week prior to Complainant's meeting with Captain Dickson. Despite testimony that Respondent has a true open door policy, the Tribunal credits Captain Davis' email which lays out an expectation within Flight Operations to follow the chain of command instead of going directly to senior management with concerns. CX 21 at 1-2.

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[204] The Tribunal elaborates on this topic, *infra*.

[205] *See, e.g.,* CX 199 at 84.

Finally, the Tribunal gives little weight to the deposition testimony of Mr. Ed Bastian; he provided little, if any, information that added the Tribunal in addressing the issues before it.[206]

B. Complainant's (Preponderance of the Evidence) Case

1. Covered Employer and Employee

The parties stipulated that they were covered under the Act.[207] Tr. at 8. The record does not suggest otherwise. Therefore, the Tribunal finds Complainant established this element of her case.

2. Protected Activity

The parties stipulate that Complainant engaged in protected activity with the filing of her Safety Report in January 2016. Tr. at 20 and 182; JX B.[208] Therefore, the Tribunal finds this element of Complainant's case is also established.[209] The Tribunal, additionally, finds that Complainant's November 3, 2015 email to Captain Davis, Respondent's Regional Director of Flight Operations, constitutes protected activity. CX 1; CX 11-003. In that email, Complainant raised compliance concerns about Respondent's SMS policy, discussed a culture of "fear based tactics" (rather than the open door policy professed in the SMS), and requested a meeting with Captains Dickson and Graham to discuss same. *Id.* The Board has explained that, "[a]s a matter law, an employee engages in protected activity any time [the employee] 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.A. § 42121(a)). The SMS program requires the development of a robust

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[206] Within the briefs submitted to the Tribunal, only Complainant, and almost in passing, referenced the content Mr. Bastian's testimony. *See* Compl. Br. at 19 n. 18, 32 and 39.

[207] Even if the parties had not so stipulated, the Tribunal separately finds that they are subject to the Act. Respondent is a Part 121 air carrier and Complainant is a first officer employed by Respondent.

[208] *See also id.* at 8, 16 and 195.

[209] Notwithstanding that concession, the Tribunal independently finds that it was protected activity. Complainant's report details issues with Respondent's Safety Management System (SMS), an FAA mandated program. *See* 14 C.F.R. Part 5. Complainant's report contains specific alleged incidents of Respondent's management's effort to suppress employee reporting of safety related incidents and concerns. Complainant also reported issues with Respondent's implementation of flight and duty limitations and rest, and Complainant provided accounts of Respondent pressuring its pilots to fly while fatigued. JX B at 13-15; *see also* 14 C.F.R. Part 117. Even Captain Graham acknowledged that there is "constant operational pressure" on its pilots. CX 200 (Graham Dep.) at 140-41. Complainant also raised issues about inadequate training and proficiency among Respondent's pilots. JX B at 7, 16-23; *see also* 14 C.F.R. §§ 121.400-419, 121.431-445. The Act protects the reporting of these types of safety matters. *See Benjamin v. Citationshares Mgt, LLC*, ARB Case No. 12-029, ALJ Case No. 2010-AIR-001 (Nov. 5, 2013), slip op. at 5-6; *Sylvester v. Parexel Int'l LLC*, ARB Case No. 07-023, ALJ Case Nos. 2007-SOX-039, -042 (May 25, 2011), slip op. at 40. Complainant alleges additional alleged protected activity that occurred in 2011 and September 2015, but it is time barred so the Tribunal need not address it.

reporting culture, and an open door policy is a component of such a reporting culture. Tr. at 1169, 1209. The SMS is itself a safety sensitive FAA regulation. Tr. at 1059; § 14 C.F.R. § 5.1(a); Stipulation 4, *supra* (demonstrating Respondent's recognition that reporting of SMS-concerns constitutes protected activity).

Complainant's concerns were also subjectively and objectively reasonable. Complainant repeated and expanded upon her earnest safety complaints within her larger January 2016 Safety Report. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016); *see* Tr. at 235–36 (Complainant's testimony about her subjectively belief that Respondent violated its own safety culture procedures). Indeed, Complainant's November 3, 2015 email serves as a precipitating event in the factual narrative, and shows Complainant's subjective belief as to the truth of her allegations. The record contains credible testimonial evidence concerning Complainant's proficiency as a pilot, and that others shared her concerns. *See*, *e.g.*, 66, 120–21, 129, 142–49, 152 277 See CX 129, CX 130, CX 132, CX 133, CX 134, CX 136 – CX 140; RX 71. This demonstrates the objective reasonableness of her complaint. *Burdette*, slip op. at 5. Because Complainant's November 3, 2015 email satisfies all requirements to establish protected activity, the Tribunal finds Complainant's act of producing the email to Respondent—the email was sent to Davis and then provided to Captain Graham—also demonstrates an additional instance of protected activity.

3. Adverse Action

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, "[u]nder 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. Accordingly, the 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

As the Tribunal ruled in its Order Denying Complainant's Motion for Summary Decision, referral to a Section 15 evaluation was an adverse action.[210] This Decision incorporates that ruling.

[210] *See Order Denying Complainant's Motion for Summary Decision* (Feb. 21, 2019).

It matters not that the Respondent had a legitimate interest, if not need, to refer a pilot to a Section 15. The fact of the matter is the result of merely instituting a Section 15, no matter the eventual outcome, tarnishes the pilot's reputation, and therefore constitutes an adverse employment action. For example, here Respondent was eventually cleared of the substantial allegation Respondent levied upon her that she had mental health issues. But regardless of the ultimate—contrary—finding of the NME, within a close-knit industry like aviation, a pilot's reputation is paramount. Here, concerns from other pilots that came to know of this saga will linger. Any allegation of a mental health deficiency for a professional pilot can be fatal to their career.

The ARB recently failed to disturb an ALJ's findings and conclusions on the adverse action element, but noted in dicta that "an employer's directive to a pilot to undergo a psychological evaluation, in and of itself, is not an adverse action" *Estabrook v. Federal Express Corporation*, ARB Case No. 2017-0047, ALJ Case No. 2014-AIR-00022, slip op. at 11, n. 7 (Aug. 8, 2019) (citing to *Zavaleta v. Alaska Airlines, Inc.,* ARB Case No. 15-080, ALJ Case No. 2015-AIR-016, slip op. at 11 (May 8, 2017)). It then wrote the following:

> FedEx's 15D evaluation[211] is part of an air carrier's safety responsibility for employing a pilot. A requirement of periodic and "for cause" psychological assessments for aircraft pilots is beneficial to the airline community and to the public. For example, it is not an adverse action to require a pilot to undergo physicals and vision and hearing tests to ensure the pilot's physical competency to operate an aircraft. Second, a psychological assessment may benefit a pilot who actually needs counseling. The 15D evaluation is a desirable tool to protect the public and the employer from the foreseeable danger of an accident. Estabrook knew of the 15D process and it was part of the collective bargaining agreement with FedEx. The parties do not dispute that Estabrook continued to be paid during his grounding.
>
> We do not suggest that a directive to undergo a 15D examination, in itself, could never be an adverse action. *If selectively implemented or utilized in a retaliatory fashion, subjecting an employee to a 15D evaluation might be actionable as an adverse action.* (emphasis added)

The Board's recent observation warrants this Tribunal's comment because it believes that, even in dicta, this statement misdirects the reader and could engender confusion on the issue of adverse action in future AIR 21 cases.

The operative facts of *Zavaleta*—the case the ARB cited to in the foregoing discussion, in dicta, from *Estabrook*—are factually distinct to either the facts in *Estabrook* or to those in this matter. Mr. Zavaleta was an "Aircraft Technician"[212] and later an inspector for his carrier-

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[211] The "15D evaluation" referenced in *Estabrook* is essentially the same process as the Section 15 process involved in this matter.

[212] Neither the ARB's decision nor ALJ's decision makes clear what the underlying certification Mr. Zavaleta held when they used the term Aircraft Technician. Mr. Zavaleta held either: (1) a mechanics

employer, never a pilot. Unlike pilots,[213] neither a mechanic nor inspector are required to hold an airman's medical certificate, let alone a first-class medical certificate. *See* 14 C.F.R. § 65.71. Further, once issued, a mechanic certificate does not expire, while a first-class medical certificate must be renewed every six months for a pilot to fly for a Part 121 air carrier.[214] This is significant because Mr. Zavaleta's certificate to perform his duties as a mechanic was never placed in jeopardy. This fact alone makes *Zavaleta* distinguishable to the facts here. Further, the underlying case in *Zavaleta* was the granting of a motion for summary decision where the ALJ found the following adverse actions: the airline's investigation into Zavaleta's timekeeping practices, failure to be selected for another management positions, and that he was verbally abused and treated with contempt throughout the investigation. *Zavaleta, supra,* at 6-7. The ALJ in that case noted that the investigation ended with no disciplinary action. Additionally, the ALJ also found no evidence that Mr. Zavaleta lost his seniority rights, as alleged here. *Id.*

On appeal, the ARB found that merely "the investigation of Zavaleta constituted adverse employment action under AIR 21." *Id.* at 10. And finally, the ARB cites to page 11 of the ALJ's slip decision.[215] Page 11 of the *Zavaleta* opinion does not contain the quotation posited in the *Estabrook* footnote. Instead, the quotation is found on the page where the ARB reverses the ALJs findings because the *pro se* litigant had "demonstrated a genuine issue of material fact that the investigation to which he was subjected constituted adverse employment action within the meaning of AIR 21." *Id.* at 11. The ARB notes in footnote 44 the *Burlington Northern* admonition that "[w]e simply doubt that the Court intended to consider … threatened discipline as 'trivial.' To the contrary, we are of the opinion that they are patently not trivial and, therefore, presumptively 'material' under *Burlington Northern." Id.* at 11, n. 44. In short, the proposition the ARB employs to support its footnote in *Estabrook* appears to rely on an unsupported legal

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certificate, which would not expire if he was to have left the air carrier's employ, or (2) a repairman's certificate, which is only valid while working for a specific air carrier. *Compare* 14 C.F.R. § 65.81 (mechanic may perform or supervise maintenance, preventative maintenance or alteration of an aircraft or appliance, or a part thereof for which he is rate) *with* 14 C.F.R. § 65.103 (repairman can only perform duties for the certificate holder by whom the repairman is employed and recommended). *See id.* at § 43.3. Additionally, a mechanic can have two types of ratings: Airframe and Powerplant. *Id.* at §§ 65.85 and 65.87. Almost all mechanics have both certifications, so they are commonly referred to as an "A&P". This difference in the type of certificate an aviation mechanic holds can be important because a mechanic retains any license in the event of termination. Thus, the mechanic can go to any other air carrier shop, repair station or general aviation maintenance facility and continue employment in short order, while a person with merely a repairman's certificate must obtain certification anew.

[213] To exercise the privileges of an airline transport pilot certificate under Part 121, the pilot must possess a First-Class medical certificate. 14 C.F.R. § 61.23(a); *see also* 49 U.S.C. § 44729(g)(2) and 14 C.F.R. § 121.383(a).

[214] Similarly, an ATP's certificate never expires, but to exercise the privileges there are additional training and recurrency requirements to exercise the privileges that certificate bestows.

[215] Out of an abundance of caution, the Tribunal also looked at the *Leiva* decision cited in this footnote. The ARB is referencing *Leiva v. Union Pacific R.R. Co., Inc.* ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (May 29, 2015). However, in looking at this decision, that reference only pertains to the ARB not addressing the adverse action in that case because it was supported by substantial evidence and unchallenged.

foundation. Rather, the Tribunal recognizes the authority the ARB relied on in *Estabrook* to support its own position, *supra*, that *any* referral to a Section 15 mental health evaluation constitutes an adverse employment action.

In addition, this footnote appears to contradict the ARB's own precedent. The Board has upheld an ALJ's determination that an employer's referral of a pilot for a psychiatric examination and to remove the flight deck privileges of said pilot constituted adverse actions, because such action serves to change the conditions of employment. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ Case No. 2003-AIR-22 (Nov. 30, 2005). *Robinson*, like this case, involved a first officer. In May 2001, Robinson reported a baggage security violation to the FAA and a union representative. In July 2001 he sent copies of his letter to five other pilots and "Osama bin Laden (in absencia)[sic]". *Id.* at 2. In December 2001, Robinson became locked in a pilots' baggage room while preparing for a flight and maintenance workers were eventually needed to get the door open. Following this incident, Northwest's Director of Flying consulted one of Northwest's labor-counsel and its medical services director about Robinson's behavior in the baggage room as well as concerning the tape recording of his conversation to others about being locked in the baggage room.[216] On January 2002, Northwest's Director of Flying informed First Officer Robinson that they were requiring him to undergo a psychiatric evaluation per the collective bargaining agreement between the company and its pilots. Northwest thereafter took Robinson out of service as a pilot and placed him on paid status pending results of the examination. *Id.* at 3. Following the examination, a physician concluded that Robinson was not currently fit for duty and that he should undergo two months of counseling and then be re-examined to rule out obsessive compulsive disorder. Robinson did not undergo the counseling, nor did he arrange to be examined by a psychiatrist of his own choosing, as was his right under the collective bargaining agreement. During this time Northwest prohibited Robinson from accessing its flight decks, including the jumpseat. Later, Northwest placed Robinson on long-term sick leave. *Id.* at 4. In addressing these facts the ARB found substantial evidence to support the ALJ's findings that "Northwest's decisions to send Robinson for a psychiatric examination and to remove him from the flight deck were adverse actions that changed the conditions of his employment." *Id.* at 6. The ARB later affirmed the ALJ's conclusion that Robinson had failed to demonstrate that his protected activity of communicating the baggage removal violation to the FAA was a contributing factor in Northwest's adverse action. *Id.* at 6-7.

