STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of JAMES P. STONE, Complainant, and HAWAII AIR AMBULANCE (HAWAII LIFE FLIGHT), Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2011-10 DECISION NO. 28 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Following a *de novo* proceeding before the Hawaii Labor Relations Board (Board), and for the reasons discussed below, the Board finds in favor of Complainant JAMES P. STONE (Complainant or Stone).

Any conclusion of law improperly designated as a finding of fact, shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact. To the extent the parties' post-hearing briefs contain what may be construed as proposed findings of fact, any such facts submitted by a party that are not incorporated as a Board finding herein or that are clearly contrary to the findings herein, are denied.

I. PROCEDURAL HISTORY

On April 8, 2011, the Board received from Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR), a Notice of Contest regarding a discrimination complaint by Stone against Respondent HAWAII AIR AMBULANCE (HAWAII LIFE FLIGHT)[i] (Employer) in Hawaii Occupational Safety and Health Division (HIOSH) Case No. 10-003. Stone appealed from the HIOSH determination that he was not discriminated against/terminated for his safety-related complaints to management, including an incident in 2008 where Stone claimed that pilots were operating fuel trucks without a Commercial Driver's License (CDL) or proper training required by the administrative rules of the Department of Transportation, State of Hawaii.

On December 14, 2012, Stone filed a motion to stay proceedings in this case pending disposition of the Federal Occupational Safety and Health Administration (OSHA) proceedings. On January 8, 2013, Employer filed a memorandum in opposition to Stone's motion to stay proceedings. Also on January 8, 2013, the DLIR filed its response to Stone's motion to stay proceedings, stating its objections to the motion.

On December 14, 2012, Stone also filed a motion for leave to file an Amended Pretrial Conference Statement. In the motion, Stone sought to include the following issue for trial:

> 1. Whether the Director lacked proper jurisdiction for this complaint due to federal preemption of Hawaii law and regulation by the Federal Aviation Act of 1958, 49 U.S.C. § 40103 *et seq.*, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

On January 8, 2013, Employer filed its statement of no position on Stone's motion for leave to file Amended Initial Conference Statement. Also on January 8, 2013, the DLIR filed its response to the Stone's motion for leave to filed Amended Initial Conference Statement, taking no position.

On January 14, 2013, the Board conducted a hearing on the motions, and determined that the issue regarding jurisdiction should be addressed as a threshold matter,

and requested the parties to submit briefs regarding jurisdiction. The Board reserved the right to schedule a hearing on the matter, and denied both of the pending motions.

On February 19, 2013, Employer filed a motion in support of the HIOSH's jurisdiction, and the DLIR filed its memorandum in support of HIOSH's jurisdiction to conduct its discrimination investigation. Also on January 19, 2013, Stone filed his memorandum regarding jurisdiction.

On March 13, 2013, the Board conducted a hearing on the issue of jurisdiction, and the parties had full opportunity to present further evidence and argument to the Board regarding jurisdiction.

On March 28, 2013, the Board issued Order No. 502, finding that on July 14, 2010, Stone filed a discrimination complaint with HIOSH alleging he was wrongfully terminated for reporting safety concerns to management, including an incident in 2008 where Stone claimed that pilots were operating fuel trucks without a CDL or proper training required by the State Department of Transportation, and that on July 16, 2010, Stone filed an identical complaint with OSHA alleging he was wrongfully terminated because of his reporting safety concerns. The Board found it had jurisdiction pursuant to Hawaii Revised Statutes (HRS) § 396-8(e) and § 396-11(e) and (g).

The Board hereby incorporates Order No. 502, in which it found jurisdiction over this proceeding.

On June 14, 2013, the Board issued a Stipulated Protective Order, Order No. 507, in this matter, in which the parties stipulated to provisions controlling the protection, use, and dissemination of Confidential Information and documents produced by the parties pursuant to the order.

Trial in this matter was held before the Board on July 9, 10, and 11, 2013; August 19 and 20, 2013; and February 10 and 12, 2014. During the trial, the Board heard testimony from Stone; Craig Lyle Young; Monz David Hahn; Robert Bryan Darrow; Kelly Anderson; Tin Shing Chao; Joshua Martin Betof; Kevin Richard; and Harold Rodriguez, Jr. The Board received into evidence Board Exhibits 1 through 41; DLIR Exhibit 1; Complainant's Exhibits 1 through 62; and Employer's Exhibits 1, 2, 6, 8, 10 through 12, 14 through 28, 32, and 33.

On March 21, 2014, the parties filed their post-hearing briefs and memorandum in this matter.

II. FINDINGS OF FACT

1. Stone's Background

Stone began his airline career in 1988 as a ramp agent for Aloha Airlines. In 2004, after 15 years of service for Aloha Airlines, Stone became a pilot. He worked as a pilot for Aloha Airline for four years, from 2004 to 2008, when Aloha Airlines ceased its operations on March 31, 2008.

During his employment with Aloha Airlines, Stone became familiar with the applicable rules and regulations for safe aircraft operation, piloting, and refueling. While at Aloha Airlines, Stone learned how to employ safe aircraft refueling practices, and obtained his CDL.

When Aloha Airlines ceased its operations, Stone applied for a job with Employer. On July 2, 2008, Stone was hired by Employer as a pilot. He was stationed at Employer's Waimea base on the Island of Hawaii (Big Island). Stone was laid off by Employer on June 11, 2010, after Hawaii Air Ambulance merged with its competitor, Hawaii Life Flight Corporation.

2. Employer's Background

Employer[ii] is an air medical transport company for critically ill and injured individuals throughout Hawaii who need immediate transport to medical facilities.

Prior to May of 2010, Employer operated under the name Hawaii Air Ambulance. In May of 2006, Eagle Air Med (now called Air Medical Resource Group), headquartered in Utah, purchased and began operating Hawaii Air Ambulance.

Effective on or about May 1, 2010, Hawaii Air Ambulance merged with another air medical transport company, AirMed Hawaii. As a result of the merger, Employer's name was changed to Hawaii Life Flight Corporation.

Employer's operational headquarters is in Honolulu, and it also maintains one airbase on each of the islands of Maui and Kauai, and three bases on the Big Island. Employer operates seven aircraft in total, one for each base plus one spare for use when an aircraft is down for maintenance. There are two daily 12-hour shifts at each base, and there are two or three pilots on staff at each base.

At Employer's Waimea base, the day shift runs from 8:00 a.m. to 8:00 p.m., and the night shift runs from 6:00 p.m. to 6:00 a.m. (there is a two hour overlap of shifts during the busiest evening hours). At Waimea, one pilot is on duty during each shift.

3. Aircraft Refueling Safety Complaints

Within the first few months of employment with Employer, Stone was instructed on Employer's procedures for refueling planes. Stone was surprised to learn that Employer instructed its pilots to refuel planes without regard to state or federal requirements, such as the requirement to possess a CDL, along with an Airport Operations Area (AOA) badge and Motor Vehicle Operating Permit (MVOP) to operate aircraft refueler units.[iii] None of Employer's other pilots had a CDL or MVOP. If a plane is refueled contrary to the CDL laws, it is the operator of the vehicle (in this case, the pilots), not the company, who is cited.

At Employer's Honolulu location, where fuel prices were lower than they were on the neighbor islands, Employer had a fuel truck that was parked on the side, and the pilots were told by Employer to roll out the hose and fuel their planes. Later, the location of the fuel truck changed to the "ramp" and the pilots had to drive the truck around to refuel.

