



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

February 22, 2006

Rao Zahid Khan
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(*Complainant*)

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Colgan Air, Inc.
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(*Lead Counsel For Respondent,
Admitted Pro Hac Vice*)

Re: Rao Zahid Khan v. Colgan Air, Inc.;
Docket No. ERRELNOANCSREP-391-02

Dear Parties:

Enclosed please find the **FINAL DECISION** of the undersigned Administrative Law Judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

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10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

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10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

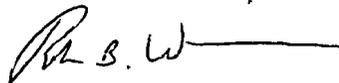
10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,

A handwritten signature in black ink, appearing to read "R. B. Wilson", with a horizontal line extending to the right.

Robert B. Wilson
Administrative Law Judge

RBW/jk

Enclosure

cc: Ivin B. Lee, Executive Director
Charlene Marshall, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RAO ZAHID KHAN,

Complainant,

v.

**DOCKET NUMBER: ERRELNOANCSREP-391-02
EEOC NO. 17JA200234**

COLGAN AIR, INC.

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on March 30th and 31st, 2005 in Cabell County, at the West Virginia Human Rights Commission's Huntington Branch Office, 2nd Floor Conference Room, 801 Madison Avenue, Huntington, West Virginia, before Robert B. Wilson, Administrative Law Judge. Telephonic testimony was taken on August 11, 2005 and September 28, 2005, after which the record was closed for taking evidence in this matter.

The Complainant, Rao Zahid Khan, appeared in person and by Counsels, Dwight J. Staples, Esq. and Gail Henderson Staples, Esq. with the firm of Henderson, Henderson & Staples, L.C.. The Respondent, Colgan Air, Inc., appeared in person by its representative, Mary C. Finnigan, Vice President; as well as by Counsels, Mark A. Dombroff, Esq. and Shaleeza Altaf, Esq.; with the firm of Dombroff & Gilmore P.C.; as well as by local counsel, Brian J. Moore, Esq. with the firm of Jackson & Kelly, P.L.L.C. The parties submitted

proposed findings of fact and conclusions of law, memoranda of law in support thereof, and response briefs through December 22, 2005.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of Counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

A.

FINDINGS OF FACT

1. Complainant, Rao Zahid Khan, is male, married and has two young children. Complainant's religion is Muslim. Complainant is of Pakistani national origin and Asian race. He came to the United States of America in 1984 at age 16; and, has resided in the United States since that time. Tr. Vol. I, pages 231, 232 and 234.

2. Respondent, Colgan Air, Inc., is a U.S. Airways Express Carrier, providing regional airline service in the Northeast United States, with a crew base in Huntington, West Virginia. Respondent employs more than twelve people (12) in West Virginia. Tr. Vol. I, pages 20, 23 and 127.

3. Complainant received his bachelor's degree in Aeronautical science from State University of New York in 1998. Complainant worked as a flight instructor for Mid Island Air Service for thirteen to fourteen months from 1998 through 1999; providing instruction primarily in single engine Piper Cherokees with only limited instruction in multi-engine planes. Complainant worked briefly for Air East Management as a pilot trainee in 1999 and then for American Eagle Airlines in 2000, prior to being accepted into Respondent Colgan Air, Inc.'s training program. Tr. Vol. I, pages 234-239.

4. Complainant began training with Respondent in August 2000. Complainant successfully completed his initial proficiency check on September 21, 2000 and his initial operating experience on September 30, 2000, as a First Officer. Complainant went on the flight line as a First Officer with Respondent beginning in October 2000. Tr. Vol. I page 79; Complainant's Exhibit No. 1 , Colgan 00152, All Training Report for Rao Zahid Khan, printed 29APR02.

5. 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 n****r”, “rag head” and “camel jockey”. They said he stunk, that he wasn’t very intelligent and that he doesn’t speak good English. 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, and stated, “That F****ing B**** can’t fly. I’ve been flying all morning with a F****ing Arab and he can’t fly either.” Tr. Vol. I, pages 179,183, 190, 191, 248, 250, 253 and 254; and, Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 25.

