U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 October 2008

CASE NO.: 2007-AIR-00007

In the Matter of:

MARK J. HOFFMAN,
Complainant

v.

NETJETS AVIATION, INC.,
Respondent

APPEARANCES:

Richard R. Renner, Esq.
For the Complainant

Celeste Wasielewski, Esq.
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DENYING RELIEF

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century [hereinafter "the Act" or "AIR 21"], 42 U.S.C. § 42121. The Act prohibits air carriers from discharging or otherwise discriminating against employees who inform their employers or the federal government, or who file proceedings, or participate in proceedings, about violations or alleged violations of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or of any other federal law concerning air safety. 42 U.S.C. § 42121; 29 C.F.R. § 1979.102.[1]

[1] 29 C.F.R. § 1979.102(b) states that "It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee" informs his employer or the federal government, or files proceedings, or participates in proceedings, about violations or alleged violations of any order, regulation, or standard of the FAA or of any other federal law concerning air safety.

II. COVERAGE

NetJets Aviation, Inc. ("NJA") is an "air carrier" under the Act. 49 U.S.C. § 40102(a)(2) defines "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[2] NJA has stipulated that it is covered by the Act. (ALJX 1, Stip. 17).

Complainant is an "employee" under the Act. 29 C.F.R. § 1979.101 defines "employee" as "an individual presently or formerly working for an air carrier...." Hoffman has been employed by NJA since 1997. (ALJX 1, Stip. 4).

III. PROCEDURAL HISTORY[3]

Complainant, Mr. Mark J. Hoffman (hereinafter "Hoffman"), filed multiple complaints of discrimination with the Department of Labor against NJA. Hoffman filed his initial complaint on or about May 17, 2006. Thereafter, he filed two supplemental complaints; one complaint was filed on or about June 7, 2006, and the other on or about August 22, 2006. Complainant alleged violations of the employee protection provisions of AIR 21 and of the Toxic Substances Control Act of 1976 (hereinafter "TSCA"), 15 U.S.C. § 2622.

Captain Hoffman has alleged that he was placed on paid administrative leave, issued a letter of warning, threatened with discharge or other disciplinary actions, denied a promotion, and subjected to interrogation, investigation, and a hostile work environment in retaliation for engaging in protected activity. Hoffman alleges that he engaged in protected activity by raising compliance issues with management, refusing to fly a plane with a fuel leak, tape recording to collect evidence of violations, and instituting a previous whistleblower claim against NJA in March of 2005.

In addition, Hoffman alleged that NJA "also maintain[s] an unlawful policy or practice to prevent or discourage employees from protected activities, including but not limited to recording for the purpose of collecting evidence of violations." Hoffman sought, as relief, an order directing NJA to rescind any policies "that restrain or direct employees in connection with reporting of compliance issues or collecting or recording for the purpose of obtaining evidence of violations."

The complainant was investigated by the Department of Labor and found not to have merit. On March 30, 2007, the Secretary issued her Findings and dismissed the complaint. By motion dated April 27, 2007, Hoffman objected to the Secretary's Findings and requested a hearing before an administrative law judge.

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[2] The definition of "air carrier" under the Federal Aviation Act, 49 U.S.C. § 40101 *et seq.* is applicable. *See* Procedures for Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 Fed. Reg. 55, 14101 (March 21, 2003).

[3] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judges; "CX ___" refers to complainant's exhibits; "RX ___" refers to respondent's exhibits; "TR ___" refers to the transcript of proceedings page; and, "DT___" refers to the testifying witness's deposition page.

Pre-hearing, Hoffman filed a Motion for Partial Summary Decision and NJA filed a Cross-Motion for Summary Decision. Summary decision was entered against Hoffman on several claims.[4] The remaining claims proceeded to hearing.

A hearing was conducted on January 14, 2008, through January 18, 2008, and April 15, 2008 in Columbus, Ohio. Post-hearing briefs were filed on August 1, 2008. Post-hearing rebuttal briefs were filed on September 15, 2008.

IV. EVIDENTIARY RULINGS

Hoffman filed a previous claim under AIR 21 against NJA, ("*Hoffman I*"). In *Hoffman I*, he filed a complaint with OSHA on March 7, 2005, predominantly based on allegations arising in 2004 and 2005. A hearing was held before Judge Ralph A. Romano on February 7 and 8, 2006. Judge Romano issued a Decision and Order on August 4, 2006, denying the claim and the Administrative Review Board ("ARB") affirmed Judge Romano's decision on July 22, 2008.

As evidenced by Judge Romano's and the ARB's decisions, Hoffman alleged, *inter alia*, denial of promotion to an Initial Operating Experience ("IOE") position and a hostile work environment. With respect to protected activity, he offered evidence regarding, *inter alia*, a ferry permit issue on July 16, 2004, a MEL'able (minimum equipment list) lights issue around November 18, 2005, a fuel leak incident on October 17, 2001, and a June 2004 "latches" incident. Judge Romano found that NJA would not have promoted Captain Hoffman to an IOE position in the absence of any protected activity. Judge Romano also found that Hoffman had offered only time-barred discrete acts related to the hostile work environment claim and that even if the alleged acts were not time-barred discrete acts, the acts did not amount to a hostile work environment. Finally, he found that Complainant did not establish any constructive discharge during the "crew rot" period.

In his pre-hearing statement for the current case, Hoffman alleged the following protected activities: October 17, 2001 write-up for a plane venting fuel; November 5, 2003 plane with left wing fuel leak; July 16, 2004 ferry permit complaint to the FAA, November 18, 2005 mel'able lights issue; making 750 tape recordings; and, filing a prior proceeding under AIR 21. As the above paragraph shows, some of these alleged protected activities were the subject of *Hoffman I*. Also in the pre-hearing statement, Hoffman alleged that the protected activities led to the following non-exhaustive list of retaliation: Respondent's recordation policy; April 21, 2005 through May 19, 2006 administrative leave for investigation of recordings; a warning letter, dated April 21, 2006 regarding recordings; May 19, 2006 final warning letter regarding recordings; June 14, 2006 denial of promotion to an OCARO position; threats of discipline and discharge; interrogations and investigations; a discriminatory and hostile work environment; August 2001 warning letter; denial of promotion to the IOE position; discipline and counseling for the July 19, 2004 ferry permit incident; a four-day evaluation ride in 2001 for the fuel venting incident; and, hostility from managers Cimarolli, Smith, Hart, MacGhee, Decker, Okey, and

[4] Summary Decision was entered for NJA on Hoffman's TSCA claim. Summary Decision was also entered for NJA on Hoffman's claims that NJA's Recordation Policy and Flight Operations Manual ("F.O.M.") 4.6.1 are unlawful under the Act. Evidence on F.O.M. 4.6.1 was admitted for purposes of determining NJA's motive in taking any adverse employment actions.

Baumgardner. Similar to the alleged protected activities, some of the alleged acts of retaliation were considered and rejected by Judge Romano in *Hoffman I*.

Given the multiple complaints containing overlapping allegations and facts, strict attention was paid to rules regarding the admission and use of evidence. In applying the evidentiary rules, the issues addressed in *Hoffman I* and in each of Hoffman's subsequent three complaints, which constitute his present claim, were closely examined. *See* Table I. Additionally, the entire *Hoffman I* record was accepted into evidence. [TR 1059-1060]. (ALJX 3). (ALJX 3A).[5]

While some of the evidence presented to Judge Romano is relevant to the present case, the parties were directed to not re-litigate *Hoffman I*. In an order dated September 24, 2007, I limited discovery to matters occurring on or after January 1, 2006. In *Hoffman I* full discovery took place and Judge Romano considered a hostile work environment claim.[6]

After giving consideration to the above, the following rules regarding the admission and use of evidence were applied. It should be noted that absent definitive Sixth Circuit guidance, I relied on cases from several circuits for rules dealing with the principles of res judicata and collateral estoppel.

29 C.F.R. § 1979.103(d) provides that a complaint must be filed within ninety (90) days after an alleged violation of the Act ("*i.e.*, when the discriminatory decision has both been made and communicated to the complainant"). Hoffman filed his first complaint in the present case on May 15, 2006, and therefore, discrete violations on or before February 13, 2006, cannot form the basis of employer liability.[7] *See also Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). It should be noted that this does not preclude the admission of evidence from earlier dates regarding events culminating into the actionable violation.

Therefore, 20 C.F.R. § 1979.103(d) serves as one ground to prevent my consideration of the alleged discrete violations at issue in *Hoffman I* as the basis of employer liability. An additional ground is the doctrine of res judicata or claim preclusion.[8] [TR 110-111].

The application of res judicata to the present case also prevents my consideration of two additional bases for employer liability. First, I can not consider the hostile work environment, including the facts and events, at issue in *Hoffman I* as a basis for employer liability. Second, res judicata also bars consideration of facts and events taking place prior to Complainant's first complaint,[9] but not considered in *Hoffman I*, as a basis for employer liability.[10] [TR 109-110]. *See Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-1202 (9th Cir. 1982)(Plaintiff's second lawsuit barred by res judicata because same cause of action with merely newly-discovered facts); *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981)(res judicata bars

[5] See V Procedural Rulings, Section A.
[6] The September 24, 2007 Order states that "no claims regarding an alleged hostile work environment or other complaints of retaliation for the period prior to January 1, 2006, which were or could have been heard by Judge Romano, will be reheard."
[7] For simplification, I have numbered each specific rule in an accompanying footnote. Rule One.
[8] Rule Two.
[9] Complainant's first complaint was filed on March 7, 2005, and commenced *Hoffman I.*
[10] Rule 3.

the re-litigation of issues that have already been litigated or could have been litigated in a prior action.).

Both res judicata and the related doctrine of collateral estoppel or issue preclusion relieve parties of the cost of multiple lawsuits, promote judicial efficiency, "preserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel forecloses re-litigation of matters litigated and decided. "Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* at 415. For res judicata "a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." *Id.* at 415 citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

The Sixth Circuit describes "res judicata as 'extinguish[ing] "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."'"[11] *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644 (6th Cir. 2007) quoting *Walker v. General Tel. Co.*, 25 Fed. Appx. 332, 336 (6th Cir. 2001). The elements are as follows:

> (1) there is a final decision on the merits of the first action by a court of competent jurisdiction; (2) the second action involves the same parties, or their privies, as the first; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and, (4) there is identity of claims.

Id. at 650. Identity of claims is satisfied if "'the claims arose out of the same transaction or series of transactions,' or if 'the claims arose out of the same core of operative facts.'" *Browning v. Levy*, 283 F.3d 761, 773-74 (6th Cir. 2002) quoting *Micro-Time Mgmt. Sys., Inc. v. Allard & Fish, P.C. (In re Micro-Time Mgmt. Sys., Inc.)*, 983 F.2d 1067 (6th Cir. 1993).

In *Rivers v. County of Marin*, 2006 WL 581096 (N.D. Cal. 2006), the plaintiff had filed a lawsuit in 2003 alleging race and gender discrimination and harassment. The plaintiff filed a second lawsuit in 2005 containing similar allegations. Plaintiff's 2005 complaint contained several allegations based upon conduct that served as the subject of the first action and occurred before the filing of the first action. The complaint also contained a paragraph alleging misconduct, which served as the focus of the current complaint, which occurred between the filing of the complaint in the first case and the entry of judgment in the first case. Employer's Motion to Strike, which was denied, was based on the argument that the allegations were barred by res judicata. The court allowed the allegations from the prior complainant to stand as allegations from prior complaints may provide useful background. The court found the allegations which served as the focus of the current complaint to not be barred by res judicata

[11] The Fifth Circuit characterizes this as a "transactional test" and states that the "critical issue under the transactional test is whether the two actions are based on the 'same nucleus of operative facts.'" *Broadway v. Dep't. of Homeland Security*, 2005 WL 1400452 (E.D. La. 2005).

because the allegations did not arise from "the same nucleus of transactional facts" as the facts in the first complaint.

In *Singh v. U.S. Security Assocs.*, 2006 WL 2460642 (S.D.N.Y., 2006), a Title VII Civil Rights Act of 1964 case, the court applied the doctrine of res judicata. In his first suit, Singh complained of (1) race discrimination; (2) denial of promotion; and, (3) a hostile work environment. Singh's second Title VII lawsuit, filed several years later, alleged that the defendant discriminated against him, harassed him, and terminated him in retaliation for filing the first lawsuit. The court ruled that all of the claims, except for the new claims arising from the termination, were precluded because the claims were asserted in the first litigation and the criteria for res judicata was satisfied.

In *Broadway v. Dep't of Homeland Security*, 2005 WL 1400452 (E.D. La. 2005), the court applied res judicata to prevent the plaintiff from asserting a hostile work environment claim. The plaintiff filed a lawsuit under Title VII in 1999 that included a hostile work environment claim. Plaintiff filed a second lawsuit in 2001 that also included a hostile work environment claim. The court ruled that the hostile work environment claim was barred by res judicata because there was no evidence suggesting that the second hostile work environment claim arose from a transaction or occurrence that was separate from the transaction or occurrence in the first claim. Additionally, the remaining res judicata elements were satisfied. *See also Gregory v. Widnall*, 153 F.3d 1071 (9th Cir. 1998).

In *Roberts v. Texas Dep't of Human Services*, 275 F.3d 1083 (5th Cir. 2001), the plaintiff filed her first Title VII action in 1995 and a second Title VII action in 1999. The second action included a hostile work environment claim based on allegations involving incidents occurring prior to the trial of Plaintiff's first lawsuit. The court held that the claims were barred from retrial by res judicata because the claims "were or could have been tried in [Plaintiff's] prior lawsuit." *Id.*

In *Mannie v. Potter*, 326 F. Supp. 2d 880 (N.D. Ill. 2004), the court ruled that res judicata did not bar the plaintiff's claims in her second Title VII lawsuit where the claims arose from a "new and different" set of facts.[12] This was so even though the facts occurred prior to the plaintiff's filing of her first Title VII lawsuit and the facts were not considered in the first lawsuit. It should be noted that the court did not discuss Title VII's 180-day statute of limitations.

In summary, in the case sub judice, res judicata bars basing NJA's liability on the following evidence: evidence of discrete violations at issue in *Hoffman I*; evidence of the hostile work environment at issue in *Hoffman I*; and, evidence of facts and occurrences taking place prior to the complainant's first complaint, but not considered in *Hoffman I*. First, the parties in the present case were involved in the prior litigation. Second, the prior litigation resulted in a final judgment on the merits. Third, the issue of employer's liability based upon these facts has been actually litigated or should have been litigated. Finally, any claims would involve the same transaction or series of transactions.[13]

[12] Plaintiff claimed discrimination, retaliation, and a hostile work environment in both claims.

[13] However, it is clear that Hoffman has also raised new complaints in the present case which need to be considered.

However, while the aforementioned facts may not be used to establish NJA's liability in the present case, the facts considered in *Hoffman I* may be used as "background."[14] [TR 110]. *See Rivers v. County of Marin*, 2006 WL 581096, 5 (N.D. Cal. 2006)(allowing evidence of allegations from prior complaint to provide background information); *Sherman v. Daimlerchrylser Corp.*, 2002 WL 31875469 (E.D. Mich. 2002)("Res judicata and collateral estoppel bar the relitigation of issues, not the admission of evidence."); *Nat'l RR Passenger Corp. v. Morgan*, 122 S. Ct. 2072 (2002).

