

U.S. Department of Labor

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Issue Date: 23 May 2005

CASE NO. 2004-AIR-00028

In the Matter of:

CARROLL SIEVERS,
Complainant,

vs.

ALASKA AIRLINES, INC.,
Respondent.

Appearances:

Thomas Spaulding, Esq.
For Complainant

Kevin C. Baumgardner, Esq.
For Respondent

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER

Carroll Sievers (“Complainant”) brings this complaint against Alaska Airlines (“Respondent”) under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; 49 U.S.C. § 42121 (“AIR 21”). A hearing was held in this case on December 14-16, 2004. The following exhibits have been admitted into evidence: Complainant’s exhibits (“CX”) 1-48; Respondent’s exhibits (“RX”) 1-50; Administrative Law Judge exhibits (“ALJX”) 1-3.¹ On January 20, 2005, Complainant submitted CX-49, hereby admitted to the record, and requested that CX-5 be withdrawn and replaced with CX-50. As Respondent does not object to this request, CX-50 is hereby admitted

¹ ALJX-1 is Complainant’s pre-trial statement; ALJX-2 is Respondent’s pre-trial statement (including the supplement submitted on December 8, 2004 and the errata submitted on December 13, 2004); ALJX-3 is my order denying Respondent’s motion for summary decision.

to the record. On February 24, 2005, Complainant submitted CX-51. As Respondent does not object to its admission, CX-51 is hereby admitted to the record.

Complainant filed a complaint on October 6, 2003. On June 1, 2004, the Regional Administrator issued a determination that the complaint lacked merit. On June 18, 2004, Complainant filed a request for hearing. On August 31, 2004, the parties submitted a stipulation and protective order and on September 8, 2004, I issued an order confirming the stipulation and protective order in all of its particulars. On November 23, 2004, Respondent filed a motion for summary decision, accompanied by exhibits A-Q, hereby admitted as "RSJX." On December 2, 2004, Complainant filed a response to Respondent's motion, accompanied by exhibits 1-35, hereby admitted as "CSJX." On December 9, 2004, I issued an order denying Respondent's motion for summary decision.

On January 19, 2005, Respondent and Complainant submitted a statement of agreed facts, hereby admitted as ALJX-4. Respondent's post-trial brief was received on February 23, 2005, as was Complainant's. These are hereby admitted as ALJX-5 and ALJX-6, respectively.

Issues in Dispute:

1. Did the Complainant engage in activity protected under AIR 21?
2. Was Complainant's protected activity a contributing factor in Respondent's decision to terminate him?
3. If so, would Respondent have terminated Complainant even in the absence of his protected activity?

SUMMARY OF DECISION

Complainant engaged in protected activity when he reported engine vibration, wing slat droop, cracked interior window covers, defective hydraulic reservoir, and missing wing placards. This protected activity was a contributing factor in Respondent's decision to terminate Complainant. Respondent would not have terminated Complainant in the absence of his protected activity. Complainant is entitled to lost earnings in the amount of \$534,293.00 and compensatory damages in the amount of \$50,000.00.

SUMMARY OF EVIDENCE

I. Background and Overview

Complainant was born in Indiana and was fifty-two years old at the time of the hearing. Tr 38. He began his professional career as a helicopter mechanic, Tr 38, and has worked as an aviation mechanic for almost thirty-two years, Tr 72. In September 1988, Respondent hired Complainant as an aircraft mechanic at Respondent's Seattle base. ALJX-4. In May 1989, Complainant became a line maintenance supervisor. Complainant transferred to Respondent's Portland station in July 1995. He continued to work as a line maintenance supervisor.

From November 2001 until his termination, Complainant reported to Lloyd Golden, who was then the Manager of Line Maintenance in Portland. Tr 291. Mr. Golden replaced Art Adams, who was removed from that position after failing a performance plan. Before coming to Portland, Mr. Golden managed the hangar operation in Seattle. Tr 292-93. He also worked as Manager of Line Maintenance for San Francisco, Oakland, and Phoenix. Tr 292.

Beginning around March 2003, Mr. Golden reported to David Keith, who became the Director of Line Maintenance for Respondent's out-stations in January 2003. Tr 495. Before that, Mr. Keith was the Director of Line Maintenance for Seattle. Tr 495. Mr. Keith also worked at US Airways for almost twenty years. Tr 496. Mr. Keith reported to Brian Hirshman, Respondent's Staff Vice President of Maintenance. CX-6, p. 95. Robert Kurlfink, the Director of Maintenance Operations, also reported to Mr. Hirshman. Tr 586-89. During all times relevant to this case, Mickey Cohen worked as Respondent's Senior Vice President of Maintenance and Engineering. RX-12, p. 411.

Complainant and two of his fellow supervisors, Chris James and William Shields, were terminated on July 9, 2003. RX-12, p. 410. Respondent alleges that these three supervisors were terminated because they committed timecard fraud. A fourth supervisor, Don Booth, was terminated on June 19, 2003, after being placed on a performance plan. Tr 216; RX-45, p. 811. Complainant contends that senior management officials terminated the supervisors as part of an effort to "clean house" and rid the Portland station of supervisors whom it perceived as overly concerned with safety.

At the request of Complainant, Mr. James, and Mr. Shields, George Bagley, the Executive Vice-President of Operations, conducted an internal investigation of the Portland terminations. Tr 658. Mr. Bagley ultimately upheld all three terminations.

The "Overhaul" of Respondent's Line Maintenance Organization

On January 31, 2000, Alaska Flight 261 crashed into the Pacific Ocean.² Eighty-eight people were killed and the airplane was destroyed. In response to the crash, Respondent commissioned Enders Associates International to evaluate Alaska's safety practices. CX-30, p. 358. The evaluation was conducted from April 10 through May 18, 2000 and culminated in a report ("Enders report") dated June 19, 2000, which contained various recommendations for strengthening Respondent's "safety culture." CX-30, p. 355.

Mr. Hirshman commenced a company-wide "review and overhaul" of Respondent's Maintenance Department, using the Enders Report as a guide. RSJX-L, p. 52. Discussing his impression of the Maintenance Department, Mr. Cohen stated that "there wasn't a sense of urgency . . . throughout the company in the line maintenance organization." CX-2, p. 18. He attributed this attitude as a response, in part, to concerns over Flight 261: "[M]echanics . . . were

² National Transportation Safety Board., *Aircraft Accident Report, Loss of Control and Impact with Pacific Ocean Alaska Airlines Flight 261 McDonnell Douglas MD-83, N963AS, About 2.7 Miles North of Anacapa Island, California, January 31, 2000*, December 30, 2002, at xii, <http://www.nts.gov/publictn/2002/AAR0201.pdf>.

hesitant They knew there was (sic) accusations out there about . . . the accident being caused by a maintenance problem, and they . . . wanted to be sure that they had good documentation before they would do anything on the airplane.” CX-2, p. 19.

Management’s overhaul of the Maintenance Department resulted in an increase in the accountability and performance expectations for both managers and supervisors. ALJX-4. One of the goals set by Mr. Hirshman was to reduce the average number of overnight out-of-service aircraft down to three. Tr 596-97. Mr. Kurlfink told Mr. Hirshman that he felt this goal was unattainable. Tr 597.

II. Alleged Protected Activities

Pressure from Senior Management

Complainant testified that the Portland station was “a relatively high seniority station” and that assignment to the station was “prized” by Respondent’s employees. Tr 64. However, Complainant felt that “things changed” after Mr. Cohen and Mr. Hirshman were hired. Tr 64. He described the change at the Portland station as follows:

There was more pressure being applied to us to try and have an on-time schedule, on-time launch, make repairs faster, get the airplane back in service quicker, just in my opinion more unnecessary pressure and tension.

Tr 65. Complainant believed that the new senior management wanted to “get rid of the old guard.” Tr 64.

Mr. Golden testified that Complainant, Mr. Booth, and possibly Mr. Shields complained to him that they felt that the supervisors were being pressured: “they were looking at it from an aspect of were we rushing them to go – try to take a shortcut or do something that was unsafe.” Tr 410. Mr. Golden stated that he did not pass these complaints on to Mr. Keith or Mr. Hirshman. Tr 410.

Mr. Kurlfink perceived the Portland station as a “particular problem, greater than the other stations.” Tr 635. He agreed that he attributed Portland’s problems to the ineffective performance of its supervisors, Tr 638, and that he questioned repeated repairs identified at the station by asking “Why is it only in Portland?” or by demanding verification of the need for certain repairs. Tr 623. The supervisors perceived such comments as intended to inhibit the identification of repairs. Tr 75-76, 204-5, 700-2. However, Mr. Kurlfink stated that he has never told anyone to limit the scope of their inspections so that needed repairs would not be found. Tr 632.

Respondent’s maintenance program is a “stage” or “sequence” program. Tr 510. Mr. Keith explained that the program mandates sequenced inspections, starting with walk-around inspections which occur each time an aircraft goes through a technician-staffed station and moving through more thorough inspections, culminating in an in-depth check occurring every five to six years. Tr 511-14. Mr. Keith stated that mechanics sometimes conduct inspections

that exceed the parameters specified in the maintenance program. Tr 516. He explained: “. . . sometimes you get guys . . . that you have caused them some ill will, whether you turn them down for a vacation day or he had some payroll problems . . . he might retaliate and become overzealous and start doing an inspection that’s really not called out at that proper time and finding something.” Tr 519.

Complainant recalled Mr. Hirshman emphasizing that maintenance staff must adhere to the approved scope of inspection. Tr 75. Complainant stated that the Portland staff did not change the scope of their inspections, but “continued to do the same thing that we had always done, above and beyond the letter of the work card. We looked at the whole aircraft . . . [b]ecause it’s our job.” Tr 75-76.

Although Mr. Hirshman agreed that Portland had more cancellations and delays due to maintenance than did Respondent’s other stations, he testified that the mechanics were never pressured “not to find things that weren’t appropriate for a line maintenance level of check” because to do so would be “inappropriate.” CX-6, p. 97-101.

The Enders Report

Complainant testified that he was aware of the Enders Report and that it was available to Alaska employees. Tr 709-10. Notably, the report contains the following perspective on effects of deregulation on airline safety:

In recent years, as the aviation industry has developed under deregulation, economic competition has sharpened, and marketing has generally gained a higher level of prominence in executive decision-making. While this is an understandable trend, the situation also brings with it an insidious potential for a high-risk imbalance between safety and economics.

CX-30, p. 363. Complainant stated that he was cognizant of this potential imbalance and tried to manage it by continuing “to take a stand and do, in the interest of safety, what we needed to do with the jet, and try not to go in that direction of – of better statistics We were ensuring that the aircraft was in an airworthy condition and we had the documentation in place for the jet to fly.” Tr 710-11.

The Federal Aviation Regulations

The orders, regulations, and standards of the Federal Aviation Administration (“FAA”) provide the backdrop for Respondent’s maintenance operation. ALJX-4. Compliance with the Federal Aviation Regulations (“FAR”) and other applicable safety rules is one of the primary duties of all supervisory management within Respondent’s Maintenance Department. Respondent’s General Procedural Manual (“GPM”) was drafted to comply with the FARs. The GPM implements orders, standards, or practices of the FAA, and provides the guidelines by which repairs are to be made. Compliance with Respondent’s maintenance program as set forth in the GPM is mandated by the FARs. Tr 149.

When a mechanic identifies a repair, under the FARs, he must either make the repair or find an authorization allowing release of the aircraft for service. Tr 43-45; CX-29, p. 461-483. Complainant identified several sources for such authorizations, including the Minimum Equipment List (“MEL”), the Configuration Deviation List (“CDL”), the GPM, and the Engineering Department. Tr 43-45. If none of these sources authorizes the deferral of a repair, the repair must be made before the aircraft can be released. Tr 45.