6. Captain Riley also made sexually offensive comments directly to Complainant; including; “Why does your wife not work?”; “Do you have an arranged marriage”; and, 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. Tr. Vol. I, pages 190,192, 196, 249 and 250.

7. 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 was aware of what he called problems between Complainant and Captain Riley (although Captain Mayers did not use the word discrimination); and that Captain Duncan had told him about the comment Captain Riley made regarding “I’ve been flying with that F***ing Arab and he can’t fly either.” Vol. I, pages 185-190, 253 and 254; and, Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 25.

8. 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. 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. 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. 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. Captain Mayers stated that he was not aware that Complainant went to Manassas and did not talk to anyone there until Ms. Finnigan contacted him concerning the matter following the posting of an offensive cartoon. Tr. Vol. I, pages 51-53; Tr. Vol. II, pages 22, 23, 26, 27 and 31-37.

9. 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. He therefore went to Ms. Finnigan, Vice President for Personnel and 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. Tr. Vol. I, pages 60 and 255-258.

10. At that meeting with Ms. Finnigan, Complainant presented a list of concerns. Complainant told her that his confrontation with Captain Riley began on the very first day over a mix up on travel to Huntington when he showed up late. Complainant's concerns centered around discriminatory issues and his concerns about not getting to upgrade to Captain, because Captain Riley felt he wasn't ready and was "behind the aircraft". Ms. Finnigan acknowledges that Complainant discussed the fact that Captain Riley had made comments about his wife including something to the effect of the comment "is she good in bed?" Ms. Finnigan acknowledges that Captain Riley was a check airman for Respondent at the time. Ms. Finnigan discussed the concerns with Complainant and stated that she would talk to Captain Riley and get back to him. Tr. Vol. I, pages 60, 71, 72, 73 75 and 76; Complainant's Exhibits Nos. 5, 6 and 7.

11. On June 20, 2001; Captain Riley met in Manassas, with Respondent's Chief Pilot, Mike Kelley, and Ms. Finnigan, Vice President for Personnel and Marketing concerning Complainant's complaints of discriminatory comments by Captain Riley. Captain Riley denied making any of the comments categorically. Nevertheless, Ms. Finnigan went through the Respondent's sexual harassment and discrimination policy with Captain Riley, retraining him concerning those matters. Chief Pilot, Mike Kelley gave him a serious dressing down on what is professional behavior and wrote a letter reprimanding him to that effect, dated June 20, 2001, which Captain Riley acknowledged receipt of therein. Chief Pilot, Kelly instructed Captain Riley that it was his responsibility

as Captain to mentor First Officers. Ms. Finnigan made it clear that if she heard that there were any other incidents or if he retaliated against Complainant in any way, it would result in severe disciplinary action up to and including termination. Thereafter, Ms. Finnigan called Dave Mayers, Lead Pilot at Huntington about the allegations. Captain Mayers said he was aware that there was a personality conflict between the two but that it was never brought as a race, religion or any kind of harassment or discrimination issue. Tr. Vol. I, pages 86-88, Complainant's Exhibits Nos. 5 and 6; and Respondent's Exhibit No. 10.

12. 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". Ms. Finnigan was contacted on that date by Chief Pilot, Mike Kelley, who had received a phone call and a faxed copy of the cartoon from Ms. Pam Jarrell. Ms. Finnigan called Huntington; confirmed the cartoon had been posted, instructed them to make sure no copies remained posted and to send her the original. Thereafter she called Complainant and left a voice message and left a voice message with Captain Riley. Captain Riley returned her call that evening at home and denied drawing the cartoon. After a lengthy discussion Captain Riley admitted that the cartoon had been drawn at his crash pad by his roommate, Captain Ryan Heuston. Shortly thereafter she

received a call from Complainant who informed her that he had seen the cartoon, copied it and put it back so that others would see it. He proceeded to inform Ms. Finnigan that a death threat had been made against he and his wife to his brother in New York by Captain Riley. Ms. Finnigan was further informed that Complainant filed a crime report with the police regarding the death threats. Tr. Vol. I, pages 98, 99,101 and 102; Complainant's Exhibit No. 8.