As for evidence of facts and events occurring between March 3, 2005, the date of Complainant's initial AIR complaint in *Hoffman I*, and Judge Romano's decision in *Hoffman I*, this evidence can be considered to establish a hostile work environment claim in the present case.[15] The allegations contained in the three complaints filed in the present claim must shift the balance to establish a hostile work environment. Evidence of events and facts occurring in this same period, not otherwise time-barred or considered in *Hoffman I*, may be used to establish discrete violations.

Finally, evidence of facts and events occurring after August 21, 2006, when Complainant's last OSHA complaint was filed, were admitted into evidence only for consideration on the issues of motive, intent, or discrimination as to the earlier alleged actions.[16] Respondent's liability cannot be based upon this evidence. *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382 (7th Cir. 2000)("The last date of the allegedly discriminatory conduct is not a bright line beyond which the conduct of the employer is no longer relevant in a discrimination case.…The focus must remain on whether the evidence is relevant to demonstrate that discrimination played a role in the decision, and that determination is not served by a bright-line temporal restriction.").

V. PROCEDURAL RULINGS

A. Admission of ALJX 3A

During the hearing, a CD, prepared by NJA, containing the record in *Hoffman I*, was admitted into evidence. [TR 1059-1060]. (ALJX 3). Hoffman argued that the CD did not contain the entire *Hoffman I* record, and Hoffman was granted leave post-hearing to submit any additional exhibits which he contended were part of the *Hoffman I* record. [TR 1054-1055; 1060]. (ALJX 3A). The dispute over the *Hoffman I* record arises from the following: Hoffman submitted additional evidence on the date the record closed, May 1, 2006 ("contested exhibits"). Subsequently, NJA filed a Motion to Strike which was not ruled on by Judge Romano. In his appeal brief to the ARB, Hoffman included the contested exhibits, and NJA renewed its Motion to Strike.

Hoffman submitted additional exhibits, including the contested exhibits, to the undersigned on May 29, 2008 (ALJX 3A). Thereafter, NJA filed a Motion to Strike Rejected

[14] Rule four.
[15] This is limited to evidence not considered in *Hoffman I.*
[16] Rule five.

Evidence from ALJX 3A. NJA's first Motion to Strike Rejected Evidence addressed CX Tabs Q and R contained on ALJX 3A. After reviewing the relevant *Hoffman I* transcript sections, I find that Judge Romano did admit CX Tab Q (ALJX 3, hearing transcript at 100-102) and did not admit CX Tab R (ALJX 3, hearing transcript at 172-173).

NJA subsequently requested that ALJX 3A be excluded, in its entirety, from the record in the present case based on the ARB's July 22, 2008 decision in *Hoffman I*. In that decision, the ARB granted NJA's Motion to Strike portions of Complainant's brief relating to evidence outside of the evidentiary record. Based on the ARB's decision, to the extent that ALJX 3A includes the contested exhibits, ALJX 3A is excluded from evidence in the present case. The remainder of ALJX 3A is admitted.

Hoffman argues that excluding parts of ALJX 3A is prejudicial as the act of proffering exhibits in *Hoffman I* constitutes protected participation and establishes protected activity. However, whether Hoffman engaged in protected activity is not at issue in the present case; the record clearly shows that Hoffman has engaged in protected activity. The parties have stipulated that a previous hearing was held under the Act and that Hoffman engaged in protected activities on occasions in 2005 and 2006 until about August 22, 2006. (ALJX 1, Stip. 7 and 16). Therefore, Complainant does not suffer prejudice upon the exclusion of the contested exhibits from ALJX 3A.

B. NRFO Promotion[17]

On August 6, 2008, I issued an order receiving Attachment A to NJA's Post-Hearing Brief into evidence (RX 34) and allowing Complainant five days to file an objection to the exhibit's admission. Attachment A is an Operations Memorandum, dated May 22, 2008, showing that Complainant received a promotion and was placed in an NRFO position, the successor to the OCARO position. On August 14, 2008, Hoffman filed a response, conditioning his acceptance of RX 34 on the admission of his own evidence regarding the post-hearing promotion. Specifically, Hoffman sought the introduction of a settlement offer into evidence. Hoffman's request is denied, and his objection to the admission of RX 34 is overruled.

C. Aircraft N990QS testimony

On June 26, 2008, NJA filed a Motion to Supplement Record Or, In The Alternative, Motion To Strike Declaration of Mark Hoffman.[18] In short, NJA argues that it is necessary to supplement the record with the affidavits of two employees to rebut Hoffman's testimony concerning aircraft N990QS. On July 14, 2008, Hoffman stated that he does not object to NJA's Motion to Supplement if an additional declaration of his, dated July 9, 2008, is considered as well. The additional affidavit is attached to Hoffman's Memorandum on Respondent's Motion to Supplement or Strike.

[17] NRFO stands for Non-Routine Flight Operations.

[18] On May 30, 2008, Complainant filed a Memorandum on Admissibility of Evidence of NetJets Large Aircraft Company, LLC ("NJLA") Actions. The declaration of Hoffman is attached to the memorandum.

NJA's Motion to Supplement Record is denied; however, Hoffman's testimony regarding aircraft N99OQS, located on pages 1220-1223 of the hearing transcript, is stricken from the record.[19] Therefore, it is not necessary for NJA to supplement the record. The testimony is excluded based upon 29 C.F.R. § 18.403 which provides for the exclusion of relevant evidence if the evidence's probative value is "substantially outweighed by the danger of confusion of the issues, or misleading the judge as trier of fact, or by considerations of undue delay, [or] waste of time…." 29 C.F.R. § 18.403. Additionally, the testimony sheds little, if any, light on the issues of "motive, intent, or discrimination," and does not suggest any recrimination against Captain Hoffman for reporting N99OQS issues.

D. Ty Nishikawa's Testimony

During the hearing on January 18, 2008, NJA objected to the testimony of Ty Nishikawa. NJA objected to the testimony on the ground that it concerned events, occurring prior to March 7, 2005, that were not brought before Judge Romano in *Hoffman I.* Additionally, NJA objects to the testimony by stating that the testimony is not relevant and even if the testimony is relevant its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues.[20]

Hoffman, in his August 13, 2008 Memorandum in Opposition to Respondent's Motion to Strike Testimony of Ty Nishikawa, argues that Mr. Nishikawa's testimony is relevant and admissible. More specifically, Complainant argues that the testimony is relevant, *inter alia*, to oppose the testimony of witnesses Hart and Meikle and to show Respondent's managers' pattern of hostility towards protected safety concerns.

Based upon the evidentiary rules set forth during discovery and at the hearing, Ty Nishikawa's testimony, although relevant, is not admitted. The testimony concerns events occurring prior to March 7, 2005 that were not brought before Judge Romano in *Hoffman I*. However, in an effort to give Captain Hoffman the benefit of the doubt, Mr. Nishikawa's testimony has been considered and the testimony does not affect the outcome of the case.

VI. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties have agreed to, and I have accepted, the following stipulations of fact:

1. NJA is engaged in the management, operation and maintenance of fractionally owned aircraft as well as air charter operations. NJA operates over 400 aircraft, which range in size from the Citation V Ultra to the Boeing Business Jet.

[19] Respondent's Motion to Strike Declaration of Mark Hoffman is denied.

[20] 29 C.F.R. § 18.401 defines relevant evidence as "evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues, or misleading the judge as trier or fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 29 C.F.R. § 18.403.

2. NJA employs approximately 2,700 pilots to operate the aircraft.
3. Since the early 1970s, the pilots have been represented for purposes of collective bargaining by the International Brotherhood of Teamsters, Airline Division.
4. Hoffman was hired by NJA in February 1997 and has been in the Citation X aircraft program since approximately April 2001.
5. The Recordation Policy, implemented on or about June 23, 2005 provides

> NJA does not condone the interception or recordation by, between or among employees concerning the business of NJA, whether such conversations are in person or over the telephone. Accordingly, no employee shall intercept or record, attempt to intercept or record, or procure another person to intercept or record any in-person or telephone communications by, between, or among NJA employees and relating in any way to business of NJA.
>
> Consent for interception or recordation of in-person or telephonic conversations may be granted by NJA personnel at or above the level of Executive Vice President or President or a designee thereof. The granting of such consent is at the sole discretion of the Executive Vice President, President or his or her designee. In those instances where consent in granted, it shall be provided in writing.
>
> Failure to comply with this policy will result in discipline, up to and including discharge.

6. The recordation policy was published to pilots via electronic e-mail. Hoffman received a copy on or about June 25, 2005.
7. A hearing in *Hoffman v. NJA Aviation, Inc.*, ARB Case No. 06-141, ALJ Case No. 2005-AIR-00026 (*"Hoffman I"*) was held on February 7 and 8, 2006. Hoffman proceeded *pro se* in that case until April 25, 2006.
8. Prior to that hearing, the parties engaged in extensive discovery. NJA's First Request for Production of Documents to Hoffman included the following: "Produce all documents concerning conversations you have had with current and/or former NJA personnel, including management personnel, regarding the allegations in your March 7, 2005 AIR21 complainant, including copies of any tape recordings or other recordings made of said conversations."
9. Hoffman tape recorded conversations with NJA management and non-management personnel, agents, employees and representatives of the Teamsters as well as the OSHA Investigator assigned to *Hoffman I*.
10. Approximately one week after the hearing in *Hoffman I*, Hoffman took an extended leave of absence to care for his ailing mother. NJA managers came to believe that some 400 conversations had been recorded after implementation of the Recordation Policy.
11. Hoffman returned to work on April 19, 2006. On April 21, 2006, Hoffman and his Union representatives, Amy Vidovich and Todd Weeber, met with former Director of Operations Gary Hart and Employee Relations/Ethics Officer Richard Needles.
12. Hoffman had previously sought permission to tape record the meeting.
13. Hart read the following statements to Hoffman:

> Per instructions of General Counsel, you are not permitted to tape record this meeting.
>
> The Company has reason to believe that since the implementation of the Recordation Policy on June 23, 2005, you have repeatedly violated the policy

through the recording of conversations with management and possibly non-management personnel.

The Company recognizes that in some of these instances, you were engaged in protected activity under federal whistleblower statutes. As such, your conduct does not violate the Recordation Policy.

However, the Company has reason to believe that you were not engaged in protected activity each and every time you recorded a conversation.

You are requested to cease recording conversations with all Company personnel to the extent you are not engaging in protected activity.

The Company is going to conduct an investigation into this matter. We intend to focus on ascertaining which recordings constitute protected activity and are not violations of the Recordation Policy, and which recordings are not protected and as a result, violations of Company policy. You will have a full opportunity during the investigation to explain your conduct to the Company.

You are going to be placed on administrative leave per Section 21 of the collective bargaining agreement pending the outcome of the investigation. The leave will be with pay.

14. Hart concluded the meeting by presenting Hoffman with the notice of paid administrative leave per Section 21.1(b) of the collective bargaining agreement.
15. Hoffman filed a complainant with the Occupational Safety and Health Administration ("OSHA") on May 19, 2006.
16. Hoffman engaged in "protected activities" on occasions in 2005 and 2006 until on or about August 22, 2006, the date of his third OSHA AIR complaint.
17. NJA is an "air carrier" covered by the Air Act and "employer" under the TSCA.
18. Company policies, rules and regulations are set forth in the NJA "Flight Policy Manual," also known as the "Flight Operations Manual" or "FOM."
19. FOM 4.6.1 states "[a]ny time a situation arises where the crew suspects unscheduled maintenance may be required, crew members shall consult with MCC and their ACP on duty. This is necessary to ensure that proper action is taken in regards to the issue and all pertinent parties are advised of the aircraft's status as soon as possible."
20. Many of the terms and conditions of employment of NJAs pilots are contained in the CBA.
21. The 1998 CBA between NJA and the Teamsters became open for amendment in October 2001 when labor negotiations commenced. Bargaining continued through mid-2004 when the majority of the pilots rejected a proposed tentative agreement.
22. There was a hiatus in bargaining when NJA pilots disaffiliated with Teamsters Local Union 284 and created their own local (Local 1108). Bargaining resumed in early 2005.
23. Operational Checks flights involve the ground movement of aircraft under their own power or actual flight operations conducted to confirm that an aircraft discrepancy is not recurring.
24. Restricted Aircraft Operations involve the ground movement of aircraft under their own power or actual flight operations conducted outside the normal operational restrictions set forth in NJA's FOM.
25. As a result of collective bargaining, NJA created a program, pursuant to a MOU dated August 24, 2005, where NJA pilots would operate OCARO flights in lieu of non-seniority list

pilots, e.g. manufacturer's pilots, test pilots, or NJA management pilots, which previously operated such flights.
26. The MOU provided:

> a) OCARO pilot bids will be published via Company-issued electronic device and posted on the Crew Ops website for at least 14 days. The Company commits to posting a sufficient number of OCARO positions for the expected workload in each fleet. In addition, the Company commits to fill vacancies as soon as practicable after a vacancy occurs.
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> b) The Company will review the submitted qualifications of all pilots who bid any OCARO positions.
>
> c) The Company will appoint the candidates of their choice for all OCARO positions.
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> d) OCARO pilots will be compensated at the Check Airman premium pay rate. Pilots selected for OCARO positions who receive or in the future will receive a pay premium associated with a position set forth in Section 5.4(d) of the Collective Bargaining Agreement shall receive only one rate for both duties: the Check Airman premium pay rate.

27. As a result of NJA's delay in implementing the August 24, 2005 OCARO MOU, the union filed a grievance, on March 6, 2006, to enforce the MOU.
28. David Cimarolli, the Chief Pilot, Citation X Program, provided guidance to the pilots assigned to analyze the applicants. The analysis of applicants was assigned to three of his Assistant Chief Pilots: Ed Anderson; Allan Wyrick; and, Dave Robbins**.**
29. Hoffman provided eight compact discs containing conversations he had recorded from May 2004 through January 2006, in response to NJA's discovery requests in *Hoffman I*. Complainant did not edit the CDs to include only conversations germane to his AIR21 complainant in *Hoffman I.*
30. The May 19, 2006 letter concerning violation of NJA's recordation policy was removed from his personnel file on May 19, 2007 pursuant to CBA section 23.3
31. Jet fuel is a "toxic substance" covered by the TSCA.
32. NJA is required to follow the Federal Aviation Administration's Federal Aviation Regulations ("FARs").
33. NJA and Teamsters Local 1108 negotiated amendments to the 1998 collective bargaining agreement that were ratified by the pilots on November 21, 2005.
34. Respondent changed the name of the OCARO position to "Non-Routine Flight Operations" or "NRFO" per the NJA FOM NRFO Manual and LOA 01-008 on December 29, 2006.
35. Since December 29, 2006, the term "Restricted Aircraft Operations" is no longer used in NJA's FOM.
36. The grievance referenced in Stipulation 27 is identified as class action grievance number 640-06.

B. The Parties' Contentions:

1. *Complainant:*

Captain Hoffman states that he has engaged in protected activity by raising compliance issues with management, tape recording to collect evidence of violations, and instituting and participating in a prior hearing under the AIR Act. As a result of this protected activity, Hoffman

alleges that he has suffered adverse employment actions. Hoffman states that he was placed on administrative leave from April 21, 2006 through May 19, 2006, received a written warning letter on May 19, 2006, and was denied a promotion on June 14, 2006 in retaliation for engaging in protected activity. Hoffman additionally alleges that he has been subjected to a hostile work environment, adverse assignments, and discipline in retaliation for protected activity.

