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HOWARD GOTBETTER

FAA DOCKET NO. CP98EA005 1

(Civil Penalty Action)

FAA-98-4691-19

COMPLAINANT'S REPLY BRIEF

COMES NOW Complainant, Federal Aviation Administration (FAA), by and through its designated and authorized representative, the Regional Counsel for the FAA's Eastern Region, pursuant to section 13.233(e) of the Rules of Practice for FAA Civil Penalty Actions, 14 C.F.R. §13.233(e), to serve this Reply to Respondent's Brief in support of his Appeal of the Written Initial Decision of Administrative Law Judge Burton S. Kolko in FAA Docket No. CP98EA005 1 dated August 4, 1999.

STATEMENT OF THE CASE

The hearing was held on April 14 and 15, 1999 in New York City before Administrative Law Judge Burton S. Kolko (ALJ). The ALJ issued a Written Initial Decision on August 4, 1999, with the following specific findings of fact and conclusions of law as to Respondent:

1. Respondent Howard Gotbetter was a passenger on American Airlines Flight 58, originating in San Francisco, California on September 29, 1997 and destined to arrive at John F. Kennedy International Airport, Jamaica, New York.
2. Respondent Howard Gotbetter assaulted Flight Attendant Patricia Murray aboard Flight 58.

3. Specifically, Respondent Howard Gotbetter grabbed her left shoulder and shook her. When she asked to be removed from his grip, he squeezed harder.
4. By reason of the foregoing, Respondent Howard Gotbetter violated Section 91.11 of the Federal Aviation Regulations, in that Respondent Howard Gotbetter did assault a crewmember aboard an aircraft being operated.
5. Therefore, it is ordered, pursuant to 49 U.S.C. § 46301(a)(1), that Respondent is liable to and hereby assessed a civil penalty in the amount of \$500.

On August 13, 1999, the Respondents filed his Notice of Appeal from the ALJ's Written Initial Decision.

STATEMENT OF THE FACTS

A. Chronology

1. From San Francisco:

Patricia Murray testified she has been a Flight Attendant for American Airlines for fourteen years (T8). She flies approximately 105 hours a month which equates to about seven two-day trips a month. Her trips are usually transcontinental flights aboard a 767 or DC-10 (T9).

On September 29, 1997, she was working on a flight from San Francisco to New York; the aircraft was a 767-300 (T12). On this flight there were three galleys, each providing service to the three different cabins - first class, business class, and coach . Flight Attendant Murray's duties on the flight were to cook for the business class cabin in the business class galley. The flight lasted about five hours, with a delay occurring prior to landing in New York due to weather which was expected to last approximately 30 minutes (T10).

There were 12 crewmembers assigned to this flight - two in the cockpit (a Captain and a First Officer (T15)) and ten Flight Attendants (T11). Flight Attendant Murray's duties required her to remain in the galley and did not require her to participate in aisle service. The aisle Flight Attendants provided service and distributed catering to passengers from a cart in the aisle (T12).

The business class galley is located in the center portion of the 767-300 aircraft. On aircraft right, there are two jump seats, which are crew rest seats which are used on an international flight (this flight being a domestic leg of an international flight continuing on to South America (T20)). Forward of the galley on each side are lavatories in aircraft left and in aircraft right. Both fore and aft of the galley are blue curtains, in aircraft left and in aircraft right, separating the galley from the business and the coach cabins (T12-13). The curtains separating Business Class and Coach Class Cabins are located forward of 17A and -B on aircraft left; and aft of 17H and -J (jump seats, inside the Business Class galley) on aircraft right (T93). Leading to the galley are two aisles. There are approximately 14 passengers in first class, 30 in business class, and 158 in coach (T13). On this flight, all seats were full, although there was at least one vacant seat in coach (T19).

Among the flight attendants there is a purser or "number-one" or "premium", who is basically the captain of the cabin - on this flight the number-one was Susan Darning (T14, 185).