13. After Complainant's brother made threats against the Respondent's Company that night when Ms. Finnigan called him to investigate the Complainant's report of death threats, Ms. Finnigan called Respondent's counsel. The next day she notified the President of the company that there was a serious problem although she is not sure the extent to which she described the situation. She again talked to Complainant on the next day July 10, 2001. She also informed Chief Pilot, Mike Kelley. That day Mike Kelley called Ryan Heuston directing him to come to Manassas for a meeting. They also set up a meeting with Captain Riley for July 11, 2001. Ryan Heuston faxed in a letter of resignation and would not even come in for the meeting. That was on July 13, 2001. On July 11, 2001, Captain Riley instead of coming for his meeting called from his attorney's office. Ms. Riley states that she terminated Captain Riley and during the course of the call was asked if Captain Riley could be allowed to resign. Respondent allowed him to resign and granted him a two-week leave of absence, even after it had verified that he had threatened one of the Respondent's employees. Respondent had previously suspended

him from July 9, 2001 when the cartoon was posted. 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. Tr. Vol. I, pages 104-112; Complainant's Exhibits No. 9 and No. 10.

14. 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 Kelley said I have received letters from the other Captains, your co-workers. He refused to name them. 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. Tr. Vol. I, pages 268, 269 and 270; Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, pages 19 and 20.

15. 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. Nevertheless, a Pilot Records Improvement Guide report from his previous employer American Eagle indicated that Complainant had failed an initial upgrade or transition-training course under FAR Part 121 or Part 135 within the past five years. 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. Complainant did get better progressively. There were numerous instances reported to him that created a doubt in his mind that he 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. Tr. Vol. I, pages 244 and 245; Tr. Vol. II, pages 27, 28,39 and 40; and, Respondent's Exhibits No. 5 and No. 6.

16. 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. Tr. Vol. II, pages 100 and 104; Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, page 92; and, Respondent's Exhibits No. 11 and No. 12.

17. 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 limitations 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. Tr. Vol. II, pages 110, 112 and 113.

18. 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 re-training. Tr. Vol. II, pages 119-122.

19. 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 through 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. 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. Tr. Vol. II, pages 123-128.

20. After the ILS approach, Captain Barrett directed the Complainant to complete a VOR approach, another FAA required maneuver. While attempting this approach, Complainant was late configuring the aircraft in terms of landing gear and reduction of power. Complainant also placed the aircraft in a dangerous dive and caused the Ground Warning Proximity Warning System to activate. At that point Captain Brink assumed control of the aircraft. Tr. Vol. II, pages 131-136, and 184-187.

21. Captain Barrett informed Complainant that the VOR approach was unsatisfactory, and, since they had already trained to proficiency twice on two failed maneuvers, the maximum allowed by the FAA for proficiency checks on the flight portion, that the proficiency check was unsatisfactory due to his failure of the third required maneuver. Complainant verbally acknowledged his poor performance. Tr. Vol. II, pages 138 and 139.

22. Complainant was thereafter given the option of resigning or being terminated by Director of Flight Operations for Respondent. He asked to be given retraining at his expense but was told the Respondent would not agree. Complainant tendered his resignation. Tr. Vol. I, pages 320-325; and, Respondent's Exhibit No. 7.

23. 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. Tr. Vol. I, page 292; and, Tr. Vol. II, page 106.

24. 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 that recommended rate of descent in trying to attain the approach altitudes specified in the VOR approach plate. 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. Tr. Vol. I, pages 301-318.

25. 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. Tr. Vol. I, pages 29-38; Complaint's Exhibit No. 2.

