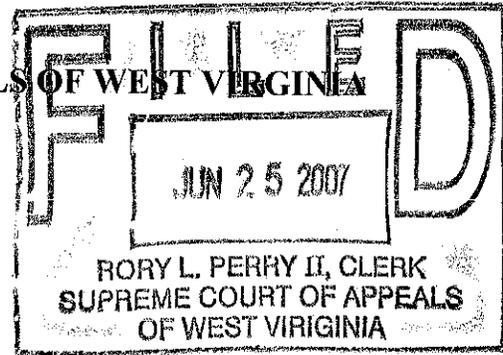


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Appellant,



v.

APPEAL NO.: 070285v
(West Virginia Human Rights
Commission Docket No.:
ERRELNOANCSREP-391-02)

WEST VIRGINIA HUMAN RIGHTS
COMMISSION; RAO ZAHID KHAN,

Appellees.

COLGAN AIR, INC.'S REPLY BRIEF

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I. INTRODUCTION

Colgan Air respectfully submits this reply to the appellate briefs of Appellees Rao Zahid Khan and the West Virginia Human Rights Commission ("the Commission"). Colgan Air received Khan's brief on June 8, 2007, and the Commission's brief on June 10, 2007.

In this appeal, Colgan Air seeks review and reversal of the Final Order of the West Virginia Human Rights Commission, which modified the Final Decision of Administrative Law Judge ("ALJ") Robert Wilson, who presided over the public hearing in this case on March 30 and 31, 2005.

In his Final Decision, the ALJ held:

The Complainant has not proven by a preponderance of the evidence that race, national origin, religion or gender discrimination motivated or played a role in the decision not to upgrade the Complainant to Captain or the decision to terminate his employment; or, that his termination was the result of retaliation for his complaints about discrimination. The undersigned finds that Complainant has not proven by a preponderance of the evidence that the hostile work environment is imputable to the Respondent employer because Respondent took reasonable steps to investigate and eliminate the harassment of Complainant once it became aware of the situation.

As the Complainant has failed to prove by a preponderance of the evidence that illegal discrimination or retaliation for reporting illegal discrimination was a motivating factor in the decision not to upgrade Complainant to Captain and the decision to terminate the Complainant (or that it would not have taken the respective action anyway in light of the failed FAA proficiency check ride), or that the Respondent's actions were insufficient to deter unwelcome abusive conduct by its non supervisory personnel, who created a discriminatory hostile work environment, the complaint in this matter must be dismissed.

(Final Decision of ALJ Robert Wilson, dated February 22, 2006, hereinafter referred to as "ALJ Final Decision," Conclusions of Law ¶s 5, 6).

Although the Commission's Final Order adopted the ALJ's Final Decision to a large extent, it specified the following modifications: (1) the Commission held that Colgan Air is liable for harassment because its "management officials at the Tri-States Airport failed to address

this harassment...until compelled to do so by...corporate management located at Manassas, Virginia;" and (2) the Commission ordered Colgan Air to reinstate and retrain Khan because it deemed Colgan Air's failure to offer retraining after the failed proficiency check discriminatory and determined that Colgan Air's legitimate, non-discriminatory reason for this employment action was "inconsistent."¹ (Final Order of West Virginia Human Rights Commission, dated December 22, 2006, hereinafter referred to as "Commission Final Order," pp. 1-3).

Colgan Air's opening brief squarely addressed the Commission's stated grounds for modification of the ALJ's decision and imposition of liability. Rather than address the concise issues presented to this Court on appeal, the Commission has chosen to purposefully convolute the record with extensive extraneous information and supposed "findings and conclusions" never set forth by the Commission in its Final Order.

Specifically, prior to Colgan Air's review of the appellate brief drafted by the Attorney General, Colgan Air had no notice or knowledge that the Commission had "found" that: (1) Colgan Air had knowledge of the discrimination because it was so pervasive that "everyone" at Colgan Air knew about it; (2) Colgan Air is strictly liable because the harassers were "supervisors;" (3) Colgan Air retaliated against Khan because he was not upgraded to the position of Captain; and (4) the FAA-mandated proficiency check was not administered in a fair manner and was a pretext for discrimination/retaliation. (Commission Appellate Brief, pp. 2-3).

Now, both Khan and the Commission, which, according to the Attorney General's brief, has apparently adopted Khan's position *in toto*, come before this Court and reargue every theory of recovery presented by Khan throughout the pendency of this litigation, even though the

¹ The Commission's order that Colgan Air rehire and retrain Khan raises significant aviation safety concerns. Moreover, as set forth in the amicus curiae brief filed in this matter by the Regional Airline Association, the Commission's order in this regard is preempted by the Airline Deregulation Act.

majority of those theories were dismissed by the ALJ, and, per the Commission's Final Order, the dismissals were affirmed by the Commission.

As set forth in more detail in section II (A) below, Colgan Air believes that the assertion in the Appellees' briefs of "findings and conclusions" that are absent from the record, and the Appellees' strategy to reargue Khan's entire case before this Court, are improper and hinder Appellant's right to meaningful appellate review. Notwithstanding this position, in the event that the Court decides to consider these new matters asserted by the Appellees, Colgan Air has responded as comprehensively as possible given that it does not have an actual legal ruling from the Commission on these additional issues.²

II. ARGUMENT

A. ANY AND ALL REFERENCES BY APPELLEES TO ALLEGED "FINDINGS AND CONCLUSIONS" OF THE COMMISSION THAT ARE NOT PRESENT IN THE RECORD AND OUTSIDE THE SCOPE OF APPEAL SHOULD BE STRICKEN

The Attorney General is clearly faced with a dilemma in defending the Commission's Final Order. In its Final Order, the Commission adopted the ALJ's Final Decision, but reversed the ultimate holding by imposing liability on Appellant as follows: (1) Colgan Air is liable for harassment because its "management officials at the Tri-States Airport failed to address this harassment...until compelled to do so by...corporate management located at Manassas, Virginia;" and (2) Colgan Air must reinstate and retrain Khan because Colgan Air's failure to offer retraining after the failed proficiency check was discrimination *and* Colgan Air's legitimate, non-discriminatory reason for this employment action was "inconsistent."

² In its appellate brief, the Commission has identified supposed findings and conclusions based on extensions of, and assumptions from, the language in the ALJ's decision. The Commission does not, however, cite any other portion of the record in support thereof. Thus, in order to clarify certain misstatements and inaccuracies in the Appellees' position, at times, Colgan Air will refer to the transcripts of witness testimony and the public hearing exhibits to present supplemental relevant details.

(Commission Final Order,” pp. 1-3).

However, now that this Court has accepted the matter for appellate review, the Attorney General, on behalf of the Commission, has chosen to cover the Commission’s decision to impose liability without any substantial legal reasoning, findings, or conclusions by pretending the Commission actually set forth detailed reasons for its decision and made numerous supplemental findings of fact and conclusions of law. These assertions are not supported by the record.

Under this Court’s rules, if an appellee “is of the opinion that there is error in the record to his prejudice, [he] may assign such error in a separate portion of his brief and set out authority and argument in support thereof.” W. Va. R. of Appellate Proc. 10(f). In addition, it has been the long standing position of this Court that portions of briefs “that have no relation to the merits of the case and is not justified by anything appearing in the record” should be stricken. Rush v. Brannon, 95 S.E. 521, 522 (W. Va. 1918). In the present matter, the Appellees have not asserted any cross-assignments of error pursuant to Rule 10(f), yet both Appellees’ briefs contain extraneous claims and arguments that the record clearly indicates are not at issue in these proceedings. As a result, Colgan Air respectfully requests that the Appellees’ briefs be stricken to the extent that they reference or argue supposed findings and conclusions of the Commission that are absent from the record, and not errors at issue in this appeal.

Specifically, the Attorney General has inserted unsupported and undocumented findings, conclusions and determinations in the body of the Commission’s appellate brief in an effort to confuse findings that were actually made by the ALJ, and per the record, adopted by the Commission, with factual findings that he wishes had been made by the Commission at the time it reviewed the ALJ’s decision. As a result, the Attorney General has confused what is an otherwise clear record.

