

No. 33355

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

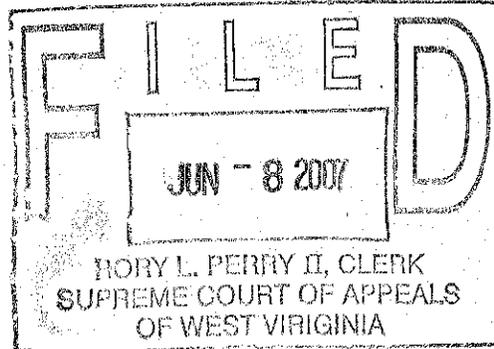
COLGAN AIR, INC.,

Appellant,

v.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION and RAO ZAHID KHAN,

Appellees.



FROM THE FINAL ORDER OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
DOCKET NO. ERRELNOANCSREP-391-02

BRIEF OF THE APPELLEE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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BRIEF OF THE APPELLEE
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I. INTRODUCTION AND OVERVIEW

Colgan Air has appealed from the Final Order of the Human Rights Commission which ruled that Colgan had violated the Human Rights Act by creating (and failing to prevent) a hostile work environment for Khan, a pilot of Asian race, Pakistani national origin and Muslim religion.

The evidence of hostile environment is extremely compelling in this case, and does not appear to be in dispute. Colgan Air does not dispute that Khan was the victim of a hostile environment, and Colgan Air does not dispute any of the ALJ's findings which detail the horrendous pattern of harassment. Instead, Colgan Air contends that the HRC erred in holding Colgan Air liable for the harassment. Colgan Air argues that a proper application of the law of vicarious or imputed liability will not permit Colgan Air to be held liable for this particular harassment. (This issue of Colgan Air liability, and an issue related to the remedy ordered by the HRC, are the matters before this Court.)

The ALJ who heard the evidence was convinced by the evidence of the existence of a hostile environment, which he detailed in his findings. The ALJ was affirmatively convinced of

the credibility of Mr. Khan and he was dubious about the credibility of some of the witnesses who disputed parts of Khan's testimony on behalf of Colgan Air (although he did not always explicitly resolve disputes in testimony in his Decision). However, the ALJ ruled for Colgan Air on the ultimate question of discrimination because he adopted Colgan Air's position on how the legal principles regarding imputed liability applied to the facts of this case.

Specifically, the ALJ ruled: (A) that Mr. Khan's tormentors were not his supervisors, so there was no strict liability under *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995); (B) that circumstantial evidence of the conduct had not been shown to be sufficiently pervasive or repetitive that a reasonable employer, intent on complying with the West Virginia Human Rights Act would be aware of the conduct and thus be subject to imputed liability under *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801, Syl. pt. 5 (1996); and (C) that Colgan Air was not liable for the harassment based on its effective remedial procedures and the adequacy of its response upon learning of the harassment.

The HRC reviewed the ALJ's Final Decision at the request of Khan and in accordance with the HRC administrative appeal rules and the proper standard of review. The Commissioners adopted the ALJ's Findings related to the existence of the hostile environment, because they are clearly supported by the evidence in the record and Colgan Air has not even challenged them. But the Commissioners took a different view than the ALJ as to how the law of imputed liability should apply to these clearly established facts. While the Final Order does not contain detailed Findings of Fact or Conclusions of Law, it is clear that the Commissioners recognized that the harassers were "supervisors" within the meaning of *Hanlon*.

The important HRC conclusions were several. The Commission concluded that the ALJ's findings that the Complainant was subjected to "repeated and constant outrageous insults" so pervasive that "the other flight crews" and just about "everyone" at Colgan Air knew what the tormentors were doing to the victim, supported the conclusion of law that the

misconduct was "sufficiently pervasive or repetitive that a reasonable employer, intent on complying with the West Virginia Human Rights Act, would be aware of the conduct." Second, and contrary to the ALJ, the Commission concluded from the ALJ's factual findings (and the clear evidence upon which they were based) that the victim's tormentors (all three pilots) were also the victim's supervisors (he was their copilot), so that Colgan Air was strictly liable for their behavior. Third, and again contrary to its ALJ, the Commission concluded that Colgan Air's Lead Pilot's knowledge of the unlawful harassment was properly imputed to Colgan Air because: (a) Colgan Air had designated the Lead Pilot as its "liaison" between the home office and the Huntington field crew; (b) the victim and other co-workers had reported the mistreatment of Mr. Khan to the Lead Pilot dozens of times; and, (c) the Lead Pilot exercised supervisory authority on behalf of Colgan Air including, *inter alia*, repeatedly and unsuccessfully chiding the pilots for their offensive behavior. Fourth and finally, the Commission concluded from the facts found by the ALJ that Colgan Air engaged in unlawful retaliatory behavior (based upon evidence too extensive for this Overview but detailed below) when it refused to promote, re-qualify or retrain Mr. Khan.

The Commissioners recognized that when agency law is properly applied to the essence of the ALJ's findings, Colgan Air is liable for this discrimination against Khan. Accordingly, the Commission's Final Order altered the ALJ's Final Decision, upholding most of his findings, but applying the law properly and arriving at a different outcome.

Because the HRC properly applied the law to findings, which are well supported by the evidence or undisputed, the HRC Final Order should be upheld.¹

¹*Amicus Curiae's* argument that the remedy of reinstatement and retraining is preempted by federal law was not argued below and is not addressed herein. Arguments raised for the first time on appeal are ordinarily deemed waived, Syl. pt. 20, *State v. Dennis*, 216 W. Va. 331, 607 S.E.2d 437 (2004); *citing* Syl. pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). However, if this Court is inclined to consider this issue, it should direct the Commission to determine on remand whether this argument has merit and, if so, whether front pay can make the Complainant whole.

II. OMISSION'S AND INACCURACIES² IN APPELLANT'S STATEMENT OF THE CASE

In this section the Commission will rely almost exclusively on direct quotations of the ALJ's twenty-eight Findings of Fact to unveil to the Court the wholly inaccurate picture of the record that Colgan Air's supposed "statement of the relevant facts" creates. It bears emphasizing that in Colgan Air's Appellant's Brief it does not dispute a *single one* of the Findings of Fact quoted in this **Section II** of the Commission's Brief.

For clarity and ease of understanding it is important to note that what the parties and the ALJ refer to throughout the record and the Findings of Fact as a "Captain," is what most of us laymen would refer to as a "pilot." What the parties and the ALJ refer to as a "First Officer," we would call a copilot. This becomes crucial later on as we explain the supervisory role that the Captains - that is the pilots - had over copilot First Officer Khan.

A. Findings of Hostile and Abusive Work Environment

Other than hostile environment cases involving physical assault of the victim, this case has as pervasive, hostile and protracted a pattern of systematic abuses as can be conceived. The ALJ minced no words in describing what Pilots Terry Riley, Jimmy Galbrath and Ryan Heuston did to Copilot Khan.

During his employment with Respondent, Complainant was subjected to an extremely hostile environment in which **repeated and constant** outrageous insults were directed toward him by fellow employees, Captains Terry Riley, Jimmy Galbrath and Ryan Heuston. They referred to Complainant as "sand

²The predecessor to the current Rule 10(d) of the *Rules of Appellate Procedure* directed appellees to include in their briefs a section addressing "Misstatements of Law and Fact in Appellant's Brief." I always dutifully included a section so captioned. It often evoked peals of protest from opposing counsel at the affront to their honor. Since then this Court has "softened" Rule 10 to now direct appellees to "point out any alleged omissions or inaccuracies of the appellant's statement of the case." While I still dutifully caption the next section, "Omissions and Inaccuracies in Appellant's Statement of the Case," I add now this note to make clear that I imply no insult to my worthy adversary; to the contrary, his reputation for honorable dealings is beyond repute. Still, he will point out his client's best "facts" and make of them what he can; I will do likewise. If I suggest hereinafter that Appellant has been "disingenuous," has displayed "legerdemain," "tortured the record," or the like, such comment is directed only at the argument, and not at counsel.

n****, "rag head" and "camel jockey." They said he stunk, that he wasn't very intelligent and that he doesn't speak good English.

ALJ's Finding of Fact No. 5 (emphasis added).

Captain Riley and Captain Galbrath both pledged to prevent First Officer Rao Khan from being promoted to Captain or even requalifying as a copilot. Captain Heuston was Captain Riley's roommate and, it will be revealed below, was found to be a co-conspirator in the Captains' scheme to get rid of Mr. Khan. Each of these three Captains exercised his supervisory authority during various flights to seize control of the aircraft from First Officer Khan and each filed false reports with the airline that they had done so because Khan was flying unsafely. This is discussed in greater depth in **Section II. E.** below (the facts related to retaliation / reprisal) because Colgan Air claimed to have relied in large part on these supervisors' disputed reports in not requalifying Complainant.

The ALJ's description of the pattern of abuse inflicted by Captains Riley, Galbrath and Heuston continues:

Captain Riley would repeatedly say things directly to Complainant like "You guys are terrorists," "Are you a Muslim?"; "All Muslims are terrorists." Captain Riley said that he **would do anything to make sure Complainant did not get promoted and that he would do anything to get Complainant fired.** Additional insults included, "Why don't you get a job with Pakistani Airlines?" On another occasion, Captain Riley came on board an airplane that Captain Duncan was on after a female pilot had shot a low visibility approach,³ and stated, "That F***** B**** can't fly. I've been flying all morning with a F***** Arab and he can't fly either."

