U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 August 2006

Case No.: 2005-AIR-00026

In the matter of:

MARK J. HOFFMAN
Complainant

v.

NET JETS AVIATION, INC.
Respondent

DECISION AND ORDER

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 *et. seq*. ("the Act") and the regulations promulgated thereunder, which can be found at 29 C.F.R. Part 1979. The Act prohibits an air carrier from discriminating against an employee because the employee provided information to the employer or the federal government, in relation to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration ("FAA") or any other provision of federal law related to air carrier safety.

Mark J. Hoffman ("Complainant") filed this complaint on March 7, 2005. On May 5, 2005, the Occupational Health and Safety Administration (OSHA) issued its findings and order, in favor of Employer. Complainant filed a request for hearing on June 23, 2005 and the case was referred to the Office of Administrative Law Judges ("OALJ") and was assigned to me on July 5, 2005. The hearing in this matter was held in Columbus, Ohio, on February 7 and 8, 2006.[1] At that time, the parties were given the opportunity to offer testimony and other evidence. Employer's post-hearing brief was received on May 30, 2006, and Complainant's post-hearing brief was received on June 1, 2006.

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties and the applicable law.

STIPULATIONS AND ISSUES

The parties have entered into the following stipulations, which I find the record supports:

[1] The transcript of the hearing consists of 556 pages and will be cited as "Tr. at --."

1. Employer is engaged in the management, operation and maintenance of fractionally owned aircraft as well as air charter operations. Employer manages over 340 aircraft, which range in size from the Citation V Ultra to the Boeing Business Jet.

2. The Company employs nearly 2,000 pilots to operate the managed aircraft.

3. Since the early 1970s, the pilots have been represented for purposes of collective bargaining by the International Brotherhood of Teamsters, Airline Division ("Union"). Many of the pilots' terms and conditions of employment are contained in a collective bargaining agreement.

4. Additional Company policies, rules and regulations are set forth in the NJA Flightcrew Policy Manual, also known as Flightcrew Operations Manual.

5. There are several types of instructor positions offered by Employer, including check airman, instructor, and initial operating experience ("IOE") instructor. The number of instructor positions for each of the different aircraft programs may vary, depending on the size of the program.

6. Section 5.4(d)(1) of the collective bargaining agreement in effect at all relevant times herein provides that "[a]ll instructors (ground/flight) and Line Orientation Training ("LOT") Captains will be appointed by the Company. Should two applicants possess identical qualifications, then seniority shall prevail."

7. Complainant has been in the Citation X program since approximately April 2001.

8. Approximately 30 pilots bid for the IOE instructor positions, including Complainant.

9. The bid awards were published on or about July 9, 2004.

10. On or about August 5, 2004, Complainant filed a grievance with Employer alleging a violation of, *inter alia*, Section 5.4(d) of the collective bargaining agreement. Complainant contended that since April 1998, he had been denied several instructor positions in various aircraft programs, including the present bid.

11. Among the remedies requested by Complainant in his grievance was that instructor bids be awarded on a seniority basis, contrary to the collective bargaining agreement.

12. Complainant also sought significant remedies through his grievance.

13. Collective bargaining negotiations for a successor contract were ongoing at the time Complainant filed his grievance and it was well know that the Union was seeking economic gains across the board, including instructor pay. In the contract that was

submitted to the pilots for a ratification vote in Fall 2004, IOE instructor pay increased to $350.00 per month in addition to regular wages.

14. Complainant appealed the Company's decision to the four-member panel of the System Board of Adjustment ("SBA" or "Board"). Pursuant to the collective bargaining agreement, the four-member panel consisted of two Union representatives and two Company representatives.

15. A hearing was held on or about November 3, 2004, at which time the board found no violation of the labor agreement. Nevertheless, the board recommended that Complainant's "qualifications and performance be re-evaluated to include an in-person interview. If it is determined that [Complainant] is qualified for the position, he should be awarded an instructor position."

16. Complainant was the only candidate of the 30 pilots who bid the IOE instructor positions to be granted an interview. None of the 22 other pilots who had failed to receive bid awards were granted interviews following their rejections for the positions.