A number of concise examples of this tactic are found in the "Introduction and Overview" portion of the Commission's appellate brief. For example, the Attorney General argues that the imposition of liability should be upheld because the Commission concluded that Colgan Air had knowledge of the discrimination because it was so pervasive that "everyone" at Colgan Air knew what the tormentors were doing to the victim..." (Commission Appellate Brief, pp. 2-3). This reasoning, however, is completely absent from the Commission's Final Order. Clearly, the Attorney General is attempting to supplement the Commission's Final Order with findings and conclusions that were not made and are not supported by the record.

Similarly, with respect to the issue of strict liability based on supervisor harassment, the Attorney General states "it is clear that the Commission recognized that the harassers were "supervisors" within the meaning of Hanlon." (Commission Appellate Brief, p. 2). The Attorney General also states that the "Commission concluded from the ALJ's factual findings...that the victim's tormentors (all three pilots) were also the victim's supervisors..., so that Colgan Air was strictly liable for their behavior." (Commission Appellate Brief, p. 3). Notably however, the Commission's Final Order does not even contain the word "supervisor." (Commission's Final Order, pp. 1-3).

Another example of this impermissible assertion of unrecorded findings and conclusions is found in the following passage:

[T]he Commission concluded from the facts found by the ALJ that Colgan Air engaged in unlawful retaliatory behavior...when it refused to promote, re-qualify or retrain Mr. Khan.

(Commission Appellate Brief, p. 3). Colgan Air can only speculate as to what Opinion the Attorney General is reading that contains these "conclusions." None of these conclusions are stated in the only opinion Colgan Air is aware of, the Commission's Final Decision.

The Attorney General clearly is aggrieved by the fact that the Commission did not make detailed findings of fact and conclusions of law. See e.g., Commission Appellate Brief, p. 2. The Attorney General, however, clearly recognizes that the additional findings of fact and conclusions of law, **that the record reveals were not made by the Commission**, are necessary to support the Commission's imposition of liability on Colgan Air, and thus, has incorporated them into the Commission's appellate brief. By introducing these supposed findings and conclusion which are absent from the record but were supposedly rendered by the Commission, the Attorney General essentially seeks to have this Court rule on the facts *de novo*, substitute its judgment for that of the ALJ, and issue additional and/or modified factual findings, witness credibility determinations, and conclusions of law regarding every legal theory presented by Khan in this matter.

Neither Appellee asserted any cross-assignments of error in these proceedings. Moreover, both Appellees significantly rely upon findings and conclusions absent from the record. For these reasons, to preserve the integrity of the appellate process and provide for meaningful appellate review, this Court should strike from the record any references to alleged findings and conclusions of the Commission that were not set forth in the Commission's Final Order, and are not errors at issue in this appeal.

B. THE COMMISSION ERRED IN DETERMINING THAT APPELLANT IS LIABLE TO KHAN FOR HARASSMENT³

The Commission erred as a matter of law in determining that Colgan Air is liable in damages to Khan for harassment because there is an insufficient factual basis for imputing the

³ Although Colgan Air asserts that the Commission's alleged findings and conclusions set forth in its appellate brief appear to have been rendered by the Attorney General and not the Commission, for ease of reference, this distinction is not asserted throughout the brief. For ease of reference, the additional findings and conclusions contained in the appellate brief drafted by the Attorney General are identified as the Commission's findings and conclusions.

hostile work environment to Colgan Air. The ALJ correctly determined that the discriminatory behavior perpetrated by its non-supervisory personnel cannot be factually imputed to Colgan Air because it promptly and effectively addressed the abusive conduct as soon as it learned of the behavior in June 2001, when Khan reported the harassment to management personnel in accordance with company policies and procedures. (ALJ Final Decision, pp. 24-26, 35). Moreover, the ALJ's determination in this regard is supported by substantial evidence on the whole record.

The West Virginia Human Rights Act does not impose automatic liability on employers simply on the basis that an employee has been subjected to harassment or discriminatory behavior. Rather, the law recognizes that such behavior cannot be attributed to an employer who was unaware of the situation, had no basis to know of the situation, and took swift remedial action when it learned of the discriminatory conduct. See Fairmont Specialty Services v. West Virginia Human Rights Comm'n, 522 S.E.2d 180, 189 (W. Va. 1999). Hence, for this reason, the law requires a harassment plaintiff to prove not only that the harassment was sufficiently severe or pervasive, but also that it was factually imputable to the employer. See id.

Colgan Air should not be punished for the actions of Khan's co-workers, which it promptly and effectively addressed, simply because Khan himself chose not to follow company procedures, and failed to report the abusive conduct to the proper persons until June 2001. Khan made the decision to discuss the harassment issue with his co-worker Dave Mayers, rather than with his immediate supervisor, Chief Pilot Mike Kelly, or Mary Finnigan. If Khan had simply followed company procedures and immediately reported the behavior to management the situation would have been promptly rectified, as was immediately done when Khan reported the conduct to Mary Finnigan.

1. The Commission erred because it determined that Colgan Air had knowledge of the hostile environment, findings which conflict with the ALJ's findings of fact and are unsupported by the evidence of record

In support of its erroneous decision to impute the hostile environment to Colgan Air and thus impose liability for harassment, the Commission's appellate brief claims that Colgan Air had knowledge of the abusive behavior because: (1) "[t]he 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,'" and (2) Lead Pilot Dave Mayers knowledge of the harassment was imputable to Colgan Air. (Commission Appellate Brief, pp. 2-3, 26-27).⁴ These findings directly conflict with the ALJ's findings of fact and are unsupported by the evidence of record

a. The Commission's finding 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 that conduct" conflicts with the ALJ's findings of fact, and is unsupported by the evidence of record

In its appellate brief, the Commission indicates that, pursuant to the standard set forth in Conrad v. ARA Szabo, 480 S.E.2d 801 (W. Va. 1996), it found that the abusive behavior 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." (Commission Appellate Brief, pp. 2-3, 26-27).

In response, Colgan Air initially notes that, pursuant to Conrad, the Commission's above-referenced finding that Colgan Air had knowledge of the misconduct is not a conclusion of law, as suggested by the Commission, but rather, a finding of fact. This is a significant distinction

⁴ It should be noted that knowledge of the hostile environment is only one aspect of the determination whether a hostile environment should be imputed to an employer as a matter of law. Another aspect of the inquiry is the effectiveness of the employer's remedial measures. See Fairmont Specialty Services v. West Virginia Human Rights Comm'n, 522 S.E.2d 180, 189 (W. Va. 1999)

because this finding of fact by the Commission directly and impermissibly conflicts with the ALJ's factual findings in this matter.

In Conrad v. ARA Szabo, 480 S.E.2d 801 (W. Va. 1996), this Court addressed a plaintiff-employee's appeal of the Circuit Court's order granting summary judgment to her employer with respect to her allegations of hostile environment sexual harassment. In determining that the lower court erred in granting summary judgment to the employer, this Court held:

[k]nowledge 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. **A jury could have found, from the evidence presented, that a reasonable employer would have been aware of the conduct in question. The issue of the employer's knowledge, either actual or imputed, is therefore a factual issue to be determined by the trier of fact.**

Id. at 812-13 (citations omitted).

Thus, under West Virginia law, in hostile environment cases, the issue of an employer's knowledge, either actual or imputed, is a factual issue to be determined by the trier of fact.

Conrad, 480 S.E.2d at 813. Both the Commission and this Court must give deference to the findings of fact of the ALJ. Fairmont Specialty Services, 522 S.E.2d at 184 (W. Va. 1991). A reviewing court is not entitled to reverse the finding of the trier of fact simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of fact. Id. While the Commission is not precluded from making additional findings, **it may not make findings that are in conflict with those reached by the ALJ.** Id.