ALJ's Finding of Fact No. 5 (emphasis added) (internal citations omitted).

Captain Duncan, referred to above, was a disinterested fellow Colgan Air pilot. He corroborated much of Mr. Khan's key testimony and disputed none of it. Other non-supervisory

³I am not sure what it means to "shoot a low visibility approach" and the record didn't clear this up for me. Throughout the ALJ's Decision he uses aviation terminology that leads me to believe that he is either a pilot or is otherwise conversant with the jargon they use. Regardless, the record does not suggest that the female pilot's performance warranted the critique, much less the hostility.

Colgan Air employees likewise corroborated Mr. Khan's testimony and disputed none of it (Pam Jarrell, for example, referred to in the ALJ's Finding of Fact quoted next below). In fact, **every time** the ALJ commented upon the veracity of Mr. Khan's testimony, he credited it. **Every time** the ALJ resolved a conflict arising from a Colgan Air supervisor testifying contrary to Mr. Khan, the ALJ *credited* Mr. Khan's testimony and *rejected* the Colgan Air supervisor's contrary testimony.

The next paragraph contains language that would be offensive to a lot of American men; though possibly less so to a particularly coarse crowd. It is crucial to note, however, that these comments are profoundly humiliating to a Muslim man; that the humiliation is compounded manifold by having been delivered in the presence of a woman; and that these precise considerations likely animated the comments:

Captain Riley also made sexually offensive comments directly to Complainant including; " Why does your wife not work?"; "Do you have an arranged marriage"; and, he even asked, "How's your wife in bed?" One of the worst comments made was **made in the presence of Pam Jarrell, a woman working as a customer service agent**, when Captain Riley said that the Complainant "would not be able to eat his wife and that it probably tasted like chicken anyway." This was in reference to the fasting strictures of Complainant's faith. That same individual also heard **both Captain Galbrath and Captain Riley say they would do anything to get Complainant fired and that he would not pass his proficiency flight.**

ALJ's Finding of Fact No. 6 (emphasis added) (internal citations omitted).

This last sentence has bearing both on the nature of the harassment, addressed in this section, and again in **Section II. C.**, below (related to evidence that the perpetrators were Mr. Khan's supervisors) because Captains Galbrath, Riley and Heuston later "affected the terms and conditions of the Mr. Khan's employment" by keeping Complainant from requalifying when, as his supervisors, they filed incident reports purporting to document Khan's deficiencies. Pam Jarrell reported this offensive comment to Colgan Air's Lead Pilot for the Huntington flight crews, Captain David Mayers. Her early complaints to Captain Mayers, and Captain Duncan's

ratification of Mr. Khan's account, portend how widespread knowledge of Khan's mistreatment would become among Colgan Air employees, as addressed in **Section II. B.**, next below.

Throughout the months that Captain Riley, Captain Galbrath and Captain Heuston persecuted First Officer Khan, numerous reports relayed up the chain of command were utterly ineffectual. Ticket agent Pam Jarrell, Copilot Khan, and Captain Duncan all reported the behavior to Colgan Air's Lead Pilot for the Huntington flight crews, Captain David Mayers.

Both the Complainant and Ms. Jarrell complained about the discriminatory conduct toward Complainant to the Lead Pilot for Respondent at the Huntington[,] West Virginia crew base, Captain David Mayers. Ms. Jarrell testified credibly that Captain Mayers knew these acts were occurring and that "other flight crews" and just about "everyone" knew it was going on. Complainant estimates he went to Dave Mayers about **twenty to twenty-five times** about the behavior of Captain Riley. **Ms. Jarrell was specific with Captain Mayers that the dislike was a result of the fact that Complainant was "Middle Eastern."**

Captain Duncan also testified credibly that Dave Myers (sic) was aware of what he called problems between Complainant and Captain Riley . . . and that **Captain Duncan had told him about the comment Captain Riley made regarding "I've been flying with that F***** Arab and he can't fly either."**

ALJ's Finding of Fact No. 7 (emphasis added) (internal citations omitted).

It became clear that not only would Colgan Air fail to take any effective remedial measures to curtail the abuse, it basically treated it like locker room banter.

Captain Mayers admits that both Complainant and Pam Jarrell mentioned Complainant's poor treatment at the hands of Captain Riley, (and on one occasion Captain Heuston) on several occasions, and that after each time Complainant told him about something he called Captain Riley (and Captain Heuston once) and told them to **knock it off** as he deemed this behavior dishonorable and unprofessional.

Captain Mayers never went to the Chief Pilot or anyone else in Manassas regarding Complainant's complaints to him concerning his mistreatment by Captain Riley.

ALJ's Finding of Fact No. 8 (emphasis added).

Emboldened by Lead Captain Mayers' "Aw, knock it off fellows" approach to the matter, and the fact that he never reported the behavior on up the chain of command, Captains Riley and Heuston increased their efforts to shed Colgan Air of this repugnant "sand nigger" who was such a burr under their saddles. If Colgan Air would essentially tolerate all that the ALJ has described thus far, how much further could they go? Prominently posting racist cartoons? Maybe even terroristic threats?

On or about July 9, 2001 someone posted a hand drawn cartoon which is highly offensive. That cartoon depicts an airline entitled Punjab Airlines which among other offensive writings, states: "COLGAN AIR NOW HIRING PUNJAB PILOTS! ! !" and "NOTE: PUNJAB AIRLINES NOT RESPONSIBLE FOR LOSS OF LIFE HUMAN ANIMAL OR OTHERWISE."

After a lengthy discussion [with management] Captain Riley admitted that the cartoon had been drawn at his crash pad by his roommate, Captain Ryan Heuston. Shortly thereafter, . . . Complainant informed [management] that a **death threat had been made against he and his wife to his brother in New York by Captain Riley.**

ALJ's Finding of Fact No. 12 (emphasis added).

B. Evidence That Knowledge of Abuse of Complainant Was Both Widespread Within Colgan Air and Had Been Repeatedly Reported up the Chain of Command

To provide context, we briefly remind the Court of the principle of law that animates the facts set out next in this **Section II. B.**

Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the West Virginia Human Rights Act would be aware of the conduct.

Conrad v. ARA Szabo, Syl. pt. 5, 198 W. Va. 362, 480 S.E.2d 801 (1996)

Recall that at least three employees had reported First Officer Khan's mistreatment to their Lead Pilot, David Mayers. Note now, too, that the behavior by this point had gained widespread knowledge in and around Colgan Air:

Both the **Complainant and Ms. Jarrell** complained about the discriminatory conduct toward Complainant to the **Lead Pilot** for Respondent at the Huntington[,] West Virginia crew base, Captain David Mayers. **Ms. Jarrell testified credibly** that Captain Mayers knew these acts were occurring and that **"other flight crews" and just about "everyone" knew it was going on.** Complainant estimates he went to Dave Mayers about **twenty to twenty-five times** about the behavior of Captain Riley. Ms. Jarrell was specific with Captain Mayers that the dislike was a result of the fact that Complainant was "Middle Eastern."

Captain Duncan also testified credibly that Dave Myers (sic) was aware of what he called problems between Complainant and Captain Riley ... and that Captain Duncan *had told him* about the comment Captain Riley made regarding "I've been flying with that F***** Arab and he can't fly either."

ALJ's Finding of Fact No. 7 (emphasis added) (internal citations omitted).

The Appellant insulated Colgan Air from the conduct of its Captains and the knowledge of its Lead Pilot, by successfully convincing the ALJ to write the Captains and the Lead Pilot out of Copilot Khan's chain of command:

Captain Barrett was the made (sic) Director for Flight Standards for Respondent in Spring of 2000, after serving for three years before that as Chief Pilot. He testified regarding the chain of command for flight operations per Respondent's Policy Manual. When flight crews are out on a trip, the First Officer would address any complaints or concerns to the Captain. Should the concern be with the Captain, then the complaint or concern is to be addressed to the Chief Pilot.⁴ The Lead Pilot is not a supervisory position.

ALJ's Finding of Fact No. 28.

The Commission notes that to the extent that this is actually a "finding of fact," as opposed to a mere recitation of the testimony, this finding, as it relates to the chain of command, while true, does not go far enough. Based on Colgan Air's Chain of Command policy: "Crews in the **field** are responsible to the Captain at all times. All contact with the

⁴The Commission additionally found that it was reasonable for Khan, Jarrell and Duncan to report their complaints about Captains Riley, Heuston and Galbrath up their chain of command to Lead Pilot Riley; and, that Riley's function as Lead Pilot was at least, by Colgan Air's own reckoning, to serve as its "liaison" to receive and pass on such communications. The *American Heritage Dictionary* (2d ed., Houghton Mifflin, 1985) defines liaison as "a channel or means of communication."

company when in the **field** should only come from the Captain. . . ." (Complainant's Exhibit No. 3). The Chain of Command policy applies when **in the field**, not just while **on a trip**. The Commission found additionally that the Captains, including Captains Riley, Heuston and Galbrath, supervised the crews, including First Officer Khan. This further finding is buttressed by the fact, noted repeatedly below, that the Captains were in positions which gave them authority to affect the terms and conditions of Khan's employment. "The Commission is not precluded from making additional findings of fact that are not in conflict with those reached by the ALJ." *Fairmont Speciality Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 90, 522 S.E.2d 180, 184 (1999); Appellant's Brief, p. 11.

