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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TIFFANY ANNE NICHOLSON,
Plaintiffs,
vs.
HYANNIS AIR SERVICE, INC.
d.b.a. CAPE AIR,
Defendant.

Civil Case No. 06-00027

**ORDER RE: DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

On March 25, 2008, this matter came before the court for a hearing on the Defendant, Hyannis Air Service, Inc.’s Motion for Summary Judgment. The Defendant argued that the Plaintiff Tiffany Anne Nicholson had failed to offer a prima facie case based on sex discrimination under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-5(f)(1). Having considered the parties’ arguments and submissions, as well as relevant caselaw and authority, the court hereby **GRANTS** the Defendant's motion and issues the following decision.

BACKGROUND

On September 28, 2006, this action was instituted by the Plaintiff pursuant to Title VII of the Civil Rights Acts of 1964, as amended, 42 U.S.C. § 2003, *et. seq.* The complaint alleges that while she was employed with Hyannis Air Service, Inc., d.b.a. Cape Air (“Cape Air”) she was subjected to sex discrimination. Cape Air is a small regional airline based in Hyannis, Massachusetts. *See* Docket No. 39, Motion, Ex. M at 177:4-9. In 2000, the Plaintiff began her employment with Cape Air. At that time she was based out of Cape Air’s Hyannis and Florida operations flying a Cessna 402.

1 In 2004, Cape Air began its operations in Micronesia at an expense of more than \$3 million.
2 See Docket No. 39, Motion, Ex. S at 69:7-12. The Plaintiff was selected to be one of eight pilots
3 (four captains and four first officers) to staff Cape Air's Micronesia flight operations. *Id.*, Ex. A
4 at 74:1-3. The pilots were selected based on seniority, regardless of gender. *Id.*, Ex. A at 72:24 -
5 73:2; Ex. P at 17:3-9, 108:24-109:4. Each of the eight pilots were trained at a cost of \$25,000 to
6 \$30,000. *Id.*, Ex. O at 177:16-23, 178:8-13. After the pilots' training concluded, in June 2004 the
7 Plaintiff was transferred to Guam and began working as a Captain and First Officer. Compl. at ¶ 10.

8 The Micronesia routes utilized an ATR42 aircraft, which is a larger aircraft than the Cessna
9 402, which Cape Air utilizes in its other routes. As noted prior to being transferred to Guam, the
10 Plaintiff flew the Cessna aircraft. The Cessna is a single pilot aircraft whereas the ATR42 requires
11 a flightdeck of two, a Captain and First Officer. Because there are two pilots on deck, cooperation
12 is essential. In the industry, such cooperation is referred to as Crew Resource Management
13 ("CRM"). CRM requires flight crews to set aside any personal differences they may have and
14 likewise requires each crew person to have a cooperative personality and team approach to the
15 complicated task of flying the aircraft. See Docket No. 39, Motion, Ex. P at 112:6-18; Ex. R at
16 43:5-44-20, 45:4-10. CRM is critical to safe flying and is recognized across the aviation industry.
17 *Id.*, Ex R at 48:1-5. According to fellow pilot David O'Connor "[t]here's still accidents occurring
18 because captains refuse to take input from first officers and also accidents where first officers sort
19 of mentally take over the cockpit and direct the flight."¹ *Id.*, Ex. O at 145:6-10. During ground
20 school and initial training on the ATR42, the Plaintiff proved to be a competent pilot with
21 acceptable CRM skills. *Id.*, Ex. O at 12:7; Ex. P at 10:10-15.

22 However, once the actual flights began, the Plaintiff experienced problems with her co-
23 pilots. See Docket No. 39, Motion, Ex. R at 76:20-25. Her CRM skills were deemed insufficient
24 and additional training was found necessary. Cape Air's then Pacific Regional Administrator,
25 Russell Price, flew to Guam and tried to provide the Plaintiff further opportunities to correct and
26 improve her cockpit communication skills. Mr. Price had been impressed with the Plaintiff's
27 performance at ground school and had wanted to see her succeed. Mr. Price assessed the Plaintiff

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¹Mr. O'Connor was the Director of Training. He provided the ground training for the eight pilots in Hyannis, Massachusetts, the simulator training Houston, Texas and the training for the actual flying of the aircrafts in Guam. See Docket No. 39, Motion, Ex. O at 11:24-12:1.

1 as having “[b]etter-than-average textbook knowledge, slightly below average stick-and-rudder
2 skills, and on the poorest edge of acceptability CRM.” *Id.*, at 73:24-74:5. Mr. Price developed a
3 four-day training plan, each day allowing a Plaintiff an opportunity to improve her CRM skills.
4 However, those training opportunities did not go well.