2. *Respondent:*

NJA agrees that Hoffman has engaged in protected activity, but denies that Hoffman's protected activity has contributed to any adverse employment actions being taken against him.[21] NJA states that Hoffman was placed on paid administrative leave in accordance with CBA section 21.1(b) pending a review of the recordings for the purposes of ascertaining the contents of the tapes and enforcing its non-discriminatory company recordation policy. NJA further asserts that Captain Hoffman was not promoted in June of 2006 because he was not ranked among the top ten applicants. Finally, NJA denies that Captain Hoffman has been subjected to a hostile work environment, adverse assignments, and discipline in retaliation for protected activity.

VII. ISSUES

A. Whether, under 49 U.S.C. § 42121(a), the respondent discriminated against the complainant regarding compensation, terms, conditions, or privileges of employment because,

> He provided to the employer or Federal Government information related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety?
>
> He has filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety?

B. If the respondent so violated 49 U.S.C. § 42121(a), what are the appropriate sanctions or damages?

C. If the respondent so violated the Act, what reasonable costs and expenses is the complainant entitled to in bringing and litigating the case, including attorney's fees?

[21] See ALJX 1, Stip. 16

VIII. PRELIMIINARY FACTS[22]

Captain Mark Hoffman is a forty-two year old, married, father of three. He holds a Bachelor of Arts degree from Park College in aviation. His life-long aspiration was to become a pilot/astronaut. [TR 680]. He struggled and over the years worked to become a pilot. He earned his Certified Flight Instructor license in 1989 and became a qualified captain in 1994. At Point Park, he learned about the Federal Aviation Regulations ("FARs") and how they were "written in blood." That is, many regulations result from aviation accidents. [TR 682]. He learned about "error chains" and the importance of breaking them (to avoid mishaps). [TR 684]. According to Captain Hoffman, even the most seemingly innocuous matter can contribute to accidents. For example, Captain Hoffman related how a placard (signage) error led to the crash of a DC-3 aircraft of which he saw the aftermath. [TR 685-687]. I found Captain Hoffman overly ready to ascribe malevolent motives to company actions in situations where a more reasonable person would not.

NJA's predecessor, Executive Jets Aviation, hired Hoffman in 1997. (RX 25 is his employment application). He began as a Citation V Ultra pilot and "really enjoyed NJA's culture" and "felt a lot of promise." [TR 693-695]. Captain Hoffman had previously worked for Flight Safety International ("FSI"), Airmen West, and Trans States. In 1998, Warren Buffet's Berkshire Hathaway invested in Executive Jets Aviation and it became NJA. Captain Hoffman transitioned to the Hawker program and became a Line Orientation Instructor ("LOT") pilot. Beginning in 2008, Captain Hoffman earned about $156,000 per year at NJA.

NJA employs over 2,000 pilots. The average pilot is 42 years old with over 6,000 flight hours. Mr. David MacGhee, Executive Vice President of Flight Operations, testified that it is not company policy to fly "unairworthy" aircraft and that in the past four years none of their planes have been found unairworthy. He added that no NJA passenger has ever been harmed or killed, and, aside from one accident, involving a collision with glider, there have been no major accidents. [TR 545]. Admittedly, Mr. MacGhee testified that NJA does not train employees on the law. However, he added that all employees know they can raise "safety" issues at any level. [TR 513]. In fact, according to Mr. MacGhee, NJA had over 42,000 maintenance write-ups between May 19, 2006 and March 15, 2008. While the maintenance write-ups are maintained by aircraft tail number, the raw input form has a block reflecting which pilot discovered the discrepancy.

Mr. MacGhee served thirty-three years in the U.S. Air Force, retiring as a general officer. Among his last assignments, he served as the inspector general of the enormous Air Combat Command. He is an extremely experienced pilot who has flown nearly every type of aircraft in the Air Force inventory. [TR 1164-1166]. I found his testimony to be very straight-forward and credible.

[22] Hoffman argues that NJA is barred from producing evidence on the OCARO selection process because NJA's Rule 30(b)(6) witness, Mr. Gary Hart, was not knowledgeable of the selection process. [CX 234 at 78-80]. While Hoffman's argument may have some merit, it is of no consequence because details of the OCARO selection process were revealed ad infinitum prior to and during the hearing.

David Cimarolli, Citation X Chief Pilot, is Captain Hoffman's immediate supervisor. The Citation X program has over 100 aircraft with 500-600 pilots. Mr. Cimarolli has nine Assistant Chief Pilots ("ACPs") working for him. The ACPs work directly with the pilots. [TR 353-354]. He testified that NJA does have classes concerning ethics, run by Human Relations. [TR 372-373]. Mr. Cimarolli was the company representative in Captain Hoffman's first AIR case. [TR 422].

As an instructor, Captain Hoffman worked a great deal of overtime and was better paid, earning about one and one half times his base pay. [TR 702-704]. He claims that NJA began contracting out maintenance in 1999 and that this resulted in more conflict with management. Captain Hoffman worked for George Lusk, whom he considered a "bad manager." [TR 699; 707-710]. At the time, Captain Hoffman had a run in with management over defective emergency lights. He considered this to be a safety matter since the lights were on the aircraft's Minimum Equipment List ("MEL"). Every aircraft must have all its MEL before it may be flown. [TR 701-702].

In early 2001, Captain Hoffman gave up his LOT position and transferred to the company's Citation X program. As a result of the collective bargaining agreement, the LOT position became an "IOE" position for which pilots had to bid. Captain Hoffman admitted, in so many words, that by then he was not known as a "go to" man. [711-712; 715-716].

Captain Hoffman's first major run in with the company occurred on October 17, 2001 regarding a jet fuel leak. (CX 105, p. 1097). During fueling, his assigned aircraft, Quebec Sierra Citation 913, dumped 30 to 40 gallons of fuel from the left wing and the left wing fuel overfill light illuminated. He discussed the matter with crew member Captain Preston and manager Billy Smith. Despite his better judgment, Hoffman nevertheless had the plane fueled and flew it. On two of the three flight legs, the aircraft vented excess fuel. Apparently, the aircraft had a major problem with a valve. Captain Hoffman "wrote-up" the defect and faxed it to management. (CX 20). He claimed that program manager, Mr. Cimarolli, berated him and threatened a job loss. After the incident, Hoffman testified that Mr. Cimarolli scheduled him for a check ride. Captain Hoffman believed this was done because he challenged Mr. Cimarolli. There can be severe consequences if an aircraft vents excess fuel. The fuel leak/venting and alleged berating by Mr. Cimarolli were addressed in *Hoffman I*. [TR 716-725; 730-731].

The next major run in Captain Hoffman had was on July 16, 2004 when he refused to board a company employee as a passenger on an aircraft he was to fly under a FAA "ferry" permit. Ferry permits limit who and what can be transported on an aircraft as the aircraft is flown to a service center. Captain Hoffman involved the FAA in the matter and a second "ferry" permit was issued. Hoffman claimed the company suspended him for involving the FAA. As a result, he claims to have lost flight hours which later impacted his ranking when applying for an Operational Check and Aircraft Restricted Operations ("OCARO") position. The ferry permit matter was addressed in *Hoffman I*. [TR 733-734].

Captain Hoffman began secretly recording conversations with NJA's employees and management in May 2004 "out of a concern for safety." He testified that he did not reveal his practice because he feared potential repercussions. On March 7, 2005, he filed his first AIR

complaint. He filed the first complaint because he felt trapped, out of options, and no one could stop the safety abuses he perceived. [TR 737-738]. In April of 2005, he provided OSHA with CDs of his surreptitious recordings. Captain Hoffman filed a FOIA request for copies of his own recordings in September of 2004. He also testified that he mentioned his recording to a few other pilots. [TR 740-741]. In May 2005, OSHA completed its investigation denying relief. On June 18, 2005, Captain Hoffman posted a message on the union website mentioning secret recordings in response to what he considered a "threatening" posting there. On June 23, 2005, he appealed OSHA's finding to the Office of Administrative Law Judges ("OALJ"), United States Department of Labor. RX 3 contains a transcript of Captain Hoffman's recordings discussed at his earlier deposition.[23] [TR 746-747; 744].

In 2005, NJA needed OCARO pilots. Between 63 and 65 pilots applied, including Captain Hoffman who applied in December of 2005. [TR 388]. All applicants submitted resumes. Mr. Cimarolli, who was responsible for filling the positions, created what he believed was an objective point-system to evaluate applicants in order to "be as fair as possible." He had not previously used a point scoring system. Mr. Cimarolli used union input and the union placed heavy weight on military experience. Mr. Cimarolli wanted to level the playing field so he ordered ACPs to subtract any points given for military service from the union score. Flying hours was the "predominant factor."[24] [TR 398]. (See RX 9). Seniority, flight hours, and input from the maintenance department were also considered in ranking applicants. [TR 388-390]. Mr. Cimarolli testified that he believed everyone on the list could qualify for the position. [TR 404].

Mr. Cimarolli tasked his assistants, E.J. Anderson and Dave Robbins, to adjust the scoring formula and to obtain input from the maintenance controllers ("MCCs") because the controllers worked closely with the pilots. Additionally, Mr. Cimarolli told the ACPs to add in flight hours and other criteria. [TR 400-404].

The pilot's union created their own formula for input.[25] The union reviewed the OCARO applications. (RX 174; RX 8). On a green, yellow, and red scale, the union ranked Hoffman 25th or "yellow." (RX 8). Several pilots were rated either red or green. Mr. Cimarolli did not check to verify the accuracy of the union scorecards. [TR 398]. Mr. Hart then asked Mr. Cimarolli for the names of the top ten applicants. [TR 403-404].

Mr. E.J. Anderson has been an Assistant Chief Pilot in the NJA Citation X program for the past three years.[26] Before that, he served as a line pilot under Mr. Cimarolli. He testified that he has no reason to doubt Captain Hoffman's honesty and that the latter has always been "professional" in handling issues. [TR 1082-1083].

Mr. Anderson corroborated that Mr. Cimarolli directed him to develop a spreadsheet to rank OCARO applicants. [TR 1083-1084]. Mr. Cimarolli gave no detailed instructions other

[23] Captain Hoffman admitted that he had testified at his deposition that several of the recorded conversations did not involve a violation of the law.
[24] Captain Hoffman was 17th with less than half the flight time of those in the top ten. (RX 8). He was 54 out of 63 in seniority. (RX 10). [TR 927-930].
[25] RX 26 is the NJA-Union Letter of Agreement regarding OCARO position compensation which resulted from settlement of a grievance.
[26] Mr. Anderson's deposition was admitted as CX 236.

than wanting a "fair" process and "no favorites." [TR 1086]. The general criteria to consider were: types of aircraft flown; seniority; flight time; union score; and, MCC points.[27] A point scale was developed for scoring. Each maintenance controller could award 0-10 points to each applicant. Although they were aware the applicants would be ranked, the controllers were not given any criteria upon which to base the scores. Mr. Cimarolli and Mr. Anderson thought that since OCARO pilots were going to be working with the MCCs, the MCCs should have some input in the selection process. [TR 1089]. Mr. Anderson distributed score cards to about seven to ten controllers. [TR 1089-1091]. The MCC scores were compiled by Mr. Anderson. (RX 14). [TR 1096]. One maintenance controller, Mr. Paez, gave Captain Hoffman a zero. Another maintenance controller, Mr. Martinez, did not give a score to any applicant. [TR 1098].

For the "interview" portion of the application process, five points were available for each of six generic questions posed during the interview for a possible total of 30 points.[28] [TR 1089-1094]. Mr. Anderson participated in the complainant's interview, on April 19, 2006, and he completed the interview score card for Captain Hoffman. (RX 18). Mr. Anderson recorded interview scores on a spreadsheet. (RX 13). [TR 1133-1135].

Mr. Anderson obtained some of the data for scoring, such as seniority and flying hours, by himself.[29] (RX 9; RX 10). Mr. Cimarolli forwarded the union rankings to him, and he recorded them on a spreadsheet. (RX 8: RX 11). Mr. Anderson did not review or score the resumes. He and Mr. Cimarolli observed that the union had given heavy weight to military experience which they believed over-weighted some scores. Therefore, they decided to delete points for military experience. (RX 12). Mr. Anderson also prepared RX 19 and RX 20. He testified that RX 29 was a CD recording of Captain Hoffman's OCARO interview. As far as Captain Hoffman's interview score for item 6, RX 18, the panel did not feel he had given the OCARO position any forethought. Mr. Anderson identified CX 149 as pilot Taylor's interview score card.

Mr. Paez testified that he had been a maintenance controller, who had worked with Captain Hoffman since September 2004. He recalled Mr. Anderson giving him a card to score OCARO applicants and that no "parameters" for the rating were given. He was fairly new and did not recognize many of the applicants, but he recognized Captain Hoffman's name and gave him a zero. [TR 461-462]. Other MCCs had told him Captain Hoffman recorded conversations and was not helpful. [TR 463]. Mr. Paez's "beef" with the complainant was based upon the latter's refusal, unlike other pilots, to interrogate the IMT computer system on-board aircraft to refine maintenance issues.[30] [TR 464-467]. That refusal requires mechanics to "load the cannon," that is send out a full compliment of parts to the aircraft for any type of problem. [TR 463-466]. Mr. Paez testified that one does not need an A&P license to interrogate the IMT; it is just like any other gauge. [TR 471-472]. With respect to Hoffman's recording, Mr. Paez testified that he felt the recording matter was a "big trust issue." [TR 467].

[27] Though not stated, applicants were also scored on an interview.

[28] Captain Hoffman ranked 18 out of 63 for the interview. (RX 13).

[29] Captain Hoffman admitted the "seniority" scoring, where he got 54 of 63 points, was to his benefit. (RX 10). He also admitted an advantage to him when the company removed military experience as a scoring factor.

[30] According to Mr. Paez, the IMT involves an on-board computer program dealing with maintenance matters. Interrogating the IMT can inform the mechanics of the aircraft's condition, if service is needed, and the level of service.

Mr. Marshall Harvey, a maintenance controller, testified that he was asked to provide scores for OCARO applicants. [DT 5]. He was not told what to consider when scoring the applicants, and based his scoring on "[p]ersonal rapport with the pilots that I knew and their ability to help troubleshoot the aircraft." [DT 6]. He did not award points to pilots that he did not know well enough or pilots who were inadequate in their ability to help troubleshoot. [DT 9]. Harvey testified that that Hoffman is unwilling to help troubleshoot; he will not enter the maintenance page of the aircraft's diagnostic system. [DT 11]. Harvey has heard that Hoffman records phone conversations. [DT 15]. Hoffman's write-ups did not affect Harvey's decision to award him no points. [DT 25].

Maintenance controller Mr. Mark Glowa testified that Mr. Anderson told him to provide scores for the OCARO applicants, but did not say how to assign the points. Glowa assigned points based mainly on "name recognition and with some previous interaction with those individuals." [DT 5-6]. The scores were returned to the ACP group for the Citation X program. [DT 8]. Glowa testified that he did not award any points to Hoffman because there was "really no name recognition" and nothing to make him stand out. [DT 9]. Glowa did interact with Hoffman on the ferry permit issue and former knew the company wanted him to testify in *Hoffman I*. [DT 12-14]. Glowa is aware that Hoffman records some of his telephone conversations. [DT 16-17]. Finally, Glowa testified that the OCARO scoring was within his discretion and was subjective. [DT 23].