17. Complainant was interviewed by Decker, John Martin, Billy Smith, and James Nichols on or about November 16, 2004.

18. On or about July 16, 2004, Complainant and a co-pilot were scheduled to operate a maintenance ferry flight from Denver, Colorado to Wichita, Kansas. Employer crewmembers would be traveling on the ferry flight.

19. On August 5, 2004, Complainant filed a grievance protesting a three day suspension discipline issued by the Company on August 2, 2004.

20. All references to the July 16, 2004 incident discipline were removed from Complainant's personnel file on or about October 13, 2004. Backpay for the three-day suspension was included in Complainant's October 29, 2004 paycheck.

21. Complainant was made whole for the three-day suspension.

22. On October 5, 2004, an investigatory meeting was held in Columbus, Ohio, on the second floor of Easton II building regarding Complainant's claim of a hostile work environment. Allen Price, LuTonda Baumgardner and Complainant were present.

23. On October 6, 2004, a meeting was held in Columbus, Ohio, on the second floor of Easton II building regarding the results of Employer's investigation into Complainant's claim of hostile work environment and Grievance No. 240-04. Gary Hart, Mark Okey, LuTonda Baumgardner, Allen Price and Complainant were present.

(JX-1A).

When Complainant filed his initial complaint, the sole issue presented for my resolution was whether he was denied the IOE instruction position in retaliation for engaging in protected activity. However, Complainant has since alleged that he is entitled to relief because Employer has created a hostile work environment. I will consider these two issues only, as the other adverse actions alleged by Complainant are time barred since Complainant did not file a complainant regarding these matters within ninety days as required by the Act. *See* 49 U.S.C. § 42121 (b)(2).[2]

SUMMARY OF THE EVIDENCE

Eighteen witnesses testified at the formal hearing in this matter. In addition, the parties submitted seventeen joint exhibits, which will be referred to herein as "JX-1" through "JX-17." Complainant submitted numerous exhibits, which had been marked for identification prior to the hearing using both a letter and number, and will be referred to in the same manner herein.[3] Employer submitted 12 exhibits at the formal hearing, which were premarked as "Company Exhibit 1" through "Company Exhibit 12." They will be cited herein as "CX-1" through "CX-12." Complainant also submitted a compact disc ("c.d.") containing various tape recorded conversations that ensued between himself and Employer's agents. This c.d. was marked "CX-1-19," but because Employer's exhibits were already marked as "CX-1" through "CX-12," the recordings will be referred to herein as "Complainant's Recording 1" through "Complainant's Recording 19."[4] Finally, several depositions were taken post-hearing and the transcripts thereof were submitted into evidence unmarked. I have marked the transcripts as follows and admitted them into evidence: Richard Weeks (CX-13); David Cimarolli (CX-14); Billy Smith (CX-15); Jacob Decker (CX-16); John Martin (CX-17); Thomas Bell; (Complainant Ex. 1).

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[2] 49 U.S.C. § 42121 (b)(2) states, "**Filing and notification.**--A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination."

[3] Complainant's exhibits were separated into what Complainant referred to at the hearing as "tabs." Therefore I will refer to each exhibit using the letter of the tab it can be found in. However, I note that Complainant also numbered each page of each exhibit. I will use only the number of the first page of each document to refer to the document, rather than separate exhibit numbers for each page of a single document as Complainant has done. In addition, where Complainant has submitted an exhibit that appears elsewhere in the record, the exhibit will be cited as a joint or company exhibit only, as those exhibits are easier to identify and locate in the record.

[4] In actuality, the only recording that I found to warrant discussion herein is Complainant's Recording 19, which is a recording of the panel interview granted to Complainant to reassess his qualifications as an IOE Instructor.

