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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA

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10 Gregory S. Hawn, Michael R. Prince,  
and Aric A. Aldrich,

No. CV 04-2954-PHX-SMM

11

Plaintiffs,

**ORDER**

12

v.

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Executive Jet Management, Inc.,

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Defendant.

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Currently pending before the Court are Defendant Executive Jet Management, Inc.’s (“EJM”) Motion for Summary Judgment (Doc. 123) filed pursuant to Federal Rule of Civil Procedure 56, and Plaintiffs’ Motion Requesting Two Statement of Facts Be Deemed Non-Admitted (Doc. 148). The motions are fully briefed and ripe for consideration.

20

As a preliminary matter, the Court will address Plaintiffs’ Motion Requesting Two Statement of Facts Be Deemed Non-Admitted (Doc. 148). Plaintiffs request that the Court issue an order finding that Plaintiffs’ responses to Statements of Fact 135 and 139 in Support of Defendant’s Motion for Summary Judgment be recognized as disputed, rather than admitted, based on the fact that Plaintiffs’ counsel inadvertently and incorrectly asserted that the statements were not in dispute. Plaintiffs’ counsel contends that they did not “intend[] to suggest to the Court that Plaintiffs did not dispute the substance of the testimony itself or the credibility of the deponents.”

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1 The two statements of fact pertain to the personal beliefs of EJM Executive Vice  
2 President Richard Williams and the personal opinion of EJM President Al Pod and were  
3 drawn directly from their respective depositions. The Court finds that despite their apparent  
4 effort to remedy this situation, Plaintiffs have failed to produce evidence disputing the  
5 specific deposition testimony. Rather, Plaintiffs submitted to the Court an affidavit of  
6 Plaintiffs' counsel attesting to her intentions in preparing the responses. Providing an  
7 affidavit of Plaintiffs' counsel does not create a material dispute regarding the specific  
8 statements of fact, it merely substantiates counsel's attestation regarding her own conduct,  
9 rather than calling into question the credibility of the deponents or substance of the  
10 statements of fact in question. Thus, the Court is left with no basis to justify issuing an order  
11 such as the order requested by Plaintiffs. Therefore, Plaintiffs' motion (Doc. 148) is hereby  
12 **DENIED**. Moreover, a Court cannot judge the credibility of a witness when ruling on a  
13 motion for summary judgment, credibility is a matter for a jury to decide. *Spring Co. v. Edgar*,  
14 99 U.S. 645, 658 (October Term, 1878).

### 15 PROCEDURAL HISTORY

16 This case arises out of EJM's decision to discharge Plaintiffs from their employment  
17 at EJM. EJM contends that there are no genuine issues of material fact in this case and EJM  
18 is entitled to judgment as a matter of law.<sup>1</sup> Plaintiffs, on the other hand, contend that they  
19 would not have been discharged for engaging in inappropriate conduct toward a flight  
20 attendant had Plaintiffs been non-Caucasian employees, female employees, and/or employees  
21 of non-American descent.

22 On December 21, 2004, Plaintiffs Michael R. Prince ("Prince"), Aric A. Aldrich  
23 ("Aldrich"), and Gregory S. Hawn ("Hawn")(collectively referred to as "Plaintiffs") filed a  
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25 <sup>1</sup> EJM asserts that the undisputed evidence illustrates that it did not discriminate  
26 against Plaintiffs on the basis of gender, race, or national origin in terminating Plaintiffs'  
27 employment. Instead, EJM steadfastly asserts that Plaintiffs were terminated because  
28 they engaged in inappropriate conduct in the workplace in violation of EJM policy.

1 Complaint against Defendant EJM. Therein, Plaintiffs allege that they were discriminated  
2 against based on their gender, race, and national origin with respect to their discharge and  
3 as such seek relief under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C.  
4 § 2000e, et seq. and 42 U.S.C. § 1981.

### 5 **BACKGROUND**

6 Plaintiffs were all formerly employed as pilots for EJM. Prior to their employment,  
7 Plaintiffs had previously never worked with flight attendants.

8 Plaintiffs' terminations all came subsequent to allegations of sexual harassment made  
9 by another EJM employee, flight attendant Robyn McCrea<sup>2</sup> (McCrea). On or about January  
10 6, 2003, McCrea lodged a verbal complaint regarding conduct allegedly engaged in by  
11 Aldrich during a two day training seminar which occurred on January 3<sup>rd</sup> and 4<sup>th</sup> of 2003. The  
12 complaint was investigated internally, and Aldrich was disciplined on or about January 14,  
13 2003. On the same date, EJM received a 14-page complaint from McCrea alleging additional  
14 incidents of sexual harassment against Aldrich, as well as Prince and Hawn. Therein,  
15 McCrea alleged that she was subjected to hostile work environment sexual harassment based  
16 on the alleged actions of all three Plaintiffs. Thereafter, EJM hired a third party investigator  
17 to commence an investigation into McCrea's allegations.<sup>3</sup>

18 Executive Jet's President, Albert C. Pod, solicited the opinions of senior management  
19 who had reviewed the investigator's report. Consequently, Pod determined that McCrea was  
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21 <sup>2</sup>Plaintiffs also refer to Ms. McCrea as McCrae and McRae. (Doc. 141)

22  
23 <sup>3</sup>The investigator, Jim Sterling, compiled his factual findings into a detailed report  
24 (“Sterling Report”) that was presented to EJM’s senior management. The report  
25 addressed McCrea’s allegations against Plaintiffs; included their rebuttal responses; and  
26 included allegations of misconduct lodged by Plaintiffs against McCrea. The Sterling  
27 Report did not contain factual findings of misconduct by non-Caucasian, female, or non-  
28 American employees.

1 “more credible than not” in her allegations against Plaintiffs and issued instructions for the  
2 discharge of Plaintiffs. The terminations took place on April 18, 2003, and were reportedly  
3 for Plaintiffs’ “inappropriate behavior.” During the course of EJM's investigation, McCrea  
4 filed a charge of discrimination with the EEOC. Approximately three months after Plaintiffs'  
5 termination, the EEOC's investigation into the same allegations of sexual harassment resulted  
6 in a determination against EJM for a violation of Title VII. The EEOC found merit in  
7 McCrea’s claim of hostile work environment sexual harassment.

8 Thereafter, on February 27, 2004 and March 2, 2004, Plaintiffs filed their charges of  
9 discrimination with the EEOC. The Commission dismissed the charges on September 22,  
10 2004. Notwithstanding the dismissal, Plaintiffs herein allege that they were discriminatorily  
11 discharged on the basis of gender, race, and national origin.

#### 12 **UNDISPUTED FACTS**

13 1. Executive Jet Management is engaged in the business of aircraft management and air  
14 charter operations.

15 2. Plaintiff Aric Aldrich was employed as a pilot by EJM from May 30, 2001 until April  
16 18, 2003.

17 3. Plaintiff Michael Prince was employed as a pilot by EJM from July 26, 1999 until  
18 April 18, 2003. [EJM’s Response to Prince’s First Request for Production]

19 4. Plaintiff Gregory Hawn (“Hawn”) was employed as a pilot by Executive Jet on the  
20 shuttle operations from February 3, 2002 until April 18, 2003. [EJM’s Response to Hawn’s  
21 First Request for Production]

22 5. On or about January 6, 2003, a flight attendant on the shuttle operations, Robyn  
23 McCrea, contacted her supervisor, Lead Flight Attendant Amy Jackson, with a complaint  
24 regarding Aldrich’s behavior. [Chakerian Dep.]

