

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33355

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**COLGAN AIR, INC.,
Appellant,**

V.

**WEST VIRGINIA HUMAN RIGHTS COMMISSION
AND RAO ZAHID KHAN,
Appellees.**

**Appeal from the West Virginia Human Rights Commission
Docket No. ERRELNOANCSREP-391-02**

REVERSED

Submitted: September 18, 2007

Filed: October 25, 2007

**Brian J. Moore
Jackson Kelly PLLC
Charleston, West Virginia
Mark A. Dombroff
Shaleeza Altaf
McLean, Virginia**

**Darrell V. McGraw, Jr.
Attorney General
Paul R. Sheridan
Deputy Attorney General
Attorneys for the Appellee,**

**Attorneys for the Appellant,
Colgan Air, Inc.**

**West Virginia Human
Rights Commission**

**Dwight J. Staples
Henderson, Henderson &
Staples, L.C.
Huntington, West Virginia
Attorney for the Appellee,
Rao Zahid Khan**

The Opinion of the Court was delivered PER CURIAM.

**JUSTICES STARCHER AND ALBRIGHT concur in part, and dissent in part, and
reserve the right to file separate opinions.**

SYLLABUS BY THE COURT

1. “Where an appeal from an order issued by the West Virginia Human Rights Commission is brought directly to the West Virginia Supreme Court of Appeals, pursuant to W. Va. Code § 5-11-11 (1989), this Court will apply the same standard of review that is applied to Human Rights Commission orders appealed to a circuit court.” Syllabus point 1, *Cobb v. West Virginia Human Rights Commission*, 217 W. Va. 761, 619 S.E.2d 274 (2005).

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

3. “W. Va. Code [§] 5-11-9(7)(C) (1992), prohibits an employer or other

person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act.” Syllabus point 11, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).

4. “““In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, *W. Va. Code, 5-11-1, et seq.*, as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant’s employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant’s discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.’ Syl. pt. 4, *Frank’s Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).” Syl. pt. 1, *Brammer v. Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990).” Syllabus Point 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).” Syllabus point 6, *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

5. ““When an employee makes a prima facie case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge. In rebuttal, the employee can then offer evidence that the

employer's proffered reason for the discharge is merely a pretext for the discriminatory act.' Syllabus Point 2, *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991).” Syllabus point 4, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

Per Curiam:

The appellant, Colgan Air, Inc. (hereinafter “Colgan”), appeals from an adverse ruling issued by the West Virginia Human Rights Commission (hereinafter “HRC”) on December 22, 2006. Such order reversed the February 22, 2006, order of the administrative law judge (hereinafter “ALJ”). The order appealed from found Colgan liable to Rao Zahid Khan (hereinafter “Mr. Khan”) for harassment and discrimination, and further found that Mr. Khan’s subsequent discharge and failure to retrain was in retaliation for his earlier complaints of discrimination. On appeal to this Court, Colgan argues that such order was in error and lacked support, and that the order by the ALJ, which found no discrimination, had substantial support and should have been affirmed by the HRC. Based upon the parties’ arguments,¹ the record designated for our consideration, and the pertinent authorities, we reverse the order of the HRC. In so doing, we find that the HRC erred in holding the employer, Colgan, liable for damages to Mr. Khan for harassment and discrimination.

I.

FACTUAL AND PROCEDURAL HISTORY

Mr. Khan began work with Colgan in August 2000 as a pilot trainee. He successfully completed his initial proficiency check on September 21, 2000, and his initial

¹We wish to acknowledge the contribution of an amicus curiae brief filed in this case. We value the participation and will consider the brief in conjunction with the parties’ arguments.

operating experience on September 30, 2000, as a First Officer. Mr. Khan went on the flight line in October 2000, with the hopes of becoming a Captain.