Craig Lyle Young (Young), another pilot who worked for Employer for approximately two years beginning April of 2007, was approached one evening at Honolulu airport by a security officer who asked for Young's identification. The officer also asked Young if he had a CDL, which Young did not, and if Young had a permit to drive a truck onto the tarmac, which he did not. Young told the officer that his company (Employer) authorized Young to refuel the planes. The officer did not give Young a ticket, but did write a report. This incident occurred around July of 2008. The day after Young received the warning, he and Stone discussed the incident and that the pilots had to be careful not to do the refueling operation, and they both brought the issue up with Dawn Guillermo (Guillermo), who was Employer's Program Director and responsible for all business aspects of the company and supervision of the medical teams. Guillermo

replied that the issue was "dealt with." Guillermo also accused Young of having a bad attitude, and "got in his face" with Stone. Employer chose not to call Guillermo as a witness.

After Guillermo's dismissal of Stone's safety concerns, Stone raised his concerns about the airport refueling trucks to Employer's Compliance Officer, Jason Nix (Nix). Nix replied that a CDL was not necessary, and told Stone and fellow pilot Monz Hahn (Monz) that they can drive the truck, because "it's perfectly fine." Stone was alarmed by this response from a Compliance Officer. At another meeting, Stone brought paperwork of the CDL regulations to Guillermo, to show her that a CDL was required, but was brushed off by Guillermo, who seemed "agitated" by it.

Based on testimony at trial, the Board finds that Stone brought up the refueling safety violation issue to management "a lot" on behalf of the pilots.

In March of 2009, Employer's lead pilot Dave Heck (Heck) told Stone that Guillermo had "cross-hairs" on Stone's back because of the fuel truck situation which was costing the company money. In July of 2009, Young had a proficiency "check ride" with Heck, during which Heck mentioned the "cross hairs" on Stone's back. Heck told Young that if it were up to Guillermo, Stone would have been fired long ago, but because Stone's wife was an emergency room doctor, it would be "bad PR" for the company and they did not want to cause turmoil involving Waimea Hospital. Employer was concerned about the potential business consequences of terminating Stone because of the possibility that Stone's wife could divert business to Employer's competitor. The reason for wanting to terminate Stone was "his attitude." Heck was subsequently counseled by Employer for warning the pilots about the "cross-hairs" on their backs, and removed from his management duties.

In November of 2009, more than one year after Stone brought his safety concerns to Guillermo, Employer received an exemption letter from the Oahu Airport Manager, exempting Employer's pilots from the CDL requirement to drive fuel trucks at Honolulu Airport, for pilots who have completed a fuel safety training program.

After Respondent announced it had received an exemption letter, Stone requested that the pilots be allowed to see it and that a copy of it be placed in the fuel truck. Employer refused to place the exemption letter in the fuel truck, despite Stone expressing his understanding that such placement was required by law.[iv] Employer's Director of

Operations, Joshua Betof (Betof) told Stone that Employer did not want the letter in the fuel truck because its competitor would find out about it. Stone's requests that the exemption letter be placed in the fuel truck continued until February of 2010. When Stone again raised this issue in February of 2010, he asked if Employer could place the written exemption in the truck so the pilots who were refueling would have something to show to security if they were stopped while operating the truck, would know when the exemption expired, and would have it within arm's reach as required by Hawaii law. Betof refused.

4. Other Safety Complaints

In addition to the refueling safety complaints, Stone raised other health and safety issues with Employer. In August and December of 2008, and early 2009, Stone raised the issue of Employer requiring pilots to exceed a safe number of consecutive on-duty hours. Stone also informed Employer about defective equipment on Employer's aircraft, including a broken battery caution light in late 2008; a door seal leak in November of 2009; a weight and balance issue in March of 2010; and an incorrectly located oxygen port in May of 2010.

Generally, Employer maintained a work environment that discouraged employees from reporting safety concerns. Credible witness testimony described Guillermo as being agitated by safety complaints. Young testified about being targeted for being a whistleblower. One pilot was scolded for reporting mechanical issues in-flight over the company radio. Pilots referred to Employer's "safety meetings" as "free lunch" meetings because Employer was not interested in hearing about or discussing safety issues, but did provide a free lunch.

On April 24, 2009, Federal Aviation Administration (FAA) Principal Operation Inspector Scott Hartley (Hartley) issued a letter to Betof with instructions that the letter be sent to all pilots. The letter warned pilots not to fly aircraft knowing there is a deficiency that had not been fixed or deferred properly, or the pilot will receive a violation notice and suspension of flying privileges. The letter further advised the pilots to contact Hartley "if [they] see anything questionable or are asked or pressured to fly an aircraft that hasn't been properly maintained or if [they] have any questions[.]" However, Betof did not send Hartley's letter to the pilots until forced to do so by Hartley in October of 2009. Betof testified that he had sent out his own "reworded" copy of the

letter by email to all pilots, but credible witness testimony showed that the pilots did not receive such an email, and Employer did not produce a copy of the reworded email.

Additionally, the Board finds that Betof, who was Employer's primary witness at trial, was not a credible witness. Some examples include: Betof's testimony regarding Pilot Robert Darrow's employment in Waimea is contradicted by Darrow's testimony; Betof's testimony that Pilot Rodriguez was given discipline for the May 12, 2010, incident is contradicted by Rodriguez's testimony, and no copy of any such discipline was provided in response to Stone's discovery request; Betof testified that he never discussed Stone's discipline with Guillermo, yet email shows Betof solicited Guillermo's input prior to issuing the discipline; Betof testified that it was standard operating procedure to record all dispatch calls, yet when Stone suggested in an email that Betof listen to Stone's call with the dispatcher on May 12, 2010, Betof never responded to those emails and claimed that the system "got switched in June of 2010" so they were conveniently not available; although Betof testified that the issue with the CDL was resolved long before Stone's termination, Betof eventually admitted that Stone did continue to bring it up; and Betof failed to produce several documents in response to Stone's discovery request in this proceeding, such as Betof's email to the FAA Principal Operations Inspector that Stone only obtained from the FAA through a Freedom of Information Act (FOIA) request.

It is possible that Young may have been retaliated against for making safety complaints about Employer to the FAA, as Young was also warned to watch his back because Guillermo "had it out" for him; Young was subsequently disciplined for a formation flight despite the other pilot involved not receiving any discipline; and Young was ultimately terminated for being an "unsafe pilot" despite receiving Employer's safety award the prior month for being their safest pilot, and despite the statements by Employer's chief pilot at the time to the Unemployment Insurance Division that Young "demonstrated nothing but professionalism from the very beginning" and Young being "the type of employee anyone would welcome." Betof disputes Young's version of his termination, but as stated earlier, Betof was not a credible witness, and the Board does not believe Betof's stated reasons for the termination.

5. Employer's Position on Stone

Employer asserts that Stone was not a "team player" and placed his own needs ahead of the company's operation priorities.

In March of 2010, Employer received a complaint from its chief mechanic that Stone was unwilling to stay with his aircraft in Honolulu and insisted on flying back to the Big Island to avoid risk of delay in returning home. Also, in March of 2010, Stone objected to staying at the Employer-provided housing located near base if he could not meet the 20-minute response time (due to road work in Waimea) because it would be "unfair" to take Stone away from his home and family during his work shift of twelve to fourteen hours a day.

On July 20, 2008, Stone was arrested for "DUI" and reported the matter to the FAA on July 28, 2008, as required by 14 C.F.R. § 61.15.[v] However, Stone did not report the arrest to Employer until January 8, 2009. Stone expressed remorse and desire to comply with all FAA and State requirements, and assured Employer that his CDL, FAA physical and ATP & Instructors Pilots licenses remained valid. Employer took no action against Stone when it learned of the DUI arrest.