2. The Sick Passenger:

After taking off at 9 a.m. from San Francisco, and when the aircraft reached 10,000 feet altitude, a bell sounded indicating to the Flight Attendants that it is safe for them to get up and begin their duties. Flight Attendant Murray stood up from her jump seat on the business class galley. The seat belt sign was lighted (T21). About 15 to 20 minutes after takeoff (T21, 69), a Flight Attendant in coach advised her that a passenger from coach was not feeling well.

The passenger came from aircraft left, walked through the galley to aircraft right and entered the lavatory, all the while not looking well and holding his hands over his mouth, as if about to vomit. The coach Flight Attendant noted that he had not closed the lavatory door. Flight Attendant Murray could not move the door and observed that the passenger had passed out and fallen backwards in to the business class aisle. Flight Attendant Murray called the Number One Flight Attendant, Susan **Derning**, to advise she had an ill passenger and required assistance and oxygen (T16). Someone brought the “grab and go kit”, containing supplies to protect a Flight Attendant when dealing with blood or bodily fluids. The passenger’s eyes were rolled back and he was unconscious.

Flight Attendant Murray loosened the passenger’s belt and **Derning** administered oxygen - the passenger regained consciousness (T17, 65). Meanwhile, Flight Attendant Murray asked him questions in a protocol to learn about medications or illnesses, to which the passenger responded. They determined the cause to be blood sugar level. Flight Attendant Murray gave him orange juice and bread to raise his blood sugar level, to which the passenger responded favorably. The Flight Attendants then brought the passenger back to his seat in Row 19 in coach, 19B. Flight Attendant **Derning** reported the matter to the captain (T188).

A female passenger was seated in 19A, and two more passengers in 17A and 17B (T18) (there was no Row 18). Flight Attendant Murray advised these passengers that the sick passenger’s name was Trip; he is not feeling well; her name is Pat; the other Flight Attendants are aware the passenger is sick; and that although she will keep an eye on him from her position in the galley, they should call and a Flight Attendant will instantly respond (T 19).

When there was a lull in service, an incident report was to be filled out by the Flight Attendants (T22). However, as Flight Attendant Murray met with one of the two business class Flight Attendants, she saw that the sick passenger was up again and coming toward the business class galley (T23). It had been about two hours since he last passed out (T65).

As Flight Attendant Murray addressed him, he passed out and fell toward her. She tried to brace his fall with her right hand (touching her palm (T67)), while also trying to push a fully

loaded beverage cart away with her right leg. As Trip, the sick passenger, fell, he hit his head on the corner of the cart with the bridge of his nose. He then fell on her right leg (touching the inside of her right knee (T67)), taking her down with him. He also vomited on her, and his chest was across her right forearm (T67), face down on top of her, and his face was in the vomit. Vomit was on her uniform and on the floor - on rubber matting and on carpeting (T87).

Flight Attendant Murray requested pillows and blankets from the passengers in Row 17 and told one of the business class Flight Attendants to call the Premium Flight Attendant, get oxygen and a doctor (T24). An announcement requested a doctor and one came forward from coach into the business class galley. Flight Attendant Murray laid a blanket on the floor where a glass had broke and Trip was rolled on to it. They (including Flight Attendant Darning (T190)) pulled down the jump seat on aircraft left and Trip's legs were placed on top of the jump seat, with the rest of his body laying in the galley. The doctor examined Trip, using a medical kit they brought to him, and the doctor stayed with Trip for awhile, monitoring him and taking his blood pressure (T25). They again administered oxygen and decided to keep Trip in a reclining position.

About 25 to 35 minutes since he had passed out (T69), they finally moved him to aircraft right in the galley area. Trip still had oxygen and the blood pressure cup attached on his right arm - he was placed on seat 17H, a jump seat. The doctor continued to monitor Trip until stabilized, when the doctor was about to retake his seat.

Then a phone in the galley rang. It was the Captain, reporting that there was going to be a 30-minute weather delay and he was put in a holding pattern due to weather (T26). (The Captain's announcement occurred about 35 to 40 minutes since Trip fell against the cart (T86), or soon after he was stabilized). The Captain wanted to know whether he needed to declare a medical emergency, and he asked this of Number One Flight Attendant Darning as well, who consulted with the doctor. The doctor indicated that as long as Flight Attendant Murray continued to monitor Trip in the position that he was laid, it was not necessary to declare a medical emergency. The doctor returned to his seat (T27).