Adverse actions may be perfectly legal and may even be warranted. In *Vannoy v. Celanese Corp.*, the Board observed, "[a]n adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 09-118, slip op. at 13-14 (Sept. 28, 2011). The Tribunal does not at all take issue with the proposition the ARB espoused in *Estabrook* that the Section 15 process is a desirable and even necessary component in maintaining the highest level of safety in air commerce. But that is irrelevant to the issue of whether or not it is an adverse action. For this element the Tribunal must decide whether an employment action "would deter a

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[216] First Officer Robinson told the crew scheduling technician that he was "in no frame of mind to go flying an airplane after this crap" and that somebody should send the fire department to rescue him or "shoot a bazooka" to open the door." *Id.* at 3.

reasonable employee from engaging in protected activity." *Menendez v. Halliburton, Inc.,* ARB Case Nos. 09-002, -003, ALJ Case No. 2007-SOX-005, slip op. at 20 (Sept. 13, 2011). If an adverse action could deter whistleblowing, then that employment action is adverse. Adverse actions, moreover, are more than trivial, either as a single event or in combination with other deliberate employer-actions.[217] *Williams v. American Airlines, Inc.,* ARB Case No. 09-018, ALJ Case No. 2007-AIR-04, slip op. at 15 (Dec. 29, 2010). The crux of an adverse action determination concerns the *effect* of the action.

Here, the Tribunal finds that the effect of Respondent's referral of Complainant to a Section 15 mental health evaluation is anything but trivial and is an adverse action. The results of that evaluation place at issue a professional pilot's very career and livelihood. As Captain Davis rightly deduced, the gravity of the situation warranted the presence of a union representative: he understood that the Section 15 process had career ending implications for pilots like Complainant.[218] Tr. at 2115-16. The Section 15 process impacts not only the pilot's current employment but any future employment. Further, to formally question a pilot's mental fitness stigmatizes that pilot in the eyes of the close-knit aviation community, regardless of the ultimate outcome.

It is obvious that both Respondent and its pilots' union find referral to the Section 15 procedure to be adverse because they specifically provide in their contract terms that the disclosure of the information about the referral is not to be given to the FAA—the very body that issues the medical certificate—until completion of the Section 15 process.[219] This provides powerful

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[217] *See also Williams*, ARB No. 09-018, slip op. at 15. In *Williams*, the Board clarified the adverse action standard in AIR 21 cases:

> To settle any lingering confusion in AIR 21 cases, we now clarify that the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term 'discriminate' is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.

[218] Captain Dickson agreed that a pilot would be concerned about the potential threat a Section 15 would have on their career. CX 199 at 73.

[219] Dr. Faulkner summarized the concern about the consequences of informing the very body that regulates issuance of the medical certificate, the FAA.

> Under the Section 15 agreement, the FAA is not to be involved. This is, again, for the pilot's protection -- because again, if the FAA does get involved, there's potential that they would pull the FAA or the airman's certificate, which would then result in them being on sick leave or disability. So, it's a way of not having the FAA involved. At the same time,

evidence that the both Respondent and its union were well aware that the mere identification of a pilot having a mental health issue could result in action by the FAA, up to and including, its suspension of a pilot's airman's medical certificate.[220] And then one must consider that Complainant was subjected to the Section 15 process for 21 months where her very career hanged in the balance. The Tribunal recognizes the severe emotional toll this situation placed on Complainant's wellbeing. Finally, placing a professional pilot on the sidelines impacts their proficiency to operate the aircraft, particularly instrument flying skills. It is general known that a pilot's skills degrade over time if not maintained.[221] A pilot removed from flying duties for the duration Respondent subjected Complainant to—or even shorter—requires refresher training before returning to the cockpit; even then, a pilot's colleagues would tend to more closely watch and be dubious of said pilot's flying skills. *See* Tr. at 1723 (Mr. Puckett acknowledging that flight proficiency is a perishable skill and piloting skills tend to degrade over time). The deleterious impact of being subjected to the Section 15 process—even if warranted, which was not the case here—cannot be overstated.

Respondent seems to argue that the fact that Complainant continued to receive full pay during pendency of the final outcome of the Section 15 process, and that her sick leave was replenished once she was ultimately exonerated, somehow factors against the finding of an adverse action. Such logic seems more consistent with the "tangible consequences standard" rejected by the Board in *Menendez v. Halliburton, Inc.,* ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5 (Sept. 13, 2011). In so arguing, Respondent has not considered that adverse employment actions "can extend beyond tangibility and ultimate employment actions." *Id.* Moreover, the Board has expressly held that paid administrative leave may constitute adverse employment action. There is no genuine dispute that while Complainant was subjected to the Section 15 process for 21 months, she was removed from service as a pilot and was also ineligible to use jumpseat privileges. There is no question that Respondent's effort to subject Complainant to the Section 15 process affected the terms, conditions or privileges of Complainant's employment such that it constituted adverse action under the Act.

> the pilot is removed from active flight status, so they're not flying, while we get time to investigate this further.

Tr. at 1293. The Tribunal itself expressed concerns about withholding this information from the FAA during the hearing itself and at the end of the hearing. *See* Tr. at 1332-34, 1364-65 and 2123-26.

[220] *See generally,* FAA Order 2150.3B (thru CHG 13), Compliance and Enforcement (Aug. 27, 2018), at ¶¶ 5-15(d), 6-9, and 6-13.

[221] The Department of Defense recently acknowledged this phenomenon in its explanation for flying military aircraft over four of the nation's cities during the pandemic in lieu of fireworks. *See* https://www.northcom.mil/Newsroom/Press-Releases/Article/2246257/dod-support-to-salute-to-america-2020/ ("Flying hours are a sunk cost for the Department of Defense, and these aircraft and crews would be using these hours for proficiency and training at other locations if they were not conducting these flyovers."). Even Respondent's senior management agreed with this proposition. Captain Dickson agreed that any pilot "who is off of flying for a while is going to have to rebuild their proficiency." CX 199 at 206.

Adverse Action: Conclusion

Complainant has successfully established that Respondent committed adverse action when it referred Complainant to a Section 15 evaluation for alleged mental health reasons.

4. Contributing Factor Analysis

Because Complainant successfully established that Respondent committed an adverse action by removing her from flight duty and subjecting her to the Section 15 process, the Tribunal must determine whether Complainant's protected activity was a contributing factor in that unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The Board has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian National Railway,* ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). "Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer,* ARB No. 16-035*,* USDOL Reporter, page 52 (emphasis in the original). "In satisfying this statutory standard, a complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action." *Acosta v. Union Pacific Ry. Co.,* ARB Case No. 2018-0020, ALJ Case No. 2016-FRS-00082, slip op. at 6 (Jan. 22, 2020).[222] "Where an employer has established one or more

[222] In *Acosta*, the Board further stated "'the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.'" *Id.* (quoting *Kuduk u. BNSF Ry. Co*., 768 F.3d 786, 791 (8th Cir. 2014)). Yet, the Board has previously ruled that "neither motive nor animus is required to provide causation . . . as long as protected activity contributed in any way to the adverse action." *Petersen v. Union Pacific Railroad Co.,* ARB No. 13-090, ALJ No. 2011-FRS-17 (Nov. 20, 2014). The Board is no doubt aware of the potential for confusion its precedent has engendered in the law. The Tribunal also notes that the Board has held that punitive damages in FRS cases can only occur if the retaliation was intentional. The Board recently reversed an ALJ's imposition of punitive damages "because of the ALJ's unchallenged finding that BNSF did not intentionally discriminate or violate the FRSA." *Brough v. BNSF,* ARB No. 2016-0089, ALJ No. 2014-FRS-00103, slip op. at 15 (June 12, 2019). As AIR 21 does not include a provision for punitive damages, the Tribunal finds the intentional retaliation preference in *Acosta* confusing and possibly inconsistent with the Board's reasoning for when to impose punitive damages for whistleblower cases based upon AIR 21.

The Tribunal also notes that there is a circuit split over which legal standard to apply in evaluating whether a protected activity was a contributing factor in an unfavorable employment decision. The Seventh and Eighth Circuits require proof of "intentional retaliation" prompted by the employee engaging in

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). This can be established by direct or circumstantial evidence. "One reason circumstantial evidence is so important is that, in general, employees are likely to be at a severe disadvantage in access to relevant evidence." *Palmer, supra,* slip op. at 56 (citing *Bechtel,* ARB No. 09-052, slip op. at 13 n. 68). "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. The focus is not "on how the employer came to learn of the employee's wrongdoing rather than the employer's actions based on that wrongdoing or protected activity…." *Thorstenson v. BNSF Railway Co*., ARB No. 18-059, ALJ Case Nos. 2018-FRS-0059, -0060, slip op. at 10 (Nov. 25, 2019).[223]

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 employer's reasons for its actions are relevant at both the contributing factor stage, when applying the "preponderance of the evidence "standard, and at the affirmative defense stage, when analyzing the employer's burden by the "clear and convincing evidence" standard. *Acosta, supra,* slip op. at 12. However, "if the

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protected activity. *See Kuduk, supra* and *Armstrong v. BNSF Ry. Co.,* 880 F.3d 377, 382 (7th Cir. 2018). The First, Third, Fourth, Sixth, Ninth, and Tenth Circuits do not seem to require proof of "intentional retaliation", as such. *See Pan. Am. Railways, Inc. v. U.S. Dep't of Labor*, 855 F.3d 29, 33-35 (1st Cir. 2017); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158-59 (3d Cir. 2013); *Lowery v. CSX Transp., Inc.*, 690 F. App'x 98, 101 (4th Cir. 2017); *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App' x 334, 338 (6th Cir. 2014); *Frost v. BNSF Railway Co*., 914 F.3d 1189, 1195-96 (9th Cir. 2019); *BNSF Ry. Co. v. U;S. Dep't of Labor*, 816 F.3d 628, 639-40 (10th Cir. 2016). The Second Circuit has yet to address the issue. Further, the Board in its recent past has taken issue with applying the intentional retaliation criteria. *See Riley v. Dakota, Minnesota & Eastern Railroad Corp,* ARB Case Nos. 16-010, -052, ALJ Case No. 2014-FRS-044, slip op. at 6 n. 13 (July 6, 2018). However, the Eighth Circuit reversed the Board's decision in *Dakota* and remanded it because it did not follow *Kuduk. Dakota, Minnesota & Eastern Railroad Corp. v. Riley,* No. 18-2888 (8th Cir. Jan. 30, 2020).

As this case arose within the jurisdiction of the Ninth Circuit, the Tribunal will follow that Circuit's case law. Accordingly, Complainant can meet their burden of showing discriminatory or retaliatory intent "by proving that their protected activity was a contributing factor to the adverse employment decision. There is no requirement, at either the prima facie stage or the substantive stage, that [complainant] make any additional showing of discriminatory intent." *Frost*, 914 F.3d at 1196; *see Wooten v. BNSF,* 2020 U.S. App. LEXIS 19446, 2020 WL 3410888 (9th Cir. June 22, 2020).

[223] The Board went on to say that an ALJ may find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established. However, "the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event." *Thorstenson*, slip op. at 10 (citing *Koziara v. BNSF Ry Co.*, 840 F.3d 873, 877 (7th Cir. 2016)).

ALJ believes that the protected activity *and* the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Palmer, supra,* slip op. at 53.

Discussion of Contributing Factor Analysis

A complainant must further establish by a preponderance of the evidence that any protected activity was a contributing factor that motivated a respondent to engage in the adverse employment action. 49 U.S.C.A. § 42121(b)(2)(B)(iii). Only if the complainant meets this burden is it necessary for the fact-finder to determine whether a respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); *Peck v. Safe Air In'l, Inc*., ARB No. 02-028, ALJ No. 01-AIR 03, slip op. at 18 n.7 (ARB Jan. 30, 2004).

Complainant's brief relies heavily on Board precedent holding "protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity." Compl. Br. at 22 quoting *Benjamin v. Citationshares Management, LLC,* ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 12 (Nov. 5, 2013). Complainant maintains that "where an employee's protected activity triggers an investigation that results in an adverse employment action, the contributing factor requirement has been satisfied." Compl. Br. at 23.[224] However, the Tribunal recognizes that, after the filing of briefs, the Board distanced itself from such prior precedent. In *Thorstenson v. BNSF Ry Co*., ARB Nos. 2018-0059, 0060, ALJ No. 2015-FRS-00052, slip op. at 10 (Nov. 25, 2019), the Board held that it no longer requires ALJs to apply the "inextricably intertwined" or "chain of events" analysis. However "an ALJ may find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established. For these cases, the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event." *Id.*; *see Perez v. BNSF Railway Co.*, ARB nos. 2017-0014 and -0040, ALJ No. 2014-FRS-00043, slip op. at 10–11 (ARB Sept. 24, 2020) (discussing the Board's change in precedent concerning the "inextricably intertwined" standard, per *Thorstensen*).

