

**U.S. Department of Labor**

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**Issue Date: 31 August 2007**

Case No.: 2006-AIR-00022

In the Matter of:

RICHARD EVANS,  
Complainant

v.

MIAMI VALLEY HOSPITAL

and

CJ SYSTEMS AVIATION GROUP, INC.,  
Respondents

**DECISION AND ORDER**

This proceeding arises from a claim under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 519. This statute and the implementing regulations at 29 CFR Part 24, protect employees from discrimination in retaliation for engaging in protected activity such as reporting health, safety or environmental violations. In this case, Richard Evans ("Complainant") filed a complaint against Respondents, Miami Valley Hospital ("MVH") and CJ Systems Aviation Group, Inc. ("CJ"). Complainant alleges that the Respondents terminated him after he grounded an aircraft and reported safety concerns to the Federal Aviation Authority ("FAA").

**STATEMENT OF THE CASE**

**Procedural History**

Complainant filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") on November 28, 2005. (ALJX 1). He alleged he had been terminated in violation of the above-cited whistleblower statute. Complainant seeks compensatory damages, front and back pay, reinstatement, and damages for emotional distress.

On July 26, 2006, the Regional Administrator for OSHA issued his findings concerning the complaint. After an investigation, the Administrator found no evidence to support a claim that the Respondents discharged Complainant in retaliation for grounding an aircraft and reporting safety concerns to the FAA. (ALJX 2).

Complainant appealed the OSHA findings by means of a Notice of Appeal and Request for Hearing transmitted to the Office of Administrative Law Judges (“OALJ”) on September 8, 2006. (ALJX 3).

Respondent, MVH, filed a motion for summary decision on December 29, 2006 seeking dismissal of the claim against it on the grounds that it is not an air carrier covered under the Act. However, after a thorough review of the evidence, an Order was issued finding that a genuine issue of material fact existed regarding whether Complainant was engaged in a protected activity, whether MHV is a covered employer/contractor, and whether MHV contributed to Complainant’s adverse employment action. Both parties submitted sufficient evidence to illustrate that a hearing was needed in order to resolve the issues of liability and entitlement.

A hearing was conducted in this claim on January 16, 2007, in Cincinnati, Ohio. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Complainant’s Exhibits (“CX”), and Respondents’ Exhibits (“RX”) were admitted into evidence. The Exhibits are discussed throughout the summarized testimony below. The record was held open after the hearing to allow the parties to submit closing and reply briefs. All parties submitted briefs and the record is now closed. Furthermore, the record includes a voluminous amount of testimony and evidence. Although every statement and exhibit may not be discussed in this opinion, in reaching my decision I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

Issues:

1. Whether Respondent, MVH is a covered employer under the Act<sup>1</sup>;
2. Whether Complainant violated FAA requirements and is thereby, barred from Whistleblower protections;
3. Whether Complainant engaged in protected activity under the Act;
4. Whether Complainant thereafter was subjected to adverse action regarding his employment;
5. Whether Respondents knew of the protected activity when it took the adverse action;
6. Whether the protected activity was the reason for the adverse action; and
7. What damages, if any, Complainant is entitled to because of any retaliatory actions taken by Respondents.

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<sup>1</sup> Whether CJ is a covered employer is an uncontested issue; therefore, based upon the evidence of record, I find that CJ is a covered employer under the Act.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The statutes invoked in this claim prohibit employers from discriminating against employees for engaging in whistleblower activities protected by the statutes. In order to prevail on his claim, Complainant must establish by a preponderance of the evidence that Respondents took adverse employment action against him because he engaged in protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ. No. 2001-AIR-3 (ARB Jan. 30, 2004); *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and other anti-discrimination statutes. See *Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, *inter alia*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). "To prevail in an adjudication a complainant must prove unlawful discrimination" by a preponderance of the evidence. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ. No. 2001-AIR-3 (ARB Jan. 30, 2004).

### **Summary of the Evidence**

#### **Credibility Determinations**

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., *Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. See, *Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

Credibility is that quality in a witness, which renders his evidence worthy of belief. For evidence to be credible,

[it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

*Indiana Metal*, 442 F.2d at 52. Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the

demeanor of witnesses. Probative weight is granted to the testimony of all witnesses found credible.

The transcript is over 1,200 pages long. Therefore, I have only summarized the testimony directly relevant to the determination of the issues in this claim. My credibility findings are discussed below. When formulating my credibility findings I took into consideration the entire record, the demeanor of the parties, and the logical probability of the witnesses' statements based upon the evidence.

#### **A. Complainant's Hearing Testimony**

Complainant currently resides in Dayton, Ohio with his wife, Tamyka, and his son, Ryan Patrick. (Tr. 42). He works as a pilot for Air Methods an EMS flight group based primarily in Portsmouth, Ohio. Complainant first became a pilot in the early nineties after entering the Army National Guard. (Tr. 42). He went to work as a civilian helicopter pilot in 2000, for MedFlight out of Columbus, Ohio. (Tr. 44). Then in 2002, Complainant took a position with CJ Systems as a pilot for the CareFlight program at MVH in Dayton. (Tr. 45). Although Complainant liked the program at MedFlight, the two-hour commute from Dayton to Columbus was too much for him. (Tr. 45, 283). He wanted a better family life. (Tr. 45).

CJ Systems' headquarters are located in Pittsburgh. (Tr. 46). Mr. James (Jim) Lynn, the lead pilot, works in the Pittsburgh office. (Tr. 46). Complainant's interview process included an interview at MVH with Candy Skidmore and Dave Gottschalk. (Tr. 46). Ms. Skidmore is the manager of the CareFlight program at MVH. (Tr. 46). Mr. Gottschalk is the chief pilot for the CareFlight location. (Tr. 46). Complainant was then hired. (Tr. 47). He worked as an emergency helicopter pilot for the CareFlight program. (Tr. 48). Complainant received his flight instructions from the dispatch office located in the hospital. (Tr. 49). He would fly anywhere within a 150-mile radius. (Tr. 49). The flights normally included one pilot, two nurses and the patient. (Tr. 50). Complainant was also responsible for performing public relations work to promote CareFlight's services. (Tr. 49). Mr. Gottschalk was Complainant's direct supervisor; however, he testified that he also reported to Ms. Skidmore. (Tr. 568). The nurses report to Ms. Skidmore and the dispatchers report to Steve Pratt and Ms. Skidmore. (Tr. 51). There were between six and eight other pilots working for CareFlight, all of whom had similar qualifications. (Tr. 257).

Complainant was responsible for flying both aircraft owned by MVH. (Tr. 53). He testified that prior to each shift he would get there early so he could be debriefed by the off-going pilot. (Tr. 51). He would check on maintenance and weather issues. (Tr. 51). Complainant then performed his pre-flights, which involved the daily inspection of the aircraft. (Tr. 52). The pre-flight inspection, which involved making sure the aircraft was in complete working condition, took around thirty to forty-five minutes to complete. (Tr. 53). If Complainant found a problem with the aircraft he would discuss the issue with a mechanic. (Tr. 55). If the problem involved a safety issue, the aircraft would be grounded, but if not, the issue would be addressed during the aircraft's next inspection. (Tr. 55). The problems were then written in the aircraft log book.<sup>2</sup> (Tr. 57).

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<sup>2</sup> An example is located at CX 5.

Complainant testified that the practice at CJ was to have the mechanics write the discrepancies in the log book. (Tr. 60). He reasoned that since most pilots are not mechanics they don't know the name of certain pieces of the aircraft or exactly what is mechanically wrong. (Tr. 60). Complainant at times would enter the discrepancy himself, but with the help of a mechanic. (Tr. 60). Complainant agreed on cross-examination that the FAA requires pilots to document discrepancies/mechanical problems accurately. (Tr. 276, 347). He agreed that as a pilot, he "is the guy responsible to make sure that there is a record made of discrepancies." (Tr. 346). However, Complainant asserted that this was not normal CJ procedure. (Tr. 276). Complainant stated that either the mechanic would make the entries or the mechanic would help the pilot make the write-up. (Tr. 279). Complainant agreed that CareFlight never forced him to break the law, but that it was the company's standard procedure to have the mechanics make the logbook entries. (Tr. 279).

In September 2003, Complainant took disability leave because of a back injury. (Tr. 76). His coworkers went out of their way to help him during this time. (Tr. 76-7). Complainant never asked for their help. They delivered meals to his home and even collected money for his family. (Tr. 76-7). Then at one point, Complainant believed his job was in jeopardy. (Tr. 80). Mr. Lynn called Complainant and informed him that Ms. Skidmore was frustrated with how much it was costing the hospital to pay overtime to pilots covering Complainant's shifts, the doctor bills and workers' compensation. (Tr. 80-1). Mr. Lynn mentioned relocating Complainant to another program. (Tr. 81). Some of the nurses told Complainant that they had advocated to Ms. Skidmore that they did not want Complainant replaced. (Tr. 82-3). Ms. Skidmore was not happy with the complaints; however, Complainant urged that he never solicited the nurses' support. (Tr. 83-4). Complainant stated that Ms. Skidmore informed him to never have controversial conversations with the crew or he would be terminated. (Tr. 85).

Complainant testified to numerous safety concerns he encountered while at CareFlight. (Tr. 63). First, there was an occasion when Complainant transmitted over the radio that he was taking an aircraft out of service. (Tr. 70). At the time CareFlight had a patient on the ground who was critical but Complainant needed to land the aircraft before he could arrive. (Tr. 70). Ms. Skidmore was very upset and told him to never "for whatever reason, transmit any kind of service or maintenance-related issues over the radio, because you never know who might be listening." (Tr. 70). The problems Complainant experienced were logged by mechanic, Dan Martin. (Tr. 75).

Next, Complainant testified to a situation referred to as the "trash bag incident." (Tr. 85). Complainant described that when he arrived at work he heard over the radio that a trash bag was sucked into the tail rotor of an aircraft being flown by Dale Williams. (Tr. 86). Complainant was scheduled to fly the same aircraft during his shift, but expected the aircraft to be out service for some time due to the incident. (Tr. 88). However, Mr. Williams had a mechanic walk him through the inspection over the phone and chose to fly the aircraft anyway. (Tr. 86, 90). Complainant stated that the crew came to him very upset after the incident. (Tr. 90). He then called dispatch and refused to fly the aircraft until a mechanic examined it piece-by-piece. (Tr. 92). When Mr. Williams returned he jumped out of the aircraft, and asked Complainant to fill out the logbook for him because he was late for a hockey game. (Tr. 94). Complainant grew frustrated, believing that Mr. Williams had put the crew at risk because of a hockey game. (Tr. 94). Complainant then started his pre-flight inspection and found pieces of the bag still embedded in the rotor. (Tr. 94). The crew started asking Complainant whether it

was safe to fly in that condition. (Tr. 95). Complainant agreed that he yelled at Mr. Williams, but only after they were away from the crew. (Tr. 96). Then Mr. Williams left, but he came back and cursed at Complainant. (Tr. 96). He was unsure whether the crew heard this conversation. (Tr. 96). The aircraft was finally cleared after the lead mechanic had inspected it.<sup>3</sup> (Tr. 97). Complainant was later counseled by Dave Gottschalk and Ms. Skidmore about the incident. (Tr. 98). He stated that Ms. Skidmore did not understand why Complainant was so upset about the incident. (Tr. 100). Complainant was given a written counseling statement, stating that he needed to get along better with his peers. (Tr. 98). Complainant explained that he was written up because of his statements to Mr. Williams and for discussing a maintenance issue over the radio. (Tr. 99).

Next, Complainant discussed another safety issue he encountered, referred to as the “spring incident.” (Tr. 122-130). The incident occurred around January 2005. (Tr. 105). When Complainant arrived at work, Rick Ponder, the day shift pilot, told him about a maintenance repair that Complainant might not be comfortable with. (Tr. 289). Then when Complainant conducted his pre-flight inspection he found that the fuel control was repaired with two springs “rigged together” instead of a correct spring that actually fit the aircraft. (Tr. 123). The mechanic had taken a spring out the trash which was too short and attached the conjoined springs to the aircraft.<sup>4</sup> (Tr. 123-4). The springs were attached like “twist[ing] two coat hangers together.” (Tr. 125). This repair occurred instead of taking the aircraft out of service until a new spring arrived. (Tr. 124). Complainant was very upset about this incident and could not believe that someone was willing to put lives at stake. (Tr. 128). Complainant took the aircraft out of service and called Richard “Wyatt” Arp, another pilot, to get his take on the situation. (Tr. 129). Wyatt told Complainant to take pictures of the spring. (Tr. 129). Complainant also called Mr. Lynn, the chief pilot. (Tr. 129). While taking the picture a flight nurse came out and asked what was going on. (Tr. 130). Complainant told her that he was uncomfortable with a repair that did not seem right, but that the situation was being taken care of. (Tr. 130, 298). He testified that he tried to take the picture while no one was present.

Then Mr. Lynn called Complainant back and stated that the mechanic told him that the spring was merely a new kind of spring. (Tr. 131). Complainant told Mr. Lynn that this was not true because he was looking right at the spring and it was in fact two springs hooked together. (Tr. 131). Mr. Lynn got angry with Complainant, stating that the mechanic would not lie to him. (Tr. 131). Mr. Lynn also argued that another pilot had already flown the aircraft earlier that day and had no problem with the new spring. (Tr. 131). Complainant then informed Mr. Lynn that he believed there was a lack of maintenance going on and that a number of the crew members had complained to him about maintenance issues, about the way other pilots conducted their pre-flights and that they were uncomfortable with the situation. (Tr. 132). Mr. Lynn agreed to have a mechanic come and look at the spring. (Tr. 141). During this time, Ms. Skidmore started asking a lot of questions about why the aircraft was out of service and for how long. (Tr. 141-2). The two also discussed the other pilot’s pre-flight inspections and what they should be doing. (Tr. 142). Complainant told Ms. Skidmore that some of the nurses had complained about maintenance issues, crashes that had occurred in the last few months in other agencies and the way some of the other pilots conducted their pre-

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<sup>3</sup> The entry in the log book was made by mechanic Dan Martin. (CX 6).

<sup>4</sup> CX 23 is a picture of the sub-par repair job.

flights. (Tr. 142). During this time a mechanic came in with the correct spring and fixed the aircraft.<sup>5</sup> (Tr. 145).

Thereafter, Complainant met with Dave Gottschalk and Ms. Skidmore about the preceding events. (Tr. 148). They met in Ms. Skidmore's office prior to the pilot and staff meetings. (Tr. 148). Complainant stated that Ms. Skidmore accused him of discussing maintenance issues with the crew and stated further that he was accusing the other pilots of not performing pre-flight inspections. (Tr. 148). Complainant maintains that Ms. Skidmore took his words out of context and failed to let him explain that the nurses came to him with their concerns and he never put the thoughts in their minds. (Tr. 148-9; 332). Ms. Skidmore told Complainant that nurses were complaining to her about maintenance issues and she blamed Complainant for the complaints. (Tr. 150). Complainant and Ms. Skidmore then went to the pilots' meeting. (Tr. 151). Dave Gottschalk did not attend. (Tr. 151). Ms. Skidmore started the meeting by telling the pilots that Complainant alleged that the pilots were not performing pre-flights, they were flying unsafe aircraft and not doing their jobs. (Tr. 151, 306). Complainant asserts that he tried to correct Ms. Skidmore but no one would listen. (Tr. 151). The meeting was heated and the whole room grew angry. (Tr. 151, 303-4). Complainant believed that Ms. Skidmore was trying to alienate him from the rest of the pilots. (Tr. 302). Complainant also stated that the pilots were angry because he had refused to fly aircraft that they had already flown. (Tr. 152). The meeting ended with no resolution. (Tr. 161). Between six and eight pilots attended the meeting. (Tr. 260). Complainant was afraid he would lose his job and his friendships with the other pilots after the meeting. (Tr. 309).

The next day, Mr. Gottschalk called Complainant and asked him to take a couple of days off. (Tr. 162). Some of the pilots had asserted concerns for Complainant's emotional state. (Tr. 162). Complainant was placed on leave and traveled to Pittsburgh to meet with Mr. Lynn. (Tr. 163). They discussed Complainant's safety concerns, why he had taken aircraft out of service on numerous occasions, the spring incident, maintenance issues, the nurses' concerns, why Complainant should not discuss things with the crew and Complainant's overall feelings about things. (Tr. 163-4). Complainant presented Mr. Lynn with a list of maintenance concerns he had with the aircraft. (Tr. 164-5). Complainant told Mr. Lynn that he was uncomfortable with the fact that he continuously discovered maintenance issues that others seemed to ignore; however, Mr. Lynn failed to address his concerns. (Tr. 266, 267). Mr. Lynn told Complainant that the other pilots were uncomfortable with his accusations and as a result, Complainant should see a flight surgeon. (Tr. 166).

Complainant met with a flight surgeon, Dr. Lambrou. (Tr. 166). Complainant discussed his concerns with the CareFlight program, the maintenance issues he had and how he conducted his pre-flights. (Tr. 166). Dr. Lambrou wanted to ensure that Complainant was comfortable with flying. (Tr. 166). They also discussed Complainant's safety issues. (Tr. 167). Complainant showed Dr. Lambrou the picture of the "spring incident." (Tr. 167). Dr. Lambrou called Jay Heffernan, who was in charge of safety after the meeting. (Tr. 167). Dr. Lambrou also suggested that Complainant see a psychologist. (Tr. 168). As a result, Complainant saw a psychologist. (Tr. 169). Both Dr. Lambrou and the psychologist cleared Complainant to return to flight status without limitations or restrictions.<sup>6</sup> (Tr. 169).

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<sup>5</sup> An investigation was conducted by the FAA regarding the spring incident. (Tr. 147).

<sup>6</sup> JX 28 includes a letter from Dr. Lambrou to Mr. Lynn clearing Complainant for duty.

Thereafter, Complainant met with Messrs. Gottschalk and Lynn at the hospital to discuss his return to work. (Tr. 170). They gave Complainant a written warning dated February 6, 2005, which included steps he needed to accomplish to continue working for CareFlight and Ms. Skidmore.<sup>7</sup> (Tr. 171). The warning blamed Complainant for all the turmoil that occurred in the last few weeks. (Tr. 171). Neither CJ nor MVH disciplined any other pilot for his behavior, for flying unsafe aircraft or for failing to perform proper pre-flight inspections. Complainant disagreed with the warning and refused to sign. (Tr. 171-2). He was completely surprised by the warning. (Tr. 316). He was hurt, frustrated and felt victimized. (Tr. 317). Mr. Lynn offered to move Complainant to another base within the U.S., but Complainant refused. (Tr. 319). Complainant stated that although he was unhappy with the situation and Ms. Skidmore, he did not quit or agree to a transfer because he loved his job. (Tr. 302-3). He thought that it was the best for his family. (Tr. 302). Thereafter, Complainant returned to work. Complainant testified that Ms. Skidmore was very involved with the work of the pilots and mechanics. (Tr. 270). He believed that at times Ms. Skidmore was more worried about revenue than safety. (Tr. 272). Complainant asserted that sometimes Ms. Skidmore put image and money ahead of patient care. (Tr. 282). He urged that this is unacceptable and that safety should be the top priority. (Tr. 275, 282). Complainant believed that Mr. Gottschalk was unsupportive of his safety complaints. (Tr. 275).

In May 2005 Complainant experienced problems with the backup aircraft called “the whale.” (Tr. 173). Complainant discussed the problems with the mechanics to determine whether they were safety related. (Tr. 175). He stated that if an item is not safety-related and will not interfere with FAA regulations then the maintenance can be deferred until later. (Tr. 175). However, after talking with the mechanics, Complainant took the aircraft out of service. (Tr. 179). Complainant knew that corporate and Ms. Skidmore would be upset with his decision. (Tr. 179). Taking the backup aircraft out of service meant that the program would not have an operating aircraft, but Complainant did not want to risk a crash. (Tr. 179). The aircraft was scheduled to go to Cleveland and Complainant feared that if a mechanic did not examine the aircraft then things would not get fixed. (Tr. 179). Complainant was then off work for seven days and was unsure whether the problems were fixed; however, eventually “the Whale” crashed after an in-flight loss of control.<sup>8</sup> (Tr. 180).

Then in August 2005, the events transpired that led to this cause of action. (Tr. 181). One of the aircraft at MVH underwent a routine one hundred-hour inspection on August 24, 2005. (Tr. 181). Complainant flew the aircraft from Warren County to Moraine, the maintenance operation center, for the inspection. (Tr. 373, 378). When he arrived he informed the mechanics about numerous concerns he had with the aircraft. (Tr. 183). He made no written record of his concerns at this time because the issues were already supposed to be addressed during the inspection. (Tr. 379). However, Complainant testified that the mechanics were not interested in his concerns. (Tr. 183). They gave him responses like, “They’ve already dealt with it,” and “They don’t have the parts,” or “It costs too much.” (Tr. 183). He informed them about the problems he experienced with the autopilot, the vibration of the windscreen and a hydraulic leak. He had experienced these problems a few days prior. (Tr. 407-8). Complainant asked the mechanics why the windscreen was vibrating and if it

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<sup>7</sup> JX 27 and CX 3 are copies of the written warning and steps Complainant was expected follow.