3. Weather Delay:

In the meantime, all the Flight Attendants continued service. Business Class Cabin was to receive follow-on service, which required Flight Attendant Murray to bake bread and cookies and set up service carts, bring carts to the aisle, open bottles of wine, and attend to passengers' needs in business class (T143).

The Captain announced over the PA system that he had been put into a holding pattern due to the weather, thunder storms in the New York area (T108). The seat belt sign was lighted, and he instructed passengers to remain in their seats (T30,107).

4. Katzman:

Just after the announcement, two individuals approached from the coach cabin, one, a female, from aircraft left, and the other, a male, from aircraft right. At the time Flight Attendant Murray had an oven rack she was pulling out of the oven with cookies on it to bring through the galley (T30). The female was yelling about the delay (T89). As the curtain on aircraft left opened abruptly, Flight Attendant Murray warned the female that she had a hot rack - "Hot rack, stop, stop, I've got a hot rack". She put the hot rack down in the galley. The female was leaning in and putting her foot forward (T88). Flight Attendant Murray noted that the female did not have shoes on, just socks, and she was concerned because of the broken glass on the floor (T31); there could also have been blood there (T88). She cautioned the female about the floor (T90). Meanwhile, the male had already come in to the galley on the other side (T89). The female did not back up (T90).

The female came through with a verbal barrage (T28) and entered the galley area (T90). Flight Attendant Murray ascertained that the female was quite disturbed about being placed in a holding pattern. The female went on that she was being held hostage and that the Flight Attendants were liars. The female (Denise Katzman) told Flight Attendant Murray that she was like the rest of the "fucking cunts" in the back; that she was a "fucking liar"; and that she deserved to know what was going on. After Flight Attendant Murray tried to find out where she was seated, Ms. Katzman responded that she didn't "fucking" care about her; that a meal is never served an hour before landing; and that she flew the flight all the time. According to Flight Attendant Murray, Ms. Katzman was, to put it mildly, inconsolable, (T29). Ms. Katzman would not tell he where her seat was.

A passenger, Suzanne Minatti, who was seated next to where the sick passenger had been, had observed Ms. Katzman approach the galley and heard say very loudly, "fuck you", to Flight Attendant Murray after Murray had advised her she had hot items in her hand and asked her to take her seat. She saw Murray follow Katzman down the aisle (T247).

Flight Attendant Murray still had to attend to doing the follow-on service; maintaining the well-being of the sick passenger, still lying on the floor; and deal with the safety issues arising from having to clean the galley area when going into the turbulent weather, as things

could fly around. Flight Attendant Murray wanted somebody from the coach cabin, as Ms. **Katzman** was from coach and was irate and volatile and consumed with what was going on. Flight Attendant Murray observed Ms. **Katzman** to be spitting, her face beet-red, her hands shaking, the veins in her throat popping. In her years of service, Flight Attendant Murray had never seen someone go so far, whether drunk, sober, or on drugs. Flight Attendant Murray's gut instinct made her ask herself - what is on the airplane we don't know about? What has this person so inconsolable? In response to her trying to help, Ms. **Katzman** screamed again at her, throwing her finger in the air and saying "fuck you", before turning and starting down the aisle (T30).

At that, Flight Attendant Murray checked with Trip, the sick passenger, since he appeared quite startled at what was going on. Then she started down the aisle on aircraft left in to coach behind Ms. **Katzman**. As they got to the over-wing area, about row 25 (T104), Ms. **Katzman** turned on her with another verbal barrage, coming in very close to her. Ms. **Katzman**'s finger was close to her nose, and once again she used foul language (T32).

Suzanne Minatti observed that Ms. **Katzman** got into Murray's face (T264).