25 6. Jackson reported the conduct to Chief Pilot Chakerian:

26 [McCrea] told me that pilots are rude not just during training, but also at  
27 work. I asked her if it was all pilots she was referring to. She said, no –

1 specifically Aric Aldrich makes her uncomfortable when he discusses topics  
2 of a sexual nature and that he makes derogatory remarks toward women. She  
3 said that a few of the other pilots will sometimes join in, but that Aric  
4 [Aldrich] is the instigator. I asked her if she has told him that his comments  
5 make her uncomfortable. She said, yes she has told him numerous times, "I  
6 don't want to hear it, please stop." [Id.]

7  
8 7. McCrea further told Jackson that "this type of behavior is making her work  
9 environment uncomfortable to the point that she does not want to go to work if she is  
10 scheduled to fly with [Aldrich]." [Id.]

11  
12 8.. Executive Jet's Human Resources Manager, Cynthia Brusman, contacted Chakerian,  
13 "indicating that she had been contacted [by McCrea] and wanted to know what was going  
14 on" regarding the alleged conduct. [Chakerian Dep. at 14:14-17]

15  
16 9. During a conference call on or about January 6 or 7, 2003, with Vice President of  
17 Flight Operations Dan O'Neal, Director of Operations George Curtis, Brusman and  
18 Chakerian, it was decided that Brusman would speak with McCrea regarding the alleged  
19 conduct of Aldrich. [Chakerian Dep.]

20  
21 10. Chakerian was instructed to investigate the allegations made by McCrea against  
22 Aldrich. [Chakerian Dep. at 14:18-24]

23  
24 11. During the investigation, fellow EJM employee Stoffel reported that Prince raised the  
25 subject of animals and sex shows. [Chakerian Dep. at 65:15-19]

26  
27 12. With regard to the comment about animals and sex shows, Chakerian testified, "I  
28 believe what Mr. Aldrich had said was that he hadn't said that, and that Mr. Prince had said  
it." [Id. at 67:8-13]

13  
14 13. Meanwhile, Brusman spoke with McCrea about the allegations and asked McCrea to  
15 put them in writing and send them to her. [Brusman Dep. at 72:8-10]

16  
17 14. Chakerian then met with Brusman and EJM's President, Albert C. Pod, regarding the  
18 results of his investigation. [Brusman Dep. at 59:7-14]

19  
20 15. Brusman did not find Chakerian's report to be credible. According to her: "Based on  
21 what I had already heard from [McCrea], and what [Chakerian] was saying, my gut feeling  
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1 was it wasn't jiving, and that he was basically defending Aldrich. I didn't believe a word he  
2 said." [*Id.* at 59:18-25, 60:1-2]

3 16. Chakerian testified that Aldrich admitted that "he had joked around with the crew."  
4 [Chakerian Dep. at 79:10-16]

5 17. Chakerian and Aldrich also met with O'Neal and Curtis while they were in Cincinnati.  
6 [Chakerian Dep.]

7 18. According to Chakerian's testimony and a letter he wrote regarding the issue, during  
8 the meeting in O'Neal's office, O'Neal issued Aldrich a verbal warning. [*Id.*]

9 19. According to Chakerian:

10 Mr. Aldrich started the progressive disciplinary process in early January,  
11 2003 in Cincinnati by Mr. Dan O'Neal, Vice-President of Operations. George  
12 Curtis and I witnessed the counseling session and verbal warning he received  
13 for the behavior for which he is now being terminated. [*Id.*]

14 20. Chakerian testified that O'Neal admonished Aldrich:

15 You're in a leadership position now as lead of the Arizona domicile. And  
16 joking around and being part of the group takes on a different meaning when  
17 you're in a leadership position.... You just can't joke with your staff as being  
18 part of that staff. You have to be more discrete.  
19 [Chakerian Dep. at 39:21-25, 40:1-2]

20 21. On or about January 14, 2003, McCrea telefaxed written allegations to Brusman  
21 pursuant to the request of the Human Resources Manager. [Brusman Dep.]

22 22. Brusman took the document to Pod and they reviewed the additional allegations of  
23 harassment. [*Id.* at 76:11-17]

24 23. O'Neal called Pod, who indicated the Company had just received a 14- page telefax  
25 from McCrea with additional allegations of hostile environment involving Aldrich, including:

26 One evening at dinner with Aldrich, Tonti and EJM pilot Paul Moening,  
27 Aldrich made rude gestures across the table at McCrea, including  
28 "mimick[ing] oral sex with his tongue." [EJM'S Response to Prince's 3rd  
Request for Production ("Sterling Report")]

During a meal at Denny's Restaurant, Aldrich related to McCrea and Stoffel  
an incident about his prior employment with another company wherein a  
client "sent two naked hookers up to the cockpit and they sat on his lap." [*Id.*]

1 Aldrich asked McCrea whether she cleaned or touched her horse's penis, and  
2 then continued to talk about people "having sex with their horse." [Id.]

3 Aldrich made a remark to her regarding "tea bagging," in reference to oral  
4 sex. [Doc. #MP02658]

5 Aldrich referred to his wife as a "dirty bitch" or "dirty whore" and frequently  
6 discussed "the fact that they never ha[d] sex anymore...." [Doc. #MP02646]

7 24. McCrea also claimed that Prince engaged in conduct creating a hostile work  
8 environment, including:

9 While returning from lunch one day, Prince commented that "he sure would  
10 love to suck on Pamela Anderson's tits, and how does she breastfeed her kid  
11 with those?" [Doc. #MP02649]

12 Sending McCrea e-mail messages of a sexual nature or sexual in content.  
13 [Doc. #MP02670-MP02720]

14 Discussing women having sex with donkeys. [Doc. #MP02655]

15 Discussing a video about "a woman tied up, acting like she enjoyed it, being  
16 gang raped and assaulted." [Id.]

17 Telling dirty jokes, including one with a punch line involving testicles. [Doc.  
18 #MP02656]

19 While seated next to Prince in an airport, he signaled to her by pointing his  
20 finger to his groin area while watching a suggestively dressed woman pass  
21 by to imply that he was having an erection or that looking at the woman gave  
22 him such an idea. [Doc. #MP02657]

23 25. McCrea further claimed that Hawn engaged in conduct creating a hostile work  
24 environment, including:

25 Pinching her on the buttocks. [Doc. #MP02650]

26 Discussing with Aldrich in her presence "the merits of a woman who claims  
27 to have sex with hundreds of men." [Id.]

28 Encouraging an EJM employee to lift up her shirt and "flash" him because  
it was his birthday. McCrea confronted Hawn in the crew lounge and in the  
presence of Stoffel, among others, told him that his conduct was  
"inappropriate and could be considered as sexual harassment." [Doc.  
#MP02650-51]

Telling dirty jokes, including a joke regarding oral sex. [Doc. #MP02656]

Making a remark to her regarding "tea bagging" in reference to oral sex.