5 For example, Mr. Price thought it would be beneficial for the Plaintiff to observe the CRM
6 skills exhibited by fellow pilots Kevin O’Connor and Phil Derry as they flew the ATR42 on a
7 flight. *See* Docket No. 39, Motion , Ex. K at 112:24-113:5, 169:5-7; Ex. O at 38:12-13. On this
8 training day, the Plaintiff failed to take advantage of the opportunity to “learn by watching.” Rather
9 than observing in the cockpit, she sat in the first row of the aircraft during the critical final preflight
10 preparation. *Id.*, Ex. R at 96:1-22. Upon arriving on the aircraft, Mr. Price found her asleep in the
11 passenger cabin and asked her why she was not in the cockpit. *Id.* She responded that she did not
12 want to get in the way. *Id.* She then left early for the day, observing only one round trip for the
13 entire day though she could have observed four trips.

14 On another training day, the Plaintiff was tasked to fly with fellow pilot and Captain John
15 Kappeyne. *Id.*, Ex. K at 173:20-22. She arrived to work without a required headset² and was sent
16 to retrieve a replacement headset, which resulted in her missing part of the flying day. *Id.*, at Ex.
17 K at 173:23-175:0. The remaining days of the additional training were also marked by poor CRM.
18 On the next day, after the flight with Captain Kappeyne, the Plaintiff was told she was
19 insubordinate after refusing to shut an engine down at the captain’s command. *Id.*, at 125:20-
20 126:17. She used negative sarcasm during the flight. Ex. R at 111:5-21. On the third day, Mr.
21 Price set up a flight between the Plaintiff and Captain Chuck White, on the same route that Captain
22 White had previously removed her. During that flight, Mr. Price perceived the Plaintiff’s attitude
23 to be “defensive, antiauthoritarian, ego-driven.” *Id.*, at 119:22-25. Mr. Price believed her attitude
24 made the flight one of his “top ten scary and dangerous flights” with a total breakdown of CRM.
25 *Id.*, at 114:13-15. Apparently the flight started off with an operational error on the Plaintiff’s part,
26 which caused the Plaintiff and Captain White to argue, and ended with Mr. Price removing her
27 from flying for the rest of the day and taking over her flight duties. *Id.*, at 118:4-121:22.

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²A headset is required and a mandatory part of the Cape Air’s uniform for pilots. *See*
Docket No. 39, Motion , Ex. R at 107:3-7.

1 demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled
2 to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party opposing summary judgment
3 cannot rest on conclusory allegations, but must set forth specific facts showing that there is a
4 genuine issue for trial. *Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988). Moreover, to defeat a
5 summary judgment motion, the nonmoving party must come forward with evidence sufficient to
6 establish the existence of any disputed element essential to that party's case, and for which that
7 party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

8 The court must draw inferences from the evidence in a light most favorable to the
9 nonmovant, and resolve all reasonable doubts in that party's favor. *Matsushita Elec. Indus. Co.*
10 *v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Facts are considered "material" if they "might
11 affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
12 242, 248 (1986). Summary judgment should not be granted if the evidence indicates that a
13 reasonable fact-finder could find in favor of the non-moving party. *Id.*

14 Where the moving party does not bear the burden of proof on an issue at trial, the moving
15 party may discharge its burden of production by either of two methods. *Nissan Fire & Marine Ins.*
16 *Co., Ltd., v. Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). The moving party may produce
17 evidence negating an essential element of the nonmoving party's case, or, after suitable discovery,
18 the moving party may show that the nonmoving party does not have enough evidence of an
19 essential element of its claim or defense to carry its ultimate burden of persuasion at trial. *Id.*

20 Under a Title VII claim, the appellant must carry the burden under the statute of
21 establishing a prima facie case of discrimination. See *McDonnell Douglas Corp. v. Green*, 411
22 U.S. 792, 802 (1973). A plaintiff alleging discrimination under Title VII may proceed under two
23 theories of liability: disparate treatment or disparate impact. *Watson v. Fort Worth Bank & Trust*,
24 487 U.S. 977, 986-87 (1987).

25 To establish a prima facie case of disparate treatment the Plaintiff needs to provide evidence
26 that suggests that the employment decision was based on an impermissible criterion such as race,
27 color, religion, sex or national origin. *Diaz v. Am. Tel & Tel.*, 752 F.2d 1356, 1361 (9th Cir. 1985).

