No. 20-1322



IN THE

# Supreme Court of The United States

§

MICHAEL NEELY,

*Petitioner,*

v.

THE BOEING COMPANY,

*Respondent,*

§

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

§

## PETITION FOR WRIT OF CERTIORARI

§

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## QUESTIONS PRESENTED

1) Do Whistleblowers have a right to the equality of standard review under law, when the adverse effect dismisses the entire causes of action?

2) Do Whistleblowers have a right to trial under the constitution amendments of the United States Constitution?

## PARTIES TO THE PROCEEDING

Petitioner, Michael Neely, was the plaintiff in the district court, appellant in the court of appeals proceedings, and is the complainant in the U.S Department of Labor administrative law proceedings. Respondent The Boeing Company was the defendants in the district court proceedings, appellee in the court of appeals proceedings, and respondent in the U.S Department of Labor administrative law proceedings.

## CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual, a citizen of the United States of America, self represented in these matters.

## RELATED CASES

Michael Neely v. The Boeing Company, No. 2-16-cv-01791-JCC, U.S. District for the Western District of Washington

Michael Neely v. The Boeing Company, No.19-35449, U.S.Court of Appeals for the Ninth Circuit

Michael Neely v. The Boeing Company, No.2018-AIR-00019, U.S. Department of Labor ALJ

Michael Neely v. The Boeing Company, No.2018-AIR-00019, U.S. Department of Labor ARB

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# Supreme Court of The United States

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner, Michael Neely, a commoner of We the People of The United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, United States District for the Western District of Washington judgment, and United States Department of Labor ALJ Decision. Under ORDER LIST: 589 U.S. March 19, 2020 COVID-19, Neely submits his writ timely.

### JURISDICTION

The judgment of the court of appeals denying rehearing en banc was entered on October 19, 2020. The Decision of the U.S. Department of Labor was entered on September 24, 2020, under ARB Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case presents a familiar and exceptionally important question whether the standard review under law is applied with equality to whistleblowers, when the effect in this case has dismissed the entire causes of action. The United States has already taken a position to further protect whistleblowers of aircraft safety and fraud violations through congresses H.R. 8408 (116th): Aircraft Certification Reform and Accountability Act, section 19. Whistleblower Protection.

This case, with the strengthening of congresses legislature, warrants this courts review of the matters where it questions the lower courts application of standard review to the law for whistleblowers protection, and its error dismissing the entire cause[s] of action. The time is now for this court to resolve the long running litigation of the causes that could have saved lives, if timely investigated and trialed. The court has consistently recognized these circumstances in opinions, yet the lower courts have disempowered them through error. The petition for a writ of certiorari should therefore be granted.

### A. Facts and Procedural History

Petitioner, Michael Neely ("Neely") was a 54 year old male with a 33 year laudable aerospace engineering career when his employment was terminated by The Boeing Company (Boeing) on March 25, 2016. During his employment at Boeing from 2014 until his termination, he witnessed violations of Boeing not applying safety procedures to design of commercial aircraft per Federal Aviation Regulation 14 CFR 25.1309, and fraud. He wistleblew these issues to his supervisor[s] starting in December 2014, followed with multiple formal Boeing ethics complaints file throughout 2015 for Safety violations, fraud, harassment and retaliation. He was also age discriminated and filed internal Boeing complaints and with the EEOC federal agency timely.

Neely alleges his supervisors retaliated against him because he wistleblew; his supervisors continuously altered his job assignments; assigned him his first

corporate corrective action in his career; administered him the lowest performance review in his career; then terminated his employment in March 2016. Neely filed a lawsuit against Boeing July 7, 2016 in California thereafter transferred to the U.S. District for the Western District of Washington. Neely incorporated by reference the factual allegations, cause of actions and demands set forth in his second amended complaint filed with the district as true and correct. (*Ap 385a)* and *Neely v. Boeing Co., Case No. 16-01791-RAJ (W.D. Wash. Sep. 19, 2017).*

1 Civil Action

Neely filed ten cause of actions (*Ap 386a and 397a-411a).* The case was litigated suffering numerous stays and motions to compel discovery. Neely had exhausted all administrative remedies except for his AIR-21 claims. The U.S. Department of Labor (DOL) Occupational Safety Health Association (OSHA) extended its investigation outside its statute where on January 18, 2018 the Secretary noticed parties its inconclusive findings, releasing Neely to appeal and pursue in administrative proceedings with the DOL.

On March 1, 2018, the U.S. DOL granted Neely's appeal and his AIR-21 whistleblowing safety violation claims were assigned by the DOL-ALJ Case No. 2018-AIR-00019, cloning the civil case into dual litigation path with the same parties. On May 18, 2018, the district order granting in part and denying in part, relieved the AIR-21 claim from federal court the U.S. DOL-ALJ (Ap 61a). Consequently the AIR-21 case suffered the same stays, motions to compel discoveries and reconsiderations.

On May 24, 2018 Neely motioned the district reconsideration to dismissing Sarbanes-Oxley and Dodd Frank. After erroneous stays by the Boeing, the district granted leave to re-file his reconsideration on December 10, 2018 (Ap 72a-82a). On February 14, 2019 Neely filed two motions for Sanctions. On February 14, 2019 Boeing filed Summary Judgment. The district granted leave for Neely to respond March 4, 2019 (Ap 117a).

On April 15, 2019, the district minute order reassignment of case to another judge. On April 17,

2019, one hundred thirty seven days after Neely filed his reconsideration, the district erroneously ordered Respondent to respond, thereafter denying reconsideration on May 17, 2019 (Ap 83a-86a). On May 20, 2019 the district granted Boeing summary judgment (Ap 32a), followed by order dismissing the case (Ap 87a).

On May 24, 2019 Neely filed appeal to the circuit schedule order Case No. 19-35449, briefings were timely filed (Ap 413a and AP451a). Neely motioned the circuit to take judicial notice of the AIR-21 case and was denied (Ap 6a). The circuit affirmed the lower court summary judgment on August 12, 2020 (Ap 1a). Neely's motion for en banc was denied by the circuit on October 19, 2020 (Ap 30a).

**2 Administrative Action**

As noted, the AIR-21 cause was assigned into case on March 1, 2018 with the U.S. DOL-ALJ. Alike the civil matters, the case suffered numerous stays, motions on discovery issues, and hearing reschedules. On April 16, 2019, the ALJ denied Boeing summary judgment. The case was heard completing seven days of testimony, witnesses and experts on May 10, 2019 (Exhibits 1360a and 3207a). Post hearing briefs were filed and responded timely (Ap246a and 253a).

The ALJ ordered amicus curiae briefs on April 13, 2020 from the U.S. Federal Aviation Administration (FAA) and Solicitor of Labor. The FAA responded May 14, 2020 (Ex 9285a) and the Solicitor responded June 15, 2020 (Ex 9261a), both favoring Neely's position.