The Engine Vibration Incident

Sometime in January through March 2003, Tr 145, one of Respondent’s pilots reported that the engine of an aircraft was vibrating excessively. Tr 70. Portland mechanics on duty inspected the jet, but were unable to find the reason for the vibration. Complainant, the supervisor on duty at the time, called Maintenance Control to report that the aircraft was still out of service. Mr. Kurlfink asked why Complainant did not release the plane himself, since the mechanics had been unable to find anything wrong with the aircraft.³ Tr 616. Complainant refused to do so.

Under the FARs, when a mechanic signs off on an aircraft, he is stating that no known condition exists which would make the aircraft un-airworthy. Tr 76; CX-29, p. 335, 353. Mr. Hirshman stated that it is not appropriate for a senior manager to pressure a line maintenance supervisor to overrule a mechanic’s decision not to certify an aircraft as airworthy under the rules and regulations of the FAA. CX-6, p. 111.

Wing Slat Droop Repairs

Complainant testified that there were several occasions when management questioned slat droop repairs, including one incident in April 2003.⁴ Tr 147-48. The slats are the leading edge of the wing on an aircraft. Tr 72. During take off and landing, the slats are extended and during flight, the slats are pulled up. The FAA regulations specify the amount of “droop” allowable in the slats. The permissible droop is measured by the thousand of an inch. Tr 73. Complainant testified that when slat droop exceeds the permissible tolerance, there is no deferral and the slat must be fixed before the plane can be released to service.

Mr. Golden stated that the Portland station reported more incidents of slat droop than did other stations and that management was legitimately curious about how the Portland mechanics were finding this issue. Tr 318-19. Mr. Keith also testified that the Portland mechanics found slat droop repairs more frequently than did other stations and that, following one such incident, he traveled to Portland to determine the reason for this increased frequency. Tr 536-37. Mr. Keith felt that that the increased frequency was the result of Portland mechanics looking “a little

³ Mr. Kurlfink testified that the aircraft, an MD-80, was equipped with a mechanism which measured excessive vibration. Tr 617. He therefore questioned the mechanics’ decision to hold the aircraft if no vibration was detected. However, Complainant contradicted this assertion, stating that the MD-80, unlike other models, has no such mechanism. Tr 708-9. Mechanics must therefore detect any excessive vibration manually. Tr 708-9. Art Adams confirmed that not all aircraft have such a mechanism. CX-49, p. 656.

⁴ Mr. Keith’s testimony that he was involved with several of the “slat droop” incidents confirms that these incidents likely occurred in early 2003, after Mr. Keith became Director of Line Maintenance Outstations.

too close.” CX-7, p. 126. Mr. Cohen testified that the Portland mechanics were performing “a detailed inspection where they took measurements, which is something that is done at a ‘C’ check.” CX-2, p.21.

The Inner Window Piece (“Reveal”) Repair

Sometime in fall 2001,⁵ Portland maintenance took an aircraft out of service after a mechanic found several of the interior plastic window covers with cracks. CX-11, p. 169; Tr 77. The mechanic could not find any regulation that would allow him to defer the repair. Tr 77. Complainant acknowledged that the window pieces had no structural significance, but stated that without appropriate documentation permitting a deferral, the aircraft had to be grounded. CX-11, p. 169.

Mr. Cohen was “surprised” that the aircraft was grounded and the window pieces were repaired given that there was no structural significance to the pieces. CX-2, p. 22. Mr. Keith recalled that he, Mr. Kurlfink, and Mr. Hirshman “were all upset about the situation” involving the window piece. Cx-7, p. 134.

Mr. Hirshman testified that he was frustrated because Portland line maintenance did not go to engineering or maintenance control to seek a deferral. CX-6, p. 119. Mr. Hirshman believed Portland maintenance grounded the plane because the regulations forbade them from releasing the aircraft. CX-6, p. 120. He acknowledged that, at the time of the incident, he mistakenly believed that a deferral was “in place” for such repairs, when, in fact, a deferral was not in place. Tr 627. Mr. Hirshman confirmed that he could not insist that an aircraft be released unless there was a “legitimate deferral for it.” Tr 627.

Hydraulic Reservoir Repairs

Complainant testified that senior management questioned the mechanics’ decision to repair the hydraulic reservoir on several occasions. Tr 151-52. He recalled that the latest incident occurred in late 2001. Tr 152. Senior maintenance officials were concerned that this repair was only being identified at the Portland station. Tr 151. Mr. Kurlfink acknowledged questioning “why it would be a reservoir all the time when there are so may other hydraulic components that . . . could be at fault prior to changing the reservoir.” Tr 624. In some cases. Mr. Kurlfink halted repair of the reservoir until Respondent’s technical service could confirm the need for the repair. He never, however, prevented a repair from being completed.

The Wing Placard Incident

⁵ In his deposition, Mr. Keith testified that he recalled discussing this incident with Mr. Hirshman and Mr. Kurlfink, indicating that the incident may have occurred after Mr. Keith became Director of Line Maintenance Outstations in early 2003. CX-7, p. 134. However, in his deposition, Complainant testified that this incident occurred when Art Adams was Director of Line Maintenance in Portland, RSJX-A, p. 127, and I find Complainant’s testimony more persuasive evidence of the time period in which this incident occurred.

Sometime in 2001, Tr 153, Portland maintenance took an aircraft out of service because placards were missing on the bottom of the wings. CX-11, p. 169. Complainant testified that Mr. Hirshman was frustrated about this incident, CX-2, p. 169, and Mr. Hirshman's own testimony conveys disappointment about how the incident was handled: "[T]hey could have gone to engineering and got a deferral. They could have stocked the part there . . . There were several steps they could have taken." CX-6, p. 116. Complainant testified that Mr. Hirshman told him it was "standard industry practice" to simply mark the wing with the missing placards and move the aircraft. Tr 77. Complainant refused to do so without appropriate documentation indicating that this was an appropriate solution. Tr 77. Mr. Hirshman denied saying this.

III. The Timecard Investigation

The Investigation

Mr. Golden testified that on June 5, 2003, he received an anonymous call complaining that Arthur Van Uchelen, a mechanic, did not show up for his shift until almost midnight, but was signed in two or three hours earlier.⁶ Tr 340-43. Mr. Keith stated that Mr. Golden called him the day after receiving the anonymous phone call. Tr 555. During their conversation, they discussed whether to investigate the allegation and Mr. Keith suggested that Mr. Golden verify the mechanic's arrival time by checking security videotapes. Tr 555. Mr. Golden asked an administrative assistant to find out whether there was a way to verify the time an employee arrived at the airport. Tr 345-46. Sometime in the next few days, the assistant called him to report that she could get reports showing the time an employee used his badge to gain entrance to the parking lot. Tr 346.

Mr. Golden stated that initially, he believed that only the mechanics were involved in the timecard fraud. Tr 348. Mr. Golden testified that he did not ask a supervisor to assist with or conduct the investigation because no supervisor was on duty that day. Tr 348. Mr. Golden stated that he initiated the investigation himself because the union contract requires an investigation and resulting discipline to take place within fourteen calendar days. Tr 350. Mr. Golden continued that he also wanted to verify that there was some truth to the allegation prior to involving the supervisors because false alarms, such as "somebody calling up to try and get somebody else into trouble . . . some animosity between two employees," had happened on

⁶ There is conflicting evidence regarding the date of the anonymous phone call. During his deposition, Mr. Golden stated that he received the anonymous phone call on "March 4, the night of the 3rd and the morning of the 4th. It was right before we had the supervisors' meeting and I had all the supervisors off so that they could attend this meeting on the morning of the 4th." Tr 399. Complainant also recalled that he first learned that there was a time card investigation during a meeting held on March 4-5 2003. Tr 78. Respondent's records confirm that a meeting of the supervisors was held on that date. RX-9, p. 134. In a written statement, Mr. Van Uchelen made an entry for the dates of his various timecard discrepancies, followed by an explanation. RX-9, p. 343. One of the entries is for March 3, although there is no explanation following the date. RX-9, p. 343. However, at the hearing, Mr. Golden stated that his earlier testimony was mistaken. Tr 399. In an investigation report, completed by Mr. Golden on June 13, 2003, he indicates that the call came in on June 5, 2003. RX-9, p. 78. There is no evidence in the record of a supervisors' meeting on June 5 or 6.

numerous previous occasions. Tr 349. Mr. Golden could recall no other incident in which a supervisor was not involved in the investigation of a mechanic's conduct. CX-4, p. 52.

Mr. Golden testified that his review of the badge swipe records showed several instances of timecard irregularities. Tr 352. Mr. Golden proceeded to interview the mechanics, who informed him of the supervisors' involvement. Tr 360. According to notes in Mr. Golden's investigation file, he asked the mechanics the following questions during their interviews:

Is this your time card?

Did you change or Sup.?

Did you tell Sup.?

Did you call in before shift?

What were the circumstances?

Is this a violation?

What normally happens?

RX-9, p. 29. In a June 21, 2003 email to Respondent's Labor Relations Department, which is copied to David Keith, Mr. Golden notes that "[t]here appears to be an atmosphere that if the supervisor says it's OK, timecard deviations are legal." RX-22, p. 505.

The supervisors do not appear to have been involved in the investigation until they were summoned to give statements (June 18-23, 2003). Tr 362. All three supervisors admitted to having signed incorrect timecards and to "rounding up" overtime for employees under their supervision. ALJX-4. Complainant disclosed that he had punched an employee's timecard on two occasions. Tr 123; RX-13, p. 417. In one instance, an employee who was quite ill and who needed to leave immediately gave Complainant his timecard. Tr 90-91. Complainant was in his office and placed the mechanic's timecard in his pocket, only remembering that he still had the card as he was leaving. He then punched the card and put back in its slot. In the other incident, Complainant punched a late employee in on time because the employee promised to work through his lunch. RX-9, p. 109.

Complainant testified that although he understood that punching in another employee's timecard was a violation of company policy, at the time, he felt that the policy applied to the rank and file employees, not the supervisors. Tr 124-25.

Two incidents in which an employee was punched in, but not present were never explained. CX-22, p. 227. No supervisor admitted punching these employees' timecards. CX-22, p.226-27.

The Employee Relations Department works with management when conducting an investigation or when a management employee's performance is at issue. Tr 455. A separate department, the Labor Relations Department, handles union or bargaining unit employee issues. Tr 455. Mr. Golden stated that after receiving the anonymous phone call, he first called the Labor Relations Department. Tr 351. According to his testimony, he did not contact the Employee Relations Department until later in the investigation, when he learned that the supervisors might be involved. Tr 360-61.

Leah Hanson was a senior employee relations representative at all times relevant to this case. Tr 453. She stated that the Employee Relations Department "would help support the person that's conducting the investigation, mostly in an advisory capacity." Tr 456. The Employee Relations Department conducts investigations "if that person that's involved in the investigation of a management – if they're involved with that then we would typically take over the investigation." Tr 456. Ms. Hanson stated that she worked with Mr. Golden to facilitate obtaining badge swipe records from the Port of Portland. CX-50, p. 683.

Timecard Padding was a System-wide Practice

One of the timecard irregularities uncovered during the investigation was a practice of padding certain mechanics' overtime (hereinafter "timecard padding"). In order to encourage a mechanic to remain on duty past the end of his scheduled shift, supervisors would add extra time to the mechanic's timecard. Tr 53-57. Complainant recalled that while he was in Seattle, overtime padding was a common practice. Tr 54-57. Complainant testified that this practice existed in Portland as well. Tr 62-63. He believed timecard padding was sanctioned, albeit unofficially and that it was a "win-win" for both management and employees. Tr 57-59.