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1 To make out a prima facie case of disparate impact, the Plaintiff must identify a neutral practice
2 or policy that has a significantly adverse impact on persons of a protected class. *Conn. v. Teal*, 457
3 U.S. 440, 446 (1981). Under the disparate treatment theory, proof of discriminatory intent is
4 required, whereas intent is irrelevant to a disparate impact theory. *Watson*, 487 U.S. at 988.

5 **A. PRIMA FACIE CASE**

6 In this instance, the Plaintiff is proceeding on a disparate treatment theory. She will thus
7 need to show that: 1) she belongs to a protected class; 2) that she was qualified for the position; 3)
8 that she was subject to an adverse action; and 4) that other similarly situated individuals outside
9 the protected class were treated more favorably. *McDonnell Douglas Corp. v. Green*, 41 U.S. 792,
10 802 (1973); *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123 (9th Cir. 2000).

11 The Plaintiff satisfies the first prong of the *McDonnell* test, as she is a member of a
12 protected class because she is a woman. 41 U.S. at 802. As to the second prong, there is some
13 question as to whether she was qualified for the position. While the Plaintiff claims that she was
14 more than competent, the evidence presented indicates that she was not qualified to fly the ATR42
15 for Cape Air.

16 Each of her superiors testified that she was not qualified to fly the ATR42 because of her
17 deficient CRM skills. *See* Docket No. 39, Motion, Ex. P at 175:22-23; Ex. O at 122:19-25.
18 Adequate CRM skills are essential for a pilot, particularly for the pilot of a passenger aircraft where
19 passengers' lives are at stake. The Plaintiff did not fulfill the duties of a First Officer under the
20 General Operating Manual, particularly the duties to assist the captain in an efficient manner,
21 preparing all required forms, maintaining a high degree of crew coordination and cockpit
22 discipline, and performing other duties required by the captain. Instead, the Plaintiff acted in an
23 insubordinate manner. She was removed from flying for insubordination, on August 31, 2004 by
24 Captain Chuck White. *See* Docket No. 39, Motion, Ex. C.

25 Captain White's removal of the Plaintiff from the flight was discussed among Mr. Price,
26 in his capacity as Pacific Regional Administrative, Steve Phillips, Cape Air's Chief Pilot and David
27 O'Connor, Cape Air's Director of Training. *See* Docket No. 39, Motion, Ex. O at 29:7-10.
28 Captain White found it impossible to work with the Plaintiff because of her behavior. *Id.* at 29:11-

1 20. Mr. Price and Messrs. Phillips and O'Connor, in their review and own personal experiences
2 with the Plaintiff determined that the Plaintiff displayed poor CRM thereby creating an unsafe
3 flying environment and posing a risk to the passengers, crew and aircraft. *Id.*, Ex. P at 41:7-17.

4 Captain O'Connor remarked that the Plaintiff had a "fault-finding mentality and an inability
5 to both accept constructive criticism and to hear suggestions from crew members." *See* Docket No.
6 39, Motion, Ex. O at 130:3-130:5.

7 A. And I found that when Tiffany was acting as the captain, she could
8 be domineering to the point of stifling input from the first officer.
9 And when she was a first officer, she could be fault finding to the
10 point where she was advising the cockpit.

11 Q. You said that both situations are dangerous. Could you describe
12 how.

13 A. Sure. In the 1970's there was a famous accident in Tenerife where
14 a captain who wouldn't listen to his flight engineer and his co-pilot
15 for KLM initiated a takeoff in fog despite the fact that Pan Am was
16 still on the runway, and they crashed into one another. The co-pilot
17 and the flight engineer on the KLM flight both knew that something
18 wasn't right, but were unable to get through to the captain.

19 There have been other accidents in the regional airline industries
20 especially where a weak captain is dominated by a first officer who
21 is attempting to usurp the authority of the captain. And where the
22 captain is not in charge, then the state of the cockpit degenerates to
23 the point where both controlled flight into terrain where they both
24 lost situational awareness, and they ended up flying into the side of
25 a hill.

26 In both those scenarios, there was either an overly domineering
27 captain or a domineering co-pilot, and it can be quite dangerous.

28 Q. Okay. And your experience

A. That is correct.

Id., Ex. O at 145:11-146:17.

23 The Plaintiff herself, admits in a letter to Cape Air, that her CRM skills were lacking and
24 that further CRM skills training would address her "problem." *See* Docket No. 39, Motion, Ex.
25 J. It seems clear from the evidence submitted that the Plaintiff was not qualified because of her
26 deficient CRM skills.