During his employment with Colgan, Mr. Khan was subjected to inappropriate treatment by some of his coworkers. Specifically, fellow employees Captain Riley, Captain Galbrath,² and Captain Heuston repeatedly referenced Mr. Khan's race, religion, and intelligence.³ Mr. Khan was the victim of labels such as "sand n****r," "rag head," and "camel jockey." He was also subjected to repeated comments about being a terrorist. These fellow employees evidenced a general dislike of Mr. Khan, and displayed their feelings through inappropriate remarks about Mr. Khan's wife, his flying skills, and by threatening that they would do everything in their power to get him fired, including making him fail his proficiency test.

Mr. Khan and another coworker complained about the treatment of Mr. Khan. The complaints were made to Captain Mayers, who was the Lead Pilot⁴ for Colgan at the

²While some facts existed through second-hand knowledge of comments made by Captain Galbrath, the facts relevant to this case are mostly regarding Captains Riley and Heuston.

³Mr. Khan is of Pakistani national origin and Asian race, and his religion is Muslim.

⁴The position of Lead Pilot is an administrative position acting as a liaison between the flight crews stationed at the base and the Chief Pilot. The Chief Pilot is the supervisor over the pilots, but is stationed at Colgan's headquarters in Manassas, Virginia.

Huntington, West Virginia, crew base. Most members of the crew knew of the treatment to which Mr. Khan had been subjected. Captain Mayers admits to knowledge of the behavior by Captains Riley and Heuston, and that each time he learned of inappropriate treatment towards Mr. Khan, he would tell Captains Riley and Heuston to “knock it off” as he deemed their behavior dishonorable and unprofessional. Captain Mayers *did not* notify anyone at headquarters in Manassas, Virginia, regarding the conduct.

In June 2001, Captain Riley made offensive comments to Mr. Khan about Mr. Khan’s wife. Mr. Khan was so upset that he traveled to headquarters in Manassas, Virginia, to talk to someone about the harassment. In Manassas, Mr. Khan spoke to Ms. Finnigan, Vice President for Personnel and Marketing, about the treatment he received from Captain Riley. Ms. Finnigan then spoke to Captain Riley on June 20, 2001, in Manassas, Virginia, regarding Mr. Khan’s complaints of discriminatory comments. Captain Riley denied making any discriminatory comments. Ms. Finnigan proceeded to retrain Mr. Riley with respect to the sexual harassment and discrimination policy. The Chief Pilot, also at Manassas, Virginia, talked to Captain Riley about what is considered professional behavior and wrote a letter of reprimand dated June 20, 2001. Captain Riley was told that if any other incidents occurred, he would be severely disciplined, including possible termination. Ms. Finnigan then contacted Captain Mayers, Lead Pilot, in Huntington, West Virginia, regarding the allegations. Captain Mayers admitted that he knew of the personality conflicts, but stated that he was not aware it was due to “race, religion or any kind of harassment or

discrimination issue.”

Thereafter, on July 9, 2001, a hand-drawn cartoon was posted that was highly offensive. The cartoon depicted an airline with the caption “COLGAN AIR NOW HIRING PUNJAB PILOTS!!!” Further, it stated, “NOTE: PUNJAB AIRLINES NOT RESPONSIBLE FOR LOSS OF LIFE HUMAN ANIMAL OR OTHERWISE[.]” A coworker of Mr. Khan’s faxed the cartoon to the Chief Pilot in Manassas, Virginia, who alerted Ms. Finnigan. Upon inquiry, it was learned that the cartoon was drawn at Captain Riley’s crash pad by his roommate, Captain Heuston. Ms. Finnigan contacted Mr. Khan, who informed her that Captain Riley made a death threat against him and his wife, and that he filed a criminal report. Captain Riley was suspended on July 9, 2001.