FINDINGS OF FACT

Ferry Permit Issue

The evidence introduced regarding this topic is cumulative and for the most part unhelpful in the resolution of Complainant's claim. In short, Complainant was issued a ferry permit to move an aircraft that had a mechanical irregularity to another airport on July 16, 2004. The ferry permit was sent via facsimile to Complainant, and when received, Complainant noticed that the permit stated, "Carriage of cargo or persons other than the crew necessary for the purpose of the flight is prohibited." (JX-11). However, Employer had intended Complainant to carry two additional people, who were crewmembers of a different fleet, pursuant to the permit. Complainant admitted that he did not believe this was a safety issue (Tr. at 88), but because Complainant thought this to be impermissible he attempted to contact Mr. Smith, who is the Assistant Chief Pilot of the Citation 710 Fleet. (Tr. at 167).[5] When he was unable to reach Mr. Smith, Complainant contacted Dennis Garcia, who issued the ferry permit, directly. (Tr. at 365-66). Mr. Garcia is employed by the Federal Aviation Administration ("FAA") Flight Standards District Office in Columbus, Ohio, and serves as the Principal Maintenance Inspector to Employer. (Tr. at 387). According to Mr. Garcia, Complainant "was insistent" and the two engaged in "a lively debate." (Tr. at 392, 393). However, Mr. Garcia indicated that Complainant did not use obscenities, did not raise his voice, and was not confrontational, and he even described Complainant's behavior as "very professional." (Tr. at 402-03).

However, on August 2, 2004, Complainant was notified by Mr. Cimarolli, the Chief Pilot for the Citation 7 and Citation 10 aircraft fleets, that he was being suspended for three days beginning August 24, 2004, "[a]s a result of [his] unprofessional conduct," regarding the call he made to Mr. Garcia. (JX-16). The counseling record issued to Complainant on August 2, 2004, under the heading "Summation of Infraction" states, "Unprofessional conduct in regards to not following the chain of command when contacting the Columbus local FSDO and unprofessional conduct in the manner in which that exchange was conducted with the Columbus local FSDO." (JX-17).

On August 5, 2004, Complainant filed a grievance in response to the three-day suspension he received as a result of this matter. (JX-12). The grievance was assigned an internal tracking number of 240-04, and a hearing was held on August 12, 2004. At the conclusion of the hearing between Complainant and Mr. Okey, the suspension was reduced to one day. (JX-14). However, On October 6, 2004, a second meeting was held between Complainant, Allen Price, Gary Hart, LuTonda Baumgardner and Mr. Okey. As a result of this hearing, Employer agreed to remove any references to the disciplinary action from Complainant's personnel file and to return the three days pay Complainant lost as a result of his suspension. In return, Complainant agreed to withdraw his grievance. (JX-15).

[5] Complainant testified that these crewmembers were from a Citation 560 Ultra, which is a different aircraft than that which Complainant was flying, therefore indicating that these people could not legally fly this aircraft (Tr. at 79-80). Complainant also testified that these people were getting in the way of the emergency exit and were, for all intents and purposes, passengers. (Tr. at 80).

In 2004, Mr. Michael was a captain in the Falcon 2000 Program, and was a shop steward for the Union and sat on the Executive Council. (Tr. at 270). He represented Complainant in reference to the ferry permit issue. (Tr. at 270-71). Mr. Michael recalled that during that proceeding, Mr. Cimarolli brought up the issue of latches. (Tr. at 271). It was Mr. Michael's understanding that the meeting was solely to address "discipline associated with this issue of going outside the chain of command in an effort to resolve the maintenance ferry permit." (Tr. at 272). When asked if Mr. Smith was ever "a problem, as far as maintenance write-ups, pushing crews to do unsafe acts," Mr. Michael responded, "To the extent of forcing a crewmember, or pressuring a crewmember to do something unsafe, no." (Tr. at 278). Mr. Michael admitted that in reference to the ferry permit incident, he lobbied Mr. Cimarolli to purge any reference to Complainant displaying unprofessional conduct or being confrontational. (Tr. at 274, 282). Mr. Michael testified that if Mr. Garcia authorized the crew members who were not trained to operate Complainant's aircraft to travel aboard that aircraft, then it was permissible for Complainant to transport such crewmembers. (Tr. at 284-85).

MEL'able Lights Issue

Complainant testified that after landing in Lubbock, Texas, on November 18, 2005, he noticed both of the aircraft's landing lights were shattered. He felt this was unsafe because the broken glass may migrate to different parts of the wings or may harm electrical wires. (Tr. at 130). Complainant did not think this issue fit the requirements for the minimum equipment list ("MEL"), which is basically a list of certain inoperative items that can be ignored for a certain period of time to allow the aircraft to continue to fly. (Tr. at 131). Furthermore, Complainant testified that even when an item is MEL'able, he still has the right to refuse to fly the aircraft as the Pilot in Command. (Tr. at 381).