On September 24, 2020, the ALJ Decision and Order Denying Relief (Ap 147a). Under AIR-21, the ALJ affirmed that Neely met the burden of proving 1) he engaged in protected activity whistleblowing Safety issues, and 2) Neely suffered an adverse employment actions, but the ALJ erred denying relief on the premise Neely did not meet 3) the protected activity was a contributing factor to the adverse action under U.S.C.§ 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). Neely filed appeal to the U.S. DOL Administrative Review Board (ARB) timely on September 30, 2020 granted (Ap 246a). Neely's filed reply brief filed

March 8, 2021 (Ap 253a) pending ARB review and decision. This court should review those adjudicated findings 1) in the interest of public safety, 2) in the interest of controversy between court decisions on standard review[s] of law, and 3) extend the protection of whistleblowers per the statutes and congressional priorities.

3 **Public Harm**

Neely whistleblew safety issues beginning in December 2014 and throughout 2015 to Boeing (Ap 389:#16-389:#18). With no resolve to his complaints, he experienced harassment, retaliation and threats (Ap 389:#19-395:#32) Neely then filed whistleblower safety complaints to the FAA and U.S DOL-OSHA in 2016(Ap 395a:#33-396:#34).

Exhausting administrative remedies he pursued civil and administrative actions beginning in mid 2016 in order to bring to light the severity of safety issues that could harm the general public and seek relief under law. Although Neely's safety complaints were raised against a new Boeing commercial aircraft 777x under development need not matter as the safety complaints he rose were against Boeing not complying to regulated safety procedures required used across <u>all</u> Boeing commercial aircraft designs [emphasized].

Neely presented evidence through discovery that Boeing <u>failed internal corporate audits across its commercial aircraft business</u> (3864a to 3875a) [emphasized], and it had failed using the same safety procedures in its designs of other commercial aircraft, including 737 MAX (Ap 3736a, 379a-381a ) and other Boeing commercial aircraft in service. Neely's heroism to surface these facts were disempowered by the corruption of attorney's and erroneous lower court decisions undermining his case.

On October 29, 2018, Lion Air flight 610 737 MAX crashed killing 181 souls. On March 10, 2019, Ethiopian Air flight 302 737 MAX crashed killing 149 souls.

Neely's safety whistleblowing complaints of Boeing failing to comply with regulated safety procedures is not only specific to the 737 MAX causes (Ap 379a-

381a), but specific to all systems on all Boeing commercial aircraft that have catastrophic system designs in them (Ap4880, Ap4888, Ap6027a-6031a, Ap6042a-6043a).

The safety issues Neely whistleblew still exist in all Boeing commercial aircraft where these safety procedures have failed use. The totality of Neely's safety whistleblowing complaints have been ignored, suppressed through the wielding of litigation swords and judicial orders to hide the truth. The FAA and Boeing together collaborated on a FAA report confirming Neely's safety complaints.[1] (Ap380).

During the first day of the AIR-21 hearing, Boeing's attorney's surprise attack motioned the court to strike all evidence, expert reports and testimony about to be given on the totality of these safety issues. The ALJ ordered Neely, providing him mere hours to strip all related evidence, expert reports and testimony in a cleansing effort to protect the guilty, Boeing (Ap379-380).

Congress, FAA, National Transportation Safety Board (NTSB), European Union Aviation Safety Agency (EASA), Indonesian government National Transportation Safety Committee (NTSC), independent investigations Joint Authorities Technical Review (JTAR) on authority by the FAA, have all investigated providing detail written reports that concluded the 737 MAX crashed killing 346 souls were due to the same safety issues Neely whistelblew (Ap379a-381a ).

On January 7, 2021, the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), and the United States Attorney's Office for the Northern District of Texas (the "USAO-NDTX") under the United States of America, filed a Prosecution Agreement in the U.S. District Court for the Northern District of Texas, holding Boeing negligent of criminal acts for the 737 MAX crashes, related to these matters (Ex 9292a).

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1 https://www.faa.gov/aircraft/air_cert/design_approvals/air_software/media/TC-16-39.pdf

## 4 Congressional Action

In March 2020, the House Committee on Transportation Infrastructure released is preliminary findings on 737 MAX crashes. [2] The report identified the same causes of 737 MAX were issues Neely complained about some three years earlier, to no avail. Congresses report states *"...FAA technical and safety experts determined that certain Boeing design approaches on its transport category aircraft were potentially unsafe and failed to comply with FAA regulation, only to have FAA management overrule them and side with Boeing instead..*(p3)"[3], and *"...FAA failed in its duty to hold Boeing accountable for violations of FAA regulations inthe 737MAXprogram..*(p5), and *"...The Committee's investigation has also found that the FAA's certification review of Boeing's 737 MAX wasgrossly insufficient and that the FAAfailed in its duty to identify key safety problems and to ensure that they were adequately addressed during the certification process..."* (p12), to only cite a few of the FAA and Boeing's negligence. Congresses final report was released September 2020.[4]

On November 17, 2020, the United States House of Representatives passed *H.R. 8408 Aircraft Certification Reform and Accountability Act.* The act provisioned enhanced further protection of whistleblowers under Section 42121 of title 49,

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[2] https://transportation.house.gov/imo/media/doc/TI%20Preliminary%20Investigative%20Findings%20Boeing%20737%20MAX%20March%202020.pdf

[3] "Amid Committee's Ongoing Investigation into the Certification of the 737 MAX, Chairs DeFazio and Larsen Raise New and Serious Concerns to FAA About Other Safety-related Issues," Press Release, Committee on Transportation and Infrastructure, November 7, 2019, accessed here: https://transportation.house.gov/news/press-releases/amid-committees-ongoing-investigation-into-the-certification-of-the-737-max-chairs-defazio-and-larsen-raise-new-and-serious-concerns-to-faa-about-other-safety-related-issues-.(Hereafter referenced as Committee Press Release, Nov. 7, 2019).

[4] https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf

United States Code (AIR-21), who report safety issues. The act also initiates expert safety review of assumptions relied upon by the Administration and manufacturers of transport-category aircraft in the design and certification of such aircraft disclosing safety critical design information under part 25 of title 14, Code of Federal Regulations that Neely whistleblew complaints of Boeing not following (A[390a:#17-392:#24). It is time for this court to review these severe matters that continue to harm the general public.

## REASONS FOR GRANTING THE PETITION

Safety Wistleblowers put themselves in harm's way to protect the safety of the general public, and should be protected by law. This case presents questions of extraordinary importance for standard of review of whistleblower cases. Whether or not the standard of review law is applied with equality to whistleblowers on dismissals, reconsiderations, summary decisions, appeals and en banc denying a passage to a trial by a jury of its peers without prejudice, bias, or political indifferences.

Congress has passed H.R. 8408 Aircraft Certification Reform and Accountability Act enforcing and strengthening safety whistleblowers protection directly related to these matters.

The United States Supreme Court, court of appeal[s] and district court[s] have entered decision[s] in conflict of the decision[s] made in this case on the same important matters, and the lower court[s] decision[s] are so far departed from the accepted and usual course of judicial proceedings, it calls for an exercise of the Supreme court supervisory power.

The U.S. Department of Justice Fraud Section and USAO-NDTX have found Boeing criminally negligent in these related matters (Ex 9292a).