A meeting was scheduled for Captain Heuston to meet with Ms. Finnigan and the Chief Pilot in Manassas, Virginia. However, prior to the time of the meeting, Captain Heuston faxed in a letter of resignation and did not report for the meeting. Captain Riley was scheduled to appear for a meeting on July 11, 2001. However, instead of reporting for the meeting, Captain Riley telephoned from his attorney’s office. During the phone call, Ms. Finnigan terminated Captain Riley; wherein, Captain Riley tendered his forced resignation. After the resignations of Captains Riley and Heuston, Mr. Khan was no longer the subject of any other improper conduct from his coworkers.

Mr. Khan was the only one from his training class who had not been upgraded from First Officer to Captain. On October 30, 2001, Mr. Khan underwent a mandated FAA proficiency check. Mr. Khan satisfactorily passed the oral portion of the exam, but failed the flying portion. During the proficiency check, Mr. Khan failed to complete a takeoff stall, an FAA required maneuver. His attempt at this tactic resulted in a loss of an unacceptable amount of altitude during the maneuver.⁵ The check airman for the proficiency check alerted Mr. Khan to his failure, suspended the testing portion of the flight, and retrained Mr. Khan. Mr. Khan then successfully re-attempted the maneuver. Mr. Khan was then directed to perform an ILS approach, which is another FAA mandated tactic. Mr. Khan also failed this part of the proficiency check when he deviated from the center lines of the localizer and glide slope and exceeded permitted descent speed, resulting in an unstable approach. The check airman again alerted Mr. Khan of his failed maneuver, suspended the testing portion of the flight, and provided retraining. Mr. Khan's second attempt at the ILS approach was successful. As the next part of the proficiency check, Mr. Khan was directed to complete a VOR approach, which is another FAA required maneuver. Mr. Khan failed this attempt because he was late configuring the aircraft in terms of landing gear and reduction of power. Mr. Khan's actions placed the aircraft in a dive and caused the Ground Proximity Warning System to activate. The check airman was forced to take control of the aircraft to prevent a crash. FAA guidelines allow a maximum retraining on two maneuvers during a proficiency

⁵The allowable altitude loss is set by FAA guidelines.

check. Because Mr. Khan had already received retraining on both the takeoff stall and the ILS approach, a third retraining was not allowed. Thus, the third failed maneuver resulted in a failed proficiency check under FAA guidelines.⁶

The facts elicited during the ALJ hearing portrayed a pilot who was unsafe. While it was acknowledged that Mr. Khan's skills did progress, he needed a lot of instruction while flying. The Lead Pilot, Captain Mayers, stated that he doubted Mr. Khan was capable of commanding an airplane. As support for this feeling, it was recounted that, on one occasion, Mr. Khan lined up on the wrong runway, and another pilot had to take control of the plane.

After Mr. Khan's failed proficiency test, he was informed that Colgan did not have the funds to retrain him. From September through December 2001, Colgan was unable to provide retraining to anyone. Thirty pilots were furloughed and others downgraded to First Officer on September 20, 2001, due to financial constraints. Moreover, three leased planes were returned. After the terrorist attacks on September 11, 2001, most airlines, including Colgan, experienced financial difficulties. Colgan was also in the midst of a

⁶Mr. Khan's application to Colgan's training program illustrates that Mr. Khan had held one previous pilot position with American Eagle Airlines, from April to June 2000. He was involuntarily terminated from that position during training due to deficiencies in his flight skills, including difficulty with approaches and landings. Information provided by his previous employer also illustrated that Mr. Khan had failed to complete an initial upgrade or transition training course. Additionally, he had failed a required proficiency check.

bankruptcy consultation at the time in question. Thus, without the possibility of retraining, Mr. Khan had the option to resign or to be terminated. Mr. Khan chose to resign.

