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**UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

_____)	
MARK ESTABROOK,)	
)	
Complainant,)	
)	CASE NO. 2014-AIR-00022
v.)	
)	ADMINISTRATIVE LAW JUDGE
FEDERAL EXPRESS CORPORATION,)	JOHN P. SELLERS, III
)	
Respondent.)	
_____)	

**COMPLAINANT'S NOTICE OF AMENDED MOTION, AMENDED MOTION,
AND MEMORANDUM TO COMPEL REQUESTS FOR ADMISSIONS,
INTERROGATORIES, AND REQUESTS FOR DOCUMENTS**

NOTICE

PLEASE TAKE NOTICE, that Complainant, Mark Estabrook, by and through his attorneys, Seham, Seham, Meltz & Petersen, LLP, requests and moves that this Court issue an order pursuant to 29 CFR § 18.21 and Fed. R. Civ. P. 37 to compel responses to Complainant's Request for Admissions, Interrogatories, and Requests for Documents served on Respondent Federal Express Corporation on August 29, 2014. (Exhibit A). This amended motion supplants

the Complainant's motion dated November 17, 2014.

MOTION AND MEMORANDUM

PROCEDURAL BACKGROUND

FedEx's responses to the Complainant's First Combined Discovery, dated August 29, were originally due on September 29, 2014. During a teleconference with Judge Sellers on September 26, 2014, Complainant's counsel agreed to FedEx's request for a two-week extension with the caveat that Complainant expected a full response to its First Combined Discovery.

FedEx did not provide a response to Complainant's First Combined Discovery until October 29, 2014 -- a full month after the original due date. (Exhibit B). By letter dated November 4, 2014, Complainant's counsel advised FedEx that its responses were substantially defective and requested the courtesy of a response by November 10, 2014, as to whether FedEx would correct the specifically identified defects. (Exhibit C). Alternatively, Complainant's counsel offered to discuss the issues by telephone upon request of FedEx.

Due to the lack of response from FedEx, Complainant's counsel filed a motion with this court on November 17, 2014. Respondent FedEx never submitted a response to the motion with the court. A teleconference with Judge Sellers and the parties was held on December 18, 2014, during which the Respondent FedEx agreed to provide a privilege log and supplement its discovery responses later that week.

On January 15, 2015, Respondent FedEx provided its privilege log (Exhibit D), additional documents, and a letter dated January 15, 2015, supplementing its prior responses to the Complainant's discovery requests (Exhibit E). On January 23, 2015, the parties held a teleconference to address existing discovery disputes and issues relating to the privilege log. The parties' telephonic review of discovery disputes was completed on February 2, 2015, with FedEx

counsel promising to provide additional information by the end of that business day. On February 3, FedEx provided supplemental responses to the Complainant's Request for Interrogatories and Requests for Admissions, but omitted promised supplemental documents and failed to amend its response to Interrogatory No. 7. FedEx counsel failed to respond to three email reminders sent on February 3, February 10, and February 17, 2015. (Exhibit F).

Although the parties' discussions served to address certain issues, the greater part of the defects identified in the Complainant's original motion of November 17, 2014, remain unresolved. The evidence being withheld relates to the core issues of this case, including: Respondent's knowledge of protected activity, Respondent's subjective intent in placing the Complainant on Non-Qualified (NOQ) flight status and in mandating compulsory psychiatric evaluation, and the legitimacy (or pretextual nature) of the reasons proffered for Respondent's adverse actions against the Complainant.

Therefore, the Complainant seeks an order compelling FedEx to provide appropriate responses and to reimburse Complainant for all reasonable expenses arising from this motion, including attorney's fees, pursuant to FRCP 37(d). The award of expenses is particularly justified, and even necessary, in light of the substantial costs imposed on the Complainant by the Respondent's defective responses and failure to reply to Complainant's counsel's efforts to resolve these matters.

FACTUAL BACKGROUND

Exclusively for the purposes of facilitating the Court's review of this motion, the Complainant provides the following summary factual background.

As relevant to this case, the Complainant engaged in "protected activity" related to two separate aviation safety issues. The first concerned his refusal to depart from Laredo into a severe

and solid line of thunderstorms on April 10, 2013, and – in response to a retaliatory disciplinary investigation by the Respondent – his initiation of an AIR 21 action. The AIR 21 action was initiated on April 29, 2013, and subsequently withdrawn on May 2, 2013, after FedEx terminated its disciplinary proceedings. FedEx’s retaliatory disciplinary proceedings were conducted by Fleet Captain Rob Fisher and relied, in substantial part, on the reports of the Flight Duty Officer, Mark Crook. Significantly, in an evidentiary interview conducted by OSHA Investigator Jason Brush, Captain Fisher **denied** that he had knowledge of the Complainant’s AIR 21 filing. Evidence being withheld by the Respondent would almost certainly confirm that Captain Fisher’s statements to OSHA were untruthful in this respect.