Complainant's meeting with Captains Graham and Dickson—and even prior to that, Complainant's November 3, 2015 email, which Captain Graham ultimately received—triggered a series of events including the later interview with Ms. Nabors. Respondent argued that it subjected Complainant to the Section 15 process, in part, due to the content of the discussion that occurred between Complainant and Ms. Nabors. Resp. Br. at 24-33. The temporal proximity and

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[224] Complainant wrote that the ARB has consistently held that "protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity." *Benajmin v. Citationshares Management, LLC,* ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 12 (Nov. 5, 2013). Further, where the employee's protected activity triggers an investigation that results in an adverse employment action, the contributing factor requirement has been satisfied. *Smith v. Duke Energy Carolinas, LLC,* ARB No. 11-003, ALJ No. 202e0-FRS-012, slip op. at 7 (Oct. 26, 2012).

connectedness of Complainant's protected activity to the adverse action alone establishes causation. *See* CX 11 at 3 (Complainant's November 3, 2015 email concerning, in part, safety issues); CX 22 at 1 (Captain Graham's November 18, 2015 email recognizing the "safety culture concerns" Complainant has expressed); JX C (Captain Graham's notes of Complainant's communications to Respondent, which confirms Captain Graham's understanding of the safety concerns contained therein). In other words, Respondent proves Complainant's case.

But Respondent's actions also demonstrate the interwoven nature of the factual narrative between Complainant's protected activity and the adverse employment action. Respondent dispatched Ms. Nabors, an HR employee with an EO specialty, to interview Complainant about her concerns, which primarily dealt with air safety issues. Despite Respondent's contention, Ms. Nabors was tasked to inquire into both employment discrimination topics *and* safety related topics such as FAA compliance issues, including falsification of records, training procedures, and issues associated with pilot fatigue. Tr. at 1566-67, 1612, 1618-19, 1649-56; *see also* JX D at 4-5. Respondent contends that the March 2016 interview represented an intervening event; it was not. The March 2016 meeting between Complainant and Ms. Nabors arose directly from Complainant's provision of the safety report to Captains Dickson and Graham. Although the March 2016 meeting was a *subsequent* event, it was not an *intervening* event sufficient to sever causation between Complainant's protected activity and the adverse employment action.

Respondent's assertion that Ms. Nabors was not involved in the investigation of compliance issues is meritless.[225] To resolve this, one need only look at the list of topics Respondent's agents, specifically, Mr. Puckett, tasked Ms. Nabors to ask Complainant about at the March 2016 meeting. To wit: the failure to provide a required oral examination during training; falsification of training records; improper use of a laptop computer on the flight deck; compelling pilots to fly while fatigued, and the use of retaliatory measures to suppress reports of non-compliance. JX D at 4-5; *see* Compl. Br. at 6-7. Importantly—and worth repeating—is the fact that the topics were provided to Ms. Nabors by Mr. Puckett, an attorney in Respondent's labor department. These topics were unquestionably FAA-compliance and air safety related. *See* JX E at 8. If anything, Ms. Nabors' interview was a tool of convenience for Respondent to obtain additional information for it to respond to Complainant's safety concerns. The topics Respondent tasked her to resolve at her meeting with Complainant provide compelling evidence that Ms. Nabors' interview involved the safety issues highlighted in Complainant's report.

Respondent raises, as contrary evidence, Ms. Nabors' reporting of concerns about Complainant's comments and demeanor at the March 2016 meeting. But this must be viewed in the context of the preparation she received from Mr. Puckett and other agents of Respondent prior to the interview. The Tribunal further agrees with Respondent's argument that Ms. Nabors was

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[225] Similarly Respondent's argument that Ms. Nabors' interview was an intervening event is meritless. Respondent's themselves concede that the *only* reason that Ms. Nabors interview took place was in response to Complainant's January 28, 2016 Safety Report. But for Complainant's protected activity, the interview with Ms. Nabors' would never have occurred. This alone is a sufficient link to satisfy the "contributed to" causation standard. *See Benjamin v. Citationshares Management, LLC,* ARB No. 12-029, ALJ No. 2010-AIR-a, slip op. at 12 (Nov. 5, 2013).

not "qualified to consider any issues related to safety." Resp. Br. at 5. That Respondent may have sent the wrong employee to discuss Complainant's safety report does not preponderate against a finding that the meeting was in no way involved or was precipitated by Complainant's safety report. Respondent infers some import to Ms. Nabors' contacting of Respondent's counsel after the meeting. However, Respondent's counsel had been involved in this matter from the very beginning and were involved in developing the very questions she was to ask Complainant. To report back to counsel after hearing the matters Complainant disclosed during their meeting is not surprising and further establishes that the meeting involved Complainant's protected activity. The Tribunal does not doubt that when leaving that meeting with Complainant she had concerns about what Complainant conveyed to her. But those concerns only arose due to events precipitated by Complainant's protected activity and therefore do not rebut the intertwined nature of events from the protected activity through the adverse employment action.

The facts surrounding the meeting with Captain Graham are also telling concerning the connection between Complainant's protected activity and the adverse employment action. To wit: Captain Graham played a more outsized role in the Section 15 process than what he has testified to and what Respondent has argued. Captain Graham's role is critically important in the connection of Complainant's protected activity to the adverse employment action of the Section 15 process, because Captain Graham first contemplated the Section 15 process after reading the November 3, 2015 email.[226] Those emails are damning and bear repeating:

On November 9, 2015 Captain Graham wrote to Captain Miller:

> Glad to meet with her anytime, probably good to engage HR again, at this point, given this latest e-mail to Phil, as I believe we could find ourselves being accused of inappropriate wrongdoing by her and we need to start tracking for this phase. I also think *we should consider whether a Section 15 is appropriate*, while I'm sure she would find issue with that course of action, if she cannot embrace and understand the reasons behind our actions it stands to reason she might not be able to make appropriate decisions for the safe operation of a flight as a crew member.

CX 11 at 2 (emphasis added); Tr. at 289-90. Captain Miller forwarded Captain Graham's email to Mr. Puckett later that afternoon. CX 11 at 2.

On November 16, 2015, Captain Graham wrote:

> Here we go… just FYI, I will brief HR and handle this with kid gloves. *She could be a candidate for a Section 15 after this goes through*, if she continues to see herself as the victim and refuses to accept that she cannot just use Delta proprietary information as her own, as well as Delta pictures (Aircraft QRH Volume 1, et cetera) and intellectual knowledge. Will keep you informed. JG.

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[226] The Tribunal here reminds the reader that, *supra*, the Tribunal found that the November 3, 2015 email constituted protected activity.

CX 7 at 1 (emphasis added); Tr. at 290-91. Captain Graham's stated connection between the protected activity contained in the November 3, 2015 email and the Section 15 process continued throughout the remainder of the factual narrative. Notably, Respondent--through its agent Captain Graham—first contemplated a applying the Section 15 process to Complainant less than a week after receiving Complainant's November 3, 2015 letter. Captain Graham's outsized role in that process further demonstrates the connection between Complainant's protected activity and the Section 15-related adverse action. Captain Graham played a considerable role throughout the entirety of the factual narrative: from receipt of the November 3, 2015 letter, to administration of the section 15 process, to the reinstatement of Complainant to flight status.

Respondent argues in response that it had legitimate reasons to institute the Section 15 process. According to Captain Graham, Dr. Faulkner's biggest concern centered on Complainant's fear that Flight Operations was out to harm Complainant. CX 200 (Graham Dep.) at 30; *see* Tr. at 1173.[227] But Captain Graham did not enter this meeting as a neutral and detached manager. That is not to say he was required to be, but his decision-making has to be placed in the proper context. Unlike Respondent's portrayal of him, Captain Graham was far more than a passive recipient of the recommendations he received. As early as November 2015 Captain Graham demonstrated his willingness to apply the Section 15 process to Complainant. CX 7; CX 11. Captain Graham viewed Complainant's tenacity in seeking clarification about her stated safety concerns as somehow problematic. To even the most casual observer, Complainant's reports of safety issues appear prudent and reasonable. Reading between the lines, the reports represent Complainant's reasonable indictment of certain management practices under Captain Graham's charge. Contemplating referral for psychiatric evaluation for the reasonable issues raised by Complainant is, at the least, heavy-handed. While this Tribunal does not sit as a super human-resources department, it may properly evaluate the reasonableness of a manager's action and consider such as circumstantial evidence of ulterior motive. Assuming, *arguendo*, Captain Graham's behavior was not simply ham-handed management, Complainant would still make out her case because Respondent's argument does not sever the connection between the protected activity and the adverse action. Captain Graham's behavior represented the conduit for this connection.

There is no evidence that Captain Graham or Captain Miller contemplated the application of less intrusive and less damaging options such as Complainant's formal counselling, suspension, or simple mentoring. Captain Graham affirmatively offered to Dr. Altman Complainant's alleged "memory" issues related to Respondent's policies. Tr. at 562-63, 571. More troubling, Captain Graham had no prior indications that Complainant had mental health issues, nor did he even solicit information of same from Complainant's supervisor, Captain Davis, other associates that interacted with her, or even her fellow pilots. Captain Graham jumped to the extreme conclusion that a Section 15 was warranted simply after reading Complainant's November 3, 2015 email. Captain Graham later relied upon the rank hearsay from Ms. Nabors involving uncorroborated events by a person that has no flying experience or had heretofore even conducted an investigation concerning flight operations matters. Nor did Captain Graham even give Complainant an

[227] During the hearing Captain Graham initially said he did not recall Dr. Faulkner stating that. Tr. at 1172. However, upon further questioning and after being shown his deposition testimony, he agreed that his deposition testimony was accurate. Tr. at 1175.

opportunity to provide her version of events prior to making his decision to refer Complainant to the Section 15 process: a process he knew full well removed her from duty and placed her career in jeopardy. Captain Graham's decision making began after reading Complainant's November 3, 2015 email.

In his own defense, Captain Graham attempted to provide an explanation for this. He acknowledged that Complainant's pre-March 2016 conduct factored into his thoughts when contemplating the Section 15 referral and it "solidified my decision that we should go ahead and have the Section 15." CX 200 (Graham Dep.) at 81. Further, Captain Graham acknowledged that Complainant's Safety Report was at least a factor in his decision to refer Complainant for a Section 15:

> Q: But when you made the Section 15 decision in March, did you reflect back on her comportment during the January meeting in terms of substantiating the need for a Section 15 referral?
>
> A: I think that certainly as I reflected on what Dr. Faulkner said, some of the concepts that lead to a mental capacity that needed to be assessed, I was able to say, yes, I did think that I saw that in the meeting, *and certainly it was evident in the report.*
>
> *Q: In the report she gave you at the time?*
>
> A: **Yes.**

CX 200 (Graham Dep.) at 85 (emphasis added). Far from demonstrating his defense, this fact alone establishes the requisite causal factor between Complainant's protected activity and Respondent's adverse employment action of subjecting Complainant to the Section 15 process.

The Outsized Role of Mr. Puckett in the Section 15 Process

The roles of Mr. Puckett, Dr. Faulkner and Dr. Altman further demonstrate this connection and, therefore, also merit discussion. The Tribunal was struck by Mr. Puckett's observable over-involvement in the supposed "medical" Section 15 process. This, despite Mr. Puckett's professed diminished role in the Sections 15 process. Tr. at 1701–02.

As Respondent's in-house lawyer, Mr. Puckett's primary duties involved overseeing the day-to-day operational issues within flight operations and supporting supply operations management. Tr. at 1683-89. Mr. Puckett testified that his only role in the Section 15 process was ostensibly to provide advice and counsel on compliance with the Section 15 process. Tr. at 1701-02. Mr. Puckett, who Respondent represented was its "prime expert on this collective bargaining agreement" (Tr. at 1710, 1794), justified his ostensibly hands-off-role by noting that the Section 15 process was "under the control of the director of health services. So, it's taken out of the chief pilot's office." And once the Section 15 process started, Respondent's DHS, Dr. Faulkner, was to exercise his medical judgment and discretion on how to best run it; Dr. Faulkner is independent of Respondent's chief pilot's offices. Tr. at 1719. However, as one can see from the summary below, despite Respondent's assertions, Mr. Puckett was intimately involved in this process, if not a *de*

facto decision maker, in the Section 15 process to which Respondent subjected Complainant. Mr. Puckett's role in the narrative further helps Complainant establish the causal connection required to establish her prima facie case.

Since November 9 2015, Mr. Puckett was aware of Captain Graham's views about Complainant: Captain Miller forwarded to Mr. Puckett Captain Graham suggestion of a Section 15 evaluation. CX 11 at 2. He was also in receipt of Complainant's correspondence with Mr. Anderson on January 19, 2016, including her authored-articles, and Mr. Anderson's response to Captain Graham. CX 20 at 1 and 7-9; CX 65. Following the January 28, 2016 meeting between Complainant and Captains Graham and Dickson, Captain Graham sent a copy of Complainant's Safety Report (JX B) to Mr. Puckett and Respondent's legal department asking them to review it. Tr. at 1725-26. Mr. Puckett and Ms. Meg Taylor, a member of Respondent's legal department, then talked about the safety report. JX B. Ms. Taylor and Mr. Puckett eventually met with Captain Graham and reviewed the document together. Tr. at 1726, 1850. Captain Graham gave Mr. Puckett and Ms. Taylor guidance to address JX B using this three-bucket concept.[228] Tr. at 1727, 1850.