<sup>8</sup> There was a great amount of discussion about this crash on direct and cross examination; however, the details of the crash are not directly relevant to this claim, and therefore, they are not be summarized.



would come apart in flight. (Tr. 188). The mechanics told him that the vibration started because the windscreen did not fit properly into the rebuilt frame. (Tr. 188). Apparently, “a couple of guys” had to lie on the windscreen in order to get it to fit. (Tr. 189). Thereafter, Complainant left Moraine to find some oil samples for one of the mechanics and when he returned the inspection had been completed. (Tr. 188-9). Complainant flew the aircraft with Josh Jones, a mechanic, in order to perform a “power check.” (Tr. 189, 382). The aircraft was then put back in service and Complainant flew it back to Warren County. (Tr. 385, 389). Complainant testified that he did not notice any problems with the windscreen, autopilot or hydraulic leak at this time. (Tr. 389).

The next day, while performing his pre-flight inspection, Complainant determined that the hydraulic leak was getting worse and that there was still a problem with the collective link. (Tr. 190, 391, 536). He spoke with Jason Kinser, one of the mechanics, about the issues. (Tr. 190, 536). Complainant wanted to get all the problems looked at right away since they had extra mechanics available. (Tr. 190). Jason said that the mechanics were keeping an eye on the leak. (Tr. 191). Complainant made no written record of the issues. (Tr. 392). Then after Jason left, Complainant called him and said he was not comfortable with some of the problems with the aircraft and wanted to get them addressed. (Tr. 192). Jason told Complainant to fly the aircraft to Moraine and have the other mechanics look at it. (Tr. 192). In the interim, Complainant called Robert Briggs and Wyatt to discuss the issues with the aircraft. (Tr. 193, 395). Complainant wanted their opinions concerning whether the aircraft should be out of service until the issues were addressed. (Tr. 401). He told them about the windscreen vibration. (Tr. 536). Wyatt had flown the aircraft before and said that the windscreen started vibrating after an inspection one month prior when they rebuilt the frame. (Tr. 193). Around that time MVH started getting calls for flights and, as a result, Complainant took the aircraft out of service. (Tr. 194). Complainant agreed that under the FAA regulations and CJ’s procedures, the pilot has the authority to take an aircraft out of service for any reason he deems necessary. (Tr. 583). Complainant testified that, after speaking with Wyatt, he thought that the aircraft was unsafe to fly. (Tr. 409).

Then Jason called and was very angry with Complainant for taking the aircraft out of service.<sup>9</sup> (Tr. 195). Jason argued that now Complainant could not fly the aircraft to Moraine because he had taken it out of service and that they would need a special “ferry permit.” Complainant told Jason that he only took the aircraft out of service because he was afraid they would get a flight request before the aircraft was inspected. (Tr. 196). Jason wanted to know exactly what was wrong with the aircraft and Complainant said that the same problems existed as the day before, which were not addressed. (Tr. 196). Complainant testified that Jason told him to stay put and not do anything. (Tr. 197, 539). He also stated that throughout the day, he spoke with Jason and Josh on numerous occasions and continuously told them the problems with the aircraft. (Tr. 538). Complainant states that he never refused to tell the mechanics why the aircraft was out of service. (Tr. 538).

Complainant then spoke with Mr. Lynn who was very upset and wanted to know what was going on. (Tr. 200). Mr. Lynn said that Ms. Skidmore was very upset and wanted to know why her aircraft was out of service. (Tr. 200). Complainant listed all the problems for Mr. Lynn who wanted to know why they were not taken care of during the hundred-hour

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<sup>9</sup> JX 39 is a call log of the calls Complainant made and received during this incident.

inspection. (Tr. 200). Complainant said that he asked the mechanics to address the issues but “I think they blew me off.” (Tr. 201). Mr. Lynn asked Complainant if he flew the aircraft after the inspection and he responded “yes.” (Tr. 201). Mr. Lynn also wanted to know if the nightshift pilot flew the aircraft, which he had. (Tr. 202). Complainant testified that Mr. Lynn accused him of “flying with no discrepancies.” (Tr. 202). He asked Complainant if he wrote the issues up in the logbook and Complainant told him no. (Tr. 202). Mr. Lynn urged that it was not Complainant’s duty to dictate to the mechanics what to fix or work on. (Tr. 203). Finally, Mr. Lynn told Complainant that he needed to decide whether “to write the aircraft up, and then basically admit that [he’d] been flying with no discrepancies, uh, or put it back in service and worry about, uh, the fact that you took it out of service for no reason.” (Tr. 203, 544). Complainant felt threatened by these statements. (Tr. 540, 545-6). Complainant thought that Mr. Lynn was more concerned with keeping Ms. Skidmore happy than getting the aircraft fixed and safe. (Tr. 549).

Next, Complainant spoke with Ms. Skidmore who wanted to know why the aircraft was out of service and why the problems were not fixed during the inspection. (Tr. 205). She was afraid that they were going to miss flights. (Tr. 204). Then, later that afternoon, Josh and another mechanic came to look at the aircraft. (Tr. 205-6). They stated that they could not fix the hydraulic leak because it was too labor intensive, but they tightened the windscreen. (Tr. 206). Complainant stated that after the mechanics were finished Josh told Complainant what to write in the log book. (Tr. 208). Complainant agreed that, when an aircraft is taken out of service, the pilot is supposed to make an entry in the logbook. (Tr. 547). After discussing the situation with Josh, Complainant only recorded the autopilot issue in the logbook.<sup>10</sup> (Tr. 214, 550, 551). Complainant agreed that, under the FAA regulations and the CJ handbook, the pilot is supposed to write-up all irregularities in the logbook.<sup>11</sup> (Tr. 584). Then in order to put the aircraft back into service a licensed mechanic must sign off on the irregularity. (Tr. 587). Complainant testified that his log entry was not inaccurate because he wrote what the mechanic informed him to write. (Tr. 552). (Tr. 214). He did not write anything about the hydraulic leak because Josh said they did not have the parts to fix it. (Tr. 214). Complainant had asked Josh if the windscreen was fixed and Josh said that he would replace it if Complainant wanted him to but that it would not make a difference. (Tr. 209). Josh then left. (Tr. 208). Complainant still was not comfortable with the response regarding the windscreen. (Tr. 208). Therefore, he started making some phone calls to the FAA about the situation. (Tr. 208). Complainant stated that he was not “comfortable with the fact that they rebuilt a frame and now you no longer have a windscreen that fits flat, and it took three guys lying on the windscreen to screw it back in place and now we’ve got a bow in it.” (Tr. 209). He stated that his intentions were not to cause CJ problems; he only wanted to ensure that the aircraft was safe. (Tr. 210).

Complainant called into work sick the next day because of an inner-ear infection. (Tr. 212). Complainant spoke with Mr. Williams who informed him that Mr. Lynn had taken Complainant off the schedule. (Tr. 213). Thereafter, Mr. Lynn called Complainant and arranged a meeting at the Dayton airport on August 31, 2005. (Tr. 216). At the meeting, Mr. Lynn gave Complainant a letter of termination from CJ and a memorandum from Ms. Skidmore.<sup>12</sup> (Tr. 217). Complainant testified that during the meeting he was never

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<sup>10</sup> JX 38.

<sup>11</sup> RX 47 is a copy of CJ’s employee handbook.

<sup>12</sup> JX 41 is a copy of the termination letter and JX 42 includes the memorandum from Ms. Skidmore.

informed that CJ believed he was in violation of the regulations. (Tr. 218). He was also never told that he acted in an unsafe manner. (Tr. 218). The termination letter stated that Complainant failed to inform mechanics and Mr. Lynn as to why the aircraft was grounded. (Tr. 617). Complainant found this statement to be completely untrue. (Tr. 617). The letter also stated that Complainant failed to make a notation in the logbook. (Tr. 617). Complainant stated that he waited three hours to make the notation because he was waiting for a mechanic to look at the aircraft and the mechanic had informed Complainant to wait until he arrived. (Tr. 617-8).

Complainant started looking for another job a couple of months after leaving CareFlight.<sup>13</sup> (Tr. 227). He waited a while because his wife had just given birth to their son and he was overwhelmed with feelings and emotions about the termination. (Tr. 227). Complainant made several attempts to find another pilot position but had no luck at first. (230). At one point he was hired to work for PHI, a flight group based out of Louisiana; however, he was terminated on the same date of his hire, after the human resources manager found out that Complainant used to work with Mr. Lynn. (Tr. 230-1). Finally, by the end of November/beginning of December 2006, Complainant was hired by Air Methods, an EMS flight group based primarily in Portsmouth, Ohio. (Tr. 236). Complainant continues to live in Dayton, Ohio and has a two-hour commute; however, at times he is forced to stay in a hotel which costs between twenty and one hundred dollars a night. (Tr. 236-7). Complainant is unable to move because he is unable to sell his home at this time and his wife is unable to leave her job in Dayton. (Tr. 237). When Complainant left CareFlight his salary was \$2,206.88 bi-monthly.<sup>14</sup> (Tr. 238). At his new position he receives \$1986.12 bi-monthly. (Tr. 240). He also had to pay for COBRA insurance for twelve months after his termination. (Tr. 240).

Complainant asserts that he has suffered psychological damages as a result of his termination. (Tr. 243). Complainant testified that his confidence has suffered. (Tr. 243). He stated that he was accused of being afraid to fly which has caused him to second-guess himself. (Tr. 243). Complainant urged that the biggest stress he faced was not being able to provide for his family. (Tr. 244). His family also experienced strains financially and emotionally. (Tr. 244). Complainant's wife was a stay-at-home mom and, as a result of the termination, was forced to return to work. (Tr. 244). They also went to individual and couple's therapy for a year. (Tr. 244). Complainant was placed on Paxil for depression and anxiety. (Tr. 244-5).

Complainant was cross-examined in depth on whether he acted professionally around the other employees and when speaking over the radio. Complainant stated that he always presented himself in a professional manner. (Tr. 595-6). He repeatedly testified that he always tried to discuss safety issues outside the presence of the crew. However, counsel played a recorded conversation between Complainant and dispatch, where Complainant states he is not going to fly "that son-of-a-bitch." (Tr. 598). He informed the dispatcher over the radio that until a mechanic looked at the aircraft he was taking it out of service. (Tr. 598).

Another issue of contention is whether MVH is an employer of Complainant. Counsel questioned Complainant extensively on facts surrounding this issue. Complainant agreed that Miami Valley Hospital's name was not on his paychecks and that MVH was not the entity that

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<sup>13</sup> Complainant had a small real estate business that he started prior to his termination. (Tr. 227). However, by the time of the termination his business had ended. (Tr. 229).

<sup>14</sup> CX 33 is a copy of Complainant's last paycheck stub.

withheld taxes from his salary. (Tr. 562-3). He also testified that, as a result of his discussions with the human resources department he believed his workers compensation benefits were paid by MVH. (Tr. 565). During his redirect examination, Complainant reviewed the contract agreement in effect between MVH and CJ. (CX 25). It stated that “Miami Valley Hospital will reimburse IHC for all reasonable and necessary expenditures,” and this included “Benefits for all aviation personnel.”<sup>15</sup> (Tr. 611-2). It also stated that an “Employee discharge must be mutually agreed upon by both Miami Valley Hospital and IHC.” (Tr. 618).

Based upon Complainant’s testimony, his demeanor at the hearing and the other evidence of record supporting his testimony, I find Complainant a credible witness. I place great weight upon his testimony. Respondents argue that Complainant’s testimony, which they categorize as self-serving, should get no weight. However, I find Complainant’s testimony to be sincere. He presented valid safety concerns to his employers, but instead of taking the complaints seriously, they ostracized him and ultimately terminate him.

### **B. Complainant’s Witnesses**

**Lisa Weaver**, a nurse for the CareFlight program at MVH, testified at the hearing. Ms. Weaver is the chief flight nurse and has a master’s degree in critical care and trauma patients. (Tr. 415). She has worked for MVH since 1991 and has worked as a flight nurse since 1992. (Tr. 415). Ms. Weaver also works as a surveyor for the Commission of Accreditation of Air Medical Transport Services. (Tr. 418). She is responsible for reviewing different critical care air and ground transportation sites. (Tr. 418). She reviews the site’s safety practices and procedures. (Tr. 419). Ms. Weaver testified that the CareFlight training program places a strong emphasis on safety. (Tr. 416). There are also different mechanisms for the crew to express safety concerns. (Tr. 417). She stated that there is a safety drop box and a safety committee. (Tr. 417). Ms. Weaver was unaware of any situation where a pilot was pressured to take a flight or was retaliated against for bringing forward a safety concern. (Tr. 420). She discussed that, not only the pilots but also the nurses, can have an aircraft grounded. (Tr. 421). She testified that all a nurse has to do is inform the pilot that she/he is uncomfortable with the situation and the mission is aborted. (Tr. 421). These situations frequently occur. (Tr. 421). Ms. Weaver also opined that Complainant is a nice man, who worried what others thought when it came to decisions. (Tr. 422). Ms. Weaver stated that Complainant often sought the reassurance of others. (Tr. 422). However, she asserted that Complainant was concerned with safety, but never expressed his concerns to the crew. (Tr. 425).

I find Ms. Weaver’s testimony credible and supported by the evidence in the record.

**Richard P. “Wyatt” Arp** works as a pilot for the CareFlight program. He first started flying between 1971 and 1973. (Tr. 426). After retiring from the Marines in 1996, he went to work for Indianapolis Heliport, the company which contracted with the CareFlight program at MVH, prior to CJ. (Tr. 426-7). The company was then “bought out” by CJ Systems. (Tr. 427). Wyatt worked with Complainant at CareFlight. (Tr. 428).

Wyatt testified to the incidents surrounding the “spring incident.” (Tr. 433). He stated that Complainant called him and told him that a mechanic used two springs tied together instead

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<sup>15</sup> CJ took over the IHC’s duties and benefits under the contract.

of a proper replacement spring. (Tr. 433). As a result, Wyatt told Complainant to take a picture of the spring. (Tr. 433). Wyatt also discussed the pilots' meeting. (Tr. 434). However, he could not remember whether Ms. Skidmore stated that Complainant accused the pilots of being unsafe. (Tr. 434). Wyatt stated that some concern came from the nurses who observed Complainant doing a more thorough preflight than some of the other pilots. (Tr. 435, 466). He thought Ms. Skidmore acted professionally during the meeting. (Tr. 466). Wyatt did not believe she was setting up Complainant. (Tr. 466). He opined that Complainant went "above and beyond what was required" when it came to preflight inspections. (Tr. 435). Wyatt agreed that the meeting became heated and that some of the pilots believed Complainant was accusing them of being unsafe. (Tr. 435). The discussion was primarily between Dale Williams, Mr. Blaho and Complainant and it was equally heated on all sides. (Tr. 436). Wyatt stated that Complainant seemed to imply that the pilots were acting improperly when performing their pre-flights. (Tr. 458). He felt indirectly attacked. (Tr. 458). After the meeting the pilots discussed the situation among themselves. (Tr. 459). Wyatt thought Complainant was merely "trying to indicate that he thought we could be doing things better." (Tr. 460). Wyatt acknowledged that every pilot has regulations he/she must follow, but a pilot may go above and beyond that minimum in order to ensure safety. (Tr. 461). He believed Complainant's intentions were to improve safety. (Tr. 472). Wyatt stated that it is never inappropriate to bring forward safety issues. (Tr. 472).

Then Wyatt discussed the events that occurred in August 2005. (Tr. 436). He stated that the aircraft underwent a hundred-hour inspection, but that there were still some unresolved issues. (Tr. 436). Wyatt stated that the aircraft had a hydraulic leak, there was a problem with the autopilot and the windscreen was vibrating excessively. (Tr. 436, 456). He urged that the vibration was very unusual and brought the problems to the mechanics' attention. (Tr. 436, 439). He was very concerned about the windscreen, but could not remember date when he first noticed the problem. (Tr. 454-5, 481). The vibration started after the frame was rebuilt. (Tr. 439). The windscreen did not fit properly into the new frame. (Tr. 439). The windscreen was eventually fixed after Complainant was terminated. (Tr. 444). Wyatt agreed that the aircraft should have been taken out of service for the vibration. (Tr. 438). Wyatt overheard one of the mechanics talking to Complainant on the 25th, and stated that the mechanic acted very upset that the aircraft was out of service. (Tr. 438). The mechanic was angry because they had already looked at the aircraft once that day and now had to come back and re-examine it again. (Tr. 438).

Wyatt testified that while he informed the mechanics about the vibration, he never made a write-up in the logbook regarding the incident. (Tr. 442). He discussed how maintenance issues are addressed. (Tr. 442). First, when a maintenance issue arises, the pilot determines whether the aircraft is flyable and, if not, he grounds the aircraft. (Tr. 442). Then the pilot calls dispatch and informs them that the aircraft is out of service. (Tr. 443). Next, the pilot calls a mechanic to inspect the aircraft. (Tr. 443). After the mechanic inspects the aircraft he/she makes the write-up in the logbook. (Tr. 443). Prior to Complainant's termination, the pilots only occasionally made the write-ups. (Tr. 443). This was the maintenance procedure for many years. (Tr. 444). Wyatt could not recall an incident where a pilot was ever disciplined for following this procedure. (Tr. 445). Wyatt agreed that this policy is different from that of the FAA and the CJ employee handbook. (Tr. 446). Wyatt testified that under the regulations a pilot can either make the entry himself or ensure that a mechanic makes the entry. (Tr. 447). The purpose of having a mechanic make the entry is to ensure that the mechanic understands the problems and can adequately make the repair. (Tr. 448). Wyatt stated that a significant

mechanical problem should always be recorded by someone, while a problem of little significance may not be logged at all. (Tr. 448-9).

When a pilot takes an aircraft out of service at CareFlight it is a major issue, “because an aircraft that’s not flying is not making money.” (Tr. 450). Wyatt stated that this is how the aviation industry works in general. (Tr. 450). He urged that you only take an aircraft out of service for serious mechanical problems, those that need to be recorded in the logbooks. (Tr. 450). When an aircraft is taken out of service the pilot should ensure that someone makes an entry regarding each problem. (Tr. 451). Nevertheless, Wyatt testified that it is not unusual for a pilot to wait to make an entry until after the aircraft is evaluated. (Tr. 452). Often it takes an hour or more for a mechanic to arrive and inspect the aircraft. (Tr. 469). During the waiting period nothing is entered in the logbook. (Tr. 469). Wyatt urged that pilots are never pressed to ignore safety or maintenance issues and that the mechanics are “appropriately concerned about doing the maintenance required to make the aircraft safe.” (Tr. 462-3). Wyatt stated that he has never been retaliated against for grounding an aircraft. (Tr. 465, 467). He has grounded numerous aircraft for mechanical reasons and the crew’s comfort level. (Tr. 468).

I find Wyatt’s testimony very credible and supported by the evidence in the record. I give his testimony great weight.

**Marcia Roemer**, a nurse for the CareFlight program, testified at the hearing. She has worked for the program since July of 2001. (Tr. 483). Ms. Roemer was a part of Complainant’s flight crew. (Tr. 484). She testified to the problems they experienced with the backup aircraft in early 2005. (Tr. 484). She stated that the weather was very cold and the crew experienced problems communicating with dispatch and the next night the problems continued. (Tr. 485). The crew was trying to relay a report to the emergency trauma center. (Tr. 485). They made numerous attempts at contacting dispatch on all channels but the communication failed. (Tr. 486). The aircraft also experienced problems with the control lights. (Tr. 486-7). As a result, on the second night the flight was aborted. (Tr. 487). The entire crew agreed with the decision. (Tr. 487). When they landed, Complainant called for a mechanic, who showed up a couple of hours later. (Tr. 487). The mechanic seemed very annoyed that he was called and acted like the nurses just did not know what they were doing. (Tr. 489). Finally, the mechanic put another radio in the aircraft and they were back in service. (Tr. 489). Ms. Roemer spoke with Ms. Skidmore about the incident. (Tr. 490). She was concerned with the mechanic’s demeanor, actions and approach to addressing the concerns. (Tr. 490). Ms. Roemer made the complaints herself and Complainant never encouraged them. (Tr. 491). She also spoke with the chief flight nurse, Lisa Weaver, regarding the incident. (Tr. 492).

Ms. Roemer also witnessed pilots performing their preflight inspections. (Tr. 493). She observed the differences between Complainant’s pre-flights and some of the others. (Tr. 494). Ms. Roemer stated that Complainant would crawl up onto the aircraft and inspect areas that the other pilots would avoid. (Tr. 494). However, she stated that the differences did not cause her concern. (Tr. 494). Ms. Roemer also testified that she never heard Complainant speak negatively about other pilots. (Tr. 494).