The second aviation safety issue concerned the Complainant’s position that FedEx’s existing cargo practices facilitated the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes. By email dated August 4, 2013, the Complainant sought a meeting with FedEx CEO Fred Smith to discuss terrorist-related issues that he had previously raised in his capacity as Security Chairman of the pilots’ labor union. The August 4 email refers to FedEx’s CEO as “Fred.” On August 5, 2013, FedEx engaged in retaliatory action – in response to Complainant’s protected activity related to the Laredo departure and the August 4 email – by removing the Complainant from flight duty as not qualified (NOQ). Significantly, the Respondent is withholding all correspondence amongst its decision-makers relating to the motive for placing the Complainant on NOQ and Respondent has failed to fully respond to an interrogatory seeking an explanation for the rationale for Respondent’s placement of the Complainant on NOQ. While Respondent’s counsel has stated orally that the August 5 NOQ decision did not relate in any way to any concern regarding Captain Estabrook's mental health, he has failed to respond to three written requests to confirm this response in writing.

On August 9, 2013, FedEx arranged a meeting between the Complainant and three

company officials: Fleet Captain Rob Fisher, Labor Relations Counsel Robb Tice, and Managing Director of Aviation and Regulatory Security Todd Ondra. During the meeting, the Complainant presented his position that FedEx's existing cargo practices, including publication of live tracking information, facilitated the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes. By way of explaining his credentials with respect to security issues, he referenced his military service on AWACS aircraft that engaged in the surveillance of Russian bombers. He also referenced a "rumor" that he had heard that Auburn Calloway – a FedEx pilot who had hijacked a FedEx aircraft and inflicted physical injuries ending the careers of three FedEx pilots – might be advising Al Qaeda. The meeting concluded with an extensive interrogation of the Complainant by Labor Relations Counsel Tice as to whether the Complainant posted on a pilot website under the sobriquet "Mayday Mark." A package of highlighted "Mayday Mark" postings in Tice's possession indicated that the individual had suffered a stroke. The Complainant denied that he was "Mayday Mark" and the Company representatives accepted this denial.

Security Director Ondra did not attend the entire August 9, 2013 meeting and was absent at the meeting's conclusion. At the conclusion of the meeting, Fleet Captain Fisher decided to restore the Complainant to active flight status. Fleet Captain Fisher subsequently called Complainant and told him that he was required to, once again, remove the Complainant from active flight duty because "you know too much." Significantly, while the Respondent has provided the "Privileged and Confidential" meeting notes of Ondra as evidence, it has withheld any other notes or correspondence among the decision-makers relating to the August 9 meeting or the conclusions drawn therefrom.

FedEx subsequently engaged in further retaliatory action by advising the Complainant that it would terminate him unless he submitted to psychiatric examination.

THE IMPORTANCE OF A NARROW APPLICATION OF PRIVILEGE

The United States Supreme Court had held that, in light of the heavy burden that they place on the search for truth, "evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances," *Herbert v. Lando*, 441 U.S. 153, 175 (1979). Consequently, the Court mandates that the scope of privileges be construed narrowly. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). Judges should not recognize a privilege or read an existing one expansively unless to do so will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation marks omitted).

A privilege should operate only where "necessary to achieve its purpose," see *Fisher v. United States*, 425 U.S. 391, 403 (1976), and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise." *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 464, 357 A.2d 689, 693-694 (1976).

In this matter, there is good reason to believe that the privilege is being invoked to cloak the truth. As discussed further below, the Respondent's limitations on its discovery responses leave the Complainant virtually bereft of evidence relating to the core issues of this case, including: the Respondent's knowledge of protected activity, the subjective intent behind Respondent's August 5 NOQ decision, the Respondent's rationale for compelling psychiatric evaluation of the Complainant, and evidence of the shifting nature of the Respondent's proffered rationales for its actions.