On February 19, 2016, Mr. Puckett emailed Ms. Seppings, Ms. Taylor, and Ms. Nabors a copy of Complainant's Safety Report (JX B). Tr. at 1730-31; RX 29. Mr. Puckett and Ms. Nabors then sat down and reviewed Complainant's Safety Report and determined what portions of it Ms. Nabors would investigate. Tr. at 1492-93, 1575. The two of them discussed the topics she would address, and then Mr. Puckett prepared an outline of questions for Ms. Nabors to ask Complainant and emailed the outline to Ms. Nabors and Ms. Taylor (JX E at 3 to 9). Tr. 1806, 1822; *see id*. at 1494-97, 1542; 673-74. It was Mr. Puckett's idea to include the "Safety Complaint" portion of the outline he and Ms. Nabors created. Tr. at 1739; JX E at 3-4. When asked why he did not just give Ms. Nabors the document Captain Graham had prepared (JX D), Mr. Puckett could not provide a reason. Tr. at 1740. In response to Respondent-counsel's question, Mr. Puckett offered that he was not sure that he possessed JX D at that point. Tr. at 1741. However, given Captain Graham's testimony about the sequence of events and his desire to investigate the "buckets" featured in JX D, the Tribunal doubts that Mr. Puckett did not have this document by this time—almost a month later.

Mr. Puckett also specifically included in the outline provided to Ms. Nabors comments concerning Complainant's conduct. Tr. at 1743-44; *see, e.g.,* JX E at 4 ("[reasonably certain it was 2010]"), *id.* at 6 (commenting "[multiple times]" concerning when Ms. Nabors was to ask questions to Complainant about her commenting on the aviation industry and not to use Respondent's trademarks on Complainant's published materials.). They also discussed Complainant's prior behavior, including social media usage and trademarking, "[a]nd that . . . she wasn't necessarily stopping it or she continued to ask." Tr. at 1599-1600. At some point, Mr. Puckett provided to Ms. Nabors copies of emails where Complainant was representing herself as a Respondent-employee and conducting book signings. Tr. at 1601. On February 29, 2016, Ms. Nabors contacted Mr. Puckett to let him know that she had reached out to Complainant. Mr.

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[228] The buckets included, safety concerns, individual accusations, and items in Complainant's report concerning policies. Tr. at 1116-17; JX C.

Puckett responded by providing Ms. Nabors with an outline of topics (JX 3 at 3-9) to address with Complainant during the March 8, 2016 meeting. Tr. at 1734. Contrary to his stated assertions, Mr. Puckett's hands-on approach is evident throughout.

On March 10, 2016, two days after Ms. Nabors' interview with Complainant, Mr. Puckett met with Ms. Nabors along with Ms. Taylor and Ms. Seppings to discuss the details of Ms. Nabors' meeting with Complainant. Tr. at 1512-13, 1751. During this meeting Mr. Puckett said that he wanted to talk with her and Dr. Faulkner about the concerns Ms. Nabors had taken from the meeting because it sounded to him "very much like there were mental fitness issues in play." Tr. at 1753; *see id.* at 1513, 1752-53. Immediately following this meeting, Mr. Puckett and Ms. Nabors went to Mr. Puckett's office and just the two of them had a telephonic conversation with Dr. Faulkner about Complainant. Tr. at 1754, 1511. The telephone call lasted about 30 minutes. Tr. at 1754. This again shows Mr. Puckett's outsized role in the process.

After Ms. Nabors finished talking with Dr. Faulkner and later that day, Mr. Puckett and Ms. Taylor thereafter had a separate telephone conversation with Dr. Faulkner about "perhaps" consulting somebody with a psychiatric background. Tr. at 1755–56. They made the decision to contact Dr. Altman, given his background and experience and that Mr. Puckett had worked with Dr. Altman before. Tr. at 1757. It was Mr. Puckett that thereafter reached out to Dr. Altman, not Dr. Faulkner. Tr. at 1757-58; RX 40. Mr. Puckett's choice of Dr. Altman is curious in itself. Two years prior, in 2014, Mr. Puckett, Dr. Faulkner and Dr. Altman had worked together in another case involving a Section 15 mental health inquiry. This inquiry concerned a Captain [P]. During this inquiry Dr. Altman sent a copy of his Psychiatric Report to the FAA. ALPA later wrote to Mr. Puckett asserting that contacting the FAA prior to completion of the Section 15 process "clearly violated the PWA and wholly undermines the integrity of the Section 15 process." CX 92. This was followed by several letters to Mr. Puckett and Captain Dickson about Respondent not following the Section 15 process when the matter involved a mental health evaluation. *See* CX 94, CX 95. The Tribunal is struck that Mr. Puckett would again select Dr. Altman, even after the pilots' union's expressed concerns to him about Dr. Altman's reporting of his findings to the FAA prior to completion of the Section 15 process.

At some point, Ms. Nabors summarized her interview with Complainant and gave her summary to Mr. Puckett. Tr. at 1515, 1518; JX E at 10-11. Mr. Puckett in-turn physically handed her summary to Dr. Faulkner.[229] Tr. at 1806. Ms. Nabors' next involvement with Complainant occurred when Mr. Puckett notified her about a meeting on March 17, 2016 that occurred in a conference room in Respondent's flight operations area; Ms. Nabors attended this meeting in-person. Tr. at 1518. On March 10, 2016, Mr. Puckett sent Dr. Altman an email, copying Ms. Taylor, another attorney for Respondent, inquiring as to his availability over the next couple of day for a telephone call to discuss a pilot that had "made a few statements that have raised some mental fitness concerns…." CX 3, RX 40; Tr. at 560. Thereafter, Mr. Puckett sent Dr. Altman some documents that included Complainants Safety Report (JX B) and her Ethnographic Study (JX K). Tr. 614, 665; CX 3 at 5-6.

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[229] He actually handed him a copy of JX E at 3 to 11. Tr. at 1806.

On March 11, 2016, Mr. Puckett called Dr. Altman; he followed up his call with an email. CX 3 at 3. The email reflects that Mr. Puckett and others would call Dr. Altman on March 16, 2016, and for Dr. Altman to plan about an hour for the telephone call and that Mr. Puckett would send Dr. Altman some materials to give him some background on the issues to be discussed. CX 3 at 4. A telephone conference call occurred as planned, and Respondent's personnel described where a manager from Respondent's EO office (Ms. Nabors) had interviewed Complainant, wherein she raised several issues including a concern that people at Respondent were in some way going to harm her. They also represented to Dr. Altman that Complainant had memory problems;[230] the chief pilot's office had multiple contacts with her over the years and they felt they had communicated information to her, yet she kept raising the topic again and again. Tr. at 561-63. Based upon this information alone, Dr. Altman said that the identified issues required psychiatric evaluation, and that it should include neuro-psychological testing because of the purported memory problems. Tr. at 563, 663. Mr. Puckett certainly influenced that outcome.

After being asked by Mr. Puckett to document her three-hour meeting with Complainant, Ms. Nabors produced a four paragraph document. Tr. at 1414; JX E at 10. Following his receipt of this document, Mr. Puckett suggested to Dr. Faulkner to involve Dr. Altman,[231] as Mr. Puckett had worked with Dr. Altman in another case involving psychiatry. Tr. at 1309-11, 1390-91, 1393. This is despite the fact that Mr. Puckett testified that his only role in the Section 15 process was to provide advice and counsel on compliance with the requirements of the Section 15 process. Tr. at 1701-02. Thereafter, on March 15, 2016, and without asking Dr. Faulkner what information should be sent, Mr. Puckett emailed to Dr. Altman Ms. Nabors' statement[232] as well as the two articles Complainant authored. CX 3 at 7; Tr. at 1312 1394-95; JX E at 1-3; *see* Tr. at 1889. On March 16, 2016, Mr. Puckett provided Dr. Faulkner with Ms. Nabors' statement (JX E at 3-11).[233] Tr. at 1308-09, 1311-13, 1413; RX 42.

On March 16, 2016, Mr. Puckett, Dr. Faulkner and Ms. Nabors discussed the concerns identified in Ms. Nabors' statement. During her testimony, Ms. Nabors said that her reference to March 16 in her report (JX J at 7), generated sometime between March 16 and May 27, 2016 (the

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[230] Dr. Altman later explained that the "memory issues" he evaluated included Complainant's use of her uniform in public when giving presentations and a letter of counseling Complainant received back in 2011 that related to Respondent's social media use policy. Tr. at 636.

[231] Complainant resides in Seattle. Dr. Altman is located in Chicago. During cross-examination, Dr. Faulkner acknowledged that there were board certified psychiatrists in Seattle, and that at least one that is on the FAA psychiatrist list is located in Los Angeles. Yet Dr. Faulkner did not contact any of them for Complainant's evaluation and only contacted Dr. Altman. Tr. at 1387-88. He testified that he considered one other psychiatrist that Respondent had used previously, Dr. Gitlow, but he never contacted him about this matter. Tr. at 1426-27.

[232] Tr. at 1761.

[233] During his testimony, Mr. Puckett indicated that JX J was the report Ms. Nabors created after issuing her preliminary report (JX E); it just had more details. However, the Tribunal has questions about what was added to this document, when it was added, and by whom. As Ms. Nabors herself explained it was a "living document" subjected to editing during this process. *See* Tr. at 1493, 1521-22. All that the Tribunal does know is JX J was printed on May 27, 2016. How this document was changed from its inception until that date is unclear.

date printed on JX J), and during her deposition, was a mistake. Tr. at 1524. However, Ms. Nabors not only identified the date but the day of the week that this telephonic conversation occurred: Wednesday. March 16, 2016 was a Wednesday. She also only mentioned that this was a telephone conversation with Mr. Puckett and Dr. Faulkner. This too is significant because the weight of the evidence, including Ms. Nabors' own testimony, establishes that both Mr. Puckett and Dr. Faulkner participated in-person in the meeting that occurred on March 17, 2016, and that Captain Graham was present. *See* Tr. at 1518-20. She makes no mention of Captain Graham when referencing this telephone call. This is significant because of his position within Respondent and because of the import of the March 17 meeting itself. Finally, when asked again about the March 16 date by Respondent's counsel she admitted that "I may very well have talked to Dr. Faulkner again on the 16th, yes." Tr. at 1530. This, again, shows that Mr. Puckett's role in Respondent's decision to apply the Section 15 process—and beyond—was greater than Mr. Puckett attempted to let on at hearing. Ms. Nabors' obfuscation and lack of candor highlighted in this exchange also undermines her credibility.

On March 16, 2016, a teleconference occurred between Mr. Puckett, Ms. Taylor and Dr. Altman.[234] Dr. Faulkner was not on the call. Tr. at 1759; *see* RX 40 at 2.

During the March 16, 2016 meeting with Captain Graham, Mr. Puckett was present (Tr. at 1763) as well as Ms. Nabors, two of Respondent's lawyers, and Dr. Faulkner. Tr. at 1141, 1314, 1518-19; *see* RX 45. Dr. Altman participated by telephone. Tr. at 1315, 1395-97, 1399. Based on what Ms. Nabors told him, Captain Graham testified that he had operational concerns regarding Complainant's fitness to fly. Tr. at 1139. He said that he had a question in his mind as to Complainant's mental stability, which created the potential for instituting the Section 15 process, prior to receiving a recommendation from Dr. Faulkner.[235] Tr. at 1167. Thereafter, a discussion amongst the meeting participants occurred where other members of the group brought up issues relating to Complainant's social media and uniform usage, and her interactions with the press. CX 200 at 34.

Prior to him joining this meeting, Dr. Faulkner had a conversation with Respondent's Labor Relations and Legal Department[236]; as he came in to the meeting he said that he would like to get a subject matter expert on the telephone, Dr. Altman. Tr. at 1141-42. Thereafter, "Dr. Faulkner asked if there were any issues prior to this point with [Complainant], and [Captain Graham] gave

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[234] It is curious that Dr. Altman does not include this conversation in his report's chronology. *See* JX L at 41. In fact, Dr. Altman's report makes no mention of his interactions with Respondent's personnel concerning Complainant until after the Section 15 letter was issued.

[235] Captain Graham acknowledged that a request for a mental health evaluation "comes as a result of what we see in operational performance or training performance." CX 200 at 28.

[236] During his deposition Captain Graham recalled that, prior to this meeting, Dr. Faulkner had conversations with Captain Miller and Captain Davis about Complainant. CX 200 at 30; Tr. at 1196-97. However, during his hearing testimony he said his deposition testimony was incorrect, but could not explain how Dr. Faulkner obtained information that would have originated from these two. Tr. at 1197. Captain Graham also attempted to correct his deposition testimony that he discussed Complainant's prior history with Dr. Faulkner. Tr. at 1199-200; *see* CX 200 at 33-34.

[Dr. Altman] a recount of what the interactions there had been with Captain Miller and Captain Davis." CX 200 at 34; Tr. at 1201.

