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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL W. Plaintiff, Plaintiff, vs. Defendant Airline AIRLINES, INC., Defendant.	Case No. C 98-3877 CRB (PJH) **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Date: April 14, 2000 Time: 10:00 a.m. Before: Hon. Charles R. Breyer

STATEMENT OF ISSUES

1. Whether Plaintiff has established a *prima facie* case under the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

2. Whether Defendant has carried its burden of proof justifying termination of Plaintiff's employment.

3. Whether Plaintiff has raised a genuine issue of material fact as to his entitlement to punitive damages under state law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The emperor has no clothes. Defendant Airline swaddles itself in the mantle of "airline safety," but is stripped bare by the law, by common sense, and by the facts.

The law tells us -- as Defendant Airline does not -- that USERRA makes it *Defendant Airline's* burden to prove the absence of discriminatory animus, not Plaintiff's to prove its existence. Were this a case under Title VII or the VRRA, as Defendant Airline pretends, Defendant Airline would have been required to do no more than "articulate" some legitimate, nondiscriminatory reason for firing Plaintiff, but the burden of *proof* would have always been Plaintiff's. USERRA reverses the burden of proof. Under USERRA, once Plaintiff makes out a *prima facie* case that his protected status was "a" motivating factor, it is Defendant's burden of *proof* (not merely of "production" or "going forward") to establish, with objective evidence, that it would have acted identically in the absence of protected status or activity. In this regard, USERRA is virtually unique among antidiscrimination statutes; it explicitly and without equivocation places the ultimate burden of proof on the employer, not the employee.

Common sense tells us -- as Defendant Airline does not -- that Plaintiff, a decorated F-16 fighter pilot, an exemplary employee who at all times performed within or exceeded Defendant Airline's standards and whom Defendant Airline itself rated highly just before it fired him, would suddenly have become "unprepared" and "unsafe to fly." Common sense tells us - as Defendant Airline does not - that if Plaintiff had truly become "unsafe," the decision to fire him should have been easy, not the "struggle" Defendant Airline claims it was. Common sense tells us - as Defendant Airline does not - that if Plaintiff had truly become "unsafe," there would have been absolutely nothing he could have said to Defendant Airline that would have induced it to reverse its decision to fire him; yet Defendant Airline tells us that had Plaintiff just managed to "convince" Colby of his "sense of responsibility" he would have been returned to work! Common sense tells us -- as Defendant Airline does not -- that if Plaintiff had truly become "unsafe" to fly, Defendant Airline would *not* have reinstated him 2 years later after nothing more than a perfunctory interview. Common sense tells us what Defendant Airline *cannot*: Plaintiff was not so "woefully unprepared" as to have been "unsafe" -- he was the sacrificial lamb in Defendant Airline's plan to ameliorate its staffing problems by

discouraging other pilots from taking military leave.

Finally, and most importantly, **the facts** tell us -- as Defendant Airline does not -- that there was absolutely nothing about Plaintiff's performance during training that was worse than that of many, many other pilots, *none* of whom was terminated (as Plaintiff was) after successfully completing annual training. The facts tell us -- as Defendant Airline does not -- that Plaintiff's performance during training was well within Defendant Airline's written policies and consistent practice. Defendant Airline routinely provided two additional training days, even to probationary pilots. Defendant Airline routinely provided more than one proficiency check during annual recurrent training, even to probationary pilots. Moreover, if Plaintiff was "unprepared," and therefore "unsafe" because he required two additional training days and one additional P-Check, what then of the other pilots with similar or worse training scenarios? What made them safe to fly Defendant Airline "passengers and equipment?" Was it that they may have been represented by a union?

There is no subtle way to put this: safeguarding air travel may have the emotional appeal of motherhood and apple pie, but here it is a sham. "Unpreparedness" and "safety" are code words for discrimination, just as "poor attitude" and "does not fit in" have been held to be code words for other types of unlawful discrimination.

What is Plaintiff's evidence that his protected activity motivated Defendant Airline? The record is replete with evidence -- both direct and circumstantial -- that Defendant Airline unlawfully considered and took into account, and acted adversely upon, Plaintiff's military leave. Some of the circumstantial evidence has been summarized above; more is set forth in the brief. The direct evidence, however, is conclusive: most of the Defendant Airline managers who participated in the consensus decision to fire Plaintiff expressed -- to Plaintiff and to others -- outright hostility to his use of military leave, going so far as to question whether his loyalty was to Defendant Airline or to the military, and doing so *at the precise time* Plaintiff's fate was being decided. This obvious animus, coupled with Defendant Airline's refusal to objectively compare Plaintiff's performance with that of other pilots, its refusal to consider its own Training Department's judgment that Plaintiff was flightworthy, and its refusal to give credence to the contemporaneous reports praising Plaintiff, lead to one, and only one, conclusion: Defendant Airline intentionally and arrogantly violated USERRA.

What is Defendant Airline's evidence? It claims that it fired Plaintiff because of his "unpreparedness." However, Defendant Airline could not have fired Plaintiff because of his "unpreparedness" in the *past,* because Defendant Airline itself consistently praised Plaintiff's performance. Defendant Airline could not have fired Plaintiff because of his "unpreparedness" during annual recurrent training, because Defendant Airline's Training Department certified him proficient (i.e., "safe") and cleared him to return to flying. Defendant Airline has *never*, before or since, terminated a pilot for training-related anomalies after that pilot had been cleared by its Training Department. Rather, Defendant Airline claims it fired Plaintiff because he "*might* not put forth the effort necessary to remain proficient *in the future*," a position for which Defendant Airline has no objective support and advances only the most subjective of bases: that he was unable to "convince" Colby that he would be "responsible" in the future! In other words, Defendant Airline fired a highly decorated and demonstrably skilled pilot because he was unable to read Colby's mind and say the magic words that Colby secretly wanted to hear. This is not ordinary, or even gross, negligence on Defendant Airline's part - it is willful, malicious discrimination of the worst kind.

Defendant Airline's argument regarding punitive damages fares no better. Despite its claim of a "careful and meaningful review" of Plaintiff's employment before deciding to fire him, the record demonstrates no such review. Despite its claim that Plaintiff was the "worst-prepared probationary pilot" of whom the decisionmakers were aware, the evidence clearly shows that those decisionmakers remained "unaware" (if indeed they *were* unaware) by ignoring all available objective evidence to the contrary. And despite Defendant Airline's claim of reliance on the assessment(s) of Training Department personnel that Plaintiff was the "worst prepared they had seen," *every* involved Training Department person either expressly denied, or had no memory of, making any such assertion.

In sum, Defendant Airline's characterization of Plaintiff's "employeeship" is amorphous, nebulous and incapable of proof. Defendant Airline has not yet, and indeed cannot, meet its burden, and its motion for summary judgment should be denied.

STATEMENT OF UNDISPUTED FACTS

Plaintiff Michael Plaintiff was employed by Defendant Airline as a B-727 Second Officer ("SO") between December 1996 and October 1997 (*Plaintiff Depo, 50)*. After satisfactorily completing initial training in January 1997, Plaintiff began serving as a 727 SO on regularly-scheduled Defendant Airline flights, and continued to do so until he was withdrawn from service for review of his "employment status" in October 1997. Between January and September 1997, Plaintiff's performance at Defendant Airline was exemplary *(Hunt Decl., Ex. 1, "Chart I")*. In September 1997, Plaintiff was issued a new Pilot's Operating Manual with a radically altered format[1] and was notified that he was scheduled for annual recurrent training on October 5, 1997.[2]

Plaintiff's performance at his annual recurrent training session is set out in detail in *Chart II, (Hunt Decl., Ex. 2)*. Plaintiff performed extremely well on the first two stages of training, scoring 100% on one test and 93% on the other.[3] After 1.5 hours of Line Oriented Flight Training ("LOFT"), Plaintiff was "not recommended" for the next step, a proficiency checkride in a simulator ("P-Check"), was granted one additional day of training after which he was graded "unsatisfactory" ("UNSAT") on the P-Check, was granted another day of training, was recommended to go forward with the P-Check, and passed the P-Check "with flying colors." *Plaintiff Depo, 26, 31-32, 121-123, 136; S. Smith Depo, 48-49, Ex. 2,3; K. Smith Depo, 74; Fralish Depo, 70, 74, 80; Colby Depo, 118.*

Plaintiff's performance during annual recurrent training was well within Defendant Airline's published standards *(Hunt Decl., Ex. 3, pp. 21-6 - 21-10); White Decl., ¶¶ 9, 11, 14-16, Ex. B, C; Winegar Depo, Ex. 7, 8)*. The additional training day after a non-completed LOFT is automatically granted and is not considered a "failure." In fact, up to *two* additional training days may be granted

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[1] Defendant Airline neither oriented nor trained Plaintiff (or any other pilot) regarding this new manual, beyond the issuance of a brief memorandum and a five-page Flight Crew Bulletin informing the pilots that the change had occurred. The revised POM presented serious challenges and difficulties for even the most experienced Defendant Airline pilots.*White Decl., ¶ 17; Gruver Decl., ¶ 6*.

[2] At Defendant Airline, all pilots undergo annual recurrent training to ensure the pilot's continuing qualifications and competency *(Hunt Decl., Ex. 3, p. 21-9)*.