OVERVIEW OF ISSUES RELATED TO THE PRIVILEGE LOG

For several, frequently overlapping, reasons, it is the Complainant's position that none of the forty-five (45) documents identified in FedEx's log may be considered privileged. These reasons include the fact that:

- (1) at least five of the identified documents originate from a paralegal rather than an attorney (1, 6, 7, 12, 19). *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *HPD Labs v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001)(finding communications with paralegal were not protected by attorney-client privilege where paralegal's own advice, rather than advice of lawyer, was sought).
- (2) at least sixteen of the identified documents assert a privilege in the absence of any existing legal claim (1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19) despite federal case law cautioning that, because litigation might be anticipated whenever an incident occurs, there must be a "substantial and significant threat of litigation" in order for work product immunity to apply. *Trujillo v. Board of Education of the Albuquerque Public Schools*, 2007 U.S. Dist. LEXIS 33919, 2007 WL 1306593, at *6 (D.N.M. Mar. 12, 2007), quoting *Allen v. Chicago Transit Auth.*, 198 F.R.D. 495, 500 (N.D. Ill. 2001).
- (3) Respondent engaged in the selective provision of privileged and confidential documents relating to the supposed basis for referring the Complainant to compulsory psychiatric review (Exhibit G - FDX4-60-64) despite well-established federal case law holding that the provision of selected privileged documents effectuates a waiver of privilege for all documents related to this same subject matter. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) ("voluntary disclosure of the content of a privileged attorney communication results in waiver as to all other communications on the same subject."); *United States v. Nobles*, 422 U.S. 225, 239-40 (1975) ("Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.");
- (4) the withholding of *any* internal documents/communications originated by or sent to Labor Counsel Robert Tice, identified by FedEx as one of the primary decision-makers and one of only three fact witnesses (Response to Interrogatory No. 3). *See, e.g., Waugh v. Pathmark Stores, Inc.*, 191 F.R.D. 427, 432 (D.N.J. 2000) (communications created for internal investigation purposes are discoverable); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1099 (D.N.J. 1996)(work product doctrine does not apply when an attorney undertakes an internal investigation to comply with internal policy).

While the Complainant bears the burden of demonstrating the subjective intent of the Respondent, FedEx has effectively withheld all documentary evidence of such intent on the basis of privilege with the exception of four pages of “Privileged and Confidential” notes from Todd Ondra, which constitutes the Respondent’s primary evidence of its allegedly non-discriminatory intent. In short, the Complainant is deprived of all evidence other than what the Respondent FedEx chooses to provide. Under these circumstances, the Complainant is compelled to request an *in camera* review of the documents identified in the Respondent’s privilege log to determine whether they are being properly withheld.

DEFECTIVE RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST NO. 8: That at your meeting with the Complainant on August 9, 2013, the Complainant referenced the fact that his military service included the tracking of Soviet aircraft.

RESPONSE TO REQUEST NO. 8: Denied as written. See Ondra’s notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx’s original response provided identical responses to RFA’s 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: “Denied as written. See Ondra’s notes and summary of conversation, which summarizes the information discussed.” Request No. 8 is pivotal since it directly relates to one of the three reasons proffered by the Respondent for compelling the Complainant to submit to compulsory psychiatric analysis.

The response is defective because: (1) Ondra did not attend the entire meeting, (2) Ondra’s handwritten notes are cryptic and in conflict with his typewritten notes, (3) the Respondent did not consult with the two other FedEx representatives prior to formulating its response, and (4) the

Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial.

Respondent's counsel committed via telephone to consulting with the other participants at the August 9 meeting in order to provide a fuller response; however, that response has not been provided.

REQUEST NO. 9: That at your meeting with the Complainant on August 9, 2013, the Complainant stated his belief that the Respondent's practice of providing up-to-date package tracking information facilitated and maximized the criminal destruction of cargo, aircraft and human lives by granting terrorists the ability to carefully select the time of detonation.

RESPONSE TO REQUEST NO. 9: Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx's original response provides identical responses to RFA's 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: "Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed." Request No. 9 directly relates to the nature of the Complainant's protected activity of August 9, 2013, which was previously admitted in a submission to OSHA Investigator Jason Brush. The response is defective because (1) Ondra did not attend the entire meeting, and (2) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial, (3) the Respondent's response conflicts with its prior admission of the same factual issue in its submission to OSHA Investigator Jason Brush dated December 4, 2013 at page 4. (Exhibit H). Respondent should be

estopped from denying an admission made in its submission to OSHA Investigator Jason Brush.

The evasive response is also in conflict with FedEx's tacit admission in its counsel's letter of January 15, 2015, which provides:

FedEx admits Complainant raised safety-related issues associated with the industry's package tracking systems. FedEx also admits Complainant express [sic] concern that terrorist groups could use tracking information in carrying out terrorist attacks. FedEx also admits Complainant suggested FedEx ask the Federal Department of Homeland Security to order airlines to cease making tracking information available on-line.

(Exhibit E).