Thereafter, Mr. Khan filed a discrimination action against Colgan with the HRC in April 2002. The proceedings were held in March 2005, wherein Mr. Khan alleged he had been subjected to a hostile work environment due to his race, religion, ancestry, and sex. He further averred that the offensive conduct was perpetrated by his supervisors and that Colgan failed to address the situation. The ALJ found, by order entered February 22, 2006, that “[Mr. Khan] was subjected to unwelcome conduct based upon his membership in these various protected classes; particularly his Muslim faith and Pakistani national origin. The unwelcome conduct was both severe and pervasive in its nature. That conduct included offensive comments concerning his national origin, his ancestry, his color and race.” The ALJ further found that “[t]he harassment of [Mr. Khan] and the hostile and abusive workplace created at [Colgan’s] Huntington crew base (and in the cockpit when flying with Captain Riley), were created by non[-]management employees[.]” Moreover, the ALJ found:

Captain Mayers, as Lead Pilot at [Colgan’s] Huntington crew base, had no actual authority to take any disciplinary actions against Captain Riley (or Captains Heuston or Galbrath) because he had no management or supervisory authority. [Colgan] had a procedure for reporting harassment which included reporting it to the Chief Pilot or the Vice President for Personnel. The harassment policy of [Colgan] makes it incumbent upon any employee to report discrimination and to investigate it should it occur.

Furthermore, the record makes clear that Colgan employees must undergo Discrimination

and Harassment Training. On August 7, 2000, Mr. Khan signed an acknowledgment certifying that he had reviewed and understood the anti-harassment policy and received the training, which stated:

If anyone believes they are being subjected to any of these forms of harassment, or believes they are being discriminated against because other employees are receiving favored treatment in exchange, for example, for sexual favors, we must bring this to the attention of appropriate persons in management. The very nature of harassment makes it virtually impossible to detect unless the person being harassed registers his or her discontent with Colgan Air Management. Consequently, in order for Colgan Air to deal with the problem, we must report such offensive conduct or situations to the Immediate Supervisor, or the Director of Personnel[.] . . . If you are unsatisfied with the attention your report receives, contact Mary Finnigan, Vice President, Marketing and Personnel[.]

The ALJ went on to find that management did not know of the harassing situation until Mr. Khan went to Manassas, Virginia, to speak to Ms. Finnigan following the comments about his wife. Thereafter, Colgan took appropriate and decisive action.

In regard to Mr. Khan's claim that the failure to promote him to Captain was a result of disparate and retaliatory treatment, the ALJ concluded as follows:

[Mr. Khan] has established a prima facie case of both hostile workplace discrimination and discrimination in the failure to promote him to Captain on the basis of race, national origin, religion and gender and retaliation; and retaliation for complaining of discrimination in the failure to promote him to Captain and subsequent termination after failing his FAA proficiency check ride. [Colgan] claims that the discriminatory hostile work environment is not imputable to the employer because it was created by [Mr. Khan's] coworkers and not his

supervisors; and, that [Colgan] took immediate and effective action to correct the situation once the appropriate corporate officials were made aware of the situation. [Colgan] articulated legitimate non discriminatory reasons for its failure to upgrade [Mr. Khan] to Captain and his forced resignation following an FAA proficiency check ride. Those reasons being his poor pilot skills and his failing three required maneuvers during the FAA proficiency check ride. [Mr. Khan] has not proven by a preponderance of the evidence that race, national origin, religion or gender discrimination motivated or played a role in the decision not to upgrade [Mr. Khan] to Captain or the decision to terminate his employment; or, that his termination was the result of retaliation for his complaints about discrimination. The undersigned finds that [Mr. Khan] has not proven by a preponderance of the evidence that the hostile work environment is imputable to [Colgan] because [Colgan] took reasonable steps to investigate and eliminate the harassment of [Mr. Khan] once it became aware of the situation.