Betof testified that Stone was very "rigid" about requesting days off and expected other pilots to change their schedules in order to accommodate his requests; that two pilots working with Stone in Waimea complained to Mr. Betof several times that Stone was not flexible in accommodating them and thus caused conflict; that Stone, because he was paid when on call regardless of whether he was assigned to fly, often wanted to get out of flying assignments. Also, Stone complained more than other pilots that his workload was heavier than other pilots, and that he was called more often to take flights than other pilots.

Kevin Richard, a communication specialist with Employer, testified that on several occasions, Stone did not meet his estimated time of arrivals to the hospitals. Also, Stone did not make himself available to assist fellow pilots by "coming on shift" early to relieve other pilots, which resulted in other pilots not wanting to "come on shift" early to relieve Stone, making dispatch for Waimea difficult. Further, that Stone complained about his base being busier than others, and about being sent to Kona or Maui.

Employer further points to Stone's "heated phone calls" with Rodriguez and Stone's unwillingness to work with anyone civilly, and references an email from Stone to Rodriguez sent on November 20, 2008, which included the following:

> Don't act like you've done Mons or me any favors because you haven't. In fact even though you dont [sic] fly very much at night only once have you accepted a flight before your shift, probably to prove your point about moving the day shift to an earlier start. You don't want to work you just want to get paid. You think we all owe you because of all the time you had to take off, and you know how i [sic] know that, because you've said more than a few times that you need to make up pay and that's the reason why you should'nt [sic] be the one to take off on Christmas.
>
> Since all of this has happened, and since your wife is not going to be working, and since my wife is working, and since I don't have a baby sitter that I can count on all the time, I am going to let management know that from now on I am going to be the night pilot.

Employer further points to Stone's contest of his disciplinary letter in May of 2010, which is discussed below, as evidence of Stone's insubordination towards his managers.

6. Employer Merges with Its Competitor

On or around May 1, 2010, Hawaii Air Ambulance merged with its only competitor, AirMed Hawaii (AirMed). Shortly after the merger, Employer terminated Stone.

7. The May 12, 2010, Confusion Over Shifts

On May 12, 2010, pilot Harold Rodriguez (Rodriguez)[vi] was scheduled to work the day shift, and Stone was scheduled to work the night shift. This was Stone's first day back from vacation.

It was Employer's procedure at the time to schedule which pilots would work a particular day, but not a particular shift, and leave it up to the pilots to work out who worked the day and evening shifts.[vii] Rodriguez was scheduled for days and Stone for nights. However, Rodriguez was in the process of moving from Kona to Waimea at the time, and for that reason he needed to work nights. When Stone went on vacation, Rodriguez worked nights. At the end of Stone's vacation, the pilots were in the process

of "switch[ing] back." Rodriguez had a night flight on May 11, and understood that Stone had the night flight on May 12.

At 8:30 a.m. on May 12, 2010, Employer's Dispatcher Chris Guillermo [Dispatcher][viii] called Stone and asked whether Stone was working the day or night shift. Stone replied that he was working the night shift. The Dispatcher said the other pilot scheduled for that day was unable to work. Stone explained that he had already made plans to work the night shift and could not come in for the day shift due to his child care responsibilities that day. The Dispatcher replied "ok" and ended the conversation. Later that day, Stone checked in for, and worked, his scheduled night shift. Rodriguez did not realize that it had remained an issue, and thought it had been settled.

On May 18, 2010, Betof sent to Stone via email a Notification of Disciplinary Action and Written Warning regarding the May 12, 2010, shift mix-up, for "fail[ing] to report for his assigned shift, which resulted in the Waimea base being out of service for ten hours while the second Waimea pilot was on a required rest period." Employer considered it an "abandonment of base" and warned Stone that if this type of behavior continued, Stone would be subject to further disciplinary action up to and including termination of employment. Employer issued the written warning without asking for Stone's input or side of the story prior to its issuance. No other employee received any discipline for the shift mix-up. Although there were numerous times pilots were confused about their start time, Stone was the only pilot to ever receive a letter of discipline for it.

Stone responded to the May 18, 2010, disciplinary email, explaining that he was never assigned to the May 12, 2010, day shift, and that Employer never asked him for an explanation of what happened. Initially, Betof told Stone that he would withdraw the warning letter; however, in an email reply Betof told Stone that he had given it more thought and "decided not to withdraw the warning letter from [Stone's] file."

Finally, Employer claimed Stone had violated Employer's General Operations Manual (GOM) by not calling in advance to confirm his shift when returning after several days off. However, Employer never provided Stone with a copy of this supposed requirement, despite Stone's request for it. Employer finally provided a copy of the GOM on August 20, 2013, over three years after the incident. The GOM from Employer provided:

> When returning from a series of days off, the flight crewmember shall check in with the communications center to verify their scheduled one calendar day in advance of their return to duty.

However, the page that the language quoted above appears on is dated 7/10/2010, approximately *two months* after the incident and after Stone had already been terminated by Employer. Fortunately for Stone, he was able to present a copy of the GOM as it existed at the time of the incident, which provided in relevant part:

> Each pilot will be informed of the next shift assignment before the end of the previous shift or at least ten hours prior to the beginning of the shift assignment.

(Page dated 11/13/07).

8. Malfunctioning Air Conditioning on May 19, 2010

On May 19, 2010, at 1:00 a.m., Stone and two nurses were returning to Waimea when the air conditioner in the plane malfunctioned and smoke began filling the cockpit and cabin, requiring Stone to perform an emergency landing in Honolulu. Upon returning to Waimea, Stone wrote a report to the NTSB, as required by law. Betof appeared surprised and disappointed that Stone reported the incident to the NTSB. Initially, Betof told FAA Principal Operations Inspector Bernard Connolly (Connolly) that Stone made up the event because he had received a letter in his file. However, later, Betof admitted that the smoke was an actual in-flight emergency; he stated in an email, "I was off base in my suspitions [sic] and it was really the vent blower motor." This email was not produced by Employer to Stone despite Stone's discovery request in this proceeding; rather, Stone obtained a copy through a Freedom of Information Act (FOIA) request to the FAA.

On May 29, 2010, Employer sent a company-wide email describing the emergency and praising the crew's action and the pilot's foresight, training, and level of experience, without naming Stone as the pilot deserving of the praise.

9. Stone's Termination on June 10, 2010

Because of the merger with AirMed, Betof, as Director of Operations, was tasked with determining the appropriate manpower for the company, including whether a reduction of force would be necessary and, if so, which pilots would be laid off. Betof consulted with Guillermo, who provided input about her experiences with all the pilots. Six out of the seven pilots who were laid off were from AirMed; Stone was the only pilot from Hawaii Air Ambulance that was laid off. Additionally, the other pilots who were laid off were all from Oahu; Stone was the only pilot from the Big Island who was laid off.

On June 10, 2010, at 9:30 p.m., Betof told Stone that he was being laid off immediately due to a "reduction in force." No other explanation was given to Stone. Employer's letter to Stone entitled "Notice of Reduction in Workforce" stated, "I regret to inform you that your position with Hawaii Life Flight is being terminated due to a reduction in workforce effective June 11, 2010" and "Thank you for your service to the people of Hawaii."

At trial, however, Betof testified that he selected Stone to be one of the seven pilots laid off because of Stone's "poor attitude with regard to work, his desire to place his own priorities above the priorities of the Company, and his ability [sic] to get along and work well with the other employees."

On the morning of June 11, 2010, less than 15 hours after ostensibly laying off Stone due to a "reduction in force," Employer offered Stone's position to Robert Brian Darrow (Darrow)[ix], a pilot of AirMed based on Oahu, who had no interest in moving from Oahu, and never expressed any interest in relocating to, or working in, Waimea. Betof's email dated July 19, 2010, described Darrow as "[o]ur proposed Waimea pilot to fill James Stone's place[.]" Rather than transfer to Waimea, Darrow accepted a job with Aloha Air Cargo, based on Oahu.