As the trier of fact in this matter, the ALJ evaluated the evidence presented at the public hearing, including the credibility of the witnesses, and concluded that Colgan Air took "strong and decisive" remedial action once its management personnel became aware of Khan's situation. (ALJ Final Decision, pp. 24-26; 35). Specifically, the ALJ held:

[t]here is an insufficient factual basis for imputing the hostile and abusive work environment to the Respondent employer, **which took reasonable steps to know about any discriminatory conduct and reacted with strong and decisive measures to cease that conduct once its management personnel became aware of that conduct.**

(ALJ Final Decision, pp. 24-26). The ALJ's above-referenced language indicates that he found, as a matter of fact, that Colgan Air did not possess any knowledge of Khan's situation until June 2001, when he reported it to Colgan Air management, and the company promptly acted to address the behavior.⁵

In reviewing the decision of the ALJ, the Commission failed to give deference to the factual determinations of the ALJ, which, as set forth in Colgan Air's appellate brief, are supported by substantial evidence, and impermissibly substituted its own opinion regarding the weight of the evidence for that of the trier of fact. The ALJ found that Colgan Air did not have knowledge, actual or implied, until Khan reported the behavior to management in June 2001. The Commission clearly chose to disregard this finding, and now seeks to cloak its action from review by claiming these are legal conclusions.

This Court should not permit the Commission to completely disregard limitations on its standard of review and substitute its opinion for that of the trier of fact. The ALJ was in the best position to evaluate the evidence and credibility of witnesses with respect to the factual issue of employer knowledge, and his factual findings should have been granted the deference they are entitled to under West Virginia law.

⁵ The Commission's decision is even more puzzling because the Commission specifically recognized the factual findings made by the ALJ. "The ALJ concluded that Colgan Air management had been unaware of...mistreatment that had been inflicted on First Officer Khan...until the Complainant himself...reported his ordeal to the company vice-president...during June of 2001." (Commission Appellate Brief, p. 13).

Even if this were a legal finding the Commission might be empowered to make, it would still not withstand review by this Court because it is not supported by the record. Notably, the Commission mischaracterizes portions of the ALJ's factual findings to support its conflicting finding that knowledge of the abuse was "widespread" at Colgan Air and thus imputable to the employer.

Specifically, the Commission incorrectly states that the ALJ found 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," and then attempts to use this "finding" to impute liability to Colgan Air. (Commission Appellate Brief, pp. 26, 32). Essentially, the Commission is stating that the ALJ found that the pervasive nature of the harassment caused it to be known by "the other flight crews" and just about "everyone" at Colgan Air." As the record reveals, the ALJ never made this finding.

What the ALJ found was that Khan "was subjected to such severe and pervasive comments and conduct, that the Complainant's conditions of employment were altered compared to those of other employees not belonging to his protected classes." (ALJ Final Decision, pp. 22-23). The ALJ, as the trier of fact, never held that the misconduct was "so pervasive that 'the other flight crews' and just about 'everyone'" at Colgan Air knew about it.

Notably, the "other flight crews" and "everyone" language to which the Commission refers is included in a finding of fact of the ALJ which quotes the limited testimony of Pam Jarrell regarding her observations at the Huntington Tri States Airport facility.⁶ The Commission mischaracterizes this finding by indicating that the ALJ determined that "'the other flight crews'

⁶ Specifically, the relevant finding of fact, which the Commission mischaracterizes, states "Ms. Jarrell testified.....that "other flight crews" and just about "everyone" knew it was going on." (ALJ Final Decision, Finding of Fact #7).

and just about 'everyone' at **Colgan Air**' knew about the conduct. The ALJ never made such a finding, nor would it have been reasonable to do so based solely on the statement of Pam Jarrell, who was not a Colgan Air employee and was clearly not in a position to know whether anyone outside of the limited number of Colgan Air employees working at the Huntington Tri States Airport facility, none of whom were supervisors, knew about the conduct, let alone whether "everyone' at Colgan Air" knew about it.⁷

The record establishes that, contrary to the Commission's "findings," knowledge of the treatment Khan was subjected to was by no means "widespread" at Colgan Air. This is most evident from Khan's own statements on the issue. Specifically, when Khan met with Mary Finnigan in June 2001 to report the behavior of Terry Riley, he clearly stated that there were no witnesses to the discriminatory behavior because it occurred in the cockpit where only the two pilots were located. (ALJ Final Decision, Findings of Fact #s 9, 10; Transcript of Public Hearing on March 30, 2005, hereinafter referred to as "Tr. Vol. I," pp. 88-89).

It is clear that the ALJ found as a matter of fact that Colgan Air had no knowledge of the hostile environment until June 2001, and this finding is supported by substantial evidence on the whole record. As such, the Commission erred when it substituted its judgment for the trier of fact with respect to the factual issue of knowledge, and rendered the contrary and unsupported finding that knowledge of the abuse was widespread and thus imputable to Colgan Air.

⁷ Contrary to the Commission's assertions, Pam Jarrell is not, and never was, a Colgan Air employee, nor does the ALJ's decision state that she was. Ms. Jarrell was a customer service agent employed by Alleghany Airlines, which performed ground handling functions at the Huntington Tri States Airport facility. As an Alleghany Airlines customer service agent, Pam Jarrell came into contact with some Colgan Air employees working at the Huntington Crew Base. Notably, there was another airline, CC Air, also operating from this base. (Khan Appellate Brief, p. 12; Tr. Vol. I, pp. 177-78).

- b. The Commission's finding that Lead Pilot Dave Mayers was a supervisor with knowledge of the harassment which is imputable to Colgan Air conflicts with the ALJ's findings of fact, and is unsupported by the evidence of record**

The ALJ specifically found that Lead Pilot Dave Mayers was not a supervisor or manager, had no authority to discipline the harassers, and never discussed Khan's concerns with any Colgan Air management personnel, and these findings are supported by substantial evidence on the whole record. (ALJ Final Decision, Findings of Fact #s 8, 28, pp. 24). The Commission's determination that Mayers was Khan's supervisor and possessed knowledge of the harassment which is imputable to Colgan Air conflicts with the ALJ's findings of fact, and is unsupported by the evidence of record in this matter.

The Commission distorts the facts in this case in order to support its conflicting and unsupported finding that Dave Mayers was a Colgan Air supervisor and had knowledge of the behavior which can be imputed to Colgan Air. Specifically, the Commission relies on the following points to support its assertions regarding Mayers: (1) Khan and other co-workers reported the mistreatment to Dave Mayers; (2) Mayers exercised "supervisory authority" on behalf of Colgan Air when he chided the harassers for their behavior; and (3) Mayers was a "liaison." (Commission Appellate Brief, p. 3). These supposed findings clearly do not support the determination that Mayers was a supervisor and manager or that his "knowledge" was imputable to Colgan Air.

Based on the substantial testimony and documentary evidence introduced at the public hearing of the matter, the ALJ concluded that "the Lead Pilot is not a supervisory position." (ALJ Final Decision, Finding of Fact # 28). This factual finding is supported by extensive testimony from Colgan Air Director of Flight Standards Jeb Barrett and documentary evidence.

Specifically, the fact that Lead Pilot is not a supervisory position is clearly set forth in the Colgan Air Flight Operations Policies and Procedures Manual, which is issued to every pilot who joins the company, including Khan, and is approved and mandated by the FAA. Moreover, the flight operations chain of command, upon which the Commission places significant emphasis, does not even list the "Lead Pilot" position. (Transcript of Public Hearing on March 31, 2005, hereinafter referred to as "Tr. Vol. II," pp. 101-103). Lead Pilot David Mayers had no management responsibilities at the Huntington crew base. (ALJ Final Decision, Finding of Fact # 17).

This Court has held that a reviewing court is not entitled to reverse the finding of the trier of fact simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of fact. Fairmont Specialty Services, 522 S.E.2d at 184. The Commission may make additional findings that are not in conflict with those reached by the ALJ. Id.

The Commission's determination that Dave Mayers was a supervisor is clear error because it disregards Judge Wilson's findings of fact and the substantial supporting evidence that there was no Colgan Air management personnel in Huntington. The Commission is not entitled to reverse the ALJ's factual findings simply because it may have weighed the evidence differently if it had been the finder of fact.