5. Respondent:

As Ms. **Katzman** came in to the galley, the male passenger, in a hot pink shirt, Respondent Howard Gotbetter, also entered from aircraft right, without saying a word (and while the sick passenger was still lying on the floor). Flight Attendant Murray had not perceived that there was a relationship between the female and the male passengers (T31).

Like Ms. **Katzman**, Respondent was also loud, saying "Hey lady, hey lady!" He was standing with the sick passenger at his feet, his attention drawn to Flight Attendant Murray and the female passenger, **Katzman**. As she left the galley to attend to **Katzman**, Murray thought he was trying to get her attention to the sick passenger on the floor (T53).

Suzanne Minatti observed Respondent walk up the aisle on the other side, through the galley, and down her aisle, the left-hand aisle to Murray and **Katzman**, some ten rows back (T261), where he and **Katzman** sandwiched in Murray (T248).

As they got to the overwing area and Ms. Katzman turned on her with another verbal barrage, coming in very close to her, Flight Attendant Murray felt a hand on her left shoulder with a significant grip and shaking her - that person was also yelling at her. Ms. Katzman is yelling in her face, Respondent is shaking her shoulder, and she was sandwiched between them (T32), so that he was no more than an inch or two away from her and right on her (T104). She turned to look to her left side, and knew from the hot pink shirt that it was the male passenger - Respondent - who had come through the galley. She realized that these two passengers were together.

As she turned she told Respondent, "Sir, you need to remove your hand from my shoulder". At that his grip tightened (also T53-54) - she closed her eyes and was fearful he was about to hit her. Both passengers were yelling at her - Respondent with "What the hell are you doing?" (T54).

She asked him again, "You need to remove your hand from my shoulder", at which his hand sprung off and he came around her right-hand side going aft (also T116). As they now stood at angles side by side facing her (T117), she put her hand up as a stop sign and advised them she apologized for the inconvenience of the weather delay but that the seat belt sign was on (also T107) and, for their safety and the safety of others, they need to be in their seats.

Respondent responded by telling her that she did not know what the hell she was doing (T33), and that she should find another career because she sure as hell could not explain this one. Ms. Katzman told her she had better watch herself.

Suzanne Minatti heard Flight Attendant Murray tell them to sit down, and heard Respondent respond by telling Murray in an elevated tone that if she can't take it, she ought to find another job (T248-249). She testified that she thought Murray handled herself very well, did not deserve to be treated the way she had been, was very calm throughout, and did not lose her cool - she acted professionally (T250, 263-264).

Nancy Surdoval, another passenger, was seated near where Respondent came up to Flight Attendant Murray, about ten rows from the front on the left side of the coach cabin. Ms.

Surdoval observed that Flight Attendant Murray was very calm and level-headed and did not seem to get too flustered, while dealing with Respondent and Ms. Katzman (T276). She recalled he sounded loud and upset (T291). She testified that Respondent put his hand on Flight Attendant Murray's shoulder and he was very close to her, so she had very little room (T293).

Flight Attendant Murray had dropped her hand and turned around thinking that she was not going to console these volatile people, who were pulling her away from her duties in the galley; who had interfered with her personal space; who had interfered with her trying to do her job. They would not listen to her - they would not take their seats. She possessed no authority in their eyes, even though she was trying to keep them safe.

She went forward to the galley. The female passenger in Seat 19A reached out to her and offered her business card and to help (T34) (Suzanne Minatti (T127)). From the time she had left the galley until she returned, only about two to five minutes had elapsed (T1 01 - 102, 137). Once in the galley, she called Flight Attendant Darning over the phone (who responded from the front of the aircraft (T119)) to report what had just happened, including the man grabbing and shaking her very hard by her left shoulder, and her asking him to remove his hand, which he had not done (T198). Flight Attendant Darning reported to the Captain that Murray had been pinned by two passengers, she had been threatened, and that she had been touched or handled by the man (T192, 197).

Flight Attendant Darning advised the Captain and came aft with a passenger misconduct form for Flight Attendant Murray, who filled out a portion of it, "Description of Incident" (T120, 124). Darning also filled out a portion (T121). Flight Attendant Murray identified Respondent's Exhibit R-2 as that form (T123).