The U.S. DOL ALJ has adjudicated Neely met his burden proving his protected activity whistleblowing Safety issues, and proving he suffered adverse employment actions, using the same evidence presented to the district and circuit on appeal that should of survived summary judgment. The U.S. DOL ALJ order alone contradicts the lower court[s]

decision[s]. Neely has marshaled a mountain of direct evidence to the lower courts to survive reconsideration, summary judgment, appeal and en banc decision[s].[5] (Ex 471a, Ex 1360a, Ex 3607a). The petition for a writ of certiorari should therefore be granted.

**A. The questions presented are exceptionally important and warrant review of this case to protect whistleblowers rights under law**

The importance of the questions cannot be overstated. The case presents fundamental constitutional, amendment and legal questions of rights under law to protect whistelblowers; protect those affected by age discrimination; SOX; Dodd Frank; and those affected by wrongful termination causes resulting from whistleblowing. The United States has identified these same exact safety issues Neely complained recently passing legislation to strengthen whistleblowers affected under the statutes. The substantial arguments on both sides of the questions have been fully aired in multiple lower courts. The lower courts erred and forever prejudice those affected and this courts resolution of the questions is urgently required. The petition for writ of certiorari should therefore be granted.

**1. Lower court[s] erred on Standard of review applying the law**

Here, the district erred not applying *"Importantly, a court must not "weigh the evidence and determine the truth of the matter" in deciding a motion for summary judgment. Id Anderson, 477 U.S. at 249"*, and *"[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for*

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[5] *"When the evidence is direct, " '[w]e require very little evidence to survive summary judgment' in a discrimination case." Lam v. Univ. of Haw., 40 F.3d 1551, 1564 (9th Cir. 1994) (quoting Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1111 (9th Cir. 1991)) (alteration in original).* In RIF cases, a plaintiff can *"show through circumstantial, statistical or direct evidence that the discharge occurred under circumstances giving rise to an inference of . . . discrimination." Nesbit v. Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993) (per curiam).*

*purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).* Neely provided substantial direct evidence that *a genuine dispute existed to the material facts*, even though the court did not have to *weigh the evidence and determine the truth on matters* that are triable issues for a *reasonable jury* determine verdict. (Ap 39a-40a, and Ap 1a)

**2. Violation of Section 519 of the AIR-21 Act**

**Relevance to this case[6]**

As noted above, the lower court dismissed Neely's AIR-21 claim on the lack of subject matter jurisdiction on the premise the statute does not contain a mechanism to bring an AIR 21 claim in federal district court. See 49 U.S.C. § 42121(b). The AIR-21 case was assigned by the U.S. DOL-ALJ on March 1,2018. On April 16, 2019, the ALJ denied Boeing summary judgment and the case was heard completing seven days of testimony, witnesses and experts on May 10, 2019. Post hearing briefs were filed and responded timely.

The ALJ ordered amicus curiae briefs on April 13, 2020 from the U.S. Federal Aviation Administration (FAA) and Solicitor of Labor. The FAA responded May 14, 2020 (Ex 9285a) and the Solicitor responded June 15, 2020 (Ex 9261a), both favoring Neely's position.

On September 24, 2020, the ALJ Decision and Order Denying Relief (Ap 147a). Under AIR-21, the ALJ affirmed that Neely met the burden of proving 1) he engaged in protected activity whistleblowing Safety issues, and 2) Neely suffered an adverse employment actions, but the ALJ erred denying relief on the premise Neely did not meet 3) the protected activity was a contributing factor to the adverse action under U.S.C.§ 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). Neely filed appeal to the U.S. DOL Administrative Review Board (ARB) timely on September 30, 2020 granted (Ap 246a). Neely's filed reply brief filed March 8, 2021 (Ap 253a) pending ARB review and

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[6] "*A court ... may rely on a document to which the complaint refers if the document is central to the party's claims and its authenticity is not in question*". *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).*"

decision. This court should review those adjudicated findings 1) in the interest of public safety, 2) in the interest of controversy between court decisions on standard review[s] of law, and 3) extend the protection of whistleblowers per the statutes and congressional priorities.

Boeing opens the door in its appeal response to the ARB "ALJ erred by excluding evidence (including testimony from Mr. Neely's expert, Vance Hilderman) related to the 737-MAX for purposes of demonstrating Boeing's safety issues. See, e.g., Neely Br. at 34" Rsp at 49. The record shows that Neely introduced testimony and evidence, that the ALJ accepted, that Boeing failed its Office of Internal Governance (OIG) audit on the very same Safety issues Neely complained about Tr.194:5-203:3., four months before Neely's first complaint to DeGenner in December 2014 Tr.200:8-201:4. The Safety procedures in question of Neely's complaints are used to design "all" Boeing commercial aircraft Tr.197:5-12, Tr.198:13-18, Tr.200:3-7. Boeing OIG found severe deficiencies of engineers following these Safety procedures in its commercial aircraft design across all its commercial aircraft types in August 2014, that included 737 MAX Tr.196:5-12. Neely's complaints of Safety issues started in December 2014, continued throughout 2015, to government agencies to include the FAA in 2016, uninvestigated and differed over six years of litigation diatribe. Neely Safety expert prepared an expert report, prepared to testify to these very facts, and the ALJ order to strike and remove all related facts from his report and testimony Tr.28:3-13:1. Three years after Neely raised and filed his Safety complaints on these very same issues, reports are on the FAA's website that the 737 MAX crashes that killed 346 souls were the direct result of not following these same safety procedures to meet 14CFR 25.1309;

- FAA's "Summary of the FAA's Review of the Boeing 737 MAX" found exact issues Neely complained Safety resulted 737 MAX crash.[7]

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7 https://www.faa.gov/foia/electronic_reading_room/boeing_reading_room/media/737_RTS_Summary.pdf

- FAA's "Joint Authority Technical Report (JATR)[8]

The ALJ himself set on record that he would inter into evidence any and all FAA materials at his disposal for use in this case Tr.20:11-13, and failed to do so. Boeing itself, collaborating with the FAA, submitted a damning joint report in December 2016, nine months after terminating Neely that fully substantiated Neely's Safety Whistlblowing claims.3 The United States Government found Boeing culpable, negligent to the very same Safety issues Neely complained[9] finding "concealment", "Boeing creates inherent conflicts of interest that have jeopardized the safety of the flying public", "failed to take appropriate actions to represent the interests of the FAA and to protect the flying public", "Boeing failed to indicate it knew" [lied], and "Boeing's own analysis showed... the result could be catastrophic...and did not share with the FAA". The ALJ was coerced, prejudice and ignored the extraordinary facts and evidence to a worldwide general public safety issues apart of record, and still exist today. Neely raised complaints of Boeing not following these safety procedures in its designs; Boeing failed to investigate Neely's complaints even when it had advanced knowledge [knew] its corporate audit failed; and Boeing killed 346 souls from its neglect, and was prosecuted for doing so *United States of America v. The Boeing Company; Case No. 4:21-CR-005-O.* As the United States cites, Boeing has a history of "conspiring" to protect for profit. Advance knowledge of its neglect to protect public safety and then people die as cause, is criminally negligent (Ap379a-381a). Boeing's supplier, General Electric Aviation ("GE") notified Boeing numberous times of these safety deficiencies not in compliance with safety procedures (Ap4236a-

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(at 67, Recommendation 04.R-2018-35.20 FAA), and at 68.