Mr. Stephen Siegel, another maintenance controller, testified that an ACP provided the maintenance controllers with a list of OCARO applicants and asked for their input on which ones were better to work with. [DT 6-7]. Siegel scored "ones that I was familiar with, which would have been recently, and felt that they were crew members that would do well in the position and I easily communicated with." He was new to the company at the time, and did discuss the applicants with other controllers, although he cannot remember with whom. [DT 10]. Siegel testified that he may not have yet worked with Hoffman at the time of the scoring and that no other controllers told him anything about Hoffman. [DT 13-14]. He has overheard that Hoffman records conversations. [DT 14].

Finally, maintenance controller Mr. Randy L. Kemmer testified that Mr. Anderson asked him to provide scoring on the OCARO applicants; Mr. Anderson did not provide any directions other than telling the controllers to pick who they thought would be best for the positions. [DT 5-6]. Mr. Kemmer scored the pilots according to his personal preferences based upon talking to the pilots on the phone and meeting them. [DT 6-7]. He had not heard that Hoffman records telephone conversations. [DT 8-9].

Captain Hoffman testified about what he subsequently learned about the OCARO selection process. He testified extensively, pointing out his belief that portions of the data upon which his scores were based were wrong. (CX 139, pp. 1167-69). Captain Hoffman testified that the OCARO score card wrongly listed his: "time in type;" years with NJA; and, Instructor Pilot ("IP") and check airman ("CA") times. Captain Hoffman recalculated what he believed should have been his OCARO union score; it should have been 40 points. [TR 811-819]. (CX 139A). He opined that the maintenance controllers gave him zero points because he "writes-up" aircraft and will not troubleshoot defects without having been trained on the IMT system.

Captain Hoffman admitted that had he gotten an overall OCARO score of "169," he would have "tied" for the 25th position on the list, and thus, still not have been among the selected top ten. (RX 20).[31] In actuality, he was ranked 37 out of 63 applicants. (RX 20).

If he had gotten the OCARO position, Captain Hoffman speculated that he would have added about $14,000 to his 2008 base salary. [TR 821]. Captain Hoffman prepared a spreadsheet (CX 219) reflecting "Extended Days" (essentially overtime) for listed OCARO pilots. He calculated that he would have received an additional $870 per day as an OCARO pilot. [822-826]. However, he admitted that his analysis did not differentiate between OCARO and IOE time or regular "line" duties. Mr. Henneberry, Senior Vice President for Scheduling, testified that there has been no study of whether OCARO pilots had more or less overtime than line pilots. He testified that RX 16 reflects Captain Hoffman's pay, and the overtime and extended days of the ten pilots selected for the OCARO positions. [TR 991-997].

Mr. MacGhee testified about the genesis of the company's recordation policy. In October 2005, the union and company signed a collective bargaining agreement. [TR 488]. As part of its negotiating strategy, NJA decided to brief pilots on its confidential financial status, primarily at "recurrent" classes which all pilots must take. These four-day classes were conducted 48 weeks a year with about 40-60 students attending each session. Mr. Boisture, the company president, actually conducted most briefings. [TR 492-494]. According to Mr. MacGhee, three union members, to whom he had promised confidentiality, informed him that they suspected that some of the briefings were being secretly recorded by attendees. Mr. MacGhee learned of this information in the Spring of 2005 and the Recordation Policy was issued shortly thereafter. [TR 502-503]. The union members were Messrs. Wentz and Bennett. [TR 508-509]. Mr. Bennett has since died. Captain Hoffman testified about his extreme disbelief concerning Mr. MacGhee's sources. Captain Hoffman admitted tape recording at the recurrent classes in December 2007.

Because this competitive information could not be leaked to competitors, Mr. MacGhee advised Mr. Boisture of the taping recordings, and working with counsel, they developed a recordation policy. [TR 501-502]. The briefing was cut from thirty-six slides to six slides until the policy was issued. [TR 504]. Sometime after Mr. MacGhee learned of the recordings, Mr. Cimarolli, who was also a union member, informed him that he had heard similar reports. [TR 506].

Captain Hoffman testified that he learned of NJA's Recordation Policy on June 24, 2005. NJA had adopted the policy, on June 23, 2005. Captain Hoffman received an emailed copy of the policy, along with other employees, on June 25, 2005. (RX 2). The Recordation Policy is set forth in Stipulation 5. See VI Stipulations And The Parties' Contentions. Hoffman testified that NJA itself has a computer-based recording system. (See CX 124). He unsuccessfully "grieved" the policy and its application.

In *Hoffman I*, Captain Hoffman disclosed CDs with 750 recordings during discovery. (RX 7). As previously stated, Judge Romano's decision denying relief was issued on August 4,

[31] If Captain Hoffman had gotten a composite score of up to 194, he would not have been in the top ten pilots selected.

2006. Several events transpired between the hearing and the issuance of Judge Romano's decision.[32]

Upon learning of the recordings, Mr. MacGhee, who was responsible for enforcing the policy, met with Mr. Hart to discuss a course of action and asked NJA's legal counsel to review the recordings. [TR 518-519]. Since he was hired in 2004, Mr. MacGhee has never approved any recording by a pilot. [TR 506]. Mr. MacGhee testified that until he knew what was on the tapes and received counsel's advice, he could not determine if discipline would be appropriate. [TR 522-523]. Mr. MacGhee was advised that Captain Hoffman had been "an honorable employee for a long time." [TR 527-528]. Captain Hoffman was placed on paid administrative leave while the matter was being reviewed. Mr. MacGhee testified that the paid administrative leave was not "punishment."

Mr. Gary E. Hart previously served as NJA's Senior Vice President for Flight Operations/Director of Operations. [TR 631]. Upon learning of Captain Hoffman's recordings, Mr. Hart decided to place Mr. Hoffman on paid administrative leave while the recordings were looked into, pursuant to the CBA, section 21.1(b). (RX 1). Mr. Hart testified that he had no reason to believe Captain Hoffman was untruthful or dishonest. [TR 639]. Mr. Hart initially wanted to meet with Captain Hoffman on February 20, 2006. (CX 62, p. 270). Mr. Anderson emailed Captain Hoffman on February 16, 2006, about travel to Columbus for that meeting. However, the meeting was delayed when he learned Captain Hoffman was on FMLA. [TR 651]. In fact, on February 20, 2006, Mr. Hart emailed Captain Hoffman to express sympathy regarding his mother's cancer and to reschedule the meeting. (CX 63, p. 272). Section 18.3 of the CBA required the union to be notified of the meeting.

Captain Hoffman took FMLA leave, from February 12, 2006 through April 19, 2006, to care for his mother who had cancer. He was taking her to the hospital when he got the email from Mr. Anderson scheduling a meeting in Columbus, Ohio with Mr. Hart. (CX 62, p. 270). He felt this was "interfering in his life on a grand scale."[33] He felt the timing of the email suggested retribution. [TR 772-778]. His mother passed away on March 13, 2006. [TR 780]. Any time this matter was brought up at the hearing, Captain Hoffman became very emotional.

Mr. Hart gave Captain Hoffman a letter on April 21, 2006 at which time he read from talking points. (RX 4; RX 23). The recordings were reviewed by NJA's general counsel and outside counsel. Mr. Hart did not listen to the recordings himself. He was advised that some of the recordings involved activity not protected by AIR 21. He and Mr. MacGhee decided to give a letter of warning to Captain Hoffman for violating the recording policy. (RX 5). While Mr. Hart testified in *Hoffman I*, the first AIR case played no role in that determination. [TR 632-636]. On May 19, 2006, when he met with Captain Hoffman to issue the warning letter, he asked him

[32] Administrative Law Judge Romano considered the following matters raised by the complainant: The July 2004 ferry permit matter and subsequent union grievance; suspension in August 2004, allegedly for contacting the FAA about the ferry permit; Mr. Billy Smith's questioning regarding the ferry permit; November 2005 emergency lights MEL incident; November 2005 meeting with Mr. Cimarolli; October 17, 2004, Citation X fuel venting/overfill incident; June 2004 aircraft latches matter; berating by Mr. Cimarolli over a fuel leak; January 2001 closed airport incident; Captain Hoffman's union grievance regarding denial of the IOE job; review of the recordings of the IOE interview; IOE non-selection and appeal; no flying assignments between July 11 and October 7, 2005 or crew "rot"; an October 2004 meeting regarding hostile work environment; and, July 2004 aircraft fuel leak.

[33] This is but one unfortunate example of Captain Hoffman attributing bad motives to an act that when reasonably viewed shows none.

to please stop recording. Under the CBA, the letter would remain in Captain Hoffman's personnel file for a year. [TR 637-638]. Mr. Hart stated that he was not aware of any harm caused to NJA from the recordings. [TR 667]. Mr. Hart added that Mr. Cimarolli played no role in the matter because of the difficulties he and Captain Hoffman had. [TR 646].

NJA's counsel reviewed the recordings and advised that about thirty-seven contained material not considered "protected activity."[34] (RX 3). Mr. MacGhee testified that he did not review the recordings himself. [522-523]. Nor was he aware of any other employee who had surreptitiously recorded non-safety conversations. He testified that the policy is not applicable to protected activities and that with their vast experience, NJA pilots know what is and is not a safety issue. [TR 513-514]. Mr. MacGhee testified the final decision was delayed because he had become aware of Captain Hoffman's mother's cancer and his leave. Mr. MacGhee's father had died from a similar cancer. Captain Hoffman emailed his union for representation at the meeting. (CX 66, p. 280). Additionally, Mr. Cimarolli testified that he was not involved with the complainant's violation of the recording policy or discipline nor was he familiar with the contents of the recordings.

On April 21, 2006, NJA placed Captain Hoffman on paid administrative leave, under the CBA, while it investigated him for possible violations of its recordation policy. (RX 4). Mr. Cimarolli recalled that he had notified Captain Hoffman of the initial meeting and that the latter was on FMLA leave. Captain Hoffman's request to record the April 21, 2006 meeting was denied by Mr. Hart. The paid administrative leave ended on May 19, 2006. Captain Hoffman was accompanied by two union representatives at the meeting. He testified that he raised concerns about NJA's understanding of protected activity, but Mr. Hart did not answer. The union provided a written summary of the meeting. (CX 72, pp. 291-2).

On May 3, 2006, while on paid administrative leave, Captain Hoffman was paged for a meeting with Mr. Hart. After making arrangements through the company to travel to Columbus, Ohio, and talking to Mr. Hart, Mr. Hart was unaware of any scheduled meeting, claiming a misunderstanding. Captain Hoffman perceived this as further evidence of harassment. On May 5, 2006, Captain Hoffman testified that he was briefed to attend Citation X training and felt that too was "playing games" with him.[35] [TR 792-796].

On May 15, 2006, Captain Hoffman filed his first complaint in the present case. He complained about: the recordation policy; his suspension during the investigation of the alleged violation; the April 21, 2006 letter suspending him; threats of discipline and discharge for violation of the policy; and, the related investigation and interrogation. He testified that the filing was the last thing he wanted to do, but that he wants to fly safe aircraft. He added that he does not like prior pilots failing to writing up defects; "nobody does anything."

On May 19, 2006, Captain Hoffman met with Mr. Hart while accompanied by union representatives. Mr. Hart gave Captain Hoffman a letter stating he had violated the company's

[34] Many of those involved ordering food, ground transportation, "dead-heading" on commercial flights, hotel stays, returning to duty from DNIF status, items left on aircraft, scheduling, pager problems, where to pick up an aircraft, no-show passenger, etc. NJA did not review all of the recordings.

[35] These are other examples of Captain Hoffman's misattributed views of company motives.

recordation policy by recording several "non-protected" communications (e.g., ordering crew meals). (RX 5). NJA then returned Hoffman to work. Under section 23.3 of the CBA, the warning letter was removed from Hoffman's personnel file a year later on May 19, 2007. There was no evidence that Mr. Hart knew of Captain Hoffman's OSHA complaint at the time.

On June 6, 2006, Captain Hoffman filed his second complaint in the present case. He complained that the May 19, 2006 NJA letter, concerning violations of the recordation policy and the recordation policy itself violated the Act.

On June 14, 2006, NJA advised Captain Hoffman he had not been selected for the OCARO position for which he had applied. On August 22, 2006, Captain Hoffman filed his third complaint in the present case, alleging that his denial of promotion to the OCARO position was in retaliation for his earlier protected activities.

Mr. Cimarolli vaguely remembered Captain Hoffman complaining about some aircraft checklists not being current, as required. The company audited all its aircraft checklists and was in compliance possibly in or around mid-June 2006. It appears Captain Hoffman had not been aware of the audit and again, attributed bad motives to NJA.

In June of 2007, Mr. MacGhee received Captain Hoffman's email addressing safety concerns. (CX 120). He responded to Captain Hoffman and passed it on to Mr. Miekle, Vice President of Safety, to attend to. [TR 543-544].

Captain Hoffman testified that since mid-January 2008, he has detected a pattern where he has not been assigned flights or has been assigned as a "first officer" (rather than pilot in command). He added that he still is assigned aircraft that have open write-ups and that there are "unairworthy" aircraft flying. Captain Hoffman testified that he has flown up to 800 hours per year. In 2005, he flew about 109 hours. In 2006, he flew about 150-160 hours, and in 2007, he flew about 150 hours. However, he added that the "change" between 2006 and the present involved NJA taking him seriously and making progress, not "pushing me," as in the past. Captain Hoffman admitted, during cross-examination, to multiple excused absences between 2006 and the hearing date for, among other things, vacation, recurrent training, *Hoffman I* litigation, FMLA, simulator training, and depositions. Of course, these absences reduced his flying hours.

Mr. Gabriel B. Bruno was permitted to testify as an expert witness. He spent his career working for the FAA, rising in its ranks. (CX 226). In addition to being rated as an airline transport pilot, he is a certified flight instructor. He has no specific knowledge of NJA's operations. [TR 129-133]. Mr. Bruno testified that the Part 91, FARs, applicable to all aircraft, set a "minimum" standard. Part 121 covers airlines and Part 135 covers "on-demand" carriers. [TR 294]. The "pilot in command" rule makes the pilot ultimately responsible for the safe operation of the aircraft. There is an "ever-present" potential for conflict between air carrier rules and the "pilot in command" rule. [TR 294-296]. The FARs prohibit interference with the pilot in command and require companies to have systems in place for safe operations because the pilot in command cannot do it all. [TR 308-310]. He testified that, in his experience, it is not "uncommon" for a pilot in command to be "pressured" to fly. The FARs specify what must be

maintained and the FAA enforces that. It is commonly known and in his experience true that raising safety issues "does not make friends." He testified that the industry has "very subtle" ways of discouraging such conduct. [TR 324; TR 350].

Mr. Bruno testified that fuel leaks, which can have "disastrous consequences," definitely require maintenance attention. While pilots monitor fuel flow, real fuel flow problems must be addressed by a licensed "A&P" mechanic. [TR 321-323].