During the hearing, Mr. Golden testified that he suspected that timecard irregularities occurred when he was stationed in Seattle. Tr 323. Although he did not conduct an investigation in Seattle, Mr. Golden testified that he told the Seattle supervisors, "if you get caught dealing in a time card use that isn't by the book, I'll fire you. You will be terminated for these kinds of actions." Tr 324. Mr. Golden testified that he was unaware of any timecard irregularities in the Oakland facility. Tr 293.

Mr. Golden informed Mr. Keith that he believed the timecard padding practice was system-wide. Tr 377. When asked whether he suspected that a practice of padding time cards existed during the time he worked in Seattle, Mr. Keith responded that there were "some rumors that there were some improprieties to some time card (sic). Nothing specific stuck out." Tr 501. Mr. Keith stated that he addressed these rumors by holding monthly staff meetings in which supervisors and management would "go over the different issues that were creeping up that we were uncovering, making sure that we were all working on a consistent basis to correct those problem areas." Tr 501-2.

When Mr. Keith informed Mr. Hirshman of the possibility that timecard padding was systemwide, Mr. Hirshman told Mr. Keith to conduct an investigation. Tr 528. Mr. Keith testified that he asked his station managers to find out whether the timecard padding practice existed at their respective stations, but the managers did not find any similar practice. Tr 529.

He stated that he also went to the payroll department and “thumbed through” timecards, but did not uncover any problems. Tr 529. Mr. Keith did not, however, do any type of secondary check on when employees accessed the work site, such as reviewing badge swipe records. Tr 560-61. He acknowledged that such a secondary check would be “one way” of verifying a practice of timecard padding. Tr 560-61. Mr. Keith testified that even if he had discovered that timecard padding was a system-wide practice, he would still have terminated Complainant. Tr 529-30.

Kurt Kinder, who was the Director of Line Maintenance in Seattle at all times relevant to this matter, CX-45, p. 615, met with Mr. Hirshman to discuss the decision to terminate Complainant. CX-45, p. 615. Mr. Kinder informed Mr. Hirshman that he had received a written warning for timecard padding in 1992, when he was a supervisor. CX-45, p. 615. Mr. Kinder also informed Mr. Cohen of the 1992 incident. CX-45, p. 617.

Mr. Adams stated that timecard padding was an established practice. CX-49, p. 654. He acknowledged giving mechanics extra time by either signing them out or punching their timecards. CX-49, p. 654-55.

Ms. Hanson stated that at the time of the investigation, she was unaware of allegations that timecard padding was a system-wide practice. CX-50, p. 688. She also stated that she was unaware that the Portland supervisors alleged that timecard padding was a longstanding practice at Alaska Airlines. CX-50, p. 681.

Testimony of Supervisors and Mechanics

Mr. Shields testified that the timecard padding practice existed in both Seattle and Portland. Tr 189. He observed the practice under each of the managers for whom he worked in Portland. Tr 190. He testified that Mr. Golden was aware of the timecard practice and often told supervisors to “do what you have to do” to get a job done, Tr 191, although Mr. Golden never directly condoned the practice, Tr 200. Mr. Booth stated that he was never instructed to stop the practice or told that he would be terminated if he failed to do so. Tr 200. Mr. Booth agreed that punching another employee’s timecard is a violation of the System Regulations. Tr 209.

Richard Lawrence has worked as a mechanic for Respondent for the past fifteen years. Tr 168. Before transferring to the Portland station in October 2000, Mr. Lawrence worked in San Francisco and Oakland. Tr 169. Mr. Lawrence testified that the time card padding practice occurred in Oakland and in San Francisco, and that it was “a common practice throughout all of the stations.” Tr 172-73. Mr. Lawrence could not recall a specific incident when Mr. Golden approved the timecard padding practice in Portland. Tr 174. However, he did hear Mr. Golden tell Mr. James to “work your magic” on one occasion when an aircraft needed repair and no mechanic had volunteered for overtime. Tr 175.

Richard Ferrer has worked for Respondent as a mechanic for fourteen years. Tr 178. He worked at both the Oakland and Portland stations. Tr 178. He stated that he has observed the timecard padding practice at both stations. Tr 179. Mr. Ferrer testified that in Oakland, a supervisor would punch the timecards to alter them: “the lead would instruct us to lay our card

upright in the rack and it would be taken care of. The next day we would come in and would be punched out” Tr 180.

Mr. Ferrer wrote a letter, which was signed by thirty-five mechanics from the Portland station, protesting the termination of the Portland supervisors. Tr 183; CX-19, p. 194. The letter states that Mr. Golden knew of the timecard practice. CX-19, p. 194. Mr. Ferrer recalled that he heard Mr. Golden tell the supervisors to “work your magic on the time cards” on several occasions. Tr 184. Mr. Ferrer averred that he wrote the letter and collected the signatures on his own initiative, and the neither Complainant nor any of the other supervisors asked him to do so. Tr 183.

Walter Killinen has worked for Respondent as a mechanic for eleven years. Tr 254. He worked in Anchorage for four years and has spent the remainder in Portland. Tr 254. Mr. Killinen testified that he observed the timecard padding practice both in Anchorage and in Portland. Tr 254-55. He stated that the practice existed under all three of the Portland managers for whom he worked. Tr 255. Mr. Killinen wrote a letter to Respondent’s management, protesting the termination of the Portland supervisors. Tr 256; CX-19, p. 199. The letter states that timecard padding was a common practice and that Mr. Golden knew of the practice and encouraged it. CX-19, p. 199. Mr. Killinen testified that on one occasion, he asked Mr. Golden to adjust his timecard:

. . . I had stayed over to change a nose steering actuator on an MD-80 one time with another mechanic, and we were done before the four hours was up. It probably only took us a couple of hours. I had taken my timecard in to [Mr. Golden’s] office, and he told me to have [Mr. James] do his magic.

Tr 257. Mr. Killinen stated that Mr. James signed his timecard and he was paid for more hours than he worked that day. Mr. Killinen never saw a supervisor punch in a timecard; he agreed that such an action was against System Regulations. Tr 258-59.

Russell Prewitt has worked as a mechanic for Respondent fourteen years. Tr 259-60. He has been stationed in Juneau, Seattle, and Portland. Tr 260. He stated that he has observed timecard padding at all three stations. Tr 260. He testified that supervisors would document the reason for a timecard deviation on the back of the timecard. Tr 261. Mr. Prewitt wrote to Mr. Bagley to protest the termination of the Portland supervisors. Tr 263; CX-19, p. 205. He noted that “a vast majority” of the mechanics felt that the terminations were “done unfairly and with malice.” CX-19, p. 205. Mr. Prewitt offered to meet with Mr. Bagley, but did not receive a response to the letter. Tr 263. On cross-examination, Mr. Prewitt agreed that it was not a common practice for a supervisor to punch an employee’s timecard. Tr 265.

Richard Wagner has worked as a mechanic for Respondent since 1982. Tr 266. He testified that the timecard padding practice existed at every station to which he has been assigned. Tr 267-68. Mr. Wagner stated that the practice existed under every Portland manager for whom he worked. Tr 269-70. Mr. Wagner wrote a letter to Respondent’s management, protesting the termination of the Portland supervisors. CX-19, p. 204. Mr. Wagner explained that he felt the terminations were “unconscionable” because the timecard padding practice “was

a known standard throughout Alaska Airlines” Tr 273. On cross-examination, he agreed that it was not a standard practice for a supervisor to punch an employee’s timecard. Tr 274.

Brian Snyder, a mechanic working at Respondent’s Portland station, ALJX-1, p. 30, testified that timecard padding was a common practice at both the Seattle and Portland stations, Tr 276. He stated that the practice existed under every Portland manager for whom he worked. Tr 277. Mr. Snyder wrote a letter to Respondent’s management protesting the terminations. Tr 278; CX-19, p. 198. He testified that he overheard Mr. Golden remarking “make it work” or “do what you gotta do” to the supervisors. Tr 279. On cross-examination, Mr. Snyder agreed that it was not a standard practice for a supervisor to punch an employee’s timecard. Tr 281.

David Goad is a mechanic who has worked for Respondent for fifteen years. Tr 282. He has worked at both the Seattle and Portland stations. Tr 282. He stated that the timecard padding practice existed at both stations. Tr 283. He emailed Mr. Bagley to protest the firings, stating that the timecard padding practice was common at “most, if not all airlines for decades.” CX-19, p. 191. Mr. Goad testified that, in his opinion, timecard fraud was not the real reason for the termination of the supervisors. Tr 287.

Conrad Vlaming was deposed on December 7, 2004. CX-46. He has worked as both a mechanic and a supervisor at Alaska, and now works in the vendor maintenance department. CX-46, p. 627. Mr. Vlaming testified that, on one occasion, he engaged in timecard padding. CX-46, p. 627. He stated that, at the time, he felt it was within his discretion as a supervisor to do so. CX-46, p. 627. Mr. Vlaming stated that punching another employee’s timecard was “a big violation” and a terminating offense. CX-46, p. 629.

Richard Pinkham was deposed on December 7, 2004. CX-47. He currently works as a line maintenance supervisor in Respondent’s Seattle station; prior to that, he worked as a mechanic. CX-47, p. 633. When a supervisor he understood that it was within his discretion to give a mechanic extra hours for a job well done. CX-47, p. 634. Mr. Pinkham testified that the practice of timecard padding existed from the time he began working for Respondent as a mechanic until the Portland supervisors were terminated. CX-47, p. 634. He agreed that punching in another employee’s timecard is a terminable offense. CX-47, p. 637.

Although Mr. Golden could not recall an occasion on which he said “work your magic,” he testified that he often encouraged people to “make it work” in the sense of getting involved in a situation to ensure that the repair was successfully and timely completed. Tr 324-25. He denied ever saying “work your magic with the timecards.” Tr 325. He testified that neither Mr. Keith, Mr. Hirshman, nor Mr. Cohen ever indicated that timecard padding should be tolerated. Tr 329. Complainant acknowledged that Mr. Golden never specifically told him to pad overtime or falsify timecards. Tr 109.

Alleged Prior Warnings to Supervisors

Respondent’s Rules of Conduct prohibit certain conduct and provide that employees may be subject to disciplinary action up to and including discharge for engaging in such conduct. ALJX-4. The rules include the following proscriptions: “Do not alter, punch, or make entries on

another employee's time card." "Falsification of records . . . or misrepresentation of facts including time records . . . will not be tolerated." ALJX-4.

During a December 6, 2001 meeting, which Complainant attended, Mr. Golden discussed timecard procedures. Tr 113. The notes from this meeting indicate that overtime was to be justified by a supervisor "in the back of the Supervisor Turnover Book." Tr 113; RX-6, p.20.

Mr. Golden distributed a memorandum dated June 27, 2002 to "All Maintenance Employees" in the Portland station addressing the subject "New Time Card Documentation Form." Tr 114; RX-3, p. 17. The memo stated that timecards would still be filled out "as usual," but that an additional form was to be used for "anything outside the normal day." RX-3, p. 17. The memo reads, in part, "If you do not get a Supervisor signature . . . it could cause a delay . . ." RX-3, p. 17.

On July 19, 2002, Mr. Golden distributed another memo, also addressed to "All Maintenance Employees" and entitled "Time Card Procedure." RX-4, p. 18. The memo discusses an employee's responsibility for his timecard. Tr 117; RX-4, p. 18. Complainant testified that the supervisors do not use timecards to record their own hours. Tr 117.