[8] https://www.faa.gov/news/media/attachments/Final_JATR_Submittal_to_FAA_Oct_2019.pdf (at IX, recommendation R7, at 12 R2.3 and F2.3-A, at 16 R3, at 31 F6.1-C

[9] https://www.faa.gov/aircraft/air_cert/design_approvals/air_software/media/TC-16-39.pdf

4237a, Ap4563a-4564a). Yet Beoing knew, and ignored as they proceeded authorizing GE to begin designing to defected safety critical engineering that it knew was 1) not compliant to regulated safety procedures, and 2) unsafe (Ap 4652a-4666a).

The ALJ ordered amicus curiae briefs on April 13, 2020 from the U.S. Federal Aviation Administration (FAA) and Solicitor of Labor. The FAA responded May 14, 2020 and the Solicitor responded June 15, 2020, both favoring Neely's position.

On September 24, 2020, the ALJ Decision and Order Denying Relief. Under AIR-21, the ALJ decision that Neely met the burden of proving 1) he engaged in protected activity whistleblowing Safety issues, and 2) Neely suffered an adverse employment actions.

On appeal, Neely motioned the circuit to take judicial notice that was denied (Ap6a). This court should accept the writ, notify the DOJ and Fraud division, reverse and remand.

**3. Sarbane Oxley (SOX) and Dodd Frank Claims Survive Dismissal and Reconsideration**

The Respondents motion to dismiss states that "*Boeing accepts the facts pleaded in Plaintiff's Second Amended Complaint as true*". Boeing's supporting declaration states: "*Complainant . . . filed an internal complaint with Respondent [Boeing] about fraudulent concealment and misuse of the risk system*" (Ap 74A).

In Neely's Second Amended Complaint, he alleges, inter alia, that "*The manipulation of the Enterprise Risk system prevented accurate reporting of cost and schedule impacts that would lead to inaccurate Corporate Financial reports to the Securities and Exchange Commission and inaccurate reports to BOEING shareholders. ... Neely learned much later that the Executive Vice President of 777x had the "Issues" module disconnected ... in attempts to prevent exposure to significant technical, cost and schedule impacts*", and "*NEELY alleges that this constitutes a fraud against shareholders ...*" (Ap392a:#25).

In its Motion to Dismiss, Boeing asserts, contrary to the allegations in Neelys second amended complaint, that his complaints related only to FAA safety

regulations. In Response to the Motion to Dismiss, Neely set forth the facts that "*Neely learned and reported ...*" that Boeing had made false reports to its shareholders. The Response also references Boeing's false reporting to the SEC in is 2015 10-K Report. Boeing's bald assertions were erroneously accepted by the district that Plaintiff had not raised SOX concerns where in fact he did (Ap393a:#26).

Notwithstanding the specific allegations in Neelys second amended complaint, which Boeing had accepted as true, the districts order states "*Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state a claim. The rule requires the court to assume the truth of the complaint's factual allegations and credit all reasonable inferences arising from those allegations. Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007). A court "need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).*"

Neelys second amended complaint also identified the SOX complaints that Plaintiff filed a timely complaint to the U.S. DOL -OSHA. Although an investigation had began, the agency never issued findings or preliminary order, therefore under law Neely exhausted his SOX remedies and pursued his SOX claims in federal court (Ap397a:#34).

On reconsideration, Neely argued under FRCP 59 and FRCP 60 and LCR 7(h)[10] (Ap73a,75a-76a) he brought new facts to the court he filed a complaint with the United States Securities and Exchange Commission, submission Number 15266-366-368 90(Ap73a). Neely emphasized Local Rule 7(h) that authorizes a motion for reconsideration where there is *"...showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence"* and the rules *"authorizes*

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[10] Local Rule 7 is the functional equivalent of a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e). *Aronson v. Dog Eat Dog Films*, 738 F.Supp.2d 1104, 1118, (W.D. Wash. 2010), citing *Fuller v. M. G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991).

*a motion for reconsideration where there is "a manifest error in the prior ruling ... or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence" (Ap73a, 75a-76a,83a).*

Neely also emphasized "*new facts and legal authority that could not have been brought to the court's attention because the ruling of the U.S. Supreme Court in Digital Realty, Inc. v. Somers, 138 S.Ct. 767 (2018) was issued after Plaintiff filed his Second Amended Complaint. At that time, a Dodd Frank complaint could proceed in district court even if the plaintiff had notified only his employer. Somers v. Digital Realty Trust, 850 F.3d 1045 (9th Cir. 2017). The Supreme Court's ruling to the contrary in Somers constitutes new legal authority that imposed a hitherto new prerequisite for bringing a SOX case in federal court,*" that he had satisfied the statute requirements and a "reconsideration is appropriate where the court "has misapprehended the facts, a party's position, or controlling law." Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). Neely believed that as to his SOX claim, the Court has misapprehended the facts.

a. **Lower court[s] erred on Count one: Violation of Section 806 of the Sarbanes-Oxley Act**

On reconsideration, Neely argued he satisfed the Van Asdale requirement that his *"communications ... definitively and specifically relate[d] to [one] of the listed categories of fraud or securities violations under 18 U.S.C. §1514A(a)(1). Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996 (9th Cir. 2009).*

Perhaps the court was misled by Boeing's false claim that his concerns addressed only safety issues, but the SAC (AP-385A) clearly states that *"Neely learned and reported ..."* that Boeing had made false reports to its shareholders. The SAC (AP-385A) also alleges that *"Plaintiff made these complaints to his employer and through its agents and employees".* Even Defendant's exhibits belied the assertion that Neely's complaint was only about safety. It says: *"Complainant . . . filed an internal complaint with Respondent [Boeing] about fraudulent concealment and misuse of the risk system"*

The Court's conclusion that *"Plaintiff does not allege that he reported his belief that these actions were defrauding Boeing's shareholders to Boeing or to any other federal agency,"* is manifest error that should survive reconsideration and summary judgment *"the inference of such reporting – a reasonable inference to which the court must give deference. Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007).*[11] *Dismissal under FRCP 12 is permissible only if the complaint fails to allege "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007). A complaint is "plausible on its face" if the facts the plaintiff pleads "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S.Ct. 1937 (2009). See also, Wiggins v. ING U.S., Inc., 2015 U.S. Dist. LEXIS 167362 (U.S. Dist. Ct. Conn., 2015).*

In Wiggins, the Defendant raised numerous arguments as to why Ms. Wiggins SOX complaint should be dismissed. First, Defendant claimed that the complaint lacked any specific detail as to who, where, when or how the whistleblower claim arose. The court rejected that argument as "unconvincing" in light of FRCP 8(a)(2). Neely's complaint not only satisfies FRCP 8(a)(2), but also clearly meets the "who, where, when and how" standard. Next, ING argued that Wiggins' SOX claims failed to satisfy FRCP 9(b) because Plaintiff failed to plead fraud "with particularity." The Court rejected that argument because SOX "protects an employee who 'reasonably believes' that conduct violated an enumerated statute." (18 U.S.C. §1514A).