1 [Doc. #MP02658]

2 26. On January 27, 2003, McCrea filed a Charge of Discrimination alleging hostile work  
3 environment with the Equal Employment Opportunity Commission (“EEOC” or  
4 “Commission”). [Brusman Dep. at 113:11-19]

5 27. Executive Jet retained the services of International Security Associates (“ISA”) to  
6 investigate the new allegations of hostile work environment by McCrea. [Pod Dep. at 29:1-6]

7 28. James (“Jim”) Sterling was assigned to the fact-finding investigation. During the  
8 period from January 31 through March 24, 2003, Sterling interviewed 21 individuals,  
9 including McCrea, a third party trainer, and current and former EJM employees. [Sterling  
10 Report]

11 29. At the outset of his interview with Prince, Sterling noted in his report that “Capt.  
12 Prince appeared to be very nervous throughout the interview. He excused himself twice  
13 during the interview to go to the bathroom. The first time was shortly after we started.” [Doc.  
14 #MP02599]

15 30. Sterling also reported that Prince was not forthcoming with revealing a certain e-mail  
16 address at the outset of the interview. [*Id.*]

17 31. Prince reported to Sterling that McCrea “hit him on the butt twice.” [Doc. #MP02603]

18 32. Sterling continued: “I asked him if he reported it to anyone and he said no.” [*Id.*]

19 33. Sterling further reported: “I asked him if there was anything else that he wanted to add  
20 and he replied no, but I do have a question for you. I said okay, and he asked me if he should  
21 start looking for another job? I explained to him that was not my call. I shared with him that  
22 the company would review my report and that they would decide what if anything should be  
23 done.” [*Id.*]

24 34. Subsequent to the meeting with Sterling, Prince became concerned that his job was  
25 in jeopardy based on the content of the meeting and the nature of the questions asked by  
26 Sterling. [Prince Dep. at 100:22-25, 101:2]

27

28

1 35. Aldrich and Sterling met for approximately three hours. [Aldrich Dep. at 92:20-21 ]

2 36. During the meeting, Aldrich had an opportunity to rebut McCrea’s allegations. [*Id.*  
3 at 94:8-18]

4 37. During his interview, Aldrich denied relating a story to McCrea and Stoffel wherein  
5 “two naked hookers [came] up front and [sat] on his lap.” [Doc. #MP02604]

6 38. Sterling reported: “When I asked him to describe what he said to McCrea he replied:  
7 ‘he was relating a situation where a customer had two (2) strippers flying with him and that  
8 they said hello to him, that’s all.’” [*Id.*]

9 39. Sterling reported that Aldrich admitted to telling “dirty jokes” in the cockpit. [Doc.  
10 #MP02605]

11 40. Sterling reported: “I asked him if this was documented and he said no. I then asked  
12 why none of these ‘talks’ were ever documented? He explained that Mr. Chakerian had told  
13 him ‘to talk to them, not to write anything down.’” [*Id.*]

14 41. At the conclusion of the interviews, Sterling presented a written report of the fact-  
15 finding investigation, with exhibits, to EJM. [Doc. #MP02576-MP02745]

16 42. Brusman read the report. [Brusman Dep. at 79:25, 80:1] She was of the opinion that  
17 Prince, Hawn and Aldrich should be terminated. [Brusman Dep. at 49:12-16, 66:3-5, 66:15-  
18 25, 67:1; Pod Dep. at 15:17-25]

19 43. Vice President O’Neal was also of the opinion that Prince, Hawn, and Aldrich should  
20 be terminated. [Pod Dep. at 14:8-25]

21 44. Executive Vice President Richard Williams read the Sterling Report and believed that  
22 a majority of McCrea’s allegations had been substantiated; that sexual harassment had  
23 occurred; and that the Plaintiffs should be terminated. [*Id.* at 12:17-19, 13:10-18]

24 45. President Al Pod inquired of Brusman and/or O’Neal “how they saw the facts.” [Pod  
25 Dep. at 25:4-25, 26:1-12] He also asked Williams for his opinion. [Williams Dep. at 11:17-  
26  
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1 18] Pod, likewise, read Sterling's report and was of the opinion that McCrea was "[m]ore  
2 credible than not." [Pod Dep. at 8:16-17; 33:14-19]

3 46. Pod decided to terminate Prince, Hawn and Aldrich. [Response No. 9, EJM's  
4 Responses to Prince's First Set of Interrogatories; Response No. 1, EJM's Responses to  
5 Hawn's First Set of Interrogatories; Response No. 1, EJM's Responses to Aldrich's First Set  
6 of Interrogatories]

7 47. On Friday, April 18, 2003 Pod instructed Hal Raber, Director of Operations, to  
8 discharge Prince, Hawn and Aldrich. [Hal Raber Dep. at 7:4-10, 17:15-20]

9 48. Pod did not discuss with Raber the nature of the allegations against Prince, Hawn,  
10 and/or Aldrich. [*Id.* at 16:22-25, 17:1-5, 17:21-25]

11 49. Raber traveled to Phoenix on Sunday, met with each pilot, and advised each of his  
12 termination from EJM. [*Id.* at 16:16-21; Prince Dep. at 101:3-25, 102:1-21; Hawn Dep. at  
13 39:8-23; Aldrich Dep. at 105:1-12]

14 50. Prince testified that he understood that his termination was based on the allegations  
15 of Robyn McCrea: "I figured it had to do something with the investigation and the  
16 investigation led me to believe Robyn McCrea." [*Id.* at 102:10-21]<sup>4</sup>

17 51. The termination letters read, in part:

18 It has been determined that you have exhibited job behaviors that are in  
19 violation of the Executive Jet Management Employee Handbook Policy #126.  
20 Therefore your employment with Executive Jet Management is terminated,  
21 effective immediately. [Prince Dep.; Hawn Dep.; Aldrich Dep.]

22 52. On July 16, 2003, the EEOC issued a determination finding merit to McCrea's charge  
23 of discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of  
24 1964. According to the Commission:

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25  
26 <sup>4</sup>Prince also testified that he believes he was terminated because he did not fall  
27 into a traditional protected class because of his age and because he is a "white man."  
[Prince Dep. at 62:1-25, 64:7-23, 65:19-66:4.]

1 Examination of the evidence revealed that Respondent fostered a hostile work  
2 environment created by demeaning, crude, derogatory sex-based remarks and  
3 touching by male managers and employees. Despite Respondent's denial, the  
4 evidence shows that the charging party was required to work in a hostile  
5 environment in which derogatory, sex-based vulgar comments were regularly  
6 used and inappropriate touching occurred...\*\*\* [*Id.*]

7 53. Plaintiffs identify their race as "Caucasian." [Complaint ¶7, Docket No. 1, filed  
8 December 21, 2004.]

9 54. Prince testified that he did "not necessarily" believe that EJM targeted him for  
10 discharge because he is Caucasian. [Prince Dep. at 64:22-25, 65:2-3]<sup>5</sup>

11 55. Prince further testified that he did not know what EJM's motivation was in  
12 terminating his employment. [*Id.* 65:10-11]

13 56. Hawn testified that he believed he was terminated by EJM "to let EJM wash their  
14 hands of the situation and make themselves right in the eyes of the EEOC," and "to appease  
15 the EEOC of the lawsuit by Robin [sic] McCrea." [Hawn Dep. at 34:10-18, 105:16-20]

16 57. Aldrich testified that he "was terminated due to the sexual harassment charges."  
17 [Aldrich Dep. at 102:20-23]

18 58. Prince identified his national origin as "born in the United States." [Prince Dep. at  
19 62:15-16]

20 59. Hawn identified his national origin as "American." [Hawn Dep. at 104:20-25, 105:1]

21 60. Aldrich identified his national origin as "Caucasian American of European descent."  
22 [Aldrich's Responses to EJM's First Set of Interrogatories, Requests for Admissions and  
23 Production of Documents]

24 61. Brusman testified that if an employee sends a sexually explicit e-mail message from  
25 his/her home account to another employee's home account, EJM does not become involved  
26 in the matter because the Company "can't regulate what they do at home." [Brusman Dep.