In support of its finding that Dave Mayers was a supervisor, the Commission emphasizes that Lead Pilot is a "liaison" and thus, "would surely be duty-bound to relay...discrimination complaints from three different subordinates on up the chain of command." (Commission Appellate Brief, p. 13). However, the Commission does not cite any information in the record supporting this notion that Mayers, as Lead Pilot, had a duty to report complaints "up the chain of command." Specifically, the ALJ's findings of fact indicate that Lead Pilot is "an

administrative position” and further, that the Chief Pilot stationed in Manassas, Virginia, and not Mayers, “has actual supervisory authority over the pilots.” (ALJ Final Decision, Finding of Fact # 8).

Additionally, Appellees’ falsely assert that Dave Mayers was “the highest ranking person at the Huntington work site.” (Khan’s Appellate Brief, p. 35). There is nothing in the ALJ’s findings, or the evidence of record to support such a notion. In fact, specific testimony from Colgan Air’s Vice President of Administration Mary Finnigan, who is clearly in a position to know the management structure of the company, directly refutes this assertion. Specifically, Mrs. Finnigan testified as follows:

Q. Was there anyone else at the Huntington office that was over Mr. Mayers? Dave Mayers?

A. No. And **Mr. Mayers wasn’t over anybody at the Huntington office.**

(Tr. Vol. I, p. 54).

Moreover, Mayers own testimony regarding his understanding of his role as Lead Pilot reveals that he was not a member of management and was not a supervisor. Specifically, Mayers testified that:

Q. Were you part of management?

A. Oh, heck no. I wasn’t paid to be a manager.

Q. Is the—was the position at that time of lead captain described in the flight operations manual?

A. Absolutely.

Q. And did it indicate in there that the lead captain was not part of management?

A. It said it’s not a supervisory position in the FOPP.

Q. ---and the FOPP’s what? The Flight Operations Policy and Procedures Manual?

A. Correct.

Q. And is that something that every pilot and first officer got?

A. Yes.

(Tr. Vol. II, pp. 19-20).

The Commission further suggests that because Khan and Pam Jarrell chose to discuss the abusive behavior with Mayers, and because Mayers spoke with the harassers in response, he exercised supervisory authority. This is a nonsensical assertion.

With respect to the supposed complaints made to Dave Mayers, the Commission's assertion that "numerous reports relayed up the chain of command were utterly ineffectual" and "at least three employees had reported First Officer Khan's mistreatment to their Lead Pilot, David Mayers" are inaccurate and misleading. As stated previously, Pam Jarrell, one of the "employees," referred to by the Commission, who discussed the abusive behavior, was not even a Colgan Air employee, and moreover, her decision to discuss her observations with Dave Mayers is irrelevant to the issue of whether Mayers was a Colgan Air supervisor with management authority. Similarly, simply because Khan felt comfortable speaking with Mayers, and thus chose to discuss his concerns with him, does not render Mayers a supervisor. Lastly, although the Commission repeatedly cites to the ALJ's findings regarding Michael Duncan's testimony that "Captain Duncan also testified credibly that Dave Myers (sic) was aware of what he called problems between Complainant and Captain Riley" it purposefully excludes the language in the cited finding indicating that Captain Mayers never used the word discrimination. (Commission Appellate Brief, p. 9). Specifically, what the ALJ found was that:

Captain Duncan also testified credibly that Dave Myers (sic) was aware of what he called problems between Complainant and Captain Riley (**although Captain Mayers did not use the word discrimination**)

(ALJ Final Decision, Finding of Fact # 7).

The facts establish that Khan received Colgan Air's anti-harassment training, and was clearly informed that harassment complaints should be reported to his immediate supervisor, who in this case is the Chief Pilot, or Mary Finnigan. (Colgan Air Employee Harassment Policy

& Training Acknowledgement, signed by Rao Khan, Colgan Air's Public Hearing Exhibit 3). Khan was also issued a copy of the Colgan Air Flight Policies and Procedures Manual ("FOPP"), which clearly indicates that Lead Pilot is not a supervisory position, and further states that pilots are supervised by the Chief Pilot. (Tr. Vol. II, pp. 101-03). It is absurd to suggest that Khan had knowledge of the Flight Operations Chain of Command set forth in the FOPP, but not the other provisions in the same document specifically informing him that as a first officer, his immediate supervisor is the Chief Pilot, and that the Lead Pilot is not a supervisory position.

Furthermore, the fact that Dave Mayers spoke to the harassers about their treatment of Khan does not render him a supervisor, nor does it indicate that he exercised supervisory authority. Under the Commission's logic, it appears that simply speaking to a co-worker about that individual's treatment of another co-worker somehow equates to official supervisory authority. Such a proposition defies common sense.

Contrary to the assertions of the Appellees, the record clearly establishes that Mayers had no authority to discipline the harassers and never reported the behavior to management. Mayers decision to approach the harassers was motivated by his friendship with Khan, not by some grant of authority from the company. Mayers testimony on this issue further clarifies these points:

- Q. Did you ever feel it incumbent upon you to contact any member of the administration....
- A. No. I contacted Terry Riley.
- Q. Can I finish---let me finish the question. To conduct an investigation into what was going on?
- A. No. I contacted Terry Riley.
- Q. Okay. Did you have any authority to discipline Terry Riley?
- A. No, I didn't. I was doing that on an honorary basis, basically because I liked Rao Khan and I didn't like what Terry Riley was doing.

(Tr. Vol. II, pp. 33).

- Q. But you never called Manassas to report him, did you?

A. No, I didn't. Because that wasn't my job—job description.

(Tr. Vol. II, pp. 34).

A.As a matter of fact, I consider Rao a friend.⁸ He liked flying with me at the time. He even told my wife, who was my girlfriend at the time, that he loved flying with me because I tried to help him out and I didn't treat him like anybody else. That I treated him very well.

(Tr. Vol. II, p. 26).

Lastly, the Commission suggests that:

Given the adamancy of Colgan Air's Chain of Command policy...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...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.

(Commission Appellate Brief, p. 12).⁹ Notably however, the Commission fails to mention the fact that Lead Pilot **is not in the chain of command**. Moreover, as is further clarified below, the Flight Operations Chain of Command only applies **on the aircraft when crews are out on a trip**. Specifically, the ALJ found:

[Captain Barrett] 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**. Lead Pilot is not a supervisory position.

(ALJ Final Decision, Finding of Fact # 28). Nothing in this chain of command policy for flight operations supports the notion that Lead Pilot Dave Mayers was a supervisor or manager.

⁸ Mayers statement that Khan and he were friends is corroborated by Khan's own testimony, which references an occasion where Mayers called Khan and asked him to go out to eat dinner with him. (Tr. Vol. I, pp. 265-267).

⁹ This is yet another example of the Attorney General attempting to add findings that were not actually made by the Commission. The Commission's Final Order made no mention of the propriety or efficacy of Colgan's anti-harassment training.

As is clear from the ALJ's findings, and the evidence of record, Lead Pilot Dave Mayers was not in a supervisory position, and never relayed any of Khan's concerns to management personnel. Hence, there is no basis to factually impute the hostile environment to Colgan Air based on any knowledge Captain Mayers may have had regarding Khan's situation.

2. The Commission erred because the ALJ's finding that Colgan Air management first learned of the discriminatory behavior in June 2001 is supported by substantial evidence on the whole record

The ALJ's factual determination that Colgan Air had no knowledge of the discriminatory behavior prior to Khan's meeting with Mary Finnigan in June 2001 is supported by substantial evidence on the whole record, including the facts that: (1) prior to June 2001, the offensive behavior was never reported to or observed by Khan's immediate supervisor Chief Pilot Mike Kelly, Mary Finnigan, or any other Colgan Air management personnel; and (2) the abusive behavior took place at Colgan Air's Huntington Tri States Airport facility and in the cockpit where the two pilots are located, and Khan did not present sufficient evidence to support the finding that knowledge of the conduct was widespread at Colgan Air, or even known to any Colgan Air employees outside the Huntington crew base.

In support of the suggestion that the hostile environment can be factually imputed to Colgan Air, Appellee Khan asserts as a "fact" that Pam Jarrell reported the discrimination to Mary Finnigan in March/April 2001. In introducing this information, Khan argues that because the ALJ noted that Pam Jarrell "testified credibly" with respect to one portion of her testimony, all aspects of Ms. Jarrell's testimony must be credible and accepted as definitive. This is an untenable notion.