The Court held that *"a whistleblower need not show that the employer actually committed fraud, but only that the employee had a reasonable belief that fraud was occurring, citing Guyden v. Aetna, Inc. 544 F.3d 376, 384 (2nd Cir. 2008).* Accordingly, the Wiggins court held that FRCP 9(b) does not apply to SOX retaliation cases. Mr. Neely alleged numerous facts

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[11] Notably, *Van Asdale* involved a dismissal on summary judgment, not a motion on the pleading in which the burden of proof is substantially less.

from which the Court should infer that he had a reasonable belief fraud was occurring.

Finally, the court also rejected the defendant's claim that Wiggins' complaint was deficient because it did not allege that her subjective belief was objectively reasonable. The Wiggins court observed that *"whether a belief was "objectively reasonable"* is judged according to *"the basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience." Nielsen v. AECOM Tech Corp., 762 F.3d 214, 221 (2nd Cir. 2014).*

The Wiggins court determined that "the Amended Complaint alleges facts that permit a reasonable inference that a person in Wiggins' position could reasonably come to believe that ING was acting illegally.The same rationale applies to Mr. Neely's case. The SAC (AP-385A) sets forth that he had worked for Boeing since 1995 as part of its Space and Defense Unit ( SAC (AP-385A:#8), was assigned by Boeing in January 2014 to support its Commercial Business Unit on the 777x program (AP-385A:#10), and to perform certain project management responsibilities for ELMS in November 2014 (AP-385A:#11).

From these facts alone, a reasonable inference could be drawn that Mr. Neely was experienced enough with aircraft engineering and Boeing procedures reasonably to believe that Boeing was acting illegally as to the 777x project. Here, the SAC (AP-385A) alleges that as early as March 2015, Plaintiff observed Defendant was manipulating its RISK system to prevent exposure of the negative impact on costs and schedules, thereby violating SOX. (AP-385A:#25).

Plaintiff then alleged that he made SOX complaints "to his employer and through its agents and employees" (AP-385A:#39). He also alleged that by filing an inaccurate 10 K Report with the SEC, Boeing fraudulently withheld "from its stockholders and the SEC that the increased spending on the 777x aircraft was a product of its ... submission of requirements to suppliers that were not usable simply so it could falsely report that it met

contractual deadlines. This, Plaintiff asserted, constitutes "a fraud against shareholders..." (AP-385A:#26).

After making such reports to "his employer and through its agents and employees," plaintiff suffered retaliation. (AP-385A:#30). Plaintiff "amended his internal complaints to include allegations that he was being retaliated against in violation of the Sarbanes Oxley Act." (AP-385A:#33). On February 20, March 10 and March 14, · before he was terminated by Boeing – Plaintiff filed whistleblower retaliation claims with the Department of Labor, and was later told by the DOL that he had exhausted his administrative remedies under SOX. (AP-385A:#36-38).

Each of these allegations should have given rise to a reasonable inference that Plaintiff raised *allegations of shareholder fraud prior to any retaliation," contrary to the Court's conclusion.* Neely's reconsideration should be granted and the dismissal of the SOX Count be reversed.

On Appeal, Neely argued Whistleblower retaliation claims under Sarbanes-Oxley *"are governed by a burden-shifting procedure under which the plaintiff is first required to establish a prima facie case of retaliatory discrimination." Tides v. Boeing Co., 644 F.3d 809, 813-14 (9th Cir. 2011) (citing 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(B)(i)).*

To make a prima-facie showing, the plaintiff must show that (1) the plaintiff engaged in protected activity; (2) the plaintiff's employer knew, actually or constructively, of the protected activity; (3) the plaintiff suffered an unfavorable personnel action; and (4) the circumstances raise an inference that the protected activity was a contributing factor in the unfavorable action. *Id. at 814 (citing Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996 (9th Cir. 2009)); see also 29 C.F.R. § 1980.104(e)(2)(i)-(iv).*

If the plaintiff makes this showing, then *"the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity." Van Asdale, 577 F.3d at 996.* Plaintiff's burden is not a

heavy one. He does *"not have to prove that he reported an actual violation. . . . He would have to prove only that he 'reasonably believed that there might have been' a violation and that he was 'fired for even suggesting further inquiry.' . . . We have referred to this standard as a 'minimal threshold requirement.'" Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176 (9th Cir.2019) (quoting Van Asdale at 1001 and citing Sylvester v. Parexel Int'l LLC , No. 07-123, 2011 WL 2517148, at *14 (Dep't of Labor May 25, 2011) (en banc)).*

Further, in this context, *"[a] contributing factor is 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" Frost v. BNSF Ry. Co., 914 F.3d 1189 (9th Cir. 2019) (quoting Rookaird v. BNSF Railway Co. , 908 F.3d 451, 461 (9th Cir. 2018)). There is no question that these elements were sufficiently alleged, see Coppinger-Martin v. Solis, 627 F.3d 745, 751 (9th Cir. 2010),* but the district court took the position that the reports to the FAA did not constitute protected activity. The district court was wrong.

First, report was made to the FAA and the employer. Under the Act, a complaint to *"a Federal regulatory or law enforcement agency"* or *"a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)" constitutes protected activity. 18 U.S.C. § 1514A.* Thus, the district court should have considered the communication to plaintiff's supervisors.

Second, as has been noted with respect to the issues concerning Boeing's representations with the 737 Max, falsifying safety factors can clearly impact stock value. *See, e.g., Ben Winck, "Boeing shares slide as the latest 737 Max delay threatens holiday-season travel (BA)," Business Insider, September 3, 2019. Certainly, the action by management could constitute mail or wire fraud. See John C. Coffee, Jr. & Charles K. Whitehead, The Federalization of Fraud: Mail and Wire Fraud Statutes, in White Collar Crime: Business and Regulatory Offenses §*

*9.05, at 9–73 (1990); . United States v. Keplinger, 776 F.2d 678, 697– 98 (7th Cir.1985) (affirming mail fraud convictions for scheme to submit false laboratory results on safety of medications; no requirement that it be shown that an actual mailing took place as a reasonable juror could infer that the mailings took place). cert. denied, 476 U.S. 1183 (1986)."*

The district failed to apply Fed. R.Civ. P. 56; , R.56(d)(2) denying Neely Fed. R. Civ. P. 30; R.30(b)(6) discovery in its order denying discovery sanctions where Neely should have been allowed to pursue discovery on these issues. Other circuits have reversed on failure to allow more time for depositions before granting summary judgment against the Plaintiff. Tonnas v. Stonebridge Life Insurance Co., 2003 WL 22430515 (5th Cir. Oct. 27, 2003). In Tonnas, since this turned on rule 56 issue, it was reviewed under the abuse of discretion standard of review. "A court ... may rely on a document to which the complaint refers if the document is central to the party's claims and its authenticity is not in question". Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)."

The dismissal of SOX denying reconsideration was erroneous. The affirmation was erroneous on appeal. This court should accept the writ, reverse and remand.