27 The third prong concerns whether the Plaintiff was subject to an adverse employment
28 action. The Ninth Circuit has held that "not every employment decision amounts to an adverse

1 employment action,” explaining that “only non-trivial employment actions that would deter
2 reasonable employees from complaining about Title VII violations” are actionable. *Brooks v. City*
3 *of San Mateo*, 229 F.3d 917, 928 (9th Cir.2000). Termination, negative employment references,
4 undeserved negative performance reviews, and denial of promotions qualify as adverse
5 employment actions. *Id.*, see *Lyons v. England*, 307 F.3d 1092, 1118 (9th Cir.2002) (average or
6 mediocre performance ratings failed to make out a prima facie case for retaliation). In contrast,
7 “mere inconveniences or an alteration of job responsibilities do not qualify.” *Sanchez v. Denver*
8 *Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998); *Kortan v. State of Cal.*, 5 F.Supp.2d 843, 853
9 (C.D.Cal. 1998) (neither verbal disparagement, low performance rating, denial of request for
10 change of supervisor, nor denial of transfer amount to an adverse action.) Likewise, paid
11 administrative leave does not constitute an adverse employment action. See *Green v. Safeway*
12 *Stores*, 1998 WL 898366 (N.D.Cal. 1998); *Sharp v. Am. Tel. & Tel. Co.*, 2000 WL 970665
13 (N.D.Cal. 2000) (held no adverse action when Plaintiff placed on leave with full pay because no
14 evidence of any loss in wages or benefits.).

15 Construing the facts in the Plaintiff's favor, as the court must do at this stage of the
16 proceedings, Cape Air's reassignment of the Plaintiff's flying duties likely constitutes an adverse
17 employment action because the change would have been a “material adverse change in the terms
18 and conditions of her employment.” See *Torres v. Pisano*, 116 F.3d 625, 640 (2nd Cir.1997) (an
19 adverse employment action involves a “materially adverse change in the terms and conditions of
20 employment”) (citation omitted); *St. John v. Employment Dev. Dep't.*, 642 F.2d 273, 274 (9th Cir.
21 1981) (a transfer to another job of the same pay and status may constitute an adverse employment
22 action.).

23 However, the court does not find that the Plaintiff satisfies the fourth prong of the
24 *McDonnell* test. To be similarly situated, the Plaintiff must show that another individual had a
25 similar job and displayed similar conduct of comparable seriousness. *Vaques v. County of Los*
26 *Angeles*, 359 F.3d 634, 641 (9th Cir. 2004). She has failed to present any such evidence. Although
27 there are other employees who held the same level position as the Plaintiff, no other employee
28 “engaged in problematic conduct of comparable seriousness to that of [the plaintiff].” *Id.* at 641.

1 While other pilots had initial unsatisfactory check rides in a simulator, and were given additional
2 training, no other pilot was recognized for having CRM problems. See Docket No. 39, Motion,
3 Ex. O at 17:2-5, 21:3-13; Ex. P at 26:7-13. The pilots who received additional training “were on
4 a scale of operating the aircraft and performance on the check ride. Tiffany’s was more towards
5 having the proper attitude to communicate well and help in good crew resources management. And
6 so that was little different than the technical skills that were knowledge of flying the airplane.” *Id.*,
7 Ex P at 141:24-142:9.

8 The Plaintiff claims that there were similarly situated pilots because there were pilots who
9 had challenges with their technical piloting skills that required additional retraining. Therefore,
10 she argues that her CRM deficiencies and the piloting deficiencies are a distinction without a
11 difference. However, there does indeed seem to be a difference. One can be retrained and refine
12 their piloting skills; however, if personality is an issue, the CRM skills, if not improved upon, may
13 continue to pose a real risk of safety.

14 The Plaintiff is tasked with showing there were male pilots engaged in comparable conduct,
15 specifically, deficient and unsafe CRM skills, and then were subjected to a different form of
16 discipline. Here, no evidence was presented to indicate such a situation. None of the remaining
17 seven male pilots she worked with failed at CRM. No other pilot needed a third round of training
18 like the Plaintiff. Quite simply, there is no other employee to compare to the Plaintiff.

19 Moreover, even if the court was to find that the Plaintiff was similarly situated to her co-
20 employees, she was certainly not treated differently. Under Cape Air’s procedures, if a pilot fails
21 a test, he or she is given another opportunity to pass. See Docket No. 39, Motion, Ex. O at 14:12-
22 15. If they fail a further test, then they undergo a review to determine if there will be a further
23 opportunity for training. No other person had failed at a second round of training. *Id.*, at 183:25-
24 185:2. The offer of subsequent training to the Plaintiff was no different treatment than that offered
25 her counterparts. She did not take advantage of the second round of training and was offered a third
26 round which she declined. The court finds that the Plaintiff has not established a prima facie case.