We request that the Respondent's evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981) ("an evasive denial, one that does not "specifically deny the matter," or a response that does not set forth 'in detail' the reasons why the answering party cannot truthfully admit or deny the matter, may be deemed an admission.").

REQUEST NO. 10: That at your meeting with the Complainant on August 9, 2013, the Complainant stated his belief that Respondent's practice of providing up-to-date package tracking information had the result of encouraging terrorists to view the Respondent as a particularly effective means of utilizing explosive, incendiary and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation.

RESPONSE TO REQUEST NO. 10: Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx's original response provides identical responses to RFA's 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: "Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed." Request No. 10 directly relates to the nature of the Complainant's

protected activity of August 9, 2013, which was previously admitted in a submission to OSHA Investigator Jason Brush. The response is defective because (1) Ondra did not attend the entire meeting, and (2) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial, (3) the Respondent's response conflicts with its prior admission of the same factual issue in its submission to OSHA Investigator Jason Brush dated December 4, 2013 at page 4. (Exhibit H). Respondent should be estopped from denying an admission made in its submission to the OSHA Investigator Jason Brush.

The evasive response is also in conflict with the FedEx's tacit admission in its counsel's letter of January 15, 2015, which provides:

FedEx admits Complainant raised safety-related issues associated with the industry's package tracking systems. FedEx also admits Complainant express [sic] concern that terrorist groups could use tracking information in carrying out terrorist attacks. FedEx also admits Complainant suggested FedEx ask the Federal Department of Homeland Security to order airlines to cease making tracking information available on-line.

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We request that the Respondent's evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981) ("an evasive denial, one that does not "specifically deny the matter," or a response that does not set forth 'in detail' the reasons why the answering party cannot truthfully admit or deny the matter, may be deemed an admission.").

REQUEST NO. 11: That at your meeting with the Complainant on August 9, 2013, the Complainant expressed an interest in improving the Respondent's security.

RESPONSE TO REQUEST NO. 11: Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx’s original response provides identical responses to RFA’s 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: “Denied as written. See Ondra’s notes and summary of conversation, which summarizes the information discussed.” In its supplemental response, the Respondent stated that: “Without waiver of or prejudice to the foregoing response, Respondent admits Complainant’s conversation could reasonably be interpreted as expressing an interest in improving security.” Complainant also submits that the Respondent’s response reflects improper gamesmanship, particularly in light of Respondent counsel’s January 15, 2015 cover letter, which states:

FedEx admits Complainant raised safety-related issues associated with the industry’s package tracking systems. FedEx also admits Complainant express [sic] concern that terrorist groups could use tracking information in carrying out terrorist attacks. FedEx also admits Complainant suggested FedEx ask the Federal Department of Homeland Security to order airlines to cease making tracking information available on-line.

(Exhibit E).

Request No. 11 directly relates to the nature of the Complainant’s protected activity of August 9, 2013, which was previously admitted in a submission to OSHA Investigator Jason Brush. The response is defective because (1) Ondra did not attend the entire meeting, and (2) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial, (3) the Respondent’s response conflicts with its prior admission of the same factual issue in its submission to OSHA Investigator Jason Brush dated December 4, 2013 at page 4 (Exhibit H) and with all meetings notes relating to the August 9 meeting that have been produced by the Respondent. (Exhibit G- FDX4-60-64). We request that the Respondent’s evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981)(“an evasive denial, one that does not “specifically deny the matter,” or a response that does not set forth ‘in detail’ the reasons why the

answering party cannot truthfully admit or deny the matter, may be deemed an admission.”).

Moreover, in view of the gamesmanship reflected in Respondent’s refusal to admit, particularly in light of the admissions contained in Respondent counsel’s January 15 letter, attorney’s fees and costs should be awarded to the Complainant.

DEFECTIVE RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 7: State the reasons why the Complainant was placed on NOQ status on or about August 5, 2013.

RESPONSE TO INTERROGATORY NO. 7: Complainant was placed on NOQ status on or about August 5, 2013 because he had been referred for examination under Section 15.D. of the collective bargaining agreement between Respondent and the Air Line Pilots Association.

DEFICIENCY: The Complainant’s original objection was that FedEx’s response to the interrogatory as to why the Complainant was withheld from flight status (NOQ) is vague and evasive (“referred for examination”) and that FedEx must respond as to *why* Captain Estabrook was referred for an examination.

In its January 15, 2015 cover letter, Respondent’s counsel rescinded Respondent’s prior answer and stated, instead, that: “Complainant was placed on NOQ status on or about August 5, 2013, to facilitate scheduling the meeting he had requested as soon as practical, and Complainant expressed his understanding of this.” (Exhibit E). The reference to the need for an “examination” as causing the NOQ was abandoned.