[3] Per Defendant Airline policy, a score of 70% is passing. *Hunt Decl., Ex. 3, 21-10 ("Home Study")*.

at this stage of annual recurrent training. Nor is the fact that Plaintiff received an Unsat on his first P-Check considered a final training failure, as probationary pilots are entitled to *two* P-Checks at annual recurrent. *Hunt Decl., Ex. 3, pp. 21-11 - 21-12; K. Smith Depo, 59-61; Flood Depo, 100-101; Fralish Depo, 44; Burnfield Depo, 77-78.*[4]

On successful completion of his recurrent training, Plaintiff was certified proficient by Defendant Airline's Training Department and returned to line flying *(Shirley Depo, 15, 17-18, 20-22; Colby Depo, 147, **"We don't release any unsafe pilots, to our knowledge, back to the line."**).* The next day, Plaintiff was instructed to report to his Chief Pilot, Jon Swift, who then informed Plaintiff that he was being withheld from service pending review of his "employment status" *(Plaintiff Depo, 136-137; Swift Depo, 69-70, Ex. 6).*

Stunned, Plaintiff immediately contacted numerous Defendant Airline managers, union representatives, and pilots with whom he had flown for Defendant Airline in an attempt to determine exactly *what* was being reviewed and how he could overcome this clear threat to his career in commercial aviation. *Plaintiff Depo, 138-152.* Several pilots who had evaluated Plaintiff sent letters of support and affirmation of Plaintiff's qualifications to Defendant Airline *(Winegar Depo, Ex. 6; Chart I exhibits: (DL 2162, DL 2170, DL 2163).* Paul Gruver, a Defendant Airline B-727 SO, spoke with several Defendant Airline managers regarding Plaintiff's situation, as did Michael Jones and Benny White, Defendant Airline pilots and officers with ALPA. *Gruver Decl., ¶¶ 3,4, Ex. A, B; Jones Decl., ¶¶ 5,6, Ex. A; White Decl., ¶¶ 8-11.*

On October 28, 1997, Plaintiff was terminated by Chief Pilot Swift *(Plaintiff Depo, 138; Swift Depo, 139).* Plaintiff was never told the basis for his termination *(Plaintiff Depo, 138; Swift Depo, 139-141, Ex. 16, 17).* Plaintiff was thereafter designated ineligible for rehire *(Cusick Depo, 40, Ex. 1).*[5]

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[4] Indeed, Defendant Airline's records show that between January 1996 and November 1997, at least 39 *other* pilots required two or more additional training days before completing a Defendant Airline training regimen, and at least 67 other pilots "busted" at least one P-Check or other FAA-required checkride *(Hunt Decl., Ex. 4,DL 2815-2832, the "Shirley Log").*

[5] Plaintiff was reinstated with full seniority (but without backpay or benefits restoration) in May of 1999, but only after a full year of trying to obtain reinstatement without

ARGUMENT

I.. PLAINTIFF HAS ESTABLISHED A *PRIMA FACIE* CASE UNDER THE USERRA BURDEN OF PROOF, AS A MATTER OF LAW.

A. Defendant Has Misstated The Standard Of Proof Governing This Lawsuit.

The burden of proof applicable to this lawsuit is statutorily mandated in USERRA, as follows:

> (c) An employer shall be considered to have engaged in actions prohibited ... if the person's membership, ... service ... or obligation for service is the uniformed services in **a motivating factor** in the employer's action, **unless the employer can prove that the action would have been taken in the absence of such membership, ... service ... or obligation for service.**

38 U.S.C. §4311(c)(1) (emphasis added). Thus, cases decided under USERRA's predecessor statute, the Veterans' Reemployment Rights Act ("VRRA"), or under Title VII, do not govern. The legislative history of USERRA provides:

> Section 4311(b) [the USERRA antidiscrimination section] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test **and that the burden of proof is on the employer, once a *prima facie* case is established.** ... [T]he courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See, 132 Cong. Rec. 29226 (Oct. 7, 1986)* (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

H. Rep. No. 65, 103d Cong., 2d Sess (1994), 1994 U.S.C.C.A.N. 2449, 2457 (emphasis added), reaffirmed in S. Rep. 104-371, 104th Cong., 2nd Sess. 1996, 1996 U.S.C.C.A.N. 3762 (1996).[6] Accordingly, Defendant's reliance on VRRA or Title VII authority to delineate the proof model is wholly inappropriate here, as the Title VII three-prong burden-shifting paradigm may not be applied

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litigation and an additional six months post-lawsuit, including an unsuccessful mediation. *See, e.g., Thomas v. City and Borough of Juneau*, 638 F.Supp. 303, 305 (D. Alas. 1986) ("It is undisputed that the City did rehire Thomas **once it recognized its obligation to do so**." (emphasis added)).

[6] Cited by Defendant in its Memorandum herein ("Defendant Airline MPA"), at p. 11.

to USERRA cases.[7]

B. Defendant Airline Calculated, Queried, Discussed, Analyzed and Challenged Plaintiff's Military Leave Usage. Accordingly, Plaintiff Has Established A *Prima Facie* Case Under USERRA.

To make out a *prima facie* case of discrimination in violation of USERRA, a plaintiff need only show that his protected status was "a motivating factor" in the adverse employment action, after which the burden shifts to the employer to "prove that the action would have been taken in the absence of such membership."[8] 38 U.S.C. §4311(c)(1) (1996); *Gummo v. Village of Depew, N.Y.*, 75 F.3d 98, 106 (2nd Cir. 1996).[9] Moreover, USERRA expressly provides,

> (h) In any determination of a person's entitlement to protection under this chapter, **the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service)** in the uniformed services, shall not be a basis for denying protection of this chapter...

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[7] Both cases cited by Defendant in support of the Title VII standard (*Gummo v. Village of Depew, N.Y.,* 1997 U.S.Dist. LEXIS 7974 (W.D.N.Y. 1997), and *Key v. Hearst Corp.*, 963 F.Supp. 283 (S.D.N.Y. 1997) expressly ruled under the VRRA, and thus cannot govern here. Ironically, Defendant Airline attached a USERRA case to its brief that explicitly reaffirms the Congressional intent: *Chance v. Dallas County Hospital,* 1998 U.S. Dist. LEXIS 5110 (N.D. Tex. 1998).

[8] Defendant Airline contends that no pilot before Plaintiff had ever filed a USERRA complaint, and that Plaintiff's National Guard Commander in Fresno, California had no knowledge of Defendant Airline having taken any adverse action against a military pilot in the past. Thus, Defendant Airline argues, it simply cannot have discriminated against Plaintiff. But other inferences are also plausible: (1) that Defendant Airline *had not* discriminated in the past, but did discriminate against Plaintiff *for the first time*; (2) that Defendant Airline *had* discriminated in the past, but was never "caught"; or, (3) that Defendant Airline *had* discriminated in the past, but the employee(s) chose not to pursue the matter. Defendant Airline cannot come forward with objective evidence in support of its preferred inference. Accordingly, the inference Defendant Airline advances is irrelevant, and should not be considered by this court. *See, e.g., James v. Otis Elevator*, 854 F.2d 429, 432 n. 3 (11th Cir. 1989).

[9] *Accord, Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F.Supp. 571, 575 (E.D. Tex. 1997); *Chance v. Dallas County Hospital, supra*, at 8; *Satterfield v. Borough of Schuylkill Haven,* 12 F.Supp.2d 423, 439 (E.D. Pa. 1998); *Kelley v. Maine Eye Care Assoc., P.A.*, 37 F.Supp.2d 47, 54 (D. Me. 1999); *Brandsasse v. City of Suffolk, Va.,* 72 F.Supp.2d 608, 617 (E.D. Va. 1999).

38 U.S.C. 4312(h) (emphasis added).[10]

Military status is a motivating factor if the defendant "**relied on, took into account, considered, or conditioned its decision"** on that consideration**.** *Robinson, supra,* at 576 (emphasis added); *Chance, supra,* at 7; *Brandsasse, supra,* at 617. To establish that his military leave was "a motivating factor," Plaintiff must demonstrate that it was "one of the factors that a truthful employer would list if asked for the reasons for its decision." *Kelley, supra,* at 54. This Plaintiff can easily accomplish.

As best Plaintiff can determine, the amount of military leave ("MLOA") taken by Plaintiff before he reported for annual recurrent training was first noted by Dave Winegar, Plaintiff's base new hire coordinator in Salt Lake City, and Kevin Smith, the Training Department Senior Instructor who authorized Plaintiff's first additional training day after the LOFT, on October 7, 1997. Smith reviewed Plaintiff's monthly flight schedules from January through September of 1997 *(K. Smith Depo, 68-69)*, and later asked Plaintiff about the amount of MLOA he had taken *(Plaintiff Depo, 160-161, Ex. 9)* . Winegar reviewed and printed out those schedules, making handwritten calculations comparing the number of days Plaintiff flew for the Air National Guard to the days flown for Defendant Airline *(Winegar Depo, 21-25, Ex. 2 (DL 2179),* discussed Plaintiff's MLOA with Noah Flood, the Salt Lake City Assistant Chief Pilot *(Flood Depo, 52, 94)*, and provided the information to Jon Swift, the Salt Lake City Chief Pilot *(Winegar Depo, 24-25)*.

On October 8, 1997, Scott Smith, the Training Department Instructor with whom Plaintiff worked between October 5th and October 9th, told Plaintiff there was "concern" about the amount of MLOA he had taken *(Plaintiff Depo, 161, Ex. 9)*.[11] On October 9, 1997, Noah Flood sent an E-Mail communication to Shand Gause, the Director of Flight Operations and system Chief Pilot, stating:

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[10] Even under USERRA's predecessor, the VRRA, courts consistently held that an employer's consideration of the "voluntary" nature of a reservist's military leave was impermissible. *See, e.g., Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1469 (11th Cir. 1987); *Lemmon v. County of Santa Cruz, Calif.*, 686 F.Supp. 797, 803 (N.D.Cal. 1988); *Bottger v. Doss Aeronautical Services, Inc.*, 609 F.Supp. 583, 587 (M.D. Ala. 1985).

[11] No one remembers discussing Plaintiff's MLOA with Smith, and Smith does not recall making the statement to Plaintiff *(S. Smith Depo., 51:4-7)*.

> [Plaintiff] presents questions regarding our MLOA ["military leave of absence"] policy and lack of proficiency with a New Hire. I feel we should address the proficiency issue first and if he survives then address the MLOA questions. ... This New Hire has worked 60 days for Defendant Airline with 53 days of MLOA since February. What triggers should we use for reviewing MLOA usage? ... Under DEFCON 3 what is an appropriate level of Guard/Reserve participation?