**b. Lower court[s] erred on Count three: Violation of the Anti-Retaliation Whistelblower Protections of the Dodd-Frank Act**

On reconsideration, Neely argued at the time he filed his Second Amended Complaint, the state of the law regarding prerequisites to filing a lawsuit was only that a concern must have been raised to the employer (Ap80a) Somers v. Digital Realty Trust, 850 F.3d 1045 (9th Cir. 2017)(employees need not file with SEC to be protected by Dodd Frank). On February 21, 2018, the Supreme Court reversed the decision of the Ninth Circuit and required those seeking protection under Dodd Frank to have filed a complaint with the SEC. Digital Realty Inc. v. Somers, 138 S.Ct. 767.

This fact satisfies the requirement for reconsideration of a change in legal authority. Allstate Insurance Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2010); McNamara v. Royal Bank of Scotland, 2013 U.S. Dist. LEXIS 66516 (U.S.D.C. So.Cal.). In McNamara, the court specifically held that an intervening change in the controlling law is an appropriate ground for granting reconsideration, as long as it is binding precedent, citing Kona Enters. Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

Clearly, the decision of the Supreme Court in Somers is binding precedent that changed the law regarding what a whistleblower must do as a prerequisite to bringing a Dodd Frank claim in federal court. Accordingly, reconsideration is appropriate. Consistent with the Supreme Court decision, Plaintiff has now filed a complaint with the SEC within the statutory time limits.[12] (Attached to Michael Neely Declaration). This electronic filing constitutes a "new fact[] ... which could not have been brought to its attention earlier with reasonable diligence." LCR 7(h). The court should of granted Neely's reconsideration re-instating his Dodd Frank claim on the pretense he satisfied the Somers requirement by filing with OSHA and the SEC.

On appeal, Neely's arguments followed suit to his reconsideration to the district furthering Sarbanes-Oxley, Dodd-Frank was passed in the wake of a financial scandal — the subprime mortgage bubble and subsequent market collapse of 2008. See Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018). The Act provided new incentives and employment protections for whistleblowers by adding Section 21F to the Securities Exchange Act of 1934. Id. The Act defines a "whistleblower" as "any individual who provides ... information relating to a violation of the Securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). To protect

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[12] Pursuant to SOX, the statute of limitations for federal securities fraud claims is five years from the time of the violation. 28 U.S.C.S. §1658(b); *Senn v. Hickey*, 2006 U.S. Dist. LEXIS 46332.

whistleblowers from retaliation, Section 21F provides:

*No employer may discharge ... or in any other manner discriminate against, a whistleblower in the terms and conditions of employment ... because of any lawful act done by the whistleblower: (i) in providing information to the [SEC] in accordance with this section; [or] (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002....*

Id. § 78u-6(h)(1)(A). The circuit Court has taken position that individuals who were fired after making internal disclosures of alleged unlawful activity were protected under the Act even if no complaint was made to the SEC, a determination ultimately rejected by the Supreme Court. Somers v. Digital Realty Tr. Inc., 850 F.3d 1045 (9th Cir. 2017) revd. 138 S.Ct. 767 (2018), on remand 886 F.3d 1300 (9th Cir. 2018). Based on Circuit precedent at the time, and Erhart v. Bofi Holding, Inc., 269 F.Supp.3d 1059 (S.D. Calif. 2017), the original complaint omitted an allegation of reporting to the SEC.

Here, Neely had made proper complaint to the and on a 12(b)(6) motion to dismiss "a plaintiff may supplement the complaint with factual narration in an affidavit or brief. If the extra assertions make out a claim, then the complaint stands." Albiero v. City of Kankakee, 122 F.3d 417, 419 (7th Cir. 1997); see also Smith v. Dart, 803 F.3d 304, 311 (7th Cir. 2015); Gutierrez v. Peters, 111 F.3d 1364, 1367 n.2 (7th Cir. 1997) ("[F]acts alleged in a brief in opposition to a motion to dismiss . . . as well as factual allegations contained in other court filings of a pro se plaintiff may be considered when evaluating the sufficiency of a complaint so long as they are consistent with the allegations of the complaint.").

The SEC complaint was a matter of which judicial notice could be taken. See Dreiling v. Am. Express Co., 458 F.3d 942, 946 n. 2 (9th Cir.2006) (Courts, including this Court, "may consider documents referred to in the complaint or any matter subject to judicial notice, such as SEC filings.").

On en banc, Neely argued the circuit overlook the Supreme Court's opinion in Somer to affirm the

lower courts reconsideration of Neely's SOX and Dodd Frank claims, and dismissed his case, but the Somer decision does not favor this court[s] judgment against Neely (See Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 778 (2018)) [emphasized]. This panel overlooks many facts that differentiate Somer to Neely's whistleblowing SOX under the law.

First, Somer did not file a SOX or Dodd Frank complaint respectively to the DOL-OSHA or SEC to qualify him under 15 U.S.C. §78u–6 , he only brought a case against his employer under a Dodd Frank claim.

Here, Neely filed a SOX and AIR21 complaint to the Department of Labor – OSHA (DOL OSHA) within the statute of limitations, while still employed with Boeing that qualifies him under 15 U.S.C. §78u–6. Neely entered "protective activity" prior to Boeing's retaliatory actions taken against him (Ap 389a:#16-18; Ap388a:#12-13, Ap397a:#36-37 under SOX, Ap400a:#53 under AIR21; Ap404a:#74-75 under Dodd Frank; and, Ap407a"#96 under Retaliation Age Discrimination).

SOX and AIR21 provision protected activity affirmed by the Supreme Court in Somer (Id, p.1 & 2). Neely is a qualified Dodd Frank Whistleblower because he provided "original information" under 15 U.S.C.§78u–6(a)(3) of a "related action" [his SOX complaint] under 15 U.S.C.§78u–6(a)(5) to the Commission under 15 U.S.C.§78u–6(a)(6) [timely under protected activity of his SOX][13] alleging violations of the "securities laws" under 15 U.S.C.§ 78c(a)(47) which SOX is inclusive.[14] The DOL for SOX is the "appropriate regulatory authority" under

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[13] *"...the court found that the plaintiff's SOX complaint to OSHA was timely under the post-Dodd-Frank Act 180-day filing timeframe, because he the plaintiff "filed both his whistleblower complaint with the Secretary and his civil complaint with this Court after the 2010 amendments went into effect..." Ashmore v. CGI Group Inc. , No. 11 Civ. 8611, 2012 WL 2148899 (S.D.N.Y. June 12, 2012)*

[14] *For SOX complaints, "The Secretary of Labor has delegated responsibility for receiving and investigating whistleblower complaints to OSHA, an agency within the Department of Labor. See Day v. Staples, 555 F.3d 42, 53 n.4 (1st Cir.2009); 29 C.F.R. § 1980.103(c)."*

15 U.S.C.§78u–6 (h)(2)(D)(i)(II). Neely's SOX complaints qualifies under 15 U.S.C.§78u–6(h)(1)(A)(iii) for protection of Whistleblowers prohibition against retaliation also affirmed by the Supreme Court in Somers. Neely enforced the action under 15 U.S.C.§78u–6(h)(1)(B) bringing suit to the appropriate district court of the United States seeking relief provided under 15 U.S.C.§78u–6(h)(1)(C). "A whistleblower, so defined, is eligible for an award if original information he or she provides to the SEC leads to a successful enforcement action under 15 U.S.C §78u–6(b)–(g). And, most relevant here, a whistleblower is protected from retaliation for, inter alia, making disclosures that are required or protected under Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation proscription at 18 U. S. C. §1513(e), or any other law subject to the SEC's jurisdiction. 15 U. S. C. §78u–6(h)(1)(A)(iii) [emphasized] (IdS. Ct Somers ,p. 1). This panel overlooked Neely's appeal opening brief emphasizing Dodd-Frank claims under 15 U.S.C. §§ 78u-6(h)(l)(A)(iii) "*No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower...in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002*".