Mr. David R. Miekle, NJA's Vice President of Safety, testified. He believes NJA has an "exemplary" safety culture with very "robust" reporting. It is "key to business" and "client trust." Mr. Miekle explained a "reporting culture" is desired so that the employer knows about problems. [TR 580; 588-589]. NJA tries to inculcate they (flight crews) are "paid to be safe, whether it involves crew rest, weather, maintenance, etc." It is NJA's clear policy that any time a crew member finds a discrepancy, it must be reported and inspected by a qualified mechanic. NJA has an anti-harassment policy. (CX 119). Mr. Miekle did not know if the policy covers AIR matters, but suspects it does. He added that he would be the one responsible for taking action should anyone act in retribution against an employee for reporting a safety violation. [TR 593-596]. Mr. Miekle testified about three company aircraft accidents; one in the 1990's where a cow was hit in fog on the ground; one in 2002, involving a runway overrun; and, the 2007 glider collision incident. None involved any injuries or fatalities. [TR 574-577].

Mr. Miekle testified that the FAA has a new Aviation Safety Action Program ("ASAP") which NJA implemented in October 2006. ASAP allows the company and employees to report safety and regulatory concerns to the FAA which foregoes "certification" or disciplinary action. Each year company representatives meet with the FAA and the union to review and resolve ASAP reports. The company's ASAP reporting started out at about 70 reports per month and now has reached about 130 reports per month. Every ASAP reports gets a response. While the program involves confidentiality, it is not anonymous. Mr. Miekle reviewed the ASAP reports and testified that Captain Hoffman had not filed one, as of the date he testified. [TR 580-585].

Mr. Miekle was tasked with reviewing Captain Hoffman's June 2007 email raising safety issues in the company's Citation X program. The review, completed in July 2007, took about 180 man hours and six weeks. His report was provided to NJA's counsel. [TR 560-561]. Mr. Miekle is not familiar with any recordings made by Captain Hoffman. [TR 577]. Mr. Miekle's testimony reflects that, on behalf of NJA, he took Captain Hoffman's safety concerns seriously, while not agreeing with all of them, and ensured the legitimate concerns were appropriately addressed. His testimony also illustrates that Captain Hoffman was often not fully informed about the nature and status of "safety" issues he raised. For example, Captain Hoffman's concerns about Citation X horizontal stabilizers, set forth below, and, Cessna, the manufacturer's actions. [TR 562-565]. While NJA and Cessna were acting on the matter, Captain Hoffman attributed malevolent motives for NJA's apparent inaction because he was not aware of Cessna's actions.

Mr. Miekle looked into Captain Hoffman's complaints related to Aircraft 938QS. He found Captain Taylor, another pilot, had logged seven maintenance discrepancies; all have been corrected. [TR 565-566]. With respect to Captain Hoffman's concerns about Citation X

horizontal stabilizers, Cessna, the manufacturer, is familiar with the issue and is addressing the details of what is acceptable and what requires repair.

Since *Hoffman I*, Captain Hoffman testified he has only tape recorded "safety" matters so that his activity could not be misconstrued.

Captain Hoffman testified he prepared a "payroll" chart which reflects his compensation. (CX 231).[36] NJA prepared and submitted Captain Hoffman's detailed payroll information in RX 15. Captain Hoffman admitted at his earlier deposition that his health was fine, that he had a "fantastic" relationship with his wife, and that he had not sought counseling, other than grief counseling related to his mother's death. He reviewed Dr. Clary's report, which is discussed below, and observed that the latter had opined that he tends to resent authority and to blame others. Captain Hoffman testified that the primary source of his emotional distress was NJA's actions while he was attending to his mother, while on FMLA. The company "took away precious moments . . . (which) can't be fixed."

Dr. Richard H. Clary is board certified in psychiatry. He interviewed Captain Hoffman, during a 90-minute evaluation, on December 21, 2007 and submitted a written report. (RX 6). Dr. Clary wrote that Captain Hoffman reported that his main stress came from the conflict at work and that the legal issues with his employer took all of his time. Dr. Clary essentially found no abnormalities or psychiatric disorders. His MMPI-2 testing revealed evidence of "narcissistic and paranoid thinking. . . he tends to be suspicious of the motivations of others. . . [h]e will have a tendency to resent authority and will tend to blame others for his problems…." Dr. Clary did not find evidence of significant mental anguish or mental distress.

Dr. Clary was deposed on July 25, 2008. (RX 33). He reiterated that he evaluated Hoffman for ninety minutes and conducted an MMPI-2 test. [RX 33 at 12-14]. Dr. Clary testified that Hoffman has some paranoid thinking, but that there was no evidence of paranoid delusions or psychotic symptoms. [RX 33 at 20]. Dr. Clary felt that Captain Hoffman was honest during the evaluation. [RX 33 at 24]. Dr. Clary further testified that he does not believe Hoffman suffered severe emotional distress. [RX 33 at 51].

Ty Nishikawa, another NJA's pilot, who tape recorded work conversations at the suggestion of other pilot, testified. He has been with NJA about seven years and now flies the XP Hawker. [TR 1012]. He was unaware of AIR 21 until Captain Hoffman told him of it. NJA had no training related to it. [TR 1011]. Captain Nishikawa had previously flown in NJA's Citation V program, but transferred out because he felt he had been harassed by the program's chief pilot, Mr. George Lusk. Captain Nishikawa had "written-up" three aircraft for the same problem. When Mr. Lusk called him in to talk about it, Mr. Nishikawa recorded the meeting. While acknowledging Captain Nishikawa's authority to perform write-ups and the legitimacy of the three write-ups, Mr. Lusk suggested that the former use more discretion if things were not falling apart. [TR 1014]. Mr. Lusk also sent only Nishikawa for training on oxygen masks on what Nishikawa felt was a ruse -- that he had earlier done an inadequate preflight inspection. Captain Nishikawa felt this was retribution for his write ups. A month after the Lusk meeting, he

[36] CX 231, Subparts A-D reflects pay of other named pilots. Admittedly, it does not differentiate between OCARO and non-OCARO duties.

was assigned as second in command on a flight rather than the pilot-in-command, as he had been. Then, he was called for a second meeting; this time with Mr. Hart, in Columbus, Ohio. Nishikawa secretly recorded the meeting, the topic of which was his write-ups. [TR 1015]. (CX 222).[37]

Mr. Hart said he noticed Captain Nishikawa had not made write-ups as second-in-command, which the latter explained. [TR 1016]. Hart pointed out that Captain Nishikawa had "grounded" many more aircraft than other pilots. Captain Nishikawa explained that other pilots carry these things (essentially ignore them) because they want to avoid the "radar screen." [TR 1020-1021]. He felt that was the company's culture. Captain Nishikawa testified that even with his write-ups the aircraft could nevertheless be permitted to fly if they met the MEL for the plane. [TR 1023]. However, the write-ups did ground some. After he perceived that Mr. Lusk was "following him around," he transferred out. [TR 1027].

Mr. Nishikawa testified that Mr. Hart found out about the tape recording of the meeting between the two of them. He stated that Hart told him that he understood the conversation was recorded and that he was going to self-disclose to the FAA. [TR 1021-1022].

Captain David Lewis, a former NJA pilot, testified.[38] He had served as NetJets Large Aviation ("NJLA") Chief Pilot. [TR 192]. He testified that NJLA had a culture of safety. He believed NJLA fostered a belief that it had an "A" team and a "B" team with different sets of rules. The former, which did all to get the job done, got better trips, promotions, and favors. The latter, which were less "company-people", had limited promotions and more discipline. [TR 196-197]. A series of aviation events in 2004 concerned him. One concerned the Director of Safety and Standards recertifying himself, which Captain Lewis felt was inappropriate. The other concerned the same person, who had experienced an "ignitor" issue on a NJLA international flight, which Mr. Lewis felt was inappropriately handled. Captain Lewis reported it to the Berkshire Hathaway hotline and it was investigated. [TR 197-208].

Captain Lewis testified that he had recorded communications after learning that another NJA manager did. [TR 227]. He was unsure whether the recordings concerned "safety" matters. He sent copies of the recordings on CDs to Mr. Boisture, NJA's President, at the latter's request. (CX 27-not admitted). CX 82, page 514 (not admitted) is a letter he prepared at Complainant's request regarding the recordation of a March 2005 series of meetings. (CX 82).[39] [TR 229-230].

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[37] The recording was played, on the record, at the hearing.

[38] During the hearing, NJA objected to Mr. Lewis' testimony as irrelevant. [TR 213]. NJA argued that the testimony is irrelevant because Mr. Lewis testified about his employment with NetJets Large Aircraft Company ("NJLA"), a company separate from NJA, and was not employed by NJA. The parties were invited to brief the issue post-hearing. On May 30, 2008, Respondent filed its brief on the joint employer issue and Complainant filed his brief on the admissibility of evidence of NJLA actions.

Mr. Lewis filed and participated in his own case under AIR 21 in which NJLA and Berkshire Hathaway, Inc. were named as Respondents. On July 2, 2007, Administrative Law Judge Daniel L. Leland issued a Decision and Order Granting NJLA's Motion for Summary Decision wherein he found NJLA and NJA to be joint employers. I find that collateral estoppel applies to Judge Leland's finding regarding the relationship between NJLA and NJA. Therefore, the two are joint employers, and Mr. Lewis' testimony is admitted into evidence.

[39] Only pages 553-559 were admitted.

Captain Lewis resigned his position as Chief Pilot on March10, 2005. [TR 239]. He brought an AIR21 case against NJA, but eventually lost the case. (CX 82). The judge found he had not been terminated for engaging in protected activity, but rather for engaging in "extra-curricular" (and unauthorized) work for another carrier while "DNIF" on the NJLA payroll.[40] (CX 228). [TR 281-282]. He is now a pilot with a casino in Florida. [TR 183].

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

If Complainant proves by a preponderance of the evidence that his protected activity was a "contributing factor" motivating Respondent to take an adverse action against him, then Complainant establishes a violation of the Act. If Complainant establishes a violation, Respondent may avoid liability by satisfying its burden of proof by demonstrating by clear and convincing evidence that it would have taken the adverse action against Complainant in the absence of protected activity. *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004); *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).[41]

Complainant may establish a violation of the Act through direct or circumstantial evidence. Title VII's burden shifting framework, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is appropriate when the complainant "makes an inferential case of discrimination by means of circumstantial evidence."[42] *See Brune*, ARB No. 04-037, ALJ No. 2002-AIR-08. Under the framework, a complainant has the initial burden to make an inferential case of discrimination. Once Complainant establishes an initial inferential case of discrimination by circumstantial evidence, Respondent must set forth a "legitimate non-discriminatory reason" for the adverse action. At this stage, Respondent bears a burden of production, not a burden of proof. *Id.* If Respondent produces a legitimate non-discriminatory reason, the complainant must then "prove by a preponderance of the evidence that the legitimate reason was pretext" or that it is more likely than not that discrimination motivated the respondent's actions. *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12 (ARB Dec. 31, 2007) citing *McDonnell Douglas Corp.*, 411 U.S. 792, 802 (1973). Complainant can do this by showing that the proffered reason "(1) has no basis in fact, (2) did

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[40] Duties not involving flying.

[41] Preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune*, slip. op. at 12.

[42] The complainant's initial inferential showing of discrimination is sometimes referred to as a "*prima facie* case." *See Parshley v. Am. W. Airlines*, 2002-AIR-10 at 52 (ALJ Aug. 5, 2002). This should not, however, be confused with the complainant's required *prima facie* showing at the OSHA investigatory level, covered under § 1979.104(b). Accordingly, when discussing the complainant's initial showing under the Title VII analytical framework, the Board has not used the term "*prima facie* case" but rather "[initial] inferential case of discrimination by circumstantial evidence." *See Peck*, ARB No. 02-028 at 10; *Brune*, ARB No. 04-037 at 14. Likewise, I do so here.

Additionally, the Board has stated that it "discourage[s] the unnecessary use of discussion of whether or not a whistleblower has established a *prima facie* case when a case has been fully tried." *Kester*, ARB 02-007 at 6 n. 12. This is because the relevant inquiry is whether the complainant establishes, by a preponderance of the evidence, that the reason for any adverse employment action was Complainant's protected activity. *Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999); *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007). While recognizing that the analysis of a *prima facie* case [*i.e.* inferential case of discrimination] serves no analytical purpose because the final decision rests on the complainant's ultimate burden of proof, for purposes of my analysis, I find it helpful to lay out Complainant's initial inferential case of discrimination.

not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000).

To establish an inferential case of discrimination by circumstantial evidence, Complainant must show: (1) that he engaged in protected activity; (2) the employer was aware of the protected activity; (3) he suffered an adverse employment action; and, (4) the circumstances raise the inference that the protected activity contributed to the unfavorable employment action. *Svendsen v. Air Methods, Inc.*, 2002-AIR-16 (ALJ March 3, 2003); *Gary v. Chautauqua Airlines*, 2003-AIR-38 (ALJ May 27, 2004).

If a violation of the Act is shown, the Respondent may be ordered to take action to abate the violation, to "restore the terms, conditions, and privileges associated" with the complainant's employment, and provide compensatory damages. 49 U.S.C. §42121(b)(3)(B).

Initial Inferential Case of Discrimination

A. Protected Activity

In AIR cases, the protected activity essentially is providing to the employer or federal government "information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety…." 49 U.S.C. § 42121(a). 29 C.F.R. 1979.102(b). Filing or participating in a proceeding related to an alleged violation also constitutes protected activity. *Id.*

To constitute protected activity under AIR 21, a complainant's complaints must relate to a regulation or order, must be specific, and must be reasonably believed by the complainant. The complaints may be oral or written. *See Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008).

I find that Complainant has engaged in protected activity, and the parties have stipulated to this.[43] Complainant's protected activity includes, *inter alia*, filing and participating in a previous AIR 21 proceeding, raising compliance issues with management, and recording conversations about safety violations.

B. Knowledge

For protected activity to contribute to Respondent's decision to undertake an adverse action, as required by the Act, Respondent must be aware of the protected activity. *Peck*, ARB No. 02-028, ALJ No. 2001-AIR-3. Therefore, Complainant must show by a preponderance of the evidence that the person making the adverse employment decision had knowledge of Complainant's protected activity. *Gary*, ARB No. 04-112, ALJ No. 2003-AIR-38 citing *Peck*, slip op. at 14.

NJA argues that Hoffman cannot establish a prima facie case for a denial of promotion because the employees who made the promotion decision were not aware of Hoffman's

[43] *See* ALJX 1, Stipulation 16.

protected activity. NJA asserts that the assistant chief pilots, Anderson, Robbins, and Wyrick, decided which applicants would receive promotions to the OCARO position, and therefore, made the adverse employment decision. NJA states that the data compiled by the pilots was used to create a final ranking sheet which Mr. Cimarolli used to provide the names of the top ten applicants to Mr. Hart. NJA argues that neither Mr. Cimarolli nor Mr. Hart, both of whom had knowledge of Hoffman's protected activity, decided which applicants to promote.

As set forth above, Mr. Cimarolli testified that he established a points formula. [TR 389]. He further testified that he accepted the union rankings, instructed his assistant chief pilots to remove points for military experience from the union rankings, and to "add in the flight hours and the other criteria I gave them and to formulate a list of who would be the OCARO pilots." Mr. Cimarolli stated that he told the assistant chief pilots the formula to use to make the computations.[44] [TR 400].

Mr. Anderson testified that Mr. Cimarolli and he discussed the criteria to be used for ranking the OCARO applicants and chose several different criteria, but that he developed the spreadsheet on his own. [TR 1083-1084; 1086]. Mr. Anderson assembled the points applicants were awarded under each criteria, and then organized and entered the information into excel spreadsheets which he created. The spreadsheets ranked the applicants under each respective criteria and a composite sheet which showed the overall rankings was then created. [TR 1120-1132; 1136].