When asked at his deposition to explain the E-Mail, Flood said, "I was unaware of how, if at all, [MLOA] should play into any of the decisions regarding Mike's training," and "whether MLOA is a factor that should or shouldn't be considered in determining his employment" *(Flood Depo, 88, 89, 96, Ex. 5).*

Also on October 9th, Plaintiff was graded "Unsat" on his first P-Check, and was thereafter taken by Terry Christian, a Senior Instructor, to see Chuck Burnfield for approval of an additional training day before taking another P-Check. During this period, Christian asked Plaintiff if he was "having any problems with the Guard" *(Plaintiff Depo, 162)*, and later wrote a memo to Gary Shirley, Training Department Program Manager, where he stated that Plaintiff's "biggest source of stress seems to be that he realizes that he has let the guard take first place and Defendant Airline is a distant second. His recent flying record shows more time with the guard than with Defendant Airline." After Christian met privately with Burnfield and Chuck Hanner (who had become "involved at the request of Noah Flood," according to Christian's memo*)*, Christian escorted Plaintiff into Burnfield's office. *Christian Depo, 32-40, Ex. 2*.[12]

During the October 9th meeting between Plaintiff, Burnfield and Hanner, Plaintiff was assaulted from both sides regarding his military leave usage. Burnfield (a Training Department manager) waved a Defendant Airline pay envelope in Plaintiff's face and loudly asked, "Do you want to be a military pilot or a Defendant Airline pilot?" Burnfield also told Plaintiff that Defendant Airline must be his first priority: "Defendant Airline first over the military." Hanner (a Flight Operations manager) said, "You've flown 60 days with Defendant Airline and 53 days with the military. We hired you to pull your load." *Plaintiff Depo, 167-169, Ex. 9; Burnfield Depo, 109 ; Hanner Depo,50-52; Winegar Depo,*

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[12] No Defendant Airline employee recalls informing Christian about Plaintiff's MLOA usage.

47-49, Ex. 6 .

Defendant Airline's unlawful conduct did not stop there. Between October 13th and October 28th, virtually every Defendant Airline manager involved in Plaintiff's employment status review and his ultimate termination made statements evidencing Defendant Airline's unlawful consideration of Plaintiff's MLOA. When Paul Gruver spoke with several Defendant Airline managers regarding Plaintiff's termination, virtually *all* made disparaging comments regarding Plaintiff's usage of military leave *(Gruver Decl., ¶¶ 3-5, Exs. A-C)*, as follows:

- Jon Swift, Plaintiff's Chief Pilot: "I understand he took a lot of military leave...you have to wonder where his loyalty is," and, "Does he want to be a military pilot or a Defendant Airline pilot?"
- Dave Winegar, Plaintiff's New Hire Coordinator: "There's concern about who he really wants to work for."
- Chuck Hanner, System New Hire Coordinator: "I wonder where his heart really is, with the military or Defendant Airline?" And, "There's great concern in this office about Plaintiff's attitude...he did take a lot of military leave."

Mike Jones and Benny White, both ALPA representatives and experienced Defendant Airline pilots, spoke with Defendant Airline decisionmakers regarding Plaintiff's termination, and each reported evidence of Defendant Airline's discriminatory animus regarding military leave:

- "**Joe Moran said someone from the company was concerned Plaintiff was putting the reserves in front of Defendant Airline**..." *Jones Decl., Ex. A (emphasis added).*
- "Jon Swift further stated that the bottom line was that attitude and commitment was at the heart of the issue and that he had questions as to [Plaintiff's] commitment as evidence by lack of preparedness, **use of Military Leave of Absence (MLOA) that was excessive during the first year** that may have caused the problem, or for whatever reason, because he wasn't ready for training." *Jones Decl., Ex. A (emphasis edited)*
- "Later that week, I again contacted Noah Flood who told me that Mike Plaintiff was a pilot with the Air Force Reserve and **his military leave activities had been reviewed as a part of the overall evaluation of his job performance as a Defendant Airline Pilot. There was additionally an issue of concern that Mike Plaintiff had used a significant amount of military leave and seemed to have plenty of time to do that, but had not reported for his Recurrent Training prepared to pass his check ride.**" *White Decl., ¶ 10 (emphasis added).*
- "As a direct result of the termination of Mike Plaintiff, I wrote an article entitled "Probationary Year - It's Not Over Until It's Over", which was published in the November/December 1997 edition of the Widget, a true and

correct copy of which is attached as Exhibit A. My objective in writing this article was to energize the probationary pilots to prepare themselves for the Recurrent Training Check Ride and to make everyone aware that the priority for Defendant Airline was performance as a Defendant Airline pilot, not military participation." *White Decl., ¶ 13.*

- "I wrote the article after discussion with Bud Sittig, Executive Administrator of the DALPA MEC, who agreed that an article should be published in the Widget **because of the comments made by various Defendant Airline managers which indicated that Defendant Airline was focusing attention on military leave by reservists and if pilots got into trouble this military leave usage might influence management decisions which might be adverse to the pilot**." *White Decl., ¶ 13 (emphasis added).*

When asked whether he ever discussed Plaintiff's MLOA with any Defendant Airline employee during his deposition, Terry Cusick, who in 1997 reported directly to Colby, admitted that he had done so, " in weighing options with Shand and Richard, Richard Colby, Shand Gause." *Cusick Depo, 72.* In addition, Plaintiff's MLOA was discussed during one or two meetings[13] called by Richard Colby, VP of Flight Operations, which Gause, Cusick, Burnfield, Hanner, Shirley and Flood attended *(Colby Depo,107-108, 134; Hanner Depo, 63-66; Flood Depo, 106-107; Shirley Depo, 23-25, 99-100, 102-104) .*[14]

Discriminatory statements made by those participating at any level in a decision to terminate an employee may support a claim of discriminatory discharge.[15] Here, Defendant Airline asserts that

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[13] As noted in Defendant's brief, the record is unclear as to whether there was one meeting, or more. There is no doubt from the testimony, however, that Gause, Cusick, Burnfield, Hanner, Shirley and Flood discussed Plaintiff's employment status and ultimate termination with Colby, whether over the telephone or in a face-to-face meeting.

[14] Gause may have attended one or all of the meetings as well *(Gause Depo, 60)*. Others attended, including inhouse counsel for Defendant Airline; however, no Defendant Airline manager remembers clearly all attendees.

[15] *See, e.g., Lam v. Univ. of Hawaii*, 164 F.3d 1186 (9thCir. 1998); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204 (3d Cir.1995) (there was sufficient evidence from which a jury could reasonably conclude that plaintiff's immediate supervisor, who may have harbored a discriminatory animus and who participated in a decision to fire plaintiff, was a decision-maker for purposes of plaintiff's discharge); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 727 (3d Cir.1988) ("[I]t plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decision-making process and thus allowed discrimination to infect the ultimate decision."); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990) (if a committee "acted as the conduit of a [supervisor's] prejudice--his cat's-paw--the innocence of its members would not spare the company from liability"). *See also, Satterfield, supra,* where the court held that, under USERRA,

Richard Colby was the sole decisionmaker, and that he made no statements that create even an inference of military bias. However, Colby was *not* the sole decisionmaker, and virtually all other managers in the Flight Operations department who provided input to Colby raised Plaintiff's military leave as a concern to Defendant Airline. Indeed, Colby admits that the decision to terminate Plaintiff was based upon a *consensus* after consultation with appropriate staff members, which his second-in-command, Shand Gause, confirms, stating, "anytime we [fired] a pilot it was a consensus opinion with myself [Gause], the chief pilot [Flood acting for Swift], the training department if it was a training environment situation [Shirley], and the vice president of flight operations [Colby]." *Gause Depo, 31-32; Colby Depo, 125.*

The evidence is overwhelming that the persons whose attitudes and knowledge about Plaintiff influenced Colby's decision to terminate Mike Plaintiff had "relied on, taken into account and considered" his military leave time, during his recurrent training as well as during the two-week "review" period that preceded his termination. Accordingly, Plaintiff has established a *prima facie* case, and Defendant Airline's motion for summary judgment as to this issue should be denied.

II. Defendant Airline CANNOT SUSTAIN ITS BURDEN OF PROOF THAT Plaintiff'S TERMINATION WAS JUSTIFIED UNDER USERRA.

Because Plaintiff has sustained his burden to make out a *prima facie* case under USERRA, summary judgment is inappropriate, as a matter of law. In a case remarkably similar to this lawsuit that was decided under the *Transportation Management* proof model, the Seventh Circuit held, *inter alia*, that questions regarding whether the airline employer harbored discriminatory animus and whether there was a causal connection between such animus and the discharge of the pilot were not appropriate for summary judgment. *Lebow v. American Trans Air, Inc.*, 86 F.3d 661 (7th Cir. 1996). *See also, Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111-1112 (9th Cir. 1991).

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where input from an employee who has expressed concern with the protected activity affects the decision, summary judgment is not appropriate, and *Chance, supra at 12,* on which Defendant Airline relies heavily, where the person who had expressed concern about Chance's military leave "was not involved in the decision to terminate plaintiff."

Assuming, *arguendo*, that Defendant Airline's motion for summary judgment is proper, Defendant Airline still cannot prevail. To sustain its burden on summary judgment, Defendant Airline must prove, by a preponderance of the evidence, that it would have terminated Plaintiff regardless of his military service. "The burden is [defendant's] to prove, not the plaintiff's to disprove." *Tarin v. County of Los Angeles,*123 F.3d 1259, 1266-67 (9th Cir. 1997); *Satterfield, supra,* at 439; *Kelley, supra,* at 54.[16] The employer must show through *objective evidence* that its legitimate reason, standing alone, would have induced it to make the same decision. *Robinson, supra,* at 576; *Chance, supra.*

Defendant Airline has proffered no objective evidence supporting its claim that Plaintiff was terminated solely because he "failed to maintain his proficiency and allowed himself to become unprepared to safely perform his job," relying instead on its mistaken view of the law that all it need do is articulate a legitimate nondiscriminatory reason for Plaintiff's termination *(Defendant Airline MPA, 1, 12).* In fact, Defendant Airline cannot prove that Plaintiff failed to maintain his proficiency or that he was so unprepared as to implicate the safety of Defendant Airline's passengers or equipment – unless Defendant Airline wishes to concede that all other pilots with training profiles identical to or worse than Plaintiff's should also have been terminated, despite its published policies and consistent practice to the contrary.