Under West Virginia law, the credibility of the witnesses is for the hearing examiner to determine. Fairmont Specialty Services, 522 S.E.2d 180, 184 (W. Va. 1999). Moreover, this

Court has recognized on numerous occasions that the hearing examiner is in the best position to make credibility determinations. Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Comm'n, 527 S.E.2d 155,159 (W. Va. 1999); Westmoreland Coal Co. v. West Virginia Human Rights Comm'n, 382 S.E.2d 562, 567 n. 6 (W. Va. 1989); see also GMC v. Smith, 602 S.E.2d 520, 531, n. 13 (noting that an ALJ who has heard the evidence and seen the witnesses in person is in the best position to judge the credibility of both).

In the present matter, in his Final Decision, the ALJ noted “[t]o the extent that the testimony of the various witnesses is not in accord with the findings stated herein, **it is not credited.**” Since the ALJ specifically found that Colgan Air “took reasonable steps to know about any discriminatory conduct and reacted with strong and decisive measures to cease that conduct once its management personnel became aware of that conduct,” clearly he did not credit Ms. Jarrell’s allegation that she complained to Mary Finnigan prior to June 2001. (ALJ Final Decision, pp. 24-26).

Rather, the ALJ clearly credited Mrs. Finnigan’s testimony, wherein she stated that she had only one conversation with Ms. Jarrell, and this occurred in early July 2001 in relation to the cartoon that was posted on the Huntington facility’s bulletin board. Ms. Jarrell never spoke with Mrs. Finnigan on any occasion other than in early July 2001. (“Tr. Vol. II,” pp. 202-03). This conclusion is further supported by documentary evidence in this case. As required by company policy, Mrs. Finnigan kept notes of her communications and activities in relation to Khan’s harassment complaints. These notes document in detail the facts surrounding the harassment complaint and the subsequent events that occurred up to and including the termination of Riley and Hueston, and the notes reveal that Mrs. Finnigan first learned of the harassment in June

2001. (Portion of Mary Finnigan's Notes of Khan Discrimination Investigation, Khan's Public Hearing Exhibit 6).

Where the ALJ determined that Ms. Jarrell's testimony was credible, he included it in his decision. It is nonsensical to suggest that, simply because the ALJ determined that one portion of Ms. Jarrell's testimony was credible, he deemed her entire testimony credible. As the hearing examiner, the ALJ was in the best position to observe the demeanor of the witnesses throughout the public hearing, and adjudge their credibility accordingly. The ALJ did not consider Ms. Jarrell's testimony on this point credible; thus, **he excluded any reference to this information in his decision and concluded that the company learned of the conduct in June 2001.** This Court should give deference to the witness credibility determinations made by the ALJ.

3. The ALJ correctly concluded as a matter of law that Colgan Air is not liable to Khan for harassment

As set forth in more detail in Colgan Air's appellate brief, the ALJ correctly determined that Colgan Air is not liable to Khan under the West Virginia Human Rights Act ("WVHRA") because it has strict rules prohibiting discrimination, and in conformity with company policy, it promptly, adequately, and successfully responded to Khan's complaint. As soon as Colgan Air management was informed of the situation, decisive action was taken, and the perpetrators' employment with the company was terminated. After the harassers left Colgan Air, the discriminatory behavior stopped. The subject conduct cannot be factually imputed to Colgan Air. Colgan Air should not be punished for the actions of these offending individuals because it did not tolerate their behavior and took swift action to rectify the situation.

Notably, the Commission's Final Order states "[t]o the Respondent's credit, once the report of harassment was made to the Respondent's management officials in Manassas, **the**

Respondent did act to stop the harassment.” However now, based on the Commission’s appellate brief, and notwithstanding this statement, the Attorney General claims that the Commission “found” that Colgan Air’s response to Khan’s complaints was insufficient.

Specifically, the Appellee’s brief states:

In June of 2001,....[Khan] finally got some action when he traveled to Virginia and complained to the Vice President. She caused Lead Pilot [Chief Pilot] Mike Kelley to summon his buddy Captain Riley to Manassas, reprimand him and warn against continuing abuse. **They didn’t bother to counsel Galbraith or Hueston.”**

(Commission Appellate Brief, p. 21). In response to this attack, Colgan Air will simply note for the Court that Khan never complained about the behavior of any individual other than Terry Riley during his meeting with Colgan Air, and also stated that there were no witnesses to the conduct. (ALJ Final Decision, Findings of Fact #s 9, 10; Tr. Vol. I, pp. 88-89). Had Khan given any indication to management that Galbraith or Hueston were also perpetrating offensive conduct, remedial measures would have been taken, as they were against Riley after Khan complained to Mrs. Finnigan, and against Hueston, when Colgan Air management learned of the offensive cartoon. The Commission’s above-referenced statement is an unwarranted attack on Colgan Air’s prompt and effective actions to address the harassment.

The Commission also mounts new attacks on Colgan Air’s remedial measures as follows:

The ALJ noted that Colgan Air gave Captains Riley and Hueston 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.

(Commission Appellate Brief, pp. 22). Once again, the Appellee’s brief gravely mischaracterizes the ALJ’s findings and the evidence of record in an effort to justify its erroneous imposition of liability on Colgan Air. What the ALJ actually found was:

Although the resignations were forced, it is important to note that the reasons for

the forced resignations, which were harassment, discrimination, and a death threat, would not be required to be disclosed to future prospective employers under the federal Pilots Records Improvement Act.

(ALJ Final Decision, Finding of Fact #13). The ALJ never found that, if Colgan Air had “fired” the harassers rather than forcing their resignations, “the federal Pilots Records Improvement Act would have required memorialization of their misconduct for future prospective employers’ perusal.” Nor would the ALJ have made this determination considering it is **clearly wrong as a matter of law.**

The Pilot Record Improvement Act only requires disclosure of information pertaining to an individual’s piloting skills. Contrary to the Commission’s assertion, regardless of whether the harassers were terminated or forced to resign, the Pilot Records Improvement Act **would not “have required memorialization of their misconduct for future prospective employers’ perusal.”** 49 U.S.C. § 44703(h) (2007). This fact is clearly evidenced in the record of this case and was explained by Mary Finnigan as follows:

- Q. Because termination could be devastating to a prospective pilot, is that correct?
- A. It depends on the reason for the termination. Rao was terminated from his company and we hired him.
- Q. So it depends on the reason?
- A. Well, would depend---certainly, it would depend on the reasons.
- Q. The reason being discrimination and harassment, that would probably be a deterrent to future employment.
- A. **No, sir, that’s not covered under the Pilot Records Improvement Act. What’s covered under the Pilot Records Improvement Act has to deal with proficiency. Have you ever failed a check ride, that sort of thing. It has nothing to do with whether you were involved in a harassment discrimination. It’s not covered under the law.**
- Q. **So if you were considering, seeing that you have the authority to hire for your company, if you were considering a prospective pilot, first officer or captain, and you had information that that person had been terminated for racial/religious discrimination from their prior employment, that wouldn’t weigh in your decision at all?**
- A. **We wouldn’t have that information, sir. That’s not provided to us under the Pilot Records Improvement Act.**

(Tr. Vol. I, pp. 109-110).

The record clearly establishes that Colgan Air took prompt and effective remedial action to address Khan's harassment complaints as soon as it learned of the discriminatory behavior. After Colgan Air addressed the matter, and the perpetrators left the company, Khan himself admitted he was no longer subjected to any further discriminatory behavior. Hence, this Court should conclude that Colgan Air is not liable to harassment as a matter of law.

4. The Commission erred in determining that Colgan Air is strictly liable because the harassers were supervisors

The Commission erred in determining that Colgan Air is strictly liable on the basis that the harassers were supervisors. As the evidence of record reveals, the suggestion that the harassers were supervisors is fatally flawed because these individuals do not fall within the definition of "supervisor" for purposes of imputing discrimination liability to an employer.