On July 23, 2002, Mr. Golden placed a disciplinary letter in Chris James' file. RX-5, p. 19. The letter admonishes Mr. James for altering an employee's timecard:

On week ending 6/23/02 you changed the times on Kevin Lamonts timecard. This resulted in him being shorted 10 hours of pay. This is a direct violation of System Regulation rule #4 "Do not alter, punch, or make entries on another employee's timecard." This is totally unacceptable! I want to clarify; as a supervisor you have to annotate entries on hourly timecards but you are not allowed to do anything to a timecard that will change the pay or alter the amount of time or vacation a person is to be paid. You are responsible to verify compliance but it is the employee's responsibility to fill out and make corrections to their timecard. Any further incident of this kind will result in further discipline up to and including discharge.

RX-5, p. 19. Mr. Golden testified that he informed the other supervisors that this letter was placed in Mr. James' file and that they "needed to make sure to get the mechanic or the employee to make that change and to make it a correct and accurate record." Tr 338-40. Complainant acknowledged that he knew of this incident, but stated that he did not know the details, only that Mr. James received a letter because he had taken ten hours off an employee's timecard. Tr 118.

Mr. Golden testified that, on another occasion, shortly after Mr. Golden was transferred to Portland, he spoke with Mr. James after Mr. James allowed a mechanic to leave early without losing pay. Tr 322. He said that this incident was one of "the contributing factors" that led him to put Mr. James on a performance plan and that he assumed this conduct was "strictly an issue with Chris James." Tr 322. He stated that he and Mr. James had a verbal discussion and that he

gave Mr. James “directions on, you know, how I wanted him to conduct his duties” in the performance plan. Tr 323-22.

During the March 4-5, 2003 meeting with the Portland supervisors, Mr. Keith addressed the implementation of the new electronic timecard system. Tr 507-8. He testified that he conveyed his concern that the new system “would show a lot of improprieties if they were in fact happening I wasn’t saying that anything was going wrong in Portland at that time, but if anything was improper, that it better stop because [the new system] is real good about finding out who the supervisor is that signed the stuff off . . . and if the reports started showing that you were a supervisor that was giving away funds, there was no way I could help you.” Tr 508.

IV. Termination of the Portland Supervisors

Mr. Golden testified that once Complainant admitted punching timecards, it was clear to him that Complainant could not maintain his employment with Respondent. Tr 364. Mr. Golden explained that punching another employee’s timecard broke a “cardinal rule.” Tr 421. Mr. Golden testified that it was the system regulation proscribing altering, punching, or making entries on another employee’s timecard which caused him to feel that he had no option but to terminate Complainant. Tr 440-41. He agreed that this regulation did not distinguish between punching a timecard and altering or marking another employee’s timecard. Tr 441.

Mr. Golden acknowledged that mechanics are sometimes paid for time not actually worked under the terms of the union contract. Tr 321. The contract contains the following provisions governing late or missed lunches:

If . . . the employee receives his lunch [late], he will be entitled to straight time pay, not to exceed thirty (30) minutes for the late lunch period, and will be permitted to receive his full lunch period as soon as possible. The Company may direct the employee to leave work thirty (30) minutes early, without loss of pay, in lieu of pay for the lunch period. * * * If . . . an employee fails to receive his lunch period . . . he shall receive thirty (30) minutes straight time pay for his missed lunch and also receive pay for all hours worked (overtime if applicable). A graveyard shift employee who misses his lunch will receive the applicable rate of pay for all hours actually worked plus thirty (30) minutes straight time pay and thirty (30) minutes at time and one-half as compensation for the missed lunch.

CX-26, p. 246. Supervisors complied with this provision by “altering” a mechanic’s timecard and explaining the circumstances on the back of the card. Tr 57. Mr. Golden maintained that when a supervisor credits a mechanic for time not actually worked under the terms of this provision, “in fact [the supervisor] created an accurate account of the contract allowance that would allow him to depart the premises while getting paid for that thirty-minute lunch period” Tr 321.

Mr. Golden stated that the system regulation guidelines for assessing disciplinary action are applicable to supervisory employees. Tr 422-23. Respondent’s system regulations state that “[a]lthough the philosophy of progressive discipline applies to all employees, our management

employees are at-will and may be terminated or resign at any time, with or without cause.” CX-12, p. 172. The regulations also provide that “[m]ore serious conduct may require more severe action such as suspension or immediate discharge without prior discipline or corrective action. The use of progressive discipline is not appropriate in all cases.” CX-12, p. 174. The regulations list the following “considerations” when determining the appropriate disciplinary action:

- Type and gravity of misconduct.
- Employee’s prior record including same or similar misconduct.
- Disciplinary action issued against other employees for the same or similar infractions under the same or similar circumstances.
- Adverse impact or the potential adverse impact of the violation on employees, supervisors, customers, the Company, or its business.
- The employee’s attitude about his or her behavior, expressed commitment to refrain from such conduct and conform to company rules and standards.
- Any mitigating or exacerbating circumstances in a particular case that would suggest lesser or greater discipline.

CX-12, p. 174-75.

In a memo dated June 25, 2003, Mr. Golden recommended Complainant’s termination, noting “8 of the 18 irregularities were approved by [Complainant]. [Complainant] admitted to punching employees timecards in and out . . . Because of the higher standard that management has due to their position and previous guidance was ignored, termination would be appropriate” RX-9, p. 115. Mr. Golden did not recommend any disciplinary action for the other supervisors and did not recommend termination for any employee except Complainant. RX-9, p. 115. Mr. Golden recommended two of the mechanics be disciplined, both of whom had timecard discrepancies indicating that they were punched in when not actually on the premises. RX-9, p. 115. He advised that timecard procedures be outlined for employees and management personnel and stated that it was his belief that “this is not isolated to Portland.” RX-9, p. 115.

Mr. Golden, Mr. Hirshman, and Mr. Keith met to discuss Mr. Golden’s recommendations. Tr 379. Mr. Golden testified that they agreed that the mechanics should not be disciplined because the supervisors had condoned their actions. Tr 379. Mr. Golden stated that in the course of their discussion, they determined that Mr. James and Mr. Shields should also be terminated because “it’s like being a little bit pregnant. The bottom line is they stole from the company and they still created a false time card record.” Tr 380. Mr. Golden stated that the decision to terminate the Portland supervisors was “devastating.” Tr 380.

Mr. Keith testified that no one suggested “cleaning house” in Portland by getting rid of all of the supervisors and that the only reason for the terminations was timecard fraud. Tr 526. He stated that he did not perceive Complainant to be a problem employee. Tr 527. Mr. Keith testified that Mr. Hirshman was the final decision maker regarding the terminations. Tr 573.

Mr. Kurlfink stated that he did not learn of the terminations until after the fact. Tr 640.

Ms. Hanson stated that Christine Douglas, the Director of Employee Relations, recommended that all of the supervisors be terminated. Tr 465; CX-23, p. 210.

Complainant, Mr. James, and Mr. Shields were terminated on July 9, 2003.⁷ CX-13, p.177; CX-14, p. 178. Mr. Golden was present at Complainant's termination meeting. Tr 383.

Complainant received consistently good performance evaluations up until the time of his termination. Tr 107. Mr. Golden stated that he was very impressed with Complainant's work performance and that the two had a good relationship. Tr 300-1. Mr. Golden testified that he conducted two formal evaluations of Complainant and that both were positive. Tr 301-2. He stated that neither Mr. Hirshman, Mr. Keith, nor Mr. Cohen ever indicated that they felt Complainant was not a good supervisor or instructed him to downgrade Complainant's evaluations. Tr 303. Mr. Golden testified that he also gave Bill Shields positive performance reviews. Tr 306. He stated that although he put Chris James on a performance plan, because Mr. James' performance improved, Mr. Golden asked for and received approval to give Mr. James a merit raise. Tr 307-8. Mr. Hirshman approved this raise. Tr 308. Mr. Golden gave Mr. James a positive review in April 2003. Tr 308.

Respondent is unaware of any other instance in which a supervisor was terminated for timecard falsification. CX-32, p. 429-30.

On July 22, 2003, following the termination of the supervisors, Mr. Hirshman distributed a memo to "All [Maintenance & Engineering] Supervisors" addressing "Time Card Procedures." CX-27, p. 247. The memo states that "[e]very supervisor is responsible for making sure employees are paid only for hours *actually worked*" and warns that "[t]o alter or approve a timecard for hours not worked is fraud and theft and could result in disciplinary action up to and including discharge."

ECR Investigation

Following their terminations, Complainant, Mr. Shields, and Mr. James initiated an Employee Complaint Review ("ECR"), a procedure in which a senior management official not involved in the investigation or termination (here, Mr. Bagley) would conduct a review of the underlying facts and discipline. ALJX-4. The Complaint Review Request in which Complainant, Mr. Shields and Mr. James requested a review of their terminations, did not suggest that the reason given for their termination (timecard fraud) was pretext, nor did it mention safety, any of the incidents referenced in Complainant's complaint, or retaliation. RX-14, p. 422.

Many of the Portland mechanics sent letters or emails to Mr. Bagley protesting the termination of Complainant, Mr. James, and Mr. Shields. See CX-19. As previously discussed,

⁷

A week prior to Mr. Golden's recommendation that Complainant be terminated, Mr. Booth was discharged after he failed a performance plan. Tr 375. Mr. Golden stated that the performance plan was 120 days and that he met with Mr. Booth every two weeks during that time. Tr 388; RX-45. He stated that the Employee Relations Department was involved with the performance plan. Tr 393.

Mr. Ferrer wrote one such letter, which was signed by thirty-five Portland employees. CX-19, p. 194-95. The letter alleges that Mr. Golden knew of the “time card documentation problem” and requests he be removed from his position as Maintenance Manager. CX-19, p. 194.

At Mr. Bagley’s request, Mr. Golden wrote a memo detailing the circumstances of the terminations. Tr 381; RX-15, p. 464-67.⁸ Mr. Golden stated that the content of this memo, dated July 15, 2003, was taken “mostly verbatim” from his June 25, 2003 memo to Mr. Keith and Mr. Hirshman. Tr 382; CX-21, p. 220-223. However, the memo to Mr. Bagley did not include Mr. Golden’s statement that the timecard padding practice was not limited to Portland. Tr 382; RX-15. Mr. Golden explained that “I took out any embellishments or opinions that I had . . . and tried to stick strictly to the facts . . .” Tr 382-83. Mr. Bagley agreed that Mr. Golden’s June 25, 2003 memo was not included in the documents he was given to review during the ECR process. Tr 678.

The memo submitted to Mr. Bagley contained the following under the heading “Conclusion”:

***Carroll Sievers: Terminated 9 July, 2003**

8 of the 18 irregularities were approved by Carroll Sievers. Mr. Sievers admitted to punching employees timecards in and out.

***Bill Shields: Terminated 9 July, 2003**

Bill signed 2 people in on time that were 15 minutes late. He also signed 1 person out at 1500 and let him leave 1 hour early with pay.

***Chris James: Terminated July 9, 2003**

Chris paid 2 mechanics 3 ½ hours of Overtime and they completed the job two hours earlier and went home.

CX-21, p. 222. Mr. Bagley stated that he thought Mr. James’ case was different than the other supervisors because his conduct was limited to timecard padding and did not include other types of timecard irregularities. Tr 666. Mr. Bagley testified that he requested Mr. James be eligible for rehire following the conclusion of the termination process. Tr 670.

Mr. Bagley met with Complainant, Mr. James, and Mr. Shields to discuss their respective terminations. ALJX-4.

Mr. Golden, Mr. Keith, and Mr. Hirshman also met with Mr. Bagley in the course of Mr. Bagley’s investigation.⁹ Tr 385. Mr. Golden testified that he told Mr. Bagley that it was his recommendation that neither Mr. James nor Mr. Shields be terminated. Tr 437. However, he did

⁸ Although the heading on the memo reads “To All Portland Personnel,” Mr. Golden testified that this was an error and the memo was intended for and sent to Mr. Bagley. Tr 381-82.