Subsequently, Mr. Khan appealed this adverse decision by the ALJ to the full HRC. The HRC reversed the ALJ and found Colgan to be liable to Mr. Khan for workplace discrimination. In so doing, the HRC found as follows:

The findings of fact of the [ALJ], in this case, reveal that [Mr. Khan] faced egregious harassment because of his religion, ethnicity and national origin at [Colgan's] facility at the Tri-State[] Airport in Huntington, West Virginia. [Colgan's] management officials at the Tri-State[] Airport failed to address this harassment at the Tri-State Airport until compelled to do so by [Colgan's] corporate management located at Manassas, Virginia. . . . To [Colgan's] credit, once the report of harassment was made to [Colgan's] management officials in Manassas, [Colgan] did act to stop the harassment. . . . Accordingly, the Commission modifies the [ALJ's] decision to find that [Colgan] is liable in damages to [Mr. Khan] for \$5,000.00 (sum certain) for the harassment suffered by [Mr. Khan] and in addition for the expenses he incurred in traveling to Manassas, Virginia[,] to report the harassment to [Colgan's] corporate officials –

something that should have been the responsibility (at the very least), of [Colgan's] local management officials at the Tri-State Airport. The Commission also finds that [Colgan] is liable for [Mr. Khan's] attorney fees and costs associated with this case in the sum of \$46,575.00. . . . [t]he Commission finds that not offering retraining to [Mr. Khan] was, in fact, discrimination, and finds that [Mr. Khan] should be reinstated to the next available non-flying position with retroactive seniority and benefits along with the opportunity to retrain.

Colgan appealed the HRC's rulings directly to this Court.

II.

STANDARD OF REVIEW

The appeal before this Court results from the HRC's ruling that Colgan engaged in unlawful discriminatory practices. The parties appealed directly to this Court pursuant to W. Va. Code § 5-11-11 (1989) (Repl. Vol. 2006). We have previously explained the standard of review as follows:

Where an appeal from an order issued by the West Virginia Human Rights Commission is brought directly to the West Virginia Supreme Court of Appeals, pursuant to W. Va. Code § 5-11-11 (1989), this Court will apply the same standard of review that is applied to Human Rights Commission orders appealed to a circuit court.

Syl. pt. 1, *Cobb v. West Virginia Human Rights Comm'n*, 217 W. Va. 761, 619 S.E.2d 274 (2005). In reviewing cases appealed to a circuit court from the Human Rights Commission, we have held that

“West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are

supported by substantial evidence or are unchallenged by the parties.” Syllabus Point 1, *West Virginia Human Rights Comm’n v. United Transp. Union, Local No. 655*, 167 W. Va. 282, 280 S.E.2d 653 (1981).

Syl. pt. 2, *Smith v. West Virginia Human Rights Comm’n*, 216 W. Va. 2, 602 S.E.2d 445 (2004). Further,

“[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syllabus Point 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

Syl. pt. 1, *Smith*, 216 W. Va. 2, 602 S.E.2d 445. Thus, we apply a *de novo* standard of review to questions of law, and we will not disturb the findings of fact unless they are clearly wrong. Mindful of these applicable standards, we proceed to consider the parties’ arguments.

III.

DISCUSSION

Both the ALJ and the HRC determined that Mr. Khan was the victim of unlawful discriminatory conduct at the hands of some of his coworkers, and that it was severe and pervasive. However, the ALJ and the HRC disagree as to when Mr. Khan gave sufficient notice to management of his coworkers’ behavior to trigger Colgan’s duty to take prompt remedial action. Further, the ALJ and the HRC agree that the failure to upgrade Mr. Khan from a First Officer to a Captain was a discriminatory action. However, the ALJ and

the HRC disagree as to whether a legitimate, nonpretextual reason was offered by Colgan.

Thus, to resolve this appeal, we must address two issues. First, we must address whether Colgan is liable to Mr. Khan for harassment based upon a determination as to when management knew of the unlawful discriminatory conduct of Mr. Khan's coworkers. Second, we will determine if Colgan discriminated against Mr. Khan when it discharged him and when it did not offer to retrain him with regard to his failed proficiency test, and if so, whether a legitimate nonpretextual reason was offered. These intertwined issues will be discussed together.