A co-worker with superior rank but only minimal authority over an allegedly harassed plaintiff is not a "supervisor" for purposes of imputing liability to an employer. Mikels v. City of Durham, N.C., 183 F.3d 323, 333 (4th Cir. 1999).¹⁰ If such an individual has no power to take tangible employment actions against the plaintiff, **and only has authority to occasionally direct operational conduct, the individual is not a supervisor.** See Mikels v. City of Durham, N.C., 183 F.3d 323 (4th Cir. 1999) (holding that a corporal was not the supervisor of a private-level squad member for Title VII purposes); see also Durkin v. City of Chicago, 199 F. Supp. 2d 836 (N.D. Ill. 2002) (holding that the fact that one police officer

¹⁰ The evidentiary standards for suits brought pursuant to the WVHRA are identical to those applicable to claims asserted under the anti-employment discrimination provisions of the Act's federal counterpart, Title VII of the Civil Rights Act of 1964. W. Va. Code Ann. § 5-11-1(2005); Heneger v. Sears, Roebuck & Co., 965 F. Supp. 833, 835-36 (N.D. W. Va. 1997); Heston v. Marion County Parks and Recreation Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989).

outranks another does not establish a supervisory relationship that would support imposing vicarious liability in a Title VII hostile work environment claim).

In support of their assertion that the harassers were supervisors, the Appellees repeatedly cite to the legal principle that “the essence of supervisory status is the authority to affect the terms and conditions of the victim’s employment.” Parkins v. Civil Constructors, 163 F.3d 1027, 1034 (7th Cir. 1998). The Appellees then suggest that the harassers “affected the terms and conditions of Khan’s employment by keeping him from requalifying when they filed false reports as his supervisors.” (Commission Appellate Brief, p. 6). However, the Appellees conveniently exclude from their briefs any reference to the language immediately following the above legal principle, that this authority to affect the terms and conditions of the victim’s employment primarily **consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.** Parkins, 163 F.3d at 1034; Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002); Bray v. City of Chicago, No. 01 C 7770, 2002 U.S. Dist. LEXIS 20889, at *17 (N.D. Ill. October 30, 2002). **Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes of imputing liability to the employer.** Parkins, 163 F.3d at 1034. **The mere fact that an employer authorizes one employee to oversee aspects of another employee’s job performance does not establish a supervisory relationship.** Bray, 2002 U.S. Dist. LEXIS at *18. Moreover, courts have distinguished between low-level supervisors, who are equivalent to co-employees for purposes of Title VII, and true supervisors whose authority and power is sufficient to make consequential employment decisions affecting the subordinate, such that the supervisor was effectively acting on the employer’s behalf. Parkins, 163 F.3d at 1033.

The ALJ correctly determined that the perpetrators of the discriminatory behavior at the Huntington Crew Base were not supervisors, and thus, their discriminatory behavior cannot be imputed to Colgan Air. None of these individuals had any authority to hire, fire, demote, promote, or take any other tangible employment actions against Khan. (Tr. Vol. I, p. 76). As set forth in the Colgan Air Flight Operations Policies and Procedures Manual, their designation as captains simply meant that they maintained responsibility for the safe operation of the aircraft and command of the crew during flight.¹¹ (ALJ Final Decision, Finding of Fact # 28; Tr. Vol. I, p. 42). These responsibilities cannot be equated with the significant authority to hire, fire, or discipline employees within a company. In fact, they had no authority to do any of these things. (Tr. Vol. I, p. 76). Rather, this was a situation where one employee simply oversaw the job performance of a co-worker on limited occasions.

Moreover, Khan's citation to Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) is erroneous and misleading. The Court should note that this precedent does not set forth the standard for determining whether an individual is a supervisor such that an employer can be vicariously liable for his/her behavior, **nor does it define a supervisor as someone with immediate or successively higher authority over an employee, as suggested by Khan.** Rather, these cases discuss an employer's vicarious liability for the acts of a supervisor, and affirmative defenses available to employers in such circumstances. See Burlington Industries, Inc. 524 U.S. at 765; Faragher, 524 U.S. at 807.

As discussed above, extensive Title VII precedent establishes that a "supervisor" is an individual with the authority or power to hire, fire, demote, promote, transfer, or discipline an employee. The contention that the harassers "affected the terms and conditions of Khan's

¹¹ Ryan Hueston was demoted from the position of captain to first officer shortly before he drafted the discriminatory cartoon and was forced to resign. (Tr. Vol. I, pp. 99-100).

employment by keeping him from requalifying when they filed false reports,” which the Court should note is unsupported by the evidence of record, does not render them supervisors for purposes of imputing hostile environment liability.

Appellees’ additional suggestion that the harassers are supervisors because the Flight Operations Chain of Command indicates that “crews in the field are responsible to the Captain” is also erroneous. The Chain of Command upon which Appellees place extreme emphasis simply highlights the principle that a captain is responsible for the safe operation of the aircraft. Hence, all crewmembers, including pilots and flight attendants, are responsible to the captain **during flight**. The Commission attempts to conceal this fact by suggesting “The Chain of Command policy applies **when in the field, not just while on a trip**.” (Commission Appellate Brief, p. 10). This statement is simply incorrect. A reading of the ALJ’s findings regarding the Chain of Command indicate:

[Colgan Air Director of Flight Standards] 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 should be addressed to the Chief Pilot.

(ALJ Final Decision, Finding of Fact #28). Such minimal and limited authority cannot be used to raise a co-worker to the level of supervisor for purposes of strict liability. The mere fact that an employer authorizes one employee to oversee aspects of another employee’s job performance does not establish a supervisory relationship. Bray, 2002 U.S. Dist. LEXIS at *18.

Thus, there is clearly no legal basis for the assertion that the perpetrators of the discriminatory behavior at the Huntington Crew Base were supervisors and Colgan Air is not strictly liable.

C. THE COMMISSION ERRED IN DETERMINING THAT COLGAN AIR DISCRIMINATED/RETALIATED AGAINST KHAN BECAUSE HE WAS NOT UPGRADED TO CAPTAIN

The Commission erred in determining that Colgan Air discriminated or retaliated against Khan because he was not upgraded to captain. The facts clearly establish that the decision not to upgrade Khan had no relation to his race, religion, national origin, ancestry or complaint of harassment. The record clearly establishes that Khan was not upgraded because he did not exhibit the flight skills necessary to be pilot-in-command of a passenger flight.

In order to establish a prima facie case of employment discrimination, the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; and (3) **but for the plaintiff's protected status, the adverse decision would not have been made.** Heston v. Marion County Parks and Recreation Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989).

Colgan Air employs and upgrades pilots that possess appropriate flight skills which will enable them to safely operate aircraft. (ALJ Final Decision, p. 29). It is paramount that Colgan Air's pilots possess such qualifications because the alternative could lead to a devastating catastrophe. During flight, Colgan Air pilots are responsible for the safety of each and every passenger onboard the aircraft. Colgan Air would be an irresponsible and reckless employer, and in violation of FAA regulations, if it did not ensure that its pilots possess the necessary qualifications and expertise to operate passenger flights.

Khan was not upgraded to captain because he did not exhibit the skills necessary to be a pilot-in-command of a passenger flight. (ALJ Final Decision, p. 28). The decision to upgrade a pilot is not an automatic process based on the amount of time an individual has worked with Colgan Air, as Khan suggests. Rather, the upgrade determination depends on numerous factors,

including the experience, qualifications, performance, and leadership skills of the pilot. (ALJ Final Decision, p. 29; Tr. Vol. II, p. 150). Khan did not possess the skills necessary to become a captain, and thus was not upgraded.

Khan claims that Colgan Air discriminated against him because various individuals who were less senior to him were upgraded but he was not. (Khan Appellate Brief, pp. 25, 40). However, Khan's own testimony during the public hearing establishes that this is untrue and inaccurate. James Lowell, Dave Vonkrebs, and James Duviare were not promoted to captain. (Tr. Vol. II, pp. 83, 85-88).