On August 19, 2010, Employer hired pilot Phil Lisonbee (Lisonbee) to be based in Waimea. It appears that Lisonbee was not an employee of Employer at the time, so his filling Stone's position was not merely a transfer but a new hiring.

10. Stone's Retaliation Complaints to HIOSH and OSH

On July 14, 2010, Stone filed with HIOSH a complaint of discrimination under HRS § 396-8(e), alleging that he was terminated by Employer for reporting unsafe working conditions to the company. On July 16, 2010, Stone filed a complaint with OSHA regarding the same facts and circumstances alleged in his HIOSH complaint. The federal OSHA proceeding was still pending as of the close of the Board hearing in the present case.

By letter dated November 24, 2010, HIOSH notified Stone of its conclusion that his termination was based on a legitimate business reason, and that HIOSH was closing his complaint. By letter dated December 9, 2010, received by HIOSH on December 13, 2010, Stone appealed the HIOSH's determination. On April 8, 2011, the Board received from the Director a Notice of Contest regarding Stone's discrimination complaint.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Statutory Provisions

Hawaii's occupational safety and health is governed by HRS chapter 396. Pursuant to HRS § 396-8(e), discharge or discrimination against employees for exercising any right under chapter 396 is prohibited. In consideration of this prohibition:

> (1) No person shall discharge, suspend, or otherwise discriminate in terms and conditions of employment against any employee by reason of:
>
> (A) The employee's failure or refusal to operate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or
>
> (B) The employee's failure or refusal to engage in unsafe practices; or violation of this chapter or any standard, rule, regulation, citation or order issued under the authority of [chapter 396];
>
> * * *

(3) **No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [chapter 396], or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by [chapter 396];**

(4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;

(5) Upon receipt of the complaint, the director shall investigate to determine if a discharge or discrimination in violation of this subsection has occurred; [and]

(6) If upon investigation the director determines that the provisions of this subsection have been violated, the director shall order the employer to provide all appropriate relief to the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority[.]

(Emphasis added).

With respect to appeals from the Director's determinations, HRS § 396-11 provides:

(e) Any employee or representative of employees may file a notice of contest of an order of the director denying a complaint of discrimination filed by an employee pursuant to section 396-8(e); provided that in each case the notice is filed within twenty days after receipt of the order by the employee.

* * *

(g) Upon receipt, the director shall advise the appeals board of any notice of contest.

(h) The appeals board shall afford an opportunity for a de novo hearing on any notice of contest except where rules require a prior formal hearing at the department level, the proceedings of which are required to be transcribed, in which case review before the appeals board shall be confined to the record only.

(i) The appeals board may affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate.

The federal Williams-Steiger Occupational and Safety Health Act of 1970 (Act) is contained in 29 U.S.C. § 651, *et seq.* Section 11(c) of the Act prohibits reprisals against employees who exercise rights under the Act, and provides in 29 U.S.C. § 660(c)(1):

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself [or herself] or others of any right afforded by this chapter.

B. The Authority of HIOSH to Investigate

Stone's complaint to HIOSH alleged that he was wrongfully terminated by Employer in retaliation for having made "various aircraft discrepancy write ups." One of the complaints that Stone had made was that pilots were operating a 3,000-gallon fuel truck in the Honolulu Airport operations area without having secured a CDL or having received any type of training in fueling or hazardous materials. Other safety complaints pertained to the operation of aircraft; for example, undertaking emergency flight procedures when he encountered smoke in the cockpit of his aircraft at 8,000 feet.

The Board agrees with the Director and Employer that the FAA, and not HIOSH, has the authority to investigate safety complaints pertaining to the operation of the aircraft, such as the emergency flight procedures when smoke was encountered in the cockpit at 8,000 feet.[x] The Board further agrees with the Director and Employer that HIOSH had the authority, pursuant to HRS § 396-8(e), to investigate the possible discharge of, or discrimination against, Stone for exercising rights under HIOSH laws, including Stone's complaint regarding pilots operating a fuel truck without a CDL or training in fueling or hazardous materials. The requirement that the operator have a CDL is a regulation of the Department of Transportation, State of Hawaii.

1. The Hawaii State Plan

State jurisdiction and plans are governed by 29 U.S.C. § 667, which provides, in part:

> **(a) Assertion of State standards in absence of applicable Federal standards**
>
> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> **(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards**
>
> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment –

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

A background of the Hawaii State Plan can be found in the Federal Register.[xi] In Federal Register Vol. 49, No. 88 (May 4, 1984), beginning page 19182, the Assistant Secretary, United States Department of Labor, granted final approval to the Hawaii State Plan. As a result, "Federal OSHA standard and enforcement authority no longer appl[ied] to occupational safety and health issues covered by the Hawaii plan, and authority for Federal concurrent jurisdiction [was] relinquished." Federal enforcement jurisdiction was retained, however, "in the issue of maritime employment in the private sector" and Federal jurisdiction also remained in effect "with respect to Federal government employers and employees." It was noted that a "**State is expected to provide appropriate protection to employees against discharge or discrimination for exercising their rights under the State's program including provision for employer sanctions and employee confidentiality (29 CFR 1902.4(c)(2)(v))**"; and that "**Hawaii law and regulations provide for discrimination protection which is at least as effective as the Federal and in some respects more protective**" (id. at 19187, emphases added). The final approval was effective April 30, 1984 (id. at 19190). The effect of the decision was to "terminate OSHA authority for Federal enforcement of its standards in Hawaii, in accordance with section 18(e) of the Act, in issues covered under the State plan" (id. at 19191).

In 2012, OSHA modified the Hawaii State Plan's "final approval" to an "initial approval" status. See Federal Register Vol. 77, No. 184 (Sept. 21, 2012), beginning page 58488. The reason for the modification was HIOSH's "budgetary and staffing restraints" affecting the program, leading the Director to request the temporary modification to permit the "exercise of supplemental federal enforcement activity and to allow Hawaii sufficient time and assistance to strengthen its state plan" (id.). The effect of the decision was described as follows:

> The Assistant Secretary's decision to modify the Hawaii State Plan's status from final to initial approval would authorize OSHA to carry on an enforcement program to supplement that of HIOSH, including independent federal or joint state and federal inspections resulting in issuance of appropriate federal citations. However, **modifying Hawaii's final approval status would not affect Hawaii's basic plan approval** and would not affect Hawaii's legal authority to enforce state occupational safety and health standard in the state's work places (emphasis added). This modification would leave Hawaii's federal-approved state plan completely in place, and would simply reinstate federal OSHA's authority to supplement state enforcement during this difficult period.
>
> Federal OSHA inspections or joint state and federal OSHA inspections may result in the issuance of appropriate federal citations and penalties. Federal OSHA compliance officers may issue citations effective immediately. Contested federal citations and penalties will be reviewed by the Federal Occupational Safety and Health Review Commission (OSHRC). Federal OSHA will continue to exercise federal authority over safety and health issues excluded from coverage under the state plan; monitoring inspections including accompanied visits; and other federal authority not affected by the 1984 final approval decision.

(Id.)

In Federal Register Vol. 79, No. 31 (Feb. 14, 2014), pages 8855-57, OSHA and HIOSH revised their 2012 Operation Status Agreement to return greater responsibility to HIOSH for Fiscal Year 2014.