Under W. Va. Code § 5-11-9 (1998) (Repl. Vol. 2006),

[i]t shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:

(1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required[.]

Further, “[t]he term ‘discriminate’ or ‘discrimination’ means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate[.]” W. Va. Code § 5-11-3(h) (1998) (Repl. Vol. 2006).

As previously stated, because it is uncontroverted that Mr. Khan was the victim of unlawful discriminatory practices by his coworkers, the focus of our investigation must delve into when management knew of this behavior and whether appropriate action was taken. We have previously explained as follows:

When the source of the harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. Thus, an employer that has established clear rules forbidding sexual harassment and has provided an effective mechanism for receiving, investigating, and resolving complaints of harassment may not be liable in a case of co-worker harassment where the employer had neither knowledge of the misconduct nor reason to know of it.

Hanlon v. Chambers, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995) (footnote omitted).

Simply, "the employer cannot be charged with responsibility for the victim's failure to complain." *Hanlon, id.* (footnote omitted). Once an employer knows of the unlawful conduct executed by a victim's coworkers, this Court has directed that

[t]he aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct. Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999), and in violation of the public policy of this State. When such instances of aggravated discriminatory conduct occur, the employer must take swift and decisive action to eliminate such conduct from the workplace.

Syl. pt. 3, *Fairmont Specialty Servs. v. West Virginia Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999).

Applying these principles to the facts presently before this Court, it is clear that Colgan had a policy in place for reporting harassment and discrimination, and further, that Colgan took appropriate and decisive action as soon as the policy was followed and management was informed of the discriminatory conduct. The company policy, which Mr. Khan certified that he received and understood, directed that employees “must report such offensive conduct or situations to the Immediate Supervisor, or the Director of Personnel[.] . . . If you are unsatisfied with the attention your report receives, contact, Mary Finnigan, Vice President, Marketing and Personnel[.]” While the Lead Pilot located in Huntington, West Virginia, was aware of the “personality conflicts” between Mr. Khan and some of his coworkers, the Lead Pilot is not the person to whom the reports must be made.

As found by the ALJ, “Captain Mayers, as Lead Pilot at [Colgan’s] Huntington crew base, had no actual authority to take any disciplinary actions . . . because he had no management or supervisory authority. [Colgan] had a procedure for reporting harassment which included reporting it to the Chief Pilot or the Vice President for Personnel.” The relevant management positions are housed in Manassas, Virginia, at corporate headquarters. The Chief Pilot is Mr. Khan’s immediate supervisor and is located in Manassas, Virginia. Significantly, Mr. Khan cannot claim ignorance in contacting authorities at headquarters as

he did eventually make the appropriate contacts at headquarters to start the investigation into his complaints.

Moreover, once the appropriate channels were followed and management was alerted, Colgan took swift and decisive corrective action. Even the HRC recognized that “once the report of harassment was made to [Colgan’s] management officials in Manassas, [Colgan] did act to stop the harassment[.]” Ms. Finnigan immediately conducted an investigation, resulting in harassment retraining, a letter of reprimand, and a warning of possible termination. When the violatory conduct did not cease, two employees were forced to resign their positions. Mr. Khan admits that the discriminatory conduct from coworkers ceased after the two perpetrators left employment. As soon as the appropriate management officials were notified of the unlawful discriminatory conduct, swift and decisive action was taken that ended the complained-of conduct. Thus, Colgan is not liable to Mr. Khan for harassment.

Even though we have determined that Colgan is not liable to Mr. Khan for harassment, our review does not end. We must next decide whether the failure to upgrade Mr. Khan to a Captain position was in retaliation for his reports of discrimination, and whether his subsequent forced resignation resulted from such retaliatory conduct. W. Va. Code § 5-11-9 dictates as follows:

It shall be an unlawful discriminatory practice, unless

based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:

....

(7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:

....