Captain Graham said he based his decision to proceed with the Section 15 process, in part, on his recollection of Complainant's comportment during their January 28, 2016 meeting.[237] CX 200 at 76; Tr. at 1216-17, 1412. Immediately following this meeting, Mr. Puckett called Captain Davis and informed him that Complainant was being placed into the Section 15 process out of concerns of statements she made to Ms. Nabors during her investigation, and that they would send him the appropriate paperwork to initiate the process. Tr. at 1766, 2014-15. On March 18, 2016, Mr. Puckett sent Captain Davis the Section 15 letter (JX F) to provide to Complainant. Tr. at 1768, 2016-17; RX 47.

On April 27, 2016, following Dr. Faulkner's meeting with Complainant, Dr. Faulkner emailed Mr. Puckett and one of Respondent's lawyers regarding his meeting with Complainant. Tr. at 1335-36; RX 56.

On May 4, 2016, Dr. Faulkner notified Complainant that Respondent required her to undergo neuro-psychological testing on May 10, 2016. Tr. at 429, CX 36. Dr. Altman had requested that Complainant have this testing performed. Tr. at 1344. Complainant wanted a delay in testing because she wanted to prepare for the testing. Dr. Faulkner "received word" from Mr. Puckett not to change the appointment. Tr. at 1445-46; *see id.* at 1352; JX I, CX 55. This, again, shows Mr. Puckett's outsized role in the Section 15 process.

As part of his evaluation, Dr. Altman requested certain information and documents from Respondent. Tr. at 571. Mr. Puckett was one of the persons he would ask to provide him such documentation. Tr. at 572. On June 2, 2016, Mr. Puckett and Captain Davis met with Dr. Altman to brief him; the meeting lasted all day. Tr. at 652-53, 741, 1778-79. Prior to their meeting, Mr. Puckett or Captain Davis sent Dr. Altman a binder of information, dating as far back as 2011. Tr. at 652; CX 98. It was Dr. Altman's understanding prior to this meeting that such information concerned Complainant's alleged memory issues. Tr. at 628, 651. According to Dr. Altman, after his meeting with Mr. Puckett and Captain Davis, "the whole memory thing just changes…." Tr. at 626-27.

After his appointment as the CME, Dr. Altman requested a variety of documents from Respondent. Rather than having Dr. Faulkner act as the intermediary, Respondent decided to have Mr. Puckett reach out to Dr. Altman to help facilitate his review. Tr. at 1770. Although Mr. Puckett did not provide Dr. Altman with any medical records, Tr. at 1773-74, he assembled

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[237] Dr. Faulkner testified that he participated in this conversation telephonically and it was his recommendation *to Mr. Puckett* that they proceed with the Section 15 process. Tr. at 1319. However, the only conversation where Dr. Faulkner was listening in telephonically occurred prior to March 17, 2019; specifically, the meeting between Mr. Puckett, Ms. Nabors and himself on March 10, 2016 and March 16, 2016. And the only meeting were Mr. Puckett and Dr. Altman were on the same call as he was the March 16, 2016 telephonic meeting. This leads this Tribunal to question whether the Section 15 discussion occurred prior to the meeting with Captain Graham.

documents concerning Complainant's employment with Respondent and provided them to Dr. Altman. CX 98 includes the table of contents of those documents.[238]

On May 31, 2016, Mr. Puckett emailed Dr. Altman additional documents authored by Complainant addressing Respondent's safety culture. Tr. at 640-41; CX 25, JX K.

On or about October 26, 2016, Mr. Puckett and Dr. Altman exchanged emails (CX 112); they followed up that conversation with teleconference between Dr. Altman, Mr. Puckett and Captain Davis. Tr. at 1953-54. During this teleconference, Dr. Altman told Mr. Puckett and Captain Davis that he had made a determination that Complainant was medically unfit as he had diagnosed Complainant with bipolar disorder. Tr. at 1954; *see id.* at 1796-97.[239] Dr. Faulkner was not on that call. Tr. at 1954. On December 7, 2016, Dr. Faulkner received a copy of Dr. Altman's medical report, opining that Complainant was unfit for duty. Tr. at 1358, 1379; CX 39. It was only at this point that Dr. Faulkner learned of Dr. Altman's diagnosis. Of note, Dr. Faulkner conceded that he should have been the first to learn of the diagnosis, not Mr. Puckett or Captain Davis. Tr. at 1462-63. Dr. Faulkner did not thereafter make an independent determination, but deferred to Dr. Altman's opinion. Tr. at 1358.

After the issuance of both Dr. Altman's report and the Mayo Clinic's conflicting-report, Mr. Puckett continued to be involved in the Section 15 process. Tr. at 1783. Mr. Puckett recalled Dr. Altman had difficulty working with the Mayo Clinic to complete the NME. Tr. at 1784-85. Specifically, Dr. Altman and the Mayo Clinic doctors (Steinkraus and Altchuler) had difficulty agreeing on an NME. On February 28, 2017, the Mayo Clinic doctors had reached out to Dr. Altman to see if they could find another psychiatrist, who was agreeable to both parties. They offered to Dr. Altman the names of three psychiatrists. On March 3, 2017, Dr. Altman forwarded the February 28, 2017 letter from the Mayo Clinic to Dr. Faulkner. CX 49. On March 16, 2017, Drs. Steinkraus and Altman spoke, and, thereafter, Dr. Steinkraus sent Dr. Altman an email proposing three additional doctors to conduct the NME. CX 48 at 1. On May 20, 2017, Mr. Puckett sent Dr. Altman a draft email for Dr. Altman to in-turn send to Drs. Altchuler and Steinkraus. The email insinuated that the Mayo Clinic was not cooperating in the selection of the NME. CX 113. On May 19, 2017, Captain Graham sent Complainant a letter with the subject line of "Notice of Failure to Participate in Section 15 Process." CX 24, RX 118. He concluded the letter with the following sternly worded statement: "If you fail to direct the PME to participate in good faith in the Section 15 process within the next thirty (30) days, [Respondent] will assume that you have abandoned the exclusive procedure available to you under Section 15.B.8.d. and the determination of the CME becomes final." RX 118.

On June 7, 2017, Dr. Altman sent Drs. Steinkraus and Altchuler an email instructing them to begin the process in selecting an NME. CX 115 at 2. The parties continued to exchange emails from June 7 to June 13, 2017, attempting to schedule a telephone call. CX 115. On June 13, 2017, Respondent's counsel and Mr. Puckett prepared a draft letter for Dr. Altman to send to the Mayo

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[238] CX 98 is an email dated May 30, 2016.

[239] Mr. Puckett admitted being informed by Dr. Altman that Dr. Altman had reached a determination and that he was diagnosing Complainant with bipolar disorder.

Clinic doctors which indicated that he had selected two doctors for an NME and acknowledged that they had suggested three other doctors, but that none of the doctors the Mayo Clinic doctors proposed possessed the qualifications he was seeking. CX 116. On June 21, 2017, Dr. Altman drafted a letter to Dr. Steinkraus, but first sent it to Mr. Puckett, ostensibly for review. In this draft letter, Dr. Altman mentioned that Dr. Steinkraus had proposed Dr. Huff as a possible NME. He noted Dr. Huff possessed the qualifications Dr. Steinkraus had previously said were not needed. And then he commented "[t]his appears to be another example of a pattern which reoccurs in [Complainant's] case. Information is stated as an absolute, and then a short time later her position has completely changed. It is as if the initial information never happened. My question would be: Did [Complainant] personally interviewed [sic] Dr. Huff?" CX 117 at 2. On June 26, 2016, Dr. Altman sent an email to Mr. Puckett and Dr. Faulkner informing them that he had scheduled a telephonic meeting with Dr. Steinkraus for July 3, 2017. He also wrote: "Regarding additional candidates for NME both Drs. Shugarman and Huff would be excellent." CX 119.

On the morning of July 3, 2017, Mr. Puckett sent an email to Dr. Altman providing him with a list of three additional doctors to consider as an NME. His guidance to Dr. Altman was the following: "[g]oing into your call, the only point I would emphasize is that ultimately picking an NME is your call and if you feel uncomfortable with the choices then you should not feel any pressure to pick anyone you do not believe will act as a true neutral (i.e., the exact opposite of Dr. Steinkraus)." CX 120. Again, Mr. Puckett went out of his way to interject himself in the Section 15 process.

At this point, there was a December 2016 diagnosis of bipolar disorder by Dr. Altman (JX L) and a competing finding of no psychiatric disorder in February 2017 by the Mayo Clinic panel (CX 15). Yet, Respondent had not completed the Section 15 process it imposed upon Complainant; specifically no decision had been reached by the NME. Tr. at 1364. In the summer of 2017, Complainant sent a copy of her renewed First Class medical certificate to Dr. Faulkner. Tr. at 1362. Dr. Faulkner said he was shocked because there was conflicting information; he did not believe that the FAA knew of Dr. Altman's diagnosis. Tr. at 1361, 1364-65. Dr. Faulkner consulted with Mr. Puckett about this and Mr. Puckett told him that he was free to communicate the Dr. Altman's determination to the FAA. Tr. at 1915. Mr. Puckett provided this advice to Dr. Faulkner, notwithstanding the fact the pilot's union in a previous pilot's Section 15 mental health evaluation process, wrote to him directly, and objected to Dr. Altman's disclosing of his findings to the FAA prior to the completion of the Section 15 process. CX 92; *see also* CX 94. Thereafter, Dr. Faulkner contacted one of the FAA's regional flight surgeons, expressing Respondent's concerns and stating Respondent had information about a permanently disqualifying condition. Tr. at 1368.

Of importance, neither Dr. Faulkner nor anyone else for Respondent initially contacted the FAA to report Dr. Altman's diagnosis of a medically disqualifying condition. It was only after Dr. Altman's finding was in jeopardy that Respondent reported this matter to the FAA. Mr. Puckett explained, in Respondent's view, it was under no obligation to report Complainant's condition "until we went all the way through the process." Tr. at 1716-17. In essence Respondent lost control of the narrative.

That revelation is most troubling and the timing is probative of Respondent's motive. Dr. Faulkner and Mr. Puckett both testified that there was no need to get the FAA involved in this matter. Dr. Faulkner testified:

> Under the Section 15 agreement, the FAA is not to be involved. This is, again, for the pilot's protection -- *because again, if the FAA does get involved, there's potential that they would pull the FAA or the airman's certificate,* which would then result in them being on sick leave or disability. So, it's a way of not having the FAA involved.

Tr. at 1293 (emphasis added).

Mr. Puckett further stated, "[a]nd having the FAA come into that just really isn't, you know, isn't necessarily a helpful issue." Tr. at 1705. In fact, Mr. Puckett testified that, even if the CME determined that a pilot has a medically disqualifying condition, the CBA provided that they are not to report those findings to the FAA. Tr. at 1706-10.

Apparently, it is Respondent's view (and the pilots' union's view) that the entity that issues the medical certificate, the FAA, need not be informed of a medically disqualifying mental condition because it is not in *their* interest to report this occurrence to the FAA. After all, the pilot at this point would not be flying for the Respondent. Their rationale being that the process precludes the pilot with a potential mentally disqualifying condition from operating *their* aircraft. However, there appears to be nothing that would preclude this pilot with some sort of alleged mental illness from being allowed to operate an aircraft that is not Respondent's.[240] Respondent asserts that it placed Complainant in this process out of concern for safety. The process and the attitude conveyed during this hearing belies this argument. The truth of the matter is Respondent took certain actions to protect itself from liability by having Complainant continue to operate its aircraft, and once their interests were protected, Respondent found it unnecessary to involve the very body that regulates the airman's medical certificate. The Tribunal finds this position appalling and implores the FAA to address this in some manner. This process leaves the FAA's mission—to protect the flying public—by the wayside.

Respondent premises its defense on the Germanwings tragedy, but there the airline's mental-wellbeing evaluation process did *nothing* to prevent Complainant from operating aircraft other than Respondent's.[241] Respondent must learn that the harm an airman can perpetrate with an aircraft extends *beyond* Respondent's business plan. For example, a pilot found mentally unfit by Respondent could fly recreationally or even for another airline. The recent incidents involving the

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[240] The Tribunal is aware that the Pilot Records Improvement Act (PRIA), 49 U.S.C. § 44703(h), requires that an air carrier conducting operations under Part 121 or 135 to obtain certain information concerning a pilot that it desires to use in its operations. However, there are a variety of both private and commercial operations where there is no need to make such an inquiry.

[241] Additionally, the overwhelming evidence of causation between Complainant's protected activity and Respondent's adverse employment action, distinguishes the Germanwings tragedy from Complainant's case.

mechanic who stole a Horizon Q400 and the pilot that crashed a Citation Jet, both in August 2018, are but examples. *See* Guy Norris, *Horizon Air Q400 Crashes After Being Stolen by Airline Employee,* Aviation Daily (Aug. 11, 2018); Amir Vera, *Utah Man Crashes Plane into his Own Home After being Arrested on Domestic Violence Charges,* CNN (August 14, 2018, *available at* https://www.cnn.com/2018/08/13/us/utah-plane-crash/index.html). The Section 15 process might protect the airline and the members in the pilot's union *but it does not protect the public except for those that fly on Respondent's aircraft.* Complainant could still fly throughout the pendency of the Section 15 process; only not for Respondent. Further, Mr. Puckett testified that Respondent's former flight surgeon is now the FAA's flight surgeon and is aware of Respondent's Section 15 practice. Tr. at 1713. If true, at a minimum, this creates the optics, maybe unfairly, that the industry has an ally of this practice situated within the FAA itself. And these optics are aggravated by the fact that one of the witnesses in this case, at the time of this decision's issuance, serves as the current FAA Administrator; his actions while he was Respondent's Senior Vice President of Flight Operations are raised as malign in this case. The Tribunal strongly recommends that, once an air carrier learns of *any* diagnosis by a physician that medically disqualifies a pilot from holding any airman certificate, it should be required to report that medical diagnosis to the FAA. It is the FAA, not an airline or a pilots' union, that ultimately makes the medical determination of an airman's fitness. The safety of the flying public demands this outcome and the FAA should consider the Tribunal's concerns.