⁹ Respondent produced no meeting notes or related documents from Mr. Bagley’s meeting with Hirshman, Keith and Golden, although such documents were requested in discovery. CX-33, p. 432.

not include that recommendation in his written report because “it was a done deal. The terminations had already taken place.” Tr 436. Mr. Bagley testified that he was not aware that Mr. Golden recommended no disciplinary action be taken against Mr. James and Mr. Shields. Tr 679.

Mr. Bagley asked Mr. Keith, Mr. Hirshman, and Mr. Golden whether timecard padding was a past practice. Tr 421, 531, 669. Mr. Keith informed Mr. Bagley that an investigation had been conducted and that the allegations proved to be without merit. Tr 531. Mr. Bagley recalled being told that although Mr. Keith, Mr. Hirshman, and Mr. Golden had heard it was a past practice, it was not one that they condoned. Tr 669. Mr. Bagley was also informed that the supervisors were specifically told not to engage in such a practice. Tr 669.

Mr. Bagley was aware that it was a common practice in the aviation industry to offer mechanics more overtime than was actually worked in order to induce mechanics to stay past their shift. Tr 663. However, he stated that he would have upheld Complainant’s termination even if timecard padding was an established practice at Respondent’s other stations. Tr 670.

Mr. Bagley upheld the decision to terminate all three of the supervisors on July 25, 2003. CX-16, p. 183; CX-17, p. 186; CX-18, p. 190. He agreed that in deciding the ECR request from the Portland supervisors, he relied on the input he received from Mr. Hirshman, Mr. Keith, and Mr. Golden. Tr 675.

V. Post-Termination Events

On August 17, 2003, shortly after Complainant’s termination, CX-20, p. 218, Ron Moore, a technician at Respondent’s Los Angeles station, informed Mr. Keith that similar timecard practices occurred at the Los Angeles station. Tr 532. Mr. Keith conducted an investigation into these allegations. Tr 533; CX-20. According to Mr. Keith’s notes, he immediately called John Aiwazzi, the supervisor implicated by Mr. Moore. CX-20, p. 217. Mr. Aiwazzi denied the allegations. CX-20, p. 217. Mr. Keith then ran a report on overtime paid to Los Angeles mechanics in July 2003. CX-20, p. 218. On August 25, 2003, Mr. Keith went to payroll and looked at timecards from the previous two weeks. CX-20, p. 219. He concluded that the allegations were without merit.

Mr. Golden stated that the Portland mechanics were very unhappy about the termination of the supervisors and were particularly displeased with Mr. Golden. Tr 424-25. After the firing of the Portland supervisors, there was an escalation in the incidences of “overzealous inspections” (that is, mechanics performing out of sequence inspections merely to identify a repair because they are angry with Respondent) by the Portland mechanics. Tr 550.

Complainant initiated his AIR-21 complaint on October 3, 2003. ALJX-4. After Complainant filed his AIR 21 complaint, the FAA conducted an investigation and concluded that no violation of a safety regulation had occurred. RX-19, p. 496. Complainant discussed his termination with friends who also worked for Respondent, but did not mention a connection between his termination and safety or regulatory concerns. Tr 141-42.

Complainant stated that his termination troubled him and that he had a hard time functioning afterwards. Tr 101. Complainant stated that he felt betrayed by Respondent and was in “total disbelief” at his termination. Tr 95. He described his emotional reaction to the termination as follows:

It just destroys your self-esteem . . . I was really depressed, just wanted to stay in bed many days and not get up . . . I used to like to work around the house there and finish house projects, and, man, I could hardly use a screwdriver to turn a screw anymore. I just felt drained.

Tr. 101. Complainant testified that he had planned to finish his career with Alaska. Tr 96.

Complainant’s wife, Jeanette Sievers, described the emotional effects of Complainant’s termination as follows:

I have been with him for twenty-four years and I have never seen him sob. He broke down and sobbed. The family, we all sat at the table, and we all sobbed together. He was quite broken down and devastated. He had lost weight. He’s an avid jogger. He stopped running. He just fell deeper and deeper in depression was my observation.

Tr 224. Complainant stated that, as a result of his termination, he was forced to sell his home and accept a job as a helicopter mechanic, which required him to relocate to Idaho. Tr 96. His wife stated that Complainant’s relocation has put a strain on the family. Tr 225.

Complainant’s daughter and wife suffer from a chronic illness, Tr 99-100, and Mrs. Sievers testified that the family was “devastated by the loss of the medical insurance . . . We didn’t know what we were going to do.” Tr 225. Complainant’s parents loaned him money for medical insurance, as well as for costs associated with the college education of two of his children. Tr 100.

Although Complainant began looking for a job two weeks after his termination, he found that the airlines “all over the United States and the world were not doing anything. They weren’t hiring. They were laying off hundreds and thousands.” Tr 96. Complainant has been employed full-time as a helicopter mechanic for Kachina/Heli-Jet Corporation since March 3, 2004. He began his employment making \$18.00 an hour and received a raise to \$19.00 an hour on or about September 1, 2004. ALJX-4. His benefits include health insurance and a 401(k) plan. ALX-4.

Dr. Robert Male

Dr. Robert Male, a Vocational Economic Consultant, testified on behalf of Complainant. Tr 231-259; CX-36, p. 453-60. Dr. Male holds a doctorate in Counseling Psychology, and has been on the faculty at Portland State University, Oregon State University, and Merle Hirsh University. He provides vocational expert testimony at hearings before the Social Security Administration and has testified for both plaintiff and defense before federal and state courts. He

is active in several professional organizations, including the American Academy of Economic and Financial Experts, and the American Rehabilitation Economic Association. Dr. Male has published numerous articles related to economic damages.

Dr. Male prepared a chart calculating Complainant's earnings loss (see following page). CX-37, p. 466. In summary, Dr. Male determined that the present value of Claimant's earnings losses is \$389,833.00. Dr. Male also calculated a tax equalization adjustment ("TEA") to Complainant's award. Dr. Male explained that a TEA is necessary when a complainant's award is paid in a lump sum because a lump sum award is considered taxable income by the Internal Revenue Service. To account for this tax effect, Dr. Male calculated a TEA in the amount of \$144,460.00, which he added to the present value of Complainant's earnings losses, for a total award in the amount of \$534,293.00.

ANALYSIS

AIR 21 proscribes retaliation by a covered employer against an employee when the employee provides information to his employer or to the government concerning any "violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety" 49 U.S.C. § 42121(a). To prevail on a complaint of retaliation under the whistleblower provisions of AIR 21, a complainant must establish by a preponderance of the evidence that: 1) he engaged in protected activity; 2) the employer was aware of the protected activity; 3) the complainant suffered an adverse employment action; and 4) the protected activity was a contributing factor in the adverse action (causation). 49 U.S.C. § 42121(b)(2)(B)(iii); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Once the complainant has established these elements, the employer may avoid liability if it can establish by clear and convincing evidence that it would have taken the same employment action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

I. Protected Activity

Complainant asserts that he engaged in protected activity when he: 1) resisted pressure from management to override a mechanic's decision not to sign-off on an aircraft with reported engine vibration; and 2) identified and documented the following repairs: wing slat droop, defective hydraulic reservoir system, missing wing placards, and cracked interior plastic window covers.

Respondent argues: 1) these episodes were merely routine, isolated matters that were indistinguishable from the normal day-to-day operations of the Maintenance Department; 2) no regulatory or safety violation actually occurred; 3) Complainant was never prevented from doing repairs he felt were necessary, nor told to speed up repairs without regard to safety; 4) Complainant never complained to anyone, internally or externally, that a safety violation had occurred; 5) Complainant was merely uncomfortable with the "new regime" and changed culture that occurred as a result of the Enders Report; 6) management never pressured Complainant not to find problems; management was simply challenging what it perceived to be out-of-sequence maintenance inspections.

CARROLL SIEVERS – Earnings Losses

Year	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
Age	Expected Wages 1	After Tax Wages	PV Tax Adj/WE	Fringe Benefits	Net Earn Adj/WE	PV of Earn 1	Act/Proj Wages 2	After Tax Wages	PV Tax Adj/WE	Fringe Benefits	Net Earn Adj/WE & costs	PV of Earn 2	Difference (PV1-PV2)	Cum Difference		
2003	\$ 75,082	\$ 61,943	\$ 13,139	\$ 2,252	\$ 77,334	\$ 77,334	\$ 57,389	\$ 48,666	\$ 8,723	\$ 1,722	\$ 59,111	\$ 59,111	\$ 18,224	\$ 18,224		
2004	\$ 76,809	\$ 63,214	\$ 13,595	\$ 2,304	\$ 79,113	\$ 79,113	\$ 50,823	\$ 43,809	\$ 7,014	\$ --	\$ 43,823	\$ 43,823	\$ 35,290	\$ 53,514		
2005	\$ 78,729	\$ 64,637	\$ 10,647	\$ 2,362	\$ 63,900	\$ 61,265	\$ 64,584	\$ 53,992	\$ 8,002	\$ --	\$ 44,273	\$ 42,448	\$ 18,818	\$ 72,331		
2006	\$ 80,697	\$ 66,010	\$ 10,639	\$ 2,421	\$ 65,497	\$ 60,208	\$ 66,844	\$ 55,748	\$ 8,038	\$ --	\$ 46,054	\$ 42,335	\$ 17,873	\$ 90,204		
2007	\$ 82,715	\$ 67,495	\$ 10,570	\$ 2,481	\$ 67,135	\$ 59,169	\$ 69,184	\$ 57,492	\$ 8,120	\$ --	\$ 47,898	\$ 42,215	\$ 16,954	\$ 107,159		
2008	\$ 84,783	\$ 69,013	\$ 10,500	\$ 2,543	\$ 68,813	\$ 58,148	\$ 71,605	\$ 59,289	\$ 8,201	\$ --	\$ 49,806	\$ 42,087	\$ 16,061	\$ 123,220		
2009	\$ 86,902	\$ 70,565	\$ 10,430	\$ 2,607	\$ 70,533	\$ 57,144	\$ 74,112	\$ 61,216	\$ 8,233	\$ --	\$ 51,781	\$ 41,951	\$ 15,193	\$ 138,413		
2010	\$ 89,075	\$ 72,151	\$ 10,359	\$ 2,672	\$ 72,297	\$ 56,158	\$ 76,706	\$ 63,129	\$ 8,310	\$ --	\$ 53,825	\$ 41,810	\$ 14,348	\$ 152,761		
2011	\$ 91,302	\$ 73,772	\$ 10,288	\$ 2,739	\$ 74,104	\$ 55,189	\$ 79,390	\$ 65,100	\$ 8,386	\$ --	\$ 55,940	\$ 41,661	\$ 13,527	\$ 166,289		
2012	\$ 93,584	\$ 75,429	\$ 10,215	\$ 2,808	\$ 75,957	\$ 54,236	\$ 82,169	\$ 67,050	\$ 8,507	\$ --	\$ 58,130	\$ 41,507	\$ 12,729	\$ 179,018		
2013	\$ 95,924	\$ 77,027	\$ 10,194	\$ 2,878	\$ 77,856	\$ 53,300	\$ 85,045	\$ 69,141	\$ 8,579	\$ --	\$ 60,396	\$ 41,348	\$ 11,953	\$ 190,971		
2014	\$ 41,295	\$ 33,077	\$ 4,250	\$ 1,239	\$ 33,517	\$ 22,000	\$ 36,969	\$ 29,945	\$ 3,633	\$ --	\$ 22,512	\$ 14,777	\$ 7,223	\$ 198,194		
Total	\$ 976,896	\$ 794,332	\$ 124,828	\$ 29,307	\$ 826,055	\$ 693,266	\$ 814,820	\$ 674,578	\$ 93,747	\$ 1,722	\$ 593,549	\$ 495,072	\$ 198,194			