26. 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. There was no pre-flight done because he was late in arriving. 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. The next day Captain Barrett called Captain Duncan and told him they needed to do a recheck ASAP. Captain Duncan requested an opportunity to retrain prior to the recheck and Captain Barrett said no just do the recheck. The next day, November 29th, he called Captain Duncan back and said the recheck is scheduled for November 30th, the next day and that the FAA would go along. Captain Duncan testified that Captain Barrett told him the FAA wanted to go along on the next check ride because of all the failed check rides at Colgan Air, Inc. 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 with the F.A.A. observer onboard, although Captain Barrett's notes do not indicate that he told Captain Duncan he would get retraining prior to recheck. Tr. Telephonic Evidentiary Deposition of Captain Duncan, August 11, 2005, pages 36-39, 64,77,78, 80, 89 and 90; Tr. Telephonic Evidentiary Deposition of Captain Brink, September 28, 2005, pages 22-24 and 27; Tr. Telephonic

Evidentiary Deposition of Captain Barrett, September 28, 2005, pages 118-120; and, Respondent's Exhibit No. 13 page 0087.

27. Respondent was in extreme financial distress following September 11, 2001. Respondent was not providing retraining to anyone from September 11, 2001 through early December 2001, because it could not pay for it. Thirty pilots were furloughed and others downgraded to First Officer beginning September 20, 2001 through October 15, 2001 when the first began to be called back to work. During this period three leased planes were returned and the Respondent's officials consulted with a bankruptcy attorney. Toward the end of November and beginning of December 2001 things began to turn around because passengers resumed flying and Respondent took over several routes from U.S. Airways which was unable to fly out of National Washington Airport. Tr. Vol. I, pages 140-142, 147 and 148.

28. Captain Barrett was the made 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. The Lead Pilot is not a supervisory position. Captain Barrett's office is basically right across the hall from Ms. Finnigan's office. Tr. Vol. II, pages 100-103; and Tr. Telephonic Evidentiary Deposition of Captain Duncan,

B.

DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act makes it unlawful “for any employer to discriminate against an individual with respect to . . . hire, tenure, conditions or privileges of employment if the person is able and competent to perform the services required. . . .” The term “discriminate” or “discrimination” as defined in W. Va. Code § 5-11-3(h) means to “exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex. . . .” In order to establish a case of disparate treatment for discriminatory discharge or failure to hire under W. Va. Code § 5-11-9, with regard to a protected class under the Human Rights Act, the Complainant must prove as a prima facie case that:

1. The Complainant is a member of a protected class;
2. The employer made an adverse decision concerning the Complainant; and
3. But for the Complainant’s protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W. Va. 475, 358 S.E.2d 423 (1986).

A discrimination case may be proven under a disparate treatment theory which requires that the Complainant prove a discriminatory intent on the part of the Respondent.

The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Dept. v. West Virginia Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, the Complainant must first establish a prima facie case of discrimination; the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance or pretense. West Virginia Institute of Tech. v. West Virginia Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., *supra*. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995), although it need not, as a matter of law, be found. St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993).

There is also the “mixed motive” analysis under which a Complainant may proceed to show pretext, as established by the United States Supreme Court in PriceWaterhouse v. Hopkins, 490 U.S. 228 (1989), and recognized by the West Virginia

Supreme Court in West Virginia Institute of Tech., *supra*. “Mixed motive” applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the Complainant need only show that the Complainant’s protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the Complainant’s protected class had not been considered. Barefoot, *supra*, 193 W. Va. at 485, 487, 457 S.E.2d at 162 n.16, 164 n.18.

The West Virginia Human Rights Act imposes on an employer a duty to ensure, as best it can, that workplaces are free of harassment that creates a hostile or offensive working environment. Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995), Syl. Pt. 8; Conrad v. ARA Szabo, 198 W. Va. 362, 370, 480 S.E.2d 801, 809 (1996). To establish a hostile or abuse work environment claim, it must be established:

1. That the subject conduct was unwelcome;
2. That it was based on the plaintiff’s gender;
3. That it was sufficiently severe or pervasive as to alter the plaintiff’s condition of employment; and
4. That it was imputable on some factual basis to the employer.