Mr. Hart testified, during his deposition, that he was not involved in selecting the criteria used to determine which applicants should be promoted to the OCARO position. He testified that the chief pilots met and determined the appropriate criteria. [CX 234 at 78].

Based on the above testimony, I find that Mr. Cimarolli was the principal actor in developing the criteria upon which applicants were to be ranked, and hence, served as the decision maker for purposes of the promotion. Mr. Cimarolli was assisted by Mr. Anderson in determining some of the criteria to be used; however, Mr. Cimarolli was the chief decision maker.[45] While Mr. Anderson and Mr. Cimarolli engaged in discussions about the appropriate criteria on which to base the OCARO promotions, the majority of Mr. Anderson's role comprised gathering, organizing, and totaling the number of points applicants received from other sources. For example, Mr. Anderson did not determine what points were to be awarded for seniority or flight hours, but instead mechanically retrieved the data from NJA's computer systems, converted the number of hours into a ranking as directed by Mr. Cimarolli, and recorded the rankings in an excel spreadsheet.[46]

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[44] It should be noted that Mr. Cimarolli testified that he is not sure whether it was his or Mr. Anderson's idea to get input from the maintenance controllers. [TR 401]. However, I do not find this to be dispositive, as Mr. Cimarolli's testimony clearly shows his major role in deciding the promotion criteria.

[45] This finding is in accord with Stipulation 28 which states "David Cimarolli, the Chief Pilot, Citation X Program, provided guidance to the pilots assigned to analyze the applicants. The analysis of applicants was assigned to three of his Assistant Chief Pilots: Ed Anderson; Allan Wyrick; and, Dave Robbins." The stipulation is vague and does not clearly define what "analysis of the applicants" the ACPs undertook. The evidence presented shows that the ACPs undertook a perfunctory analysis whereby they simply collected and calculated point totals. The evidence does not show that the ACPs alone developed the promotion criteria or that they awarded any points beyond interview scores.

[46] Even if Mr. Cimarolli was not the chief decision maker, the record clearly shows that he was a decision maker in collaboration with Mr. Anderson.

The record shows that Mr. Cimarolli was aware of Hoffman's previous protected activity. Mr. Cimarolli was previously Hoffman's supervisor.[47] In addition, Mr. Cimarolli was NJA's company representative in *Hoffman I* and testified at that hearing. I find that Complainant has shown by a preponderance of the evidence that the person making the adverse employment decision, Mr. Cimarolli, had knowledge of his protected activity.[48]

With respect to the imposition of paid administrative leave, the record clearly shows that the company decision-makers, Messrs. MacGhee and Hart, were aware of Complainant's protected activity. [TR 518, 531; CX 234 at 67-68].

C. Adverse Action

Whistleblower jurisprudence has required a complainant to show a "'tangible employment action' that resulted in a significant change in employment status." *Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007). Firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits are examples of tangible employment actions. *Id.*

In *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), the Supreme Court rejected the application of the tangible consequences standard to Title VII's anti-retaliation provision[49] and held that the provision covers employer actions which a reasonable employee would have found materially adverse. *Id.* at 2415. Thereafter, in *Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB Case No. 04-111, ALJ Case No. 2004-AIR-19 (ARB Aug. 31, 2007), the ARB stated that the appropriate standard for establishing an adverse action is "whether the actions were 'materially adverse': that is, 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Powers* at 13 quoting *Burlington*, 126 S. Ct. 2415-2416 citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006). *See also Hirst*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47.[50] The reasonable worker has "the perspective of a reasonable person in the plaintiff's position." *Burlington* at 2416.

Paid Administrative Leave

As established, the Complainant was placed on paid administrative leave from April 21, 2006, through May 19, 2006, while NJA conducted an investigation into the recordings Complainant had made.

[47] He was involved in several of the incidents at issue in *Hoffman I*.

[48] Respondent states that although Mr. Cimarolli was involved in formulating the criteria, the criteria was selected without knowledge of which pilots had submitted bids for the position. Therefore, Respondent argues that the knowledge requirement is not satisfied. I do not find Respondent's argument persuasive.

[49] 42 U.S.C. § 2000e-3(a)

[50] In *Hirst*, the ARB noted that its caselaw requires a complainant to show a "tangible employment action" that "resulted in a significant change in employment status" to establish an adverse employment action. The ARB then stated that it would apply the standard set forth in *Burlington* to the facts of the case to determine if the employer had taken an adverse action against Complainant.

The Sixth Circuit has held that under Title VII "a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action." *Peltier v. U.S.*, 388 F.3d 984 (6th Cir. 2004) citing *White v. Burlington N. & Sante Fe Ry. Co.*, 364 F.3d 789 (6th Cir. 2004). *See also Dendinger v. Ohio*, 207 Fed. Appx. 521 (6th Cir. 2006). In both *Peltier* and *Dendinger*, the plaintiffs brought discrimination claims under Title VII. Subsequent to these decisions, as previously discussed, the Supreme Court issued its decision in *Burlington* wherein the Court enunciated that the definition of a materially adverse employment action is more liberal in retaliation claims than the definition is in discrimination claims, and "a plaintiff's burden of establishing a materially adverse employment action is less onerous in a retaliation context than in an anti-discrimination context."

Thereafter, in *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 595-596 (6th Cir. 2007), the Sixth Circuit ruled that "brief placement on paid administrative leave" appears to meet the more liberal definition of an adverse employment action in a retaliation claim as set forth in *Burlington*. *See also McDaniel v. Potter*, 2007 WL 3165807, slip. op 12 (N.D. Ohio 2007)(placement on administrative leave is "adverse employment action under the expansive terms rendered in *Burlington*…"). While the Sixth Circuit has recently held that paid administrative leave does not constitute an adverse employment action for purposes of a Title VII discrimination claim and for purposes of retaliation claims not filed under Title VII, those cases are not controlling. *See Harris v. Detroit Pub. Sch.*, 245 Fed. Appx. 437, 2007 WL 2050645 (6th Cir. 2007); *Laurence v. Gateway Health Sys.*, 2008 WL 2097390 (M.D. Tenn. 2008); *Scott v. Metro. Health Corp.*, 234 Fed. Appx. 341, 2007 WL 1028853 (6th Cir. 2007).

Based on *Michael*, I find that NJA's placement of Complainant on paid administrative leave from April 21, 2006, through May 19, 2006, constituted an adverse employment action.

Letter of Warning

As established, Complainant received a letter on May 19, 2006. The letter addressed violations of NJA's recordation policy and released Complainant from paid administrative leave. (RX 5). The letter stated that it was a "final warning" for Complainant's failure to comply with the Recordation Policy and that further non-compliance with the Recordation Policy "will result in additional discipline, up to and including termination." (RX 5). The letter was removed from Complainant's personnel file on May 19, 2007, pursuant to CBA section 23.3. (ALJX 1, Stip. 30).

In *Simpson v. United Parcel Service*, ARB Case No. 06-065, ALJ Case No. 2005-AIR-031 (Mar. 14, 2008), Complainant received a warning letter for insubordination. The letter was part of a progressive discipline system and the letter stated that future similar conduct "will result in further disciplinary action up to and including discharge." If the complainant engaged in such behavior again, over the course of the next nine months, the employer could have suspended Complainant.

The ARB found that the warning letter did not constitute an adverse action because it produced no tangible job consequences.[51] The Board stated that under AIR 21 "an employer may not 'discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment.'" 42 U.S.C.A. § 42121(a). Although the warning letter *could* lead to future consequences, the letter did not effect Complainant's present compensation, terms, conditions, or privileges of employment. *See also West v. Kasbar,* ARB No. 04-155, 2004-STA-034 (ARB Nov. 30, 2005); *Agee v. ABF Freight Sys., Inc.,* ARB No. 04-182, 2004-STA-040 (ARB Dec. 29, 2005).

Recently in *Melton v. Yellow Transportation, Inc.*, ALJ No. 2005-STA-02, ARB No. 06-052 (ARB Oct. 9, 2008), the majority of the ARB held that the proper standard for determining whether an employment action is adverse under Department of Labor enforced retaliation statutes is the materially adverse standard enunciated in *Burlington Northern*, not the tangible consequences standard. Slip. op. at 24.

In *Melton,* the Complainant was issued a warning letter for claiming fatigue to avoid work. The warning letter stated that "[a]ny further occurrences of this nature will subject you to more severe disciplinary action," though the warning letter could not be considered for disciplinary purposes after six months. The letter had no effect on Complainant's hours, pay, work assignments, retirement benefits, or opportunities for advancement. Warning letters generally remained in an employee's personnel file, but in this case, the letter was eventually removed from Complainant's file.

The majority of the Board held that the warning letter was not materially adverse under the *Burlington* standard, and hence, not an adverse employment action. The letter did not affect Complainant's pay, terms, or privileges of employment, did not lead to discipline, and was removed from Complainant's personnel file. Therefore, the warning letter would not dissuade a reasonable employee from engaging in protected activity. *Id.*

The ARB's decision in *Melton* is controlling. Hoffman has not shown that the warning letter effected his "compensation, terms, conditions, or privileges of employment." For example, Complainant has not alleged that he incurred any lost time, wages, or benefits as a result of the warning letter. In addition, per the collective bargaining agreement, the letter was removed from Complainant's personnel file after twelve months, and thereafter, could not be used in any disciplinary proceedings. [RX 1]. Furthermore, the letter was not used to impose future discipline on Complainant.

Given the above, the warning letter would not have dissuaded a reasonable worker in Complainant's position from engaging in protected activity**.** Therefore, I find that the letter of warning was not an adverse employment action.[52]

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[51] The ABR stated "ARB precedents have held that warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have tangible job consequences." Slip. op. at 6.

[52] Additionally, the ARB's decision in *Ciofani v. Roadway Express, Inc.*, ARB No. 05-020, ALJ No. 2004-STA-46 (Sept. 29, 2006) indicates that any claim based upon the written letter of warning would be moot. In that case, the employer withdrew three suspension letters issued to the complainant. The employer removed all references from the complainant's personnel file and promised that the letters would not be used in any future disciplinary action. The ARB adopted the grant of summary judgment for the respondent as the complaint was moot. *See also Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, ALJ No. 2004-STA-40

Denial of Promotion

The facts set forth above show that Complainant applied for a promotion to an OCARO position in December of 2005 and was not selected for the position. A denial of promotion constitutes an adverse employment action. *See Anthony v. BTR Auto. Sealing Sys. Inc.*, 339 F.3d 506 (6th Cir. 2003); *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir. 1999); *Bacon v. Honda of America Mfg., Inc.*, 2006 Fed. App. 0488N (6th Cir. 2006). A denial of promotion and the resulting consequences would dissuade a reasonable employee from engaging in protected activity.

D. Causation

Temporal Proximity

Temporal proximity between protected activity and an adverse employment action "'normally' will satisfy the burden of making a prima facie showing of knowledge and causation." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12, slip op. at 7 (ARB Dec. 31, 2007) citing 29 C.F.R. § 1979.104(b)(2). However, while such temporal proximity may support an inference of retaliation, temporal proximity is not necessarily dispositive. *Robinson v. Nw. Airlines, Inc.*, ARB Case No. 04-041, ALJ Case No. 2003-AIR-22 (ARB Nov. 30, 2005) citing *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001). "For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barker*, ARB No. 05-058, ALJ No. 2004-AIR- 12, slip. op at 7 citing *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

In the present case, the temporal proximity between Complainant's protected activity and the occurrence of two adverse employment actions establishes an inference of causation. *See Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28 (ARB Nov. 30, 2006)(ALJ found protected activity occurring five to nine months prior to adverse employment action to have sufficient temporal proximity to raise inference of discrimination). Complainant suffered an adverse employment action in being placed on paid administrative leave from April 21, 2006 through May 19, 2006, and in being denied a promotion on June 14, 2006. Complainant's participation in *Hoffman I* began in March of 2005 and continued through July 22, 2008 with the issuance of the ARB decision. More specifically, the hearing in *Hoffman I* occurred in February of 2006, approximately two to four months before both adverse actions occurred. Post-hearing depositions were performed in April of 2006 and an ALJ decision in *Hoffman I* was not rendered until August 4, 2006. Moreover, the parties have stipulated that Complainant engaged in protected activities until on or about August 22, 2006.

(Dec. 29, 2005)("This Board cannot redress [Complainant's] alleged injury from a warning notice that no longer has any disciplinary or other effect.")

Therefore, I find that temporal proximity, sufficient to infer causation, is present between Complainant's protected activities and the adverse employment actions.

Given the above, I find that Complainant has established an initial inferential case of discrimination by circumstantial evidence with respect to his placement on paid administrative leave and denial of promotion. Because the letter of warning does not constitute an adverse employment action, Complainant's claim of retaliation with respect to that specific action fails.

Contributing Factor

To establish discrimination under the Act, Hoffman must prove by a preponderance of the evidence that his protected activity was a "contributing factor" in motivating Respondent to take an adverse action against him. Hoffman is not required to provide direct evidence of discriminatory intent, but may also satisfy his burden through circumstantial evidence of discriminatory intent. *Clark*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12.

A. Denial of Promotion

Hoffman has failed to show by a preponderance of the evidence that his protected activity contributed to his denial of promotion**.** NJA argues that Hoffman was denied the promotion because he was not one of the applicants in the top ten on the basis of a cumulative point score. Hoffman argues that this reason is pretext and that he was instead denied the promotion because of his protected activity. The promotions were awarded were based on seniority, number of flight hours, a phone interview, a union score, the union score minus military experience, and points solicited from maintenance controllers.

Complainant states that consideration of flight time is a way to disfavor pilots who engage in protected activity. With respect to himself, Hoffman argues that his flight time is less than other pilots because by writing up maintenance problems he loses flight time. I do not find that NJA used number of flight hours in such a way as to preclude Hoffman from receiving a promotion because of his protected activity. An applicant's number of flight hours is an objective and reasonable factor to take into consideration when determining which applicants are best qualified for promotion. Number of flight hours is reasonably indicative of a pilot's experience and ability, which in turn are important factors when considering promotions. Furthermore, Hoffman has not shown that any diminution in his flight time due to protected activity is more than incidental.[53]

Hoffman also argues that the union's scorecard is proof of NJA's retaliation against him. Hoffman argues that the retaliation is demonstrated in two ways. First, Hoffman testified that he

[53] Hoffman has not provided persuasive evidence that he has lost more than a negligible amount of flight time due to his protected activity. In *Hoffman I*, Judge Romano found that NJA did not retaliate against Hoffman in his 2005 scheduling. The ARB affirmed this finding. *See Hoffman v. NJA Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-026 (July 22, 2008). The ARB acknowledged that Hoffman lost some time between May 20, 2005, and July 11, 2005, because he wrote up planes for maintenance; however, Hoffman also took vacation during this period. Additionally, in the first half of 2006, Hoffman took two months of FMLA leave, several weeks of vacation, and underwent training. Hoffman was also placed on paid administrative leave for approximately one month; I have found that NJA did not act out of retaliatory animus in placing Hoffman on the paid administrative leave.

did not receive the number of points that he should have received on the union scorecard, but instead received a lesser point total. In addition, Mr. Cimarolli, who received the scorecards from the union, did not check the accuracy of the points awarded on the union scorecard prior to including the points in the overall point total.[54]

Assuming that Hoffman did receive an incorrect number of points to his detriment on the union scorecard, this error does not show that Hoffman was denied the promotion because of his protected activity. Hoffman has produced no evidence suggesting that he was intentionally scored incorrectly because of his protected activity. Furthermore, Mr. Anderson credibly testified that "there was a large push at the company that we were going to seek union involvement in getting their input on a variety of different levels…." [TR 1087]. With the goal of improving relations between NJA and the union, it seems appropriate to have accepted union input.