She asked Darning not to give these passengers the form right away as they had taken their seats (T35) and the volatility level had gone down slightly. The ultimate goal was met in that they were seated with their seatbelts on and thus not a harm to themselves or others.

About ten minutes after the incident, Flight Attendant Murray observed through the galley curtain that Ms. Katzman had returned to her seat (T111). However, Darning stated she

would give the form to Respondent in the event something again happened before landing (T36). Flight Attendant Murray explained that the passenger misconduct form was developed by the company (as a new procedure (T131)), and that she had never, before the incident in question, or since, used the form (T44). She also explained that the bottom portion of the form was to be cut off and given to the passenger (T 134).

A call light illuminated, and Flight Attendant Murray traced it as coming from the coach cabin (T38). She observed another Flight Attendant, Mary Ann Topolsky, with Respondent - she saw that he was still clearly upset. She saw Flight Attendant Topolsky turn and go aft on aircraft right to use the phone (T39). Within a few moments Flight Attendant Darning came to the business class galley and indicated there had been another verbal barrage from Respondent, this time to Flight Attendant Topolsky, during which Respondent similarly was concerned with being held "hostage"; with Flight Attendant Topolsky not knowing how to do her job; with having to communicate with the cockpit; with wanting to know what was going on; with not being satisfied that the aircraft was in a holding pattern due to weather; with the crew holding back information; and with the crew not telling the truth (T40-41). Flight Attendant Darning gave Respondent the passenger misconduct form (T40, 194).

Flight Attendant Murray explained that, as a result of Respondent grabbing her shoulder, she suffered a whiplash to her C-6 vertebra; left shoulder rotator cuff damage; and partially separated left shoulder. She was removed from working for six months. The assault aggravated a previously existing injury from 1991 when she had broken her back on an airplane. She explained that major surgery had been performed, at locations L-3, -4, and -5 (T41-42). The disk at L-3 was aggravated as a result of the assault, along with a raised left-side rib cage, and the muscles, tendons, and ligaments were also affected for a six-month period.

Flight Attendant Murray added that she and Flight Attendant Darning had gone in to the lavatory while at The Port Authority and they did not find bruising. However, the next day she was removed from working and "deadheaded" back home, where she saw a chiropractor soon after (about October 1). At that point she had difficulty moving her left

shoulder and her neck was very stiff - she could not turn and look to the left-hand side (T42). While not working she was on disability leave. She returned to working on March 1, 1998 (T43).

Besides her chiropractor, she also saw her orthopedic surgeon, who concurred with the chiropractor's diagnosis that the injuries to the shoulder and the neck arose from being shaken (T55-56). She was removed from work for six months. Physical therapy was recommended for her, which included massage therapy, muscle strengthening therapy, and chiropractic adjustments (T168). She also saw a psychologist in the week after the incident (T181).

6. To New York:

According to Flight Attendant Murray, when the flight did land in New York (T44), uniformed police officers were there to meet the flight (which was late (T50)). These included officers to respond to a call for a "paramedic" to assist with the sick passenger, Trip.

The officers came on board the aircraft and were escorted to the business class galley by Flight Attendant Derning. She had traded positions with Derning so Derning did not remain at the forward door, but escorted some of the officers to Trip which allowed Murray to be at the forward door by the first class galley with other officers to identify Respondent and Ms. Katzman - she was still fearful of both of them (T45-46). An officer escorted each on to the jetbridge (T47). She observed that quite a few of the passengers were very happy that the authorities were there to meet the aircraft and that something was happening with these two passengers (T47-48).

She observed Ms. Katzman getting upset and yelling with one of the officers (T48-49). Mr. Gotbetter, however, simply stood (T50). Other officers loaded the sick passenger on to a gurney, and took him off the aircraft to be brought to a hospital (he later wrote Flight Attendant Murray a complementary letter (T63). In the meantime, the aircraft was completely deplaned and Flight Attendants Murray and Derning met with officers some

distance further down the jetbridge to give their side of the story (T5 1). The Port Authority police handcuffed Respondent and Ms. **Katzman** and put them in to a police car - Flight Attendant Murray observed that Ms. **Katzman** was yelling at the flight crew nearby and swearing at the police. She and **Derning** got into another police car, and they all headed to the police stationhouse (T52).