Fairmont Specialty Services v. West Virginia Human Rights Comm’n, 206 W. Va. 86, 522 S.E.2d 180 (1999). “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. Id. and Syl. Pt. 3. Employers liability in an abusive or hostile workplace case, where the harassment does not include management personnel, depends on the employer's knowledge of the offensive conduct, effectiveness of its remedial procedures and the adequacy of its response. Conrad v. ARA Szabo, 198 W. Va. 362, 480 S.E.2d 801, at 805, (W.Va. 1996) Syl. Pt. 4.

Furthermore, the Human Rights Act forbids retaliation against persons engaging in protected activities. West Virginia Code §5-11-9(7)(C) makes it unlawful; "For any person, employer, . . . to: Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."

In Conrad v. ARA Szabo, 198 W. Va. 362, 480 S.E.2d 801 (1996) Syl. Pt. 6; the West Virginia Supreme Court reiterated the elements for a retaliation case as follows:

In an action to redress unlawful retaliatory discharge under the West Virginia Human Rights Act, . . . the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in a protected activity, (2) that the complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged, and (absent other evidence tending to establish a retaliatory discharge), (4) that

the complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motive.

The Complainant is a member of several classes which are protected under the West Virginia Human Rights Act. Complainant is a member of the Asian race. His religion is Muslim. He is a person of color. Complainant's national origin is Pakistan and his ancestry is Pakistani.

The Complainant was subjected to unwelcome conduct based upon his membership in these various protected classes; particularly his Muslim faith and Pakistani national origin. The unwelcome conduct was both severe and pervasive in its nature. That conduct included offensive comments concerning his national origin, his ancestry, his color and race.

The primary source of these offensive comments was Captain Riley, who would make extremely offensive comments both directly to Complainant every time he flew with him, and to others as well. The comments were designed to be as hurtful and unpleasant as possible. They concerned both Complainant and his wife. They concerned his religion. They included offensive sexual comments of a provoking nature. The conduct of Captain Riley escalated to the point of making terrorist death threats against Complainant and his family to impede his reporting and stopping the unlawful discriminatory conduct he was subjected to by Captain Riley.

Although Captains Heuston and Galbrath did not make comments directly to

Complainant, they contributed to the hostile work environment by making similar offensive remarks to others in the workplace which Complainant heard of from others who were subjected to those comments. Those comments contaminated the work environment with intolerance and hate speech that poisoned the work environment to all who were the subject of its discriminatory animus. Thus, there is no question but that the Complainant 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.

To prevail against the Respondent employer in a claim for a hostile or abusive workplace, the Complainant must prove that the environment is imputable on a factual basis to the employer. The harassment of the Complainant and the hostile and abusive workplace created at the Respondent's Huntington crew base (and in the cockpit when flying with Captain Riley), were created by non management employees of the Respondent. Where harassment does not include management personnel, liability of the employer depends upon the employer's knowledge of the offensive conduct (either actual or that the employer had reason to know by the nature of the conduct), the effectiveness of its remedial procedures and the adequacy of its response. Given the aggravated nature of the conduct together with its severity and pervasiveness, the efficacy of the Respondent's response in this case, must be subjected to a heightened degree of scrutiny under the highest duty to respond effectively.

Nevertheless, that scrutiny must be in light of the Respondent's knowledge of the conduct involved. There is no question that the Lead Pilot at the Huntington crew base knew that there was some sort of problem between Complainant and Captain Riley. When Complainant would approach him concerning the comments being made by Captain Riley, the Lead Pilot, Captain Mayers, would pull Captain Riley aside and tell him to knock it off. Captain Riley would agree to behave and that would be it until the next time something would occur which would prompt Complainant to see Captain Mayers. Captain Mayers, as Lead Pilot at Respondent's Huntington crew base, had no actual authority to take any disciplinary actions against Captain Riley (or Captains Heuston or Galbrath) because he had no management or supervisory authority. The Respondent had a procedure for reporting harassment which included reporting it to the Chief Pilot or the Vice President for Personnel. The harassment policy of Respondent makes it incumbent upon any employee to report discrimination and to investigate it should it occur. Captain Mayers claims that the problem appeared to be a personal dislike and not in the nature of anything like discrimination or harassment. Captain Mayers further indicated that he did what he could by talking to Captain Riley (and on one occasion to Captain Heuston) because he considered the conduct rude and unprofessional.