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27 <sup>5</sup>Prince also testified that he believes he was terminated because he did not fall  
28 into a traditional protected class because of his age and because he is a "white man."  
[Prince Dep. at 62:1-25, 64:7-23, 65:19-66:4.]

1 at 31:3-8] However, if the recipient of the e-mail complains to EJM, the Company  
2 investigates the matter, “even if [the e-mail is] sent to their home.” [*Id.* at 31:22-24]

3 62. Executive Jet’s business e-mail accounts end with “EJMJets.com” or “NetJets.com.”  
4 [Brusman Dep. at 119:14-16]

5 63. Kropoff forwarded e-mail messages identified by Jim Sterling in his report as “Exhibit  
6 #9” through “Exhibit #19” to Prince, among others. [Doc. #MP02670-MP02720].

7 64. Prince subsequently forwarded the emails to McCrea. [*Id.*]

8 65. McCrea provided these e-mail messages to Sterling during his investigation into her  
9 complaints of sexual harassment. [Doc. # MPO2594-MP02595]

10 66. Kropoff used the following e-mail account when forwarding the e-mail messages to  
11 Prince: “Brandy Kropoff”<bmwaters2002@yahoo.com [Doc. # MP02671, MP02675,  
12 MP02681, MP02688, MP02693, MP02698, MP02702, MP02706, MP02709, MP02713,  
13 MP02717]

14 67. Prince did not complain to EJM management about the e-mails he received from  
15 Kropoff. [Prince Dep. at 20:16-20]

16 68. Prince testified that he also received e-mail messages from Leihgeber, although he  
17 could not recall the content of the e-mails. [Prince Dep. at 18:20-25, 19:1-21]

18 69. Prince testified that he did not report Leihgeber’s e-mails until he was interviewed by  
19 Sterling. [*Id.* at 20:21-25, 21:1-7]

20 70. Prince testified that O’Neill told a joke during a training event with a punch line that  
21 referred to testicles; specifically, “If ice is to icicle, what is test to?” [Prince Dep. at 32:8-25,  
22 33:1-23]

23 71. Prince also testified “[O’Neill] told me I couldn’t handle her, meaning sexually.” [*Id.*  
24 at 34:15-24]

25 72. Prince did not complain to EJM management about O’Neill’s joke or comment. [*Id.*  
26 at 35:13-24]

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1 73. Prince testified that Powell “would count the days and let people know how many  
2 days it had been since she had sex.” [*Id.* at 36:4-6]

3 74. Prince did not complain about Powell’s conduct to EJM management. [*Id.* at 36:12-  
4 18]

5 75. Prince testified that McCrea “would pat [him] on the butt” on two occasions; told  
6 jokes, “some of them being sexual;” and “alluded to [Prince’s] having many videos, X-rated  
7 videos.” [*Id.* at 22:8-25, 23:1-25, 24:2-21]

8 76. Prince did not tell McCrea to stop touching him or telling jokes and did not report  
9 McCrea’s conduct to EJM management until after the investigation into his alleged  
10 misconduct. [*Id.* at 25:13-25, 26:1-8]

11 77. Hawn testified that Powell “told dirty jokes,” “was very open about her sexuality,”  
12 and “was very physical in nature. She was kind of very playful, and it was more of that kind  
13 of just flirting.” [Hawn Dep. at 74:13-19, 75:4-7]

14 78. Hawn never told Powell to stop touching him, telling dirty jokes, or talking about sex  
15 in his presence. [*Id.* at 76:23-25, 77:1-6] Nor did he report Powell’s conduct to EJM  
16 management. [*Id.* at 76:12-1]

17 79. Hawn testified that he received e-mails from Kropoff containing jokes and pictures  
18 of a sexual nature, and provided his personal email address.[*Id.* at 77:7-13, 78:10-11]

19 80. Hawn never told Kropoff to stop sending him such e-mails. [*Id.* at 79:16-23]

20 81. The e-mails sent by Kropoff that are included in the Sterling Report do not show that  
21 Kropoff sent any of the e-mails to Hawn at “ghawn@qwest.net” or any other e-mail address  
22 used by Hawn. [Doc. #MP02671, MP02675, MP02681, MP02688, MP02693, MP02698,  
23 MP02702, MP02706, MP02709, MP02713, MP02717]

24 82. Hawn did not report Kropoff’s conduct to EJM management. [Hawn Dep. at 81:2-9]

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1 83. Hawn testified that Leihgeber sent him e-mails. [*Id.* at 80:5-10] But Hawn never told  
2 Leihgeber to stop sending him e-mails. [*Id.* at 80:24- 25, 81:1] Nor did Hawn report  
3 Leihgeber’s conduct to EJM management. [*Id.* at 81:10-12]

4 84. Hawn testified that McCrea “patted [his] butt,” tickled him, and invited him to her  
5 hotel room on one occasion to watch television. [*Id.* at 71:24-25, 72:1-3, 73:6-17] Hawn  
6 never told McCrea to stop touching or tickling him. [*Id.* at 76:20- 22] Nor did Hawn report  
7 McCrea’s conduct to EJM management. [*Id.* at 74:7-12]

8 85. Aldrich testified that Leihgeber sent him e-mails with inappropriate material. [Aldrich  
9 Dep. at 13:5-11] Aldrich never told Leihgeber to stop sending such e-mails. [*Id.* at 16:10- 12]  
10 Nor did Aldrich report Leihgeber’s conduct to EJM management while he was receiving the  
11 e-mails. He testified that he mentioned Leihgeber’s e-mails to Chakerian only when the  
12 Company began investigating McCrea’s allegations of sexual harassment against him. [*Id.*  
13 at 15:12-24, 16:1-6]

14 86. Chakerian’s report does not mention Leihgeber’s e-mails. [Chakerian Dep.]

15 87. Aldrich testified that Kropoff sent him inappropriate e-mails. [Aldrich Dep. at 18:24-  
16 25, 19:1] Aldrich never told Kropoff to stop sending him e-mails. [*Id.* at 19:21-23] Nor did  
17 Aldrich report Kropoff’s conduct to EJM management while he was receiving the e-mails.  
18 He testified that he mentioned Kropoff’s e-mails to Chakerian only when the Company began  
19 investigating McCrea’s allegations of sexual harassment against him. [*Id.* at 19:13-20]

20 88. Chakerian’s report does not mention Kropoff’s e-mails. [Chakerian Dep.]

21 89. Aldrich testified that Powell would tell “dirty jokes,” but only “[o]ccasionally when  
22 [he] flew with her.” [Aldrich Dep. at 25:14-25, 26:1] Aldrich never told Powell to stop  
23 telling dirty jokes. [*Id.* at 26:23-25] Nor did Aldrich report Powell’s conduct to EJM  
24 management while the conduct was ongoing. He testified that he mentioned Powell’s conduct  
25 to Chakerian only when the Company began investigating McCrea’s allegations of sexual  
26 harassment against him. [*Id.* at 26:13-22]

1 90. Chakerian’s report does not mention Powell’s conduct. [Chakerian Dep.]