ISSUES

- I. Whether the Administrative Law Judge (ALJ) erred in his findings that Respondent violated 14.C.F.R. § 91.11 when he assaulted a crewmember in that the findings were not supported by a preponderance of reliable, probative, and substantial evidence?

- II. Whether the Administrative Law Judge (ALJ) erred in his findings that Respondent violated 14.C.F.R. § 91.11 when he assaulted a crewmember in that the findings contradict the ALJ's finding that Respondent did not intimidate, threaten, or interfere with a crewmember in the performance of a crewmember's duties?

- III. Whether the Administrative Law Judge (ALJ) erred in his findings that Respondent violated 14.C.F.R. § 91.11 when he assaulted a crewmember in that the findings were not in accordance with applicable law, precedent, and policy?

- Iv. Whether the ALJ's errors, if any, were prejudicial to the Respondent?

ARGUMENT

- I. The ALJ correctly found that Respondent violated 14 C.F.R. § 91.11 when he assaulted a crewmember in that the ALJ's finding was supported by a preponderance of reliable, probative, and substantial evidence.

Respondent generally argues that FAA's witnesses are incredible. The ALJ's credibility findings should not be disturbed. The ALJ was in the best position to evaluate all the witnesses' demeanor. "While an agency is not inextricably bound by the credibility findings of its law judges, those findings are entitled to special deference on review by the agency...Law judges are in the best position to evaluate the demeanor of the witnesses." In the Matter of Park, FAA Order No. 92-3 (January 9, 1992), citing In the Matter of Carroll, FAA Order No. 90-21 (August 16, 1990). Respondent has offered no persuasive reason for disturbing the law judge's credibility determinations.

Respondent compares the testimonial accounts of witnesses Suzanne Minatti and Nancy Surdoval, who were passengers on the flight. The ALJ correctly found that:

These passengers were disinterested observers. Neither had any stake in the outcome. This fact, together with the demeanor of each, suggested that the testimony of each was credible. ALJ Decision, p. 5.

In addition to crediting Surdoval's testimony that Respondent had placed his hand on Flight Attendant Patricia Murray's right shoulder, the ALJ specifically gave greater credibility to a statement she had given 15 months before the hearing, and 3 months after the incident, when "her memory was considerably fresher", concerning respondent's placing his hand on the Murray's left shoulder. The ALJ found that "[t]he salient point in any event is that Surdoval's account confirms Murray's central, material allegation that [Respondent] gripped her shoulder." ALJ Decision, p.5-6.

Respondent argues that FAA Special Agent Richard Gierbolini is incredible and that the ALJ erroneously chose to believe him. However, nowhere in his decision did the ALJ even mention Gierbolini. In addition, there is no merit to Respondent's wildly speculative argument that the ALJ wanted to protect Gierbolini from criminal charges

for filing false reports. Respondent has presented no evidence to support his speculative claim and thus his argument is without merit.

Respondent argues that the ALJ erred by wanting to punish him through “guilt by association” with Deborah **Katzman**, his traveling companion. However, the ALJ found that, where Complainant attempted to show threats or intimidation in violation of section 91.11, these emanated from **Katzman** or from **Katzman** and Respondent jointly. The ALJ only found that Respondent assaulted Murray, in violation of section 91.11. ALJ Decision, p.8. Respondent has presented no evidence to support his speculative claim and thus his argument is without merit.