27 ***B. PRETEXT***

28 Assuming that the Plaintiff establishes a prima facie case, the burden shifts to the employer

1 to articulate a legitimate non-discriminatory reason for the adverse action. *Chuang*, 225 F.3d at
2 1123. The burden then shifts back to the Plaintiff to demonstrate that the asserted reason was a
3 pretext for retaliation. *Id.* “The issue is not ‘the correctness of desirability of [the] reasons offered
4 . . . [but] whether the employer honestly believes in the reason it offers.’” *Fishback v. D.C. Dep’t.*
5 *of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996). The Defendant claims that the discipline
6 meted out to the Plaintiff was necessary because she was considered unsafe to fly and the safety
7 of crew and passengers were placed at risk. Accordingly there were legitimate, non-discriminatory
8 business reasons for the Defendant’s actions.

9 The depositions of the chief pilot, Steve Phillips, director of training, David O’Connor, and
10 Regional Administrator for Cape Air, Russell Price, each mentioned personal experiences flying
11 with the Plaintiff and observation of her inadequate and unsafe CRM skills. *See* Docket No. 39,
12 Motion, Exs. P, O, R.

13 Because the Defendant has articulated a non-discriminatory, legitimate business reason for
14 the Plaintiff’s discipline, the Plaintiff must put forward direct evidence showing that discrimination
15 more likely motivated the employer, or indirectly, by showing that the employer’s explanation is
16 unworthy of credence. *Vasquez*, 349 F.3d at 641. The Defendant claims that there is no such
17 evidence. “Even a reasoned decision based on incorrect facts is not evidence of pretext.” *Pollard*
18 *v. Rea Magnet Wire Co.*, 824 F.3d 557, 559 (7th Cir. 1987). Cape Air decision’s was based upon
19 what it believed at the time, and what it’s key personnel had observed as to the Plaintiff’s attitude
20 and behaviors. There was no intent to terminate her, she was offered an opportunity to receive
21 additional training and maintain her employment. Mr. Wolf stated that he “would have done
22 everything [he] could have done relative to the process to see that Tiffany got back into the ATR.”
23 *See* Docket No. 39, Motion, Ex. S at 66:7-9. She chose not to avail herself of that opportunity.

24 The Plaintiff claims that she was the only female out of the eight pilots. However, she does
25 not show any connection between being a female and any discrimination. The Plaintiff also
26 mentions that Chuck White did not want to work with her because they had had a past personal
27 relationship. However, a past relationship is not the same as showing Chuck White did not want
28 to work with her because she was a female. She also states that there were rumors of her having

1 an affair with Russell Price. However, for the Plaintiff to show that the disciplinary action was a
2 pretext on this basis, the Plaintiff would have to show she was singled out for such comments
3 because of her gender. *See Pasqua v. Metro Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996)
4 (employee failed to show that alleged sexual harassment arising out of rumors of his illicit
5 relationship with one of his subordinates was based on his gender). There is no indication that the
6 rumors were created because of her gender. The Plaintiff also suggests that several of her co-pilots
7 were “solicited” to write letters concerning her lack of CRM skills. However, even if they were
8 asked to write letters for the company as to their experiences with the Plaintiff, there is nothing to
9 suggest that doing so was a pretext for discrimination.

10 The Plaintiff also claims that the Defendant failed to investigate the allegations against her,
11 confront her with the allegations and give her an opportunity to defend herself. However, there is
12 no showing that there were any “irregular” procedural steps in the grievance process.

13 In sum, there is no genuine issue of any material fact in this case. The Plaintiff cannot make
14 out a prima facie case of discrimination; she seemingly was neither qualified for her job nor was
15 she treated differently from the male pilots. In fact, there appears to have been considerable efforts
16 expended by Cape Air in trying to retrain her, but they proved unsuccessful. Additionally, the
17 Defendant has presented a legitimate, non-discriminatory basis for its discipline of the Plaintiff,
18 namely her substandard CRM skills which presented a danger to crew and passengers.
19 Accordingly, summary judgment is warranted under the set of facts as presented.

20 **CONCLUSION**

21 For the foregoing reasons, the court finds that the Plaintiff has neither established a prima
22 facie case of sex discrimination nor shown that any of the actions taken by Cape Air were pretexts
23 for discrimination. Accordingly, the Defendant's Motion for Summary Judgment is hereby
24 **GRANTED.**

25 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Mar 27, 2008