During two subsequent teleconferences with Respondent's counsel, Complainant's counsel – Lee Seham and Stanley Silverstone – asked Respondent's counsel to confirm that the Respondent's supplemental response (“to facilitate scheduling the meeting”) signified that the August 5 NOQ decision did not relate in any way to any concern regarding Captain Estabrook's mental health. Respondent's counsel agreed with this characterization, but has not responded to three email requests that this answer be formalized in a new response to Interrogatory No. 7. (Exhibit F).

A formal response, rather than a passing reference in a cover letter, is required in order to put this issue to rest and assist in tailoring the questions for future depositions. We request that the Respondent be required to provide a definitive answer to Interrogatory No. 7, particularly in light of the fact that the new response sharply varies from the original response.

DEFECTIVE RESPONSES TO REQUESTS FOR DOCUMENTS

REQUEST NO. 1: Produce each document in your possession that you reviewed to obtain facts relating to the Complaint.

RESPONSE TO REQUEST NO. 1: Respondent objects to Request No. 1 to the extent it seeks production of documents protected by the attorney-client relationship and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: FedEx's response to Request No. 1 indicates that FedEx is withholding "non-privileged documents" based on "the attorney-client relationship and/or the attorney work product doctrine."

It is well established that the "voluntary disclosure of the content of a privileged attorney communication results in waiver as to all other communications on the same subject." *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). *See also United States v. Nobles*, 422 U.S. 225, 239-40 (1975) ("Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination."). In its discovery responses, FedEx has produced meeting notes marked "Privileged and Confidential" at FDX4-60-64 (Exhibit G), and relies heavily on those notes to address the critical meeting of August 9, 2013, in response

to Requests for Admissions 8 through 11. FedEx has thus waived any privilege related to its conduct toward Captain Estabrook subsequent to his email request of August 4, 2013, for a meeting with Fred Smith.

In addition, Robb Tice has been identified by FedEx as one of the persons involved in the decision to place the Complainant on NOQ status (Response to Interrogatory No. 5). Mr. Tice was actively involved in the investigation of the Complainant's physical and mental health status and played a leading role in the interrogation of the Complainant. For these reasons too, communications to and from Robb Tice are not subject to an attorney-client or work product privilege. *See, e.g., Waugh v. Pathmark Stores, Inc.*, 191 F.R.D. 427, 432 (D.N.J. 2000)(communications created for internal investigation purposes are discoverable); *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1099 (D.N.J. 1996)(work product doctrine does not apply when an attorney undertakes an internal investigation to comply with internal policy).

For the above stated reasons, the Complainant demands the immediate production of all documents that have been withheld based on the attorney-client relationship and/or the attorney work product doctrine.

REQUEST NO. 6: Produce each document in your possession related to or referencing the Laredo Departure referenced in paragraphs 4 through 8 of the Complaint, including any document originating from, or recorded telephone call involving, Chief Pilot Bill McDonald or Rob Fisher.

RESPONSE TO REQUEST NO. 6: Respondent objects to Request No. 6 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399. Respondent is

unaware of any other documents responsive to this Request. Respondent is also unaware of any recorded telephone calls involving Chief Pilot Bill McDonald or Rob Fisher responsive to this Request.

DEFICIENCY: FedEx has failed to produce and clearly identify with sufficient particularity the number, date and time of all recorded telephone calls relating to the Laredo departure during the evening of April 10-11, 2013. Specifically, Complainant requested FedEx to produce ALL seven recordings of these calls:

- 901-397-8025 at 8:25 PM Central on April 10, 2013;
- 901-860-2600 at 9:14 PM Central on April 10, 2013;
- 901-397-8214 at 9:16 PM Central on April 10, 2013;
- 901-397-8025 at 9:39 PM Central on April 10, 2013;
- 901-397-8214 at 9:43 PM Central on April 10, 2013;
- 901-397-8025 at 9:50 PM Central on April 10, 2013;
- 901-397-8025 at 3:23 AM Central on April 11, 2013.

FedEx should be ordered to identify the number, date and time of the four recorded telephone calls that have been produced, and provide and identify all remaining recorded calls as shown on the above list. (See attached Complainant's Verizon Wireless telephone records for incoming calls to his cell phone number 901-230-4933 on the dates in question, Exhibit I).

In addition, documents 1 and 2, which appear to relate to the Laredo departure, should not be considered privileged because they originate from a paralegal. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *HPD Labs v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J.