Ms. Roemer participated in the efforts to aid Complainant’s family when he was off with his back injury. (Tr. 492). A group of nurses took food to Complainant’s house and others sent gift cards and money. (Tr. 493). Complainant never solicited the help. (Tr. 493). Ms. Roemer

also wrote a letter of recommendation for Complainant after his termination.<sup>16</sup> (Tr. 495). She stated that no one told her what to write and, in fact, Complainant told her not to even sign the letter; however, she chose to sign it anyway. (Tr. 496).

I find Ms. Roemer's testimony credible and supported by the evidence in the record.

Another nurse, **Suzanne L. Deis**, also testified at the hearing. Ms. Deis worked for the CareFlight program for nine years but left in June of 2006. (Tr. 501). She left CareFlight for a number of reasons, but safety was a concern that contributed to her decision. (Tr. 514). Ms. Deis was a member of Complainant's crew during the "trash bag incident" in 2004. (Tr. 501). She heard over dispatch that their aircraft might be out of service for a while, but then suddenly the aircraft was taking off and heading back to the base. (Tr. 503). The crew was very confused because obviously a mechanic did not have time to inspect the aircraft. (Tr. 502-3). When the aircraft landed, one of the nurses told Ms. Deis about the trash bag and that the pilot, Mr. Williams, had gotten clearance from a mechanic over the phone to fly back. (Tr. 504). Ms. Deis also heard that Mr. Williams was in a hurry because he was late for a hockey game. (Tr. 504). She heard all of this information from the other nurses and Mr. Williams himself. (Tr. 504). Ms. Deis stated that Complainant and Mr. Williams discussed the situation away from the crew. (Tr. 505). She has never heard Complainant "bad mouth" the other pilots around the crew. (Tr. 505).

Ms. Deis was also a member of Complainant's crew in 2005, when they experienced communication problems. (Tr. 505). The problems occurred during a night shift flight. (Tr. 506). The crew tried to contact dispatch but the radios were not working and, as a result, the mission was aborted. (Tr. 506). The aircraft was grounded and Complainant called for a mechanic. (Tr. 506). Ms. Deis stated that it took a mechanic a while to respond. (Tr. 507). When the mechanic, Jack Weese, finally arrived, he spoke condescendingly towards the crew. (Tr. 507). Mr. Weese blamed the crew for the radio problems. (Tr. 507). Despite Mr. Weese's actions, Ms. Deis did not complain and never heard Complainant make negative comments about Mr. Weese. (Tr. 508).

Like the other nurses, Ms. Deis also observed pilots performing their daily pre-flight inspections. (Tr. 509). She saw a difference between the inspections conducted by Complainant and the other pilots. (Tr. 509). Ms. Deis found that Complainant was very thorough and even climbed up onto the aircraft to inspect it. (Tr. 510). This difference did not cause her concern but she was curious as to why the inspections were performed differently. (Tr. 510). Ms. Deis asked Complainant about the differences and Complainant told her that pilots conduct their pre-flights according to how they were trained. (Tr. 510). Complainant never spoke negatively about the other pilots. (Tr. 511). Ms. Deis never raised any concerns about the pre-flights to Ms. Skidmore, but some of the other nurses did during a safety meeting. (Tr. 511).

Ms. Deis was also involved in the efforts to aid Complainant when he was on leave with a back injury. (Tr. 508). She urged that Complainant never asked for help. (Tr. 508). Ms. Deis never heard anyone complain about the efforts to help Complainant. (Tr. 509). She also wrote a letter of recommendation for Complainant. Ms. Deis wrote that Complainant "is a very

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<sup>16</sup> CX 34 includes copies of letters of recommendation written by nurses who worked with Complainant.

dependable, efficient and conscientious pilot. He is detail-oriented, trustworthy and always insured that safety was his number one priority.” (Tr. 512).

I find Ms. Deis’s testimony credible and supported by the evidence in the record.

Lastly, **Dashayne Wadsworth**, another nurse from CareFlight, testified. (Tr. 516). Ms. Wadsworth has worked with CareFlight for eight years. (Tr. 517). She observed the differences between Complainant’s pre-flight inspections and those of the other pilots. (Tr. 519). Ms. Wadsworth saw Complainant and another pilot climbing on top of the aircraft and inspecting the aircraft in more detail. (Tr. 519). She asked Complainant why he performed his preflight differently, and he told her that he performs his preflight the way while he in the National Guard. (Tr. 519). He never spoke negatively about the other pilots. (Tr. 520). Complainant merely stated “that people had their way of doing things and that was the way he liked to do it.” (Tr. 520).

Ms. Wadsworth discussed her pre-flight concerns with Ms. Skidmore. (Tr. 520). She brought other safety concerns to Ms. Skidmore on other occasions. (Tr. 520). Ms. Skidmore’s response was that “Quite frankly the—he should not be up there and he should not be opening the cowlings, and that is not his job.” (Tr. 521). Ms. Wadsworth also witnessed pilots take aircraft out of service on many occasions. (Tr. 523). She stated that Ms. Skidmore would get angry when an aircraft was out of service. (Tr. 524).

In the summer 2005, Ms. Wadsworth observed a problem with the windscreen vibrating in one of the aircraft. (Tr. 522). She stated that “the windscreen on the copilot’s side was vibrating tremendously.” (The 522). This was the first time she had observed the vibration. (Tr. 523). Ms. Wadsworth spoke with Complainant about the vibration and he told her that the mechanics acted like the vibration was not an issue. (Tr. 523). Ms. Wadsworth testified that the problem with the windscreen went on for some time and still rattles today. (Tr. 530).

Ms. Wadsworth was also one of the nurses who wrote a letter of recommendation for Complainant after his termination. (Tr. 524). She testified that she wrote the letter because Complainant was a great pilot and a good friend. (Tr. 524-5). I find her testimony credible and supported by the evidence in the record.

**Grady Wilson**, an experimental test pilot, provided expert testimony on behalf of Complainant.<sup>17</sup> (Tr. 622). Mr. Wilson currently serves as a consultant for the National Test Pilot School in Mojave, California. (Tr. 622). He is responsible for training civilian, military and foreign pilots. (Tr. 630). He has a bachelor’s degree in aeronautical engineering and chemical engineering from Mississippi State University. (Tr. 623). Mr. Wilson specializes in helicopters. (Tr. 623). He was a pilot for the military between 1964 and 1978, where he gained extensive training in rotary wing aircraft. (Tr. 624, 626). Mr. Wilson was “trained to recognize the faults, to troubleshoot the aircraft and to know the military’s requirements.” (Tr. 624). Mr. Wilson also worked as a maintenance officer while in the military, which involved managing the maintenance team. (Tr. 625). He took classes towards his doctorate degree at Stanford; however, he tried to do it part-time and as a result, failed the oral qualifications. (Tr. 626). Mr. Wilson then started his work as a test pilot. (Tr. 629). He was responsible for all aspects of the

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<sup>17</sup> Mr. Wilson’s resume is located at EX 49.



aircraft, mechanical and production. (Tr. 628). Mr. Wilson was responsible for testing the safety of the aircraft. (Tr. 629).

Although Mr. Wilson was not present during the factual situations involved in this claim, he reviewed the exhibits and deposition testimony to formulate his opinions.<sup>18</sup> (Tr. 683). He also reviewed the materials pertaining to the “trash bag incident.” (Tr. 634). Mr. Wilson’s understanding was that, while the nurses were loading a patient, a plastic bag was sucked through the tail rotor. (Tr. 637). The pilot, Mr. Williams, called a mechanic who walked him through an inspection over the telephone. (Tr. 637). Mr. Wilson opined that these actions were a direct violation of the FAR’s. (Tr. 638). He opined that Mr. Williams should have had a mechanic and an airframe specialist personally inspect and sign off on the aircraft before allowing it back in service. (Tr. 638). Mr. Wilson urged that Complainant was absolutely correct in refusing to fly the aircraft. (Tr. 642, 650).

Next, Mr. Wilson discussed the incident involving the radio communication and panel light problems experienced in January 2005. (Tr. 650). Mr. Wilson opined that, due to the conditions the pilots at CareFlight fly under, these problems were very serious. (Tr. 650). He agreed that an aircraft should be grounded for these problems. (Tr. 650). Mr. Wilson stated that the deposition testimony revealed that Jack Weese, the quality assurance person for CJ, was the mechanic who inspected these problems. (Tr. 651). Mr. Wilson testified that a quality assurance director should strictly enforce safety. (Tr. 651). Mr. Weese told Complainant that if the cockpit lights were operating intermittently then there was nothing he could do to fix them. (Tr. 652). Mr. Wilson stated that the aircraft should have not have been flying at night. (Tr. 652). He agreed that if the problem were intermittent it would be harder to fix, but that there was still a problem that needed to be addressed. (Tr. 652).

Mr. Wilson also conveyed his opinions in relation to the “spring incident.” (Tr. 653). He found that a broken anticipator spring was fixed with an unauthorized part. (Tr. 654). Mr. Weese was the mechanic responsible for the incident. (Tr. 654). Mr. Wilson opined that Mr. Weese clearly violated the FAA requirements and should have been disciplined if not fired.<sup>19</sup> (Tr. 654). Mechanics should only use manufacturer-approved parts. (Tr. 654). “To replace it with a broken spring is unconscionable.”

In Mr. Wilson’s experience, whether a pilot or mechanic records the discrepancies in the logbook depends on the organization. (Tr. 666). He stated that in the military it is the pilot’s sole job, but in the civilian job market things are different. (Tr. 667). All of the companies Mr. Wilson has worked for have operated under the policy that a pilot should first talk to a mechanic and have him/her log the problem. (Tr. 667). Mr. Wilson also stated that at times a discrepancy is not written down if it is going to be deferred until the aircraft’s next major phase of inspections. (Tr. 667). If he logs the discrepancy, the mechanic always informs him what to write. (Tr. 668). Only a mechanic can choose to defer a corrective action and it is up to the mechanic to decide what to write in the logbook. (Tr. 671). Mr. Wilson opined that these

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<sup>18</sup> Mr. Wilson also provided deposition testimony, which is not summarized herein. However, during his deposition testimony all the exhibits and other depositions were not available to him for review. Therefore, some of his opinions changed after reviewing the rest of the deposition testimony. Respondents impeached Mr. Wilson with this information, but he thoroughly explained why he changed his opinions, and therefore, I continue to find him highly credible.

<sup>19</sup> CX 12 includes a copy of a warning letter sent to Mr. Weese from the FAA.

actions comply with the regulations. (Tr. 670-1). However, he agreed that it is the pilot's underlying responsibility to ensure notations are completed. (Tr. 685). Furthermore, while every discrepancy does not have to be logged, those that result in the aircraft being out of service should be entered. (Tr. 686). Mr. Wilson declared that if a mechanic failed to log a discrepancy he believed should have been included, he would so inform the mechanic. (Tr. 696).

Mr. Wilson reviewed the discrepancies Complainant encountered in August 2005. He agreed that a hydraulic leak may or may not be serious. (Tr. 696). The leak can be monitored or repaired, but "if it's a seep, the corrective action is probably to fly it and watch it." (Tr. 697). Mr. Wilson classified the windscreen problems as serious. (Tr. 697). He opined that the windscreen should have been written up and monitored. (Tr. 698). Mr. Wilson agreed that if a discrepancy exists and a pilot refuses to speak with the mechanic there is a huge problem. (Tr. 699, 703). Failure to communicate puts lives at stake. (Tr. 700). Mr. Wilson was unaware of the facts surrounding the interaction between Complainant and the mechanics in August 2005. (Tr. 700). However, Mr. Wilson agreed that a pilot should be disciplined or terminated for not communicating problems to mechanics, failing to comply with FAA regulations or continuously failing to comply with an employer's operating manual.<sup>20</sup> (Tr. 703-4).

Mr. Wilson also discussed the meaning of "operational control as it pertains to Section 135, air carriers." (Tr. 674). He testified that the main focus is safety. (Tr. 675). Only aviation personnel should direct operations of the aircraft and should comprise the chain of command. (Tr. 675). When you allow the involvement of others into the chain of command problems arise and Part 135 is violated. (Tr. 675). The purpose is to ensure only those properly trained in aviation make the decisions. (Tr. 675). The FAA wants to ensure that companies do not take unsafe flights because a hospital wants to stay competitive. (Tr. 676). Upon review of the evidence, Mr. Wilson determined that MVH's personnel were involved in the operational controls of the CareFlight program. (Tr. 676). He opined that Ms. Skidmore should have never instructed Complainant to avoid talking about "mechanical issues over the radio to the dispatcher or to non-mechanical people." (Tr. 677). Mr. Wilson also opined that Ms. Skidmore had no business attending, much less conducting, the pilots' meeting. (Tr. 677). This was a safety meeting -- a place for the pilots to get together, air their gripes, and discuss the issues they have without management's involvement. (Tr. 678). He stated that she is a customer and has no business in a pilots' safety meeting. (Tr. 678). Since Mr. Gottschalk could not attend, the next senior pilot should have taken over the meeting. (Tr. 679). Furthermore, Mr. Wilson opined that pilots often critique one another in the pilots' meetings and it is each pilot's job to ensure the others are performing their duties properly. (Tr. 679-80). Mr. Wilson agreed that in his deposition he testified that the evidence does not establish that MVH was involved in maintenance issues. (Tr. 689). However, he opined that the mechanics should not have been reporting to the project manager, Ms. Skidmore. (Tr. 691). Mr. Wilson also testified that MVH is not an air carrier. (Tr. 692). He opined that it would be very hard for a hospital to become a 135 certificate holder. (Tr. 692-3). Based on the evidence provided, Mr. Wilson agreed that "CJ Systems does not subcontract or outsource any of the safety-sensitive functions to any third party, they do their own maintenance, they are the ones who are responsible." (Tr. 694).

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<sup>20</sup> There is a great deal of cross-examination involving whether MVH was consulted before Complainant was terminated and whether MVH was involved. As Mr. Wilson has no personal knowledge in relation to the actual reasoning for Complainant's termination or MVH's involvement in the termination decision, I cannot credit his opinion on those issues. But his opinion is given great weight as to the other issues he discussed.

However, Mr. Wilson was unaware of the meaning of “air carrier” under the whistle blower protection statutes. (Tr. 714).

I find Mr. Wilson’s testimony credible. His opinion is supported by the other evidence in the record, and based upon his superior qualifications I place great weight upon his opinion.

Complainant’s wife, **Tamyka Evans**, also testified on his behalf. (Tr. 724). The couple has been married since 1983 and has one son, Ryan Evans. (Tr. 724). Ms. Evans stated that “CareFlight was [Complainant’s] dream job, so that he could do what he loved to do and do it close to home, and [they] could stay where [they] were.” (Tr. 733). Complainant left his position with MedFlight in Columbus because of the long commute. (Tr. 733). From his first day at CareFlight, Complainant complained to his wife about “the lack of safety compared to MedFlight.” (Tr. 733). Ms. Evans urged her husband to quit and go back to MedFlight but Complainant did not want to relocate and thought he could help fix the system at CareFlight. (Tr. 734).

Ms. Evans works as an intervention specialist for students K through twelve. (Tr. 730). She started her position in August 2006. (Tr. 731). Prior to that she was off on maternity leave and planned to be a stay-at-home mom. (Tr. 731-2). After Complainant’s termination, she was forced to find a job and return to the work force. (Tr. 732). Ms. Evans is responsible for the household finances. (Tr. 725). She testified that Complainant started his current employment with Air Methods on November 6, 2006. (Tr. 725). Ms. Evans stated that while at CJ, Complainant’s bi-monthly pay was \$2,206.88; however, he only makes \$1,986.12 bi-monthly at Air Methods. (Tr. 725-6). Accordingly, Complainant currently makes \$51,639.12 a year; \$5,739.76 less than when he worked at CareFlight. (Tr. 727). These amounts include a \$105.95 bi-weekly deduction by CJ for medical insurance. (Tr. 727). After Complainant’s termination he paid \$773.25 per month for medical insurance through COBRA for a year. (Tr. 728). Ms. Evans testified that on average the couple pays \$1000.00 per month for Mr. Evans to live away from home while working for his current employer. (Tr. 729).

Ms. Evans witnessed the effects the termination had on Complainant and their marriage. (Tr. 732). Prior to the termination, Complainant was very sociable and suffered from no emotional problems. (Tr. 732). The termination “devastated” Complainant. (Tr. 734). Ms. Evans characterized it as if “he came home, told [her about the termination], and basically withdrew from [their] lives. For a period of three months he was unavailable, both physically and emotionally, in all facets of [their] lives.” (Tr. 734). She tried to speak with Complainant and be there for him, but he just shut down. (Tr. 734). The couple finally sought marriage counseling in November. (Tr. 735). They are still in therapy today. (Tr. 735). Complainant also sees the counselor individually and was prescribed Paxil. (Tr. 736). Although Complainant is able to fly again, Ms. Evans opined that that he will never be the same. (Tr. 736).

### **C. Respondent CJ’s witnesses**

**Jim Lynn** is the chief pilot for CJ. (Tr. 747). Mr. Lynn received his flight training in the Army. (Tr. 749). First, Mr. Lynn discussed CJ’s business operations. (Tr. 751). CJ provides aviation management, aircraft, pilots, and mechanics for EMS operations throughout the country. (Tr. 751). CJ has between thirty-five and forty-two contracts with hospitals and healthcare providers. (Tr. 752). Mr. Lynn was unaware of the financial arrangements within these contracts.

(Tr. 753). The contracts also vary depending upon who owns the aircraft. (Tr. 753). At times the aircraft are owned by the hospital and others CJ may own. (Tr. 753). MVH owns the aircraft for the CareFlight program. CJ is headquartered in Pittsburgh, Pennsylvania. (Tr. 752).

As the chief pilot, all pilots at CJ report directly to Mr. Lynn. (Tr. 754). Mr. Lynn also oversees the site managers. In general, Mr. Lynn is responsible for ensuring that all pilots are properly trained, current and qualified. (Tr. 755). All bases operate twenty-four hours a day and have four pilots and one mechanic per aircraft. (Tr. 755). Three of these four pilots also have the additional duties of either a site manager, safety representative or a training representative. (Tr. 756). CJ has numerous directors which head the direct areas of the business. There is a safety director, maintenance director, quality assurance director and others. (Tr. 757). The safety director oversees the safety operations throughout the company and handles all safety complaints. (Tr. 756). Dave Gottschalk is the site manager for the CareFlight program. (Tr. 758). He handles the issues that arise at that site and then if he is unable to answer the customer's (MVH's) questions or issues, one of the company's directors will handle the problem. (Tr. 758). Mr. Lynn encourages Ms. Skidmore, the director the CareFlight program to contact him whenever necessary. (Tr. 758).

Mr. Lynn participates in all pilot hiring decisions, but he could not remember the details of Complainant's hiring process. (Tr. 760). Besides hiring, Mr. Lynn first came into contact with Complainant when he injured his back. (Tr. 760). Mr. Gottschalk informed Mr. Lynn of the injury and that Complainant would be off duty. (Tr. 760). When a pilot is off duty the other pilots have to work the injured pilot's shifts. (Tr. 765). CareFlight bears the overtime costs. (Tr. 848). CareFlight is responsible for paying the "costs, salary, benefits and overtime" of the pilots in the program. (Tr. 848). During Complainant's leave, Ms. Skidmore called Mr. Lynn to discuss the overtime costs CareFlight was incurring due to Complainant's injury. (Tr. 850). She wanted Complainant replaced unless the situation was resolved. (Tr. 850). Complainant was informed that at some point another pilot would be hired to take his place, but that he could be relocated to another base once he came back from medical leave. (Tr.852-3). Some of the other pilots called Mr. Lynn that they were willing to work overtime so that Complainant could stay with the program. (Tr. 853). As a result, Mr. Lynn called Ms. Skidmore and told her that they would continue with the overtime. (Tr. 854). Complainant also visited the job site a few times during his time off. (Tr. 767). Ms. Skidmore viewed these visits as disruptive and so informed Mr. Lynn. (Tr. 767). Since the customer was unhappy, Mr. Lynn called Complainant and told him not to visit the site while off duty. (Tr. 768). Mr. Lynn could not remember Complainant's justification for visiting the base but stated that it was reasonable for him to visit. (Tr. 858).

Mr. Lynn was aware of the "plastic bag incident." (Tr. 878). Mr. Williams was the safety officer and pilot during the incident. (Tr. 878). Mr. Lynn agreed that it was inappropriate for Mr. Williams to fly the aircraft. (Tr. 879). It was a violation of policy and the FAR. (Tr. 879). Mr. Williams was counseled but was given no written warning or discipline. (Tr. 879).