2 91. Aldrich testified that O’Neill sent e-mails containing dirty jokes to his personal e-mail  
3 account and that he read these e-mails at night while at home and off duty. [Aldrich Dep. at  
4 47:10-23, 48:2-8]

5 92. Aldrich testified that McCrea “told dirty jokes,” [“t]alked about sex,” and “sent [him]  
6 e-mails [containing] dirty jokes.” [Aldrich Dep. at 20:7-22] Aldrich never told McCrea to  
7 stop telling jokes, talking about sex or sending him e-mails. [*Id.* at 22:8-16] Aldrich did not  
8 report McCrea’s conduct to EJM management until the Company began investigating  
9 McCrea’s allegations of sexual harassment against him.  
10 [*Id.* at 22:17-25, 23:1-23]]

11 93. Chakerian testified that Hawn identified McCrea as having engaged in conduct similar  
12 to that which resulted in his termination and that she was treated more favorably by EJM. [*Id.*  
13 at 89:23-25, 90:1-4]

14 94. Chakerian further testified that neither Prince, Hawn, nor Aldrich reported or  
15 identified to him any *non-Caucasian* or “*non American*” employees of EJM who engaged  
16 in the same or similar conduct that they engaged in that resulted in their terminations, but  
17 who were treated more favorably than them. [Chakerian Dep. at 86:2-24, 87:15-20, 90:14-17,  
18 93:3-8, 87:9-14, 87:22-25, 88:1-14, 92:16-25, 93:1- 8]

19 95. Chakerian’s subsequent correspondence to Vineyard upon learning that Prince, Hawn,  
20 and Aldrich were going to be terminated identifies only McCrea and Daryl Fuller as having  
21 engaged in conduct warranting termination. [Chakerian Dep.]

22 96. Neither Prince, Hawn, nor Aldrich reported or identified to Sterling any non-  
23 Caucasian or non-American employees of EJM who engaged in the same or similar conduct  
24 that they engaged in, but who were treated more favorably. [Affidavit of James Sterling  
25 (“Sterling Affidavit”) ¶¶ 5-15]

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1 97. With the exception of McCrea, neither Prince, Hawn, nor Aldrich reported or  
2 identified to Sterling any female employees of EJM who engaged in the same or similar  
3 conduct that they engaged in, but who were treated more favorably. [Sterling Affidavit ¶¶  
4 6, 8-11, 13, 14]

5 98. On September 22, 2004, the EEOC dismissed Plaintiffs' charges of discrimination  
6 against Executive Jet. [Doc. #MP00062, GH00001, AA00009]

### 7 STANDARD OF REVIEW

8 A court must grant summary judgment if the pleadings and supporting documents,  
9 viewed in the light most favorable to the nonmoving party, "show that there is no genuine  
10 issue as to any material fact and that the moving party is entitled to judgment as a matter of  
11 law." FED. R. CIV. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986);  
12 *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive  
13 law determines which facts are material. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248  
14 (1986); *see also Jesinger*, 24 F.3d at 1130. "Only disputes over facts that might affect the  
15 outcome of the suit under the governing law will properly preclude the entry of summary  
16 judgment." *Anderson*, 477 U.S. at 248. The dispute must also be genuine, that is, the  
17 evidence must be "such that a reasonable jury could return a verdict for the nonmoving  
18 party." *Id.*; *see Jesinger*, 24 F.3d at 1130.

19 A principal purpose of summary judgment is "to isolate and dispose of factually  
20 unsupported claims." *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate  
21 against a party who "fails to make a showing sufficient to establish the existence of an  
22 element essential to that party's case, and on which that party will bear the burden of proof  
23 at trial." *Id.* at 322; *see also Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir.  
24 1994). The moving party need not disprove matters on which the opponent has the burden  
25 of proof at trial. *See Celotex*, 477 U.S. at 323-24. The party opposing summary judgment  
26 need not produce evidence "in a form that would be admissible at trial in order to avoid  
27

1 summary judgment." *Id.* at 324. However, the nonmovant "may not rest upon the mere  
2 allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing  
3 that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see Matsushita Elec. Indus. Co.,*  
4 *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986); *Brinson v. Linda Rose Joint*  
5 *Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

## 6 DISCUSSION

7 Plaintiffs contend, among other things, that they would not have been discharged for  
8 engaging in allegedly inappropriate conduct toward a flight attendant had they been non-  
9 Caucasian employees, female employees, and/or employees of non-American descent.  
10 Defendants contend, however, that Plaintiffs are unable to establish a prima facie case of  
11 employment discrimination based on gender, race, or national origin.

### 12 **A. Direct Evidence**

13 Plaintiffs may establish a claim of employment discrimination either by presenting  
14 direct evidence of discrimination or by establishing a *prima facie* cases of race, national  
15 origin, or sex discrimination using indirect evidence.

16 Plaintiffs contend that Defendant's CEO, Albert Pod was made aware of protected  
17 categories when assessing disciplinary cases, and such awareness is direct evidence of  
18 discrimination. They argue that Pod directed Human Resources Manager Cynthia Brusman  
19 to advise him of an employee's protected status, and *always* wanted this information when  
20 making discharge considerations. However, there is no evidence in the record that Brusman  
21 in fact informed Pod, or any other member of the senior management team, that Plaintiffs are  
22 Caucasian, American males. There is also no evidence that Pod or the senior managers  
23 recommending termination *considered* Plaintiffs' sex, race, or national origin in their  
24 decisions regarding termination of Plaintiff. Plaintiffs' mere speculation, without more, that  
25 they were discharged *because* they are Caucasian, American males is insufficient to rise to  
26 the level of direct evidence and overcome summary judgment. It is well-settled that  
27

1 “[r]eliance on mere speculation, conjecture, or fantasy cannot defeat a motion for summary  
2 judgment.” *Villodas v. HealthSouth Corp.*, 338 F.Supp.2d 1096, 1104-05 (D. Ariz. 2004);  
3 *see also, Nelson*, 83 F.3d at 1081-82 (“mere allegation and speculation do not create a factual  
4 dispute for purposes of summary judgment.”)

5 Furthermore, the Court finds that when reviewing disciplinary matters, employers are  
6 not prohibited from merely *assessing* risks based on an employee’s protected status because  
7 *prima facie* discrimination occurs only when the adverse employment decision is *based on*  
8 *or because of* the employee’s sex, race, national origin or other protected category. *See St.*  
9 *Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). While Pod may have an awareness  
10 of an employee’s protected status, there is no evidence in the record that he based his  
11 disciplinary decisions on this factor. Pod testified repeatedly that his decisions are based “on  
12 the merits of the case.” Here, the “merits of the case” concerned Plaintiffs’ inappropriate  
13 conduct toward Robyn McCrea, which was documented in the Sterling Report, and included  
14 several admissions by Plaintiffs of such misconduct. Pod reviewed the report and finding  
15 McCrea’s version more credible than Plaintiffs’ accounts, determined Plaintiffs should be  
16 discharged for inappropriate conduct under company policy. Plaintiffs have produced no  
17 evidence to the contrary, and have thus failed to establish that Pod based his decision to  
18 terminate their employment because of their sex, race, or national origin.

19 **B. Prima Facie Case Under Title VII: *McDonnell Douglas* and its Progeny<sup>6</sup>**

20 Where Plaintiff is faced strictly with indirect evidence of discrimination, the proper  
21 legal framework for determining whether Plaintiffs’ claims should survive summary  
22 judgment is the burden-shifting model set forth in *McDonnell Douglas Corp. v. Green*, 411  
23 U.S. 792. Pursuant to *McDonnell Douglas* and its progeny, Plaintiffs have the initial burden  
24

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25  
26 <sup>6</sup> “Analysis of an employment discrimination claim under § 1981 follows the  
27 same legal principles as those applicable in a Title VII disparate treatment case.”  
*Villodas v. HealthSouth Corp.*, 338 F. Supp. 2d. 1096, 1105 (D. Ariz. 2004).