2001)(finding communications with paralegal were not protected by attorney-client privilege where paralegal's own advice, rather than advice of lawyer, was sought). In addition, the privilege should not be applied to obscure the truth in view of the absence of any pending claim or litigation. *Trujillo v. Board of Education of the Albuquerque Public Schools*, 2007 U.S. Dist. LEXIS 33919, 2007 WL 1306593, at *6 (D.N.M. Mar. 12, 2007), quoting *Allen v. Chicago Transit Auth.*, 198 F.R.D. 495, 500 (N.D. Ill. 2001).

REQUEST NO. 7: Produce each document in your possession relating your knowledge of any terrorist organization targeting your operations or the operations of another cargo aircraft operator and the measures taken by you, if any, to respond to this threat.

RESPONSE TO REQUEST NO. 7: Respondent objects to Request No. 7 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 7 to the extent it seeks production of documents and information protected by the attorney-client privilege and/or the attorney work product doctrine. Respondent further objects to Request No. 7 to the extent it seeks production of documents and information that may be highly confidential and/or proprietary, and would not be produced absent a showing of relevance and entry of an appropriate protective order.

DEFICIENCY: FedEx has refused to produce *any* documents in response to Request No. 7 on the grounds, *inter alia*, that the request – seeking knowledge of the efforts of terrorist organizations to target FedEx and the company’s measures in response – seeks documents that are irrelevant and/or privileged. Nevertheless, FedEx’s defense of its discriminatory conduct in this matter relies on delegitimizing the Complainant’s security concerns and the denial that his expression of these concerns constitutes protected activity. A core focus of the pivotal August 9, 2013 meeting on which FedEx based its discriminatory actions was a discussion of FedEx’s susceptibility to terrorist actions. Respondent requests an order compelling a full response to Request No. 7.

REQUEST NO. 8: Produce each document in your possession relating to the Complainant's request of August 4, 2013, for a meeting with you and/or the arrangement for the requested meeting.

RESPONSE TO REQUEST NO. 8: Responsive documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: Respondent's objection does not raise a privilege as an objection, but the privilege log indicates that items 8 through 14 would clearly be responsive to this request. In view of Respondent's failure to raise the privilege in response to Request No. 8, the privilege should be deemed waived.

In any event, the privilege should be deemed inapplicable and/or waived in view of the fact that (1) there was no pending claim or litigation (see case cites for No. 6 above), (2) Tice, a decision maker, appears to be the attorney involved in all documents other than 12 (see case cites for No. 6 above), and (3) document 12 originated from a paralegal. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *HPD Labs v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001)(finding communications with paralegal were not protected by attorney-client privilege where paralegal's own advice, rather than advice of lawyer, was sought).

REQUEST NO. 10: Produce each document in your possession that you brought to your meeting with the Complainant on August 9, 2013.

RESPONSE TO REQUEST NO. 10: Respondent objects to Request No. 10 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney work

product doctrine. Without waiver of the foregoing objections, see the non- privileged documents produced in Response to Request No. 13. Although other documents may have been brought to the meetings, Respondent is currently unaware of any other relevant documents responsive to this request. To the extent any such relevant documents were brought, Respondent believes they have been included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: FedEx's objections are invalid. As discussed in Request No. 1 above, the privileges asserted by FedEx are inapplicable. Specifically with respect to the postings related to Mayday Mark, FedEx has failed to produce the same postings or in the same condition (including notations and highlighting) in which they were brought to the meeting by Robert Tice on August 9, 2013. These documents must be produced. The documents evidence the Respondent's shifting rationales for taking adverse action against the Complainant.

REQUEST NO. 11: Produce each document in your possession addressing the issue as to whether the Complainant was "Mayday Mark."

RESPONSE TO REQUEST NO. 11: Respondent objects to Request No. 11 on the grounds that it seeks documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 11 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, see non-privileged documents produced in Response to Request No. 13.

DEFICIENCY: For the reasons stated under Request No. 10 above, FedEx's responses are unacceptable. All Mayday Mark documents must be produced, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1. The documents evidence the Respondent's shifting rationales for taking adverse action against the Complainant.

REQUEST NO. 12: Produce each document in your possession referencing Mayday Mark.

RESPONSE TO REQUEST NO. 12: Respondent objects to Request No. 12 on the grounds that it is overly broad and unduly burdensome in that it seeks the production of each document in Respondent's possession that in any way references "Mayday Mark." Respondent further objects to Request No. 12 on the grounds that it seeks documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 12 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, see non-privileged documents produced in Response to Request No. 13.