Counsel also questioned Mr. Lynn regarding the "spring incident." (Tr. 770). Mr. Weese, the Director of Quality Assurance, was in Dayton filling in as a mechanic during this time. (Tr. 770). Mr. Ponder one of the pilots, flew the aircraft prior to Complainant's shift. (Tr. 880). But, when Complainant came on duty he refused to fly due to the inappropriate spring repair. (Tr. 880). Mr. Weese called Mr. Lynn and informed him that Complainant refused to fly an aircraft that Mr. Weese repaired. (Tr. 770-1, 880). As a result, Mr. Lynn called Complainant,

who stated that Mr. Weese had made an improper repair. (Tr. 772, 881). Mr. Lynn called Mr. Weese back and asked whether the repair was authorized. (Tr. 773, 881). Mr. Weese admitted to the unauthorized repair and Mr. Lynn told him that Complainant did not have to fly the aircraft. (Tr. 774, 881). Mr. Lynn stated that Complainant did exactly what he was supposed to do. However, although Mr. Weese admitted to an FAR violation, Mr. Lynn could not state whether such was a “serious” violation, because he is not licensed to fly that particular aircraft. (Tr. 881). Although Mr. Weese was sanctioned by the FAA, he was not terminated for the unauthorized repair. (Tr. 883). Mr. Weese assured Mr. Lynn that the unauthorized repair was not that serious. (Tr. 885). “Mr. Weese, who had violated an FAR, assured [Mr. Lynn] that it wasn’t serious, and that was good enough for [Mr. Lynn]. [He has] known Mr. Weese for a long time [and] has faith in him.” (Tr. 885). Mr. Lynn could not remember the details of Mr. Weese’s disciplinary action. (Tr. 883). Mr. Lynn also agreed that Mr. Ponder should have never flown the aircraft knowing that the repair was unauthorized. (Tr. 884). However, Mr. Ponder was not disciplined. (Tr. 885).

Then in January 2005, Ms. Skidmore informed Mr. Lynn that some of the staff had complained about the disparity between the pilots’ pre-flight inspections. (Tr. 769, 859). The nurses came to her with complaints, but Mr. Lynn never questioned the nurses. (Tr. 859). Ms. Skidmore told Mr. Lynn that Complainant was the source of the complainants. (Tr. 769). Ms. Skidmore stated that Complainant “said that he was the only guy that was really doing a proper pre-flight and the rest of the pilots were not.” (Tr. 769). Mr. Lynn called Mr. Gottschalk to discuss the problem. (Tr. 775). He never spoke to Complainant personally. (Tr. 861). Mr. Lynn “understood the issue to be that Mr. Evans was accusing the rest of the pilots on the site of not doing a proper pre-flight. That he was the only person onsite who was doing the pre-flight properly.” (Tr. 775-6). Mr. Lynn thought that Complainant should have discussed the problem with him or Mr. Gottschalk. (Tr. 776). It was hard for Mr. Lynn to imagine the other pilots at Dayton not doing their jobs, especially since they were all professional and had worked for CJ for some time. (Tr. 777). Mr. Lynn told Mr. Gottschalk to have a pilots’ meeting in order to determine what the pilots believed was and was not a proper pre-flight. (Tr. 780). He also wanted to present a standardized front to the customer, Ms. Skidmore. (Tr. 781). Mr. Lynn believed Complainant’s actions were unprofessional. (Tr. 781). He expects pilots to make complaints through the Safety Director. (Tr. 799). Complainant could have also filed an interruption of service report which is a “universal form used to report mechanical irregularities, weather diverts and any safety issues.” (Tr. 800). The form goes directly to the Director of Safety. (Tr. 800). Complainant never filed a formal safety complaint. (Tr. 800). Mr. Lynn was surprised to learn that Complainant testified that he never told Ms. Skidmore that the other pilots were not performing pre-flights. (Tr. 862). Mr. Lynn agreed that he was not present during any of the discussions and could not state whether Complainant made the allegations or not. (Tr. 862). The meeting was set up because of the information Ms. Skidmore relayed to him. (Tr. 863).

Mr. Lynn did not attend the pilots’ meeting, but he received feedback from Ms. Skidmore and Mr. Gottschalk about the meeting. (Tr. 781-2). Mr. Lynn was troubled by Ms. Skidmore’s attendance, which only caused more problems. (Tr. 784). The fact that the pilots were arguing in front of the customer only made matters worse. (Tr. 785). The meeting was supposed to be strictly for CJ personnel, not a general staff meeting. (Tr. 864). Mr. Lynn was upset with Mr. Gottschalk for not attending and for allowing Ms. Skidmore to take his place. (Tr. 865). However, no disciplinary action was taken. (Tr. 866). Mr. Lynn was unaware of how

Ms. Skidmore started the meeting or that Complainant begged her not to tell the other pilots that he was making allegations. (Tr. 868). He was unaware of Complainant's assertions that he never made the allegations. (Tr. 868). Mr. Lynn agreed that starting a meeting with such accusations would anger most pilots and cause tempers to rise. (Tr. 869). Prior to "the pilots' meeting, [Mr. Lynn] had no reason to think that there was some unusual degree of tension or animosity between Mr. Evans and the other pilots." (Tr. 871).

Ms. Skidmore called and emailed Mr. Lynn about the meeting.<sup>21</sup> (Tr. 781). Ms. Skidmore stated that the meeting was bizarre, chaotic, and that at one point she thought the meeting "was going to come to fisticuffs." (Tr. 782). Mr. Lynn was under the impression that everyone in the room wanted to fight with Complainant. (Tr. 783). Some of the pilots also called Mr. Lynn after the meeting. (Tr. 785). The pilots were concerned about Complainant's behavior and his mental ability to fly. (Tr. 786). They asserted that Complainant "was standing up at the meeting, that he was—that his face was red, the veins in his neck were popped out. He was—you know, he was shaking his fist, very animated, you know, threatening people, you know that sort of thing." (Tr. 786). Ms. Skidmore also sent Mr. Lynn a copy of an email from Mr. Blaho, a pilot present at the meeting. (Tr. 872). Mr. Blaho wrote that he did not feel that Complainant and Mr. Williams should be a member of the same flight program.<sup>22</sup> (Tr. 873). Mr. Lynn did not follow-up with Mr. Blaho. (Tr. 873). He also never spoke with Mr. Williams about the incident. (Tr. 877).

Based on all the feedback, Mr. Lynn believed that action needed to be taken against Complainant. (Tr. 789). Mr. Lynn believed that Complainant was the instigator at the meeting. (Tr. 798). No action was taken against Mr. Williams or the other pilots. Mr. Lynn discussed the situation with Dawn Chambers, CJ's human resources director. (Tr. 789). The two decided to interview Complainant personally in Pittsburgh. (Tr. 789). Complainant was placed on leave so that CJ could investigate the situation. (Tr. 805). This type of leave occurs on a regular basis. (Tr. 805). Any time there is an incident involving a pilot, the pilot is placed on leave while an investigation is conducted. (Tr. 805). Complainant met with Mr. Lynn and Dawn a few days after the pilots' meeting. (Tr. 790). Mr. Lynn told Complainant about the calls from the other pilots and informed Complainant they needed to check his mental stability. (Tr. 790). Also at the meeting, Complainant handed Mr. Lynn a list of discrepancies and safety issues he thought needed to be addressed at the CareFlight program, but Mr. Lynn told Complainant that the issues would be addressed after they dealt with the pilots' meeting incident. (Tr. 790). Basically, Mr. Lynn saw these complaints as merely Complainant's way of saying no one else was performing their job as well as him. (Tr. 791). Mr. Lynn examined the notes and gave them to Mr. Bates, the director of maintenance. (Tr. 793). Mr. Lynn and Dawn decided that Complainant should see a flight surgeon. (Tr. 792).

Dr. Lambrou, a doctor and pilot for USAir, evaluated Complainant. (Tr. 792-7). CJ sends pilots to Dr. Lambrou for evaluation and has a lot of faith in him. (Tr. 792). Dr. Lambrou informed Mr. Lynn that "he didn't feel like he could make a determination" and recommended a mental health professional. (Tr. 793). Complainant then saw a physician at Western Psychiatric in Pittsburgh. (Tr. 794). Both the psychiatrist and Dr. Lambrou wrote letters opining that Complainant was able to fly. (Tr. 794).

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<sup>21</sup> A copy of the email is located at EX 25.

<sup>22</sup> A copy of the email is located at EX 25.

Mr. Lynn told Ms. Skidmore that Complainant was going to be reinstated; however, she informed Mr. Lynn that she had issues she wanted addressed first. (Tr. 794). Ms. Skidmore sent Mr. Lynn a list of concerns she wanted Complainant to improve upon or change in order to continue working at CareFlight. (Tr. 795). Mr. Lynn then drafted a warning letter for Complainant, which included Ms. Skidmore's suggestions. (Tr. 795). Mr. Lynn had doubts as to whether Complainant should work for the CareFlight program. (Tr. 795). He thought Complainant had alienated himself from his coworkers and the customer. (Tr. 795). Messrs. Lynn and Gottschalk presented Complainant with the warning letter at MVH and advised him on what he had to improve upon.<sup>23</sup> (Tr. 801). Mr. Lynn wanted Complainant to present his issues directly to CJ and to avoid involving MVH, the other staff members and the other pilots. (Tr. 803). He wanted Complainant to avoid being disruptive. (Tr. 803). Complainant believed the letter was unfair and refused to sign. (Tr. 802). Mr. Lynn thought there was no way Complainant could succeed with his employment at CareFlight. (Tr. 802). He offered Complainant the option of transferring to another CJ location; however, Complainant wanted to stay in Dayton for personal reasons. (Tr. 804). Complainant was off with pay for around a month before his reinstatement. (Tr. 805).

Until August 2005, Mr. Lynn had no other problems with Complainant. (Tr. 806). However, Complainant called him one night to ask if it was ok to ground an aircraft. (Tr. 806). The call surprised Mr. Lynn, because pilots do not usually ask for permission to ground an aircraft. (Tr. 807). He assumed that Complainant "felt threatened." (Tr. 807). Ordinarily pilots just write up the discrepancy and take the aircraft out of service. (Tr. 807). Mr. Lynn testified that he has never disciplined a pilot for taking an aircraft out of service. (Tr. 807). He stated that on average pilots at CJ turn down around 9,000 flights a year. (Tr. 807-8). He testified that he never calls a pilot and asks why he refused a flight. (Tr. 808). However, Mr. Lynn's prior actions contradict this statement, for he called and asked Complainant twice and asked why he grounded an aircraft. First during the "spring incident" and then again during the incidents surrounding this claim.

Then on August 25, 2005, Mr. Lynn attended a CJ customer retreat in Pittsburgh. (Tr. 808). The retreat is a time for CJ to get together with all of its customers, give them an update on the company and socialize. (Tr. 808). While at the retreat, Ms. Skidmore approached Mr. Lynn and asked why Complainant had taken one of her aircraft out of service. (Tr. 809-10). She stated that Complainant refused to tell dispatch his reasoning. (Tr. 810). The maintenance staff also called Messrs Lynn and Bates and told them that they were unsure why the aircraft was out of service. (Tr. 810). The mechanics were very upset because they had already left the job site when Complainant took the aircraft out of service. (Tr. 811). Mr. Lynn could not remember if the mechanic told him whether he knew what the problem was. (Tr. 812). Mr. Lynn called Complainant to see what was going on. (Tr. 811).

Mr. Lynn had a few different conversations with Complainant that day. At first Complainant acted somewhat evasive and was not going to tell him why the aircraft was out of service; however, Complainant told Mr. Lynn that there was a problem with the windscreen, the autopilot and another issue Mr. Lynn could not remember. (Tr. 813). He first spoke to Complainant sometime prior to noon. (Tr. 821). Mr. Lynn never asked Complainant why he refused to tell the mechanics the reasons the aircraft was out of service. (Tr. 890). Mr. Lynn

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<sup>23</sup> A copy of the letter is located at CX 3.

informed Complainant to write up the problems in the logbook. (Tr. 814). Mr. Lynn urged that unless you make a write-up an aircraft is still in service maintenance-wise. (Tr. 814). Mr. Lynn stated that when an aircraft is taken out of service, a write-up is made and then a mechanic comes and fixes the problem. (Tr. 815). Mr. Lynn testified that the system is designed so that a pilot makes the write-ups. (Tr. 815). However, he agreed that often the mechanic makes the write-up and the pilot then signs off on the entry, but CJ discourages this practice. (Tr. 815-6). Mr. Lynn urged that this situation was different because Ms. Skidmore, the customer was standing next to him and wanted to know why her aircraft was out of service. (Tr. 816). In order to answer her question, Mr. Lynn “needed a write-up in the logbook that said, this aircraft is down.” (Tr. 816). Mr. Lynn continuously urged that it was Complainant’s responsibility to make the entry in the logbook, not a mechanic, because the maintenance staff had already addressed the issues he was complaining about. (Tr. 816). If a problem is not written in the book, maintenance is not going to address it. (Tr. 817). Mr. Lynn agreed that at times, the staff will come and inspect the problem and then make an entry. (Tr. 817). The FAA and the CJ handbook make it the pilot’s responsibility to make the entry in the logbook. (Tr. 818). Mr. Lynn believed Complainant took the aircraft out of service to put pressure on the maintenance staff to address the problems. (Tr. 895). Mr. Lynn refused to acknowledge that these issues were safety-related, **but agreed Complainant believed they were safety issues.** (Tr. 896).

Then an hour later, Ms. Skidmore asked Mr. Lynn again why the aircraft was still out of service. (Tr. 821). Mr. Lynn then called Complainant back. (Tr. 821). Complainant told Mr. Lynn the problems with the aircraft, but Mr. Lynn could not remember if he informed Ms. Skidmore or not. (Tr. 902). Mr. Lynn never explained why he would have avoided telling Ms. Skidmore Complainant’s reasoning for taking the aircraft out of service. Mr. Lynn merely states that he cannot remember. It seems illogical that Mr. Lynn would have neglected to inform Ms. Skidmore why the aircraft out of service, since she was standing next to him complaining and he knew Complainant’s reasoning. Mr. Lynn admits that Complainant told him there was a problem with the windscreen, the autopilot and another issue that he could not remember. (Tr. 813).

During the second call, Mr. Lynn assumed that Complainant had already informed the mechanics of the problems. (Tr. 902). Since the maintenance staff stated that they had already addressed Complainant’s issues, Mr. Lynn told Complainant that the mechanics would only examine the aircraft after Complainant made a notation in the logbook. (Tr. 822). Mr. Lynn denied telling Complainant “that if he wrote those problems down he would be documenting the fact that he had flown this aircraft with known discrepancies, which is a no-no, but if he didn’t write them down, then you had an aircraft out of service improperly.” (Tr. 892). Mr. Lynn testified that he never threatened Complainant and only told him to make a write-up so they could inform the customer why the aircraft was grounded. (Tr. 823). Complainant informed Mr. Lynn that he was waiting on the mechanics to tell him their plan of action for the repairs first. (Tr. 894). Mr. Lynn asserts that he was upset with the situation because the aircraft had just undergone maintenance the day before, which Complainant signed off on and because Complainant refused to tell everyone why the aircraft was out of service. (Tr. 915). Yet, Mr. Lynn never asked Complainant why he took the aircraft out of maintenance to begin with. (Tr. 915).

A mechanic finally examined the aircraft three hours after Complainant took it out of service. (Tr. 904). After discussing the situation with the mechanic, Complainant made a write-



up in the logbook. (Tr. 823, 904). Complainant logged the autopilot issue, which the mechanic deferred, and thereafter, the aircraft was back in service. (Tr. 823). An item can be deferred if it is on the list of items the FAA states an aircraft can operate without. (Tr. 825). The item is then placed on a list and maintenance can be deferred for up to ten days. (Tr. 825). A pilot can refer to the manual and defer some items himself. (Tr. 827). Mr. Lynn was unsure whether the autopilot was an issue that Complainant could have deferred himself. (Tr. 912). When an item is not deferred, the maintenance staff must correct the problem before placing the aircraft back in service. (Tr. 826). Mr. Lynn did not understand why Complainant only logged the autopilot issue; however, he never asked Complainant his reasoning. (Tr. 824, 905, 908).

Mr. Lynn stated that in order to legally take an aircraft out of service a pilot must inform dispatch and make a write-up in the logbook. (Tr. 898). Merely calling dispatch is not sufficient. (Tr. 898). Accordingly, per Mr. Lynn's reasoning, if no write-up is made, the pilot can change his mind and put the aircraft back in service if he determines there is no discrepancy. (Tr. 898). However, Mr. Lynn agreed that this practice is different from that of CJ. (Tr. 898). Per CJ's practice, if a pilot calls dispatch and takes an aircraft out of service it is out of service. (Tr. 898). Therefore, Complainant could have changed his mind and said that nothing was wrong and put the aircraft back into service. (Tr. 899). Also, since Complainant had not written anything in the logbook it would have been ok for him to fly the aircraft to the Moraine base for maintenance to address the issues, which Complainant volunteered to do. (Tr. 899). However, Mr. Lynn continued to urge that since there were issues that needed to be addressed, Complainant needed to make a notation in the logbook. (Tr. 900). He thought Complainant should have written the complaints in the logbook while the aircraft was in maintenance and had the mechanics fix the problems at that time. (Tr. 918). Mr. Lynn agreed that at CJ mechanics make over half of the write-ups for the pilots. (Tr. 907). Also pilots "confer with the mechanic as to what the write-up should be." (Tr. 907). **Therefore, Mr. Lynn agreed that Complainant acted consistently with the practice at CJ.** (Tr. 907).

After his discussion with Complainant, Mr. Lynn decided that, at a minimum, he was going to move Complainant from the CareFlight program. (Tr. 828). Ms. Skidmore basically told Mr. Lynn that this incident was the "last straw." (Tr. 915). She inferred that she wanted Complainant out of the CareFlight Program. (Tr. 915). However, Mr. Lynn stated that Ms. Skidmore has never put pressure on him to terminate an employee because of his/her safety concerns. (Tr. 923). Mr. Lynn also discussed the situation with the CJ's directors and Dawn, the HR director. (Tr. 829, 832). They advised Mr. Lynn to terminate Complainant, which he decided to do. (Tr. 830, 917). Mr. Lynn agreed that it was his decision, not Ms. Skidmore's. (Tr. 917). He "didn't want to move this problem from one of [his] customers [and] transport it to another." (Tr. 830). Mr. Lynn then called Mr. Gottschalk and took Complainant off the schedule the following day. (Tr. 830). Dawn helped Mr. Lynn draft a termination letter.<sup>24</sup> (Tr. 832). Ms. Skidmore also wrote Mr. Lynn a letter regarding the situation upon his request. (Tr. 836). Her letter was fairly consistent with the incidents that occurred on August 25, 2005. (Tr. 837). Mr. Lynn was traveling to Kansas City the next week and on his way back he stopped in Dayton to see Complainant. (Tr. 831). Mr. Lynn landed in Dayton on August 31, 2005, and handed Complainant a letter of termination. (Tr. 835). Mr. Lynn testified that Complainant's safety complaints had no effect on his decision to terminate Complainant. (Tr. 840). He urged that pilots make safety complaints constantly and are never disciplined. (Tr. 840).

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<sup>24</sup> A copy of the letter is located at JX 41.

I find Mr. Lynn's testimony only partially credible. There are numerous occasions involving critical issues of this case when Mr. Lynn simply states that he cannot remember. Also parts of Mr. Lynn's testimony are contradicted by the other evidence in the record.

The lead mechanic for CJ, **Joshua Jones**, also testified at the hearing. (Tr. 926). He was the site mechanic at the Dayton base prior to his promotion to lead mechanic. (Tr. 927). He has worked for CJ for two years. (Tr. 927). Mr. Jones received his mechanic training in the Marine Corps. (Tr. 927). Mr. Jones often worked with Complainant at the Dayton base. (Tr. 932). He testified that he got along with Complainant and that they had "a normal pilot-to-mechanic relationship, just didn't really talk a whole lot about things other than work, just a friendly working relationship." (Tr. 932-3).

Mr. Jones testified that the 164CF aircraft underwent an airframe rebuild around May or June 2005. (Tr. 933). It was rebuilt during a 600-hour T inspection. (Tr. 933). Then on August 24, 2005, the aircraft underwent its 100-hour inspection, meaning it had been flown 100 hours. (Tr. 934). Complainant flew the aircraft to Moraine for the inspection. (Tr. 934). Complainant did not indicate any discrepancies at this time. (Tr. 934). Mr. Jones never spoke with Complainant during this inspection. (Tr. 934). After the inspection, Mr. Jones went on the check flight with Complainant. (Tr. 934-5). During the flight, Complainant told Mr. Jones that the windscreen seemed to be vibrating more than normal, but Mr. Jones was comfortable with the vibration. (Tr. 935). Mr. Jones did not feel the vibration was unsafe. (Tr. 935). Nothing was written in the logbook regarding the windscreen, hydraulic leak, autopilot, collective link, roll actuator or roll servo at this time. (Tr. 937-8). Mr. Jones testified that Complainant did not mention any of these issues to him on August 24, 2005. (Tr. 939). However, in his later testimony he agrees that Complainant discussed these problems but that they were addressed. (Tr. 974). After the flight, Complainant accepted the aircraft and flew it back to the Warren County base. (Tr. 939).