1 of establishing a prima facie case of discrimination. *Id.* at 802. More specifically, to survive  
2 summary judgment in an employment discrimination case such as this, a Plaintiff must  
3 demonstrate that (1) he belongs to a protected class, (2) he was qualified for the position, (3)  
4 he was subjected to an adverse employment action, and (4) similarly situated<sup>7</sup> individuals (of  
5 another race, national origin, or gender) were treated more favorably. *See St. Mary's*, 509  
6 U.S. at 506. If the Plaintiffs succeed in establishing a prima facie case of discrimination  
7 based on gender, race, and/or national origin, the burden (of production) shifts to defendant,  
8 in this case EJM, to articulate a legitimate, nondiscriminatory reason for terminating the  
9 Plaintiffs' employment. *McDonnell Douglas*, 411 U.S. at 802. If EJM is successful in doing  
10 so, meeting its burden necessarily causes any presumption that the employer discriminated  
11 against the plaintiff to "drop from the case" and the burden shifts back to Plaintiffs to  
12 demonstrate that EJM's articulated reason(s) is pretext for unlawful discrimination.<sup>8</sup> *Bodet*

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14  
15 <sup>7</sup>On October 26, 2007, Plaintiffs' counsel filed a Supplemental Citation to  
16 Authority in Support of Plaintiffs' Response to Defendant's Motion for Summary  
17 Judgment. (Doc. 153) Therein, Plaintiffs represented to this Court that the United States  
18 Court of Appeals for the Ninth Circuit issued an Opinion related to one of the issues  
19 pending in this case. More specifically, Plaintiff represented to the Court that the Ninth  
20 Circuit held in *Noyes v. Kelly Svcs.*, 488 F.3d 1163 (9<sup>th</sup> Cir. 2007) that plaintiff need not  
21 proffer evidence of similarly situated individuals to create a prima facie case of  
22 employment discrimination. In fact, this is *not* what the Ninth Circuit held. Moreover, the  
23 Ninth Circuit did not even *address* the issue of "similarly situated," as the prima facie  
24 case was not on appeal. The issues on appeal were (1) pretext and (2) the District Court's  
25 discretion with regard to extending discovery deadlines. The Court of Appeals held that  
26 the employee plaintiff was not required to show that she was member of protected class  
27 in order to make out prima facie case of "reverse" religious discrimination, and the  
28 district court abused its discretion in refusing to extend the discovery deadline. *Id.* Thus,  
*Noyes* has no bearing on this case.

<sup>8</sup>While the burden of production shifts in this framework, the "ultimate burden of  
persuading the trier of fact that the defendant intentionally discriminated against the  
plaintiff remains at all times with the plaintiff." *Burdine*, 450, U.S. at 253; *Bodet v.*  
*Coxcom, Inc.*, 366 F.3d 736, 743 (9<sup>th</sup> Cir. 2004)(citations omitted).

1 v. *Coxcom, Inc.*, 366 F.3d 736, 743 (9<sup>th</sup> Cir. 2004)(citation omitted). Thereafter, Plaintiffs  
2 must demonstrate that the proffered reason was not the *actual reason* for the [adverse]  
3 employment decision. Plaintiffs may succeed in this “either directly by persuading the court  
4 that a discriminatory reason more likely motivated the employer or indirectly by showing that  
5 the employer's proffered explanation is unworthy of credence.” *Texas Dept. of Community*  
6 *Affairs v. Burdine*, 450 U.S. 248, 256 (U.S. 1981)(citing *McDonnell Douglas*, 411 U.S., at  
7 804-805).

8 Where the plaintiff has established a *prima facie* case with direct evidence of  
9 discriminatory intent, “a triable issue as to the actual motivation of the employer is created  
10 even if the evidence is not substantial.” *Bodet*, 366 F.3d 736, 743 (9<sup>th</sup> Cir. 2004)(citation  
11 omitted). However, where a plaintiff relies upon indirect evidence to show that the  
12 employer’s stated reason for the adverse employment action is not the actual reason, “[s]uch  
13 evidence...must be ‘specific’ and ‘substantial’ in order to create a triable issue with respect  
14 to whether the employer intended to discriminate on the basis of a prohibited ground.” *Id.*  
15 (citation omitted).

### 16 1. Race and National Origin

17 Defendants contend that Plaintiffs are neither members of a protected class (prong  
18 one), nor qualified for their positions (prong two).

#### 19 Protected Class

20 It is well established that Title VII makes it unlawful for an employer to discriminate  
21 against any individual with respect to the terms and conditions of employment “because of  
22 such individual’s race color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). This  
23 includes white males, whether they are part of the minority or majority. *Aragon v. Republic*  
24 *Silver State Disposal Inc.*, 292 F.3d 654, 659 (9<sup>th</sup> Cir. 2002)(citing *McDonald v. Santa Fe*  
25 *Trail Trans Co.*, 427 U.S. 273, 278-79 (1976)). Thus, contrary to Defendant’s assertion  
26 otherwise, despite being Caucasian-American, Plaintiffs are in fact members of a protected  
27

1 class under Title VII. See *McDonald*, 427 U.S. at 278 (employment criteria must be applied  
2 alike to employees of all groups). Therefore, Plaintiffs have satisfied the first element of the  
3 prima facie case of employment discrimination.

4 **Qualified for the Position**

5 As to the second prong of the *prima facie* case of employment discrimination,  
6 Defendants contend that *because of* Plaintiffs' conduct toward McCrea, the conduct that  
7 allegedly led to their discharge (e.g. the "inappropriate conduct"), Plaintiffs were not  
8 qualified for their positions.<sup>9</sup> In other words, Defendant argues that the misconduct itself  
9 renders the Plaintiffs unqualified for the positions. The Court does not however come to the  
10 same conclusion. Based on the Defendant's analysis, it is permissible to base the  
11 determination of whether an employee was qualified for the position he or she was in prior  
12 to the adverse employment decision on the allegedly inappropriate conduct giving rise to the  
13 lawsuit. However, under such a regime, the remainder of the *McDonnell Douglas*  
14 framework, and the prima facie case for that matter, would be rendered superfluous in the  
15 current scenario and many other similar employment discrimination cases. Plaintiffs are not  
16 denying that specific conduct occurred, rather, they are denying that such conduct amounted  
17 to justification for the adverse employment action that consequently resulted. The Court  
18 finds that the intent behind this particular prong is to ensure that the employee was otherwise  
19 qualified for the position of employment as it relates to the actual performance of necessary  
20 duties and the skills required for the position. Accordingly, Plaintiffs have satisfied their  
21 burden of demonstrating that they were otherwise qualified to perform the *skills of pilots*,  
22 thereby establishing the second prong of the prima facie case of employment discrimination.

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25  
26 <sup>9</sup>Defendants only cited to an unpublished district court opinion from the Northern  
27 District of CA, which under the rules, is only permissible persuasive authority on this  
28 Court. (Doc. 123, p. 7) .

1 **Adverse Employment Action**

2 Defendant does not dispute the fact that Plaintiffs' discharge from employment  
3 amounts to an adverse employment action under the law. Thus, Plaintiffs have satisfied their  
4 burden of establishing the third prong of the prima facie case of employment discrimination.