Another problem with the ALJ's Finding of Fact No 28 is the final statement that "The Lead Pilot is not a supervisory position." This finding is irrational and is wholly contrary to the evidence of record and to common sense. Riley received Khan's complaints and admonished the tormentors. He received Pam Jarrell's complaints and admonished the tormentors. Even under Colgan Air's best attempt to torture the facts, the Lead Pilot was its "liaison" - which has to mean *something*. The *American Heritage Dictionary* (2d ed., Houghton Mifflin, 1985) defines liaison as "a channel or means of communication." In light of the company's adamant Chain of Command policy, he had to at least be responsible for receiving complaints and passing them up the chain of command. The Commission thus concluded that the company was chargeable with his knowledge of the harassment.

Since it is a crucial "factual inconsistency" in the ALJ's Decision, which the Commission obviously rejected, we address it now in this portion of our brief:

First, Appellee misleads when it writes, "There is no concept of 'local management' in Colgan Air's business structure... [M]anagement personnel are based at the company's headquarters, not at the airport crew bases. . . ." Appellant's Brief, p. 3.

This is contrary to Colgan Air's "Statement of Policy" with respect to the chain of command in effect at the time Khan hired on. It provided *exactly the opposite*, and it forcefully scolds its employees into compliance.

Colgan Air and the rest of the commercial aviation industry has deep roots in and draws many of its personnel and practices from military aviation; indeed, the two often share airspace, radio frequencies, air traffic control, airports and the like with their military counterparts. Nowhere is the significance of their quasi-military nature more evident than in Colgan Air's adamant chain-of-command policy reproduced below. It was no less forceful than was the chain-of-command policy of the United States Marine Corps. In fact, Colgan Air's policy was even *more rigid* than the Marine Corps', because Marines have a formalized procedure called "Request Mast" whereby soldiers could obtain an audience with their immediate supervisor's commanding officer.⁵ Other than as specified in Colgan Air's first day orientation regarding discrimination complaints, it tolerates no such circumvention:

The company has been laid out in such a way that a direct chain of command exists from the CEO on down to all employees. The chain can only function properly if it is kept unbroken. For that reason, all employees **must** deal with their direct supervisor. For instance, **crews in the field are responsible to the Captain** at all times. **All contact** with the company when in the field **should only come from the Captain.** *** This simple principle is the **foundation of our administrative policy.** Remember, If you go around your supervisor, you take him/her out of the loop. For this reason, it **will not be tolerated.**

Colgan Air Chain of Command Policy, Complainant's Exhibit No. 3 (emphasis added).

Second, Appellee twice blatantly misleads when it falsely claims in its brief that Colgan Air's policy "clearly states" that victims are required to report discrimination to its Vice President, Mary Finnigan, in Manassas, Virginia: "Colgan Air policies and procedures **clearly state** that any incidents of discrimination or harassment should be reported to management personnel in

⁵While statements in this single paragraph are beyond the record, they are so utterly indisputable as to be subject to judicial notice under Rule 201(b), *W. Va. R. Evid.*, which Rule 201(b) is expressly applicable to this Honorable Court pursuant to *W. Va. R. Evid.* 101.

Manassas, Virginia." Appellant's Brief, p. 3 (emphasis added) (internal citations omitted). And, "The training specifically states that every employee has a responsibility to prevent and report harassment, and advises that any discriminatory behavior **should be reported to Mary Finnigan, Vice President, Colgan Air.**" Appellant's Brief, p. 5 (emphasis added) (internal citation omitted). In truth and fact, what Colgan Air's harassment literature "makes clear" and "specifically states" is that employees have the express option of reporting the harassment "to their Immediate Supervisor **or**" Mary Finnigan:

The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with Colgan Air management. Consequently, in order for Colgan Air to deal with the problem, we must report such offensive conduct or situations **to the Immediate Supervisor, or** the Director of Personnel, Mary Finnigan. . . .

Appellant's EEO Policy, §I-6, Respondent's Exhibit 1 (emphasis added).

Given the adamancy of Colgan Air's Chain of Command policy quoted at pages 11-12, *supra* ("All contact with the company when in the field should only come from the Captain . . . [deviations] will not be tolerated.") contrasted with the fact that the discrimination and harassment training was a routine, "sign-the-form-here" part of Colgan Air's first day orientation process for newly hired personnel, coupled with other facts discussed below, the Commission ultimately concluded that it was reasonable for Khan and the other employees who reported his mistreatment up the chain of command to have reported the harassment to Huntington Crew Base Lead Captain Mayers.

Colgan Air had to come up with *some* function for their Lead Pilot, so they sold the ALJ on the idea that he wasn't a "supervisor," he was just a "liaison":

Captain Dave Mayers was the Lead Pilot for Respondent at the Huntington[,] West Virginia crew base, a position described as that of **an administrative position acting in a liaison capacity between the flight crews stationed at the crew base and the Chief Pilot, who has actual**

supervisory authority over the pilots, and, who was stationed in Manassas, Virginia.

ALJ's Finding of Fact No. 8 (emphasis added).

But even under Colgan Air's strained version of the facts, the Lead Pilot's role is "liaison" between the field and the Chief Pilot. "Liaison" has to mean *something*, even if you are using it as an excuse for not knowing what was going on at your field crew base. The *American Heritage Dictionary* (2d ed. Houghton Mifflin, 1985) defines liaison as "a channel or means of communication." As such, the Lead Pilot, as "liaison," would surely be duty-bound to relay twenty-plus discrimination complaints from at least three different subordinates on up the chain of command.

Despite the vast weight of evidence to the contrary, the ALJ concluded that Colgan Air management had been unaware of what the ALJ described as the "repeated and constant" mistreatment that had been inflicted on First Officer Khan during the nine months between "his very first day" in September 2000 (ALJ's Finding of Fact Nos. 4 and 10) until the Complainant himself made the trek down to Manassas and reported his ordeal to the company vice-president nine months later during June of 2001. The ALJ drew this conclusion notwithstanding his contrary findings that the abuse had been reported to Colgan Air's official liaison, Lead Pilot Mayers in Huntington, twenty-five times, by three different people, that it was known by "all the other flight crews" and "just about everyone" else at Colgan Air.

In June 2001, Complainant became so upset by Captain Riley's comments concerning whether his wife was good in bed, that Complainant traveled to Respondent's headquarters in Manassas, Virginia to talk to someone about his problems with harassment. He did not know who to approach with his problems because he knew Chief Pilot Mike Kelly and Captain Terry Riley were buddies.⁶ He therefore went to Ms. Finnigan, Vice President for Personnel and

⁶Captain Riley, the chief tormentor, was a "good buddy" of Chief Pilot Mike Kelley, who Colgan Air says was Mr. Khan's supervisor, if Lead Pilot Mayers wasn't. The Commission could have fairly concluded that Colgan Air's management structure was a "good ole' boy" environment like that referred to by Justice Cleckley in *Harlon v. Chambers*, 195 W. Va. 99,

Marketing at the time, because he was afraid that if Captain Riley found out he complained, Captain Riley had indicated to Complainant that one letter in his file from him, Captain Riley, would ruin Complainant's career.

ALJ's Finding of Fact No. 9 (internal citations omitted).

Colgan Air is forced to argue, "This June 2001 meeting was the first time any Colgan Air management personnel learned about the discriminatory behavior directed towards Khan." Appellant's Brief, p. 6 (internal citations and footnote omitted). In order for this Honorable Court to reverse the Commission, this Court would have to buy the same story *plus* conclude that Colgan Air was not liable for the harassment based on its effective remedial procedures and the adequacy of its response upon learning of the harassment. This conclusion is untenable and flatly contrary to the evidence of record.

C. Evidence That the Perpetrators of the Hostility Were Colgan Air Supervisors

The record is replete with Findings of Fact made by the ALJ, none of which were in any respect challenged by Colgan Air, that the chief tormentors, Captains Riley, Galbrath and Heuston, had supervisory authority over Complainant Khan. Likewise, there can be no credible conclusion other than that Colgan Air named Captain Dave Mayers, their Lead Pilot for the Huntington flight crews, to perform supervisory duties there and that he did, in fact, perform such duties. To provide context, we briefly remind the Court of the principle of law that animates the facts set out next in this **Section II. C.** "Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result." *Hanlon v. Chambers*, 195 W. Va. 108, 464 S.E.2d 741, 750 (1995). "The essence of supervisory status is the authority to affect the terms and conditions of the victim's

464 S.E.2d 741, 752 (1995), where he wrote, "If the plaintiff proves a "good ole' boy" environment in which the employer tolerated [abusive] behavior and failed to back [protected class members], she proves an abuse."

employment." Appellant's Brief, p. 13; *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998).

First, and most obvious, the idea that a Captain (pilot) of an airship does not supervise the First Officer (copilot) of the airship strains credulity to the point of breaking. This is all the more evident in light of the chain of command policy cited above: "All employees must deal with their direct supervisor. For instance, crews in the field are responsible to the Captain at all times." Colgan Chain of Command Policy, Complainant's Exhibit No. 3. Captain Barrett, a company man, testified similarly, "When flight crews are out on a trip, the First Officer would address any complaints or concerns to the Captain." ALJ's Finding of Fact No. 28.