The next day, August 25, 2005, Jason Kinser was the mechanic responsible for making the daily inspection of the aircraft in Warren County. (Tr. 940). Mr. Kinser was the lead mechanic at that time. (Tr. 940). Mr. Jones was working at the Moraine base. (Tr. 941). Complainant called Mr. Jones on the morning of the 25th and told him that the aircraft was out of service. (Tr. 941). Mr. Jones thought the call was out of the ordinary since Mr. Kinser was the mechanic at the Warren County base that day. (Tr. 941). Mr. Jones asked Complainant why the aircraft was out of service and testified that Complainant was very vague about the situation. (Tr. 941). Complainant merely said "you know what is going on." Mr. Jones also asked Complainant why he failed to mention these problems the day when the aircraft was in maintenance. (Tr. 941). However, Mr. Jones did not recall Complainant's response. (Tr. 942). Then on cross-examination, he agreed that Complainant had discussed with him the problems involving the windscreen and hydraulic leak the day before. (Tr. 959). Thereafter, Mr. Jones called Mr. Kinser and asked what was going on in Warren County. (Tr. 942). Mr. Kinser had already left and had no idea that Complainant had taken the aircraft out of service. (Tr. 942). At that time neither gentleman knew why the aircraft was out of service. (Tr. 942).

As a result, Mr. Jones called Mr. Bates, the director of maintenance in Pittsburgh, and told him that Complainant had taken an aircraft out of service for unexplained reasons and that the aircraft had just undergone its 100-hour inspection the day before. (Tr. 943). Mr. Jones called Complainant back to get a feel for the situation. (Tr. 943). Complainant told Mr. Jones

about the problems with the windscreen and autopilot. (Tr. 943). Mr. Jones wanted to know why Complainant now had a problem with the windscreen, when he was fine with the windscreen the day before. (Tr. 944). He thought Complainant was not making sense and he “didn’t really believe that that was the situation.” (Tr. 946). However on cross-examination, Mr. Jones stated that he did not go look at the aircraft because first he wanted to get Mr. Bates’ take on the situation. (Tr. 961). Mr. Jones also did not understand why Complainant did not have Mr. Kinser look at the problems before he left. (Tr. 965). Mr. Bates told Mr. Jones to go look at the aircraft and, if there were problems, to write them up in the logbook. (Tr. 946).

Mr. Jones and another mechanic, Dan Wannacott, traveled to Warren County to examine the aircraft. (Tr. 946). When they arrived, Complainant told them again about the autopilot and windscreen issues. (Tr. 947). Mr. Jones stated that Complainant never mentioned a problem with the collective link, roll actuator, roll servo or the feedback in the ICS. (Tr. 947). Mr. Jones was already aware of the problem with the hydraulic leak. (Tr. 947). They planned to deal with the hydraulic leak at another time. (Tr. 948). Mr. Jones told Complainant that the hydraulic leak was within limits. (Tr. 961). Mr. Jones also checked the windscreen again and stated that everything was fine. (Tr. 947). He stated that the windscreen problem was not a discrepancy. (Tr. 961). Mr. Wannacott tightened some of the screws in the windscreen at this time. (Tr. 962). Mr. Jones told Complainant to write up the auto-pilot as a discrepancy in the logbook. (Tr. 948). He explained that he wanted to document that Complainant had performed an unsafe procedure in flight. (Tr. 949). The autopilot problem was deferred, but Mr. Jones had to get approval to defer the autopilot because it is not something ordinarily deferrable on the MEL list. (Tr. 949). Complainant could not have deferred the autopilot issue on his own. (Tr. 962). Mr. Jones did not have Complainant write up any other problem. (Tr. 948, 964). He testified that there was nothing else to write down because the other issues were not discrepancies. (Tr. 949, 964). However, Mr. Jones stated that, even if a mechanic feels there are no discrepancies, a pilot still has discretion to make a write-up. (Tr. 949). Mr. Jones then left Warren County. (Tr. 950).

Mr. Jones agreed that when a pilot calls dispatch and takes an aircraft out of service, the aircraft is out of service at that time. (Tr. 963). A mechanic then comes and looks at the problem. (Tr. 963). The aircraft is out of service until the mechanic defers the problem, determines there is no discrepancy or fixes the problem. (Tr. 964). In August 2005, the practice at CJ was for the mechanics to determine whether a discrepancy actually existed and, if so, the mechanic was to make the write-up in the logbook. (Tr. 963-4). This is no longer CJ’s practice. (Tr. 963). After the incident with Complainant in August 2005, CJ changed this practice and it is now the pilot’s responsibility. (Tr. 964).

I find Mr. Jones' testimony partially credible and partially supported by the evidence in the record. At times Mr. Jones' testimony is contradictory in that he says he did not know what the problems were with the aircraft, but then later agrees that Complainant discussed the windscreen and autopilot issues with him.

**Jason Kinser** was the lead mechanic at CareFlight in August 2005. Mr. Kinser was responsible for scheduling maintenance, formulating the mechanics’ schedules, hiring mechanics, ordering parts and the ordinary duties of a mechanic. (Tr. 981). He no longer works for CareFlight and is self-employed. (Tr. 978). Mr. Kinser received his training in the Army. (Tr. 979). At CareFlight a mechanic is responsible for doing a daily inspection of each aircraft before the pilot’s shift begins. (Tr. 982). The inspection is more detailed than the pilot’s pre-

flight inspection. (Tr. 982). Mr. Kinser worked with Complainant while at CareFlight. (Tr. 984). The two had a good professional working relationship until the events in August 2005. (Tr. 984).

Mr. Kinser was involved in the 100-hour inspection that occurred on August 24, 2005. (Tr. 984). A 100-hour inspection involves a checklist of items that the mechanics must address and it usually takes around ten to twenty man-hours to complete. (Tr. 985). The mechanics try to address all of the aircraft's problems at this time, including items that have been deferred or that have been awaiting parts. (Tr. 986). The maintenance staff is supposed to take care of all discrepancies during the inspection before releasing the aircraft for flight. (Tr. 986). Complainant flew the aircraft to Moraine from Warren County for its inspection on August 24, 2005. (Tr. 987). Upon arrival the maintenance crew went straight to work on the aircraft. (Tr. 987). Mr. Kinser could not remember having a discussion with Complainant about the aircraft that day. (Tr. 988). However, Mr. Kinser asked Complainant to go to the other bases and locate some sample oil kits for him. (Tr. 989). He testified that he needed the kits and used them and that he did not send Complainant on a so-called "wild goose chase." (Tr. 989). After the inspection Complainant accepted the aircraft and flew it back to Warren County. (Tr. 990). Mr. Kinser stated that Complainant never informed him of any concerns he may have had with the aircraft. (Tr. 990). Mr. Kinser was aware that the aircraft had a hydraulic leak. (Tr. 990). He stated that it was within the legal limits and they were monitoring the situation. (Tr. 991).

The next morning, Mr. Kinser saw Complainant in Warren County. (Tr. 992). Mr. Kinser was responsible for performing the daily inspection on the aircraft. (Tr. 992). At this time, Complainant told Mr. Kinser about the autopilot problem he experienced. (Tr. 992). Mr. Kinser ran some tests on the autopilot and did not find anything wrong with it. (Tr. 992). He testified that Complainant never told him that the autopilot tested in flight. (Tr. 993). Complainant did not bring up any other issues at this time. (Tr. 995). Mr. Kinser then informed Complainant that he was leaving Warren County and departed. (Tr. 995). Mr. Kinser admitted that he was very busy and had multiple projects going on. (Tr. 1019). He did not recall Complainant suggesting that since they had extra mechanics available that they should address some of the issues on the aircraft. (Tr. 1019). However, Mr. Kinser did not believe there were issues that needed to be addressed. (Tr. 1020).

Then on his way to Moraine, Mr. Kinser received a phone call from dispatch informing him that Complainant had taken the aircraft out of service for maintenance. (Tr. 996). Mr. Kinser had no idea what was going on and what could have happened in the twenty minutes since he had left. (Tr. 996-7). He agreed that dispatch does not always know the reasons an aircraft is taken out of service and that it was normal procedure not to broadcast maintenance issues over the radio. (Tr. 1021). Mr. Kinser waited until he arrived at Moraine to call Complainant. He asked what the problem was, but Complainant would only say that the aircraft was out of service for maintenance and not the reasoning. (Tr. 997). Mr. Kinser insisted that Complainant tell him what was wrong, but Complainant refused stating that Mr. Kinser would get mad at him. (Tr. 997). The phone call was very short and apparently, Complainant hung up on Mr. Kinser. (Tr. 1024-5). Mr. Kinser opined that Complainant thought Mr. Kinser would get angry because Complainant had tested the autopilot in flight, which is dangerous. (Tr. 998). Mr. Kinser was unaware that Complainant had already spoken to Mr. Jones prior to his call. (Tr. 1023).

Thereafter, Mr. Kinser called Mr. Bates who told Mr. Kinser that he did not know what was going on but, since he was not Complainant's supervisor, he needed to call someone within Complainant's chain of command to deal with the situation. (Tr. 999). Mr. Kinser was livid at this point and as a result, he had another mechanic, Dan Wannacott, talk to Mr. Bates about the situation. (Tr. 1000). Mr. Kinser instructed Mr. Jones to contact Complainant, and at this point, Complainant informed him about the auto-pilot discrepancy. (Tr. 1000-1). Mr. Kinser sent Messrs. Jones and Wannacott back to Warren County to deal with the situation. (Tr. 1001). He stated that it took them three hours to get there because they were waiting until they spoke with Mr. Bates to determine how to proceed. (Tr. 1033). Mr. Kinser was upset because he could not understand why Complainant did not just tell him the discrepancy while he there that morning and since he was angry did not think he should go to Warren County. (Tr. 1001). Mr. Kinser was also upset because it would "have been helpful to know at that time that the real problem was that [the autopilot] had tested while in flight." (Tr. 1002). Therefore, when Mr. Kinser tried to troubleshoot the problem earlier that morning, it was pointless because he could not recreate the problem Complainant experienced. (Tr. 1002). He stated that Complainant should have known that the aircraft needed to be tested up on jacks in the air. (Tr. 1002).

Mr. Kinser testified that Complainant never mentioned to him a problem with the windscreen, hydraulic leak, feedback in ICS, collective link, roll actuator or roll servo. (Tr. 1003). Mr. Kinser thought it was clear that Complainant believed there were other problems with the aircraft on the 24th but thought they would not be addressed. (Tr. 1016). Mr. Kinser believed these problems were not discrepancies. (Tr. 1016). However, a few days after the events on August 25, 2005, Mr. Kinser discussed the windscreen problem with Dan Martin, a former mechanic. (Tr. 1014). Mr. Kinser was unsure whether he was aware of the windscreen issue on the 24th or not, but stated it did not matter because "it wasn't a valid discrepancy. It wasn't a safety issue, wasn't an airworthiness issue." (Tr. 1015). On the 25th Mr. Kinser told Mr. Jones to ensure that Complainant entered the autopilot discrepancy into the logbook. (Tr. 1004). He wanted Complainant to enter the problem because "it was so absurd that that would even occur, that a pilot would test that switch in flight. [He] wanted to show that that's what had happened." (Tr. 1004). The discrepancy was ultimately deferred. (Tr. 1005). However, Mr. Kinser agreed that there was an actual problem with the autopilot. (Tr. 1035). Mr. Kinser also agreed that the practice at CJ was for the mechanics to write up the discrepancies. (Tr. 1012). The mechanics, unlike the pilots, knew the language that should be used. (Tr. 1012). Generally when the pilot made an entry he/she would write what the mechanic instructed. (Tr. 1013). Mr. Kinser did not know whether Complainant suggested flying the aircraft to Moraine so the mechanics could inspect it, but agreed that they probably discussed getting a ferry permit from the FAA so that it could be flown to Moraine. (Tr. 1032). Mr. Kinser no longer trusted Complainant after the August 2005 incident. (Tr. 1008).

Mr. Kinser also spoke with Ms. Skidmore about the situation. (Tr. 1006). Part of Mr. Kinser's job was to keep Ms. Skidmore informed on when and why aircraft were out of service. (Tr. 1006). He informed Ms. Skidmore that Complainant refused to say why the aircraft was out of service. (Tr. 1007).

Mr. Kinser clearly demonstrates bias towards Complainant throughout his testimony and therefore, I find his testimony only partially credible.

#### **D. Respondent MVH's Witnesses**

**Candy Skidmore**, the director of the CareFlight program at MVH, testified at the hearing. Ms. Skidmore first worked at MVH as a flight nurse, was then promoted to chief flight nurse in 1986 and then to program manager in 1988. (Tr. 1044). She also serves as a director at the hospital. (Tr. 1044). As manager of the CareFlight program she oversees 100 employees, the clinical care provided, training, hiring, quality assurance duties and some fiscal responsibilities. (Tr. 1044). The program transports around 1,900 patients a year and they operate three helicopters. (Tr. 1045). Ms. Skidmore is also a member of numerous associations and sits on the air medical safety counsel. (Tr. 1045). She works with the accreditation of the industry and is a site surveyor for the organization. (Tr. 1046). She surveys other programs to determine whether they are in compliance with industry standards. (Tr. 1046).

Ms. Skidmore asserted that she never informed Complainant not to use the radios to relay maintenance issues. (Tr. 1049). She testified that often pilots need to relay messages through dispatch for the safe operation of the aircraft. (Tr. 1050). The pilots are only instructed not to identify a patient over the radio due to HIPAA (Health Insurance Portability and Accountability Act of 1996) regulations. (Tr. 1050). Radio traffic occurs only in flight not when the aircraft is grounded. (Tr. 1051). Furthermore, Ms. Skidmore testified that she has never instructed a pilot on how to discharge his duties as a pilot in command. (Tr. 1051). She stated that the pilots work for CJ not MVH. (Tr. 1051). She testified that she is fully aware of the different roles of the hospital and the air carrier. (Tr. 1052). Ms. Skidmore's concern was that of Complainant "casting aspersions on one of [his] peer's decision making." (Tr. 1063). She urged that there is a difference between giving the crew and dispatcher maintenance information over the radio and questioning a coworker's decisions. (Tr. 1063).

Ms. Skidmore was upset with how Complainant handled the trash bag incident. (Tr. 1063). She stated that during the incident Complainant acted unprofessionally when he called into dispatch and used vulgar language. (Tr. 1111). She disagreed with Complainant informing the dispatcher that he refused to fly the aircraft when another pilot was already in flight. (Tr. 1111). Ms. Skidmore stated that the situation caused the dispatcher to develop a poor impression of the pilot flying the aircraft and the mechanic who failed to work on the aircraft. (Tr. 1111). However, she asserts that she never discussed the "trash bag incident" with Complainant. (Tr. 1133). Ms. Skidmore testified that she only discussed the situation with Messrs. Gottschalk and Williams. (Tr. 1133).

Ms. Skidmore discussed that CJ and MVH have many avenues available to employees who have safety concerns. (Tr. 1064). First, she stated that they have an open-door policy and any employee can speak to his/her immediate supervisor about the situation. (Tr. 1064). Also there is a safety committee. (Tr. 1064). Safety issues can be placed anonymously in a "drop box" for the Safety Committee to review. (Tr. 1065). Ms. Skidmore testified that it is the practice and policy of MVH and CJ to bring forward safety issues and discuss them. (Tr. 1069). The issues are often discussed at staff meetings. (Tr. 1069). The program also holds safety training for all new employees. (Tr. 1074).

Ms. Skidmore agreed that she requested Complainant to avoid the job site while on disability because she had received complaints from her staff. (Tr. 1054-5). When Complainant was off he experienced financial difficulty and some of his coworkers started raising money to

help; however, Ms. Skidmore urged that some of the nurses complained about the solicitation. (Tr. 1054-5). She stated that her only concern was that the solicitation took place during work hours. (Tr. 1055). Then, another employee complained because it seemed that Complainant was receiving more leave than the regular MVH employees. (Tr. 1056). Ms. Skidmore stated that she never requested that Complainant bring her copies of his medical records. (Tr. 1057). She said that she informed him to give them to CJ not her. (Tr. 1058). Ms. Skidmore urged that the Human Resources person handles those matters. (Tr. 1058). She also asserted that despite Mr. Lynn's testimony, she never conversed with him regarding the amount of overtime Complainant's disability leave was costing the program. (Tr. 1159).

Ms. Skidmore learned about a problem involving the preflight inspections after the "spring incident." (Tr. 1077-8). Upon finding the improperly repaired spring, Complainant informed Ms. Skidmore that some of the pilots were not doing their preflight inspections properly. (Tr. 1078). Complainant also told Ms. Skidmore that some of the nurses had come to him with concerns about the preflight inspections. (Tr. 1078). Ms. Skidmore was very concerned from a safety standpoint about Complainant's accusations. (Tr. 1078). She also wondered why Complainant waited so long to bring the problem to her attention if it was a long-standing problem. (Tr. 1079). Then a nurse spoke to Ms. Skidmore about the preflight inspections which "pretty much mirrored the conversation that [she] had had with Mr. Evans." (Tr. 1081). She believes that Complainant spoke with the nurses about the preflight differences and that's why they complained. (Tr. 1193). However, her testimony is contradictory on whether she informed Complainant of this fact. (Tr. 1193). She asserts that some of the details in Complainant's "memorable experiences" are merely fabricated. (Tr. 1195-7). Ms. Skidmore states that she was concerned that the pilots were performing the preflights differently. (Tr. 1081). Then the chief flight nurse told Ms. Skidmore that she to had received complaints from the nurses. (Tr. 1082). Ms. Skidmore called Mr. Gottschalk to discuss the situation. (Tr. 1079). Mr. Gottschalk spoke with Mr. Lynn, who told him to have a pilots' meeting. (Tr. 1082). They also set up a brief meeting with Complainant prior to the pilots' meeting. (Tr. 1083).

Complainant met with Mr. Gottschalk and Ms. Skidmore in her office. (Tr. 1083). Mr. Gottschalk informed Complainant that "he needed to be more a part of the solution than part of the problem." (Tr. 1084). During the meeting Complainant was upset, frustrated and crying, because there were numerous maintenance issues he wanted addressed, but Mr. Gottschalk stated that they were already resolved. (Tr. 1085). Ms. Skidmore testified that she was in no way trying to set up Complainant. (Tr. 1086). She urged that she was only concerned with the safety of the preflights and that Complainant was conversing with the nurses about the situation. (Tr. 1086). They then adjourned and went to the pilots' meeting. (Tr. 1085).

Since Mr. Gottschalk was unable to attend the pilots' meeting, he asked Ms. Skidmore to start the meeting. (Tr. 1086). She was surprised that Mr. Lynn thought her participation in the meeting was inappropriate. (Tr. 1141). She had never attended a pilot safety meeting before. (Tr. 1143). Ms. Skidmore believed she had every right to attend the meeting. (Tr. 1087). Since safety was at issue and she is the customer, she thought she should be there to discuss the situation. (Tr. 1087). Ms. Skidmore testified that Complainant never asked her to avoid telling the other pilots that he was the only one performing preflights properly. (Tr. 1091). Ms. Skidmore asserted that she did not open the meeting by accusing or attacking Complainant. (Tr. 1086). Ms. Skidmore testified that she started the meeting by asserting that Complainant

had raised a safety concern regarding variances in the way preflights were being conducted. (Tr. 1088). She also stated that nurses had also brought the issue to her attention. (Tr. 1088). She found no problem in the way she started the meeting. (Tr. 1088). Ms. Skidmore stated that Complainant was the instigator at the meeting. (Tr. 1089-90). She stated that Complainant was enraged at the meeting and that “[h]e was out of his chair, his finger was pointed at people, he was – you know, he was almost hyperventilating. His veins were bulging out of his neck. His face was beet-red, he was sweating. He was yelling and swearing.” (Tr. 1091). Ms. Skidmore stated she was very concerned with the situation. (Tr. 1091). She then left and started her staff meeting, while the pilots remained in the room. (Tr. 1091).

After the meeting, Ms. Skidmore received an email from Mr. Blaho. (Tr. 1092). The email included the helipad inspection for February and an attachment regarding Complainant’s behavior at the meeting. (Tr. 1092). Mr. Blaho informed Ms. Skidmore of the events that occurred after she left the meeting and his concerns for Complainant’s unusual behavior. (Tr. 1093). Ms. Skidmore forwarded the message to Mr. Lynn. (Tr. 1093). Ms. Skidmore stated that she had no part in CJ’s decision to take Complainant off duty at this time. (Tr. 1094). However, she “was extremely concerned after sitting in that meeting, and there was a definite delineation between [Complainant’s] behavior and everybody else’s behavior.” (Tr. 1094). She urged that “there is a difference between being angry or a bit frustrated in a meeting and what [she] saw in that meeting.” (Tr. 1094). Ms. Skidmore stated that the safety officer confirmed that all pre-flights were being done by the pilots correctly. (Tr. 1096).