Neely's reconsideration had not been adjudicated when he filed summary judgment. Neely articulated in his reconsideration referencing his second amended complaint he raised alleged fraud to his supervision entering protected activity covered under SOX months prior to filing his "internal" complaints; before Boeing's disciplinary actions and poor performance retaliations; thereafter filing a SOX complaint of fraud while still employed [emphasized panel misunderstood Neely's referencing "safety" in the context of presenting the issues in his initial appeal brief "...Even Defendant's exhibits belied the assertion that Neely's complaint was only about safety. It says: "*Complainant . . . filed an internal complaint with Respondent [Boeing] about*

*fraudulent concealment and misuse of the risk system*" (Ap74a). Neely clearly articulated in his second amended complaint and reconsideration that he "observed" and "made reports" prior to raising internal SOX complaints to Boeing management re-iterating facts in his SAC (AP-385A).

Neely clearly articulated that Boeing's management concealed the safety issues through manipulating the corporate risk system to prevent the exposure of technical, cost and schedule impacts in its reporting's up through the companies enterprise risk system exposing to SEC reporting's and shareholders. When a Whistleblower voluntarily brings a related judicial or administrative action to the commission protected under SOX, he/she is also qualified for award under 15 U.S.C.§78u–6(b)(1);

*"..In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission..."*

Neely clearly articulated an objective reasonable belief that his complaints "definitively and specifically relate[d] to" fraud and satisfied the Van Asdale requirement that his "communications ... definitively and specifically relate[d] to [one] of the listed categories of fraud or securities violations under 18 U.S.C. §1514A(a)(1). Van Asdale v. Int'l Game Tech. 577 F.3d 989, 996 (9th Cir. 2009).[15] The lower court should of remanded the SOX and Dodd Frank claims to trial.

**4. Lower court[s] erred on Count four: Age Discrimination in Violation of the ADEA and Count eight: Age Discrimination in Violation of RCW 49.60.180**

Neely claimed Age Discrimination under Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., the Washington Law Against Discrimination

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[15] "*...there certainly is the inference of such reporting – a reasonable inference to which the court must give deference. Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007)."

("WLAD"), Wash. Rev. Code §§ 49.60 et seq. (Ap405a:#85-93, Ap409a"#113-#121). These claims were not challenged by the Respondent at motion to dismiss (Ap55a), rather at summary judgment (Ap80a-86a). The district summary judgment order set its standard for review "*To overcome summary judgment [on a WLAD claim], a plaintiff needs to show only that a reasonable jury could find that the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions." Scrivener v. Clark Coll., 334 P.3d 541, 545 (Wash. 2014).* The lower courts only reviewed one of many "direct evidence" (Ap80a).

The lower court must not weigh the truth on summary judgment *Id Anderson, 477 U.S. at 249", and Id Scott v. Harris, 550 U.S. 372, 380 (2007).* The lower court order stated *Plaintiff has not demonstrated that such discriminatory attitude or motive played a significant or substantial role in Defendant's termination of his employment, the adverse employment action underlying Plaintiff's age discrimination claims"* (Ap81a) is in error where the lower court overlooked many circumstantial and direct evidence Neely offered that established prima facie case of age discrimination (Ap125a:#3, Ap130a:#7, Ap131a:#9, #10, #11, Ap132a:#12, Ap132a:#14, Ap134a:#17, Ap135a:#19, Ap136a:#23, Ap238a(b), Ap139a, Ap141a:#26, and Ap145a.

The lower court then cites *McDonnell Douglas Framework* as part of its standard review for summary judgment, but here the lower court[s] erred overlooking Neely's additional direct evidence that demonstrated such discriminatory attitude or motive played a significant or substantial role in Defendant's termination of his employment;

i. The lower court substantiated Neely was in protected class and established that he was discharged from his employment. Neely offered substantial direct evidence of a discriminatory motive *Id France,* overlooked by the lower courts (Ap83a-84a).

ii. Neely entered evidence that Boeing gave him a Age Comparative document at termination that states "..*under the Older Workers Benefit Protection*

*Act to enable to decide whether to release any legal claims you may have under the federal Age Discrimination in Employment Act.*" (136a#23)
This direct evidence shows that Boeing discharge Neely under circumstances giving rise to an inference of age discrimination *Id Coleman.* It also brings rise that Boeing held a discriminatory attitude or motive toward the protected class, Neely, exposing Boeing's attitude and motive was a significant and substantial factor in an employment decision. *Id France,* and that age was the but-for cause of the defendant's challenged employment action. *Id Gross*

iii. Neely evidenced at summary he filed Boeing internal ethics complaints (Ap130a:#7), meets with Boeing corporate HR about age discrimination (Ap131a:#9), discloses his age discrimination complaints to his supervisor (Ap132a:#12) and EEOC complaints entering protected activity (Ap132a:#13), purposely investigated by Boeing interviewing his supervisor, before he was terminated (Ap140a:#25).

iv. Neely evidenced at summary he was replaced by a substantially younger employee with equal or inferior qualifications (Ap126a:#3, Ap131a:#10-#11, Ap134a:#17, and 138a(b). *Id Palmer, 794 F.2d at 537*

v. Neely articulated in summary response he filed an "*EEOC external Age Discrimination and Retaliation Complaint...The investigation of this violation would continue past his wrongful termination March 25 2016. During this time The Boeing Company was fully aware of the case and ignored Neely's Protective rights. The EEOC released a "Right to Sue" letter in mid 2016 where Neely filed this case on July 7, 2016".* (Ap132a:#13)

vi. Neely offered substantial evidence at summary he was performing his job in a satisfactory presenting his past thirty three year long exemplary employment history (Ap119a(A)), until his last year at Boeing when he whistleblew safety issues (Ap123a:#2) and age discrimination. Neely evidenced the supervisors that violated safety commended his performance during the last year of his employment (Ap131a:#10, Ap136a:#20-#21), until they began interacting with the age discriminating supervisor

(Ap128a:#5) who had ultimate authority to terminate Neely (Ap136a:#23). Neely meets the requirements under *Palmer quoting Douglas Id.* Neely also evidenced Boeing was retaliating many times throughout his last year after entering protected activity (Ap128a:#5, Ap130a:#8, Ap131a:#11, Ap132a:#13-#14, Ap133a:#15, Ap134a:#16-#17, Ap136a:#23, Ap140a:#25), to include a poor performance review that became a component of the termination (Ap135a:#19).[16] Neely also evidenced that Boeing's Safety violation supervisors required his skills beyond the termination point and that others not in the protected class were treated more favorably (Ap136a:#20). *Id Coleman.*

For all the above, Neely proved through his evidence at summary that the discharge occurred under circumstances giving rise to an inference of age discrimination *Id Coleman,* and was directly tied to the adverse employment decision *Id France.* Neely evidenced age discrimination occurred; he filed age discrimination complaints to Boeing's internal EEO; filed age discrimination complaints to EEOC; and was age discriminated at the time of termination while under protected activity.