Accordingly, the Hawaii State Plan administered by HIOSH was approved by OSHA, pursuant to 29 U.S.C. § 667, with the expectation that the State would provide

"appropriate protection to employees against discharge or discrimination for exercising their rights under the State's program."

Furthermore, 29 C.F.R. § 1902.4, which governs Criteria for State Plans, provides in paragraph (c), in relevant part (emphasis added):

> (c) *Enforcement.*
>
> * * *
>
> (2) The Assistant Secretary will determine whether the State plan:
>
> * * *
>
> (v) **Provides necessary and appropriate protection to an employee against discharge or discrimination** in terms and conditions of employment because he [or she] has filed a complaint, testified, or otherwise acted to exercise rights under the Act for himself [or herself] or others, by such means as providing for appropriate sanctions against the employer for such actions and by providing for the withholding, upon request, of the names of complainants from the employer.

2. The Surface Transportation Assistance Act

Finally, Section 405 of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105, provides, *inter alia*, that a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because the person filed a complaint or began a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. However, the STAA also expressly states that, "**[n]othing in this section preempts or diminishes any other safeguards** against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of

discrimination **provided by** Federal or **State law**." 42 U.S.C. § 31105(f) (emphases added).

Accordingly, the Board finds that HIOSH had the authority to investigate the possible discharge of, or discrimination against, Stone for exercising rights under HIOSH laws, including Stone's complaint regarding pilots operating a fuel truck without a CDL or training in fueling or hazardous materials, which is a regulation of the Department of Transportation, notwithstanding Stone's concurrent complaint to OSHA under the STAA. The requirement that the operator have a CDL is a regulation of the Department of Transportation, State of Hawaii. Although OSHA may have concurrent or supplemental authority to investigate Stone's complaint, the Board holds that HIOSH had the authority to investigate Stone's complaints under the Hawaii State Plan.

C. The Standard for Establishing Discrimination or Retaliation

Pursuant to HRS § 91-10(5), Stone has the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof is "preponderance of the evidence"[xii] (id.).

As stated earlier, HRS § 396-8(e)(3) provides, "[n]o person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [chapter 396], or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by [chapter 396.]"

To prove such a claim, a complainant must establish a *prima facie* case of discrimination or retaliation. Skellington v. City and County of Honolulu, Case No. OSAB 97-015 (Labor and Industrial Relations Appeals Board, August 29, 2001); Miura v. Pacific Ohana Hostel, Case No. OSAB 2002-16, Decision No. 2 (Hawaii Labor Relations Board, October 4, 2002); Makakoa v. Aloha Petroleum, Ltd., Case No. OSH 2009-4, Order No. 381 (Hawaii Labor Relations Board, March 23, 2010). If the complainant is able to establish a *prima facie* case, the burden shifts to the employer to provide a permissive, non-retaliatory reason for the employment action. Id. Once the employer does so, the complainant must prove the employer's stated reason(s) is/are pretextual. Id.

To establish a *prima facie* case, a complainant must show: (1) the complainant engaged in protected activity; (2) the employer subjected the complainant to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. Id.; *see also,* Lales v. Wholesale Motors Co., 133 Hawaii 332, 356-57, 328 P.3d 341, 365-66 (2014). A complainant may show causation through both direct and circumstantial evidence. Direct evidence is that which if believed, proves the fact of discriminatory animus without inference or presumption (Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998)), and includes statements demonstrating hostility toward a protected status (Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 662 (9th Cir. 2002)). Circumstantial evidence may also be used to show causation, if the evidence gives rise to an inference of unlawful discrimination (Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089 (1981)).

1. The "But For" Standard Versus Lesser Standards

Employer asserts that HRS § 396-8(e)(3) prohibits an employer from discharging or discriminating against an employee "*because* the employee has filed any complaint" (emphasis in Employer's Post-Hearing Brief, at p.26), and therefore the Board must use the "*but for*" standard adopted by the United States Supreme Court in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009) (concerning Age Discrimination in Employment Act (ADEA) disparate treatment claim) and University of Texas Southwestern Medical Center v. Nassar, – U.S. – , 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013) (concerning Title VII[xiii] retaliation claim), and not the "*motivating factor*" standard. The "*but for*" test requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer (Nassar, 133 S. Ct. at 2533, 186 L. Ed. 2d at 523). The Board disagrees with Employer's reliance on Gross and Nassar.

As remarked upon by the Court in Nassar, Title VII prohibits discrimination in employment on the bases of any of seven criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination. However, the "motivating factor" standard articulated in 42 U.S.C. § 2000e-2(m)[xiv] addresses only the first five factors (race, color, religion, sex, national origin) with no reference to "opposition to employment discrimination" or "submitting or supporting a complaint about employment discrimination" and thus the Court distinguished the standard of proof in retaliation

claims from status-based claims. The Court also declined to give deference to the EEOC's Compliance Manual which adopted the "motivating factor standard." In Gross, the Court noted that when Congress added the "motivating factor" standard to Title VII (articulated in 42 U.S.C. § 2000e-2(m)) in 1991, it did not add such a provision to the ADEA, and thus distinguished the standard of proof in ADEA claims from Title VII status-based claims.

2. OSHA's Use of a Lesser Standard

Both HRS § 396-8(e)(3) and 29 U.S.C. § 660(c)(1) use the language "*because* such employee has filed . . ." (emphasis added). However, despite the use of the language "because . . . ," in the OSHA statutes, OSHA's regulations do not require the use of the "but for" standard. The OSHA regulations governing discrimination against employees exercising rights under the Act are provided for in 29 C.F.R. § 1977, and provide in relevant part:

> At the same time, to establish a violation of section 11(c), the employee's **engagement in protected activity need not be the sole consideration** behind discharge or other adverse action**. If protected activity was a substantial reason for the action, or if the discharge or** other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. . . . Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

29 C.F.R. § 1977.6(b) (emphases added). See also, 29 C.F.R. § 1978, governing STAA complaints, investigations, findings, and preliminary orders, which provides in relevant part that a complainant must make a *prima facie* showing "that the protected activity . . . was a **contributing factor** in the adverse action" (emphasis added). The STAA prohibits discharging an employee "because" of protected conduct (42 U.S.C. § 31105(a)(1)).

Furthermore, at least one recent federal OSHA retaliation case, rendered *after* the Gross and Nassar cases, continued to use a lower standard. In Perez v. U.S. Postal Service, __ F. Supp. 3d __, 2015 WL 630476 at *18, 2015 U.S. Dist. LEXIS 18201 at *45, 2015 OSHD (CC) P 33, 438 (W.D. Wash, Feb. 13, 2015), the court held that the Secretary of Labor had "demonstrated by a preponderance of the evidence that

[employee's] protected activities were a 'substantial reason' for the . . . adverse actions" (citing 29 C.F.R. § 1977.6(b)).

3. HIOSH's Use of a Lesser Standard

Similar to 29 C.F.R. § 1977.6(b), HIOSH's administrative rules provide in § 12-57-3, "Unprotected activities distinguished":

> (a) The protected activity must constitute a substantial reason for the discharge or other adverse action, or
>
> (b) The discharge or other adverse action would not have taken place "but for" engagement in the protected activity by the employee.

4. The Legislative History of HRS § 396-8(e)

The Hawaii Industrial Safety Law, HRS chapter 376, was the precursor to chapter 396. In 1968, § 376-5 provided:

> No employer shall discharge or suspend any employee:
>
> (1) Who fails or refuses to operate or handle any machine, device, apparatus, or equipment which is in an unsafe condition; or
>
> (2) Who fails or refuses to engage in unsafe practices in violation of this chapter or of any rule or regulation issued under the authority of this chapter; or
>
> (3) Who fails or refuses to operate or handle any machine, device, apparatus, or equipment in violation of this chapter or of any rule or regulation issued under the authority of this chapter.