5 **Similarly Situated**

6 Before the burden will shift to the Defendants as dictated by the *McDonnell Douglas*  
7 regime, Plaintiffs must satisfy the final prong of the prima facie case by establishing that  
8 similarly situated individuals of another race and/or national origin were treated more  
9 favorably than Plaintiffs engaging in similar conduct. To do so, Plaintiffs must establish that  
10 non-Caucasian, non-American employees who engaged in similar conduct were treated more  
11 favorably by EJM than were Plaintiffs. *Aragon v. Republic Silver State Disposal, Inc.*, 292  
12 F. 3d 654, 660 (9<sup>th</sup> Cir. 2002). According to the evidence before the Court, Plaintiffs have  
13 unequivocally failed to articulate any scenario wherein there is any reference to fellow  
14 employees of EJM outside the Plaintiffs' protected class (race or national origin) who  
15 allegedly engaged in similar "inappropriate conduct" in the workplace, yet were treated more  
16 favorably by EJM. The facts establish that the individuals that Plaintiffs named as having  
17 participated in similar conduct were in fact Caucasian and of American descent, the identical  
18 race and national origin as the Plaintiffs. Consequently, Plaintiffs have failed to establish the  
19 final prong of the prima facie case of discrimination based on race or national origin. *See*  
20 *Kelley v. City of Mesa*, 873 F. Supp. 320, 331 (D. Ariz. 1994)(summary judgment granted  
21 in favor of defendants on Plaintiff's § 1981 claim where Plaintiff failed to "present any  
22 proper evidentiary material showing that she was terminated because of her race or national  
23 origin").

24 Accordingly, it is not necessary for the Court to continue its analysis to the second  
25 stage of the *McDonnell Douglas* test (e.g. EJM need not assert a legitimate,  
26  
27



1 are similarly situated when they have similar jobs and display similar conduct. *Vasquez v.*  
2 *County of Los Angeles*, 349 F.3d 634, 641 (9<sup>th</sup> Cir. 2003).

3 Here, Plaintiffs reported to Chief Pilot Michael Chakerian. However, flight attendants  
4 Robyn McCrea, Karen O'Neill and Marlee Powell reported to Amy Jackson. Plaintiffs  
5 provided the Court with no evidence demonstrating that the two female employees working  
6 at EJM's Cincinnati, Ohio facility, Brandy Kropoff and Michelle Leihgeber, also alleged to  
7 have participated in similar conduct, reported to Chakerian.<sup>11</sup> Given that Plaintiffs have made  
8 no showing that they and the five female employees alleged to be similarly situated reported  
9 to the same supervisor, their gender discrimination claim fails. *See, Hargrow* at 15-17. Even  
10 assuming the female employees did report to the same supervisor as Plaintiffs, Plaintiffs  
11 remain unable to satisfy this prong because the alleged conduct of the five female employees  
12 was *not* unwelcome by Plaintiffs and others at the Phoenix base as it was in the case of Ms.  
13 McCrea. In other words, Plaintiffs did not complain about the alleged conduct or display any  
14 type of aversion toward the alleged conduct. Furthermore, there is no record of complaints  
15 of harassment or offensive conduct lodged with EJM management concerning the female  
16 employees during the time in which the alleged conduct allegedly occurred or even shortly  
17 thereafter that resulted in internal or external investigations. According to the record, "[Lead  
18 Pilot Giovanni] Tonti never brought any complaints to him [Chakerian] about any employee  
19 sexually harassing any other employee." Moreover, Plaintiffs' comments to Sterling during  
20 his investigation of Plaintiff' conduct toward McCrea does not necessitate a finding that  
21 Plaintiffs and the five female employees at issue were "similarly situated." Of critical  
22 significance is the fact that Sterling was not a member of EJM management, and therefore,  
23 any statement made to him does not amount to a statement made to management or employer  
24 and thus does not automatically confer knowledge upon EJM. Furthermore, any statements  
25 made to Sterling were made *in the course of* an investigation for the purposes of unfolding

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26  
27 <sup>11</sup> Plaintiffs did not identify Kropoff and Leihgeber's supervisor .

1 the actual events surrounding the allegations of sexual harassment. Thus, the Court does not  
2 consider such statements as complaints per se, as Plaintiffs' remarks were not complaints of  
3 sexual harassment; Plaintiffs did not report that they were offended by the conduct or that  
4 they found it harassing contemporaneous to the actual conduct. Rather, Plaintiffs were simply  
5 cooperating with an investigation by reporting it in protest of the allegations against them.

6 Several courts outside of the Ninth Circuit that have been presented with comparable  
7 factual scenarios have determined that employees alleged to have engaged in similar conduct  
8 are not "similarly situated" to the plaintiff under the law where complaints of such conduct  
9 have not been made to management *in response to the conduct*. Despite the fact that they do  
10 not hold precedential value, these cases provide this Court with valuable and persuasive  
11 guidance on the issue. For example, in *Yeager v. City Water and Light Plant of Jonesboro,*  
12 *Ark.*, 454 F.3d 932 (8th Cir. 2006), the plaintiff was discharged for a single, admitted  
13 instance of inappropriate conduct in violation of the company's sexual harassment policy.  
14 The plaintiff argued that a female coworker was similarly situated where she "openly and  
15 frequently" engaged in similar conduct in violation of defendant's harassment policy, but was  
16 never reprimanded. *Id.* at 932-33. The accusations about the female worker, which she  
17 denied, were not made contemporaneous to her conduct. Rather, the reports were first  
18 brought to management's attention by employees protesting the discharge of the plaintiff. *Id.*  
19 at 934. The Eighth Circuit affirmed the trial court's ruling that the plaintiff and female  
20 coworker were *not* similarly situated. The court explained:

21 An employer that promulgates a sex harassment policy may reasonably  
22 distinguish between sexually oriented conduct that elicits a complaint from an  
23 offended coworker, and arguably comparable conduct nonetheless tolerated by  
24 co-workers without complaint. Thus, both the absence of contemporaneous  
25 complaints against [the female coworker] and the fact that [plaintiff] admitted  
his misconduct, justified [defendant] in treating these two employees as not  
similarly situated from the standpoint of compliance with its sex harassment  
policy.

26 *Id.* at 934.

1 Likewise, in *Morrow, et al v. Wal-Mart Stores*, 152 F.3d 559 (7th Cir. 1998), the  
2 Seventh Circuit rejected a similar argument made by two plaintiffs. The plaintiffs pointed  
3 to several co-workers as examples of similarly-situated female employees who allegedly  
4 received more favorable treatment by Defendant employer. Plaintiffs maintained that the  
5 women often made crude comments with sexual connotations, and asserted that management  
6 was informed of this fact during the investigation of the complaint against one of the  
7 plaintiffs. The court determined that because “no complaint was ever lodged [against her]  
8 for specific conduct that a co-employee found to be offensive or harassing,” the women were  
9 not similarly situated and were therefore never disciplined by Defendant for their alleged  
10 behavior. Thereafter, the appellate court observed:

11 Wal-Mart’s quick decision to terminate the plaintiffs may seem unfair in a  
12 work environment that appears rife with similarly off-color conduct. We have  
13 noted time and again, however, that “we do not sit as a super-personnel  
14 department that reexamines an entity’s business decisions. Title VII prohibits  
15 discriminatory employment actions, not hasty or ill-considered ones. Although  
16 some of Wal-Mart’s female employees seem to have engaged in questionable  
17 behavior, **there is no evidence that any of this behavior sparked complaints  
18 of harassment like those that Wal-Mart received concerning [plaintiffs].  
19 Without evidence of similar employee complaints, Wal-Mart cannot be  
20 faulted for failing to respond to these incidents in the same way that it  
21 responded to [plaintiffs’] situations.**

17 *Id.* at 564 (citation omitted)(emphasis added).