(C) Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

As we have previously stated, “W. Va. Code [§] 5-11-9(7)(C) (1992), prohibits an employer or other person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act.” Syl. pt. 11, *Hanlon*, 195 W. Va. 99, 464 S.E.2d 741.

Moreover, this Court has instructed as follows:

“““In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, *W. Va. Code*, 5-11-1, *et seq.*, as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant’s employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant’s discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.” Syl. pt. 4, *Frank’s Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d

251 (1986).’ Syl. pt. 1, *Brammer v. Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990).” Syllabus Point 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).

Syl. pt. 6, *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996).

In light of the facts of the current situation, Mr. Khan has established a *prima facie* case of retaliatory discharge. Mr. Khan engaged in a protected activity when he complained of harassment and discrimination. It is also a foregone conclusion that Colgan was aware of the protected activity once Ms. Finnigan, located at company headquarters, became involved. The facts also show that Mr. Khan was discharged a short time after these events occurred. Thus, the inference has been raised, and the employer must overcome the inference of retaliatory discharge.

As this Court has previously recognized,

“[w]hen an employee makes a *prima facie* case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge. In rebuttal, the employee can then offer evidence that the employer’s proffered reason for the discharge is merely a pretext for the discriminatory act.” Syllabus Point 2, *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991).

Syl. pt. 4, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992). Colgan responded to the inference by averring that Mr. Khan was discharged due to his failure to pass a mandatory FAA proficiency test. The ALJ found that “[Colgan]

articulated legitimate non discriminatory reasons for its failure to upgrade [Mr. Khan] to Captain and his forced resignation following an FAA proficiency check ride. Those reasons being his poor pilot skills and his failing three required maneuvers during the FAA proficiency check ride.” Colgan has a duty under FAA guidelines to employ Captains who can safely and effectively navigate aeronautical procedures. The evidence is clear and insurmountable that Mr. Khan was unable to safely fly a plane, and that he failed a proficiency test that was previously scheduled according to the FAA mandates. Thus, his forced resignation was a result of his own inability to safely maneuver an airplane, and Colgan’s failure to upgrade his ranking to Captain was in accordance with the prescribed federal procedure. While Mr. Khan argues that his failure at the proficiency test was the result of sabotage, such a claim is not supported by the evidence. The FAA guidelines are very clear as to what aeronautical moves are required and to what degree of deviation results in an acceptable performance. There is no discretion as to whether a candidate passes or fails the test. Mr. Khan’s performance was not within the acceptable parameters; thus, he failed the proficiency check. Significantly, the coworkers who had threatened to cause Mr. Khan to fail his proficiency test were no longer employed at Colgan at the time of Mr. Khan’s proficiency flight. Thus, no adverse atmosphere was created by his coworkers.

The HRC’s decision that the failure to retrain Mr. Khan was discrimination also is not supported by the facts. The facts illustrate that, due to financial constraints, no pilots were being offered retraining opportunities for a three-month period. Moreover, the degree

of inability showed by Mr. Khan to conduct an airplane in a safe manner was egregious, and retraining would present safety issues. As has been previously stated, “[t]he complainant [in a case arising under the West Virginia Human Rights Act] may prevail if it is shown the reason presented by the respondent is merely a pretext for a discriminatory motive.’ Syl. pt. 3, *Mingo County Equal Opportunity Council v. State Human Rights Comm’n*, 180 W. Va. 240, 376 S.E.2d 134 (1988).” Syl. pt. 7, *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999). Colgan provided a nonpretextual reason for its decisions and was within its discretion to determine that retraining was not a possibility, especially given the additional fact that Mr. Khan had been terminated from his previous job for failure to pass a proficiency test. Thus, Colgan did not discriminate against Mr. Khan when he was not upgraded to Captain status, or when he was subsequently forced to resign after failing a proficiency test.

IV.

CONCLUSION

For the foregoing reasons, the HRC’s order of December 22, 2006, is reversed.

Reversed.