Regardless, there is much more proof in the ALJ's Findings of Fact that Pilots Riley, Galbrath and Heuston and Lead Pilot Mayers were Colgan Air "agents or supervisors." We present the evidence in the order it appears in the Findings of Fact - none of which are disputed by Colgan Air in their Appellant's Brief.

First, regarding Lead Pilot Dave Mayers, who did not torment Mr. Khan, but who did nothing effective to stop it: It is clear that Captain Mayers behaved as if *he* believed that he, the Lead Pilot, had a supervisory role over Captains Riley, Heuston and Galbrath. The ALJ found that Lead Captain Mayers made many (albeit terribly ineffectual) efforts on behalf of Colgan Air to get Captains Galbrath, Heuston and Riley to leave Khan alone:

Captain Mayers admits that both Complainant and Pam Jarrell mentioned Complainant's poor treatment at the hands of Captain Riley, (and on one occasion Captain Heuston) on several occasions, and that after each time Complainant told him about something he called Captain Riley (and Captain Heuston once) and told them to knock it off as he deemed this behavior dishonorable and unprofessional.

ALJ's Finding of Fact No 8.

The ALJ also found that Captain Riley held himself out as having the ability to affect the terms and conditions of First Officer Khan's employment. This claim is first documented in the

excerpt quoted next below. In subsequent findings quoted further below, the reader will learn that Captain Riley made good on his promise. "Captain Riley said that he would do anything to make sure Complainant did not get promoted and that he would do anything to get Complainant fired." ALJ's Finding of Fact No. 5. The ticket agent, Pam Jarrell also heard Captain Riley and Captain Galbrath promise that they would make sure their subordinate, First Officer Khan, would "wash out" when it came time for him to take a proficiency test for requalification:

Pam Jarrell heard both Captain Galbrath and Captain Riley say they would do anything to get Complainant fired and that he would not pass his proficiency flight.

ALJ's Finding of Fact No. 6 (internal citations omitted).

In the next Finding of Fact the picture begins to come into focus as to why First Officer Khan eventually decided that it was futile to seek redress through his rigid chain of command. The ALJ noted that Khan knew that Chief Pilot Mike Kelley and chief tormentor Pilot Terry Riley were good "buddies." He had good reason to fear going to Chief Pilot Captain Kelley for, as the ALJ noted, "he was afraid that if Captain Riley found out he complained, Captain Riley had indicated to Complainant that one letter in his file from him, Captain Riley, would ruin Complainant's career." ALJ's Finding of Fact No. 9 (internal citations omitted). Captain Riley thus made it clear to First Officer Khan that he had "the authority to affect the terms and conditions of the victim's employment."

First Officer Khan knew that Captain Riley spoke the truth, for, as the ALJ notes in the next Finding of Fact, "[Colgan Air's Vice President] acknowledges that Captain Riley was a check airman for Respondent at the time." ALJ's Finding of Fact No. 10. **Captain Riley, as a check airman, had the authority to flunk Khan right out of his job.** Thus, it is clear from the undisputed evidence in the record that Captain Riley had "the authority to affect the terms and

conditions of the victim's employment." Again, *none of these Findings of Fact are disputed in Appellant Colgan Air's Brief.*

It also turned out that Riley delivered on his promise to keep Khan down. The ALJ acknowledged that there was evidence of record that First Officer Khan had not gotten "to upgrade to Captain, because **Captain Riley** felt he wasn't ready and was behind the aircraft." ALJ's Finding of Fact No. 10 (emphasis added).

It is likewise imminently clear that Colgan Air's Chief Pilot, Mike Kelley, treated lead tormentor, Pilot Terry Riley as if the company expected him to exercise at least a quasi-supervisory function over victim Copilot Rao Khan. On June 20, 2001, when Chief Pilot Mike Kelley reprimanded Pilot Terry Riley over the nine-month gauntlet of torment he had inflicted on Khan, Kelley nevertheless made it clear that Riley would continue in his role as an agent of Colgan Air, responsible for bringing the junior First Officer along professionally: "Chief Pilot Kelly instructed Captain Riley that it was his responsibility as Captain to mentor First Officers" like Khan. ALJ's Finding of Fact No. 11.

We suggest that Chief Pilot Captain Kelley's instruction to Riley that it was his duty "as a Captain" to mentor Khan to be a direct admission that Riley was "an agent or supervisor of Colgan Air" within the meaning of *Hanlon*. The Commission could legitimately have concluded that sending Captain Riley back where he could further torment Khan, and then thereafter allowing Riley to test Khan's flight skills, in light of Riley's promise to flunk Khan and the "constant and outrageous" harassment to which Riley and his co-conspirators had subjected Khan, to be worse than an inadequate remedial response to the torment that had gone on theretofore.

Recall, too, the pledge Captain Galbrath made as memorialized in Finding of Fact No 6, that Pam Jarrell "heard both Captain Galbrath and Captain Riley say they would do anything to get Complainant fired and that he would not pass his proficiency flight."

After Galbrath made this pledge, he, too, delivered. He filed an "irregularity report" that alleged that copilot Khan had made errors in flight, and that he had to seize control of the aircraft. *Khan never heard about this alleged incident until the hearing, at which time he flatly denied it.*

Respondents produced an irregularity report for an unsatisfactory approach and landing in which Captain Galbrath took control of the aircraft after a failed approach and go around. This incident report was filed with Chief Pilot, Mike Kelley, for an incident taking place on May 3, 2001. Complainant was never told of the report or counseled in any fashion by anyone for pilot deficiencies during his time with Respondent Colgan Air.

ALJ's Finding of Fact No. 15.

Thus, Captain Galbrath, one of the principal tormentors, one who had "pledged to do anything to get Khan fired," and one who had pledged that "he would not pass his proficiency flight," was in direct supervision of Khan, possessed of the "authority to affect the terms and conditions of the victim's employment." Thus, too, Khan was again impacted by his supervisors' mistreatment from late September 2000 through early July 2001, a period of nine months. Consequences of his tormentors' behavior, the reader will learn below, continued through the end of October 2001, when Colgan Air relied on the tormentors' evaluations of Complainant to refuse to requalify him as a First Officer.

Finally, Captain Ryan Heuston delivered on his promise to, as a supervisor, adversely affect the terms and conditions of First Officer Khan's employment. Lead Pilot Mayers testified at length in this matter, and a great deal of his testimony was patently incredible. That will be dealt with in the next **Section II. D.** related to Colgan Air's use of Khan's supervisors/tormentors

as key players in his retaliatory discharge. For this section, though, his testimony illustrates Captain Heuston's use of his supervisory authority to his subordinate Khan's detriment:

There were numerous instances reported to [Captain Mayers] that created a doubt in his mind that [Khan] was capable of commanding an airplane. One of these instances involved a report that as the flying pilot, Complainant had lined up on the wrong runway and that Captain Heuston had to take control of the airplane.

ALJ's Finding of Fact No. 15 (internal citations omitted).

Khan hotly contested this claim, as will be discussed in the following sections of this brief. The point is that Pilot Heuston was Copilot Khan's supervisor. Once again, Captain Heuston, one of the principal tormentors, was in direct supervision of Khan, possessed of and wielding with a vengeance the "authority to affect the terms and conditions of the victim's employment."

D. Colgan Air's Use of the Very Supervisors Who Tormented Complainant to Discharge Him in Direct Retaliation for Complaining

Within weeks after First Officer Khan complained about the abuse he was receiving from Captains Galbrath, Heuston and Riley, and the failure of Lead Pilot Mayers to remedy the situation, Colgan Air got rid of him. Colgan Air did so by using reports from his tormentors and from Captain Mayers and by subjecting him to proficiency tests conducted by other senior Captains (so-called "check airmen") whose testimony about knowing that Khan had engaged in activity protected by the Human Rights Act (complaining about the abuse he was receiving) was found lacking in credit by the ALJ.

Captain Mayers testified critically about First Officer Khan's flying ability. Mayers claimed that there were "numerous instances reported to him that created a doubt in his mind that he was capable of commanding an airplane[.]" . . . including "a report that as the flying pilot,

Complainant had lined up on the wrong runway and that Captain Heuston⁷ had to take control of the airplane." ALJ's Finding of Fact No. 15.

Colgan Air's Lead Pilot at the Huntington Crew Base, Dave Mayers', testimony on the whole was tainted by his incredible claim, contrary to the remaining evidence, that by the time Mr. Khan went to Manassas nine months into his ordeal, Mayers knew there was a "personality conflict" between First Officer Khan and Captain Riley, but that *he did not know that Khan's mistreatment was racially animated*. ALJ's Finding of Fact No. 8.

Twice the ALJ made note of this dubious testimony, but he failed to resolve the internal consistency between it and the remaining evidence of record. Here is another example:

Prior to the incident concerning Captain Riley's comment regarding Complainant's wife's performance in bed, which Captain Mayers heard about from Complainant after it occurred, Captain Mayers denies that he was made aware that the basis of that unprofessional treatment was related to race.

ALJ's Finding of Fact No. 8.