Neely clearly satisfied all the elements proving a prima facie age discrimination claim under the *McDonnell Douglas Framework Id and Palmer Id* to survive summary judgment while proving a genuine dispute existed to the material facts for a reasonable jury to weigh the evidence at trial.

5. **Retaliation and Wrongful Discharge**

a. **Lower court[s] erred on Count five: Retaliation in Violation of the ADEA: Count eight: Retaliation in Violation of RCW 49.60.180: and Count seven: Wrongful Discharge in Violation of Public Policy**

Neely has established causal connection and prima facie age discrimination above to this court.

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[16] *"[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007). And "Importantly, a court must not "weigh the evidence and determine the truth of the matter" in deciding a motion for summary judgment. Id Anderson, 477 U.S. at 249"*

Retaliation in Violation of the ADEA and RCW 49.60.1800 become several prongs in the Wrongful Discharge in Violation of Public Policy claim. Neely now establishes to this court direct evidence that his whistleblowing of Safety and SOX combined with Age discrimination demonstrates retaliatory and discriminatory attitude with motive that played a significant and substantial role in Boeings termination of Neely's employment.

At motion to dismiss, the lower court denied Boeings dismissal of Neely's wrongful termination claims under Washington law (Ap66a:#4-68a) *Neely v. Boeing Co., CASE NO. C16-1791 RAJ (W.D. Wash. May. 15, 2018)* (Ap66a-68a), yet the district erroneously granted summary judgment in contradiction to the law (Ap92a(D)).

The tort of wrongful termination in violation of public policy is a narrow exception to the at-will doctrine. See White v. State, 929 P.2d 396, 407 (Wash. 1997). "To state a cause of action [for wrongful discharge in violation of public policy], the plaintiff must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy . . . [that] is clearly legislatively or judicially recognized." Becker v. Cmty. Health Sys., Inc., 359 P.3d 746, 749 (Wash. 2015) (citing Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984)),

Boeing moved for summary judgment on Neely's claim for wrongful discharge in violation of the public policy for age discrimination only, set forth by the WLAD.[17] The Washington legislature has clearly recognized the public policy against "discharg[ing] . . . any person from employment because of age . . . ." See Wash. Rev. Code § 49.60.180(2).

At summary decision, the lower court proffered Neely had not offered evidence demonstrating that there is a genuine dispute of material fact about whether he was terminated because of his age in

[17] Neely's SAC (AP-385A) list a variety of statutes as bases for his wrongful discharge in violation of public policy claim. The lower court hinges its decision based on Boeing's recount of Neely's deposition that public policy claims solely premised on WALD only is in error

violation of the WLAD, but as Neely has shown the in section 4 of this writ, the lower court wholly overlook Neely's response[s] erred in its decision. Similarly, the lower court stated Neely had not established that a genuine dispute of material fact exists on whether the Defendant retaliated against him after he filed age discrimination complaints with Defendant's ethics department and the EEOC.

First, Neely has indeed demonstrated discriminatory motive, and that such discriminatory attitude played a significant and substantial role in his termination, and that the adverse employment action underlined Neely's age discrimination claims.

Second, the lower court dismisses wrongful discharge in violation of public policy solely on the premise of WALD for age discrimination only, even though it 1) broke the federal rules procedures allowing 130 days to adjudicate the SOX and Dodd-Frank whistleblowing reconsideration then adjudicating only days prior to summary decision, and 2) it dismissed AIR-21 whistleblowing claim , but that does not matter under the wrongful discharge in violation of public policy law. Under the Wrongful Discharge in Violation of Public Policy, a whistleblower does not have to file specific whistleblower claim[a] of a violation when he or she files a claim of wrongful discharge in violation of public policy. Here the lower court erred in its decision on the sole premise of age discrimination (that fails), error in its summary decision standard review on his whistleblowing.

The lower court erred in recognizing the very laws it cited in its own order "*While Plaintiff's federal whistleblowing claims have been dismissed, Plaintiff need not prove that he has a valid whistleblowing claim under federal law in order to state a claim for wrongful discharge, only that his termination may have been motivated by reasons that violate the public policy of protecting whistleblowers. See Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089 (1984). The definition of "whistleblowing" under federal law is not the sole determinant of whether Plaintiff can be considered a "whistleblower" within the bounds of his wrongful*

*discharge claim. Where, as here, the Court must credit all reasonable inferences arising from Plaintiff's allegations, his contention that his termination was motivated by his alleged whistleblowing activities is sufficient to state a claim for wrongful discharge under Washington law. Boeing's Motion to Dismiss Count Seven of the SAC (AP-385A) is DENIED.*", which still stands (Ap664a-68a).

Third, at appeal, Neely argued that other court[s] have made decisions that conflict with this lower court's decision Ellis v. City of Seattle, 142 Wash.2d 450, 13 P.3d 1065 (2000) and Green v. Ralee Eng'g Co., 19 Cal. 4th 66 78 Cal.Rptr.2d 16, 960 P.2d 1046 (1998), which has been cited by this Court in Rivera v. National R.R. Passenger Corp., 331 F.3d 1074, 1080 (9th Cir. 2003), and the Washington Supreme Court in Cent. Puget Sound Reg'l Transit Auth. v. WR-Sri 120th N. LLC, 191 Wash.2d 223, 422 P.3d 891, 909 (2018) and Danny v. Laidlaw Transit Servs., 165 Wash. 2d 200, 193 P.3d 128, 151 (2008) demonstrate that public safety is a public policy concern (Ap443a).

Forth, the U.S.DOL ALJ adjudicated Neely in fact was a whistleblower in his decision (Ap231a, Ex9261a Solicitor Amicus).

Indeed, in *Green Id*, the Court held that an employee who reported the sale of defective aircraft parts did state a claim for wrongful discharge in violation of public policy because his action was directly connected to federal regulation of air safety.

Neely indeed pled and proved that his termination was motivated not only by age discrimination, but whistleblowing in violation of the mandate of public policy set forth by the WLAD. See Becker, 359 P.3d at 749. As such, the facts substantiate this courts reason to overturn and remand his SOX and Dodd-Frank claims as well, will substantiate this courts reverse and remand the Wrongful Discharge in Violation of Public Policy claims.

## 6. Lower court[s] summary decisions are erroneous

The lower courts decisions on summary were erroneous. The administrative decisions denying Neely relief were erroneous.

## CONCLUSION

Petitioner respectfully request the Supreme Court grant his writ of certiorari.

Respectfully submitted.

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