In 1972, the Legislature repealed chapter 376 and created chapter 396 via Act 57[xv], S.B. No. 2014-72, which included the following under § 396-8 (emphasis added):

(e) Discharge or suspension of employee for refusal to engage in unsafe practice prohibited.

(1) No employer shall discharge, suspend or otherwise discriminate in terms and conditions of employment against any employee by reason of:

(A) his [or her] failure to operate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or

(B) his [or her] failure or refusal to engage in unsafe practices in violation of this chapter or of any rule or regulation issued under the authority of this chapter; or

(C) his [or her] failure or refusal to operate or handle any machine, device, apparatus, or equipment in violation of this chapter or of any rule or regulation issued under the authority of this chapter; or

(D) **his [or her] filing a complaint, testifying or otherwise acting to exercise rights under this chapter for himself [or herself] or others.**

The intent of Act 57 was to establish Hawaii's "own safety and health standard which will be just as or more effective than the standards established in Public Law 91-596 [the federal Occupational Safety and Health Act]." S. Stand. Com. Rep. No. 385-72, in 1972 Senate Journal, at 911.

In 1993, § 396-8(e) was amended via Act 204, HB No. 1665[xvi], to include the current relevant language:

> Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:
>
> * * *
>
> (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [chapter 396], or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by [chapter 396];

The intent of Act 204 was primarily to make Hawaii's occupational health and safety law relating to prohibited discrimination more consistent with federal law. H. Stand. Com. Rep. No. 278, in 1993 House Journal, at 1074; H. Stand. Com. Rep. No. 590, in 1993 House Journal, at 1208; S. Stand. Com. Rep. No. 1070, in 1993 Senate Journal, at 1159; S. Stand. Com. Rep. No. 1234, in 1993 Senate Journal, at 1215.

Accordingly, the Board holds that a complainant need not satisfy the "but for" standard in cases brought under § 396-8(e), as that would require a higher burden than provided for under federal OSHA regulations. Additionally, as far as the Board is aware, Hawaii courts have not adopted the "but for" standard articulated in Nassar.

D. Prima Facie Case

1. Stone engaged in a protected activity

Shortly after beginning his employment with Employer, Stone complained to Guillermo and Nix about the unsafe and illegal practice of having unlicensed pilots refuel the aircraft. This activity is prohibited by HAR § 19-37-8(5). Further, even after Employer received an exemption letter regarding the refueling, Employer refused to allow the letter to be placed in the trucks as required by law, about which Stone made complaints to Employer. Stone's actions in bringing these complaints to Employer were protected activities under HRS § 396(8)(e).

2. Employer subjected Stone to adverse employment action

Less than one month before his termination, Stone received a disciplinary letter for "abandonment of base." As the Board found in the Findings of Fact above, Stone was scheduled for, and did in fact work, the evening shift on May 12, 2010, not the day shift. Employer's practice at the time was for the pilots to work out among themselves which shift they would cover. Stone had been working the evening shift just prior to his vacation. The pilot normally scheduled for the day shifts was able to temporarily switch to the evening shift, which he desired to do, due to Stone being on vacation. May 12 was Stone's first day back from vacation. The Employer did not schedule Stone, and did not inform Stone ahead of time that he was expected to switch, to the day shift when he returned from vacation. Witness testimony showed that numerous pilots had issues involving scheduling mix-ups due to the Employer's policy, yet no other pilot except Stone received a letter of discipline for a mix-up over a shift.

On June 10, 2010, at 9:30 p.m., Betof told Stone that he was being laid off immediately due to a "reduction in force." No other explanation was given to Stone.

3. A causal link exists between the protected activity and the adverse employment action

Generally, Employer maintained a work environment that discouraged employees from reporting safety concerns. Pilots referred to Employer's "safety meetings" as "free lunch" meeting because Employer was not interested in hearing about or discussing safety issues, but did provide a free lunch.

Specifically, Guillermo dismissed all of Stone's safety concerns and seemed "agitated" by them. Even the Employer's Compliance Officer, Nix, gave pilots false information regarding the need for a CDL. Moreover, pilots who brought up safety concerns had "cross hairs" on their backs. Employer's Lead Pilot mentioned the "cross hairs" on Stone's back, and explained that if it were up to Guillermo, Stone would have been fired long ago, but because Stone's wife was an emergency room doctor, it would be "bad PR" for the company and they did not want to cause turmoil within the Waimea Hospital. Employer was concerned about the potential business consequences of terminating Stone because of the possibility that Stone's wife could divert business to Employer's competitor. Ultimately, Stone was terminated less than one month after Employer merged with its only competitor.

Additionally, Employer withheld from Stone and other pilots information from Hartley, FAA Principal Operation Inspector, that Hartley specifically directed Employer to disseminate to all pilots. Hartley's April 24, 2009, letter warned pilots not to fly aircraft knowing there is a deficiency that had not been fixed or deferred properly, or the pilot will receive a violation notice and suspension of flying privileges. The letter further advised the pilots to contact Hartley "if [they] see anything questionable or are asked or pressured to fly an aircraft that hasn't been properly maintained or if [they] have any questions[.]" However, Betof did not send Hartley's letter to the pilots until forced to do so by Hartley in October of 2009. Betof testified that he had sent out his own "reworded" copy of the letter by email to all pilots, but credible witness testimony showed that the pilots did not receive such an email, and Employer did not produce a copy of the reworded email.

In summary, Employer's actions regarding the suppression and discouragement of safety concerns generally, and the Employer's actions and comments regarding Stone specifically, lead the Board to find and conclude that there was a causal connection between Stone's protected action and the adverse employment action. Although Stone remained employed with Employer for approximately one-and-a-half years after *first* reporting the CDL violation, Stone's concerns and complaints were on-going, which was reasonable, particularly when Employer refused to place its letter of exemption inside the vehicle so pilots could know of its expiration date. Additionally, Stone established a convincing reason for Employer's delay in his termination: namely, Employer's economic concerns about losing business to a competitor, that were alleviated when Employer merged with its competitor. Additionally, Stone was the pilot who advocated the most on behalf of other pilots regarding the CDL issue. Finally, Employer asserts it could have laid off Stone, if it wanted to, because of his DUI arrest in 2008; however, Employer never raised this as a reason in Stone's "Notice of Reduction in Force" and apparently never chose to discipline Stone or address the DUI in any other way at the time Employer first learned about it.

E. Employer's Non-Discriminatory or Non-Retaliatory Reasons

Employer asserts it had legitimate, non-discriminatory or non-retaliatory reasons for terminating Stone's employment, such as Stone's "poor attitude" with regard to work and inability to get along with the other employees; his desire to place his own priorities

above those of the company; and his "insubordinate emails" in response to his letter of discipline for "abandonment of base."

Specifically, Employer argues that it received a complaint from its chief mechanic that Stone was unwilling to stay with his aircraft in Honolulu and insisted on flying back to the Big Island to avoid risk of delay in returning home. Also, in March of 2010, Stone objected to staying at the Employer-provided housing located near base if he could not meet the 20-minute response time (due to road work in Waimea) because it would be "unfair" to take Stone away from his home and family during his work shift of twelve to fourteen hours a day.