Colgan Air Lead Pilot Captain Dave Mayers' claims that he didn't know that the tormentors were after Khan because of his protected class status as noted in the ALJ's Findings of Fact Nos. 8 and 10 are patently incredible because they are directly contrary to the ALJ's immediate prior findings: (1) that Ms. Jarrell "testified credibly" that Mayers, "other flight crews" and "practically everyone" knew what was going on; (2) that she had been clear to Mayers that it was because Khan was "Middle Eastern"; (3) that Complainant testified credibly that he "went to Mayers twenty to twenty-five times" about Riley starting in September of 2000 and culminating with his June 2001 trip to Manassas; (4) that Captain Duncan had "testified credibly" that *he* had told Mayers about the "fucking Arab" comment; (5) that Captain Duncan

⁷Once again, Captain Heuston, one of the principal tormentors, was in direct supervision of Khan, possessed of and wielding with a vengeance the "authority to affect the terms and conditions of the victim's employment." "The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." Appellant's Brief, p. 13; *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998).

had "testified credibly" that "Myers (sic) was aware of the problems between Riley and Khan; and (6) Mayers' own testimony "that after each time Complainant told him about something he called Captain Riley (and Captain Heuston once) and told them to knock it off." ALJ's Finding of Fact No. 8. Mayers' testimony on the whole was tainted by his incredible claim, contrary to the remaining evidence, that he did not know that Khan's mistreatment was motivated by discriminatory animus.

The Commissioners likely viewed Lead Captain Mayers' testimony with a high degree of skepticism and with great care and caution; they could justifiably conclude that Lead Captain Mayers' testimony was infected by self-interest, loyalty to the company and loyalty to the other pilots in the "good ole' boy" environment⁸ at Colgan Air. Thus, to the extent that these sentences in the ALJ's Findings of Fact Nos 8 and 10 constituted actual "findings of fact" (rather than mere recitations of the testimony), the Commission rejected them as clearly wrong.

In June of 2001, after Complainant's nine-month effort to free himself from the torment by complaining to Lead Pilot Mayers, he finally got some action when he traveled to Virginia and complained to the Vice President. She caused Lead Pilot Mike Kelley to summon his buddy Captain Riley to Manassas, reprimand him and warn against continuing abuse. They didn't bother to counsel Galbrath or Heuston. ALJ's Finding of Fact No. 11.

As noted above, Chief Pilot Kelley's "reprimand" of his buddy Riley only made matters worse. The abuse continued, and two weeks later, Captain Heuston posted the cartoon (which Ticket Agent Pam Jarrell faxed to the Vice President) while Captain Riley called First Officer Khan's brother and told him he was going to kill Khan and his wife. Colgan Air responded and

⁸Once again, this "good ole' boy" language is not the Commission's own; rather, it comes directly from this Court's jurisprudence: Justice Cleckley in *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741, 752 (1995): "If the plaintiff proves a "good ole' boy" environment in which the employer tolerated [abusive] behavior and failed to back [protected class members], she proves an abuse."

summoned Captains Heuston and Riley to Manassas. Instead of showing up for the meeting, Heuston faxed in a resignation and Riley's lawyer called Colgan Air and got permission for him to resign, too. ALJ's Findings of Fact Nos. 12 and 13.

Rather than firing these two, Colgan Air accepted their resignations, leaving their records unblemished and them free to go to work for the airline next door. To be clear, the ALJ noted that Colgan Air gave Captains Riley and Heuston lenient treatment by letting them resign. Had Colgan fired them, the federal Pilots Records Improvement Act would have required memorialization of their misconduct for future prospective employers' perusal. To put it in the clear terms that practitioners of the criminal law would use to describe what happened to Riley and Heuston, given their misconduct: "They walked."

Captains Riley and Heuston were gone, but the lingering effects of their promise to get rid of First Officer Khan at any cost were just about to come to fruition. The ALJ explains:

On October 30, 2001 Complainant underwent a Federal Aviation Administration (FAA hereinafter) proficiency check pursuant to FAR 121.441 which is required annually for First Officers and every six months for Captains. The proficiency test was administered by Captain Jeb Barrett, Director of Flight Standards for Respondent, who acted in the capacity of check airman for Respondent.

ALJ's Finding of Fact No. 16 (internal citations omitted).

Things proceeded normally for the first few minutes:

Captain Barrett met with Complainant, conducted an oral examination and reviewed his certificate and manuals. The oral examination includes testing knowledge of company policies and procedures, aircraft systems, and limitations of the aircraft. There was some review on aircraft systems and limitation on the engine numbers. Captain Barrett completed the oral portion and announced to Complainant it was satisfactory. Captain Barrett next introduced Complainant to Captain Tom Brink who would be non-flying pilot, and briefed Complainant on the flight portion of the proficiency check. Complainant was given approach plates, showed him on the low in route charts, where they would be flying, and the order of air work and approaches that they would be conducting.

ALJ Finding of Fact No. 17 (internal citations omitted).

The next two Findings of Fact memorialize Colgan Air's supervisory check airman Captain Barrett's testimony regarding his decision to flunk First Officer Khan on his flight proficiency check (which is absolutely tantamount to firing him since Colgan Air didn't retain pilots who weren't qualified to fly). However, the ALJ memorialized immediately thereafter that Mr. Khan testified that the test was rigged - and there is corroboration from another minority pilot that he suffered the same fate. Moreover, the ALJ *expressly found* that Captain Barrett's testimony about some of the events surrounding the proficiency check were "simply not credible."

Beginning at this point, the ALJ failed to resolve direct disputes between First Officer Khan and Colgan Air's check airman, Captain Barrett's testimony regarding the proficiency check. He did resolve a direct dispute concerning one conversation between Khan and Barrett, finding that Khan was the truth-teller while Barrett was not: Here is what the ALJ said about that:

Complainant testified credibly that prior to the check ride after the oral portion of the proficiency check, Captain Barrett asked him to tell him exactly what happened between Complainant and Terry Riley. Captain Barrett's testimony that he was unaware of the racial discrimination of Complainant prior to the proficiency check is simply not credible.

ALJ's Finding of Fact No. 23 (internal citations omitted).

Captain Barrett directed Complainant to perform a takeoff stall, an FAA required maneuver. Complainant performed the maneuver in an unsatisfactory fashion because he lost an unacceptable amount of altitude. Captain Barrett informed Complainant that the takeoff stall maneuver was unsatisfactory. Whereupon he provided re-training during the proficiency check and allowed the Complainant to attempt the maneuver again. Complainant performed the maneuver in satisfactory fashion after retraining.

ALJ Finding of Fact No. 18 (internal citations omitted).

Captain Barrett directed the Complainant to perform an ILS approach, another FAA required maneuver. This maneuver required the Complainant to turn the aircraft onto the localizer, an electronic beam that gives the angle of descent. Complainant flew threw (sic) the localizer, in attempting to turn the aircraft, Complainant operated the electronic trim system which disengaged the

auto-pilot. This resulted in Complainant deviating from center lines of the localizer and glide slope and exceeding the permitted descent speed, which resulted in an unstabilized approach.⁹ Captain Barrett informed Complainant that the ILS approach was unsatisfactory. Captain Barrett provided re-training during the proficiency check and allowed Complainant to perform the maneuver again. After re-training the Complainant performed the ILS approach in a satisfactory manner.

ALJ's Finding of Fact No. 19 (internal citations omitted).

Here is how the ALJ described Mr. Khan's contrary testimony regarding the rest of his proficiency check:

Complainant testified that several aspects of the proficiency check were irregular. These include claims that: Captain Brink was gesticulating during taxi; that he performed a satisfactory stall in regular configuration because no particular configuration had been required prior to his being trained to proficiency on that maneuver; that the missed ILS approach was the result of Captain Brink disengaging the autopilot; and, that the missed VOR approach was the result of Captain Brink changing his teardrop VOR turn to a Parallel approach and giving him an inappropriately high starting approach altitude above that recommended on the VOR approach plate. Complainant's testimony seems to confirm that he in fact exceeded the recommended rate of descent in trying to attain the approach altitudes specified in the VOR approach plate.¹⁰ Complainant denies that the Proximity Alert System was screaming any warnings or that the rate of descent was unsafe or anywhere approaching the rate claimed by Captain Barrett and Captain Brink.

ALJ's Finding of Fact No 24 (internal citations omitted).

First Officer Khan's testimony was *never* found wanting for credibility throughout the entire hearing; Captain Barrett's testimony was expressly found to be lacking in credibility (as was other Colgan supervisors' testimony). Because the ALJ did not attempt to resolve the material deviation between Barrett's testimony in the foregoing Findings of Fact Nos. 18 and 19,

⁹Khan flatly disputed this portion of Barrett's testimony. The ALJ did not resolve the dispute. Since the ALJ credited Khan's testimony every time he addressed it, and since he found Barrett's testimony "simply not credible" the only time he addressed it, the Commission resolves the unresolved factual dispute in favor of Complainant Khan.

¹⁰The record is unclear whether this misstep alone would have caused Complainant to have failed this maneuver on his first try. It is clear, however, that if he had failed this maneuver, but only this maneuver, he would have passed his flight check.

versus Khan's flatly contrary testimony in the next Finding of Fact No. 24, that task fell on the Commission.