Once Captain Riley asked Complainant if his wife was good in bed, Complainant finally became so upset as to cause him to go to Mannassas and approach a member of Respondent's management about his concerns, when he talked to Ms. Finnigan, Vice

President for Personnel and Marketing. Respondent immediately called Captain Riley in for a meeting with the Chief Pilot, Captain Kelley, and the Vice President for Personnel and Marketing, Ms. Finnigan. Captain Riley was confronted with Complainant's allegations. Captain Riley categorically denied them. Nevertheless, Ms. Finnigan and Captain Kelley went over its anti discrimination and harassment policy and training with Captain Riley. They gave him a stern warning that future instances would result in discipline up to and including discharge. Respondent also issued a written reprimand to that effect at that time. Respondent's Exhibit No. 10 is documentary evidence of the seriousness with which Respondent's management viewed Complainant's allegations and their commitment to stopping the conduct.

The next time Respondent had knowledge of discrimination occurring in the workplace was when it received a fax of an offensive cartoon that had been posted in the Huntington crew base. Captain Riley was immediately placed on unpaid leave. Respondent that evening learned that Captain Riley had not drawn the cartoon, that it had in fact been drawn and authored by Captain Heuston, Captain Riley's crash pad mate. Respondent further learned that Captain Riley had made death threats against Complainant and his family to a family member. The next day Respondent made arrangements to call Captains Riley and Heuston in to Manassas for the purpose of terminating their employment with Respondent. Inexplicably, Respondent allowed both Captain Riley and Captain Heuston to submit their resignations instead of terminating

them even though Respondent knew that Captain Heuston had drawn and posted the offensive cartoon; and, that Captain Riley had made death threats against one of its employees. Nevertheless, Respondent clearly forced the resignations of both Captain Riley and Captain Heuston in response to the offensive conduct. Thus, there is 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. The undersigned cannot agree with Complainant's assessment that nothing was ever done about his complaints.

In addition to the hostile and abusive work environment Complainant endured while employed by Respondent, Respondent has taken two adverse employment actions against Complainant. Respondent failed to upgrade Complainant from First Officer to Captain after less senior by age class members had been made Captain or selected to begin training to upgrade to Captain with Respondent. Respondent also forced Complainant's resignation when he failed his yearly FAA proficiency examination check ride on October 30, 2001. The Complainant has established a prima facia case that he was subjected to disparate treatment and/or retaliation in regard to each of these adverse employment decisions by Respondent. Complainant is member of several protected classes under the West Virginia Human Rights Act. Complainant engaged in protected activities by making complaints to Respondent in opposition to acts prohibited under the

Human Rights Act. Complainant has offered evidence tending to either show that the decisions were the result of discriminatory or retaliatory motive or that the proffered non discriminatory reasons advanced by Respondent for those actions are false or pretextual. Respondent has offered legitimate non discriminatory reasons for each of these adverse employment decisions as well as extensive evidence in support of those reasons. In the case of the failure to upgrade the Complainant to Captain, Respondent contends that as a First Officer, Complainant had not demonstrated the pilot skills necessary to be in command of the aircraft. In regard to the Complainant's failed check ride during his FAA mandated proficiency examination and check ride on October 30, 2001, Respondent contends that the Complainant failed a third required maneuver after first having twice failed and retrained to proficiency on two earlier required maneuvers. Respondent contends that it did not offer retraining at that time because its financial condition prevented it from being able to pay for such training and because the Complainant had nearly crashed the airplane during his last failed approach.