Betof testified that Stone was very "rigid" about requesting days off and expecting other pilots to change their schedules in order to accommodate his requests; that two pilots working with Stone in Waimea complained to Mr. Betof several times that Stone was not flexible in accommodating them and thus caused conflict; that Stone, because he was paid when on call regardless of whether he was assigned to fly, often wanted to get out of flying assignments. Also, Stone complained more than other pilots that his workload was heavier than other pilots, and that he was called more often to take flights than other pilots. Kevin Richard, a communication specialist with Employer, testified that on several occasions, Stone did not meet his estimated time of arrivals to the hospitals. Also, Stone did not make himself available to assist fellow pilots by coming on shift early to relieve other pilots, which resulted in other pilots not wanting to come on shift early to relieve Stone, making dispatch for Waimea difficult. Further, Stone complained about his base being busier than others, and about being sent to Kona or Maui.

In addition, Employer points to Stone's "heated phone calls" with Rodriguez and being unwilling to work with anyone civilly.

Employer further points to Stone's contest of his disciplinary letter in May of 2010, as evidence of Stone's insubordination.

F. Pretext

Employer's stated reason for Stone' termination on June 10, 2010, was a "reduction in force" following the merger. Six out of the seven pilots whom Employer laid off were from AirMed; Stone was the only pilot from Hawaii Air Ambulance that

was laid off. Additionally all other pilots who were laid off were based on Oahu; Stone was the only pilot based on the Big Island to be laid off.

Employer continued its attempt to fill Stone's specific position in Waimea, however, after laying off Stone ostensibly due to a reduction in force. The day after Stone was laid off, Employer offered Stone's position to a less experienced pilot on Oahu who had no interest in working in Waimea and never expressed an interest in relocating to the Big Island. Betof's email described the other pilot as Employer's "proposed Waimea pilot to fill James Stone's place[.]" Ultimately, the other pilot took a cut in pay to work for Aloha Air Cargo rather than relocate to fill Stone's position. Employer then hired pilot Phil Lisonbee to fill Stone's position on August 19, 2010. Accordingly, Employer still had a "need" for a pilot to fill Stone's position when it decided to terminate Stone, and did not even know at the time whether another of Employer's pilots would be willing and able to fill Stone's position.

Additionally, Employer had no basis to issue a disciplinary letter to Stone for "abandonment of base." The Employer's policy of having pilots "work out" shifts among themselves resulted in many mix-ups over shift assignments; however, no pilot other than Stone ever received a disciplinary letter because of it. Further, Stone was actually scheduled to work, and did work, the evening shift on May 12, 2010. Employer did not even ask Stone for his side of the story before Employer decided to issue its disciplinary letter for abandonment of base. The other pilot involved in the mix-up did not receive a disciplinary letter. Moreover, Employer attempted to use a provision from its GOM that was revised two months after the incident as justification to discipline Stone, and did not provide Stone with a copy of the GOM at the time of the discipline despite Stone's request for it. The GOM as it existed at the time of the incident did not support Employer's discipline of Stone.

Given the unfairness of Employer targeting Stone for a letter of discipline, the Board does not find Stone's actions in contesting the letter to be insubordination or evidence of "poor attitude." Similarly, safety-related complaints, or Stone's assertions based on his experience and judgment, do not establish a "poor attitude" on the part of Stone.

Although Employer now asserts Stone was selected for termination due to his poor attitude, Employer did not provide this reason at the time Stone was actually terminated.

On February 1, 2013, in response to questions posed by the federal OSHA investigator regarding the pilots other than Stone who were laid off, Employer gave the following reasons for why those pilots were selected for lay off:

> All the named pilots were Oahu-based pilots employed by Air Med Hawaii before it merged with Hawaii Air Ambulance in 2010. Before the merger, Air Med Hawaii had three (3) planes based on Oahu with three (3) pilots and (3) co-pilots for each plane. Hawaii Air Ambulance had no Oahu-based planes or Oahu-based pilots before the merger, but had a maintenance base on the island.
>
> After the merger, Hawaii Life Flight (HLF) based one (1) plane on Oahu. Because HLF only had one (1) plane based on Oahu instead of the three (3) planes Air Med Hawaii had previously based on that island, HLF needed to reduce the number of pilots and co-pilots based on Oahu. [S.S.], [H.K.], [B.F.], [H.A.], and [J.R.] were junior pilots/co-pilots. These five (5) individuals were selected to be laid off based generally on their experience and seniority. [P.W.] was selected to be laid off after he failed to pass an oral exam given during an interview with [Betof] and attended by HLF's chief pilot.

Thus, Employer's criteria appeared to be lack of seniority and experience, and being based on Oahu. Stone was the only pilot terminated who did not meet that criteria. Stone was one of Employer's most experienced pilots, had significant seniority, was based on Waimea, and did not work for the competitor.

When asked why Darrow and Lisonbee were offered Stone's position in 2010, **including "the qualifications considered in making these offers**" (emphasis added), Employer provided the following evasive answer:

> [Darrow] transferred to HFL from Air Med Hawaii when Air Med merged with Hawaii Air Ambulance in 2010. [Darrow] resigned his position with HLF on August 9, 2010 and left the company. [Darrow] was scheduled to transfer from Honolulu to Waimea, Hawaii at the time of his resignation.
>
> [Lisonbee] was hired on or about September 7, 2010 to fill the position vacated by [Darrow] in Waimea.

Later, on March 22, 2013, in response to follow-up questions from the federal OSHA investigator, Employer's stated criteria for selecting pilots to be laid off included "the pilot's technical knowledge and skill and the pilot's overall employee record, including the ability to work as a team and get along with others, interpersonal skills, flexibility in scheduling shifts, and disciplinary record." When asked about the Waimea position, Employer stated, "Because [HLF] had pilots willing to relocate, the current location of each pilot did not play a role in who would be selected for lay off" and "HLH [sic] had another pilot who was willing to relocate to The Big Island and who was found to be a superior employee to Mr. Stone." This contradicts Employer's answer on February 1, 2013, that showed base location played a large role in the selection of five other pilots for layoff. It also contradicts Darrow's testimony, the first pilot Employer sought to fill Stone's position, as Darrow never expressed any desire or willingness to transfer to the Big Island, and ultimately took a pay cut to work for Aloha Air Cargo instead, to avoid having to relocate. Additionally, Lisonbee, whom Employer ultimately found to fill Stone's position, was a new hire for Employer and not simply a transfer.

Based on the Employer's after-the-fact revision of its GOM in an attempt to justify its discipline of Stone on May 12, 2010; its unwarranted discipline of Stone; its contradictory reasoning for selecting Stone among the other pilots for layoff; as well as the findings of fact and discussion above regarding Employer's targeting of Stone and other employees for having made safety complaints, and Employer's placing competitive concerns above safety concerns; and other reasons discussed herein, the Board finds and concludes that Employer's stated reasons for selecting Stone for termination were pretextual and intentionally fabricated.

IV. SUMMARY

The Board finds and concludes that Stone met his burden of proving he was wrongfully terminated due to his health and safety complaints regarding the improper, unsafe, and illegal operation of fuel trucks by pilots without CDLs. The Board finds that Stone's protected activity was a substantial factor in his termination.

V. FAILURE TO PROVIDE DOCUMENTS

Stone asserts that, at the beginning of hearing on July 9, 2013, Employer appeared with exhibits containing numerous documents that has not been previously produced,

despite Stone's May 3, 2010, First Request for Production of Documents in this proceeding. These documents include emails from Employer's owner and Executive Vice President commenting on the draft letter of discipline to Stone; Employer's internal email announcing that Darrow would not be filling Stone's position; and Employer's GOM that was referenced by Employer when Stone disputed his disciplinary letter. Additionally, Employer did not produce an email from Betof to the FAA Principal Operations Inspector regarding the incident of smoke in the cockpit, which Stone only obtained through a FOIA request to the FAA. There are other documents that Stone alleges Employer did not produce, such as leases for its previous or current locations which could establish Employer's "exclusive use" areas; emails that Betof testified he could not retrieve because he did not access his email in over two years; and other requested documents.