The Commission could have fairly concluded that given the totality of the evidence, the ALJ's earlier rejection of Colgan Air witness Captain Barrett's related testimony, the ALJ's earlier rejection of Riley's testimony, and the other suspicious circumstances which imply pretext in the following paragraphs, it was proper to credit Khan's testimony and reject Barrett's where they materially conflict. The ALJ frequently declared that Khan had "testified credibly" in general, and he specifically so found with respect to his testimony about certain events surrounding Barrett's flight examination of Khan. Barrett's testimony about these same events, the ALJ found, was "simply not credible." While the ALJ did not specifically resolve *other* material inconsistencies between Khan's testimony and that of Captain Barrett with respect to the next two paragraphs, the Commission chose to credit Khan's testimony over Barrett's where such deviations occurred but were not resolved by the ALJ.

E. Additional Evidence of Pretext Surrounding Colgan Air's Retaliatory Discharge of Complainant

There are additional factors that animated the Commission's decision to credit the Complainant's theory that he was discharged in violation of the Human Rights Act. Both of these facts are discerned from the **uncontested** Findings of Fact set out in the ALJ's Decision and unchallenged by Colgan Air in its Appellant's Brief.

Captain Duncan (an African American Captain) testified credibly that his flight proficiency check was rigged: "Captain Duncan testified credibly that he was given a recurrent check ride on November 27, 2001, which was unfair as far as he was concerned."

ALJ's Finding of Fact No 26.

More compelling was Colgan Air's treatment of similarly situated protected class and non-protected class employee pilots:

Respondent identified all pilots who had failed proficiency checks in 2000 and 2001. Josk Musoke, an African-American male failed a proficiency check on December 6, 2000. He resigned and did not get retraining after failing. Greg Carlisle, a white male, failed a proficiency check on August 19, 2000. He was retrained. Jeffrey Byrd, a white male, failed a proficiency check on August 20, 2001. He was retrained. Julie Porter, a White female failed a proficiency test on October 30, 2001. She was not retrained. Michael Duncan, an African-American male, failed a proficiency check on November 27, 2001. He was not retrained and elected to resign. John Wohner, a White male, failed a proficiency check on December 1, 2001. He was retrained.

ALJ's Finding of Fact No. 25 (internal citations omitted).

This is to say, that in all the comparable cases examined, the white men were retained and retrained, while the others were not. The Commission urges that this, when coupled with Colgan's employees' false testimony, as found by the ALJ, and when further coupled with Colgan Air's wilful ignorance concerning the tormentors' conduct, and when further coupled with this intellectually dishonest claim that pilots don't supervise copilots, and when further coupled with their false claims that discrimination claims had to be reported to the vice president (versus the immediate supervisor) is highly suspicious and is likely indicia of pretext.

III. CONCISE STATEMENTS TO MEET THE ALLEGED ERRORS

A. **The Record Is Replete with Evidence That Colgan Air Management Had *Actual Knowledge, Imputed Knowledge And Was Strictly Liable* for the Abuse to Which Mr. Khan Was Subjected.**

1. The ALJ's findings that the Complainant was subjected to "repeated and constant outrageous insults" so pervasive that "the other flight crews" and just about "everyone" at Colgan Air knew what the tormentors were doing to the victim, support the conclusion that the misconduct was "sufficiently pervasive or repetitive that a reasonable employer, intent on complying with the West Virginia Human Rights Act, would be aware of the conduct." *Conrad*, at Syl. pt. 5.

2. Knowledge of Copilot Khan's mistreatment is imputed to Colgan Air based upon the ALJ's findings: that "Captain Dave Mayers was the Lead Pilot for [Colgan Air] at the Huntington, West Virginia crew base;" that his role was "liaison. . .between the flight crews stationed at the crew base" and management; and that Mr. Khan and a subordinate coworker had reported the misconduct "to Dave Mayers twenty to twenty-five times;" coupled with Colgan Air's adamant "chain of command" policy.

3. Since the three Pilots who tormented Copilot Khan had direct supervisory authority over him, and used their "supervisory authority. . .to affect the terms and conditions of the victim's employment" by pledging to and succeeding in "doing anything to make sure [Mr. Khan] did not get promoted. . .and doing anything to get [Mr. Khan] fired," their "conduct is attributed to the employer, and. . .[Colgan Air] is strictly liable for the" three pilots' conduct.

B. Substantial Evidence Reveals That Colgan Air Ginned up a Basis for Discharging Mr. Kahn for Unlawful Reasons.

1. The ALJ's findings reveal that every reason Colgan Air assigned for not requalifying Mr. Khan as a Copilot came either directly from one of his three principal tormentors, or after he had complained of their treatment of him to management.

2. There are multiple bases for concluding that Colgan Air's assigned reasons for discharging Mr. Khan were pretextual including, *inter alia*: That the veracity of every Colgan Air witness who testified about the reasons for his discharge was found wanting by the ALJ while Khan's veracity was always approved; and Colgan Air retrained, requalified and retained every white male pilot who initially failed to requalify but refused to retrain every minority or female pilot who initially failed - which thereby effected their discharges.

IV. POINTS AND AUTHORITIES RELIED UPON

A. Standard of Review

1. The standard under which the Commission reviews a decision of an administrative law judge is established by statute. West Virginia Code § 5-11-8(d)(3) states that the "commission shall limit its review upon such appeals [from the administrative law judge's decision] to whether the administrative law judge's decision is:

- (A) In conformity with the constitution and the laws of the state and the United States;
- (B) Within the commission's statutory jurisdiction or authority;
- (C) Made in accordance with procedures required by law or established by appropriate rules of the commission;
- (D) Supported by substantial evidence on the whole record; or
- (E) Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

2. With regard to this Court's review of the factual findings made by the Commission, "West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." *West Virginia Human Rights Commission v. United Transp. Union, Local No. 655*, Syl. pt. 1, 167 W. Va. 282, 280 S.E.2d 653 (1981); *Fairmont Speciality Services v. West Virginia Human Rights Commission*, Syl. pt. 1, 206 W. Va. 86, 522 S.E.2d 180 (1999).

While the substantial evidence rule applies to findings of fact rendered by an administrative agency such as the Commission, legal rulings made by the Commission are subject to *de novo* review. See *Ruby v. Insurance Commission*, 197 W. Va. 27, 475 S.E.2d 27 (1996).

In *Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission*, 189 W. Va. 314, 431 S.E.2d 353 (1993), this Court discussed what is meant by "substantial evidence":

Such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding; it must be enough to justify a refusal to direct a verdict, if the factual matter were tried to a jury. 'This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' The reviewing court is not entitled to reverse the finding of the trier of the facts simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of the facts.

Thus, while the Commission and this Court must give deference to the findings of fact of the ALJ, the Commission is not precluded from making additional findings of fact that are not in conflict with those reached by the ALJ. In addition, the Commission may determine that the ALJ's decision is clearly not supported by substantial evidence on the whole record. *Fairmont Speciality Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999).

B. Hostile or Abusive Work Environment

1. The West Virginia Human Rights Act, as well as Title VII, imposes on employers a duty to ensure, as best they can, that their workplaces are free of sexual harassment that creates a hostile or offensive working environment. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). As the United States Supreme Court recognized in *Meritor*, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65; *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996) (citations and quotations in original).

2. "Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with ... [the West Virginia Human Rights Act] would be aware of the conduct." *Hanlon*, 195 W. Va. at 108 n.9, 464 S.E.2d at 750 n.9; *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

3. "The aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct. Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999), and in violation of the public policy of this State. When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace." *Fairmont Specialty Services v. West Virginia Human Rights Commission*, Syl. pt. 3, 206 W. Va. 86, 522 S.E.2d 180 (1999).

4. Factors to examine in determining whether an employer has met its burden to take prompt remedial action reasonably calculated to end the harassment include, but are not limited by, the gravity of the harm, the nature of the work environment, the degree of acquiescence in the harassment by the supervisors, the promptness of the employer's responsive action, and the apparent sincerity of the employer's actions. *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999).

5. Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).

6. "If the plaintiff proves a "good ole' boy" environment in which the employer tolerated [abusive] behavior and failed to back [protected class members], she proves an abuse." *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).

C. Disparate Treatment and Retaliatory Discharge

1. "In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation." Syl. pt. 4, *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986)." *Brammer v. West Virginia Human Rights Commission*, Syl. pt. 1, 183 W. Va. 108, 394 S.E.2d 340 (1990). *Hanlon v. Chambers*, Syl. pt. 10, 195 W. Va. 99, 464 S.E.2d 741 (1995) (citations in original).

V. ARGUMENT

A. The Record Is Replete with Evidence That Colgan Air Management Had *Actual* Knowledge, *Imputed* Knowledge and Was *Strictly Liable* for the Abuse to Which Mr. Khan Was Subjected.

In order to sustain a claim of unlawful reprisal / retaliatory discharge under the State's Human Rights Act in the case *sub judice*, Rao Khan must prove that:

To establish a claim for ancestral discrimination, under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999) based upon a hostile or abusive work environment, a plaintiff-employee must prove that: (1) that the subject conduct was unwelcome; (2) it was based on the ancestry of the

plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment; and (4) it was imputable on some factual basis to the employer.

Fairmont Specialty Services v. West Virginia Human Rights Commission, Syl, pt. 5, 206 W. Va. 86, 522 S.E.2d 180 (1999).

1. The ALJ's findings support the conclusion that Colgan Air had actual knowledge of the hostile environment.

The law is sufficiently settled in West Virginia to be beyond dispute. If evidence of a hostile environment is so obvious, prominent or widespread in a workplace that any reasonable company bent on complying with the Human Rights Act would have known about the conduct, then the Court will infer that the company had actual knowledge of the discrimination and a concomitant duty to take effective measures to terminate the conduct.

Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the West Virginia Human Rights Act would be aware of the conduct.

Conrad, at Syl. pt. 5.

The Findings of Fact in **Sections I.A.** (regarding the frequent, open nature of the harassment) and **I.B.** (addressing the extensive reporting of the misconduct that had taken place) are more than sufficient to establish Colgan Air's liability. The ALJ's findings that the Complainant was subjected to "repeated and constant outrageous insults" so pervasive that "the other flight crews" and just about "everyone" at Colgan Air knew what the tormentors were doing to the victim, support the conclusion that the misconduct was "sufficiently pervasive or repetitive that a reasonable employer, intent on complying with the West Virginia Human Rights Act, would be aware of the conduct." *Conrad*, at Syl. pt. 5.

Khan was actively tormented by his supervisors from late September 2000 through early July 2001, a period of nine months. Consequences of his tormentors' behavior continued

through the end of October 2001, when Colgan Air relied on the tormentors' evaluations of Complainant to refuse to requalify him as a First Officer.

One of the worst comments made was made in the presence of Pam Jarrell, a woman working as a Customer Service Agent, when Captain Riley said that the Complainant "would not be able to eat his wife and that it probably tasted like chicken anyway." This was in reference to the fasting strictures of Complainant's faith. That same individual also heard both Captain Galbrath and Captain Riley say they would do anything to get Complainant fired and that he would not pass his proficiency flight.

On another occasion, Captain Riley came on board an airplane that Captain Duncan was on after a female pilot had shot a low visibility approach, and stated, "That F***** B**** can't fly. I've been flying all morning with a F***** Arab and he can't fly either." This slur was overheard and corroborated by a disinterested fellow pilot, Captain Duncan.

Both the Complainant and Ms. Jarrell complained about the discriminatory conduct toward Complainant to the Lead Pilot for Colgan Air at the Huntington, West Virginia, crew base, Captain David Mayers. Ms. Jarrell testified credibly that Captain Mayers knew these acts were occurring and that "other flight crews" and just about "everyone" knew it was going on. Complainant estimates he went to Dave Mayers about twenty to twenty-five times about the behavior of Captain Riley. Ms. Jarrell was specific with Captain Mayers that the dislike was a result of the fact that Complainant was "Middle Eastern."

Captain Duncan also testified credibly that Dave Mayers was aware of what he called problems between Complainant and Captain Riley and that Captain Duncan had told him about the comment Captain Riley made regarding "I've been flying with that F***** Arab and he can't fly either."

This evidence, and the remainder reviewed in the foregoing **Sections II.A.** and **II.B.** are more than sufficient to meet the *Conrad v Szabo* standard: "Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with the West Virginia Human Rights Act would be aware of the conduct." *Conrad*, at Syl. pt. 5.

2. The ALJ's findings support a conclusion that Colgan had imputed knowledge of the hostile environment through their Lead Pilot.

The law regarding the imputation of knowledge of workplace hostile environment discrimination to employers is likewise clear and undisputed. In *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999), this Court quoted the Human Rights Commission's regulatory standards for imputing knowledge of workplace *sexual* harassment and then applied the same standard to national origin discrimination such as that in the case at bar:

The standard for employer liability for the actions of co-worker harassment has been set out in the Commission's legislatively promulgated regulations in the analogous area of sexual harassment, that state:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or reasonably should have known of such conduct, or expressly or impliedly authorized or ratified such conduct.

Fairmont Specialty Services, 206 W. Va. at 104, 105; 522 S.E.2d at 198, 199.

The facts reviewed in **Sections II.A.** and **II.B.**, as well as those reviewed next above, clearly support imputing Colgan Air's Lead Pilot's knowledge to Colgan Air. These include: (a) the ALJ's findings: that "Captain Dave Mayers was the Lead Pilot for [Colgan Air] at the Huntington, West Virginia crew base;" and (b) that his role was "liaison. . .between the flight crews stationed at the crew base" and management; coupled with (a) the *American Heritage*

Dictionary (2d ed., Houghton Mifflin, 1985) definition of liaison ("a channel or means of communication") and, thus, his role would be to relay discrimination complaints on up the chain of command; and (b) that Mr. Khan, Captain Duncan and a subordinate coworker named Pam Jarrell had reported the misconduct "to Dave Mayers twenty to twenty-five times;" coupled with Colgan Air's adamant "chain of command" policy, make it clear that Captain Mayers' knowledge of the nine-month gauntlet of discrimination is properly imputed to Colgan Air.

3. The ALJ's findings support a conclusion that Colgan Air is strictly liable for the hostile environment because the perpetrators were the victim's supervisors.

The Commission accepts Colgan Air's basic statement of the law that an employer is strictly liable for the discriminatory acts of its supervisory employees: "Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result." *Hanlon v. Chambers*, 195 W. Va. 108, 464 S.E.2d 741, 750 (1995). "The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." Appellant's Brief, p. 13; *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998).

The facts reviewed in **Section II.A.** and **II.B.** document the horrendous nature and continuous frequency of Captains Galbrath, Heuston and Riley's maltreatment of First Officer Khan on the basis of his race, religion and national ancestry. The facts reviewed in **Section II.C.** of this brief amply and incontrovertibly support the conclusion that Captain Galbrath, Captain Heuston and Captain Riley were First Officer Khan's supervisors, so that Colgan Air is strictly liable for their "repeated and constant" racial torment of First Officer Khan. Since the three pilots who tormented Copilot Khan had direct supervisory authority over him, and used their "supervisory authority. . .to affect the terms and conditions of the victim's employment" by

pledging to and succeeding in "doing anything to make sure [Mr. Khan] did not get promoted . . . and doing anything to get [Mr. Khan] fired," their "conduct is attributed to the employer, and . . . [Colgan Air] is strictly liable for the" three pilots' conduct.

B. The ALJ's Findings Support the Conclusion That Colgan Air Ginned up a Basis for Discharging Mr. Kahn for Unlawful Reasons.

- 1. The ALJ's findings reveal that every reason Colgan Air assigned for not requalifying Mr. Khan as a Copilot came either directly from one of his three principle tormentors, or after he had complained of their treatment of him to management.**

The facts set out in **Section II. D.** amply support the conclusion that Captains Heuston, Riley and Galbrath delivered on their promise to keep Mr. Khan from passing his flight proficiency recheck, to keep him from getting promoted and, ultimately to "do anything" to keep him from being retained. During the meeting in Manassas on West Virginia Day 2001, Mr. Khan made clear to the company's HR person, Mary Finnigan, that Heuston, Riley and Galbrath were after him:

Complainant discussed his complaint that he had not been upgraded to Captain in a meeting with Ms. Finnigan and Chief Pilot, Mike Kelley. Complainant stated that Alan Shelton, Jeremy Poist, and Michael Duncan were already Captains and that some of the people were lower on the seniority list who were currently taking the classes to upgrade to Captain. Captain Kelley¹¹ said I have received letters from the other Captains, your co-workers. He refused to name them.¹² Captain Kelley said there is a solution we'll go do a test ride with me. Complainant heard nothing more thereafter and the ride with Captain Kelley never occurred. Captain Duncan testified that of the people in Complainant's training class, Complainant was the **only one** who was not offered the opportunity to upgrade to Captain from First Officer.

ALJ's Finding of Fact No. 14 (emphasis added) (internal citations omitted).

¹¹Kelley and chief tormentor Riley were buddies in the good ole' boy network that was Colgan Air.

¹²The only evidence adduced concerning any such complaining letters reveals that they came from none other than tormentors Riley, Galbrath and Heuston.

Respondents produced an irregularity report for an unsatisfactory approach and landing in which Captain Galbrath took control of the aircraft¹³ after a failed approach and go around. This incident report was filed with Chief Pilot, Mike Kelley, for an incident taking place on May 3, 2001. Complainant was never told of the report or counseled in any fashion by anyone for pilot deficiencies during his time with Respondent Colgan Air.

ALJ's Finding of Fact No. 15 (internal citations omitted).

Lead Pilot, Captain Mayers, [claimed to have] liked Complainant and had a chance to fly with him on several occasions. . . . There were numerous instances reported to him¹⁴ that created a doubt in his mind that [Khan] was capable of commanding an airplane. One of these instances involved a report that as the flying pilot, Complainant had lined up on the wrong runway and that Captain Heuston¹⁵ had to take control of the airplane.

Id. (internal citations omitted).

On October 30, 2001 Complainant underwent a Federal Aviation Administration (FAA hereinafter) proficiency check pursuant to FAR 121.441 which is required annually for First Officers and every six months for Captains. The proficiency test was administered by Captain Jeb Barrett, Director of Flight Standards for Respondent, who acted in the capacity of check airman for Respondent.

ALJ's Finding of Fact No. 16 (internal citations omitted).

¹³Thus, Captain Galbrath, one of the principal tormentors, one who had "pledged to do anything to get Khan fired," and one who had pledged that "he would not pass his proficiency flight," was in direct supervision of Khan, possessed of the "authority to affect the terms and conditions of the victim's employment." Thus, too, Khan was again impacted by his supervisors' mistreatment from late September 2000 through early July 2001, a period of nine months. Consequences of his tormentors' behavior continued through the end of October 2001, when Colgan Air relied on the tormentors' evaluations of Complainant to refuse to requalify him as a First Officer. "The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." Appellant's Brief, p. 13; *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998).