Respondent argues that the ALJ erred by wanting to give American Airlines and the Port Authority of NY and NJ and its police an alleged defense to the civil suits brought by Respondent against them. However, the ALJ only noted, without further comment, that Respondent is suing Murray, another flight attendant, etc. ALJ Decision, p. 5, n. 1. The ALJ only noted this in the context of crediting Murray’s testimony credibility in comparison with his finding that the testimony of **Katzman** and Respondent were generally not worthy of belief. The ALJ correctly found that:

[The] opposing testimony of Patricia Murray was basically credible. Her demeanor suggested that her testimony was trustworthy. And I do not believe that Murray - who appeared to be a reasonable person - had any sensible reason to lie. I cannot fathom that she picked out **Katzman** and [Respondent], passengers unknown to her, and insisted they be met by authorities, without, at least in her own mind, a very good reason. Nor would Murray, as a reasonable person, want to invite without good cause the nuisance, aggravation, and time involved in filling out reports, repeating her story numerous times both in writing and verbally, and risking a lawsuit. ALJ Decision, p. 5.

Respondent has presented no evidence to support his speculative claim and thus his argument is without merit.

Respondent next argues that the ALJ works for the FAA and “had,” to find for the FAA. The ALJ does not work for the FAA. Respondent has presented no evidence to support this speculative claim and thus his argument is without merit.

Respondent further argues that the ALJ was “cozy” with the FAA and cites an off-record discussion with FAA counsel about a new baby. Respondent has presented no evidence to show how the ALJ erred in his findings or how such a discussion exhibits the kind of bias that Respondent seems to imply warrants a reversal in his favor. His argument is without merit.

Respondent next argues that the ALJ erred by “making excuses” for Murray in relation to her testimony. In addition to his specific credibility findings about Murray’s testimony described above, the ALJ also found that “Murray’s version of events was reinforced at several points by the testimony of two other passengers, Suzanne Minatti and Nancy Surdoval.” ALJ Decision, p.5. Although the ALJ reasoned why Murray may not have recalled the address of her chiropractors or physical therapist, ultimately the ALJ was not persuaded that her testimony about “matters relating only to the incident and its aftermath” was inherently suspect. ALJ Decision, p.6.

Finally, Respondent argues that, as a practicing attorney since 1958, he had no reason to assault Murray. His argument is without merit - indeed, his assault of a flight attendant diminishes further the reputation of the profession.

- II. The ALJ correctly found that Respondent violated 14 C.F.R. § 91.11 when he assaulted a crewmember in that the ALJ’s finding is distinct from the ALJ’s other findings that Respondent did not intimidate, threaten, or interfere with a crewmember in the performance of a crewmember’s duties.

Respondent violated section 91.11 of the Federal Aviation Regulations, and the violation occurred at least when he assaulted Flight Attendant Murray. The regulation is written entirely in the disjunctive - thus a finding of assault only is a violation. Respondent is subject to a civil penalty for this violation. In the Matter of Ignatov, FAA Order No. 96-6 (1996); In the Matter of Mayer, FAA Order No. 97-12 (1997). The term “assault” includes both assault and battery (Ignatov at 9) e m e n t s o f a

battery are a harmful or offensive intentional touching. Respondent intentionally grabbed Flight Attendant Murray with sufficient force that that it resulted in serious injury requiring a six-month recovery period and continual treatment. Respondent did not refute that Flight Attendant Murray suffered a serious injury that put her out of work for six months. He did not refute that the injury was consistent with his assault. Even the least touching of her in anger would constitute a battery. Respondent did not dispute that he came up close behind her. Thus, Respondent also assaulted Flight Attendant Murray in the sense that he intentionally acted to put into his victim the fear of a harmful or offensive touching.

The ALJ correctly found that:

[Respondent's] act of deliberately, forcefully pressing his clasped hand on Murray's shoulder constituted an unwanted and offensive touching. Its unpleasant impact was all the greater because it came in the midst of the tense atmosphere generated by Katzman's outbursts. And any doubts about its unwelcome and harmful nature were erased after [Respondent] contemptuously responded to Murray's order to remove his hand by tightening his grip. These actions constituted a battery. The term "assault" as used in section 9 1.11 includes a battery [citing Ignatov and Mayer]. ALJ Decision, p.6-7.