Employer asserts it acted in good faith to produce relevant documents under its custody and control, and immediately produced to Stone documents such as the 2010 GOM, once Employer realized that it had not been produced. Employer cites to Kawamata Farms, Inc. v. United Agri Products, 86 Hawaii 214, 948 P.2d 1055 (1997), for the standard to use in determining whether a discovery sanction is appropriate for a party's loss or withholding of discoverable evidence.

Although Stone, in his post-hearing brief, requests punitive damages in part for Employer's improper withholding, delayed, and partial document production, Stone did not move for sanctions at trial or via written motion to the Board. Accordingly, the Board does not order sanctions against Employer for the failure to produce documents identified by Stone as falling within his discovery request.

VI. ORDER AND REMEDY

Pursuant to HRS § 396-8(e)(6), if upon investigation the director determines that the provisions of that subsection have been violated, the director "shall order the employer to provide all appropriate relief to the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority[.]

Pursuant to HRS § 396-10(h), any employer who has received an order for violation under section 396-8(e) may be assessed a civil penalty of not more than $1,000

for each violation. Pursuant to § 396-19(k), civil penalties shall be paid to the Department of Labor and Industrial Relations.

Pursuant to HRS § 396-11(i), the Board may "affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate."

Accordingly, the Board hereby orders the following:

(1) Employer shall pay a civil penalty to the Department of Labor and Industrial Relations in the amount of $1,000.00, within thirty days of this decision. Employer shall coordinate with HIOSH on the method or manner of payment.

(2) Employer shall not discriminate or retaliate against any person or employee because of that person's or employee's participation in this proceeding as a witness, or because of a family member's participation in this proceeding as a witness.

(3) Employer shall expunge Stone's personnel file, if one is maintained by Employer, of any unfavorable references or entries related to his termination or to the May 12, 2010, "abandonment of base" including the letter of discipline.

(4) Based upon the Board's findings above and the evidence in this case of Employer's past conduct toward Stone, the Board finds and concludes that reinstatement is not appropriate. The Board therefore awards Stone the following amounts:

a. A lump sum in the amount of **$560,680.00** (five hundred sixty thousand, six hundred eighty dollars), based upon the daily rate of pay Stone was receiving at the time of his termination ($305 plus $50 per diem) and the expected yearly increases to that rate ($5 increase every year), and the average number of work days in any given month (twenty-five days per month;

16 days for the remainder of the month of June 2010) from and including the month of Stone's termination in June 2010 through the end of June 2015. This amount shall not be subject to any off-set.

b. Additional compensation in the amount of **$200,000.00** (two hundred thousand dollars), in lieu of reinstatement and in lieu of restoration of any other benefits including vacation and contributions to a 401(k) account.

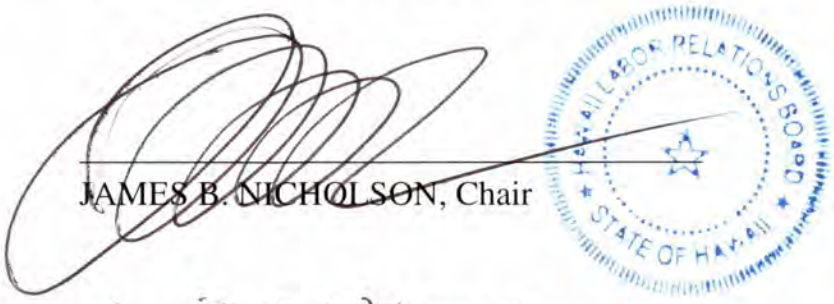
c. Because the Board orders that the amount in paragraph a. above shall not be offset by any salary Stone earned with another employer during that time period, nor by any unemployment or severance payment Stone may have received resulting from his termination, the Board in its discretion does not order pre-judgment interest on Stone's award.

In summary, the Board awards Stone the total amount of **$760,680.00** (seven hundred sixty thousand, six hundred eighty dollars).

(5) Stone's post-hearing brief requests attorney's fees in the amount of $298,781.76, without including a detailed showing of rates charged and hours expended. The Board hereby orders that any request for recovery of fees and costs shall be made by motion filed no later than ten days after the date of this Decision and Order, and the motion shall include sufficient details to enable the Board to determine reasonableness. Any opposition to such motion shall be filed no later than ten days after the filing of the motion.

DATED: Honolulu, Hawaii, June 18, 2015.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

Copies sent to:

Corianne W. Lau, Esq.
Pamela M. Harms, Esq.
James McWhinnie, Esq.
Christopher Pan, Esq.
Herbert B.K. Lau, Deputy Attorney General

[i] Hawaii Life Flight was formerly known as Hawaii Air Ambulance.

[ii] In May of 2006, Eagle Air Med (now, Air Medical Resource Group), which is headquartered in Utah, purchased and began operating Hawaii Air Ambulance.

[iii] Hawaii Administrative Rules (HAR) § 19-37-8, governing aircraft fuel servicing vehicles, provides in paragraph (5):

> Aircraft refueler units shall be attended and operated only by persons instructed in methods of proper use and operation and who are qualified to use such refueler units in accordance with minimum safety requirements. Each qualified driver operator shall possess a valid State of Hawaii commercial driver's license (CDL) and an AOA motor vehicle operator permit (MVOP). Hydrant Cart Operators are not required to have a CDL.

[iv] HAR § 19-15.1-15 provides, "Both the airport motor vehicle operator's permit and the applicable valid motor vehicle driver's license . . . shall be in the person's immediate possession while operating any vehicle in the operational area."

[v] 14 C.F.R. § 61.15(e) requires a written report of each motor vehicle action to the FAA, Civil Aviation Security Division, not later than 60 days after the motor vehicle action.

[vi] Rodriguez had expressed concern about testifying in this case, because he was the only one testifying who "has something to lose" due to his wife still having a job with Employer, even though Rodriguez now works for Hawaiian Airlines. And, that he and Stone "both know [Employer] well enough to know what's going to happen. Like you would do, I have to put my family first. I fully support your fight but it's coming down to my expense." At trial Rodriguez repeated his concern that testifying "could put her job in jeopardy[.]"

[vii] Employer subsequently changed its scheduling procedure, acknowledging there was "a lot of confusion."

[viii] Chris Guillermo and Dawn Guillermo are married.

[ix] In his written statement of support for Stone, Darrow expressed his "personal concerns" that if the letter was seen by Employer's management, his position might be jeopardized.

[x] See Wendall H. Ford Aviation Investment and Reform Act For the 21st Century, 49 U.S.C. § 42121; and United States Secretary of Labor's Order 5-2002; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, Federal Register Vol. 67, No. 204, page 65008.

[xi] Rule 202 of the Hawaii Rules of Evidence (HRS chapter 626) provides in relevant part that a court "shall take judicial notice of . . . the constitution and **statutes of the United States** and of every state, territory, and other jurisdiction of the United States" (emphasis added). In turn, 44 U.S.C. § 1507 provides in relevant part that "[t]he **contents of the Federal Register shall be judicially noticed** and without prejudice to any other mode of citation, may be cited by volume and page number."

[xii] The preponderance of the evidence has been defined as that quantum of evidence which is sufficient to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false. Makakoa v. Aloha

Petroleum, Ltd., Case No. OSH 2009-4, Order No. 381 (Hawaii Labor Relations Board, March 23, 2010); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[xiii] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

[xiv] 42 U.S.C. § 2000e-2(m) provides:

> Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

[xv] 1972 Haw. Sess. Laws Act 57, § 1 at 252-53.

[xvi] 1993 Haw. Sess. Laws Act 204, § 1 at 310-11.