Notably, Khan makes this allegation even though he possesses no knowledge or evidence of the skill level, performance, or qualifications of the individuals who were promoted to captain and whether those factors were identical to his own. (Tr. Vol. II, pp. 51-55, 89-91). Rather, Khan only focuses on the fact that those individuals were hired after him and were not Muslim men from Pakistan. This is not a sound comparison. As stated above, numerous factors are evaluated when determining whether an individual should be upgraded; **seniority is not the only factor**. Moreover, there were other non-Pakistani, non-Muslim pilots employed at Colgan Air who did not upgrade within 14 months, the total amount of time that Khan was employed at Colgan Air. For example, Gregory Carlisle upgraded to captain approximately 17 months after he was hired on April 26, 1999. (Tr. Vol. II, pp. 51-53). The pilots who were upgraded exhibited the proficiency, capabilities, leadership skills, and professionalism necessary to be pilots-in-command. Khan did not.

In support of its conclusion that Colgan Air discriminated/retaliated against Khan, the Commission once again distorts the ALJ's factual findings, and states: "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.” (Commission Appellate Brief, p. 17). This is a mischaracterization of the ALJ's findings. The ALJ never made any such finding. Rather, the ALJ, while describing Khan's complaints to Mary Finnigan in June 2001, simply relayed **Khan's own concerns** about upgrading. Specifically, the ALJ stated “Complainant's concerns centered around discriminatory issues and his concerns about not getting upgrade to Captain, because Captain Riley felt he wasn't ready and was ‘behind the aircraft.’” (ALJ Final Decision, Finding of Fact #10). Contrary to the assertions of the Commission, there is nothing in the ALJ's findings to support the notion that Khan was not upgraded because of Riley.

The Commission similarly misstates the evidence by indicating that Colgan Air allowed “Riley to test Khan's flight skills” after it had a disciplinary meeting with Riley and issued a written reprimand. (Commission Appellate Brief, p. 17). This is simply not true. There is no evidence in the record suggesting that Riley tested Khan's flight skills as suggested by the Commission.

Colgan Air's employment decision not to upgrade Khan to captain was based on an evaluation of his skills as a pilot and leader. There is absolutely no evidence supporting the notion that Colgan Air's actions were based on illegal or discriminatory motives. **Moreover, there is evidence indicating that Khan's skills as a pilot were deficient.** Specifically, according to the Pilot Records Improvement Act information provided by American Eagle on August 18, 2000, during the past five years, Khan had failed to complete an initial upgrade or transition-training course under FAR Part 121 or 135. (ALJ Final Decision, Finding of Fact #15; Khan's Pilot Records Improvement Act Information, Colgan Air's Public Hearing Exhibit 5). Moreover, Khan was terminated by American Eagle Airlines during training, after only two

months of employment, due to deficiencies in his flight skills, including problems with approaches and landings. (Colgan Air's Public Hearing Exhibit 5).

The ALJ noted Khan's piloting deficiencies as described by Dave Mayers. Specifically, the ALJ states:

Lead Pilot, Captain Mayers, liked Complainant and had a chance to fly with him on several occasions. Captain Mayers felt that he was at best an average pilot, at worst, unsafe. He felt that he had to instruct him a lot while they were flying.

(ALJ Final Decision, Finding of Fact #15).

Appellees' assertions that Colgan Air discriminated against Khan by not upgrading him to captain are unsupported by the record in this case. It is clear from the record that Colgan Air's decision not to upgrade Khan was not based on illegal discrimination and/or retaliation.

D. THE COMMISSION ERRED IN DETERMINING THAT COLGAN AIR DISCRIMINATED/RETALIATED AGAINST KHAN WHEN HE FAILED HIS FAA-MANDATED PROFICIENCY CHECK

The Commission erred in determining that Colgan Air discriminated or retaliated against Khan when he failed his FAA-mandated proficiency check. The ALJ's findings and the evidence of record in this matter clearly establish that Khan failed his proficiency check because he failed to accurately perform three required maneuvers.

According to its appellate brief, the Commission determined that Colgan Air discriminated against Khan in relation to his proficiency check because: (1) "every reason Colgan Air assigned for not requalifying Mr. Khan as a Copilot came..from one of his three principle tormentors;" and (2) it determined that Colgan Air Director of Flight Standards Jeb Barrett's entire testimony regarding the proficiency check lacked credibility and Khan's entire testimony was credible. There is nothing in the record to support these improper

assertions.¹²

In order to establish a prima facie case of employment discrimination, the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; and (3) **but for the plaintiff's protected status, the adverse decision would not have been made.** Heston v. Marion County Parks and Recreation Comm'n, 381 S.E.2d 253, 256 (W. Va. 1989).

Under West Virginia law, the credibility of the witnesses is for the hearing examiner to determine. Fairmont Specialty Services, 522 S.E.2d 180, 184 (W. Va. 1999). Moreover, this Court has recognized on numerous occasions that the hearing examiner is in the best position to make credibility determinations. Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Comm'n, 527 S.E.2d 155,159 (W. Va. 1999); Westmoreland Coal Co. v. West Virginia Human Rights Comm'n, 382 S.E.2d 562, 567 n. 6 (W. Va. 1989); see also GMC v. Smith, 602 S.E.2d 520, 531, n. 13 (noting that an ALJ who has heard the evidence and seen the witnesses in person is in the best position to judge the credibility of both).

Colgan Air's operations are regulated by the FAA, and are required to be conducted consistent with the Federal Aviation Regulations ("FARs"). 14 C.F.R. §119.1 (2007); 14 C.F.R. § 121.1 (2007). The FARs require Colgan Air first officers to pass proficiency checks every 12 months in order to engage in revenue flying. 14 C.F.R. § 121.441 (2007). Pursuant to these regulations, every first officer at Colgan Air is given a proficiency test every 12 months. (ALJ Final Decision, Finding of Fact #16).

On October 30, 2001, Khan underwent an FAA-mandated, previously scheduled, proficiency check pursuant to FAR 121.441. (ALJ Final Decision, Finding of Fact #16; Excerpt

¹² Once again, these are "findings" that are conspicuously absent from the Commission's Final Order.

from Colgan Air Flight Operations Policies & Procedures Manual, Colgan Air's Public Hearing Exhibit 11; Jeb Barrett's Notes Regarding Khan's Proficiency Check, Colgan Air Public Hearing Exhibit 12). Colgan Air Captain and Director of Flight Standards Jeb Barrett acted as the check airman for the proficiency check and Captain Tom Brink acted as the non-flying pilot. (ALJ Final Decision, Findings of Fact #s 16, 17).

During the proficiency check, the ALJ found as a matter of fact that Captain Barrett directed Khan to perform a takeoff stall, which was an FAA required maneuver. Khan failed to complete this task in a satisfactory manner because he lost an unacceptable amount of altitude during the maneuver, said amount being defined by FAA regulations. (ALJ Final Decision, Finding of Fact # 18; Tr. Vol. II, pp. 119-21). Captain Barrett verbally informed Khan that the takeoff stall maneuver was unsatisfactory. As he was authorized to do, Captain Barrett suspended the testing portion of the flight, provided retraining to Khan, and then allowed Khan to attempt the maneuver again. After the retraining, Khan performed the maneuver in a satisfactory manner. (ALJ Final Decision, Finding of Fact #18; Tr. Vol. II, pp. 121-22; Colgan Air's Public Hearing Exhibit 12).

The ALJ found that Captain Barrett then directed Khan to perform an ILS approach, another FAA required maneuver, during the proficiency check. This maneuver required Khan to turn the aircraft onto the localizer, an electronic beam that positions the aircraft relative to the extended center line of the runway. However, Khan flew through the localizer and then, in an attempt to turn the aircraft and rejoin the localizer, operated the electric trim system of the aircraft. Use of the electric trim automatically disengaged the autopilot. This resulted in Khan deviating from the center lines of the localizer and glide slope and exceeding permitted descent

speed, which resulted in an unstabilized approach. (ALJ Final Decision, Finding of Fact #19; Tr. Vol. II, pp. 123-26).

Captain Barrett informed Khan that the ILS approach was unsatisfactory. Captain Barrett again provided retraining and allowed Khan to repeat this maneuver. After the retraining, Khan performed the ILS approach in a satisfactory manner. (ALJ Final Decision, Finding of Fact #19; Tr. Vol. II, pp. 127-28; Khan's Public Hearing Exhibit 12).