Gross taxable income 2004 w/o award = \$ 50,823 Tax bill = \$ 7,014
 2004 income plus earnings and pension losses = \$ 440,656 Tax bill = \$ 131,756
 Additional tax on award in 2004 = \$ 124,742
 PV of tax on lost annual wages = \$ 31,081 (E minus K)
 Tax Equalization Adjustment (TEA) I = \$ 93,661

Gross income this year including award & TEA = \$ 585,112 Tax bill = \$ 182,555
 Additional tax on award this year = \$ 175,541
 PV of tax on lost annual wages = \$ 31,081
 TEA X = \$ 144,460 - TEA IX = \$ 4

DOB: 6/09/52; DOI: 7/09/03; Age: 51 yrs; LE: 27.3 yrs; Retire age 66; Worklife Expectancy 11.82 yrs. (active)

Assumptions and Explanations:

Expected Wages (column C) shows the expected pre-termination earning stream. Annual real wage growth rate = 0%.
 Projected Wages (column I) shows the projected mitigation earnings stream based on post displacement earning capacity and employment. Annual real wage growth rate = 1%.
 After Tax Wages (column D & J) show the annual after tax earnings (federal and state income taxes) for a married person filing separately.
 PV Tax Adj/WE (columns E & K) show the annual taxes paid on the wages adjusted for worklife expectancy in terms of present value.
 Fringe Benefits shows the annual value of matching employer contributions to optional pension/savings plans. Other benefit value is considered equal pre and post (except Alaska's defined pension plan).
 Contributions to defined benefit pension plans are not included in the annual benefit totals in columns F and L. This loss was calculated separately.
 Net Earn Adj/WE (column G) shows the value of each year's earnings adjusted for worklife expectancy and accrued to age 66.
 Net Earn Adj/WE & costs (column M) shows the value of each year's earnings adjusted for worklife expectancy and accrued to age 66.
 PV of Earn (columns H & N) show the present value of each year's earnings.
 The expected annual inflation rate is 2.5%; the interest rate is 4.3% (Treasury Bonds).
 Defined Benefit Pension losses: In addition to lost annual earnings, an analysis was made of losses resulting from being terminated at age 51 with 13.358 years of service credit vs. retiring at age 62 with 22.358 years of service credit. A comparison was made between the pension payout projected at age 62 and the payout that will now be received at age 62.
 The present value difference in pension income lost as a result of termination = \$191,639. This amount is added to the earnings losses for a total loss = \$389,833.

Tax Equalization Adjustment: In an employment case, a lump sum award made to the plaintiff is considered taxable income by the IRS in the year it is received. The progressive nature of the tax structure in combination with the tax bracket of the plaintiff often causes differences between what the plaintiff would have paid in taxes on the earnings over time versus when received in a lump sum. To account for this tax effect, a tax equalization adjustment can be made to the plaintiff's award.

Present Value of earnings losses = \$ 389,833 Tax Equalization Adjustment = \$ 144,460 Award with TEA = \$ 534,293

Note: This analysis is based upon the information provided and subsequently obtained during the evaluation process and presents the pertinent data and conclusions reached up to the date of this report, 11/11/04. If the status of any of the pertinent facts and assumptions change, the conclusions reported here may be changed accordingly.

File materials include: Earnings Records; Resume; Complaint; Benefits Plans; Personnel Records; Job Search list; Interview Notes; Research Results

Resources consulted include: *Economic Report of the President*, February 2004; United States Life Tables, 2001, Vol. 52, No. 14, 12/18/04; *Bloomberg.com*; Statistical Abstract of the United States, 2002; 2003 & 2004 U.S. Master Tax Guide, CCH; 2004 Annual Report, Board of Trustees, Social Security; "The Markov (Increment-Decrement) Model of Labor Force Activity; Extended Tables of Central Tendency, Variation, and Probability Intervals. Gary Skoog and Jim Clecka. JLE Vol. #1, 2001; *Survey of Professional Forecasters*, Federal Reserve Bank of Philadelphia; Salary Assessor, Economic Research Institute, 2004; IRS Tax Tables, 2003 - 2004.

I find that Complainant's participation in the identification and reporting of engine vibration, wing slat droop, cracked interior window covers, defective hydraulic reservoir, and missing wing placards was protected activity under AIR 21.

Section 42121(a) of the Act defines protected activity as reporting information or participating in proceedings related to violations of federal air carrier safety laws, orders, regulations, or standards:

(a) Discrimination against airline employees. -- No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a). The complaint must be specific in relation to a given practice, condition, directive, or event. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). However, the form of the complaint is not critical; the complainant need not contact the federal government, nor use the employer's prescribed channels for reporting safety violations. *Davis v. United Airlines, Inc.*, 2001-AIR-00005 (ALJ July 25, 2002) (citing *Samodurov v. General Physic Corp.*, 1989-ERA-00020 (Sec'y Nov. 16, 1993)). The complainant must have a reasonable belief that his complaint is valid, but he need not prove that an actual violation of safety regulations has occurred. *Id.* at 10.

The Ninth Circuit has held that "competent and aggressive inspection work" is protected activity under the Energy Reorganization Act ("ERA").¹⁰ *Mackowiak v. Univ. Nuclear Sys. Inc.*,

¹⁰ Congress modeled the whistleblower provisions of AIR 21 after those of the ERA. Thus, "the decisional law developed under the whistleblower protection provisions of the [ERA], the Whistleblower Protection Act, and environmental statutes provide the framework for litigation arising under AIR 21." *Davis V. United Airlines, Inc.*, 2001-AIR-00005 (ALJ July 25, 2002), at 7.

735 F.2d 1159, 1163 (9th Cir. 1984). In *Mackowiak*, the complainant, a quality control inspector, was terminated as part of a reduction in force. *Id.* at 1160. He argued he was terminated “because he was an overly zealous inspector and because he identified safety problems to the Nuclear Regulatory Commission.” *Id.* The complainant filed a whistleblower complaint under the ERA. *Id.* Noting that the employer “discouraged its inspectors from asking too many questions, and pressured those who did,” the Ninth Circuit found that the complainant was terminated in part because of his protected activity. *Id.* at 1163. The court reasoned “[a]t times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC’s regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.” *Id.* The court concluded that employers “may not discharge quality control inspectors because they do their jobs too well.” *Id.*

When applicable regulations or procedures mandate the reporting of a defect or discrepancy, an employee is protected for doing so. *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-00007 (ALJ Feb. 9, 2004), at 23; *see also Szpyrka v. American Eagle Airlines, Inc.*, 2002-AIR-00009 (ALJ July 8, 2002) (holding that an airline employee performing required safety-related duties, including carrying out inspection and reporting obligations, may be engaged in protected activity). This is true even when the reported defect is “merely cosmetic” in nature. *Kinser, supra*. In *Kinser*, the complainant, an inspector for an airline, discovered and reported several broken or missing bin latch shrouds (the protective plastic covers that shield the latch mechanism on an airplane’s cargo bin). *Id.* at 5. The applicable regulations required that the shrouds be repaired or deferred. *Id.* at 6. The employer argued that the employee’s report did not constitute protected activity under AIR 21 because a broken or missing bin latch shroud does not implicate safety. *Id.* at 23. Rejecting the employer’s argument, the ALJ held that an employee is engaged in protected activity when he reports a defect as required by the FAA, even when that defect does not implicate a serious safety concern. *Id.*

Complainant’s conduct in the instant matter is comparable to that of the employees in *Mackowiak*, *Kinser*, and *Szpyrka*. While *Kinser* and *Szpyrka* are ALJ decisions and thus not controlling precedent, I find the reasoning of those decisions persuasive and in line with the reasoning of *Mackowiak*, a Ninth Circuit decision. Like the safety inspector in *Mackowiak*, Complainant carried out his required, safety-related duties “competently and aggressively.” That Complainant and the mechanics he supervised were performing their duties competently and aggressively does not render their acts unprotected. Nor is it important that some of the defects identified by Complainant and his staff did not implicate a serious safety concern (as with the interior plastic window pieces). *See Kinser, supra*. Complainant pursued his duties “above and beyond the letter of the work card.” Perhaps Complainant did his job “too well.” Nonetheless, his zealous pursuit of safety is protected under the Act.

Further, I reject Respondent’s argument that Complainant did not engage in protected activity because he did not “complain” to the FAA and did not register a safety complaint using Respondent’s safety “hot line.” Such formal complaints are not the only activities protected under AIR 21. For a finding of protected activity, it is sufficient that Complainant carried out his required, safety-related duties: supervising the maintenance of Respondent’s aircraft and reporting, repairing, or deferring the repair of any documented defects.

Respondent next asserts that no actual violation of the FARs occurred. While true, this fact is irrelevant. AIR 21 does not require that an actual violation occur; the Act merely requires that a complainant have a reasonable belief that his complaint is valid. Here, Complainant's belief that the FARs required him to document, repair or defer each of the defects listed in his complaint was reasonable, as was his decision not to sign-off on an aircraft with reported engine vibration.¹¹ Respondent does not dispute that once reported, the defects enumerated in the complaint had to be repaired or deferred. Rather, Respondent implies that Complainant and other Portland line maintenance staff conducted out-of-sequence inspections or unnecessarily identified repairs. However, there is no evidence in the record that Complainant condoned or conducted out-of-sequence inspections. Though Mr. Keith testified that mechanics, motivated by malice, sometimes conduct inspections that exceed the parameters specified in maintenance program, he did not indicate that Complainant was guilty of such conduct.

Far from identifying repairs out of malice, I find that Complainant's insistence that defects be documented and repaired or deferred was motivated by legitimate concern for safety. There is ample proof that Complainant and the other Portland supervisors felt they were being pressured to do something unsafe. Mr. Kurlfink acknowledged asking supervisors "why are you looking there?" Complainant and Mr. Shields both stated that they perceived such comments as pressure not to find defects in need of repair. Mr. Golden also testified that the Portland supervisors felt they were being pressured to do something unsafe.

Finally, I note that the atmosphere of tension in Respondent's Portland station bears an uncanny resemblance to the kind of dangerous cultural climate described in the Enders Report:

In recent years, as the aviation industry has developed under deregulation, economic competition has sharpened, and marketing has generally gained a higher level of prominence in executive decision-making. While this is an understandable trend, the situation also brings with it an insidious potential for a high-risk imbalance between safety and economics. The

¹¹ Complainant's decision not to certify the airplane with engine vibration as airworthy was protected activity on a second ground as well: an employee's refusal to comply with a directive which he reasonably believes violates FAA regulations and quality control procedures constitutes protected activity. *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-00007 (ALJ Feb. 9, 2004); *see also Getman v. Southwest Securities, Inc.*, 2003-SOX-00008 (ALJ Feb. 2, 2004). Complainant's mechanics could not diagnose the reason for the aircraft's engine vibration and felt the aircraft needed more troubleshooting. Complainant refused to override this decision because, under the FARs, to do so would be to certify the aircraft as airworthy. The mechanics did not believe the aircraft was airworthy and Complainant supported this assessment. If Complainant were to override this decision, he would have been certifying an aircraft as airworthy when he did not in fact believe it was airworthy, a violation of the FARs. Mr. Hirshman himself acknowledged that it is a violation of the FARs to pressure a supervisor to overrule a mechanic's decision not to certify an aircraft as airworthy. Complainant's perception that Mr. Kurlfink and Mr. Golden were pressuring him to sign-off on the aircraft was reasonable, as Mr. Kurlfink's own account of the incident demonstrates his annoyance with the maintenance staff. In hindsight, Complainant's conduct appears even more reasonable, considering that Mr. Kurlfink was wrong in his assumption that the aircraft was equipped with a mechanism that could detect engine vibration. It was this erroneous assumption which appears to have peaked Mr. Kurlfink's ire.

danger lies in creating an “artificial culture” within the regulated system that permits a “culture creep” away from safety emphasis. Such a “creep” can evolve into a rationale for operating beyond regulatory intent with, for example, deferred maintenance, excusing “minor” procedural non-compliance on the flight deck and in ground operations and other procedures, etc. Conformity with a company's own stated policies and procedures can also be insidiously eroded if “culture creep” is permitted to persist.