A. Defendant Airline Cannot Prove With Competent Objective Evidence That It Would Terminate, Or Has Terminated, Other Similarly-Situated Pilots On The Ground Of Lack Of "Preparedness."

If Defendant Airline's true justification for Plaintiff's termination were that he was "the worst prepared probationary pilot" the decisionmakers had ever encountered *(Defendant Airline MPA* at 18), Defendant Airline would be able to establish, with objective evidence, that it had terminated other probationary pilots who, for whatever reason, had been unable to complete the LOFT without one additional training day and/or had been judged "Unsat" during (or "busted") one P-Check and required

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[16] *Tarin* and other authority cited herein where USERRA was not the statutory basis for the lawsuit is cited for the limited purpose referenced in the text of this brief, i.e., the type of indirect evidence required to show discrimination or the need for objective proof of just cause for termination.

one additional training day to satisfactorily complete the checkride.[17]

Yet, even were this Court to accept that the proper group with which to compare objective indicia of Plaintiff's preparedness should be limited to probationary B-727 Second Officers, Defendant Airline cannot objectively justify Plaintiff's termination on this ground.

1. Plaintiff's Performance Prior To Annual Recurrent Training Was Exemplary And Devoid Of Any Indicia Of "Unpreparedness."

Defendant Airline cannot point to a single misstep by Plaintiff before he reported for training in October 1997.[18] To the contrary, the evidence clearly shows that Plaintiff was a substantially above average performer throughout. *Chart I, and supporting evidence.*

- Of the thirteen (13) times his performance was monitored during his probationary year from March 13, 1997 through September 21, 1997 **(a mere three weeks prior to his annual recurrent training**), during regularly-scheduled flights, the majority of his ratings were the highest possible (4 on a scale of 1-4), and there is no evidence of a *single* criticism of his performance during that time. *DL 2160; Hunt Decl., Ex. 3, 21-107 - 21-110.1*[19]

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[17] Indeed, Defendant Airline's limitation of the universe of "similarly-situated" pilots to *probationary B-727 SO's at annual recurrent* urges a distinction without a difference in the context of Defendant Airline's alleged basis for Plaintiff's termination, i.e., passenger/equipment safety. Surely, Defendant Airline does not maintain that it is only this limited category of pilots who present a safety risk, or whose "preparedness" is critical, or that non-probationary pilots of other aircraft at different stages of training represent a lesser risk.

[18] What little documentary evidence exists documenting Plaintiff's pre-training and recurrent training experience with Defendant Airline is attached to *Chart I* and *Chart II*, attached hereto *(Hunt Decl., Exs. 1,2)*. There is some testimony regarding Plaintiff's performance in the record: depositions of Training Department instructors Kevin Smith, Scott Smith, Terry Christian and Jay Fralish, each of whom had personal experience with Plaintiff's annual recurrent training; deposition of Training Department 727 Program Manager Gary Shirley, who logged training problems for 727 SO's; depositions of Chuck Burnfield, System Manager of Training, and Chuck Hanner, System New Hire Coordinator, who met with Plaintiff prior to Burnfield authorizing additional training after he busted his first P-Check; and, depositions of Noah Flood and Dave Winegar, who discussed Plaintiff's training issues with Kevin Smith and gathered information regarding Plaintiff's work history at Defendant Airline.

[19] Defendant Airline is expected to argue that the New Hire Assessment ratings are insignificant because few check airmen ever gave a below-average rating *(Hanner Depo, 39-42)*. However, Defendant Airline has yet to *prove* that self-serving and incredible assertion. Moreover,

- The senior pilot who evaluated Plaintiff's performance during his Initial Operating Experience, Paul Gruver, stated, "Despite an especially demanding four day trip with two all-night legs and multiple abnormal situations, his GO-Defendant Airline attitude never wavered, his performance as an S/O was consistently above average, and he was simply a pleasure to fly with. ... some of the fewest repeat mistakes I've seen to date. ... He flawlessly handled more demanding situations during his IOE than I ever have during a single trip." *DL 2162*

- The evaluator on Rotation 4209, April 10, 1997, stated Plaintiff was the "Best S/O seen to date – Need Immediate Pay Raise!". *DL 2159*

- Arden Blaylock, the line check airman who evaluated Plaintiff during two (2) rotations, said, "Second Officer Plaintiff demonstrated the highest level of proficiency and motivation." *DL 2163*

- Captain Curtis Hamme also flew two (2) rotations with Plaintiff, and stated Plaintiff "functions well professionally," that he handled a "total system "A" hydraulic failure ... calmly and flawlessly," and "I would submit that no other second officer at Defendant Airline Air Lines could have done a better job." *DL 2170*

- The line check airman who evaluated Plaintiff during Rotation number 3202 on March 13, 1997, stated that Plaintiff was "obviously quite competent as an F.E. ["flight engineer"], and knowledgeable as a pilot. ... In spite of four long and challenging days, he performed flawlessly and cheerfully. Important to note is his adaptability to rapidly changing situations and demands, his vigilance toward safety of flight, and ability to quickly become an effective team member." *DL 2180.*

2. The Evidence Does Not Support Defendant Airline's Position That Plaintiff Was The "Most Unprepared" Pilot, Even When Confined To Defendant Airline's Arbitrarily Limited Comparison Universe.

Plaintiff successfully completed Defendant Airline's annual recurrent training regimen and was cleared to return to the line as qualified to fly. Defendant Airline admits that no other pilot was terminated for "failure to prepare" for recurrent training and no other probationary pilots who experienced training problems at annual recurrent but who ultimately successfully completed training were terminated *(Hanner Depo, 93-35, Ex. 5; Gause Depo, 90, 92; Winegar Depo, 80-81)*. Burnfield

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it is undisputed that Defendant Airline utilized the system and maintained the assessment data *(Hunt Decl., Ex. 3, pp. 107-108)*, and surely would have pointed to below-average results by Plaintiff had they existed to justify its termination of his employment. Finally, Plaintiff does not rely on the raw scores alone, but has provided evidence from the rating pilots fleshing out their assessments of Plaintiff's performance.

told Benny White that *no probationary pilot except Plaintiff had **ever** been fired after successfully completing training (White Decl., ¶11).* Thus, the focus of comparison must necessarily be upon those B-727 SO's whose performance at training was the same as or "worse than" Plaintiff's and who were *not* terminated, either before Plaintiff's termination or thereafter.[20]

There is virtually no admissible evidence that establishes that Plaintiff was any more "unprepared" than any other B-727 SO who experienced training problems during 1996 and 1997, but successfully completed training. What is clear is that the Defendant Airline managers directly involved in the decision to terminate Plaintiff had no firsthand information on the issue of Plaintiff's preparedness other than the hearsay and misrepresentations of some among them. Also clear is that those managers ignored all the objective evidence showing that Plaintiff was an excellent pilot who had a training problem that he corrected immediately, well within Defendant Airline and FAA standards.[21]

Defendant Airline seems to base this unfounded contention on several premises, all of which are disputed by Plaintiff.

The Plaintiff "Admission": Defendant Airline's contention that Plaintiff himself "admitted" that he had not prepared for annual recurrent training is categorically denied by Plaintiff, who repeatedly stated under oath that he never told *anyone* that he had not prepared for training, and that he did in fact prepare and study before reporting to the Training Department *(Plaintiff Depo, 128-*

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[20] To meet its burden, Defendant Airline must necessarily show that it "would have" terminated all similarly-situated pilots for the same "lack of preparedness" for training, thus implicating Defendant Airline's policies and practices after Plaintiff was terminated.

[21] Defendant Airline's argument that the speed with which Plaintiff "became prepared" demonstrates how unprepared he was defies logic. Plaintiff's testimony is clear that he had studied for recurrent training, that he thought he was prepared, that he was surprised that he busted the P-Check, and that he worked hard over the weekend to clear up any weak areas. The Training Department expressed no surprise at Plaintiff's training profile, calling it "routine" *(K. Smith Depo, 61-62).* Indeed, what Plaintiff's satisfactory P-Check after two days of studying shows is that he wasn't that unprepared in the first place, and that he needed relatively little time to bring his performance up to the requisite level.

131).[22]

The Training Department Characterization: Defendant Airline contends that Scott Smith, the instructor who worked with Plaintiff through his busted P-Check and who authored the only detailed training document in evidence, stated that Plaintiff's level of proficiency was "the worst that they had ever seen" during the meeting at which Burnfield granted Plaintiff the additional training day *(Burnfield Depo, 102)*. Defendant Airline does not dispute that Burnfield and Hanner and Plaintiff were present at this meeting. However, both Hanner and Plaintiff state that Smith was not at this meeting *(Hanner Depo, 40-46; Plaintiff Depo, 164-169).* In fact, it was Terry Christian who escorted Plaintiff into Burnfield's office at this time, and Christian does not recall Smith (or anyone else) being present at any time during this sequence of events, nor does he recall saying anything about Plaintiff's being the "worst" he had ever seen *(Christian Depo, 29-35)*.

Even more significant, though, is the fact Scott Smith himself testified that he *never* discussed "Plaintiff's level of preparedness for his recurrent training with any other Defendant Airline employee" except possibly a senior instructor (such as Christian or Kevin Smith) and/or Gary Shirley, Training Program Manager *(S. Smith Depo, 51-52, 53-55*, 62).

The only detailed Training document in evidence relating specifically to Plaintiff was created by Scott Smith on October 9th, after Plaintiff busted his first P-Check *(S. Smith Depo, 45-52, Ex. 2)*. In that "Instructor Comment Sheet," Smith's *only reference* to preparedness was, "While he admittedly came to training unprepared (astonished how much he had forgotten in only 10 months)..." As to that comment, Smith admits that those were *his* words, not Plaintiff's *(S. Smith Depo, 47-50)*, and Plaintiff denies making the comment to Smith at any time *(Plaintiff Depo, 128-131)*.