¹⁴Mayers' testimony on the whole was tainted by his incredible claim, contrary to the remaining evidence, that he did not know that Khan's mistreatment was racially animated (see p. 20, *supra*). The Commission viewed his testimony with great care and caution, and the conclusion that it was infected by self-interest, loyalty to the company and to the other pilots in the good ole' boy network is well supported.

¹⁵Once again, Captain Heuston, one of the principal tormentors, was in direct supervision of Khan, possessed of and wielding with a vengeance the "authority to affect the terms and conditions of the victim's employment." "The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." Appellant's Brief, p. 13; *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998).

Captain Barrett directed Complainant to perform a takeoff stall, an FAA required maneuver. Complainant performed the maneuver in an unsatisfactory fashion because he lost an unacceptable amount of altitude. Captain Barrett informed Complainant that the takeoff stall maneuver was unsatisfactory.¹⁶ Whereupon he provided re-training during the proficiency check and allowed the Complainant to attempt the maneuver again. Complainant performed the maneuver in satisfactory fashion after retraining.

ALJ's Finding of Fact No. 18 (internal citations omitted).

Captain Barrett directed the Complainant to perform an ILS approach, another FAA required maneuver. This maneuver required the Complainant to turn the aircraft onto the localizer, an electronic beam that gives the angle of descent. Complainant flew thru (sic) the localizer, in attempting to turn the aircraft, Complainant operated the electronic trim system which disengaged the auto-pilot. This resulted in Complainant deviating from center lines of the localizer and glide slope and exceeding the permitted descent speed, which resulted in an unstabilized approach.¹⁷ Captain Barrett informed Complainant that the ILS approach was unsatisfactory. Captain Barrett provided re-training during the proficiency check and allowed Complainant to perform the maneuver again. After re-training the Complainant performed the ILS approach in a satisfactory manner.

ALJ's Finding of Fact No. 19 (internal citations omitted).

Complainant denies that the Proximity Alert System was screaming any warnings or that the rate of descent was unsafe or anywhere approaching the rate claimed by Captain Barrett and Captain Brink.

Compare ALJ's Findings of Fact No. 20 and No 24.

Frequently when testimony is at variance, each side could pass a polygraph, even though one is obviously wrong. We've all seen this. In this case, either Brink or Khan was not truthful. Either the warning alarms were sounding off, or they weren't. Having heard these alarms go off in military aircraft, I can attest that they are loud and alarming.

¹⁶The ALJ frequently declared that Khan had "testified credibly" in general, and he specifically so found with respect to his testimony about certain events surrounding Barrett's flight examination of Khan. Barrett's testimony about these same events, the ALJ found, was "simply not credible." While the ALJ did not specifically resolve *other* material inconsistencies between Khan's testimony and that of Captain Barrett, with respect to the next two paragraphs, the Commission chose to credit Khan's testimony over Barrett's where such deviations occurred but were not resolved by the ALJ.

¹⁷Khan flatly disputed this portion of Barrett's testimony. The ALJ did not resolve the dispute. Since the ALJ credited Khan's testimony every time he addressed it, and since he found Barrett's testimony "simply not credible" the only time he addressed it, the Commission resolves the unresolved factual dispute in favor of Complainant Khan.

The ALJ frequently declared that Khan had "testified credibly" in general, and he specifically so found with respect to his testimony about certain events surrounding this flight examination of Khan. The tester's testimony about these same events, the ALJ found, was "simply not credible." While the ALJ did not specifically resolve *other* material inconsistencies between Khan's testimony and that of Captains Brink and Barrett with respect to the next two paragraphs, the Commission chose to credit Khan's testimony over Barrett's where such deviations occurred but were not resolved by the ALJ.

Complainant testified that several aspects of the proficiency check were irregular. These include claims that: Captain Brink was gesticulating during taxi; that he performed a satisfactory stall in regular configuration because no particular configuration had been required prior to his being trained to proficiency on that maneuver; that the missed ILS approach was the result of Captain Brink disengaging the autopilot; and, that the missed VOR approach was the result of Captain Brink changing his teardrop VOR turn to a Parallel approach and giving him an inappropriately high starting approach altitude above that recommended on the VOR approach plate. . . .

ALJ's Finding of Fact No. 24 (internal citations omitted).

Mr. Khan's testimony is corroborated in several respects by the testimony of another minority flight officer, Captain Duncan. Note the similarities:

Captain Duncan testified credibly that he was given a recurrent check ride on November 27, 2001, which was unfair as far as he was concerned. . . . Captain Duncan claims that he performed the maneuvers well and that he had a lot of talk in the cockpit as he shot his approach. He claims further that Captain Brink, the check airman, gave him the approach plate 2-3 miles before the final approach fix. He was at too high an altitude, and when he went to do a missed approach go around, Captain Brink told him no, it's a busted checkride. Captain Brink claimed that Captain Duncan lost too much altitude during a stall requiring a train to proficiency and that he missed a slight transition in heading on a VOR requiring a train to proficiency, prior to the missed approach. . . . [Captain Barrett told him that if he wanted a "recheck," he would have to do it the next day.] Captain Duncan told him that afternoon that he did not feel comfortable with that arrangement and that he would resign. Captain Duncan's letter of resignation was e-mailed or faxed and stated that Captain Duncan was resigning under distress. Captain Duncan testified that the distress related to the fact that five or six pilots had just had busted check rides. Captain Duncan was in Atlanta where he resides when the calls came from Captain Barrett concerning rescheduling a recheck with the FAA in Northern Virginia for the next morning at 9:00 a.m.; and, Captain Barrett testified that he told Captain Duncan he would undergo retraining prior to the recheck . . . [so Captain Duncan resigned].

ALJ's Finding of No. 26 (internal citations omitted).

2. There are multiple bases for concluding that Colgan Air's assigned reasons for discharging Mr. Khan were pretextual.

In addition to the rather similar suspicious circumstances of the Complainant and the other minority's check rides, the Commission examined the treatment of other similarly situated Colgan Air pilots. The ALJ's Finding of Fact No. 25 describes this treatment:

Respondent identified all pilots who had failed proficiency checks in 2000 and 2001. Josk Musoke, an African-American male failed a proficiency check on December 6, 2000. He resigned and did not get retraining after failing. Greg Carlisle, a white male, failed a proficiency check on August 19, 2000. He was retrained. Jeffrey Byrd, a white male, failed a proficiency check on August 20, 2001. He was retrained. Julie Porter, a White female failed a proficiency test on October 30, 2001. She was not retrained. Michael Duncan, an African-American male, failed a proficiency check on November 27, 2001. He was not retrained and elected to resign. John Wohner, a White male, failed a proficiency check on December 1, 2001. He was retrained.

ALJ's Finding of Fact No. 25 (internal citations omitted).

This to say that, in all the comparable cases examined, the white men were retained, retrained and requalified, while the others were not even offered retraining. The Commission viewed this, when coupled with Appellant's employees' false testimony, as found by the ALJ, and when further coupled with Colgan Air's wilful ignorance concerning the tormentors' conduct, as highly suspicious and as likely indicia of pretext. The Commission did not, however, make an express finding in this regard, notwithstanding, we suggest, that the evidence supports such a conclusion.

VI. CONCLUSION

When all is said and done, this is not a close case under the law or facts. The victim is a member of several of the most vulnerable and maligned classes of Americans in this Great Nation today. He is a dark-skinned West Asian; he is Muslim; he is Pakistani.

The aviation industry is peppered with a fair portion of macho, swaggering, testosterone-laden "flyboys." However, unlike the roughnecks of our central oilfields and the ironworkers on

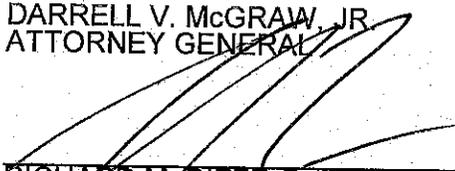
the 97th floor, airline pilots are better educated, more professional and we ought to be able to require more of them.

The protracted abuse to which this gentle soul was subjected leaves one feeling queasy. It is patently obvious that the perpetrators of the abuse were Rao Khan's flyboy supervisors; it is patently obvious that Lead Pilot Mayers, as liaison between the field and the home office, was there to squelch this mistreatment or report it up the chain of command to someone who could; it is patently obvious that "all the other flight crews" and "practically everyone" at Colgan Air knew what was going on.

Based on the evidence of record and the Commission's findings of fact, we respectfully urge the Court to affirm the Commission's Final Order.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Appellant,

v.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION and RAO ZAHID KHAN,

Appellees.

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Assistant Attorney General of the State of West Virginia, do hereby certify that the foregoing Brief of the Appellee West Virginia Human Rights Commission was served upon the following by depositing a true copy thereof in the United States mail, postage prepaid, on the 5th day of June, 2007, addressed as follows:

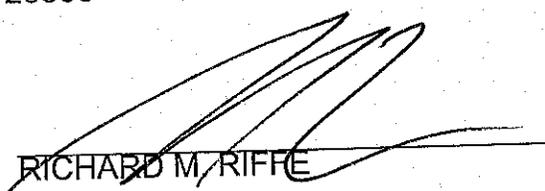
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