Following the Mayo Clinic's findings, per the union contract, the parties negotiated to select an NME. The parties agreed to use Dr. Huff. Tr. at 531, 945. On July 27, 2017, Dr. Faulkner reached out to Dr. Huff to explain his role in the process in an email reviewed by Mr. Puckett prior to Dr. Faulkner's sending it. Tr. at 1461. The email indicates that Dr. Huff should have access to any information he wants for his evaluation, and to discuss the cost of his evaluation. CX 54, CX 56; Tr. at 1376-78.

Respondent attempts to defend Captain Graham's decision by arguing that it would be inconceivable for him to "disregard the recommendations of [Respondent's] top medical professional regarding a potential mental health issue involving a pilot." Resp. Br. at 5. Again this ignores the timeline of events in this case. Captain Graham is no fool. The best way to insulate oneself in the decision-making process is to "defer" to recommendations from others. What is apparent from this case is Dr. Faulkner was a pawn in this process, not the decider.[242] Most everything Dr. Faulkner did during the Section 15 process was coordinated through, if not orchestrated by, Mr. Puckett.

On several occasions this Tribunal has heard reference to the Germanwings incident. Even in Respondent's brief it speculates what would happen if Captain Graham had rejected Dr. Faulkner's recommendation to refer Complainant for a Section 15 evaluation and a Germanwings-type incident occurred. Resp. Br. at 7. What is overlooked by that reference is Lufthansa had no

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[242] Dr. Faulkner acknowledged that of the two dozen or so cases that had proceeded to a CME, only two had thereafter gone to a PME, one being a drug and alcohol case and other being this case. Tr. at 1298-99. In both cases he reported the result to the FAA after the cases were not going Respondent's way – in violation of the collective bargaining agreement.

prior warning about that First Officer's mental health issues. It ignores how security protocols already prevent a pilot from being left alone in the cockpit. Respondent's counterfactual argument never addresses its own actions and inactions in coming to the Section 15 determination. Further distinguishing the Germanwings disaster from the current case is the presence of damning evidence showing Respondent's immediate consideration of invoking the Section 15 process as a result of Complainant's protected activity.[243]

Respondent requests this Tribunal to believe that the sole factor in determining whether to suspend Complainant from her duties and subject her to the Section 15 process were statements Complainant made during an unsolicited interview of Complainant by an HR representative. The evidence shows otherwise. Captain Graham essentially admitted that Complainant's representations in her Safety Report justified his Section 15 decision. *See also* CX 11 at 2 (emphasis added); Tr. at 289-90; CX 7. What Respondent ignores is Captain Graham's willingness to go VFR-direct to the Section 15 process so easily when Complainant did not comply with Respondent's guidance. As early as November 9, 2016, five months prior to the March meeting out of which allegedly spawned Captain Graham's decision to implement a Section 15 against Complainant, he was already raising use of the Section 15 process as a management tool.

Respondent also argues that "the only relevant question is whether Dr. Altman acted for retaliatory reasons based on [Complainant's] safety report." Resp. Br. at 50. This misstates what this Tribunal must find. It matters not Dr. Altman's intent, the focus of intent is on the deciding officials, here Captain Graham and Mr. Puckett. As referenced above, Dr. Altman was merely a tool used by Captain Graham to effectuate a management objective. The question is really why did he pick that tool and how did he utilize that tool? Of course, the argument is Captain Graham did not pick Dr. Altman, Dr. Faulkner did. However, the Tribunal finds that although Dr. Faulkner may have had apparent authority to pick the CME, in actuality it was Mr. Puckett who selected Dr. Altman and Dr. Faulkner acquiesced to that selection.[244] Further, Complainant is not even required to demonstrate the decisionmaker's intent arising out of the protected activity. To establish a contributing factor, Complainant must show "'that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity.'" *Rudolph v. National Railroad Passenger Corp*., ARB No. 11-037 slip op. at 17, ALJ No. 2009-FRS-15 (ARB Mar. 29, 2013) (*quoting Brobeski v. J. Givoo Consultants, Inc.*, ARB No. 09-057 slip op. at 14, ALJ No. 2008-ERA-003 (ARB June 24, 2011)). The Tribunal finds overwhelming evidence that Complainant has met this burden.

To be clear, the Tribunal fervently believes, when properly used, the Section 15 process is a valuable and needed tool to protect Respondent, its pilots, the pilots' union, but most importantly,

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[243] To put it in the language of the Act: The Tribunal finds that, while Ms. Nabors' report and Dr. Altman's recommendation were strong factors in the Section 15 referral, Complainant's protected activity was "a" factor in Respondent's—especially Captain Graham's—decision to pursue a Section 15 against Complainant.

[244] The Tribunal notes that in Respondent's discovery response to Complainant it stated that Captain Graham made his decision *in consultation with Puckett,* based on information received from Dr. Faulkner and Ms. Nabors. CX 5 (Response to Interrogatory No. 10).

the public. However, it is improper for Respondent to weaponize this process for the purposes of obtaining blind compliance by its pilots due to fear that Respondent can ruin their career by such cavalier use of this tool of last resort.[245] Complainant recognized as much in the November 3, 2015 email. As the Board makes clear, this Tribunal is not a super human resource department and is not to engage in second-guessing personnel decisions of an employer, even when it may disagree with them. However, there is a material difference between second-guessing a personnel decision and viewing as improper—in a specific case—the use of an otherwise legitimate human resource tool. Complainant has shown that the latter occurred here.

5. Conclusion: Complainant's Preponderance of Evidence Case

The preponderant evidence shows that Complainant has succeeded in her burden to demonstrate discriminatory retaliation under the Act. Respondent is a covered employer and Complainant is a protected employee. The parties agree that Complainant's submittal of her safety report to Respondent was a protected activity, and the Tribunal additionally finds the November 3, 2015 email constituted protected activity. Respondent committed an adverse employment action due, in part, to the subject matters Complainant raised during her meeting with Captain Dickson and Captain Graham in January 2016, which flowed straight out of the November 3, 2015 email. Ms. Nabors' March 2016 meeting was also a proximate result of that email and so the concerns raised there do not serve as an intervening event. Thus, Complainant has proven, by a preponderance of the evidence, all required elements.

C. Respondent's (Clear and Convincing) Case

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

Although Complainant has established her case by a preponderance of evidence, the Act provides, "[r]elief may not be ordered under subparagraph(A) 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). The burden, therefore, now shifts to Respondent to demonstrate by clear and convincing evidence that "in the absence of the protected activity, *it would have taken* the same adverse action." *Palmer*, ARB No. 16-035, slip op. at 31. "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 (May26, 2010); *Palmer,* ARB No. 16-035, slip op. at 52. 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.*

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[245] The threat of a psychiatric examination has been recognized as a tool to suppress whistleblower activity. *See* Kenny, Fotaki & Scriver, *Mental Health as a Weapon: Whistleblower Retaliation and Normative Violence,* J. Bus. Ethics (Apr. 17, 2018), available at https://link.springer.com/article/10.1007%2Fs10551-018-3868-4.

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 v. Vieques Air Links, Inc.*, ARB No. 04-021 slip op. at 8 (Dec.30, 2004); *see also Douglas v. SkyWest Airlines, Inc.*, ARB Nos. 08-070and 08-074(Sep.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, slip op. at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees—employees involved in or accused of the same or similar conduct—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 faces an uphill battle at this stage, because Captain Graham had already considered referring Complainant to Section 15 in light of her protected activity, per the November 3, 2015 email. Ms. Nabors' report fails as an intervening event because the interview precipitating that report stemmed from Complainant's protected activity. Respondent argues that to accept Complainant's theory the Tribunal must accept some sort of grand conspiracy. Resp. Br. at 49. The Tribunal does not find a knowing conspiracy but does find that the evidence suggests Respondent's manipulation of a process to achieve a desired outcome. The two key actors involved here are Captain Graham and Mr. Puckett.[246] They were the parties moving the pieces in the chess game in which Complainant found herself an unwitting player.

The Tribunal finds Dr. Faulkner's role was little more than affecting the process, per Mr. Puckett's wishes. Despite Captain Graham's contention, Dr. Faulkner does not recall being directly asked his opinion during the March 17 meeting. As for Dr. Altman, there is a reason Respondent selected him as its expert. Simply put, his previous opinions tended to support Respondent's objectives and not the pilot's. Notwithstanding the tangential issues about Dr. Altman's conduct during prior medical evaluations, it would be logical for Respondent to employ a physician that tends to support its management posture. The Tribunal sees the battle of experts all the time in litigation: choosing the correct doctor almost always affords a party the answer it is after and gives it cover to implement its desired outcome. Besides, Complainant does not require a grand conspiracy to prove its case; Complainant does not even carry the burden at this stage. Respondent must prove clearly and convincingly that it, in no way, considered her protected activity when instituting the Section 15. That it cannot do, chiefly—but not exclusively—due to the presence of Captain Graham's knee-jerk reaction to Complainant's November 3, 2015 email where she discussed protected activity.

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[246] The extent of involvement by Captain OC Miller cannot be determined for he was neither deposed nor testified. However, it is clear that he had some involvement in the events of this case.

Second, Complainant correctly points to Captain Graham's shifting rationale. During his deposition Captain Graham admitted that Complainant's conduct prior to Ms. Nabors' interview played a major role in his decision to refer Complainant to a Section 15 evaluation. CX 200 at 85; Comp. Reply Br. at 14. However, at the hearing Respondent claimed that the Section 15 decision occurred exclusively due to Ms. Nabors' interview of Complainant and the subsequent report. Resp. Br. at 28–33. The demonstration of such shifting rationale not only supports the existence of a causal link between the protected activity and the adverse action, but also undermines Respondent's rationale when attempting to meet the clear and convincing evidence standard. Respondent discriminated against Complainant in violation of the Act.

The Tribunal is not alone in seeing through the facile tactics used by Respondent in this case. Dr. Steinkraus of the Mayo Clinic commented on the weaponization of the process Complainant faced.

> This has been a puzzle for our group—the evidence does not support presence of a psychiatric diagnosis but does support an organizational/corporate effort to remove this pilot from the rolls. This is was not an uncommon problem for me in the AF – wherein a line commander would decide they wanted to get rid of a crew member but did not want to do it administratively – so they would ask for a medical evaluation. Sometimes it made sense, for instance a pilot with PTSD, fear of flying, etc. At other times, the intent was less benign – a problem of "fit" and, years ago in the military, it was not unusual for female pilots and air crew to be the target for such an effort.

Although Dr. Steinkraus is not an expert witness, he is an esteemed physician with experience in the aviation matters. The evidence of record substantiates Dr. Steinkraus' take on the situation. CX 197 at 2-3.

Finally, there has been the shifting—and illogical—rationale offered for Respondent's conduct. During discovery, Respondent informed Complainant that the Section 15 decision was "solely made because of the information that Ms. Nabors' recorded."[247] Tr. at 27; CX 5 (Resp. to Inter. No. 16). However, Captain Graham's testimony told a different story. He stated that his Section 15 decision included consideration of Complainant's concerns about being harmed by Respondent's flight operations department, her failure to readily assimilate certain policies and procedures, and her inability to release events from the past. CX 200 at 32-33. And of equal interest is the lack of objective evidence to initiate a Section 15. Even Captain Graham acknowledged, "normally an evaluation comes as a result of what we see in operational performance or training performance." CX 200 at 28. However, there is no evidence that

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[247] Respondent made much out of the allegedly-paranoid thoughts Complainant demonstrated during her meeting with Complainant. Assuming, *arguendo*, Complainant's statements demonstrated some paranoia, that does not prove by clear and convincing evidence that it was appropriate to initiate a Section 15. Given Complainant's role as a line-pilot who blew the whistle on a large carrier's safety practices, some paranoia was not unreasonable. What *is* unreasonable is Respondent's decision to afford such weight to Ms. Nabors' lay reporting of the occurrences at the March 2016 interview that it allegedly led to the Section 15.

Complainant's performance as a pilot was deficient in any way. Not a single witness questioned her flying acumen. Captain Graham went forward with the Section 15 without even speaking to Complainant's direct supervisor, Captain Davis, or even giving Complainant the opportunity to see or address Ms. Nabors' version of events. Captain Graham—who drafted the November 9, 2015 email suggesting a Section 15—testified that if Complainant could not understand "a pretty simple policy," such as Respondent's social media policy, "would that transfer to the airplane or not?" Tr. at 1085–86. Perhaps Complainant could use additional training in HR matters, but the Tribunal fails to follow the large logical gap between Complainant's lack of understanding some nuance about Respondent's social media policy and a concern about her mental wellbeing, sufficient to invoke the Section 15 process. In this case, the squeaky wheel did not get the grease—it got unlawfully discriminated against in the form of a career defining Section 15 mental health evaluation. In short, Respondent has not met its burden to show by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

VI. CONCLUSION

In sum, Respondent has failed to establish by clear and convincing evidence the existence of legitimate, nondiscriminatory grounds for its decision to put Complainant through the Section 15 psychiatric evaluation process. This Tribunal has analyzed all the evidence and testimony of record; when considered as a whole, this Tribunal concludes that Respondent engaged in an adverse employment action with discriminatory intent. Further, the proffered reasons for Respondent's actions do not clearly and convincingly establish that Respondent would have taken the adverse employment actions suffered by Complainant even in the absence of her protected activity. Accordingly, Complainant has prevailed in her claim and is entitled to relief.