Thus, it could not have been Scott Smith, the only instructor who had any experience whatsoever with Plaintiff that could be objectively quantified as demonstrating lack of preparedness

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[22] Plaintiff's statement that he began studying the 2 weeks prior refers to the fact that it was at that time that he received Defendant Airline's "home study" package relating to the just-issued revised Pilot's Operating Manual, which was the document containing the information he studied to prepare for annual recurrent. Plaintiff states that he began studying the new POM as soon as he received it. *Plaintiff Depo, 129-130; Hunt Decl., Ex. 3, p. 21-10.*

in any degree, who led Defendant Airline managers to believe that Plaintiff would "allow himself to become unprepared" in the future.

Nor can Defendant Airline prove that its belief that Plaintiff was the "worst prepared" originated with anyone *else* in the Training Department who had direct involvement with Plaintiff's performance at training. Scott Smith, Terry Christian and Jay Fralish *all* testified that they have no recollection of *ever* discussing Plaintiff's situation with any of the decisionmakers at issue here *(S. Smith Depo, 51-54; K. Smith Depo, 76; Christian Depo, 29-35, 52, 54; Fralish Depo, 83)*. Kevin Smith's contact with the decisionmakers was limited to telephone discussions with Noah Flood and Dave Winegar on October 9th, during which time Smith characterized only 30% of Plaintiff's training problems as being attributable to poor preparation *(K. Smith Depo, 76, 105-109; Winegar Depo, 14-18, 57-58, Ex. 1, 6)*. And Gary Shirley, the one Training Department employee who would have the most valid basis for comparing Plaintiff's level of preparedness with other B-727 SO's, said nothing to anyone regarding that issue, nor does he recall anyone saying anything to him to that effect.

There is absolutely no evidence whatsoever that any Training Department employee with personal knowledge ever represented that Plaintiff's lack of preparedness was the worst ever. In fact, Gary Shirley, the supervisor of all who worked with Plaintiff during training, stated that when he was told by one of his senior instructors about Plaintiff, the information relayed was that "we had an individual with difficulty in the program...which would not in any way alarm me because in the training world this is going to occur." *Shirley Depo, 11; K. Smith Depo, 59-61.*

The Objective Data: Gary Shirley maintained a log ("Shirley Log") in which he noted all training problems experienced by B-727 Second Officers *(Hunt Decl., Ex. 4).* Analysis of the entries in the Shirley Log shows that before November 1997, at least six other SO's failed **two P-Checks** before being rated satisfactory and released to the line as qualified to fly - Plaintiff busted only one P-Check.[23] The Shirley Log also reveals that at least eleven other SO's needed two additional days of

[23] Plaintiff does not agree that a valid comparison universe should be limited to probationary B-727 Second Officers who reported to annual recurrent training before Plaintiff's termination. First, given Defendant Airline's burden to justify Plaintiff's termination, its policies

training, of whom at least three needed **three or more additional training days** before being cleared by Training - Plaintiff needed *a total of two* additional days *(Hunt Decl., Ex. 5, Chart III)*. *See also, White Decl., ¶ 15- 16, Ex. C.*[24] **Not one of the pilots reflected on Chart III was compared to Plaintiff.**

Defendant Airline did not choose from even this limited universe of all 727 Second Officers with training problems when it selected pilots to compare to Plaintiff. Instead, Shirley prepared a chart *(Hunt Decl., Ex. 6; Shirley Depo, Ex. 2)* ("Shirley Chart")) for Burnfield (which was discussed during the meeting about Plaintiff in Colby's conference room) on which the training profiles of **four** other 727 SO's who had training problems were compared to Plaintiff. Shirley testified that the chart did not reflect "all the 727 Second Officers who had training problems in 1997", but was rather a "very finite focus...**a one-month snapshot** of the difficulty." *Shirley Depo, 91-100, Ex. 2 (emphasis added)*. *See also, Chart III.*

Even the most superficial examination of the Shirley Chart shows that Plaintiff performed (i.e.,

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and practices **after** Plaintiff's termination are highly probative. Indeed, Defendant Airline admits that very few *probationary* 727 SO's experienced recurrent training between 1994 and 1997 because Defendant Airline had only reopened hiring for these pilots in 1996. Yet, Defendant Airline concedes that lack of preparedness is critical irrespective of the pilot's seniority *(Swift Depo, 122-125; Christian Depo, 16-17)*. Further, there is no valid analytical or practical distinction between recurrent training and any other "qualification" training regimen, because all require the same result: a determination that the pilot is qualified to fly for Defendant Airline *(Hunt Decl., Ex. 3, 21-6, et seq.)*. Nor does Plaintiff concede that an objective evaluation of Plaintiff's performance and/or "preparedness" during training should be limited to 727 SO's. In 1997, over 10,000 pilots entered training - 3,218 were B-727 pilots, not broken down by seat position: Captain, First Officer, Second Officer. *White Decl., Ex. C.* Given Defendant Airline's assertion that its sole reason for terminating Plaintiff was its concern for the safety of its passengers and equipment, driven by its belief that he had "allowed himself" to become unprepared for training, it was incumbent upon Defendant Airline to compare the objective indicia of Plaintiff's preparedness or lack of same with *all* Defendant Airline pilots before obliterating his ability to work in commercial aviation - unless, of course, only the probationary B-727 Second Officers evoke this alleged concern, and then only when they sit for annual recurrent training.

[24] Indeed, a full analysis of the Shirley Log would show that well over 200 pilots needed more than 1 day of additional training to complete a Defendant Airline training regimen, more than 65 needed two or more additional training days, and more than 10 needed three or more additional training days. That analysis would also show that, like Plaintiff, over 100 pilots failed one checkride, of whom many who were not terminated failed two or more checkrides. *Hunt Decl., Exs. 4, 13.*

was prepared) as well as or better than each pilot with whom he was compared *(Hunt Decl., Exs. 7, 8 - Charts IV, V).* Plaintiff performed better than Kober on the FAA Oral, and better than Kober *and* Kronmuller on the FAA Rating Ride. Like Kronmuller, Plaintiff was not recommended and required an additional day of LOFT training before he could take his Recurrent P-Check. Like Brice and Applegate, Plaintiff "busted" his first recurrent P-check, but required only *one day* of additional training before satisfactorily completing the p-check, where Brice required *two* days of additional training. Also, while Kober had yet to report for his annual recurrent training, he was still employed by Defendant Airline despite the fact that he required *two* additional training days before he could pass his FAA Oral, had an Unsatisfactory FAA rating ride (similar to a P-Check in all material respects), and would not have been "recommended" for the Special P-Check after either the training day before he failed the Special P-Check or the one that followed that busted P-Check. Plaintiff, on the other hand, passed both the FAA Oral and the FAA Rating Ride on the first try, and was not required to sit for Special Training or a Special P-Check.

Defendant Airline produced some "raw training data" with respect to Kronmuller, Applegate and Kober (none was produced for Brice), all of which is attached hereto *(Hunt Decl., Exs. 9, 10, 11)*. Had Defendant Airline managers reviewed that data, they simply could not have decided that Plaintiff reported to training "less prepared" that any of these pilots, to-wit:

- In September 1997, Kronmuller's instructor wrote, "He had no understanding of what was happening or the ability to recognize it. Totally, unsat; so much so that the Captain instructor was concerned that we would not complete the loft due to how much time had been wasted with this malfunction," *(DL 3009)* and, "I am not sure how ___ Got through initial training. **At this point, he is at best inept, at worst unsafe for line operations**. His attitude is positive; we talked at length and he agreed with all my comments. I can not understand how man [sic] who can fly a carrier based jet fighter is overwhelmed by the panel. He did study, and he did not appear nervous. But he was unsat. I would normally recommend one additional day of training to be followed by a check. However; [sic] I am not so sure he will need [sic] two additional days of training" *(DL 3010) (emphasis added). Hunt Decl., Ex. 9.*

- Applegate's instructor wrote, "...**totally lost his mind**..." *(DL 3019)*, "could not remember how to perform test...," and "Discussion about **showing up prepared** and levels of expected performance, both in training and on the line." *(DL 3020)* Another instructor wrote, with respect to Applegate's P-Check, "**Did admit to being poorly prepared."** *(DL 3021)* (Emphasis added.) *Hunt Decl., Ex. 10.*

- Kober's instructor wrote, **"Overall, the trainee...was very unsure of himself.**

> **I have not seen this lack of confidence in the last several classes."** *(DL 2979)* Another instructor wrote, "**Depth of knowledge from both of these gentlemen was shallow. If the [sic] had been my ride 8 students, I would not have recommended them."** *(DL 2982) (Emphasis added.) Hunt Decl., Ex. 11.*

At a minimum, objective analysis of the Shirley Chart calls into question Defendant Airline's claim that "the group assembled by Colby examined the records of other probationary pilots...and found no other probationary pilot who had appeared for training as unprepared as Plaintiff" *(Defendant Airline MPA, 9)*.

Moreover, as to this Shirley Chart, confusion reigns: Gause, Burnfield and Hanner do not recall even seeing it *(Gause Depo, 55, 59; Burnfield Depo, 128; Hanner Depo, 82-83)*; Swift never discussed even its contents *(Swift Depo, 136)*; Gause, Hanner and Swift never compared any of the pilots listed on the Chart to Plaintiff *(Gause Depo, 55-58, 141; Hanner Depo, 82, 101-103; Swift Depo, 117, 135-136)*. Moreover, Gause admitted that Plaintiff's "training profile looked standard," and that the recurrent training profile of Kronmuller "looks like [it is] identical" to Plaintiff's *(Gause Depo, 108, 58-59)*.[25] **The record is devoid of any evidence that Defendant Airline analyzed the Shirley Chart and found Plaintiff to be objectively "less prepared" than any other pilot on the Chart. Of the five pilots shown on the Shirley Chart, only Plaintiff was terminated** *(Shirley Depo, 93-95, 100-102)***.**

The **Shirley Log** was not considered by the decisionmakers at any time *(Colby Depo, 116-117)*. Of all the pilots shown on the Shirley Log, only Plaintiff successfully completed the training regimen and was terminated as a result of his performance (or what that performance "indicated" to Defendant Airline) in training. In fact, Plaintiff was the only "new hire" whose employment terminated *for any reason* who was fired because he "did not prepare for Recurrent." *Hanner Depo, 93-96, Ex. 5.*

Defendant Airline's claim that the decision to fire Plaintiff was based on his "unpreparedness"

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[25] The Shirley Chart was not produced to Plaintiff by Defendant Airline until the morning of Gary Shirley's deposition, October 29, 1999. Thus, Plaintiff was unable to "refresh" Colby's, Burnfield's, or Flood's recollection as to how the performance or preparedness of the individual pilots identified thereon compared to Plaintiff, much less whether they actually thought through the comparison process.