Although Ms. Skidmore states that she took no part in the disciplinary action taken against Complainant for his actions during the pilots’ meeting, she agreed with the written warning.<sup>25</sup> (Tr. 1098). She stated that Complainant’s behavior was a concern that created a disruption to the program. (Tr. 1098-9). Ms. Skidmore agreed that Complainant was correct to discuss safety issues, but that “talking negatively or casting aspersions” was unacceptable. (Tr. 1100). She wanted to ensure that his “hostile, emotional, unpredictable behavior” was addressed. (Tr. 1101). She urged that, while it was not her job to determine CJ’s actions, she wanted to ensure that her employees were safe when flying with Complainant. (Tr. 1101). Ms. Skidmore disagreed with the proposition that she wanted to get rid of Complainant because he was costing her money. (Tr. 1075). She urged that helicopters are out of service all the time. (Tr. 1075). They either break down or the weather is bad and there is nothing they can do about it. (Tr. 1075). She agreed that yes, there was a financial issue involved. (Tr. 1118). She asserted that she never requested that CJ terminate Complainant. (Tr. 1102). However, Ms. Skidmore wrote a letter at Mr. Lynn’s request, discussing the events of August 25th.<sup>26</sup> (Tr. 1102). The letter stated that she was concerned with the fact that Complainant failed to inform dispatch and the mechanics the reasons why the aircraft was out of service. (Tr. 1105). Ms. Skidmore asserted that Complainant’s failure to inform dispatch had nothing to do with avoiding radio conversations because the discussions occurred over the telephone. (Tr. 1106). She stated that he never would tell her why the aircraft was out of service. (Tr. 1107-10).

Ms. Skidmore also discussed the other problems she experienced with Complainant. (Tr. 1111). She wanted Complainant to avoid confrontation when in front of the nurses. (Tr. 1112). She was referring to Complainant calling Mr. Williams names in front of the crew.

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<sup>25</sup> A copy of the write-up is located at CX 27.

<sup>26</sup> A copy of the letter is located at CX 42.



(Tr. 1112). However, she discussed no problems with Mr. Williams' behavior. Ms. Skidmore further asserts, she never told Complainant that he should avoid talking to the crew about anything controversial. (Tr. 1148). Ms. Skidmore states that she was also concerned as to whether Complainant was able to make flight decisions on his own. (Tr. 1117). She urged that a pilot needs to know if his aircraft is airworthy or not and if it is safe to fly. (Tr. 1117). Despite Ms. Wadsworth's testimony, Ms. Skidmore asserts that she does not remember telling Ms. Wadsworth that Complainant should not have been climbing up on top of the helicopter. (Tr. 1148-50). She also did not remember speaking with Complainant regarding an inoperative oxygen indicator. (Tr. 1151). Ms. Skidmore continued to assert that she would never interfere with a pilot's decision to take an aircraft out of service. (Tr. 1151).

Ms. Skidmore's testimony regarding the incidents surrounding August 25, 2005, is contradicted by the other witnesses' testimony. She states that she only spoke to Complainant once on that day around 6:00 p.m. (Tr. 1172). Ms. Skidmore testified that she never spoke to Complainant until that evening when she was driving to the retreat. (Tr. 1172). She states that he informed her that the aircraft was back in service. (Tr. 1172-3). The problem with this statement is that Ms. Skidmore asserts she did not arrive at the retreat until that evening. (Tr. 1172-3). By 6:00 p.m. the aircraft would have been back in service for quite a while. (Tr. 1173). Mr. Lynn testified that throughout the day Ms. Skidmore was running around at the retreat wanting to know why the aircraft was out of service. (Tr. 1173). Ms. Skidmore's reaction at the retreat played a major role in Mr. Lynn's decision to terminate Complainant. Mr. Lynn was displeased with the situation because the customer was upset and wanted answers. Dawn Chambers testified in her deposition that Ms. Skidmore was at the retreat during this time. Ms. Skidmore's assertions that she was driving around 6:00 p.m. are also contradictory to her own memorandum about the incident, which states Complainant called her around 11:15 a.m. and told her they were back in service. (CX 4). This memorandum is also contradicted by Mr. Lynn's testimony, who stated he first spoke with Complainant around noon. However, per Ms. Skidmore's testimony, this could not have occurred.

Ms. Skidmore asserts that she neither retaliated against Complainant for raising safety concerns nor pressured him to fly unsafe aircraft. (Tr. 1120). She states that she did not know that Complainant called the FAA until after he filed his OSHA complaint. (Tr. 1121). Ms. Skidmore testified that she was never Complainant's supervisor and was neither consulted regarding CJ's decision to terminate Complainant nor did she pressure CJ to fire Complainant. (Tr. 1120). Ms. Skidmore asserted that CJ has never consulted her concerning termination matters. (Tr. 1125). She urged that the contract provides for mutual agreement merely because of the situation with CareFlight's prior air carrier. (Tr. 1125). However, she agreed that under the contract she can request the removal of a CJ employee from the CareFlight program. (Tr. 1159).

MVH has around seven and one-half million dollars invested in each of the three helicopters it operates. (Tr. 1112). Ms. Skidmore testified that when an aircraft is out of service there is a potential for lives to be lost. (Tr. 1112). Therefore, she stated that, not only was it an issue for the program when Complainant failed to tell the mechanics what was wrong with the aircraft, but that it was a problem for the community. (Tr. 1113). Ms. Skidmore stated that when an emergency situation occurs and they are unable to send an aircraft the community wants answers. (Tr. 1113). When an aircraft is out of service, the program needs to know why and for how long. Ms. Skidmore needs to know when the aircraft will be available to the community;

she has to figure out the staffing issues it affects; she has to notify the emergency room department; and, she needs to know whether she needs to request a back-up helicopter from CJ. (Tr. 1114-5). Ms. Skidmore urged that the helicopters are placed out of service all the time, but that the program needs to know the reasoning. (Tr. 1116).

I find Ms. Skidmore's testimony completely lacking credibility, and therefore, I give it little weight. Not only is her testimony contradicted by that of Mr. Lynn but it is also contradicted by that of Mr. Gottschalk, whom I find credible. Many of Ms. Skidmore's assertions are proven incorrect by the testimony of Messrs. Lynn and Gottschalk and the nurses. Furthermore, Ms. Skidmore acted completely unprofessionally during the incidents involving Complainant. Her involvement in the pilots' meeting and the way she presented the allegations to the pilots was unconscionable. Her presentation of Complainant's concerns in an accusatory manner poisoned the atmosphere of the meeting, her attendance at which was proven to be totally inappropriate. Ms. Skidmore's bias towards Complainant is further illustrated by her testimony, her demeanor and the other evidence in the record.

**Ron Turnball** testified as an aviation expert on behalf of MVH. (Tr. 1200). Mr. Turnball has worked in the aviation industry for forty years. (Tr. 1200). He started out as a helicopter mechanic and pilot. (Tr. 1200). He worked for IBM for thirty-two years and the last five of those he was the pilot for the chairman of IBM. (Tr. 1213). He also received an FAA inspector's license which allowed him to inspect the maintenance work of others and sign off on the inspections. (Tr. 1213). Mr. Turnball is a certified pilot's mechanic. (Tr. 1202). He has an associate's degree in maintenance engineering, but no advanced degrees. (Tr. 1212). He now performs consulting work. (Tr. 1203). To formulate his opinions, Mr. Turnball reviewed the deposition testimony and the exhibits. (Tr. 1204).

Mr. Turnball considers himself to "have special expertise with respect to determining whether air carriers have complied with maintenance issues." (Tr. 1209). He opined that MVH is not an air carrier. (Tr. 1210). Mr. Turnball based his opinion upon the fact that MVH does not hold an air carrier certificate. (Tr. 1210). He urged that this is why MVH must contract with CJ, so that they can legally provide air transportation. (Tr. 1216). Mr. Turnball agreed that he has no knowledge of the interpretation of air carrier under the whistleblower protection statutes under the FAA. (Tr. 1216). He also opined that it was not inappropriate for Ms. Skidmore to attend the pilots' meeting and that as the customer she has an interest in the discussions at the meeting. (Tr. 1210). Mr. Turnball stated that the whole group should be involved in safety discussions, both the customer and the flight group. (Tr. 1211). Based on his review of the evidence, Mr. Turnball opined that MVH complied with all industry standards during the time involved in this claim. (Tr. 1211). He stated that, ultimately it is the pilot's responsibility to ensure a notation is made in the logbook, but agreed that "many operators discuss it with their maintenance people prior to doing that, but normally it is the PIC that makes the entry." (Tr. 1219). The pilot should supervise all entries to ensure they are correctly entered. (Tr. 1220).

I find Mr. Turnball's testimony credible; however, I grant great weight to the expert testimony of Mr. Wilson due to his superior qualifications. Nevertheless, neither expert's opinion is helpful on the issue of whether MVH is an employer under the act, because both experts agreed that they had no knowledge of the interpretation of "air carrier" as it is applied under the whistleblower statutes.

### **E. Deposition Testimony**

**Dave Gottschalk**, Complainant's supervisor and the site manager at CareFlight testified by deposition. As the site manger, Mr. Gottschalk works as a liaison between CJ and MVH. He supervises the mechanics and pilots on site. Mr. Gottschalk was hired by Mr. Lynn but he was also interviewed by Ms. Skidmore. He assumed that she took part in the hiring decision. Mr. Gottschalk stated that he and Ms. Skidmore interview all pilots before they are hired by the program. Ms. Skidmore previously provided input on the pilots' starting salary; however, now there is a set pay scale.

Mr. Gottschalk stated that the pilots make the safety decisions as to whether an aircraft is flown. They make the so-called "fly/no-fly decisions." The pilots determine the airworthiness of the aircraft based upon the weather and mechanical minimum standards for the company. When an aircraft has a discrepancy, either the pilot or the mechanic makes an entry in the log book. The entries are usually made when the discrepancy is found. Mr. Gottschalk testified that Ms. Skidmore has informed pilots not to relay mechanical problems over the radio. However, he was not sure what her reasoning entailed.

Complainant met with Mr. Gottschalk and Ms. Skidmore prior to returning to work from his back injury. Ms. Skidmore discussed that it was hospital policy that an employee's job could only be held for six months. She informed Complainant that he would not be treated any differently. However, that would have no bearing on his employment with CJ. As far as Mr. Gottschalk was concerned, Ms. Skidmore had the ability to take away Complainant's position. The pilots thought it was unfair that MVH refused to hold Complainant's position indefinitely.

Dale Williams was the pilot who informed Mr. Gottschalk about the "trash bag incident" and the confrontation he had with Complainant. Mr. Williams stated that Complainant yelled at him, threatened and accused him of being an unsafe pilot. (p. 39). Mr. Gottschalk then spoke with Complainant and told him to ensure he never makes such accusations publicly and that if he has a problem with another pilot he should discuss it privately. Mr. Gottschalk agreed that Mr. Williams' actions were not proper, but that Complainant should not have refused to fly the aircraft since a mechanic examined it prior to Complainant taking over the aircraft. However, Mr. Gottschalk was unsure what type of inspection occurred and stated that the tail rotor was not completely disassembled. Mr. Gottschalk also discussed the "spring incident." He agreed that Complainant was correct in refusing to fly the aircraft. The whole group determined that it was correct for Complainant to take the aircraft out of service.

Then Ms. Skidmore informed Mr. Gottschalk that multiple nurses had made complaints regarding pilots not performing proper pre-flight inspections. She assumed that the nurses got their information from some other source because a nurse does not usually know what a proper preflight entails. Ms. Skidmore and Mr. Gottschalk believed that Complainant was the source of the information. However, Complainant denied the allegations and Mr. Gottschalk never discussed the situation with the nurses. Mr. Gottschalk stated that parts of Complainant's preflights were different from the other pilots. The pilots have a manual to guide them through their preflights but there is no checklists they have to physically fill out. Mr. Gottschalk testified that some pilots also came to him with complaints about these accusations. As a result,

Mr. Gottschalk contacted Mr. Lynn, who told him to have a pilots' meeting. Although Mr. Gottschalk did not attend the meeting, numerous pilots spoke with him about the events. The pilots stated that Complainant accused them of not performing their preflights properly. Messrs. Williams, Blaho, Ponder and Herbert were some of the pilots who made complaints. They thought they were under attack. Mr. Gottschalk stated that Complainant needed to deal with his concerns more constructively. Mr. Gottschalk urged that Complainant's suspension during this time was merely for investigatory purposes and was not punitive, but Complainant later received a written warning. Ms. Skidmore participated in the decision concerning what should go into the written warning.

Mr. Gottschalk stated that he received numerous complaints from mechanics about Complainant's lack of communication. He stated that often Complainant would also simply say he did not have a "warm and fuzzy" feeling about the aircraft. However, Mr. Gottschalk could only remember one instance when Complainant refused to tell a mechanic why he grounded an aircraft and this is the incident at issue in this claim. One of the mechanics informed Mr. Gottschalk that Complainant complained about the windscreen. Mr. Gottschalk stated that he had also experienced the vibration but never wrote the incident down in the logbook because he did not feel the vibration was excessive.

Mr. Gottschalk was on vacation during the events surrounding the complaint in August 2005, but he was involved via the telephone. Mr. Gottschalk first heard that Complainant had grounded the aircraft from either the mechanics or Ms. Skidmore. They told him that Complainant refused to say what was wrong with the aircraft. Mr. Gottschalk never spoke to Complainant during the course of these events. He stated that "once the mechanic can figure out what the problem is, it's up to them to deal with it appropriately." Mr. Gottschalk did not direct Complainant's suspension. Mr. Lynn called Mr. Gottschalk and told him about the corrective action. Mr. Gottschalk called Mr. Williams and told him to take Complainant off of the schedule. Then Mr. Lynn discussed with Mr. Gottschalk the decision to terminate Complainant. Mr. Gottschalk stated that Complainant was terminated because his actions were contrary to the previous warning letter. I find Mr. Gottschalk's testimony credible. I place great weight upon his testimony.

A pilot for the CareFlight program, **Thomas Blaho**, also testified by deposition. However, Mr. Blaho was very combative and at first, even refused to take an oath or affirmation regarding his testimony. Then after taking a recess during the middle of his testimony, Mr. Blaho spoke with his attorney and agreed to an affirmation.

Mr. Blaho is currently a pilot for CJ systems. Mr. Blaho stated that when a pilot experiences a problem with an aircraft they call a mechanic to inspect the situation. He testified that only the mechanic can enter the corrective action taken in the logbook, but either the mechanic or the pilot can make the entry regarding the discrepancy. Mr. Blaho also stated that there are times when a discrepancy may never be entered into the logbook. However, he later disagreed that he made this statement and stated that he has only seen it happen once before. Mr. Blaho refused to answer whether a pilot has discretion to make an entry and what would happen if a pilot refused to make an entry; however, he agreed that the situation has happened.

Mr. Blaho stated that he used to work with Complainant at CJ. Mr. Blaho was present during the pilots' meeting that took place in January 2005. He could not remember the specifics

about the meeting or how it started. He stated that Complainant expressed some concerns about how preflights were being conducted. Mr. Blaho stated that Complainant “objected with certain ways that some people did things, [Mr. Blaho] included.” Mr. Blaho stated that the conversation became heated and it was mostly one-sided. He thought Complainant was the only one getting upset. Mr. Blaho stated Complainant’s conduct was unusual or in other words inappropriate, but agreed that there was probably some validity to Complainant’s complaints. After the meeting, Mr. Blaho sent Ms. Skidmore an email opining that Complainant and Mr. Williams should not work together. Mr. Blaho believed he saw hatred in Complainant’s eyes towards Mr. Williams at the meeting. He attributed the hatred to a personality clash. Mr. Blaho was concerned that either man would take drastic measures.

Complainant discussed the situation with Mr. Blaho after the pilots’ meeting. Mr. Blaho stated that he was friends with both Mr. Williams and Complainant and that he was just shocked as to the course of events. He thought that Complainant chose an improper forum to make the accusations but he did not say how the accusations should have been addressed. Mr. Blaho urged that Complainant is a professional and that he values Complainant’s opinion on certain issues.

Mr. Blaho testified that a pilot determines whether an aircraft is airworthy but that the maintenance staff determines whether it should be taken out of service. He stated that the pilot merely refuses to take a flight. Mr. Blaho urged that “in the aviation world, airworthiness is determined by maintenance, safety of flight is determined by the pilot. Now, the safety of flight is subjective. Your tolerance level probably is different from mine--.” He would not answer whether he believed Complainant was properly discharged.

The director of human resources at CJ, **Dawn Chambers**, testified by deposition. Ms. Chambers confirmed that CJ bills MVH for the pilots’ salaries. However, she was not very familiar with the operational service agreement between CJ and MVH. Ms. Chambers was involved in the decision to place Complainant on probation after the pilots’ meeting. She met with Complainant and Mr. Lynn in Pittsburg. Ms. Chambers thought they needed to speak with Complainant face-to-face and possibly have him examined by a medical professional to ensure he was safe to fly. Complainant agreed to see Dr. Lambrou. Ms. Chambers was concerned with Complainant’s accusations toward the other pilots and how he presented them. She stated that he should have used the chain of command instead of a public forum to discuss his complaints. Ms. Chambers was responsible for writing Complainant’s written warning. She spoke with Mr. Lynn and Ms. Skidmore regarding the contents of the warning. Ms. Chambers stated that, although the contract states that MVH can order a pilot to be terminated, the contract is unsigned and now MVH can merely make the request.

Ms. Chambers was also involved in the August 2005 termination decision. Mr. Lynn, Ms. Skidmore and she were at the company retreat when the events unfolded. She stated that Complainant took an aircraft out of service and refused to explain his reasoning. Ms. Skidmore was upset because she did not know why the aircraft was out of service. The group was disturbed because Complainant had failed to follow the proper protocols. Ms. Chambers overheard Mr. Lynn telling Complainant to write the problems down in the logbook. Ultimately the aircraft was placed back in service and the group had to determine what to do with Complainant. “[U]ltimately, he was discharged for not following procedure, for taking an aircraft out of service for a period of time without making an entry in the logbook, without

giving our maintenance people the opportunity to correct the problem.” (p. 35). This was a joint decision between Messrs. Lynn, Gottschalk and Heffernan. Ms. Chambers wrote the memorandum of termination for Mr. Lynn. Ms. Chambers was unaware of any other pilot who had been discharged for failure to follow procedure. I find Ms. Chamber’s testimony credible.

**Jack Weese**, CJ’s director of quality assurance, testified by deposition. He has also worked as a mechanic and director of maintenance for CJ. Mr. Weese’s responsibilities include ensuring that CJ “operates within the approved specifications of our operations manual and FAA requirements.” Also, when an aircraft experiences problems, Mr. Weese follows up with the manufacturer and the FAA to ensure that the problems get resolved.

Mr. Weese testified that he only met Complainant once when Complainant experienced radio problems. Mr. Weese was in Dayton at the time performing an audit. Mr. Weese met with Complainant and they flew the aircraft. Mr. Weese determined that there were problems with the radios and fixed the problem. Mr. Weese stated that Complainant never discussed a problem regarding flickering cockpit lights with him. Mr. Weese was unaware that the radios experienced subsequent problems.

Mr. Weese was the mechanic responsible for the “spring incident.” The incident was later investigated by the FAA. The letter Mr. Weese received from the FAA stated “that a pre-modified spring and a post service bulletin spring were mated together and installed on the aircraft.” Mr. Weese agreed with this statement. He performed the inappropriate repair because “they were awaiting the spring from Eurocopters and did not have a delivery date scheduled for it, and this was the last item left on the aircraft to return it to service.” After the repair, Mr. Weese called the duty pilot and asked him if he had a problem with the repair and he said “no.” Mr. Weese could not remember the pilot’s name. Mr. Weese and the pilot flew the aircraft and then released it for flight. Mr. Weese informed the pilot to tell the next pilot on duty about the situation and to tell the pilot that if he had a problem with the repair to call Mr. Weese. He testified that this repair was only intended to be temporary and that the manual does not provide for temporary repairs. Complainant was the next pilot on duty. He called the maintenance facility and took the aircraft out of service due to the repair. However, during this time Mr. Weese found a correct spring and sent two mechanics to make the correct repair. Mr. Weese testified that he never told Ms. Skidmore that Complainant was costing the program money and needed to be terminated. He agreed that Complainant’s complaints about the spring were well-founded.

Although I am perplexed as to how a quality assurance director who performs such an unreasonable and absurd repair is still employed by CJ and MVH, his testimony is supported by the other evidence in the record. Therefore, I find him credible.

Finally, **Dale Williams**, a pilot at CareFlight, testified by deposition. He has worked for CJ for six years. Mr. Williams also worked as a safety officer for the CareFlight program. He was responsible for chairing the safety committee, addressing safety concerns and coordinating resolutions to safety problems with Ms. Skidmore and the other committee members. He stepped down from this position in July 2006.