After the ILS approach, the ALJ found that Captain Barrett directed Khan to complete a VOR approach, another FAA required maneuver, during the proficiency check. While attempting this approach, Khan was late configuring the aircraft in terms of landing gear and reduction of power. Khan also placed the aircraft in a dangerous dive and caused the Ground Proximity Warning System to activate. At this point, Captain Brink was forced to take control of the aircraft away from Khan in order to prevent a catastrophic accident. (ALJ Final Decision, Finding of Fact #20; Tr. Vol. II, pp. 131-37, 184-87; Colgan Air's Public Hearing Exhibit 12).

Captain Barrett informed Khan that the VOR approach was unsatisfactory, and since he had already trained him to proficiency on two failed maneuvers, the maximum allowed by the FAA regulations, the proficiency check was required by the FAA to be deemed unsatisfactory due to his failure of a third required maneuver. Khan verbally acknowledged his poor performance. (ALJ Final Decision, Finding of Fact #21; Tr. Vol. II, pp. 139; Notes Regarding Meeting with Khan After Failed Proficiency Check, Colgan Air's Public Hearing Exhibit 9; Colgan Air's Public Hearing Exhibits 11, 12).

In administering Khan's proficiency check, Captain Barrett treated him the same way he has treated every other pilot to whom he has administered a proficiency check. (Tr. Vol. II, p. 105). Khan never indicated to Captain Barrett, or any Colgan Air management personnel, that he

felt he was treated unfairly or sabotaged during the October 30, 2001 proficiency check. (Tr. Vol. II, pp. 141-42; Colgan Air's Public Hearing Exhibit 9).

In support of its conclusion that Colgan Air discriminated/retaliated against Khan with respect to his proficiency check, the Commission repeatedly asserts the inaccurate and unsupported finding that Colgan Air relied upon reports from Khan's harassers when he was not requalified as a first officer. (Commission Appellate Brief, pp. 5, 18, 19-20, 36-37). There is absolutely no support in the ALJ's findings or the record for this assertion. The Commission grounds this finding on the following: (1) Mayers' testimony that Hueston had indicated Khan had lined up on the wrong runway; and (2) Galbraith submitted an irregularity event report form discussing an unsatisfactory approach and landing performed by Khan. (Commission Appellate Brief, pp. 36-37). However, the Commission fails to explain how or in what manner these reports were relied upon by Colgan Air when Khan was not requalified. To clarify this issue for the Court, Colgan Air notes that both the ALJ's findings of fact, and the evidence of record in this case, clearly indicate that **Khan did not requalify because he failed three required maneuvers during his FAA-mandated proficiency check.** (ALJ Final Decision, Findings of Fact #s 18-21). A pilot requalifies by passing his/her proficiency check. The suggestion that the Colgan Air employee who administered the proficiency check, Jeb Barrett, somehow relied on information known to Dave Mayers, or contained in Khan's personnel file, in determining that Khan's proficiency check was unsatisfactory is completely unsupported by the record and clearly wrong.

The Commission also indicates that it determined Colgan Air discriminated against Khan with respect to the proficiency check because "the ALJ did not specifically resolve other material inconsistencies between Khan's testimony and that of Captains Brink and Barrett," thus, the

Commission “chose to credit Khan’s testimony over Barrett’s where such deviations occurred but were not resolved by the ALJ.” (Commission Appellate Brief, p. 39). Once again the Commission mischaracterizes the ALJ’s findings in order to justify its erroneous conclusions. As the ALJ’s Final Decision clearly reveals, the ALJ did resolve inconsistencies between the testimony of Khan and that of Brink and Barrett regarding the proficiency check, and determined that Brink and Barrett were credible. This is evidenced by the language of the ALJ’s findings. Specifically, the ALJ’s Findings of Fact #s 18-21 recite as **facts** the events that occurred during the proficiency check, and Khan’s failure of three required maneuvers. The ALJ also found as a matter of fact that Khan “verbally acknowledged his poor performance.” Conversely, the ALJ’s Finding of Fact # 24 simply recites Khan’s testimony, and then ultimately states “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.” (ALJ Final Decision, Findings of Fact #s 18-21, 24).

The Commission improperly rendered its own determination of the credibility of the witnesses to support its erroneous conclusion that Colgan Air discriminated against Khan with respect to the proficiency check. The credibility of the witnesses is for the hearing examiner to determine. Fairmont Specialty Services, 522 S.E.2d 180, 184 (W. Va. 1999). This is because the hearing examiner is in the best position to make credibility determinations. See Tom’s Convenient Food Mart, Inc. v. West Virginia Human Rights Comm’n, 527 S.E.2d 155, 159 (W. Va. 1999). Pursuant to this important principle, the Commission should have given deference to the credibility determinations of the ALJ, who was in the best position to observe the demeanor and veracity of the witnesses’ testimony.

Moreover, there is absolutely nothing in the record to support the determination that Jeb Barrett had any desire to or did discriminate or retaliate against Khan. The Commission's suggestion that Khan's testimony that his proficiency check was "rigged" is corroborated by "another minority pilot that he suffered the same fate" is misleading. (Commission Appellate Brief, p. 23). Although Captain Duncan, the minority pilot to whom the Commission refers, did testify that he felt his check was unfair as far as he was concerned, he specifically testified as follows:

- Q. Do you feel that Colgan Air or anybody employed by them that you have talked about, Captain Garihan or Captain Barrett or Captain Brink, treated you as you described you were treated today, because you were African-American?
- A. Well, in the first place, **Captain Barrett did not treat me unfairly.**
- Q. Then lets take Captain Barrett out. Do you feel that Captain Brink or Captain Garihan, or anybody else at Colgan Air who you made contact with in connection with what you testified to today, treated you that way, whether you want to call it unfairly or unprofessionally or however you want to characterize it, because you're African-American?
- A. **I would have to say no.**

(Transcript of Deposition of Michael Duncan, pp. 107-08).

Khan failed to prove by a preponderance of the evidence that illegal discrimination or retaliation was a basis for his failure of the FAA-mandated proficiency check. Hence, this Court should find that the Commission erred in determining that Colgan Air discriminated/retaliated against Khan with respect to his proficiency check.¹³

¹³ There is a significant inconsistency in the Commission's appellate brief regarding its findings and conclusions on the failure to offer Khan retraining, and whether this was a pretext for discrimination or retaliation. In the Commission's Final Order, it indicates that it concluded the failure to retrain was discrimination. (Commission Final Order, pp. 2-3). In its appellate brief, on page 3, the Commission indicates that it concluded that Colgan Air engaged in unlawful retaliatory behavior when it refused to retrain Khan. However, on page 40 of the Commission's appellate brief, it indicates that it did not make an express finding regarding whether Colgan Air's reasons for discharging Khan, that the company could not retrain pilots who were unable to pass proficiency checks due to its post-911 financial condition, were pretextual. Conversely, in Khan's appellate brief, he indicates "The Commission found that the Administrative Law Judge's ruling regarding pretext was erroneous..." (Khan Appellate Brief, p. 45). Due to these significant inconsistencies, Colgan Air has not set forth a reply to Appellees' references to this issue. However, the Court should note that Colgan Air has addressed the issue in its appellate brief.

III. CONCLUSION

Based on all of the foregoing reasons, the Appellant Colgan Air, Inc. respectfully requests that this Court reverse the determination of the Commission, find in the Appellant's favor, and dismiss this matter with prejudice.

Respectfully submitted,

COLGAN AIR, INC.

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLGAN AIR, INC.,

Petitioner,

v.

WEST VIRGINIA HUMAN RIGHTS,
COMMISSION; RAO ZAHID KHAN,

APPEAL NO.: 070285
(WEST VIRGINIA HUMAN RIGHTS
COMMISSION DOCKET NO.:
ERRELNOANCSREP-391-02)

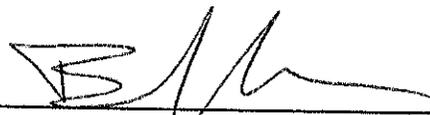
Respondents.

CERTIFICATE OF SERVICE

I, BRIAN J. MOORE, counsel for Petitioner Colgan Air, Inc., certify that service of *Colgan Air, Inc.'s Reply Brief* has been served on the parties, by U.S. Mail, postage prepaid, on this 25th day of June, 2007, as follows:

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