(Defendant Airline MPA, 20), without a scintilla of credible objective evidence illuminating that otherwise wholly subjective characterization, cannot withstand even the most superficial scrutiny. Indeed, the credibility of each decisionmaker involved in Plaintiff's termination is dubious.

Credibility Questions: As noted above, **Burnfield**'s statement that Scott Smith told him that Plaintiff's level of proficiency "was the worst...ever seen" must be discounted, if not outright rejected by this Court, in view of Smith's, Hanner's and Plaintiff's testimony to the contrary. **Hanner**'s statement that Plaintiff was "the only pilot I know of that needed two extra days of training in recurrent training" *(Hanner Depo, 22)* demonstrates, at best, that he ignored all objective evidence to which he had access. **Gause**'s statement that Plaintiff's "preparation was probably the worst that we had ever seen at Defendant Airline Airlines" is belied by the objective evidence; moreover, Gause cannot remember who told him that, and admits that he had no independent basis for his assessment *(Gause Depo, 59-60)*. Also, Gause's statement that "I can't remember a single pilot at Defendant Airline during my tenure that didn't complete the LOFT" *(Gause Depo, 50)* shows that either his knowledge or his memory is seriously flawed: whether he believed that Plaintiff "didn't complete" the LOFT *or* he believed that no pilot required additional training after the first day of LOFT, he was misinformed, as the Shirley Log clearly shows. **Colby** admitted that he reviewed no documentary evidence that supported the claim that Plaintiff "had not prepared for his training" *(Colby Depo, 122)*. Colby also testified that he discussed Plaintiff's training scenario with Scott Smith, which Smith expressly denies *(Colby Depo, 124; S. Smith Depo, 50-55)*. Yet, Colby testified earlier that he had taken *no actions regarding Plaintiff* prior to the meeting in his conference room to discuss Plaintiff's termination, other than to tell his "staff" to "get the facts"*(Colby Depo, 110)*.

B. Defendant Airline Cannot Sustain Its Burden Of Proof That It Had Just Cause To Terminate Plaintiff.

Defendant Airline's burden under USERRA goes beyond showing that it had a "legitimate nondiscriminatory basis" for Plaintiff's termination. Defendant Airline must also establish, by a preponderance of the evidence, that such basis met the legal standard for "just cause." *See, e.g.,*

Monroe v. Standard Oil Co.,[16] 452 U.S. 549, 556, 559-60 (1981), where the Court clarified that when Congress enacted VRRA section 2021(b)(3) (which later became section 4311(a) under USERRA), it "wished to provide protection to reservists comparable to that already protecting the regular veterans from 'discharge without cause' ..."

Moreover, in *NLRB v. Transportation Management, supra*, [17] the Court held that a discharge must be for "valid" and "wholly legitimate" reasons, and further stated,

> The Board was justified in this case in concluding that Santillo would not have been discharged had the employer not considered his efforts to establish a union. At least two of the transgressions that purportedly would have in any event prompted Santillo's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; indeed, not only did the employer not warn Santillo that his actions would result in being subjected to discipline, it never even expressed its disapproval of his conduct. In addition, Patterson, the person who made the initial decision to discharge Santillo, was obviously upset with Santillo for engaging in such protected activity. It is thus clear that the Board's finding that Santillo would not have been fired even if the employer had not had ananti-union animus was "supported by substantial evidence on the record considered as a whole", 29 USC § 160(f).

Id. at 404-405.[18]

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[16] Of course, the *Monroe* test, requiring that actionable conduct be based "solely" upon military status, was rejected by Congress when it enacted USERRA, replacing the *Monroe* standard with express statutory language requiring only that military status or service be "a motivating factor" in the adverse employment action. *See, Gummo v. Village of Depew, N.Y.,* 75 F.3d at 105-106.

[17] As noted above, *Transportation Management* must provide the proof model in USERRA cases. Though abrogated as to cases brought under the Administrative Procedures Act in *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), the *Greenwich Collieries* decision is expressly limited to the APA, and leaves the holding of *Transportation Management* intact. Moreover, USERRA was enacted *after* the *Greenwich Collieries* decision, and the intent of Congress was reaffirmed in post-1994 sessions. That *Transportation Management* retains its vitality is also shown by the many recent cases decided under the National Labor Relations Act, such as *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C.Cir. 1998), and *NLRB v. Taylor Machine Products, Inc.*, 136 F.3d 507, 514-515 (6th Cir. 1998).

[18] The above language could easily be modified to suit the facts of this case, as follows:

> "The Court is justified in this case in concluding that [Plaintiff] would not have been discharged had Defendant Airline not considered his [military status]. The transgression that purportedly would have in any event prompted [Plaintiff's]

In the leading case of *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968), the court articulated the "just cause" standard, as follows:

> [A] discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct; and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.

Id. at 1244.

Further, the *Carter* court held that cause has *not* been proven "unless the employer goes further than asserting [its] own subjective feelings and also meets the burden of showing *objective* conduct on the part of the employee that satisfies some *objective* standard of cause." *Id.* at 1245 (emphasis added). *See also, Mike v. Ron Saxon Ford, Inc.*, 960 F.Supp. 1395, 1400 (D. Minn. 1997) (just cause required under USERRA).[19]

Defendant Airline cannot show that it was reasonable to discharge Plaintiff because of his ostensible lack of preparedness for training because Defendant Airline cannot provide objective

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> discharge [i.e., reporting to training "unprepared", as evidenced by objective analysis of his training performance] was commonplace, and yet no transgressor had ever before [been terminated]. Moreover, [Defendant Airline] departed from its usual practice in dealing with [training anomalies]; indeed, not only did the employer not warn [Plaintiff] that his [training performance] would result in [his being terminated], it never even expressed its disapproval of his [performance, and instead certified him as qualified to return to regularly-scheduled flying]. In addition, [Flood, Burnfield and Hanner], the [managers whose input convinced Colby that Plaintiff had been "woefully unprepared,"] were obviously upset with [Plaintiff] for engaging in such protected activity [taking military leave of absence]. It is thus clear that the Court's finding that [Plaintiff] would not have been fired even if the employer had not had an anti-[military] animus was supported by substantial evidence on the record considered as a whole.

[19] While *quantifiable* poor performance can provide just cause for termination, *Roeder v. American Postal Workers Union*, 1380 F.3d 733, 738 (6th Cir. 1999), if the claim is couched in amorphous terms such as "lack of preparedness," such subjective characterizations are "particularly susceptible to discriminatory abuse and should be closely scrutinized." *Warren v. City of Carlsbad,* 58 F.3d 439, 443 (9th Cir. 1993); *PPC Holdings, Inc. v. N.L.R.B.*, 64 F.3d 935, 944 (4th Cir. 1995) ("vague allegations of 'bad attitude' do not provide a meaningful justification for dismissal"); *Chapman v. A1 Transport*, 180 F.3d 1244, 1250 (11th Cir. 1999) ("where as here, the employee has established a *prima facie* case and cast sufficient doubt on the credibility of subjective explanations that are not susceptible to evidentiary support or capable of objective evaluation by this Court, we believe that summary judgment is not appropriate.").

evidence that Plaintiff was any less prepared than many others who were not fired, either before or after November 1997. Additionally, Defendant Airline cannot show that Plaintiff had notice that requiring a total of two additional training days and two P-Checks would result in his termination because its own published policies and the uncontested testimony of all Training Department employees clearly establishes the contrary. Finally, at least three Defendant Airline employees have admitted that Defendant Airline did not have just cause to terminate Plaintiff. *See, Swift Depo, 125-129, Ex. 10, 134-135, Ex. 14; Winegar Depo, Ex. 8.*

Moreover, Defendant Airline cannot simply rely on an uninformed "belief" in the reasonableness of its conduct. Under both state and federal law, an employer's assertion of just cause for termination must be predicated upon a "factual basis" for its conclusion, "reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual." *Cotran v. Rollins Hudig Hall, Int'l, Inc.*, 17 Cal.4th 93, 107 (1998). *See also, Simmons v. Didario*, 796 F.Supp. 166, 170 (E.D. Pa. 1992) (employer's sham investigation was "of little significance to anyone"); *Weber v. Logan County Home*, 623 F.Supp. 711, 714 (D.N.D. 1985), *aff'd*.,804 F.2d 1058 (8th Cir. 1986).

Defendant Airline made only the most cursory investigation of the circumstances surrounding Plaintiff's training scenario, the results of which were peremptorily ignored by the decisionmakers. Defendant Airline's preliminary stabs at "investigating" the basis for Plaintiff's training problems occurred in the Training Department: Kevin Smith and Terry Christian, the two senior instructors who participated in the authorization of Plaintiff's additional training days, asked if he was experiencing personal problems and if he thought his military obligations might be distracting him *(Plaintiff Depo, 162, Ex. 9; Christian Depo, Ex. 2)*.