Complainant contends that he was subjected to disparate treatment by the Respondent when it failed to upgrade him to Captain during his employment with Respondent. In support of this contention, he points to the fact that many of his classmates as First Officers with Respondent were either upgraded to Captain or selected for the training program for upgrade during the period he was employed with Respondent. This was done even though as the oldest by age in class he was senior on the roster of

First Officers in that class. Complainant points to the fact that Respondent never made known to him any deficiencies in his piloting skills during the time he flew for Respondent. The fact that the irregularity report was never signed by Complainant, nor the Chief Pilot ever discussing it with him, together with testimony that Captain Galbrath engaged in the religious, and ethnic slurs, create an inference of pretextuality and falseness of that report. Similarly, Captain Riley's and Captain Heuston's threats that they would do everything in their power to see that Complainant never became Captain and to see that he was fired are evidence of discrimination against Complainant in the Respondent's failure to upgrade him to Captain. Complainant points to the fact that Captain Kelley was buddies with Captain Riley and that he never gave him a check ride to personally evaluate his pilot skills even after he indicated he would in a meeting with Ms. Finnigan around the time Captain Riley and Captain Heuston were terminated for their discriminatory conduct. Captain Kelley had indicated that other Captains had reported that his flying was unsafe but refused to identify who those Captains were.

The Respondent has introduced evidence that the piloting skills of the Complainant were not of a caliber to merit his upgrade to Captain. Respondent indicates that the Complainant had failed an initial qualification or proficiency examination with another airline before being hired with Respondent. Respondent knew of Complainant's protected classes at the time it hired him and of the previous failed proficiency check. Respondent introduced the irregularity incident report about Complainant having lined up

on the wrong runway from that on which he was cleared. Respondent's personnel who would evaluate the pilots readiness to upgrade had concerns regarding Complainant's piloting skills based on reports of other Captains with whom he flew, and in the case of Lead Pilot Captain Mayers, by his personnel observations of his flying with Complainant as his First Officer. Captain Mayers indicated that he was interested in improving and wanted to learn, but that his piloting skill were at best average and at worst unsafe. Complainant was progressing but not at a pace consistent with a passenger carrier pilot. The Respondent's witnesses testified credibly that upgrade to Captain depended upon need and upon the readiness of the individual pilots to assume Captain's responsibilities based on their demonstrating pilot skills necessary to assume command of the aircraft and its safe operation. Given the evaluation of whether to upgrade was in the purview of Captain Kelley as Chief Pilot to recommend and Captain Barrett as Director of Flight Standards to make, (and that other than a vague allegation by Complainant that Captain Riley and Captain Kelley were buddies, there is no evidence of discriminatory conduct by either Captain Kelley or Captain Barrett), the Complainant has failed in his burden to prove by a preponderance of the evidence that Respondent's decision not to upgrade him to Captain was based on unlawful discriminatory motive.

Complainant contends that his forced resignation following a failed check ride during his October 30, 2001 proficiency examination was the result of discrimination based on his protected classes and/or done in retaliation for having reported the unlawful

discrimination he was subjected to by Captain Riley and Captain Heuston. 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 suffered by Complainant or of talking to him regarding Captain Heuston prior to the proficiency check is simply not credible. If these denials are that he did not know that Captain Riley and Captain Heuston had engaged in discrimination against Complainant, Captain Barrett is Director of Flight Standards and was Chief Pilot for three years immediately prior to that. It does not make sense that he would not have been aware of the departure of Captain Riley, who was a check airman for Respondent at the time, or the circumstances surrounding his departure. If Captain Barrett carefully avoided saying he was aware of the religious and National Origin discrimination and that he never asked about the Complainant's relationship with Captain Riley, his testimony on these points is misleading.

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 that recommended rate of descent in trying to attain the approach altitudes specified in the VOR approach plate. 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. Complainant offered evidence tending to support this version by the testimony of Captain Duncan concerning similar occurrences in his busted check ride. Complainant offers as evidence of falsity of the claims of Captain Barrett his failure to note in the notes of his check ride of Complainant, that Complainant was at such a low altitude and descending at two thousand feet per minute; or that the Ground Proximity Alert came on. Complainant contends that discriminatory motive is shown by the fact that of the seven pilots to fail proficiency checks from December of 2000 through December of 2001; three were white males who were given retraining and remained as pilots for Respondent; while one female pilot, two African-American pilots and the Complainant were not retrained and were not retained as employees of Respondent.