Complainant testified that he had read parts of the report and that he was aware of the potential “high risk imbalance” between economics and safety. Certainly, following the tragedy of Flight 261, it is credible that the Enders Report, which was commissioned in response to that crash, would be well-known to Complainant. Given that the cause of the crash was linked to maintenance, it is no wonder that Complainant and the mechanics he supervised insisted on meticulous adherence to proper procedures for documenting and deferring repairs. Mr. Cohen himself testified that mechanics were aware that Flight 261 was caused by a maintenance problem and that they “wanted to be sure that they had good documentation before they would do anything on the airplane.” CX-2, p. 19.

For the foregoing reasons, I conclude that Complainant’s “competent and aggressive” inspection work was reasonable, genuinely motivated by concern for safety, and an activity protected under AIR 21.

II. Contributing Factor

Under AIR 21, a complainant must establish that his protected activity was a “contributing factor” to the unfavorable personnel action. 29 U.S.C. § 42121(b)(2)(B)(iii). A contributing factor means any factor tending to affect the decision to take the adverse action. *Collins v. Beazer Homes U.S.A., Inc.*, 334 F.Supp.2d 1365, 1379 (N.D. Ga. Sept. 2, 2004). In essence, the complainant must show that his employer’s action was, at least in part, retaliatory. Proof of retaliation may be based on circumstantial evidence. *See Lawson v. United Airlines*, 2002-AIR-00006 (ALJ Dec. 20, 2002). The existence of a retaliatory motive may be established by circumstantial evidence “even if there is testimony to the contrary by witnesses who perceived lack of such improper motive.” *Mackowiak*, 735 F.2d at 1162 (internal quotation marks and citations omitted). Circumstantial evidence may include: temporal proximity, antagonism toward protected activity, or an explanation for adverse action that is pretextual (see sections IIA-C, below). Evidence that an employer’s proffered explanation is pretextual may include: deviation from routine procedure, suspicious circumstances, and disparate treatment (see section IIC, below).

I find that Complainant’s protected activity was a contributing factor in Respondent’s decision to terminate him. Complainant has put forth ample and believable circumstantial evidence which supports a finding that Respondent’s motive was retaliatory.

A. Temporal Proximity

Temporal proximity between an employee's protected activity and an employer's unfavorable personnel action may be circumstantial evidence of discrimination. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004). I find that Complainant's protected activity was sufficiently close in time to his termination to support an inference of retaliation. Complainant engaged in protected activity as late as March 2003 when he refused to override a mechanic's decision not to release a plane with an undiagnosed engine vibration problem. Respondent initiated the investigation that ultimately led to Complainant's termination in June 2003. These two events occurred within three months of each other, a short enough time span to permit an inference of causation.

Although the other events enumerated in the complaint occurred over the course of a few years, they transpired amidst an atmosphere of ongoing tension between the management officials, and the supervisors and mechanics. This tension was caused by a continuing disagreement over the extent of inspection required by the GPM and FAA regulations. Thus, Complainant's protected activity was not anomalous and disconnected, as Respondent argues, but part of a longstanding difference of opinion. When Complainant's protected activity is considered in the context of this ongoing tension, the time between his enumerated protected activities and the inception of events leading to his termination is not overlong.

B. Antagonism toward Overzealous Inspections

Antagonism toward protected activity, such as "ridicule, openly hostile actions or threatening statements," or even "simply questioning why the whistleblower did not pursue corrective action through the usual internal channels" may be circumstantial evidence of retaliatory motive. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996). The testimony of several of Respondent's management officials supports a finding of antagonism towards Complainant's protected activities. As evidenced by Mr. Kurlfink's testimony, Respondent's management clearly felt that Portland was a problem station and that the supervisors were part of the problem. Mr. Kurlfink acknowledged asking why certain repairs were only identified in Portland and asking "why are you looking there" when supervisors reported certain repairs. The supervisors construed such questioning as intended to inhibit the identification of repairs, an inference that is not unreasonable. At the very least, Mr. Kurlfink's repeated questioning indicates disapproval of the scope of safety inspections. Mr. Keith stated that he, Mr. Kurlfink, and Mr. Hirshman were all "upset" about the reveal (inner window piece) incident, a repair which they felt was unnecessary. Mr. Kurlfink halted repair of a hydraulic reservoir until Respondent's technical staff could confirm the need to repair it. Mr. Hirshman questioned the necessity of the wing placard repair. All of this conduct evinces an antagonism toward the manner in which Complainant and others conducted the maintenance of Respondent's aircraft.

C. Pretext as Circumstantial Evidence of Intentional Discrimination

Proof that an employer's proffered explanation is pretextual is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite

persuasive.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). “Thus, a plaintiff’s *prima facie* case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Id.* at 148; *see also Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, 2002-STA-00035 (ARB August 6, 2004), at 16.

Deviation from Routine Procedure

Deviation from proper or routine procedures may be evidence that an employer’s proffered explanation is pretextual. *Porter v. California Dept. of Corrections*, 383 F.3d 1018, 1926-27 (9th Cir. 2004). Respondent deviated from its routine procedure by terminating Complainant, James, and Shields with no warning and no opportunity to correct their alleged improper conduct, falsification of timecards. This absence of warning is contrary to Respondent’s system regulations, which indicate that the philosophy of progressive discipline applies to all employees, even those who are at will. The documents that Respondent argues were warnings (the June 27, 2002 and July 19, 2002 memos from Mr. Golden) were clearly directed at mechanics, not supervisors, and were hardly specific with regard to the type of misconduct that resulted in Complainant’s termination. Only the memo issued by Mr. Hirshman *after* the terminations is specific in proscribing the particular practice of timecard padding by supervisors. Finally, Mr. Kinder, who was disciplined for timecard padding in 1992, indicated that he received a written warning. Thus, the evidence tends to show that Respondent’s past practice was to give a written warning prior to termination.

Respondent’s System Regulations also detail a number of factors to be taken into account when determining the appropriate severity of discipline, none of which appear to have been considered in Complainant’s case. These factors include: “an employee’s prior record including same or similar conduct,” “disciplinary action issued against other employees for the same or similar infractions,” “employee’s attitude about his or her behavior,” and “any mitigating or exacerbating circumstances.” Complainant’s prior record was exemplary: he had always received excellent performance reviews and was held in high regard by his coworkers. Complainant had no record of prior misconduct and had never before been disciplined for any type of timecard irregularity. When accused of timecard fraud, Complainant’s “attitude” was one of remorse and he genuinely believed that timecard padding was a “win-win” for both the company and employees. Complainant himself received no financial gain because of timecard padding. Evidence that timecard padding was system-wide would certainly be a mitigating circumstance.

Strangely, Mr. James, the only supervisor who actually *did* have a previous record of timecard misuse, was the supervisor management was most reluctant to terminate. On July 23, 2002, Mr. James received a disciplinary letter admonishing him not to alter timecards. That letter closed with a warning that the repeated conduct could result in termination. Mr. James’ termination should have been the *easiest* to justify under Respondent’s system regulations.

Respondent’s failure to adhere to the established principles of its disciplinary system supports an inference that Complainant’s termination was retaliatory.

Suspicious Circumstances

A sequence or pattern of suspicious circumstances may permit an inference that an employer's adverse action was unlawfully motivated. *Hale v. Baldwin Assoc.*, 1985-ERA-00037 (ALJ October 20, 1986), at 18 (citing *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)). Respondent's timecard investigation is replete with suspicious circumstances. I discuss five noteworthy examples below.

First, Mr. Golden's failure to involve supervisors in the initial phase of the timecard investigation is difficult to understand. Although the investigation began with an anonymous caller's complaint about a *mechanic's* conduct, Mr. Golden did not involve any supervisor in the investigation. He could recall no other incident in which a supervisor was not involved in the investigation of a mechanic's conduct. Mr. Golden's attempt to explain this anomaly is not credible: Although he testified that he wanted to ensure that the anonymous caller's allegations were substantiated, this explanation is inconsistent with the fact that Mr. Golden immediately involved his superior, Mr. Keith, and immediately ordered a report of the employees' badge swipes. Based on Mr. Keith's testimony, it appears that it was unusual to order such reports and that the airport authorities discouraged the routine request of this information.

It is also suspicious that there was no follow-up on the two unexplained incidents in which a mechanic's timecard was punched in, but the mechanic was not on the premises. No supervisor admitted to involvement in these two incidents; presumably the timecards were punched by a fellow employee. Yet management's timecard investigation never turned its focus on finding the employees responsible for these acts. Mr. Golden's final report simply leaves two incidents of documented timecard fraud unexplained, with no recommendation for further investigation. Moreover, the questions Mr. Golden drafted for his interviews with the mechanics did not include any inquiry into whether another mechanic ever punched the interviewee's timecard, although Mr. Golden did ask whether a supervisor changed the card.

Third, there was no follow-up on the mechanics' allegations that Mr. Golden knew of and condoned the timecard padding practice. Ms. Hanson testified that the Employee Relations Department takes over an investigation when a management official is involved in the events being investigated; yet even when Mr. Golden was accused of complicity in the timecard padding, Employee Relations failed to take over the investigation, continuing to serve in an advisory capacity instead. Many of the mechanics wrote Mr. Bagley, accusing Mr. Golden of complicity, without generating much interest. Certainly, if the offense of timecard padding was serious enough to merit termination of all of Portland's supervisors, it was serious enough to at least merit investigation into the involvement of a manager.

As discussed above, Mr. Bagley's testimony that Mr. James merited a lesser penalty because there were fewer documented instances of violations on his part is perplexing in light of the fact that Mr. James alone had a prior history of discipline for timecard "irregularities." Moreover, on my reading of it, the memo that Mr. Golden prepared for Mr. Bagley does not present Mr. James' violations as less severe. It is puzzling, then, that Mr. James was the only supervisor allowed to reapply for employment following his termination.

Finally, I note that the record contains no documents pertaining to the June 25, 2003 ECR meeting with Mr. Bagley. As Complainant asserts, it is hard to believe that so many management officials would fail to take notes at a meeting of this nature. I also find it suspicious that the record contains no written communication between Mr. Keith and Mr. Hirshman regarding the timecard investigation.¹² It seems highly unusual that the two men exchanged not a single email on such an important subject.

Disparate Treatment

Disparate treatment of employees who engaged in similar conduct may be proof of retaliatory intent. *See, e.g., Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990). Respondent acknowledged that no other supervisor has ever been terminated for timecard fraud. Given the widespread nature of the timecard padding practice, this is most certainly evidence of disparate treatment. The record contains overwhelming evidence that timecard padding was a system-wide practice (including Mr. Adams' testimony that he engaged in the practice, Mr. Kinder's testimony, and the testimony of the other Portland supervisors and mechanics).¹³ Respondent's management largely ignored this evidence.

What little attention Respondent paid to the evidence that padding was system-wide was cursory at best. The investigations into timecard fraud conducted at Respondent's other stations were nothing like the Portland investigation. Mr. Keith's August 25, 2003 "investigation" consisted of "thumbing through" the previous two weeks' timecards. This is hardly a thorough inquiry and it occurred at a time when Mr. Keith was unlikely to find any evidence of timecard fraud, at least with respect to the timecards he chose to examine. The Portland supervisors were terminated on July 9, 2003 and the investigation into their alleged misconduct began in June 2003. It stands to reason that any timecard padding that had occurred at other stations would have stopped well before August 2003. Thus it is not surprising that Mr. Keith's "investigation" of timecards from that month was futile. Mr. Keith also conducted an investigation at Respondent's Los Angeles station. Again, this investigation occurred *after* the Portland terminations, when Respondent's employees were already well aware that timecard padding was no longer to be tolerated.