"Investigation" by Flight Operations personnel continued until the meeting where Plaintiff's fate was decided in Colby's conference room. Flood, Assistant Chief Pilot at Plaintiff's base, asked Winegar to investigate what might have caused Plaintiff problems, and learned only that Plaintiff's performance might have been affected by his "military leave usage" *(Flood Depo, 51-52)*.[20] Winegar

[20] Flood also testified that he had the authority to suspend training if a pilot was experiencing problems that adversely affected his training performance:

continued his investigation throughout Plaintiff's training and Defendant Airline's subsequent review of his employment status, and learned a great deal about Plaintiff's excellent work history; however the document Winegar prepared summarizing Plaintiff's history was never reviewed or considered by any decisionmaker at Defendant Airline other than Cusick. Jon Swift, Chief Pilot, sent a copy of Winegar's notes to Terry Cusick, then System Manager of Flight Operations, which Cusick characterized as a "good report on [Plaintiff's] progress," but no other Defendant Airline manager can recall ever reviewing or considering this document. *Swift Depo, Ex. 12; Cusick Depo, 34-35; Gause Depo, 68-69, 142-143, Hanner Depo, 67-70; Burnfield Depo, 125-127, Ex. 7,; Colby Depo, 131-133, Exs. 7-9.*

A major factor in Plaintiff's training problems was the radically altered Pilot's Operating Manual ("POM"), which had been issued to Plaintiff only weeks before he reported for annual recurrent training. No training was provided on the POM *(White Decl., ¶ 17; Burnfield Depo, 74; Hanner Depo, 67-68; Plaintiff Depo, 111).* Burnfield admitted that he did not know if the manual change could have adversely affected recurrent training for 727 pilots in 1997 *(Burnfield Depo, 76)*. Gruver and White, both experienced Defendant Airline pilots, contend that the new 1997 POM format constituted a significant change that was challenging for even the most experienced pilot. *Gruver Decl., ¶ 3; White Decl., ¶ 7.*[21] Despite Scott Smith's notation on the Instructor Comment Sheet to the

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> "And typically what I'm looking for is anything that can impact the individual's performance: if they have medical problems, if they have family problems, if there are issues outside of the cockpit that may be impacting their performance in the cockpit. ... Because I want to know, number one, that the pilot is safe and fully prepared to go fly with our airplanes with our passengers, and secondly, that if a pilot is having rouble training, I want to address the issue. **And if there are home problems, family problems, I would rather withdraw a pilot from training and make sure those issues are addressed and then have the pilot come back when they are fully focused on doing the job.**" *Flood Depo, 53 (emphasis added)*

Yet, although Flood believed that Plaintiff's military leave was impacting his performance, perhaps at least in part because he had not had time to thoroughly familiarize himself with the newly-revised operations manual, no Defendant Airline manager offered Plaintiff the opportunity to suspend training, or reschedule training, so that he could come up to speed on the new format.

[21] In fact, immediately after Plaintiff was suspended, Gruver contacted Swift to discuss the effect the new format may have had on Plaintiff, and Swift expressed surprise and requested that

effect that the new format did in fact affect Plaintiff's performance on his first P-Check, and Kevin Smith's discussion with Winegar that 30% of Plaintiff's problems stemmed from the new format, the POM changes were not raised in any way by any Defendant Airline decisionmaker as a possible basis for Defendant Airline's conclusion that Plaintiff had reported to training "unprepared." *Winegar Depo, 12, 16-17; Colby Depo, 136.*

Colby testified that the process of reviewing Plaintiff's employability started when he "heard that we had a pilot that required a great deal of training" *(Colby Depo, 93)*. He then told his staff to "get the facts," and thereafter convened meetings and participated in telephone conferences with various managers to discuss Plaintiff's situation. *Id.* at 98, 106, 110. At the last such meeting, the group reviewing Plaintiff's situation was presented with only one document, the Shirley Chart *(Shirley Depo, Ex. 2)*. The "good report" provided to Cusick by Swift was not considered. The letters detailing Plaintiff's performance during the New Hire Assessment flights were not considered. Scott Smith's Instructor Comment Sheet was not considered. Colby never requested that Plaintiff's flight operations base file be pulled, reviewed or considered, nor did he request any additional information regarding Plaintiff's past performance or training, and the record is devoid of evidence that any decisionmaker here considered Plaintiff's exemplary past performance in this context.

The decision to terminate Plaintiff was apparently based entirely upon inaccurate anecdotal characterizations of Plaintiff's alleged unpreparedness, unsupported by even the barest attempt at legitimate investigation. *Colby Depo, 110, 112, 117, 128, 130, Exs. 6-15.* In essence, Colby and his "staff" based their consensus decision to terminate Plaintiff on one document (the Shirley Chart), the clear implications of which the entire group disregarded, and various unfounded and uninformed statements that Plaintiff was "woefully unprepared" or "the worst probationary pilot seen," none of which statements can be traced to any Defendant Airline employee with personal knowledge.

It is inconceivable that Defendant Airline's decision to terminate Plaintiff was based on anything other than its acknowledged hostility to Plaintiff's military leave usage, as evidenced by the following:

Gruver provide more details, which he did. *Gruver Decl., ¶ 3, Ex. A, B.*

- Defendant Airline failed to conduct a fair, honest and impartial investigation.
- Defendant Airline ignored all objective evidence demonstrating that Plaintiff performed as well as or better than *many* other 727 SO's whose training problems were documented on the Shirley Log, and thus could not have been less prepared for training than those pilots.
- Defendant Airline refused to even consider those mitigating circumstances of which it had knowledge, such as the new POM and Plaintiff's exemplary work history.
- Defendant Airline violated its own published policies and consistent practices by terminating Plaintiff despite his successful completion of annual recurrent training and the utter absence of any other performance problem.

Accordingly, Defendant Airline's motion for summary judgment as to Plaintiff's USERRA claim must be denied.

III. AT A MINIMUM, PLAINTIFF HAS ESTABLISHED A GENUINE DISPUTE OF MATERIAL FACT AS TO PUNITIVE DAMAGES.

A. Defendant Airline's Argument That Plaintiff Is Not Entitled To Compensatory Damages Must Be Rejected.

Defendant Airline's assertion that Plaintiff suffered no compensatory damages and is therefore "pursuing this case solely for punitive damages and attorneys' fees" *(Defendant Airline MPA, 22 n.9)* is based on another significant miscomprehension of USERRA. First, lost wages under the Act are calculated as to each *pay period*. *Dyer v. Hinky Dinky, Inc.*, 710 F.2d 1348, 1351-1352 (8th Cir. 1983), cited with approval in USERRA legislative history, 2994 USCCAN at 2472. Thus, for example, in any week where Plaintiff had no earnings from fulltime employment, amounts earned in other weeks cannot offset that loss. In addition, Defendant Airline may not offset amounts earned during reserve duty that he would have earned had he remained employed with Defendant Airline. *See, Moore v. Hill Bros. Coffee Co.,* 131 Lab.Cas. ¶11,512 at 28,304 (S.D. Al. 1992). Moreover, any earnings resulting from Plaintiff's working *more* hours at his part-time job with the reserves that he might have had he remained employed, are also exempt from offset against Plaintiff's backpay damages. *Helton v. Mercury Freight Line, Inc.*, 444 F.2d 365, 367-368 (5th Cir. 1971); *Dyer, supra.* In fact, Plaintiff has suffered, and to date has not been made whole as to lost wages, lost benefits, and

emotional distress.

In any event, neither the existence nor the amount of compensatory damages governs the availability of punitive damages; rather, it is only necessary that a tortious act be proven. *A. Esparza v. Specht*, 55 Cal.App.3d 1, 127 Cal.Rptr. 493 (1976); *Topanga Corp. v. Gentile*, 249 Cal.App.2d 681, 58 Cal.Rptr. 713 (1967). Even where compensatory damages are nominal, punitive damage awards have been held to be appropriate. *Werschkull v. United California Bank*, 85 Cal.App.3d 981, 149 Cal.Rptr. 829 (1978); *Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal.App.3d 1, 135 Cal.Rptr. 915 (1977); *Topanga, supra*. *See also, Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984) (punitive damage award 27 times compensatory amount and 17.5% of defendant's net worth not excessive).

Finally, this Circuit has soundly rejected this "no harm, no foul" approach to discrimination cases. *Hashimoto v. Dalton*, 118 F.3d 671, 675-676 (9th Cir. 1997); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1511-1512 (9th Cir. 1989).

B. Plaintiff Is Entitled To Punitive Damages Because Defendant Airline Acted With Malice In Fact When It Terminated Plaintiff's Employment.

To prevail on his claim for punitive damages, Plaintiff must establish that an officer, director or "managing agent" of Defendant Airline either himself acted with "oppression, fraud or malice," or that he ratified or authorized such conduct. *Cal. Civ. Code §3294*; *White v. Ultramar*, 21 Cal.4th 563, 88 Cal.Rptr.2d 19 (1999).[22] In *White*, *supra*, the California Supreme Court unequivocally held that the determination under §3294 of whether a corporate employee is a "managing agent" is "... a question of fact for decision on a case-by-case basis." *Id.* at 566-67. *See also, Ginda v. Exel Logistics, Inc.*, 42 F.Supp.2d 1019 (E.D.Cal. 1999).

The requisite "malice" to support a punitive damage award is found, *inter alia*, in a defendant's "reckless" or "conscious disregard of a plaintiff's rights." *White, supra; Stephens v.*

[22] Defendant Airline's reference to *Kolstad* is yet another instance of its misapplication of governing authority. *Kolstad* expressly dealt with the Title VII punitive damages standard - not the California standard of *Cal. Civ. Code §3294*, as clarified by Justice Mosk in *White, supra*, at 582.

Coldwell Banker Commercial Group, Inc., 199 Cal.App. 3d 1394, 245 Cal.Rptr. 606 (1988) (overruled on other grounds by *White,* supra); *Schroeder v. Auto Driveway Co.,* 11 Cal3d 980, 922, 114 Cal.Rptr. 622 (1974); *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 2000 WL 176017 (9th Cir. 2000); *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498 (9th Cir. 1989). Indeed, the very act of discrimination can alone support a punitive damage claim under §3294 (*Cloud v. Casey,* 76 Cal.App. 4th 895, 911-913, 90 Cal.Rptr. 2d 7 57 (1999); *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128, 74 Cal.Rptr.2d 510 (1998); *Roberts v. Ford Aerospace & Communications Corp.*, 224 Cal.App.3d 793, 272 Cal.Rptr. 139 (1990).