18 Likewise, there is no evidence that EJM ever received sexual harassment complaints  
19 regarding the female co-workers<sup>12</sup> from Plaintiffs, other employees at the Phoenix base, or  
20 any fellow employees at the Cincinnati, Ohio facility.

21 Finally, it is well established in the Ninth Circuit that to satisfy the requirements of  
22 the *prima facie* case of discrimination, Plaintiff must demonstrate that he or she was  
23

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24 <sup>12</sup> Plaintiffs contend that Brandy Kropoff, Michelle Leihgeber, Robyn McCrea,  
25 Karen O’Neill, and Marlee Powell are all female co-workers who at some point in time  
26 behaved in such a way that violated EJM’s sexual harassment policy and therefore are  
27 similarly situated to Plaintiffs .

1 discharged following protected activities of which the employer was aware. *Rolfe v. State of*  
2 *Ariz.*, 578 F.Supp. 1467, 1471 (D. Ariz. 1983) *Kauffman v. Sidereal Corp.*, 695 F.2d at 345,  
3 *quoting Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779, 781 (9th Cir.1976). The  
4 relevant inquiry here is whether EJM knew a sufficient amount regarding the womens'  
5 alleged conduct to trigger an investigation. *Id.* For an investigation to be triggered, the  
6 Plaintiffs must establish that the womens' conduct prompted a complaint of sexual  
7 harassment to management. *Id.* Even assuming at least one EJM manager knew of any of  
8 the womens' alleged conduct, there must be evidence that EJM had received a *complaint*  
9 from an employee who felt *harassed* by such conduct. *Id.* There is no such evidence in the  
10 record. Consequently, the Plaintiffs have not demonstrated the existence of a genuine issue  
11 of material fact regarding their contention that EJM treated similarly situated female  
12 employees more leniently under the company's sexual harassment policy.

### 13 **Legitimate Nondiscriminatory Reason**

14 Assuming arguendo that Plaintiffs have successfully established a prima facie case  
15 of discrimination, the burden of production shifts to EJM to produce 'some evidence' in  
16 order to articulate a legitimate nondiscriminatory reason for terminating Plaintiffs'  
17 employment. *See Burdine*, 450 U.S. at 253-54. To determine whether EJM met its burden  
18 of production, the Court must accept as true EJM's evidence supporting its alleged reason  
19 for terminating Plaintiffs (i.e. Plaintiffs violated the terms of EJM's employee harassment  
20 policy). *Bodett*, 366 F.3d at 744 (*citing St. Mary's*, 509 U.S. at 509).

21 The undisputed evidence establishes that Plaintiffs were discharged for violating EJM  
22 policy as a result of their inappropriate conduct. It further reveals that two complaints of  
23 sexual harassment were lodged by a flight attendant coworker of Plaintiffs and consequently,  
24 both internal and external investigations were conducted by EJM. Significantly, Plaintiffs  
25 admitted to some of the misconduct alleged in the complaints and other allegations were  
26 corroborated either directly or indirectly by their co-workers. Accordingly, the Court finds  
27

1 that EJM has successfully articulated a legitimate reason for terminating Plaintiffs'  
2 employment.

3 **Pretext**

4 EJM has articulated a legitimate nondiscriminatory reason for terminating Plaintiffs.  
5 Thus, the burden shifts to Plaintiffs to demonstrate that said reason is a pretext for unlawful  
6 discrimination by “either directly persuading the court that a discriminatory reason more  
7 likely motivated the employer or indirectly by showing that the employer’s proffered  
8 explanation is unworthy of credence.” *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124  
9 (9<sup>th</sup> Cir. 2000)(quoting *Burdine*, 450 U.S. at 256). Critical to this stage of *McDonnell*  
10 *Douglas* is Plaintiffs’ ability to provide *specific* and *substantial* evidence to overcome the  
11 legitimate reasons set forth by EJM. *Bergene v. Salt River Project Improvement & Power*  
12 *Dist.*, 272 F.3d 1136, 1143 (9<sup>th</sup> Cir. 2001).

13 Plaintiffs have presented the Court with evidence that “inappropriate conduct” is not  
14 included in the list set forth in Employee Handbook Policy #126, and therefore, they contend  
15 that such a violation is not a valid reason for termination. However, EJM rebuts by arguing  
16 that the lack of such an obvious inclusion does not mean that EJM tolerates or condones such  
17 conduct. EJM correctly points out that the exhibit plainly indicates that the list is *not*  
18 *exhaustive* of those “acts/actions that may require immediate disciplinary action.” *Id.*  
19 Moreover, EJM submits that there is some conduct, such as that engaged in by Plaintiffs, that  
20 plain common sense dictates should not occur in the workplace.

21 Plaintiffs do not dispute that McCrea lodged complaints against them, that EJM  
22 thoroughly investigated McCrea’s allegations, or that they admitted to some of the  
23 misconduct McCrea attributed to them. What they do dispute is EJM’s decision in April 2003  
24 that McCrea was “more credible than not.” (*See*, DSOF at ¶¶ 138-139.) However, this does  
25 not establish that EJM discharged Plaintiffs *because of* their sex, race, or national origin. As  
26 articulated by EJM, when presented with the Sterling Report, EJM, in the exercise of its  
27

1 management prerogative, could have accepted either Plaintiffs’ or McCrea’s version of  
2 events, or some combination thereof, as the truth. The Company accepted McCrea’s version  
3 of events and whether that credibility determination was, in fact, correct has no bearing on  
4 this case. The only relevant inquiry is whether the Company’s stated reason for the  
5 terminations-Plaintiffs’ inappropriate conduct, was not the true reason for the termination,  
6 but rather pretext for unlawful discrimination.

7 According to the record, Defendants have established that Plaintiffs were discharged  
8 for engaging in inappropriate conduct in the workplace. (DSOF 148.) For example, Hawn  
9 admitted to pinching flight attendant Robyn McCrea on the buttocks. (DSOF 83-84.) Prince  
10 admitted to sending McCrea sexually explicit e-mails. (DSOF 99.) Aldrich admitted to telling  
11 “dirty jokes” (DSOF 108) and was disciplined very early in this case for his inappropriate  
12 jokes; (DSOF 42-44) he does not contend this discipline was discriminatory. Plaintiffs  
13 *admitted* to engaging in inappropriate conduct toward McCrea. (DSOF 27, 41, 83-84, 97-98,  
14 99, 108.) Altan reported that Powell told her that Hawn “had slapped her on the butt . . .”  
15 (DSOF 122.) Tonti reported that he had been instructed by Chakerian to counsel Aldrich to  
16 “quit making stupid remarks” and to “talk” to Hawn after the pinching incident, but not to  
17 document any of the discussions. (DSOF 113, 116-117.) In light of the substantial evidence  
18 produced by Defendants, and Plaintiffs’ failure to produce contrary or rebuttal evidence, the  
19 Court finds that Plaintiffs have not established that EJM’s reasons for discharging them were  
20 pretext for unlawful discrimination.

21 **CONCLUSION**

22 Based on the foregoing,

23 **IT IS HEREBY ORDERED GRANTING** Defendant’s Motion for Summary  
24 Judgment in favor of Defendants and against Plaintiffs (Doc. 123).

25 **IT IS FURTHER ORDERED DENYING** Plaintiffs’ Motion for Issuance of Order  
26 that Plaintiffs' Responses to Two Statements of Fact in Support of Defendant's Summary  
27

1 Judgment Motion Not be Deemed Admitted (Doc. 148).

2 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment  
3 accordingly.

4 DATED this 14<sup>th</sup> day of March, 2008.

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Stephen M. McNamee  
United States District Judge