VII. RELIEF

The Office of Administrative Law Judges "Rules of Practice and Procedure", 29 C.F.R. Part 18, Subpart A, apply in this case. *See* 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.

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 seeks a variety of relief. She maintained that she is entitled to compensatory damages in the amount of $30,000,000, an award of attorney's fees, reimbursement for her personal litigation expenses such travel to meetings with counsel totaling $14,000 (Tr. at 539); back pay for flight pay loss totaling $180,000, recoupment of lost vacation pay in the amount of $52,522.03 (Tr. at 537), lost profit sharing and 401K contributions; front pay for eight years; relief from onerous sick leave reporting requirements; and dissemination of the Tribunal's decision to every executive and employee of Respondent by email with the posting of an OSHA AIR 21 informational bulletin in each pilot crew room and on Respondent's intranet.

Respondent argued that Complainant's request for $30 million in compensatory damages is an end-run of the Tribunal's inability to award punitive damages. Respondent wrote that Complainant had presented no evidence for defamation of character, as she alleges. It noted that Complainant presented no evidence from a medical provider or herself about the extent of any emotional harm, other than passing references to sleepless nights or that she occasionally took sick days. If any award of compensatory damages is appropriate, such an award should be minimal. Resp. Br. at 51-53. Respondent contended that economic damages are speculative, unsupported and unwarranted. Respondent fully compensated Complainant for her time away from work during the Section 15 process, although conceding that Complainant was not flying during that process. Complainant's assertions about alleged loss of flight pay were purely hypothetical, for Complainant was not guaranteed additional flight time, and additional flight time is based on a seniority basis. Nor did Respondent think she was entitled to alleged lost vacation pay noting it was Complainant who requested to use her unused vacation pay to delay her transition to disability. Respondent alleged that Complainant's request for alleged lost profit-sharing or 401(k) contributions is equally speculative. As for front pay, Respondent viewed the request for eight-years excessive, and presumes that Complainant would have been promoted at some future date, but for the Section 15 process. Respondent denied that being subject to the Section 15 process at all impacted her career advancement. It also disputed Complainant's contention for a "sick leave remedy." Finally, Respondent maintained that Complainant is not entitled to an award of attorney's fees and cost. Resp. Br. at 54-60.

B. Reinstatement

Although the Act envisions reinstatement as an automatic remedy, it is not applicable here since Complainant has been returned to full duty. Monetary recompense, therefore, is required to make Complainant whole in light of Respondent's discriminatory behavior.

C. Back Pay

Complainant has the burden to prove the back pay she has lost. The purpose of a back pay award is to return the wronged employee to the position she would have been in had her employer not retaliated against her. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99STA-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 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).

i. Complainant's Back Pay Request

According to Complainant, once reinstated to full duty, Respondent did reimburse her for her back wages but to the average line value. Tr. at 535-36. She asserts that the addition of even a single trip per bidding cycle would have increased her income in the amount of $5,000 per month. Tr. at 526. She seeks additional back pay for the period March 17, 2016 until completion of the trial on May 1, 2019. Her basis for this period is her 22-month removal from flight duty, followed by her involvement in litigation activities until the close of the hearing, deprived her of the opportunity to engage in additional flying.

The Tribunal recognizes that this request is somewhat speculative. However, it is nearly impossible to make an injured whistleblower whole with exactitude. At the same time, the Tribunal must look at Complainant's attempts prior to the retaliation that reflect her seeking "green slips". Complainant's flight schedules for years preceding her referral under Section 15 indicate that she rarely attempted to obtain additional flights. RX 131. Complainant requested the Tribunal

to consider the average overtime flying her fellow crewmembers received. Compl. Br. at 24. Of note, Complainant did not provide evidence of flight assignments that were available for her to possibly fly, but for the Section 15 process. Based upon the evidence of record, the Tribunal finds too speculative Complainant's request for additional back pay to compensate for lost overtime. Accordingly, the Tribunal does not find that Complainant has sufficiently established loss of back pay.

ii. Lost vacation pay

Upon reinstatement, Respondent applied her contractual vacation entitlement to her 22 month removal from employment. Tr. at 537. She argues that, had the company banked her vacation, she would have been paid sick leave and when that had been exhausted, she would have been placed on disability at half pay. Tr. at 537. Compl. Br. at 56. Complainant sets forth calculations that her lost vacation pay equals $52,522.03. Tr. at 537; Compl. Br. at 56-57.

The Tribunal agrees that, but for the retaliatory acts that occurred in this case, she would not have had to exhaust her vacation to avoid being placed on disability-pay (which is frequently less than full pay). Accordingly, Respondent is ordered to reimburse her either the vacation days she used to avoid being placed on disability or pay her the $52,522.03 calculated by Complainant. Respondent argues that Complainant is contractually barred from recovering lost vacation pay. Resp. Br. at 57. The Tribunal is not concerned with the terms of the PWA. The remedies under the Act are designed to make Complainant whole. A private contract cannot be used to shield Respondent for damages Complainant incurred but for its retaliatory actions. Such a contractual term is unconscionable, given Respondent's actions.

iii. Lost Profit Sharing and 401K Contributions

Complainant seeks lost profit sharing and 401K contributions to reflect her potential earnings, asserting that this amount is calculated using the difference between the highest paid pilot in Complainant's category with the same pay rate, and the amount reimbursed to her based upon contractual requirements of the Pilots Working Agreement. However, there is little evidence in the record upon which to make any such calculation. The only evidence presented appears to be the PWA's definition of annual compensation. RX 7; Compl. Br. at 57. No information has been presented as to how profit sharing is calculated or how much Respondent contributes to Complainant's 401K plan. Therefore, the Tribunal will not award damages for these items. *Douglas v. SkyWest Airlines,* ARB No. 08-070, -074, ALJ No. 2006-AIR-014 slip op. at 21 (Sept. 30, 2009).

D. Front pay

Front pay, which is money for future lost compensation as a result of discrimination, may be an appropriate substitute for promotion or reinstatement in certain circumstances. *Doyle v. Hydro Nuclear Servs., Inc.*, 89-ERA-22, slip op. at 2-3 (ARB Nov. 26, 1997). For example, front pay may be an appropriate substitute when the parties prove the impossibility of a productive and

amicable working relationship, or the company no longer has a position for which the complainant is qualified. *Id.*

Although reinstatement is the presumptive remedy in wrongful discharge cases under the whistleblower statutes, there are circumstances in which alternative remedies are preferred. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship," *Creekmore*, slip op. at 9, or where reinstatement otherwise is not possible. *See, e.g.*, *Doyle* (reinstatement impractical because company no longer engaged workers in the job classification occupied by complainant and had no positions for which complainant qualified); *Blackburn v. Metric Constructors, Inc.*, No. 86-ERA-4 (Sec'y Oct. 30, 1991) (Secretary reverses earlier reinstatement orders based on evidence developed on remand that company's electricians were terminated at conclusion of project with no expectation of continued employment). *Cf. Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1449 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005 (in ADEA case, reinstatement, not front pay, was appropriate remedy where there was no evidence that "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy").

In an adverse employment action, front pay is a form of equitable relief awarded by the court to make the plaintiff whole. *Whittington v. Nordam Group Inc.*, 429 F.3d 985, 1000 (10th Cir. 2005). Generally limited to a few years, the length and amount of a front pay award is a fact-specific inquiry that courts have characterized as "intelligent guesswork."[248] The Ninth Circuit (which has potential jurisdiction over this claim) has upheld front pay awards lasting as long as eleven years under certain factual circumstances.[249] The Fifth Circuit developed a six-factor framework to analyze whether to award front pay, and if so for how long, in *Reneau v. Wayne Griffin & Sons, Inc*., 945 F.2d 869, 871 (5th Cir. 1991). The framework examines: (1) the length of prior employment; (2) the permanency of the position held; (3) the nature of the work; (4) the age and physical condition of the employee; (5) possible consolidation of jobs; and (6) myriad other nondiscriminatory factors which could validly affect the employer/employee relationship.[250] Although the Ninth Circuit has not formally adopted it, several district courts in the Ninth Circuit have used the framework to determine front pay awards. *See Sanders v. City of Newport*, 602 F.

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[248] *Downey v. Strain*, 510 F.3d 534, 544 (5th Cir. 2007); *Sellers v. Delgado Coll*., 781 F.2d 503, 505 (5th Cir. 1986); *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237, 1246 (10th Cir. 2000)("award of front pay is based on speculation."). Even though front pay awards are somewhat speculative, "a defendant may not take advantage of the fact that its unlawful conduct was the cause of such uncertainty." *Barnett v. Bd. of Cnty. Comm'rs of Cnty. of Montrose*, 2015 WL 5074471, at *3 (D.Colo. Aug. 28, 2015). Thus, this Tribunal must attempt to make Complainant whole, without granting here a windfall. *See Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003).

[249] *Gotthardt v. Nat'l R.R. Passenger Corp*., 191 F.3d 1148 (9th Cir. 1999);*see Fresquez v. BNSF Railway Co.,* No. 17-cv-0844, 2019 U.S. Dist. LEXIS 190873 (D. Col. Nov. 4, 2019) (providing a 10 year award of front pay).

[250] The Tenth Circuit has set forth similar factors: "work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value." *Davoll v. Webb,* 194 F.3d 1116 1144 (10th Cir. 1999).

Supp. 2d 1195, 1202 (D. Ore. 2009). Front pay is reduced by a Complainant's actual earnings or by those earnings a complainant could earn using reasonable mitigation efforts. *Cassino v. Reichhold Chem.,* 817 F.2d 1338, 1347 (9th Cir. 1987); *Edwards v. Occidental Chemical Corp.,* 892 F.2d 1442 (9th Cir. 1990)(Title VII permits front pay providing the salary differential to which plaintiff would have been entitled had she received the desired promotion); *Ward v. Sorrento Lactalis, Inc.*, CV-04-006-S-BLW, 2005 U.S. Dist. LEXIS 48920 (D. ID. Dec. 22, 2005)(5 year front pay differential between the salary as a laborer and a manager).

Applying the *Reneau* factors here, the parties have a long relationship and there is every indication that relationship will continue. However, Respondent has permanently damaged Complainant's reputation within the aviation community and the likelihood of her being able to obtain promotion in the ranks is practically non-existent. The likelihood of her seeking other employment until retirement is remote, let alone being hired, because of her disclosures about safety issues. The question becomes how does this Tribunal evaluate the loss of future earnings? The Tribunal seriously considered granting front pay in this case because of the challenges Complainant will face going forward as Respondent's employee, but concludes that this remedy is not needed in this case given the other remedies available.

Complainant proposes using her current pay rate and the pay rate of an Assistant Chief Pilot from January 1, 2017 to the date of her 65th birthday.[251] She applied for the position of the Seattle-based Assistant Chief Pilot and her education, training and flight hours make her qualified for the position. Tr. at 195-97. She compared her training and credentials against Captain Dickson's and noted that she actually holds more type ratings than he. Tr. at 177; CX 199 at 14-15

Although Complainant may be qualified to be an Assistant Chief Pilot, there are far too many intangibles for this Tribunal to accept this as the benchmark. Further, the Tribunal questions whether it has the authority to reinstate a party into a position higher than one Complainant held. However, what it can do is require Respondent to pay Complainant, until her 65th birthday, at a wage she would obtain as a First Officer. Therefore, as of the date of this Order, Respondent must compensate Complainant at a wage no lower than the highest salary provided for any other Respondent-First Officer. That wage must remain in effect until, if, and when Complainant obtains a position that commands a greater salary.[252]

E. Compensatory Damages

Complainant seeks $30 million in compensatory damages. Compl. Br. at 54-55. As noted by Respondent, this happens to be the same amount Complainant asked for during the hearing where she sought $30 million to be a fine against Respondent for its actions. Tr. at 973. As the Tribunal noted during the hearing, it lacks authority to issue punitive damages. Therefore, the

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[251] Upon reaching her 65th birthday, Complainant can no longer serve as a pilot for Respondent or any other Part 121 air carrier. 49 U.S.C. § 44729.

[252] For example, being promoted to captain.

Tribunal will not take this amount into serious consideration. However, that does not mean that Complainant is not entitled to non-economic compensatory damages.

F. Non-economic Compensatory Damages

Complainant seeks two types of non-economic compensatory damages: (1) damages for emotional distress, humiliation, and loss of reputation; and (2) that Respondent place a copy of this Tribunal's Decision and Order in an area where its pilots will have access to read it in furtherance of additional training concerning the whistleblower protection provision of AIR 21.[253]

"Compensatory damages are designed to compensate discriminatees 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. "An award of 'compensatory damages based on the complainant's mental suffering or emotional distress' requires that the complainant 'show by a preponderance of the evidence that the unfavorable personnel action caused the harm." *Luder v. Continental Airlines, Inc.,* ARB Case No. 13-009, ALJ Case No. 2008-AIR-009, slip op. at 6 (Nov. 3, 2014). *See Evans v. Miami Valley Hospital*, 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)). Reasonable emotional distress damages may be based solely upon the employee's testimony. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7-8 (Aug. 31, 2011).