Respondent for its part gave very detailed and precise testimony from both Captain Barrett and Captain Brink concerning the events in the cockpit during the October 30, 2001 proficiency check ride. Captain Barrett was the check airman who conducted the FAA proficiency examination on behalf of the FAA. The Complainant was asked to

perform a take off stall and lost an unacceptable amount of altitude during that maneuver. He was trained to proficiency and performed it in an acceptable manner. Complainant flew through the localizer on his ILS approach maneuver, and when he turned the aircraft he operated the electronic trim switch which cut off the autopilot. Complainant was retrained and performed the maneuver in a satisfactory fashion. Thereupon, Complainant failed a third maneuver when he was late configuring the aircraft in terms of landing gear and reduction of power and placed the aircraft in a dangerous dive (or according to the Complainant's admission, exceeded the allowed rate of descent for the aircraft). The failure of a third maneuver is not allowed to be retrained and results in a failed proficiency check.

The fact that so many pilots were failing proficiency checks with Respondent during this period does not indicate that this was some sort of retaliation against the Complainant. Three white male pilots also failed proficiency examinations during this one year time frame, further negating the contentions of discrimination against Complainant on the basis of his various protected classes. The Complainant's case seems to be heavily predicated on the fact that two African-American pilots and a female pilot along with Complainant were the only pilots who failed proficiency checks and were not subsequently retrained and retained by Respondent. The Respondent offers as a legitimate non discriminatory reason for these differences, that it was not in a financial position to allow it to pay to retrain pilots during the time that most of the non retrained pilots failed

their proficiency examinations. Although that explanation does not hold for the first failed check ride, Josk Musoke, who failed his in August 200, it does hold true for the others. The Respondent was in financial distress from late September through the end of November or the beginning of December. Two of the white males failed and were retrained prior to September 11th, in August 2001. One of the white males failed and was retrained in December of 2001. The female pilot and Complainant both failed theirs on October 30, 2001. Captain Duncan failed his in November 2001 and although not offered retraining in a simulator or time to prepare in advance, he was immediately rescheduled for a recheck with the FAA which would have been preceded by a retraining on the failed maneuvers prior to the recheck proficiency ride with the FAA. As the undersigned is not aware of the particulars concerning Josk Musoke's failed check ride it is not possible to discount the Respondent's explanation regarding the failure to retrain Complainant. This is particularly so in light of the Respondent's belief, based upon the FAA check airmen it employs to make such determination, that Complainant not only failed his check ride, but that he almost crashed the aircraft with three aboard in the process. Given the Respondent's reliance upon the reports of Captain Barrett and Captain Brink, who provided detailed and precise testimony concerning the nature of the occurrences during that check ride, the preponderance of the evidence supports the Respondent's legitimate non discriminatory reason for its forcing the Complainant to resign following his failed proficiency check ride.

CONCLUSIONS OF LAW

1. The Complainant, Rao Zahid Khan, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-10.

2. The Respondent, Colgan Air, Inc., is a “person” and an “employer” as those terms are defined under W. Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.

5. The Complainant has established a prima facie case of both hostile workplace discrimination and discrimination in the failure to promote him to Captain on the basis of race, national origin, religion and gender and retaliation; and retaliation for complaining of discrimination in the failure to promote him to Captain and subsequent termination after failing his FAA proficiency check ride. The Respondent claims that the discriminatory hostile work environment is not imputable to the employer because it was created by Complainant’s coworkers and not his supervisors; and, that Respondent took immediate and effective action to correct the situation once the appropriate corporate officials were made aware of the situation. The Respondent articulated legitimate non discriminatory reasons for its failure to upgrade Complainant to Captain and his forced resignation following an FAA proficiency check ride. Those reasons being his poor pilot

skills and his failing three required maneuvers during the FAA proficiency check ride.

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 the 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.

6. 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.

D.

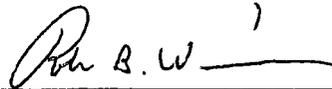
RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that this case be dismissed with prejudice and be closed.

It is so **ORDERED**.

Entered this 22nd day of February, 2006.

WV HUMAN RIGHTS COMMISSION



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