Mr. Keith's only other avenue of inquiry into the matter was to speak with the managers at other stations. But this is hardly the type of thorough and time consuming investigation that occurred in Portland. Certainly, Mr. Keith never ordered badge swipe records from other stations, as Mr. Golden did in Portland.

In light of the foregoing evidence, I conclude that Complainant's protected activity was a contributing factor in Respondent's decision to terminate him.

¹² Complainant requested copies of any such documents during discovery. CX-51.

¹³ I note that the practice of timecard padding is so widespread in the airline industry, it is even mentioned in another AIR 21 decision: "[S]upervisors or crew chiefs could make informal arrangements under which mechanics would work past their regular quitting times, but not 'badge out' on the time clock when they left for home. Later, a supervisor would sign exception sheets showing departure times that allowed mechanics to be paid for more overtime than they had actually worked." *Walker v. American Airlines*, 2003-AIR-00017 (ALJ Nov. 16, 2004).

III. Same Employment Action in Absence of Protected Activity

An employer may avoid liability if it can establish by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity. *Collins*, 334 F.Supp.2d at 1376.

Respondent asserts that it would have terminated Complainant even in the absence of his protected activity. Complainant was the only supervisor who admitted to punching an employee's timecard, conduct which Respondent argues was more culpable than merely signing an employee out by handwritten notation. I find this argument unpersuasive. First, I note that the System Regulation Complainant allegedly violated simply states "[d]o not alter, punch or make entries on another employee's timecard." The provision makes no distinction between altering and punching a timecard. Moreover, Respondent's supervisors were clearly allowed to "alter" and "make entries" on another employee's timecard under appropriate circumstances. For example, under the union contract, a mechanic may choose to leave work early without loss of pay in lieu of taking a late lunch. Supervisors complied with this provision by "altering" a mechanic's timecard and explaining the circumstances on the back of the card. Since supervisors were permitted to alter and make entries on the mechanic's timecards in certain circumstances, and given that the System Regulation makes no distinction between altering, punching, or making entries, it is difficult to understand why punching a timecard is a more serious violation than signing a timecard.

Respondent cites one other regulation in support of Complainant's termination. But that regulation simply states that falsification of records or misrepresentation of facts will not be tolerated; it says nothing to indicate that one method of "falsification" is more serious than another. Complainant credibly testified that he believed his conduct was sanctioned, albeit unofficially, and was no more a "falsification" than was allowing an additional half-hour pay as dictated by the terms of the union contract.

Finally, the reasons given by Complainant for punching, rather than signing the timecards are understandable under the circumstances. In one instance, an employee who was quite ill and who needed to leave immediately gave Complainant his timecard. Complainant was in his office and placed the mechanic's timecard in his pocket, only remembering that he still had the card as he was leaving. He then punched the card and put back in its slot. In the other incident, Complainant punched a late employee in on time because the employee promised to work through his lunch.

It is also noteworthy that Respondent has never before terminated a supervisor for timecard fraud. As discussed above, timecard padding was not only a system-wide practice, it was common in the industry as a whole. The Portland supervisors were not the only employees to engage in this practice. In fact, abundant evidence shows that Mr. Golden knew of the practice and condoned it, yet he suffered no adverse action as a result; his complicity was not even investigated. In light of these facts, it is difficult to believe Complainant would have been terminated for timecard fraud in the absence of his protected activity.

Respondent also asserts that Complainant alone was recommended for termination in Mr. Golden's initial report and that this disparate treatment demonstrates that Complainant's termination was inevitable. While true that Mr. Golden initially recommended only Complainant be disciplined, this is far from persuasive proof that Complainant would have been terminated even in the absence of protected activity. Mr. Golden was not the final decision-maker with regard to Complainant's termination. He made an initial recommendation, and then met with Mr. Keith and Mr. Hirshman to discuss that recommendation. It was Mr. Hirshman who ultimately made the decision to terminate Complainant, and Mr. Hirshman made no distinction between Complainant and the other two supervisors: all three were terminated.

Based on the foregoing analysis, I conclude that Respondent would not have terminated Complainant in the absence of his protected activity.

IV. Remedies

The regulations governing AIR 21 provide:

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. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

29 C.F.R. § 1979.109(b).

Complainant requests lost earnings damages of \$534,293.00 and "substantial compensatory damages commensurate with the harm this wrongful termination caused him." ALJX-6, p. 35. Complainant offers the testimony and written report of Dr. Male in support of his calculation of lost earnings. CX-46, p. 461-466. Dr. Male's calculation includes an estimate of the present value of Complainant's lost earnings (\$389,833.00) and a tax equalization adjustment ("TEA") (\$144,460.00). Respondent urges rejection of the figure of \$144,460.00 for the TEA because Dr. Male is not a tax expert, citing *Shovlin v. Timemed Labeling Systems, Inc.*, 1997 WL 102523 (E.D. Pa. 1997) (unpublished). As Respondent offers no other argument with respect to damages, I conclude that Respondent accepts Complainant's pleadings and proof insofar as they relate to damages except for the amount put forth for a TEA.

A. Lost Earnings

I find Dr. Male's testimony persuasive and his calculations accurate. Although Respondent takes issue with Dr. Male's qualifications, citing *Shovlin, supra*, that case does not support Respondent's position, as there was no expert of any kind at trial in that case. On my review of Dr. Male's credentials, I find that he is eminently qualified as an economic damages expert, and I find that calculation of the TEA is well within his expertise. Dr. Male's TEA

calculation is based upon the fact that in one year Complainant would receive a large lump sum (the damages award) that would otherwise be spread over twelve years (his worklife expectancy) and that most of this sum would be taxed at a higher rate as it increases according to the progressive or graduated income tax system in the United States and the individual states. This knowledge is not so arcane or specialized as to require a tax expert. Simple tax calculations involving earned and ordinary income are done every year by millions of Americans with no special training and are certainly within the capabilities of Dr. Male. The fact that he uses an accountant (and not a CPA as Respondent states) to do his taxes is irrelevant. Dr. Male's business income expenses would necessarily require a more complex tax calculation than he did for Complainant.

Therefore, based on Dr. Male's report and his calculations, I conclude that an award of \$534,293.00 for lost earnings is appropriate.

B. Compensatory Damages

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. 29 C.F.R. § 1979.109(b). While such damages must be supported by evidence of the physical or mental consequences caused by the employer's adverse actions, the testimony of medical or psychiatric experts is not required. *Thomas v. Arizona Public Service Co.*, 1989-ERA-00019 (Sec'y Sept. 17, 1993).

An administrative law judge should consider the range of awards made in similar cases when determining compensatory damages. *Van der Meer v. Western Kentucky Univ.*, ARB No. 97-078, 1995-ERA-00038 (ARB Apr. 20, 1998) slip op. at 9. Accordingly, I have reviewed a number of recent decisions in which compensatory damages have been awarded. The amount of damages awarded varies widely from case to case:

In *Smith v. Esicorp*, ARB No. 97-065, 1993-ERA-00016 (ARB Aug. 27, 1998), the Board awarded the complainant \$20,000.00 in compensatory damages, reasoning that the employer's conduct was limited to several lampooning cartoons. The complainant did not suffer loss of a job or blacklisting and did not incur any financial losses.

In *Negron v. Vieques Air Link*, ARB no. 04-021, 2003-AIR-00010 (ARB. Dec. 30, 2004), the Board upheld an administrative law judge's award of \$50,000 in compensatory damages. The complainant in that case had two young children, and was forced to sell his automobiles and deplete his family's savings as a result of his discriminatory transfer and subsequent termination.

In *Rooks v. Planet Airways*, 2003-AIR-00035 (ALJ April 14, 2004), the complainant testified that it was "hard to get by" following his termination and that he had to borrow money and lost his health insurance. The administrative law judge awarded \$5,000.00 in compensatory damages.

In *Lawson v. United Airlines, Inc.*, 2002-AIR-0006 (ALJ Dec. 20, 2002), the complainant had to cope with his wife and children's illnesses while in financial difficulty, suffered physical ailments caused by stress, and contemplated relocation, going so far as to put the family home on

the market (the family did not relocate). The administrative law judge awarded \$15,000.00 in compensatory damages.

In *Creekmore v. ABB Power Systems Energy Services, Inc.*, 1993-ERA-00024 (Sec'y Feb. 14, 1996), the Deputy Secretary awarded the complainant \$40,000.00 for emotional pain and suffering. As a result of a discriminatory lay-off, the complainant "experienced emotional turmoil due to the disruption to him and his family from his temporary consulting work at a distance from his home and his eventual relocation." The Deputy Secretary also found that the complainant suffered "embarrassment because in seeking a new job, he had to explain to others in the industry that he had been laid off after twenty-seven years with one employer."

I find the facts of *Creekmore* similar to the facts in this case. As in *Creekmore*, Complainant was forced to relocate in order to find work, which caused considerable stress to an already difficult family situation. He was also a long-time employee who had worked for Respondent for approximately fifteen years and hoped to continue there until his retirement. He was terminated at a time when the airline industry was in dire economic straits and employment in the industry was difficult if not impossible. Moreover, Complainant's wife and daughter have health issues that require on-going treatment and Complainant and his family had to cope with the fear of losing health benefits. Complainant was forced to borrow money from his parents in order to pay for continuation of those benefits. I find that Complainant and his wife credibly testified to the substantial emotional turmoil he suffered as a result of his termination and conclude that Complainant is entitled to an award of compensatory damages in the amount of \$50,000.00.¹⁴

CONCLUSION

Complainant engaged in protected activity when he reported engine vibration, wing slat droop, cracked interior window covers, defective hydraulic reservoir, and missing wing placards. This protected activity was a contributing factor in Respondent's decision to terminate Complainant. Respondent would not have terminated Complainant in the absence of his protected activity. Complainant is entitled to lost earnings in the amount of \$534,293.00 and compensatory damages in the amount of \$50,000.00.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I recommend the following Order:

1. Respondent shall pay Complainant lost earnings in the amount of \$534,293.00.
2. Respondent shall pay Complainant pre-judgment interest on lost earnings, compounded and posted quarterly, at the rate for underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. § 6221(b)(3) plus three percentage points.

¹⁴ As *Creekmore* was decided in 1996, I have adjusted the amount of the award to account for inflation.

3. Respondent shall pay Complainant compensatory damages in the amount of \$50,000.00.
4. Respondent shall pay Complainant the award enumerated in paragraphs 1 and 3 within ten days of the date of this order; thereafter, Respondent shall pay Complainant post-judgment interest on that portion of the entire award not yet paid, compounded and posted quarterly, at the rate for underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. § 6221(b)(3) plus three percentage points.
5. Respondent shall pay all costs and expenses, including attorney's fees, reasonably incurred by Complainant in connection with this proceeding. Counsel for Complainant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Respondent within twenty-one days of the date this Decision and Order is served. Counsel for Respondent shall provide the undersigned and Complainant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within twenty-one days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Complainant shall initiate a verbal discussion with counsel for Respondent in an effort to amicably resolve as many of Respondent's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within twenty-one days after service of Respondent's Statement of Objections, Complainant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Respondent, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Respondent no later than thirty days after service of Respondent's Statement of Objections. Within fourteen days after service of the Final Application, Respondent shall file a Statement of Final Objections and serve a copy on counsel for Complainant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.
6. The parties will immediately notify this office upon filing an appeal, if any.

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ANNE BEYTIN TOR KINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically. At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition 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).