> [T]he circumstances of the case and lay testimony about physical or mental consequences of retaliatory action may support such awards. The ARB has held that while the testimony of medical or psychiatric experts 'can strengthen the case for entitlement to compensatory damages, it is not required.' The ARB has affirmed compensatory damage awards for emotional distress, even absent medical evidence, where the lay witness statements are 'credible' and 'unrefuted.'

Luder, slip op. at 16.

(1) Damages for Emotional Distress, Humiliation, and Loss of Reputation

"[A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001). In whistleblower cases where complainants have prevailed, compensatory damages have ranged from $4,000[254] to $250,000.[255] However, the Tribunal

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[253] Compl Br. at 59 and Compl. Reply Br. at 25.

[254] *Jackson v. Butler & Co.*, ARB Nos. 03-116, 144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) ($4,000).

[255] *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-030 (ARB Feb. 9, 2001) ($250,000). And most of those cases that did award compensatory damages were trucking cases. *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (awarding $50,000 in compensatory damages for emotional distress); *Smith v. Lake City Enterprises, Inc.*, ARB Nos.

notes very few cases that address compensatory damages under the Act. Those that do have provided damages for emotional distress and damage to reputation ranging from $3,000 to $100,000.[256]

The Tribunal is struck by the injury the Complainant suffered and will likely continue to suffer for the remainder of her professional flying career. First there is the sheer length of time that she was unable to fly for Respondent. There was the cruelty of receiving Dr. Altman's findings on Christmas Eve wherein she was summarily notified that her flying career was potentially over. Tr. at 429. Complainant credibly described the sleepless nights she experienced associated with enduring the events—founded in discriminatory retaliation—described herein. Complainant's brief notes the drama associated with her psychological testing which she had to endure several times. There is the permanent damage to her reputation within the aviation community regardless of this Tribunal's ruling. This includes medical records that will forever be in her FAA medical file and can create special reporting requirements to the FAA. *See* CX 153. And then there is the Respondent's actions of reporting Complainant's medical results to the FAA, in direct violation of its contract in the middle of the Section 15 process and *after* she had been cleared by the Mayo Clinic panel of psychologists and psychiatrists, but *before* conclusion of the Section 15 process via the n NME report

During this entire ordeal, Complainant had every reason to fear the loss of her professional flying career if not her very ability to fly. The evidence establishes Complainant's lifelong passion for aviation and it is not hard to understand the mental anguish she felt in the potential of wrongly losing something so dear and something she worked so hard to obtain. Further, regardless of this case, Complainant will continue to be subjected to oversight by many of the same actors that inflicted these circumstances upon her. Complainant is correct to point out that she will be subject to flight line gossip and there will be a lingering question of her true flying abilities. Thus,

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09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 28, 2010) ($20,000 in compensatory damages for emotional distress and loss of reputation); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063 (ARB June 30, 2008) ($10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008) ($5,000); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 04-STA-43 (ARB Dec. 29, 2005) ($20,000);; *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004) ($10,000); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-029 (ARB Oct. 9, 1997) ($75,000); *Bigham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-037 (ARB Sept. 5, 1996) ($20,000).

[256] *Evans v. Miami Valley Hosp.* ARB Nos. 07-118, 121 (June 30, 2009)($100,000 for emotional harm and damage to pilot's reputation); *Mark Van v. Portneuf Medical Center,* ALJ Case No. 2007-AIR-00002 (Feb. 2, 2011)($100,000); *Yates v. Superior Air Charter LLC,* ARB Case No. 2017-0061, ALJ Case No. 2015-AIR-00028 (Sept. 26, 2019)($9,390.42 in damages for emotional distress); *Vieques Air Link v. USDOL*, No. 05-01278, 437 F.3d 102 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10)(First Circuit affirmed a compensatory damages award of $50,000 for mental anguish); *Bell v. Bald Mountain Air Service,* 2016-AIR-00016 (Oct. 10, 2018)($10,000 for emotional distress); *McMullen v. Figeac Aero North America,* ARB No. 2017-0018, ALJ No. 2015-AIR-00027 (Mar. 30, 2020)($5,000 awarded for emotional distress); *Rooks v. Planet Airways,* 2003-AIR-00035 (Apr. 14, 2004)($5,000 for mental pain and suffering); *Dolan v. Aero Micronesia,* ALJ Case No. 2018-AIR-00032 (Sept. 26, 2019)($5,000 award for emotional distress); *Shackleford v. Execuflight*, 2019-AIR-0003 (Dec. 17, 2019)($3,000 award for emotional distress).

Complainant's exposure to harm not only stems from Respondent's discriminatory actions; such exposure flows also to Complainant's well-being and reputation within the aviation community.

The Tribunal finds that the other AIR-21 cases where compensatory damages were awarded are not adequate comparators; the harm Respondent inflicted in this case is far worse. The Tribunal finds that the compensatory damages in this case are beyond those previously provided by other Tribunals.[257] Given the level of past, present and future harm Complainant will suffer because of Respondent's conduct, the Tribunal finds that $500,000 in compensatory damages is warranted. The Tribunal has considered not only the harm to her reputation, the embarrassment and emotional hardship she has endured over an extended period of time, but also has considered the realistic loss of future opportunities for promotion she will inevitably face going forward in Respondent's employ.

(2) Publication of the decision.

The Act can only promote air safety by deterring discriminatory acts, if the air community is aware that AIR 21 whistleblower claims can provide effective relief. That desired outcome can be partially honored and effectuated by requiring Respondent to deliver a copy of this decision directly to its pilots and managers in its flight operations department. Respondent also must prominently post copies of the decision at every location where it posts other notices to employees related to employment law (*e.g.*, wage and hour, civil rights in employment, age discrimination) for a period of 60 days.

The Tribunal is aware of the Board's guidance in *Yates v. Superior Air Charter LLC d/b/a JetSuite Air,* ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 10 (Sept. 26, 2019) cautioning that such measures may not be warranted. However, the Tribunal believes that publication is appropriate in this case. The applicable regulation provides:

> **(b)** If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to *abate* the violation, *including*, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, *conditions*, and privileges of that employment, and compensatory damages.

29 C.F.R. § 1979.109(b)(emphasis added). The regulation does not limit what remedy achieves the Department's stated goal of abating the violation, it only lists those items set forth in the statute. The purpose is to make the person whole, including the terms, *conditions* and privileges of their employment. In this case, Complainant remains in the employ of Respondent. Respondent has soiled—perhaps permanently—Complainant's reputation within the aviation community by questioning her mental fitness. The statutory term "conditions . . . of that employment" includes restoration of one's reputation within the aviation community, including Respondent's employ.

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[257] The Tribunal's compensatory damages calculation, nevertheless, still took into persuasive consideration the damages findings of other judges.

One way to mitigate the consequences of that action is to inform that community of the results of Respondent's discriminatory actions towards one of its own. An underlying purpose of the statute is to deter those that commit discrimination, and to inform those that *could* be subject to such actions, that the Act does not tolerate such conduct. An informed public is a public armed with information necessary to prevent retaliation in the first place. And such publication has been ordered in other whistleblower cases.

The Tribunal also notes that the Board has previously approved of such a remedy. In *Mark Van v. Portneuf Medical Center,* the ALJ required respondent to deliver a copy of the ALJ's Decision directly to PMC's pilots, medical flight staff, mechanics, and dispatchers and prominently post copies of his decision at every location where it posts other notices to employees that relate to employment law for no fewer than 60 days. ARB No. 11-028, 12-043, ALJ No. 2007-AIR-002. Respondent objected to this requirement and the Board found it proper, writing:

> Similar to other employee whistleblower protection statutes, the purpose of AIR 21 is to eliminate employer discrimination and retaliation against employees who report violations of air safety regulations. AIR 21 includes abatement as a remedy for a violation. It is a common remedy in discrimination cases to require a company liable for unlawful retaliation to notify employees of the liability.[258] The ALJ was within his remedial discretion to order that [respondent] post the ALJ Decision finding the hospital liable for retaliating against [complainant] in violation of AIR 21. While we recognize the burden that might be imposed on [respondent] to deliver a copy of the ALJ's 97-page Decision directly to its employees, the ALJ's decision is available electronically on the DOL's ALJ website at http://www.oalj.dol.gov and could be provided to its employees electronically via e-mail or other means.

Id., slip op. at 20. *Michaud v. BSP Transport, Inc.,* ARB No. 96-198 and 97-113, ALJ No. 1995-STA-29, slip op. at 10 (Oct. 9, 1997)(ARB approved an order requiring respondent to post a notice for 30 days).

Finally, the Tribunal finds that publication of this decision would serve as a deterrent to not only those involved in the retaliatory acts concerning *this* case, but would also serve to deter others that might consider contemplating similar actions in the future. Deterrence of the wrongdoer and those that know of the conduct committed by the wrongdoer has long been deemed a proper factor when imposing a remedy for misconduct.

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[258] Here the Board cites to *Pollack v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 16 (ARB Apr. 7, 2010); *Michaud v. BSP Transp., Inc*., ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 10 (ARB Oct. 9, 1997), *rev'd on other grounds sub nom., BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38 (1st Cir. 1998). In *Michaud,* the Board approved an order requiring respondent to post a notice for 30 days and wrote "it is a standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer."). *See also Shields v. James E. Owen Trucking, Inc.,* Case No. 08-021, ALJ No. 2007-STA-022, slip op. at 14 (Nov. 30, 2009) (citing *Michaud v. BSP Transp., Inc.,* ARB Case No. 97-113 (ARB Oct. 9, 1997); *Griffith v. Atlantic Inland Carrier,* ARB No. 04-010, ALJ No. 2002-STA-034, 2004 DOL Ad. Rev. Bd. LEXIS 6, 88 (Feb. 20, 2004).

To be clear, the intent of this portion of the order is not punitive, but remedial, and to inform the aviation community, especially those that work for Respondent. To not inform the aviation community about such actions defeats the very purpose of the Act which is to deter air carriers from retaliating against their employees. More important in deterring retaliatory conduct is the actor's perception of a high probability of detection. If the prospective manager thinks he or she will not be caught, the existence of a rule against the act will not deter the wrongdoing. Therefore, the consequence of such discriminatory actions is not just to make the Complainant whole, but to arm Respondent's leaders and employees with information about the resultant actions of violating actors. Publication as required is not onerous, possibly embarrassing, but not onerous. To the extent publication of Respondent's actions brings it any discomfort, it is a natural consequence of its unlawful discriminatory actions.

G. Attorney Fees and Costs[259]

Complainant may submit a Fee Petition within sixty (60) 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 has twenty-one (21) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant has fourteen (14) days within which to file any reply to Respondents' response.

H. Litigation Costs

In addition to attorney fees and cost, Complainant seeks reimbursement for other litigation expenses to include travel to meeting with AIR 21 attorneys and transcription. She represents these costs are in excess of $14,000. Tr. at 539; Comp. Br. at 55. However, the Tribunal does not have sufficient information to award specific costs. The Tribunal will award reasonable litigation costs, but additional details are required. As Complainant requested that it be allowed a separate filing for attorney fees and cost if an award was granted, the Tribunal views these costs as being within her request. Therefore, the parties are given the same time to submit evidence on these expenses as set forth in the attorney fees and costs section above.

VIII. ORDER

Respondent must:

a. from the date of this Order, henceforth compensate Complainant at a wage no lower than the highest salary provided for any other Respondent first officer.

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[259] Complainant's counsel specifically requested that he not be required to submit attorney invoices until after the Tribunal issued a Decision and Order. The Tribunal granted that request in its Order Deny Respondent's "Letter Motion" Opposing Complainant's Request for Subpoena and Granting Complainant's Unopposed Motion to Defer Submission of Attorney Invoices, dated March 8, 2019.

b. reinstate either the vacation days Complainant used to avoid being placed on disability, or pay her the $52,522.03 for the loss of her vacations;
c. pay Complainant $500,000 in compensatory damages;
d. reimburse Complainant her litigations costs and attorney fees and costs. Complainant's counsel will separately file a detailed request for litigation costs and his attorney fees and costs within 60 days of the date of this Order.
e. deliver an electronic copy of the decision directly to all of its pilots and managers in its flight operations department. Respondent also will prominently post copies of the decision at every location where it posts other notices to employees related to employment law (e.g., wage and hour, civil rights in employment, age discrimination) for a period of 60 days.

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 the administrative law judge's decision.

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. 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 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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system ("EFS") which is available at https://efile.dol.gov/. If you use the Board's prior website link, dol-appeals.entellitrak.com ("EFSR"), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Filing Your Appeal Online

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf and the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210–0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:
https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.

SERVICE SHEET

Case Name: **PETITT_KARLENE_v_DELTA_AIR_LINES_INC_**

Case Number: **2018AIR00041**

Document Title: **DECISION AND ORDER GRANTING RELIEF**

I hereby certify that a copy of the above-referenced document was sent to the following this 21st day of December, 2020:

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