DEFICIENCY: For the reasons stated under Request No. 10 above, FedEx's responses are unacceptable. All Mayday Mark documents must be produced, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1. The documents evidence the Respondent's shifting rationales for taking adverse action

against the Complainant.

REQUEST NO. 13: Produce the documents referenced in paragraph 16 of the Complaint.

RESPONSE TO REQUEST NO. 13: Responsive documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: For the reasons stated under Request No. 10 above, FedEx's responses are unacceptable. All Mayday Mark documents must be produced forthwith, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1. The documents evidence the Respondent's shifting rationales for taking adverse action against the Complainant.

REQUEST NO. 14: Produce each document referencing the Complainant originating between on or before August 4, 2013 through and including August 9, 2013.

RESPONSE TO REQUEST NO. 14: Respondent objects to Request No. 14 on the grounds that it is vague and ambiguous, and overly broad and unduly burdensome, in that it seeks the production of "each" document originating between the specified dates. Respondent further objects to Request No. 14 on the grounds that it is vague and ambiguous in that the term "originating" is subject to various interpretations and Complainant fails to further define what is meant by the term.

Respondent further objects to Request No. 14 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Without

waiver of or prejudice to the foregoing objections, and to the extent Respondent interprets the request as seeking documents that “originated” with Respondent, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: The privilege log reflects that, at a minimum, the Respondent is withholding documents identified as items 8 through 16. The privilege should be deemed inapplicable and/or waived in view of the fact that (1) there was no pending claim or litigation, (2) Tice, a decision maker, appears to be the attorney involved in all documents other than 12, and (3) document 12 originated from a paralegal, and (4) the Respondent has waived the privilege by providing Ondra’s “Privileged and Confidential” notes. (See case cites for Responses Nos. 1 and 6).

With respect to the issue raised by Respondent regarding the potential limiting effect of the term “originating,” during teleconferences with Respondent’s counsel, it was confirmed that the term “originating” was not intended to limit the request, and that the request is intended to cover all documents referencing the Complainant during this period. Respondent’s counsel represented that all responsive documents had been produced; however, the privilege log indicates otherwise.

REQUEST NO. 17: Produce any correspondence or communication in your possession from January 1, 2008, to the present date referencing Auburn Calloway.

RESPONSE TO REQUEST NO. 17: Respondent objects to Request No. 17 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 17 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the

attorney work product doctrine. Respondent further objects to Request No. 17 on the grounds that it is overly broad and unduly burdensome in that it seeks the production of “any correspondence or communication” and in that the temporal scope is too broad and bears no relation to this case.

DEFICIENCY: FedEx’s outright refusal to provide any documents is particularly shocking in view of the fact that Complainant’s reference to Auburn Calloway at the meeting of August 9, 2013, was one of the *three* reasons proffered by FedEx in its submissions to the OSHA Investigator substantiating an intervening event justifying its discriminatory treatment of the Complainant. Complainant requests an order requiring that FedEx furnish documents in response to Request No. 17 or waive any argument that its discriminatory treatment of the Complainant was justified by an intervening event or statement that in any way relates to Auburn Calloway.

REQUEST NO. 18: Produce each document in your possession referencing any connection between the Complainant and Russia or the Soviet Union.

RESPONSE TO REQUEST NO. 18: Respondent objects to Request No. 18 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 18 on the grounds that it is vague and ambiguous in that the term “any connection” is subject to various interpretations and Complainant fails to further define what is meant by the phrase. Without waiver of or prejudice to the foregoing objections, any responsive documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399. Respondent is unaware of any other documents responsive to this request.

DEFICIENCY: In view of the fact that the Complainant's alleged references to Russia or the Soviet Union were one of the *three* reasons proffered by FedEx in its submissions to the OSHA Investigator substantiating an intervening event justifying its discriminatory treatment of the Complainant, it is not credible that FedEx representatives engaged in no communications regarding this issue beyond the notes of the meeting of August 9, 2013. We request that the Respondent be ordered to disclose whether any of the identified privileged documents references Russia or the Soviet Union or, alternatively, we request that the court confirms that it will draw an adverse inference that none of the email communications among the decision makers reflects any reference to Russia or the Soviet Union. A proper response to this document request is relevant to Complainant's contention that the Russia-related rationale for compulsory psychiatric evaluation was pretextual in nature.

Fedex counsel conceded that he had not checked the Respondent's files relating to Complainant's military service, but has not supplemented Respondent's response since that admission.

REQUEST NO. 19: Produce each document relating to the decision to place the Complainant on NOQ status on or about August 5, 2013.