For Mr. Williams a normal day at CareFlight includes a review of the logbooks, examining the weather details and then performing a preflight inspection of the aircraft. There is

also a briefing between the pilot coming on duty and the one coming off duty. At this time a mechanic comes in and performs a daily inspection of the aircraft. Then when a call for a flight comes in, the dispatcher alerts the pilot who checks the weather again and determines whether the flight is taken. At that point a flight should only be declined for weather conditions; because if there was a problem with the aircraft it would have already been taken out of service. The pilot determines whether to accept a flight or not. When a problem is found on the preflight inspection a write-up is made in the logbook. Then a mechanic is called and the pilot calls dispatch to alert them that they are out of service. Dispatch then calls Ms. Skidmore. Mr. Williams testified that either the pilot or a mechanic can take an aircraft out of service. There is a minimum equipment list that gives some guidance on whether an aircraft is operational or not.

Mr. Williams was the pilot who was flying during the “trash bag incident.” When he landed at the hospital there was a small garbage bag floating around that was sucked into the tail rotor. Mr. Williams then shut down the aircraft and visually inspected the tail rotor. He called dispatch and placed the aircraft out of service. He then called maintenance and spoke with mechanic, Dan Martin. They discussed whether the aircraft was flyable and Mr. Martin walked Mr. Williams through an inspection over the telephone. They determined that the aircraft was flyable and it could be inspected in more detail later. Mr. Williams stated that he was a maintenance test pilot in the military and has an extensive maintenance background. He testified that in a situation like the “trash bag incident” the aircraft would not experience a sudden stoppage. He stated that the trash bag was very thin and small and would not disrupt the normal operation of the aircraft. When Mr. Williams returned to base, Mr. Martin took the cowlings off the aircraft and inspected it.

Upon his return, Mr. Williams states that Complainant immediately started yelling at him for flying the aircraft. Four flight nurses were around during this time. He stated that they could have heard the conversation. The situation turned into a shouting match between the two men. Mr. Williams agreed that he was late for a hockey game, but urged it was not important because he had someone to replace him. Mr. Williams then left and called Mr. Gottschalk. He told Mr. Gottschalk that Complainant was in no condition to fly. Mr. Williams thought Complainant “was clearly unstable whenever anything regarding maintenance issues came up, past, present, future, anything like that.” If a mechanic did not agree with Complainant that there was in fact a maintenance issue, “he would go off.”

Mr. Williams was also present at the pilots’ meeting where they discussed the preflight allegations. He stated that a meeting was held because some of the nurses came to him since he was the safety officer and made accusations that pilots were not performing their preflights. He believed Complainant made the accusations to the nurses. Mr. Williams agreed that Complainant performs his preflight differently and with more detail, but stated that those actions are not required by the flight manual. Ms. Skidmore opened the meeting because Mr. Gottschalk had to leave. Thereafter, Complainant “went psycho.” He started yelling at a number of the pilots. Mr. Williams believed that Complainant was unstable. He could not believe that Complainant “went off” on Bob Herbert and Rick Ponder because he viewed them as very safe and conscientious pilots. Mr. Williams viewed Complainant’s actions as unprofessional. Complainant stated that the other pilots were unsafe.

Mr. Williams also testified in relation to some of the aircraft safety problems Complainant described. Mr. Williams was aware of the windscreen vibration; however, he opined that it was not a safety hazard and that every aircraft experiences vibrations. Mr. Williams continued to fly the aircraft and stated that he would not have done so if the aircraft were unsafe. Like Complainant, Mr. Williams experienced problems with the oxygen system on the aircraft not working. He was also aware that Complainant made complaints about the Dauphin helicopter; however, he believed Complainant's allegations were unfounded. Mr. Williams agreed that the aircraft later crashed.

During Complainant's termination, Mr. Williams was the acting lead pilot while Mr. Gottschalk was out of town. After the incidents surrounding August 25, 2005, Mr. Gottschalk called Mr. Williams and told him to take Complainant off the schedule. Mr. Williams called Complainant and let him know. Mr. Williams assumed that Complainant was terminated because of his bad reputation for "exploding and going off on people." He stated that Complainant's personality completely changed after his back injury. Although Complainant enjoyed flying, he wanted to fly in perfect conditions, which is not how an EMS operation works. Mr. Williams believed that Complainant had developed a fear of flying.

Mr. Williams shows no remorse for his decision to fly during the "trash bag incident" and believes he did nothing wrong. The expert testimony reveals that Mr. Williams' irresponsible actions placed lives at stake. Complainant brought this to CJ's attention. The benefits of Mr. Williams' testimony are outweighed by the bias he demonstrates toward Complainant for being called to answer for his improper actions.

### **Applicable Law**

Complainant must prove by a preponderance of the evidence that he engaged in protected activity under the Act, that one or both of the Respondents took adverse action against him, and that Complainant's protected activity was a contributing factor in the adverse action. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Id.* at 6, *citing* BLACK'S LAW DICTIONARY 1201 (7th ed. 1999). However, even if Complainant establishes that Respondents violated the Act, if Respondents then present "clear and convincing evidence" that despite Complainant's protected activity he still would have been terminated, Complainant is not entitled to relief. *Id.*

Since this case was fully tried on the merits, I need not determine whether Complainant presented a *prima facie* case. *See, Peck v. Safe Air International, Inc.*, ARB No. 02-028 (stating that the *prima facie* analysis is only conducted at the investigation level). "It is not enough at the hearing phase for a complainant merely to establish a rebuttable presumption that the employer discriminated. Rather, a complainant must prove by a preponderance of the evidence protected activity, adverse action and causation." *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).



## Covered Employer

Forty-nine U.S.C. § 519 provides that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)” was engaged in protected activity. MVH argues that its actions do not fall under the Act since it is not an “air carrier.” It argues that the hospital itself does not have an air carrier certificate and does not operate helicopters. Therefore, MVH urges that it cannot be held liable under the Act. MVH’s arguments are unfounded. The Act not only imposes liability upon air carrier’s themselves but also those who contract or subcontract with an air carrier. Also, despite MVH’s arguments, the Act does not limit the contracting requirements to those involving safety. MVH is correct in its statements that there is caselaw in existence stating that the respondent must be an air carrier; however, those claims did not involve a contractor or subcontractor situation. Therefore, the issue is whether MVH and CJ have a contractual relationship and, if so, whether MVH had control over Complainant’s employment.

The evidence of record illustrates that MVH and CJ have a contractual relationship. They entered into a contract where CJ would operate the flight of helicopters owned by MVH and MVH would operate the day-to-day operations of the CareFlight program. (CX 25). Ms. Skidmore, a MVH employee, is the head of the CareFlight program. MVH also argues that Complainant is not one of its employees and that it had no control over his employment or termination. In determining whether an employee/employer relationship exists a traditional master-servant analysis must be conducted. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, p. 7. In *Fullington v. AVSC Services, LLC.*, ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005), the Board held that to state a cause of action under the Act,

There must be an employer-employee relationship between an air carrier, contractor or subcontractor employer who violates the Act and the employee it subjects to discharge or discrimination, but that the violator need not be the employee’s immediate employer under the common law.... The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant’s employment.... **Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant,** is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes.... If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail.<sup>27</sup>

*Id.* (emphasis added).

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<sup>27</sup> In *Fullington*, the complainant was unsuccessful in proving an employee-employer relationship because, although the complainant had opportunities to present facts demonstrating that the respondent actually played a role in the adverse action, he failed to do so. Therefore, the facts in *Fullington* are distinguishable from the facts in this claim.

The evidence shows that MVH fulfills all the requirements of *Fulington*. Ms. Skidmore was in control of Complainant's employment and she exercised it every chance she got. The contract between MVH and CJ provides that MVH must approve the pilots chosen and can have them removed. (CX 25). MVH is also responsible for paying the salary of pilots in the program. (CX 25). MVH must reimburse CJ for all costs associated with the benefits provided to pilots. (CX 25). Before a pilot's benefits or salary can be changed, MVH must agree to the amendment. MVH provides the base of operation for the CareFlight program and owns the helicopters flown by the pilots. (CX 25). CJ is responsible for maintaining the liability, and workers' compensation insurance policies, MVH must reimburse CJ for the costs. (CX 25). Furthermore, although the agreement provides that MVH is only an independent contractor and has no control over the functions of CJ's employees, MVH's actions prove otherwise.

The testimonial evidence also establishes that Ms. Skidmore took part in the decision to hire CJ employees, including Complainant. She also participated in the disciplinary decisions, which is illustrated by the warning letter issued to Complainant on February 17, 2005. (CX 27). Ms. Skidmore informed CJ that, in order for Complainant to remain in the program, he had to abide by her demands on his employment. Mr. Gottschalk and Complainant testified thoroughly to these facts and I found their testimony credible. Also, while Complainant was on leave for his back injury, MVH paid his workers compensation benefits and even considered terminating Complainant if he had to be on leave for more than six months. Ms. Skidmore tried to argue that she had no control over Complainant's employment and had no say in whether he remained with the program or not; however, I find her testimony totally lacking in credibility. Her statements are completely contradicted by the statements of Mr. Gottschalk and Complainant.

Therefore, the evidence shows that MVH had the power and exercised the power to hire, transfer, promote, reprimand and to influence the terminations of CJ employees. Accordingly, I find that MVH is a covered employer under the Act.

### **Whether Complainant is Entitled to Whistleblower Protections**

Respondents argue that Complainant is exempt from the protections of the Act, because he violated FAA requirements by failing to log all the discrepancies he found on August 25, 2007.<sup>28</sup> Respondents rely upon 49 U.S.C.A. § 4121(d), providing that an employee is exempt from the whistleblower protections of the Act if he/she deliberately violates a FAA requirement in relation to air carrier safety. The FAA requires that pilots ensure that all discrepancies are entered in the logbook. Respondents argue that since Complainant only entered the autopilot issue in the logbook on August 25, 2005, that he made an incomplete entry and thereby violated the Act.

After reviewing the record and the applicable regulations I find that Complainant violated no FAA regulations. The evidence overwhelmingly proves that the practice at CareFlight was for a pilot to discuss all discrepancies with the mechanics before documenting the issues in the logbook. The purpose was to ensure that only actual discrepancies were documented and so that the mechanics would know the exact problem. Therefore, on August 25, 2005, Complainant discussed the discrepancies he found with a mechanic, who informed him that the autopilot was

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<sup>28</sup> Respondents brought up this issue prior to hearing and cross-examined witnesses extensively on the subject; however, both failed to address the issue in their post-hearing briefs.

the only discrepancy. Complainant was informed that all of the other problems he found were not discrepancies and did not need to be logged. Also, the testimony revealed that when a pilot takes an aircraft out of service he has every right to change his mind if he determines that the issues he discovered really weren't discrepancies.

Accordingly, I find that Complainant made an accurate entry in the logbook on August 25, 2005, and is thereby entitled to whistleblower protections.

### **Protected Activity**

Section 42121 of the Act provides that:

(a) 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;

Furthermore, an employee's complaints must "implicate safety definitively and specifically" to be protected activity. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F. 3d 926 (11th Cir. 1995). Also, even if an employee's complaints are ultimately found unsubstantiated, he/she is still entitled to protection if the employee had a reasonable belief that his/her complaint was valid. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

First, Complainant asserts that he was involved in protected activity on August 25, 2005 when he grounded an aircraft for safety concerns. He took the aircraft out of service because he experienced a malfunction in the autopilot, a vibration in the windscreen, a hydraulic leak and other problems. At the time Complainant thought that these issues were all discrepancies that needed to be addressed by a mechanic. Therefore, he called dispatch and took the aircraft out of service. Complainant believed that it was unsafe to fly the aircraft under these conditions. Although Mr. Lynn refused to relate these issues to safety, he agreed that Complainant believed that they were so related at the time Complainant took the aircraft out of service. (Tr. 896). Complainant's belief was reasonable at the time he took the aircraft out of service. Mr. Wilson

provided expert testimony on the severity of the conditions. He stated that, depending upon the severity of the hydraulic leak, it may or may not be serious, but found the autopilot and the windscreen serious issues that needed to be addressed.

Three hours after Complainant took the aircraft out of service, mechanics finally came to inspect the aircraft. They determined that only the autopilot was an actual discrepancy; however, they received permission from the FAA to defer the repair. Although the mechanics found that the conditions were not as severe as Complainant believed, at the time he grounded the aircraft he had a reasonable belief that the issues implicated safety; and therefore, I find he was engaged in protected activity when he grounded the aircraft.

Complainant also called the FAA on August 25, 2005 to report the windscreen vibration. He was uncomfortable flying with the vibration and wanted the FAA to investigate whether the windscreen was safe. The aircraft underwent an inspection in May 2005. When Complainant called the FAA he implicated safety definitely and specifically. Furthermore, his complainant was reasonable. As stated above, Mr. Wilson opined that the windscreen vibration was a serious issue that needed to be addressed. The fact that men had to lie on the windscreen to install it was completely improper. Respondents argue that this activity is not protected because Complainant failed to document the discrepancy in the logbook. At the time Complainant made the call he reasonably believed the vibration was a discrepancy, but after the mechanics finally arrived they explained that the vibration was not a discrepancy and could not be repaired. Therefore, he did not make any documentation. Accordingly, I find Complainant's complaints to the FAA protected activity.

### **Adverse Action and Knowledge of Protected Activity**

In order for Complainant to succeed he must prove that Respondents were aware of his protected activity at the time of his adverse employment action. *Gary v. Chautauqua Airlines*, ARB No. 04-112, 2003-AIR-38 (ARB Jan. 31, 2006). Complainant was terminated on August 31, 2005. Respondents do not dispute the fact that Complainant was terminated; however, they argue that Complainant's activity does not fall within the Act because they were unaware of his protected activity. Both Respondents argue that they had no knowledge as to why the aircraft was taken out of service. Respondents testify that Complainant was secretive during the entire ordeal and refused to divulge why he took the aircraft out of service.

I find that Respondents knew about the protected activity at the time of the termination.<sup>29</sup> Mr. Lynn specifically testified that Complainant told him the problems with the aircraft over the telephone. (Tr. 902). Mr. Lynn stated that Complainant told him about the problems with the windscreen, autopilot and one other issue he could not remember. (Tr. 813). Mr. Lynn tries to argue that he does not really know if these were problems or not because of Complainant's alleged unusual behavior. These issues were the exact problems Complainant brought to the attention of the mechanics and he even called other pilots to determine if they had experienced the windscreen vibration. I find that the preponderance of the evidence supports a finding that Mr. Lynn, Complainant's superior, knew about the protected activity.

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<sup>29</sup> There is no evidence in the record proving that Respondents knew about Complainant's call to the FAA. The evidence only supports a finding that Respondents knew about Complainant's safety reasons for taking the aircraft out of service.

Ms. Skidmore, the representative for MVH, argues that she never had knowledge of Complainant's so-called protected activity. She states that, despite her requests, Complainant refused to answer her questions. Ms. Skidmore asserts that she only spoke with Complainant once, on her way to the retreat, and he told her that the aircraft was back in service. She testified that she asked Complainant why the aircraft was out of service and he merely stated "we have a plan." In contrast, Complainant testified that after Mr. Lynn told him that Ms. Skidmore was upset he immediately tried to call her. Ms. Skidmore then called Complainant down for taking the aircraft out of service in good weather. He told her the problems with the aircraft and that the mechanics were on their way to inspect it. As stated above, I find Ms. Skidmore's testimony flies in the face of credulity. There are numerous contradictions throughout her testimony on many different issues of fact. However, I give great weight to Complainant's testimony.

Mr. Lynn testified that he could not remember whether he informed Ms. Skidmore of the problems Complainant enumerated. Mr. Lynn never explained why he would not have told Ms. Skidmore the pilot's reason for the aircraft being out of service. He simply states he cannot remember. While this statement is convenient for Ms. Skidmore, Mr. Lynn's lack of communication is completely illogical given Ms. Skidmore's proximity and agitation over not knowing the reasons for the aircraft's status, how could he avoid telling her? If a person is standing next to you, completely upset and wanting to know why her aircraft is out of service and you know the reasoning, wouldn't you just tell her.

I find, based on the preponderance of the evidence, that the Respondents knew about Complainant's protected activity at the time of his termination.

### **Nexus Between the Protected Activity and Adverse Action**

#### **A. MVH's Role in Complainant's Termination**

Respondent, MVH, argues that it took no part in Complainant's termination. Ms. Skidmore asserts that CJ never consulted her when making their determination to terminate Complainant. Mr. Lynn also states that it was his decision to terminate Complainant. However, MVH ignores the fact that the main reason Mr. Lynn decided to terminate Complainant was he believed Complainant could no longer get along with Ms. Skidmore. She is the customer and Mr. Lynn had keep her happy. During the August 25, 2005 incident, Ms. Skidmore told Mr. Lynn that this was the "last straw." (Tr. 915). She indirectly informed him that she wanted Complainant out of the CareFlight program. (Tr. 915). Therefore, although Ms. Skidmore did not make the ultimate termination decision, her opinion was a direct factor in Mr. Lynn's decision to terminate Complainant. Ms. Skidmore directly influenced CJ to terminate Complainant. Whether Respondent, MVH, acted with discriminatory intent is discussed below.

#### **B. Proximity**

In *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28 (ARB Nov. 30, 2006), the ARB held that "[r]etaliatory motive may be inferred when an adverse action closely follows protected activity. An inference of discrimination, i.e., the protected activity contributed to the adverse action, is less likely to arise as the time between the adverse action and the protected activity increases." See also *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Keys v. Lutheran Family and Children's Services of Mo.*, 668 F.2d 356, 358 (8th Cir. 1981) (less than

two months). Complainant took the aircraft out of service on August 25, 2005. He was taken off the schedule and suspended the next day. Thereafter, he was terminated on August 31, 2005. Based on the proximity of the events, it appears Complainant is entitled to an inference of discrimination.

However, *Clark* also provides that “if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.” Respondents argue the holding of *Clark*, and state that Complainant’s secretive actions prevent him from receiving the inference.<sup>30</sup> Respondents argue that Complainant was terminated because he failed to follow CJ procedure by failing to inform mechanics why the aircraft was out of service and by failing to make a write-up in the log book within a reasonable time. They assert that as a result, the aircraft was unnecessarily taken out of service for three hours. The termination letter states that Complainant refused “to follow performance expectations outlined to [him] on February 15.” (CX 4). Ms. Skidmore concurred with these statements in her memorandum. (CX 4). As discussed below, Respondents’ assertions are merely a pretext for Complainant’s termination.

### C. Respondents’ State of Mind

As in most whistleblower claims, there is no direct evidence of discrimination. However, there is an abundance of circumstantial evidence in relation to Respondents’ state of mind at the time of the termination. Complainant was thought of at CJ and MVH as overly cautious. The facts illustrate numerous instances when Complainant notified CJ and MVH about safety issues, only to be ignored or disciplined. These factual situations are directly relevant to Respondents’ state of mind.

The first instance occurred when Complainant dispatched over the radio that he was taking an aircraft out of service. He was immediately ridiculed by Ms. Skidmore for transmitting maintenance issues over the radio. Ms. Skidmore argues that she never made these statements but the testimony of Complainant and Mr. Gottschalk proves otherwise. The next instance involves the “trash bag incident.” Mr. Williams acted with reckless disregard for the lives of others when he flew an aircraft after a trash bag was sucked into the tail rotor. As a result, Complainant took the aircraft out of service. Complainant was counseled by Mr. Gottschalk and Ms. Skidmore, as a result of the incident. Respondents argue that Complainant was only counseled because of his unprofessional behavior when he called Mr. Williams a “jackass” and for the way he spoke when he called into dispatch. They urge that Complainant had these conversations in front of the crew. However, Mr. Williams also spoke with the same vulgarity towards Complainant, but was never disciplined. He was not even disciplined for flying an aircraft before its airworthiness, which was called into question, could be appropriately determined.

Subsequently, Complainant reported the “spring incident.” Complainant came to work and took the aircraft out of service for the inappropriately “jury-rigged” repair. As a result, Mr. Weese, who performed the repair immediately, called Mr. Gottschalk and complained that Complainant refused to fly the aircraft, even though the previous pilot had no problem flying the

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<sup>30</sup> Respondents also rely upon *Svensen v. Air Methods, Inc.*, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), which has a similar holding as *Clark*.

aircraft. Mr. Gottschalk immediately called Complainant and upbraided him for taking the aircraft out of service. Complainant told Mr. Gottschalk about the repair, but Mr. Gottschalk would not believe him. Mr. Gottschalk testified that Mr. Weese is an honest man whom he had known for years and he did not believe he would do something like that. However, only after Mr. Weese finally confessed to the inappropriate repair, Mr. Gottschalk said it was ok for Complainant not to fly the aircraft. During this time, Ms. Skidmore was very upset that the aircraft was out of service and told a nurse that Complainant shouldn't be climbing up and opening the cowling anyway. Mr. Weese was not terminated even though he was sanctioned by the FAA.