In addition to his finding of a battery, the ALJ also correctly found that:

An assault within the meaning of section 91.11 can also arise from intentional acts which cause another person to be in fear of a harmful or offensive contact [citing Mayer]. I find an assault on this alternate ground as well. Respondent's action generated a reasonable apprehension in Murray that he would hit her. Respondent and Katzman, standing uncomfortable close to Murray, had crowded her into a small space while Katzman's full-throated verbal assault continued. Respondent, meanwhile, was tightening his grip on her shoulder. Under these circumstances, Murray's fear was reasonable [citing Ignatov]. ALJ Decision, p.7.

III. The ALJ correctly found that Respondent violated 14 C.F.R. § 91.11 when he assaulted a crewmember in that the ALJ's finding is in accordance with applicable law, precedent, and policy.

Respondent fails to argue how the ALJ's finding is not in accordance with applicable law, precedent, and policy. There is ample precedent in this area. For instance:

Where the respondent refused to fasten his seat belt and would not return a flight attendant's ID badge - sanction, \$1,700 (In the Matter of Stout, FAA Order No. 98-12 (1998)).

Where the respondent stuffed a sandwich down a flight attendant's blouse - sanction, \$1,500 (In the Matter of Mayer, FAA Order No. 97-12 (1997)).

Where a respondent who pushed a beverage cart onto the flight attendant's foot, causing injury - sanction, \$1,750 (In the Matter of Ignatov, FAA Order No. 96-6 (1996)).

Where the respondent was smoking, not fastening seat belts, and outrageously, struggling with a crewmember in a forceful attempt to enter the cockpit - sanction, \$5,000 (In the Matter of Hench, FAA Docket No. CP97SO0004 (1998)).

Where the respondent assaulted a flight attendant by grabbing her underneath her jawbone and shaking her, calling her a \$8 a hour waitress - sanction, \$1,000 (In the Matter of Offier, FAA Docket No. CP97WP0001 (1997)).

Where the respondent tossed the contents of a coffee pot onto a flight attendant after being told put out a cigarette and be seated - sanction, \$2,000 (In the Matter of Migliaccio, FAA Docket No. CP96CE0297 (1997)).

Where the respondent struck a flight attendant in the back and threw her ticket at her, though the respondent was disabled and used a cane - sanction, \$1,000 (In the Matter of Taylor, FAA Docket No. CP95WP023 1 (1997)).

Although the determining factor in setting a sanction is not whether the interference was "physical," certainly in this case there is evidence that the interference was physical and may have caused a serious injury.

IV. The ALJ's errors, if any, are not prejudicial to Respondent.

Whatever errors the ALJ may have made were not prejudicial to Respondent. Respondent fails to show how errors he has alleged the ALJ made are more than mere speculation on his part.

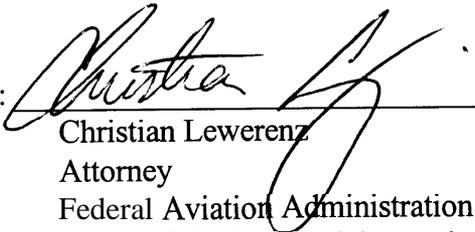
CONCLUSION

WHEREFORE, for all of the above reasons, the Administrator respectfully requests that the Respondent's appeal be rejected and the ALJ's decision be affirmed in its entirety.

Respectfully submitted,

LORETTA E. ALKALAY
Regional Counsel

By:



Christian Lewerenz
Attorney
Federal Aviation Administration
Office of the Regional Counsel
Eastern Region
Fitzgerald Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430
Tel: (718) 553-3273
Fax: (718) 995-5699

CERTIFICATE OF SERVICE

I hereby certify that on this date copies of the Complainant's Reply Brief was sent Certified Mail - Return receipt Requested and Telephone Facsimile to the following:

Federal Aviation Administration
Room 924A
800 Independence Avenue, S. W.
Washington, D.C. 20591
Attn: Appellate Docket Clerk (original and two copies)
Tel: (202) 267-3641
Fax: (202) 267-7257

Howard Gotbetter
100 Central Park South
New York, NY 10019
Tel: (212) 315-0968

Dated: 11-2-99



Lisa Charles
Paralegal Specialist