RESPONSE TO REQUEST NO. 19: Respondent objects to Request No. 19 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: This request seeks documents relating to Respondent's decision to place the Complainant on NOQ status. In view of the importance of this issue as an alleged act of retaliatory discrimination, any assertion of privilege related to communications related to this issue must be closely analyzed. All documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1. In addition, the absence of any pending claims or litigations renders any privilege inapplicable. (See case cites for Request No. 6). Finally, in view of Respondent counsel's representation that the Complainant's placement on NOQ on August 5 did not relate to his mental health condition, the assertion of a privilege related to communications concerning the NOQ determination are nonsensical and/or disingenuous. (Exhibit E).

REQUEST NO. 20: Produce each document in your possession referencing the basis or rationale for your determination in August, 2013, that Complainant should be required to submit to psychiatric evaluation.

RESPONSE TO REQUEST NO. 20: Respondent objects to Request No. 20 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: This request seeks documents relating to the basis or rationale to require the Complainant to submit to a psychiatric evaluation – the crux of this case. In response, the Respondent has identified just eight pages of documents: FDX 4 – 60-64, 71-72, and 95. (Exhibit

E at 4). The first five pages, 60-64, are the Ondra notes for the August 5 meeting, which are marked "Privileged and Confidential." Neither page 71 nor 95 makes any reference to the factual basis or rationale for a compulsory psychiatric evaluation. Page 72 addresses the Calloway issue at length, but makes no mention of Russia or the Soviet Union.

It is simply not believable that there are no additional documents referencing Respondent's decision to compel the Complainant to submit to compulsory psychiatric evaluation. To the extent these documents have been withheld based on an assertion of privilege, they should be produced per our objections above under Request Nos. 1 and 6.

REQUEST NO. 23: Produce each document in your possession relating to the Complainant's military service.

RESPONSE TO REQUEST NO. 23: Respondent objects to Request No. 23 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Without waiver of or prejudice to the foregoing objections, responsive documents may be found in Complainant's personnel file, produced in Response to Request No. 28.

DEFICIENCY: FedEx has failed to produce copies of Complainant's military service record from his employee records, including but not limited to, his DD-214, military flight logs and Officer Evaluation Reports, all of which were submitted during his initial application for employment at FedEx. In teleconferences with FedEx counsel, he has conceded that the Respondent has not looked for Complainant's military records; consequently, there is no excuse for failing to produce these documents.

REQUEST NO. 27: Produce each document, including any recording or ESI information, related to conversations between FedEx GOCC, the Flight Duty Officer and the Complainant on April 10, 2013, and recorded conversations between Complainant and Manager of A300/310 Fleet Operations, Captain Rob Fisher on August 9, 2013.

RESPONSE TO REQUEST NO. 27: With respect to the April 10, 2013 conversations, see the enclosed CD which contains copies of the recorded conversations. With respect to the August 9, 2013 conversation, Respondent is unaware of any documents, recordings or ESI responsive to the request.

DEFICIENCY: FedEx has failed to identify all of the calls from April 10 and 11, 2013, with enough specificity to clearly define the date, phone number and time of call. FedEx has failed to provide recordings of multiple conversations between Duty Officer Mark Crook and the Complainant, and hereby requests that a recording of the missing conversation be supplied. (See Complainant's attached Verizon Wireless telephone records for incoming calls to his cell phone number 901-230-4933 on the dates in question, Exhibit I). FedEx has also failed to produce a copy of the recorded telephone call from 901-224-3435 at 5:30 PM Central on August 9, 2013, which was a call between A300 Fleet Supervisor Rob Fisher to Complainant. (See Complainant's attached Verizon Wireless telephone records for incoming calls to his cell phone number 901-230-4933 on the date in question, Exhibit J). In the absence of production of the requested documents, the Complainant seeks an evidentiary ruling that his account of the relevant conversations will be admitted as fact.

WHEREFORE, Complainant respectfully requests that its motion to compel responses pursuant to 29 CFR § 18.21 and Fed. R. Civ. P. 37 be GRANTED and that, due to the broad scope of the Respondent's discovery violations, and its refusal to respond to Complainant's efforts to resolve the matter without the intervention of the Court, the Court ORDER Respondent to pay all reasonable expenses arising from this motion, including attorney's fees, pursuant to FRCP 37(d). Respectfully submitted this 18th day of February, 2015.



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*Attorneys for Captain Mark Estabrook,
Complainant*

CERTIFICATE OF SERVICE

A copy of the foregoing document was personally served on February 18, 2015, by email (without attachments) and by Federal Express overnight delivery (with attachments) to:

David P. Knox, Esq.,
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