Then Complainant went to Ms. Skidmore and informed her that nurses had complained to him about the way pilots were performing their preflights. Ms. Skidmore asserts that she was concerned with the safety aspect of these allegations, but she was also very upset with the fact that she believed Complainant had made these accusations to the nurses. She reasoned that he had no business discussing these situations with the crew. The nurses testified that they witnessed the differences in the preflights on their own and that Complainant never spoke ill about other pilots in their presence. Thereafter, Mr. Lynn decided that a pilots' meeting should be held to determine the truth of these allegations. Prior to the pilots' meeting, Complainant met with Mr. Gottschalk and Ms. Skidmore in her office. Complainant urged that he did not make the allegations and tried to bring up other safety issues. His complaints went unacknowledged.

During the pilots' meeting Ms. Skidmore informed the other pilots that Complainant asserted that they were not performing their preflights properly. The pilots felt attacked and grew angry -- any pilot in such a situation would. Certainly a pilot who believes he is being accused of not doing his job properly and putting lives at risk will get upset. Some of the pilots testified that it was predominately Complainant who was enraged, but these pilots were the target of the complaints. Wyatt testified that the discussion was primarily between Dale Williams, Mr. Blaho and Complainant and it was equally heated all around. After the meeting, Messrs. Williams and Blaho made complaints about Complainant's behavior to Ms. Skidmore and Mr. Lynn. As a result, Complainant was placed on leave and forced to see a psychiatrist. Messrs. Williams and Blaho were not punished.

When Complainant met with Mr. Lynn in Pittsburgh he tried to bring up the safety issues he had with the CareFlight program, but Mr. Lynn dismissed his concerns. Mr. Lynn even testified that he felt Complainant was just trying to show he was doing his job better than everyone else. Complainant even told Mr. Lynn that he was uncomfortable with the fact that he continuously found problems that other pilots passed over. Yet again, Complainant's safety allegations went unacknowledged. The psychiatrist cleared Complainant for flight and he was reinstated. However, he was issued a written warning for his actions. The warning included a list of things Ms. Skidmore thought that Complainant should do to continue his employment with CareFlight. Complainant was blamed for all the turmoil that occurred. No other pilot was even questioned about his actions.

Mr. Lynn also testified that he received a surprising telephone call from Complainant one night. Complainant called him to see if it was ok to take an aircraft out of service. Mr. Lynn states that he would never call a pilot and ask why he took an aircraft out of service or question his reasoning. However, Complainant was questioned on multiple occasions. Mr. Lynn thought that Complainant must have felt threatened. Despite the fact that over 9,000 aircraft are taken

out of service each year, the witnesses testified that it is a “big deal” to take an aircraft out of service at CareFlight and Ms. Skidmore gets very angry.

Complainant also had problems with the mechanics not taking his complaints seriously. The spring incident discussed above was the first instance. Then one night when Complainant experienced radio problems, the mechanic acted like there was no such problem and it was the nurse’s fault. Complainant also made safety complaints about “the Whale.” The mechanics testified that they did not believe there was a basis for Complainant’s complaints, yet “the Whale” later crashed.<sup>31</sup> Then on August 25, 2005, the mechanics failed to take Complainant’s complaints seriously. The mechanics testified that Complainant refused to tell them what was wrong with the aircraft. They stated that Complainant was fearful that they would get angry. However, they all agreed that Complainant eventually informed them that there was a problem with the windscreen and autopilot. The mechanics testified that they did not really believe there was a problem with the aircraft. It is not surprising that Complainant hesitated in relaying his complaints - he had a history of the mechanics ignoring him and his supervisors ridiculing him.

All of these issues discussed above relate to Respondents’ state of mind at the time of Complainant’s termination. The Respondents consistently testify that safety is a top priority at CareFlight and that over 9,000 helicopters are taken out of service each year with no backlash. However, their actions outlined above prove otherwise. CJ and Ms. Skidmore consistently ignored Complainant’s safety concerns on numerous occasions. They state that they would never question a pilot’s decision. Yet, Complainant’s decisions were often second-guessed and he was even disciplined while others who committed direct safety violations were not. Complainant took the aircraft out of service more than most pilots and was, therefore, viewed as too cautious. He was costing the program money and that was not acceptable. The Respondents told Complainant that he needed to be more a part of the solution and not the problem. Apparently, this statement meant he should never criticize another concerning safety.

Therefore, I find that, even without the inference of discrimination, Complainant has proven that both Respondents terminated him for his protected activity.

### C. Respondents’ Articulated Reasons and Pretext

Since Complainant has proven discriminatory intent by a preponderance of the evidence, Respondents must show by clear and convincing evidence that it would have terminated Complainant in absence of his protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ. No. 2001-AIR-3 (ARB Jan. 30, 2004). Respondents argue that Complainant was terminated for his behavior during the incidents on August 25, 2005. Ms. Skidmore testified that Complainant was fired for not following proper procedure by failing to make a write-up in the logbook and by refusing to explain why the aircraft was out of service. Mr. Lynn testified that he was concerned because no one knew why the aircraft was taken out of service. He also stated that Complainant should have made a write-up in the logbook. Respondents urge that the aircraft was taken out of service for three hours for no reason at all. They assert that all Complainant had to do was make a write-up and inform the mechanics why

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<sup>31</sup> It is not settled whether Complainant’s complaints about “the Whale” were related to the crash. The evidence in regard to the Whale is only taken into consideration in relation to the mechanics lack of interest in Complainant’s maintenance issues.



the aircraft was out of service. They state that if Complainant had performed these actions he would not have been fired.

Respondents rely upon on *Svensden v. Air Methods, Inc.*, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004). In *Svensden*, the ARB upheld the Administrative Law Judge's finding that the complainant was terminated for his "belligerent actions" and not his protected activity. *Id.* The Court found that it was the way the complainant conveyed his message not his actual message. *Id.* Although this is case similar to Complainant's, the difference is that Respondents have not shown by clear and convincing evidence that the "message" was the real reasoning for the termination. I find that Respondents' reasoning is merely a pretext.

First, Complainant followed the procedures of CareFlight by waiting for a mechanic to arrive before making an entry in the logbook. All of the witnesses testified that this was the procedure at CareFlight in August 2005. Even Mr. Lynn testified that Complainant acted according to this procedure. (Tr. 907). Then, after consulting with the mechanic, Complainant entered the autopilot issue. There is also no evidence that any other pilot has ever been terminated or even disciplined for failing to make an entry in the logbook, so Respondents' allegations on this issue appear to be a makeweight.

Next, the fact that the aircraft was out of service for three hours was not entirely Complainant's fault. The mechanics purposely waited to examine the aircraft because they believed nothing was wrong with it. They thought that Complainant was merely overly cautious and that his beliefs were unfounded. Whether Complainant was overly cautious or not, the mechanics should have taken his complaints seriously. Complainant had valid safety concerns which were ignored on numerous occasions. The evidence demonstrates that this was one of the main problems with the organization.

Respondents then argue that Complainant's lack of communication was the real reason for his termination. However, Complainant informed Mr. Lynn and Ms. Skidmore about the problems. Any hesitation he had when speaking to them was certainly justified by their past treatment of him. There is evidence to support that Complainant failed to tell dispatch the problems with the aircraft, but he was instructed never to do so by Ms. Skidmore. Dispatch was the party which first told the mechanic, Mr. Kinser, that the aircraft was out of service and Dispatch did not know why. Then Mr. Kinser was very angry that the aircraft was out of service because it had just come out of an inspection and because he had just left the base after inspecting the aircraft that morning. Mr. Jones was working at the Moraine base. (Tr. 941). Complainant called Mr. Jones on the morning of the 25th and told him that the aircraft was out of service. (Tr. 941). Mr. Jones thought the call was out of the ordinary since Mr. Kinser was the mechanic at the Warren County base that day. (Tr. 941). However, since it is established that Mr. Kinser had already departed, the call (to Jones) was not unusual. Mr. Jones asked Complainant why the aircraft was out of service and testified that Complainant was very vague about the situation. (Tr. 941). Complainant merely said "you know what is going on." Mr. Jones also asked Complainant why he failed to mention these problems the day when the aircraft was in maintenance. (Tr. 941). However, Mr. Jones did not recall Complainant's response. (Tr. 942). Then on cross-examination, he agreed that Complainant had discussed with him the problems involving the windscreen and hydraulic leak the day before. (Tr. 959). Therefore, it can be inferred that when Complainant stated "you know what is going on" he was referring to the problems he had already discussed with Mr. Jones. Both mechanics testify that

Complainant did eventually specifically tell them that there was a problem with the autopilot and the windscreen. Any hesitation that Complainant may have exercised was due to the anger of the mechanics and their lack of attention to Complainant's concerns.

Finally, Respondents argue that Complainant's language and behavior during this time was also the cause of his termination. Respondent, MVH, played a voice recording taken of Complainant on August 25, 2005. Complainant did use vulgar language; however, testified that:

[The] transmission happened after two conversations with Ms. Skidmore, three conversations with Jim Lynn, dozens of conversations between Josh Jones and Jason and Bob Briggs and Wyatt, and me taking the aircraft out of service at 9:20 in the morning, and at noon, after I have been threatened by Ms. Skidmore and Mr. Jim Lynn of losing my job, and still no mechanics had showed up. The aircraft is still out of service. Nobody has still come down to look at it.

(Tr. 610). Complainant's expressions of anger were certainly justified by the fact that Respondents were again ignoring his safety complaints and merely wanted the aircraft back in service. Although three hours is a long time to be out of service, especially with a limited fleet of aircraft, safety issues must first be addressed and taken seriously.

I find that Respondents have not proven by clear and convincing evidence that they would have terminated Complainant in the absence of his protected activity.

### **CONCLUSION**

The record demonstrates that Complainant has proven by a preponderance of the evidence that his protected activity was a contributing factor to his termination. Furthermore, Respondents have failed to present clear and convincing evidence that they would have terminated Complainant in the absence of his protected activity. In sum, Respondents have failed to establish the existence of legitimate, nondiscriminatory grounds for Complainant's termination. I have analyzed all the evidence and testimony of record, and when I consider all the evidence as a whole, I continue to find that both Respondents acted with discriminatory intent. The proffered reasons are disingenuous and intentionally polemic, and therefore, support a circumstantial finding that discriminatory intent is present. Consequently, relief shall be accorded to Complainant. Since I have found both Respondents equally liable, they are jointly responsible for Complainant's damages.

### **Damages and Relief**

Complainant seeks the following relief: 1) reinstatement; 2) compensatory damages for back pay amounting to \$79,945.44; 3) compensatory damages for emotional distress and loss of reputation in the amount of \$300,000; 4) prejudgment interest; 5) reasonable attorney's fees and costs; 6) abatement; 7) a purge of Complainant's personnel file of the termination; and, 8) a posting of this decision at Respondents' facilities.

A. Back Pay

Back pay is awarded to a complainant when it is necessary to make him/her whole again. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec’y Oct. 30, 1991). The purpose is to put “the employee in the same position he would have been in if not discriminated against.” *Id.* Complainant has the burden to prove the back pay he has lost. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec’y July 19, 1993). However, any uncertainties are resolved against the discriminating party, the Respondents. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002); *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997). Therefore, “unrealistic exactitude is not required” when calculating back pay. *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec’y Oct. 26, 1992), slip op. at 9-10.

Complainant and his wife testified to his lost regular wages and benefits he would have received. Complainant’s salary at Respondents was \$57,378.88. (Tr. 725; CX 33). He was unemployed between August 29, 2005 and November 6, 2006. Therefore, Complainant was out of work for sixty-two weeks and lost a total of \$68,413.28. He was then hired by Air Methods as a pilot, but at a lower salary than at CareFlight. Complainant’s salary is only \$51,639.12 a year; \$220.76 less per pay period. Complainant’s new position includes a two-hour commute and, at times, he is forced to obtain a hotel room. He spends on average \$1,000 a month in travel expenses.<sup>32</sup> Therefore, Complainant requests \$79,945.44 in lost wages and other compensatory damages.<sup>33</sup> The evidence in the record supports this figure.

A respondent has a duty to show that a complainant failed to mitigate damages. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998); *West v. Systems Applications International*, 94-CAA-15 (Sec’y Apr. 19, 1995). The Respondents must show that Complainant failed to use reasonable diligence to get the substantially equivalent positions that were available. *Id.* The benefit of doubt ordinarily goes to the complainant. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001). Respondents failed to provide sufficient evidence to illustrate a lack of mitigation. Respondents argue that Complainant failed to mitigate damages when he was unemployed between August 29, 2005 and November 6, 2006. Respondents assert that Complainant could have received employment at PHI in January 2006, if Complainant had tried harder. Respondents argue that Complainant “subverted his own opportunities for subsequent employment... [and] willfully and needlessly disparaged his previous employer, and PHI was predictably uninterested in such an employee.” (Respondents’ Post Hearing Reply Brief p. 11). Respondents’ assertions are unfounded. Did Respondents actually expect Complainant to lie about his prior employers? The aviation industry is a small community and obviously, PHI had heard about the situation. Complainant should not be forced to hide the fact that he was retaliated against by Respondents in order to obtain future employment. I find that the evidence supports a finding that Complainant used due diligence under the circumstances. Complainant testified that he tried numerous avenues to find a job after his termination but was unsuccessful until November 6, 2006. All doubt is resolved in favor of Complainant. *Id.*

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<sup>32</sup> Therefore, Complainant experienced a loss of \$1,441.52 (\$1,000.00 + \$441.52) a month at his new employment.

<sup>33</sup> \$68,413.28 (lost wages between August 29, 2005, and November 6, 2006) + \$7,207.60 (lost wages between November 6, 2006 and April 6, 2007) + \$4,324.56 (lost wages between April 6, 2007, and July 6, 2007)= \$79,945.44.

Respondents also argue that Complainant's travel expenses to and from his new position in Portsmouth, Ohio are not recoverable damages. Respondents assert that they should not be penalized for Complainant's "election to accept employment away from home." (Respondents' Post Hearing Reply Brief p. 12). However, the evidence shows that Complainant used reasonable diligence to find a job within his commuting area, but was unsuccessful. Complainant was forced to take the position in Portsmouth, Ohio because no other positions were available. In *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary awarded Complainant travel expenses for two trips his family made to visit him in another state prior to the time the entire family moved to join him. The Complainant would not have incurred this expense if he had not been discriminatorily laid off. If expenses are available for a complainant's family's travel expenses, they are certainly obtainable for a Complainant who is forced to commute over two hours to his new employment.

Accordingly, I find that the evidence of record supports a finding that Complainant is entitled to \$79,945.44 in compensatory damages.

#### A. Non-economic Compensatory Damages

"Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001). Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Crow v. Noble Roman's Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996), citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992). Complainant seeks \$300,000 in non-economic damages arguing that that he has suffered from emotional distress, mental anguish, impairment to his reputation, depression, and marriage problems all because of his discriminatory termination. A determination on whether a complainant is entitled to non-economic compensatory damages is a subjective determination. One must take into consideration the facts and circumstances of each individual claim. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004). Furthermore, although psychiatric or medical testimony makes it easier to prove damages, a complainant can still receive those damages without such testimony. *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995), citing *Blackburn Metric constructors, Inc.*, 86-ERA-4 (Sec'y Aug. 16, 1993); *Assistant Sec'y of Labor for OSHA v. Guaranteed Overnight Delivery*, ABA Case No. 96-108, ALJ Case No. 95-STA-37 (Sept. 5, 1996); *Jones v. EG&G Def. Materials, Inc.*, ARB Case No. 97-129, ALJ Case No., 95-CAA-3 (ARB Sept. 29, 1998).

Figuratively speaking, Courts have awarded damages between \$100,000 and \$250,000 for emotional distress in similar claims. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Anderson v. Metro Wastewater Reclamation District*, ARB No.: 98-087, Case No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001); *Singal v. ICF Kaiser Engineers, Inc.*, 1997-SDW-3 (ALJ June 4, 2001). "There is no arbitrary upper limit on the amount of compensatory damages that may be awarded under these employees protections." *Hobby*, ARB No. 98-166, p. 31. In *Hobby* the ARB acknowledged that the \$250,000 award for non-economic damages was high but due to the severe emotional distress suffered by the complainant and the effect the discrimination had on complainant's financial status and reputation, the award was warranted. *Id.* In Title VII cases, awards up to \$300,000 for non-

economic damages are allowed and each case is determined based upon its facts even without medical testimony. *Id.*

Complainant and his wife testified to Complainant's emotional state after his termination. (Tr. 243-5, 724-36). Complainant testified that Respondents accused him of being afraid to fly, and as a result, he now often second-guesses himself. (Tr. 243). This is a huge burden to overcome when every action you take affects the lives of others. Complainant's family experienced grave financial difficulties after his termination. Complainant's wife was a stay-at-home mom prior to the termination, but due to financial difficulties she was forced to return to work to support the family. The emotional strains brought on by the termination sent the couple to therapy. They attend both couples and individual counseling. Complainant was also prescribed Paxil for depression and anxiety. (Tr. 244). Prior to his discharge, Complainant was a very social person with no emotional problems, but afterwards he completely withdrew from his family emotionally and physically. (Tr. 734). Although he had waited so long to have a child, when he was terminated he shut his family out and shut down emotionally. Complainant still currently attends therapy.

Complainant also asserts that that Respondents' actions have tarnished his reputation. Complainant has the burden to prove a loss of reputation. *Jenkins v. U.S. Emtl. Protection Agency*, 92-CAA-6 (ALJ Dec. 14, 1992). The Court must take into consideration how Respondents' actions have negatively impacted Complainant's reputation. *Van Der Meer. Western KY Univ.*, 95-ERA-35 (ARB Apr. 20, 1998). Complainant's loss of reputation is illustrated by the problems he faced when trying to get another job. When employers found out where Complainant had previously worked and who he was they refused to hire him. One employer even hired Complainant, but when the human resources manager found out who Complainant's previous employer was, he was immediately fired that same day.

Although Complainant's damages are not as severe as those suffered by the complainant in *Hobby*, he has suffered severe emotional distress and loss of his reputation due to the actions of the Respondents. Therefore, he is entitled to \$100,000 in non-economic damages.

## **B. Abatement and Complainant's Personnel File**

Complainant also requests the removal of all documentation of his termination from his personnel file, that a copy of this Decision be distributed to all employees and for an order instructing Respondents to refrain from further violations under the Act. The Administrative Review Board has consistently upheld rulings to expunge a complainant's personnel file of all derogatory or negative information, to post of a copy of the ruling and to prevent further infractions. *See Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB Sept. 6, 1996); *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995); *McMahan v. California Water Quality Bd., San Diego Region*, 90-WPC-1 (Sec'y July 16, 1993). I find that Complainant's request for remedial action is warranted. Respondents are therefore ordered to purge all documents in Complainant's personnel file referencing Complainant's termination, Respondents are to refrain from future violations of the act and they are to refrain from making derogatory statements about Complainant to other employees and his future employers. Respondents are ordered to post copies of this Decision and Order in locations accessible to all employees and to take the reasonable steps necessary to ensure this Decision is not defaced or altered. Furthermore,

Respondents should include with this order a list of the steps and time limitations for filing a whistleblower complaint.

**C. Reinstatement**

In *Hobby v. USDOL*, No. 01 10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98 166, ALJ No. 1990 ERA 30), the Eleventh Circuit stated: "In addition to making the whistleblower whole again, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offender." Complainant testified that he wanted more than anything to be reinstated as an employee with the CareFlight program. Complainant feels the situation is the best for his family. Working for CareFlight would enable him to live and work in the same community as his family. Respondents have provided insufficient evidence to show Complainant should not be reinstated. Accordingly, Respondents are ordered to hereby reinstate Complainant as a pilot for the CareFlight program.

**D. Attorney Fees and Costs**

Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondents shall have twenty (20) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have ten days within which to file any reply to Respondents' response.

**ORDER**

1. Respondents shall reinstate Complainant immediately as of the date of this decision.
2. Respondents Miami Valley Hospital and CJ systems are jointly liable for Complainant's damages. Each shall pay one half of the damages awarded to Complainant.
3. Respondents shall pay Complainant the sum of \$79,945.44 in back pay plus the appropriate interest at the IRS rate, computed from the date of termination until the date of payment to Complainant.
4. Respondents shall pay Complainant non-economic compensatory damages in the amount of \$100,000.
5. Respondents shall purge Complainant's personnel file and appropriately post copies of this decision as outlined above.
6. Respondents shall pay Complainant's attorney's fees in the amount to be determined after briefing.

7. All Parties shall submit their respective briefs within the time stated regarding attorney fees.

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JOSEPH E. KANE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the Administrative Law Judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, 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. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

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

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1979.109(c). If a case is accepted for review, the decision of the Administrative Law Judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. 29 C.F.R. § 1979.110(b).