Defendant Airline would have this Court accept that it was Richard Colby alone who terminated Plaintiff, and that Colby's self-serving protestations that he did not care about Plaintiff's military leave suffice to show absence of malice.[23] However, even were this Court to hold that Colby acted alone, Colby's reckless disregard of Plaintiff's rights under USERRA **in and of itself** satisfies §3294's malice requirement so as to impute liability to Defendant Airline. As the Ninth Circuit recently held,

> In order to award punitive damages, the jury had to find that "the defendants' conduct was malicious, or in reckless disregard of plaintiff's rights." The court explained that "in this context ... conduct is in reckless disregard of a party's rights if, under the circumstances, it reflects complete indifference to the rights of others."

Lambert v. Ackerley, 180 F.3d 997, 1009-1010 (9th Cir. 1999).

Colby's testimony on this issue is telling:

> Someone pointed out that he had spent an unusual, an unusually large amount of time or great deal of time flying in the reserves, and I recall my response to that was that that's fine, but when he comes to Defendant Airline he has to come and be prepared. I don't – I think my – the words that I used at the time was I don't care if he's playing golf, tennis, running a secondary business, flying for the reserves or whatever. That in itself is not an excuse for coming to a P-check unprepared. *Colby Depo, 134:11-20.*

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[23] It is worth noting that Defendant Airline alludes to *other* "mitigating circumstances" that might justify a pilot's unpreparedness, but Colby's reaction to his staff's suggestion that Plaintiff's *military leave* usage might have contributed was to reject it outright as irrelevant. Yet, Defendant Airline admits that it would postpone or suspend training if it learned that a pilot was experiencing difficulty because of such "mitigating circumstances" as illness or marital problems . *Colby Depo, 93-96, 99-100, 134; Hanner Depo, 12-13; Swift Depo, 115-116; Flood Depo, 54, 85.*

At first blush Colby's statement may appear benign. However, with the exception of "flying for the reserves," none of the activities listed by Colby are protected by law – thus, he can ignore any role such activities may have played with impunity. Moreover, Colby admits that he refused to even consider the possibility that Plaintiff may have had training problems because of his military service, and to thereafter consider *accommodating* Plaintiff's need for additional training rather than firing him for the deficiency. Given Defendant Airline's practice of granting additional training, or even suspending training, when a pilot disclosed health, legal, marital or other problems, Colby's statement clearly shows the requisite "reckless disregard" for Plaintiff's rights. In addition, Defendant Airline managers consistently admitted that, despite indications that Plaintiff's training problems stemmed, at least in part, from the change in the POM, they did not take that change into consideration as a possible "mitigating circumstance."

Colby did not, however, act alone. The evidence establishes that Plaintiff's termination was a "consensus decision," *(Colby Depo, 97, 125-26, 174; Gause Depo, 31-32, 63-64; Hanner Depo, 58-63; Flood Depo, 106-08),* that virtually no investigation was done, and that nearly every other manager who actively participated in that consensus (Flood, Swift, Burnfield and Hanner) expressed Defendant Airline's hostility to Plaintiff's military leave usage.[24]

Even if Colby alone made the *ultimate decision* to terminate Plaintiff, liability for punitive damages should be imputed to Defendant Airline because he "authorized" or "ratified" the conduct of the managers who harbored discriminatory animus and provided input to Colby upon which he based that decision. Colby admits that he made the decision to terminate Plaintiff based *solely* on the input of his "staff," which his testimony establishes included Gause, Cusick, Hanner, Burnfield and the base Chief Pilot (Swift/Flood). Colby admits that he did no investigation independent of that staff. Accordingly, the attitudes and biases of Colby and all participating staff must be imputed to Defendant Airline for the purpose of liability under §3294. *See, e.g., Clark v. Claremont University Center and*

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[24] The record is also clear that not one of these managers had taken more than a minimal amount of military leave himself: *Colby Depo, 24* (no reserve status since 1970); *Burnfield Depo, 23, 86* (not "a whole lot" of military leave); Flood, pp. 24-25 (no military leave); *Hanner Depo, 16* (never in reserves); *Swift Depo, 41* (no reserve status since 1989); *Gause Depo, 17* (no reserve obligations after 1982).

Graduate School, 6 Cal.App.4th 639, 665-69, 8 Cal.Rptr.2d 151 (1992) (permissible inference that discriminatory evaluation at any level of employee's performance review tainted entire decisionmaking process; even independent investigation by final decisionmaker does not insulate employer from liability). *See also, Lam v. Univ. of Hawaii*, *supra; Abrams v. Lightolier, Inc.*,*supra*; *Roebuck v. Drexel Univ.*, *supra*; *Shager v. Upjohn Co., supra*.

Each Defendant Airline manager that participated in the decision to terminate Plaintiff could be found by a reasonable juror to be a "managing agent" under governing California law. Both Cusick *(77:20-78:23, 79:14-80:13)* and his replacement, "Bud" Sittig *(41:25-43:4),* testified that all involved decisionmakers in this matter were part of the Flight Operations management group, down to the level of Assistant Chief Pilot Noah Flood.

Defendant Airline does not dispute that Colby, as VP of Flight Operations, was a managing agent. The cumulative deposition testimony of Colby, Gause, Cusick, Burnfield, Hanner and Swift creates *at least* a genuine issue of fact as to whether they were acting as managing agents during Plaintiff's review and termination, as follows:[25]

- Jon Swift, testified that he was responsible for managing approximately 1500 pilots (1/6 of Defendant Airline's total pilot force) as well as all administrative functions for the entire base. As to Plaintiff, Swift told Gruver that Plaintiff had taken "a lot of" military leave and questioned Plaintiff's loyalty because of that leave, provided Winegar's chronology to Cusick, and ultimately terminated his employment. However, Swift stated that he never spoke with Colby about Plaintiff *(Swift Depo, 57-58, 127-128, 133)*.

- In Swift's absence, his Assistant Chief Pilot, Noah Flood, was authorized to act for him in all respects. In this instance, Flood informed Gause about Plaintiff's MLOA and queried its appropriateness, informed Gruver that Plaintiff's MLOA was considered in the "employment status" review, discussed Plaintiff with Colby more than once, and participated in the final Colby meeting.[26]

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[25] For detailed discussions of each manager's responsibilities, s*ee,* **Burnfield** (*15:3-22:14, 24:6-33:16, 65:3-68:19, 93:2-94:12, 117:24-118: 123:2-124:22, 127);* **Hanner** *(11:14-16:1, 17:9-16, 26:18-32:6, 46:20-49:25, 53:15-60:25, 62:5-70:25, 78:16-80:8, 83:24-86:16, 97:1-8, 101:10-102:9);* **Gause** *(15:15-16:7, 20:25-32:18, 46:23-52:22, 59:7-61:25, 63:11-66:22, 68:2-71:1, 74:15-78:25, 83:17-88:2, 90:19-97:11, 134:3-135:3)*; **Cusick** *(12:24-15:8, 18:20-21:3, 23:10-31:14, 33:21-42:7, 58:2-12, 72:9-73:7, 76:21-78:23);* **Swift** *(22:17-39:25,43:17-44:25, 81:5 - 85:25, 105:14-109:17,137:2-140:8, 167:18-168:12).*

[26] Flood, then Assistant Chief Pilot under Jon Swift, was *acting as Chief Pilot* in Swift's absence *(Swift Depo. 20:19 22:9, 160-61, 163:15-164:4)*.

- Cusick was Swift's superior in Flight Operations. Cusick received (and apparently ignored) Winegar's chronology from Swift, participated in the final Colby meeting, and flagged Plaintiff's personnel file as "ineligible for rehire."

- Burnfield and Hanner were Cusick's peers. Each expressed outright hostility to Plaintiff's MLOA, ignored all objective evidence that Plaintiff was in fact *not* "woefully unprepared," and participated in meetings with Colby.

- Cusick, Burnfield and Hanner reported to Gause, who reported to Colby. *See, Hunt Decl., Ex. 12, "Chart VI".*

In *White, supra*, the Court held that even a supervisor with "broad discretionary powers" who exercised "substantial discretionary authority in the corporation" could be a managing agent. *Id.* at 577. It went on to hold that the supervisor at issue was a managing agent under §3294, on the following basis:

> As the zone manager for Ultramar, Salla was responsible for managing either stores, including two stores in the San Diego area, and at least sixty-five employees. The individual store managers reported to her, and Salla reported to department heads in the corporation's retail management department. The supervision of eight retail stores and sixty-five employees is a significant aspect of Ultramar's business. The testimony of Salla's superiors establishes that they delegated most, if not all, of the responsibility for running these stores to her. **The fact that Salla spoke with other employees and consulted the human resources department before firing plaintiff does not detract from her admitted ability to act independently of those sources**.

Id. (emphasis added).

Under *White*, Chief Pilot Swift was clearly a "managing agent" for the purpose of §3294. Swift's testimony that he was absent from the base at all material times, and that Noah Flood acted in his stead with full authority during his absence, establishes that Flood acted as a managing agent when he communicated directly with Shand Gause regarding Plaintiff's military leave usage, when he spoke with Mike Jones regarding Plaintiff's military leave usage, and when he attended meetings or participated in discussions with Colby, Cusick and other managers where Plaintiff's "employment status" was considered. There can be no dispute that Cusick, Hanner and Burnfield were managing agents, or that their superiors, Gause and Colby, were managing agents.

Plaintiff has raised a genuine issue of fact as to Defendant Airline's corporate liability under §3294 for punitive damages. Accordingly, summary judgment in Defendant Airline's favor on this issue is inappropriate, and should be denied.

CONCLUSION

In light of the foregoing, Plaintiff respectfully urges this Court to deny Defendant's Motion for Summary Judgment in its entirety.

DATED: March 27, 2000

HUNT NARAYAN, LLP

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