Similarly, the failure to review the union scorecards for accuracy does not show that Hoffman was denied the promotion because of his protected activity. Mr. Cimarolli and Mr. Anderson acted reasonably in relying on the accuracy of the union scorecards and they relied on the accuracy of the scorecards for every applicant. There is no evidence that *any* applicant's union scorecard was reviewed for accuracy. It is not plausible to conclude that Hoffman was discriminated against due to his protected activity, as evidenced by no review of his union scorecard, when not one of the applicants had their scorecards reviewed by Mr. Cimarolli or anyone else to ensure accuracy. At best, if Captain Hoffman did receive fewer points than he should have and as a result his union scorecard was inaccurate, ordinary human error was the cause, not retaliation for protected activity.

Finally, as discussed above, NJA considered the input of maintenance controllers, a subjective factor, in calculating which applicants should receive a promotion. Hoffman alleges that the maintenance controllers were consulted with the purpose of denying him the promotion and that he received no points from any of the maintenance controllers because of his protected activity.

Mr. Cimarolli testified that an OCARO pilot position requires pilots to "go out there and fly the aircraft to make sure that all the systems are operating properly." [TR 390]. He further testified that since the pilots were going to be working with maintenance controllers, he believed that the maintenance controllers "ought to have some input to it." [TR 405]. I find Mr. Cimarolli's reason for seeking input from the maintenance controllers to be logical and sensible and not calculated to discriminate against Captain Hoffman for his protected activity. The level of interaction between pilots and maintenance controllers provides a legitimate and sensible reason for soliciting and including the input of maintenance controllers when determining which applicants to promote. Furthermore, I do not find that the lack of direction given to the maintenance controllers regarding the criteria upon which to assign points to show that Captain Hoffman's protected activity contributed to the denial of promotion.

[54] Mr. Anderson testified that he did not check the union scorecards for accuracy because he assumed that the union used due diligence and did not make an errors. [TR 1088].

Five maintenance controllers involved in awarding points to the applicants testified in this case. The controllers gave varying rationales for their assignment of points, *inter alia*, personal rapport with the pilots, the pilots' ability to help troubleshoot, the pilots' personality, and familiarity and past interaction with the pilot. (Harvey DT 6; Glowa DT 6; Siegel 10; and, Kemmer DT 6-7). Controller Paez testified that he did not assign any points to Hoffman because Hoffman is not helpful "as far as interrogating the IMT," [TR 463] and controller Harvey stated a similar reason for not assigning points to Hoffman. [DT 11]. This testimony does not show that Paez and Harvey failed to award points to Hoffman based on his protected activity; the act of refusing to interrogate the IMT system does not constitute protected activity.[55]

Paez additionally testified that he did not award any points to Hoffman because he was told that Hoffman may record phone conversations. Paez further testified that this raised "a big trust issue" with Hoffman. [TR 467]. Based on his testimony, I do not find that Paez was motivated by Hoffman's protected activity or that Paez was acting against Hoffmann in retribution for engaging in protected activity; Paez did not award points to Hoffman because of a lack of trust. While the lack of trust is secondary to recording, it is a different basis on which to not award points. Furthermore, Cimarolli and Anderson both testified that the maintenance controllers were not given directions on how to score the applicants and that they were not aware of the maintenance controllers reasons for awarding or not awarding points. [TR 401-402; TR 1093-1098]. Given NJA's managers' lack of instructions and knowledge, it is not likely that NJA used the maintenance controllers as a vehicle through which to retaliate against Hoffman for his protected activity. Finally, even assuming that Mr. Paez did not award ten points to Hoffman because of his protected activity, this is insufficient to find that Hoffman's protected activity contributed to the denial of promotion. Overall, the receipt of ten additional points from Paez would not have placed Hoffman in the top ten applicants.[56]

Therefore, I find that NJA has produced a legitimate non-discriminatory reason for Hoffman's promotion denial and that Hoffman has not met his burden of demonstrating that the point system was pretext. Hoffman has failed to show that his protected activity contributed to the promotion denial.[57] In addition, Hoffman's recent promotion to a CE-750 NRFO position further evidences that Hoffman was not denied the promotion due to his protected activity.[58]

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[55] To constitute protected activity U.S.C. § 42121(a) requires that information relating to a violation or alleged violation of any FAA regulation, standard, or other law regarding air carrier safety be reported to the employer or the federal government. Hoffman has not shown that he made any such reports. Furthermore, Hoffman has not clearly shown that accessing the IMT, to the extent the maintenance controllers' request, requires an A and P license. While FAR 43.3 generally prohibits the holder of only a pilot's certificate from performing preventative maintenance or maintenance, Hoffman has not shown that entering the IMT page of the aircraft's multifunction flight display, despite the name, constitutes maintenance. In support of his claim, Hoffman cites the testimony of Mr. Bruno. Mr. Bruno testified that the operation of modern aircrafts' electronic functions fall under "the A and P license. Anything that has to do with maintenance of an aircraft is not going to be under the pilot's purview." [TR 323-324]. However, Mr. Bruno was not specifically questioned on nor did his testimony specifically address the IMT system. Furthermore, his testimony appears to be over inclusive as it is not sensible that any and every operation of all of an aircraft's electronic functions fall under the A and P license. The testimony does not directly or convincingly establish that accessing the IMT page constitutes maintenance, but rather the testimony is vague and general. The remaining testimony on record does not clearly establish that entering the IMT's display page constitutes maintenance that requires an A and P license.

[56] Controller Glowa was aware of Hoffman's previous AIR 21 case as he was scheduled to testify. [DT 14]. Glowa testified that he assigned points mostly based on name recognition and previous interaction with the individuals. [DT 6]. He testified that he did not award points to Hoffman because of there was a lack of name recognition; Glowa was not familiar with Hoffman's qualifications and background. [DT 9-10].

[57] As NJA has produced a legitimate reason for the denial of promotion, the temporal inference established under Hoffman's prima facie case is insufficient, standing alone, to meet his burden of proof to demonstrate that his protected activity was a

Furthermore, I find that NJA has demonstrated by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of any protected activity.

B. Paid Administrative Leave

NJA states that it reviewed the recordings for the purposes of ascertaining the contents of the tapes and enforcing its non-discriminatory company recordation policy. NJA further states that Hoffman was placed on paid administrative leave pending the investigation in accordance with an additional policy, CBA Section 21.1(b). Hoffman argues that these reasons are pretext; he states that an investigation into the recordings was conducted and that he was placed on paid administrative leave because of his protected activity. Hoffman states that the investigation and paid administrative leave flowed from his participation in *Hoffman I*, including his production of approximately 750 recordings and his use of some of the recordings as evidence during the hearing.

Hoffman argues that all of the recordings constitute protected activity. First, he argues that all of the recordings are protected activity by virtue of being produced in his prior AIR case. His second argument is that all of the recordings constitute protected activity because the recordings were made to gather evidence of safety violations and for use in his whistleblower case.

Captain Hoffman's argument that all of the recordings constitute protected activity by virtue of being produced in his prior AIR 21 case must be rejected.

In *Griffin v. Consolidated Freightways Corp. of Delaware*, ARB No. 97-148, ALJ Nos. 97-STA-10, 97-STA-19 (ARB Jan. 20, 1998), the complainant filed his first STAA case in 1996. During that proceeding, Griffin wrote the presiding administrative law judge ("ALJ") a letter regarding his views on the respondent's harassment. Respondent's human resources manager saw a copy of the letter and immediately proceeded to seek a psychiatrist's opinion regarding whether Griffin posed a danger. The same manager was also present at Griffin's deposition, where Griffin made additional alarming statements. Based on Griffin's statements in the letter and the deposition, Respondent's manager arranged for a psychological evaluation. After the psychologist found Griffin temporarily unfit for duty pending psychological treatment, he was placed on paid medical leave of absence conditioned upon receiving treatment. After Griffin failed to seek treatment, he was placed on medical leave without pay.

Griffin later filed a second STAA complaint wherein he stated, *inter alia*, that Respondent removed him from driving service in retaliation for his earlier safety complaints and STAA case. The ARB stated that the critical inquiry is whether retaliatory animus motivated Respondent to remove Griffin from service and discontinue his pay. The ARB dismissed the

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contributing factor in the adverse action. *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR- 12, slip. op at 7 (ARB Dec. 31, 2007) citing *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

[58] NJA changed the name of the OCARO position to "Non-Routine Flight Operations" ("NRFO").

complaint, finding the decision to assess Griffin's psychological fitness to be legitimate and prudent and not due to retaliation. The Board found the decision to be legitimate because prior to requiring the evaluation, the respondent observed Griffin's unusual behavior through the ALJ letter and deposition testimony.

In *Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997), Merritt had previously provided deposition testimony in a co-worker's sexual harassment claim. In the deposition testimony, Merritt admitted to acts which could have been used "to construct a winning hostile environment case" against the employer. *Id.* at 1183. Based solely upon the deposition testimony he gave, Merritt was later fired by the employer's president. Merritt brought a suit alleging retaliation under Title VII. The court concluded that Merritt's deposition testimony, in his co-worker's case, constituted participation under 42 U.S.C. § 2000e-3(a). Therefore, Merritt had engaged in protected activity. The court remanded for a determination on whether Merritt was discharged in retaliation for his participation in the co-worker's proceeding or if he was fired for a legitimate non-discriminatory reason, sexual harassment. The court stated that the employer "could have fired Merritt *after* he gave his deposition testimony, as well, so long as he did not fire him because he 'testified, assisted, or participated in any manner' in a Title VII investigation or proceeding." *Id.* at 1191.

Griffin and *Merritt* are similar to the situation Hoffman presents. In all three cases, the employer took an adverse employment action based upon information it learned in a prior discrimination proceeding, and in a later lawsuit, defending a retaliation claim, asserted a legitimate non-discriminatory reason based upon that information. In *Griffin*, the employer learned of the complainant's psychological condition and asserted the condition as the reason for removing Griffin from driving service. In *Merritt*, the employer learned details of the complainant's sexual harassment and asserted that conduct as the reason for firing Merritt. In both cases, neither court ruled that the employer engaged in *per se* retaliation by taking an adverse employment action based on information it had learned in a discrimination proceeding. The courts instead undertook or remanded for an analysis of whether the articulated legitimate non-discriminatory reasons were pretext. Such an analysis would not be required if taking an adverse employment action based upon information revealed in a prior discrimination case automatically constituted a violation of the relevant Act.

Griffin and *Merritt* foreclose the argument that evidence or information gathered through the discovery process of a whistleblower proceeding automatically constitutes protected activity solely by virtue of its production during the proceeding. In terms of defining protected activity, there is a distinction between the acts of filing, participating, and testifying in a proceeding versus the information contained within the documents and testimony produced during a proceeding. Filing, participating in, assisting in or testifying in a proceeding constitutes protected activity; engaging in the discovery process most likely constitutes protected activity.[59] However, the documents produced or testimony given do not in and of themselves amount to protected activity by their mere production during a discrimination proceeding.

[59] *See Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-19, slip. op. at 11 (ARB Aug. 31, 2007)("In fact, it is possible that serving a discovery request potentially could constitute protected activity if the request was part of a whistleblower complaint."); 49 U.S.C. § 42121(a).

Therefore, while Hoffman's participation in *Hoffman I* and his participation in discovery constitute protected activity, the recordings produced by Hoffman in the prior case are not protected activity simply by their production in a prior whistleblower proceeding.

Hoffman's second argument, that all of the recordings constitute protected activity because the recordings were made to gather evidence of safety violations for use in his whistleblower case, must likewise be rejected.

Gathering evidence to be used to support a protected complaint is itself protected under whistleblower provisions. *See Michaud v. BSP Transport, Inc.*, ALJ No. 95-STA-29, ARB No. 96-198 (Jan. 6, 1997) citing *Mosbaugh v. Georgia Power Co.*, Nos. 91-ERA-1 and 91-ERA-11, Sec. Dec. and Rem. Ord., Nov. 20, 1995, slip op. at 7-8; *Melendez v. Exxon Chem. Americas*, ALJ No. 1993-ERA-6, ARB No. 96-051 (ARB July 14, 2000). However, Hoffman's argument is deflated by the recordings' contents and the time frame in which the recordings were made. Not all of the recordings contain evidence of safety violations. Some of the recordings contain conversations about hotel reservations, travel plans, and meals, but do not relate to any alleged violation of an air carrier safety order, regulation, or standard. Such recordings are not evidence which support a protected complaint. Furthermore, Hoffman was recording conversations at least ten months prior to filing his initial complaint in *Hoffman I*. This time gap casts doubt on Hoffman's claim that he was making the recordings for use in his whistleblower case**.**

Even if all of the recordings do not constitute protected activity, Hoffman argues that all of the recordings, including the ones constituting protected activity, motivated NJA to conduct an investigation and to place Hoffman on paid administrative leave. In sum, NJA was retaliating against Hoffman for his protected activity, including *Hoffman I*. As previously stated, NJA argues that it was motivated to undertake an investigation and place Hoffman on paid administrative out of a concern for the contents of the recordings and to enforce its legitimate non-discriminatory recordation policy.

After reviewing the evidence and hearing the witnesses' testimony first hand, I find that NJA's decision to review the recordings and to place Hoffman on paid administrative leave during the investigation was not motivated by Hoffman's protected activity. While NJA was motivated to undertake the investigation because of the recordings' existence, this does not equate to NJA undertaking the investigation and placing Captain Hoffman on paid administrative leave based on retaliatory animus.

Mr. MacGhee, whose testimony I found to be very straight-forward and credible, testified that the decision to review the tapes was made with the purpose of finding out the content of the tapes.[60] Mr. MacGhee did not begin the review process with the purpose of considering or imposing discipline, but stated that only after learning the tapes' contents would he draw any

[60] To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on having heard and observed the witnesses' testimony first hand and having reviewed the entire testimonial record and exhibits. "For evidence to be worthy of credit, it must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which it is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe." *Lawson v. United Airlines, Inc.*, ALJ Case No. 2006-AIR-06, slip. op. at 4 (ALJ Dec. 20, 2002)(quoting *Indiana Metal Prod. v. NLRB*, 442 F.2d 46 (7th Cir. 1971).

conclusions about discipline and make a recommendation. [TR 519-520]. He further testified that *Hoffman I* did not motivate the decision to undertake a review of the tapes. [CX 233 at 207].

Mr. Hart provided similar testimony. He stated that Hoffman was placed on administrative leave and that a review of the tapes was undertaken in order to determine Hoffman's compliance or non-compliance with the Recordation Policy. He testified that the purpose of the investigation was not to impose discipline as the results of the investigation would not be known until its conclusion. [TR 648-656].

The letter issued to Hoffman on April 21, 2006 (RX 4) corroborates that the investigation was undertaken to review the tapes and to determine whether a violation of company policy occurred. Only after the results of the investigation were known would any decision regarding discipline be made. The letter states that alleged violations of the Recordation Policy are going to be investigated, and "the level of discipline to be imposed if one or more violations is/are established, *if any*, has not be [sic] determined as of this date." (RX 4). (emphasis added).

In contrast to the above, I found the testimony of Hoffman to be less persuasive. While I do not question the honesty of Captain Hoffman, I believe that his perception is skewed due to his over-willingness to ascribe malevolent motives to NJA actions in situations were a more reasonable person would not. As I do not believe that Mr. Hoffman can see the trees of reality through his forest of suspicion, I do not find his testimony to be highly persuasive.

Therefore, I find that credible testimony establishes that NJA reviewed the tapes and placed Hoffman on paid administrative leave during the review because the company wanted to know what had been recorded. It was not only reasonable to conduct a review of the tapes, but also a responsible management action. MacGhee and Hart were informed that Captain Hoffman had made over 700 recordings and had legitimate reasons for wanting to know the tapes' contents. The recordings could have contained confidential information or information painting the company in a negative light. Furthermore, the information on the recordings could have been made available to company outsiders.[61]

In addition, NJA rightfully wanted to know whether a company policy had been violated. Management has a justifiable interest in ensuring that employees comply with policies which it has deemed necessary for an optimal work and business environment. Hoffman has failed to show that the Recordation Policy was applied to him in a discriminatory manner or in retaliation for his protected activity.[62]

Just as NJA did not review the tapes for the purpose of retaliating against Hoffman, I find that NJA did not place Hoffman on paid administrative leave to discipline him for his protected activity. Mr. MacGhee testified that being placed on administrative leave does not mean that a person is guilty and that the leave helps facilitate the investigative process. [RX 233 at 95]. Furthermore, the collective bargaining agreement provides that NJA may place a pilot "on

[61] NJA's interest in knowing the tapes' contents is heightened by Mr. MacGhee's credible testimony that he was informed of suspicions that confidential proprietary information was being recorded. In his first AIR case, Hoffman produced recordings made between May of 2004 and January 20, 2006. (RX 7).

[62] Hoffman has not provided evidence that NJA was aware of any other employee who violated the Recordation Policy. Therefore, he has not been able to show that he was treated differently.

administrative leave pending the outcome of an investigation, and that placement on administrative leave is not evidence in and of itself of any misconduct on the part of" the pilot. (RX 1, section 21.1(b)).

Captain Hoffman spends much time arguing that the Recordation Policy was adopted by NJA because management became aware of several pilots recording safety and compliance issues. Hoffman continues his argument by stating that the policy's adoption and the policy itself show company animus against recordation from which it can be inferred that NJA acted with retaliatory animus in undertaking the tape review and placing Hoffman on paid administrative leave.

NJA asserts that the Recordation Policy originated out of a concern that confidential proprietary business information would be shared with the public and competitors. As previously detailed, Mr. MacGhee testified that union members informed him of suspicions that confidential financial information being presented at recurrent classes was being recorded. He also testified that he was not aware of Hoffman's recordings until around the time of the hearing in *Hoffman I*, after the implementation of the policy. [TR 518].

As previously stated, I found Mr. MacGhee's testimony at the hearing to be very credible and straight-forward. Furthermore, I do not find that Hoffman has presented sufficient evidence to show that the Recordation Policy was initiated due to pilots recording safety and compliance issues.

Nishikawa testified that he tape recorded a meeting with Mr. George Lusk and a meeting with Mr. Gary Hart. Nishikawa stated that Hart later found out about the recording and said he was going to self-disclose to the FAA. [TR 1021-1022]. The date of the meeting was October 27, 2004. [TR 1023]. Mr. Hart testified that he heard a rumor of a possible tape recording of a meeting between himself and Nishikawa. Hart notified the FAA of the rumor. [TR 664-665]. In addition, Mr. MacGhee testified that he was not aware that Nishikawa recorded safety issues prior to Nishikawa's deposition. [TR 515].

Lewis testified that he tape recorded several meetings in early March of 2005. He stated that shortly after making the recording, he mailed two copies to Mr. Boisture, one copy for Mr. Boisture and one copy for Mr. MacGhee. [TR 227-228]. Lewis recorded several meetings, but testified that he was not sure if safety issues were on the recording. [TR 236]. Mr. MacGhee testified that Mr. Lewis did not share the recording with him and that he was unaware of the recording until he heard Mr. Lewis' testimony. [TR 515].

Captain Hoffman testified that he believes the Recordation Policy was also initiated in response to his own recording. Hoffman's argument is based on temporal proximity between several occurrences and the Recordation Policy's adoption. Hoffman points out the following: he gave tape recordings to the OSHA investigator in *Hoffman I* in April of 2005; on June 10, 2005 he received OSHA's final determination; on June 18, 2005 he posted a message on the union bulletin board system disclosing that he carries a recorder to work to record conversations; and, on June 22, 2005, he spoke with the OSHA investigator about filing an appeal and became

suspicious that the investigator had disclosed the recordings to NJA.[63] The Recordation Policy was implemented on or about June 23, 2005, and Hoffman received a copy of the policy, via e-mail, on June 25, 2005. (ALJX 1, Stip.5 and 6).

The above evidence fails to substantiate the claim that the Recordation Policy was adopted in response to the recording of safety violations. Mr. Lewis' testimony establishes neither his recording of safety issues nor management's knowledge of any of his recordings prior to his testimony. Mr. Nishikawa's testimony establishes that Mr. Hart was aware of a recording; however, the evidence does not show that other members of management were aware of the recording or that the recording motivated NJA to formulate the Recordation Policy.

As for Captain Hoffman, while his June 18, 2005 union message board posting shows that he is knowledgeable about tape recording conversations, he does not write that he is actually recording conversations. [ALJX 3, Tab. L, CX 5673]. [TR 747]. In addition, Hoffman has presented no evidence that notice of the posting was provided to NJA management. Second, OSHA's final determination letter, issued May 5, 2005, makes no mention of any recordings. [ALJX 3B Hoffman I, ALJX 1]. Third, Hoffman only speculated that the OSHA investigator had told NJA about the recordings; he offered no proof to substantiate the claim. [TR. 744-746].

Finally, it seems implausible that the Recordation Policy was initiated in response to the recording of safety issues when NJA management has testified and the April 21, 2006 and May 21, 2006 letters given to Hoffman state that protected activity is exempt from the policy.[64]

In sum, I find that NJA has offered legitimate non-discriminatory reasons for investigating the recordings and placing Hoffman on paid administrative leave while doing so. Hoffman has failed to show by a preponderance of the evidence that the reasons advanced by NJA are pretext for retaliation, and therefore, has failed to show that his protected activity was a contributing factor in the decision to place him on paid administrative leave.[65]

Furthermore, I find that NJA has demonstrated by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of any protected activity.

Hostile Work Environment Claim[66]

To prevail on a hostile work environment claim, the complainant must establish that: (1) he engaged in protected activity; (2) he suffered intentional harassment related to that activity;

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[63] In September of 2004, Hoffman made a FOIA request for his recordings. Captain Hoffman testified that he does not recall the documents he received in response to his request indicating that a copy of any document revealing his recording was sent to NJA. [TR 743].

[64] Furthermore, I find neither any alleged deviations from NJA's "normal practice" nor a failure to review the recordings for violations of other policies to support a finding of causation.

[65] As NJA has produced a legitimate reason for placing Hoffman on paid administrative leave, the temporal inference established under Hoffman's prima facie case is insufficient, standing alone, to meet his burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action. *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12, slip. op at 7 (ARB Dec. 31, 2007) citing *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

[66] As previously stated, Judge Romano found that Hoffman failed to establish a hostile work environment in *Hoffman I.*

(3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and, (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (Jan. 31, 2006) citing *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1998-SWD-2 elec. op. at 42 (ARB Feb. 28, 2003).

"Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language … and occasional teasing actionable." *Id.* at 10 citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Several factors to take into consideration when determining the existence of a hostile work environment include the "frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Id.* at 11 citing *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2,-9, slip. op. at 16 (ARB Feb. 29, 2000).

Hoffman has alleged that he has been subject to interrogation, investigation, and harassment in retaliation for engaging in protected activity. He further alleges adverse assignments, discipline, deception, and a loss of flight time for the same activity. Hoffman testified that he has lost flight hours and has been given adverse assignments due to his protected activity.[67] [TR 734;1216].

In support of his claims, Hoffman cites a February 16, 2006 e-mail from Mr. Anderson informing him of a change in travel arrangements. (CX 62). The e-mail states that Hoffman is to meet with Mr. Hart on February 20, 2006 in Columbus, Ohio. Hoffman received this e-mail while on Family Medical Leave Act ("FMLA") leave which he requested on February 13, 2006. Hoffman testified that the e-mail upset him as he wondered what was going to happen, and he was caring for his dying mother. [TR 774-778].

Mr. Hart sent Hoffman an e-mail on February 20, 2006 stating that the meeting would be postponed until Hoffman returned from leave. (CX 66). Mr. Hart explained that the meeting notice was sent after looking at Hoffman's schedule, but while NJA's Benefits Department was reviewing and processing his request for leave. Mr. Hart further wrote that when he became aware of Hoffman's leave, he was going to cancel the scheduled meeting. (CX 66).

Hoffman also cites a May 3, 2006 trip to Columbus, Ohio to meet with Mr. Hart as further evidence of a hostile work environment. Hoffman testified that on May 3, 2006, while he was on paid administrative leave, he received an airline assignment for a meeting with Mr. Hart in Columbus. He then flew to Columbus, and when he arrived Mr. Hart stated that he knew nothing about a meeting between them. Hoffman testified that he then flew back to St. Louis the same day. [TR. 792-795].

[67] Hoffman testified that after the first week of hearings in the present case, January 14, 2008 through January 18, 2008, he detected a pattern through March 27, 2008, where he was "scheduled predominantly, either not at all or as a first officer, mostly as a first officer." [TR 1216]. As this occurred after the filing of Hoffman's last complaint, the testimony is admitted only with respect to the issues of motive and intent. It cannot form a basis of employer liability.

Hoffman testified that he was afraid that he was going to be fired. He further testified that Mr. Hart told him that a misunderstanding had occurred, but "I don't think that it was. I think somebody somewhere gave me a brief that was just another form of harassment." [TR 794]. NJA spent money and resources flying Hoffman to Columbus for the meeting and flying him home to St. Louis. [TR 794-795].

In addition, Hoffman has presented evidence that he received an e-mail during his FMLA leave taking him out of scheduled training, and he received an e-mail during his paid administrative leave scheduling him for training. [TR 779-780; 795]. Both e-mails upset Mr. Hoffman as he did not know what was going on and he was dealing with his mother's illness/death. Finally, Hoffman received an e-mail from Mr. Cimarolli on April 18, 2006 stating that Hoffman was to have a meeting with Mr. Hart regarding the Recordation Policy on April 20, 2006. Hoffman perceived the e-mail as harassing as it was sent one day before depositions for *Hoffman I* were scheduled; this included the deposition of Mr. Cimarolli. [TR 782].

I do not find that Hoffman has established a hostile work environment by a preponderance of the evidence.[68] While Hoffman has engaged in protected activity, he has not shown that he suffered intentional harassment related to the protected activity. Additionally, assuming intentional harassment, Hoffman has not demonstrated harassment that is sufficiently severe and pervasive as to create an abusive working environment or harassment that would detrimentally affect a reasonable person.

The evidence shows that Hart was not aware that Hoffman had taken FMLA leave when he directed Anderson to send Hoffman an e-mail scheduling a meeting. In fact, Mr. Hart sent Hoffman an e-mail and had a phone conversation with Hoffman wherein he stated and explained that he was not aware that Hoffman had taken leave and wherein he expressed his sympathies. There is no evidence that Hart had the meeting scheduled and directed Mr. Anderson to notify Hoffman of the meeting with the intent to harass Hoffman. The same is true of the brief Hoffman received to fly to Columbus and meet with Hart. There is no evidence that intentional harassment was the motivation for directing Hoffman to fly to Columbus for a meeting that never occurred. A more reasonable interpretation is that an NJA employee made a mistake. Furthermore, NJA paid for Hoffman's travel. It is not likely that the company would incur the cost of flying Hoffman roundtrip to Columbus, Ohio solely for harassment purposes.

Furthermore, as previously discussed, Hoffman has not shown that he was intentionally grounded as harassment for his protected activities. Hoffman testified that he flew a reduced number of flight hours in 2005 through 2007. In his Decision and Order, Judge Romano found that Captain Hoffman was not retaliated against in his 2005 scheduling. The evidence in the present case shows that in 2006, Hoffman took two months of family leave, vacation time, undertook training, and was on paid administrative leave. In sum, there are legitimate explanations for the alleged reduction in flight hours.[69] Captain Hoffman has failed to provide

[68] Even when viewing Hoffman's hostile work environment claim in conjunction with the discrete adverse employment actions, I do not find in the aggregate that they are sufficiently severe and pervasive as to create an abusive work environment.

[69] Captain Hoffman's last complaint was filed on August 22, 2006. Therefore, any incidents occurring thereafter cannot be used as a basis for employer liability.

persuasive evidence that his number of flight hours was reduced in retaliation for his protected activity or to intentionally harass him because of his protected activity.[70]

In summary, I do not find that Captain Hoffman has established a hostile work environment by a preponderance of the evidence.

X. CONCLUSIONS

Captain Hoffman has clearly established that he engaged in protected activity. The evidence also shows that he was subjected to two adverse employment actions --placement on paid administrative leave and a denial of promotion. However, Captain Hoffman has failed to show by a preponderance of the evidence that his protected activity contributed to his placement on paid administrative leave and the promotion denial. NJA has produced legitimate non-discriminatory reasons for its actions, and Hoffman has failed to show that the offered reasons are pretext and that his protected activity was the actual cause. Furthermore, NJA has shown by clear and convincing evidence that it would have taken the adverse employment actions in the absence of any protected activity.

Finally, Captain Hoffman has not established by a preponderance of the evidence a hostile work environment.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's relief requested is hereby DENIED. It is hereby recommended that the complaint filed by MARK J. HOFFMAN be dismissed.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

[70] It should also be noted that I do not find that the existence of the Recordation Policy works towards creating a hostile work environment.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

TABLE 1

Complaint in Hoffman I and Three Complaints in Present Case

Considered in Hoffman I	May 15, 2006	June 7, 2006	August 22, 2006
1/01 closed airport			
2004 providing info to FAA	Info to FAA	Info to FAA	Info to FAA
6/04 aircraft latches			
recordings of IOE Interview			
2004 IOE grievance			
7/04 fuel leak	Refusal to fly plane with leak		
7/04 Ferry Permit with grievance*			
8/04 suspension*			
10/04 fuel venting			
10/04 meeting on HWE			
Alleged Cimarolli berating			
1/05 grievance on IOE Non-selection & appeal			
7/05 – 10/05 not flying "crew rot"*			
11/05 MEL lights*			
11/05 Cimarolli meeting			
Smith's query re ferry Permits			
	Participation in Hoffman I	Participation in Hoffman I	Participation in Hoffman I
	Recording evid. Of violations	Recording evid. Of violations	Recording evid. Of violations
	Raising compliance issues	Raising compliance issues	Raising compliance issues

* Raised again in Complainant's prehearing statement in the present case.