Employer felt the lights were MEL'able. A conference call was held on November 19, 2005, between Complainant, Mr. Hart and Mr. Cimarolli. (Tr. at 132). Complainant was notified by e-mail that same day that he and his first officer were scheduled to meet with Mr. Cimarolli and Mr. Hart on Monday, November 21, regarding this issue. (Tab N, Exhibit 5705). On Sunday, November 20, Complainant sent an e-mail to numerous representatives of Employer, including Mr. Hart and Mr. Cimarolli, which began, "I hereby request the following for my hearing on 11/21/05." (Tab N, Exhibit 5706). However, Mr. Hart responded notifying Complainant that it was not a hearing, but rather a meeting to gain "understanding and clarity," regarding the recent MEL issue. (Tab N, Exhibit 5706).

According to Complainant's testimony, Bridgeway One Arrival is a term used by pilots to refer to Employer's act of bringing the pilots back to Columbus as punishment. (Tr. at 136). However, Mr. Cimarolli testified that Complainant was not being punished but was being brought back to Columbus "to discuss the issues." (Tr. at 140). However, according to Complainant's testimony, he was "essentially sequestered in the back of the room" and was not given an opportunity to speak. (Tr. at 141). Mr. Cimarolli testified that he calls meetings in Columbus for reasons other than discipline, such as when there is a line operational issue. (Tr. at 443). Mr. Cimarolli insisted that Complainant was not disciplined and that discipline was never an issue. In addition, he testified that he never told Complainant to fly the aircraft despite the shattered lights on the conference call and neither did Mr. Hart. (Tr. at 154).

Fuel Leak Incident

Complainant testified that on October 17, 2001, he voiced safety concerns regarding his unwillingness to fuel an aircraft that had a known fuel leak, and after Mr. Cimarolli berated him, yelled at him and used obscenities towards him, he fueled the airplane against his better judgment. (Tr. at 328-29). Complainant testified that he was given a four-day evaluation ride for questioning the authority of a program manager and was again berated at the end of that four day period. (Tr. at 329). In addition, Mr. Cimarolli asked Complainant to get out of his fleet as soon as possible. (Tr. at 329).

Mr. Smith recalled the October 17, 2001 fuel leak incident and admitted there had been previous problems with Citation X aircrafts venting fuel. (Tr. at 421-22). He testified that he has been given instructions from the manufacturer to refuel the aircraft and see if the problem could be recreated on the ground. Complainant was told that the plane was grounded for the remainder of the day and thus should have known there was no intent to fly it. (Tr. at 423). According to Mr. Smith, the FBO was prepared to monitor the refueling. (Tr. at 423-24). Mr. Smith admitted that he issued instructions to Complainant to direct the FBO fuelers to fuel the plane and also that he instructed Complainant to sit in the cockpit and monitor the fuel gauges in order to verify how much fuel was put into the aircraft. However, Complainant was "not cooperative," according to Mr. Smith's testimony. (Tr. at 424). Mr. Smith was not aware of any discipline administered to Complainant and did not order a four day evaluation of him. Further, according to Mr. Smith, had a flight evaluation been ordered there would be evidence of it in Complainant's training folder, which there was not. (Tr. at 425).

Regarding the fuel leak, Mr. Cimarolli testified, "I know that, I know that there was an issue with a fuel leak, actually a fuel spill. And the details of it I don't know." (Tr. at 442). He testified that he did not order Complainant to undergo an evaluation for questioning the authority of a program manager in relation to this incident. (Tr. at 442). He also testified that he did not coerce Complainant to fuel the aircraft nor has he ever coerced or pressured the Standards Department to award promotions to pilots who happen to be his friend. (Tr. at 442).

Latches

The testimony indicates that there was an incident where Complainant found the latches of an aircraft to be unsafe and therefore "wrote the aircraft up," or reported the problem in order for maintenance to be performed. On June 4, 2004 Mr. Cimarolli was approached about these latches, and informed that there was nothing wrong with the latches, and that the maintenance department was visibly upset that the latches were replaced since it cost the company money since a maintenance technician had to take a road trip to replace them. (Cimarolli Depo. at 9-10). According to Complainant, Mr. Cimarolli told Complainant that "maintenance control…shoved those latches up my ass." (Tr. at 13).

According to Mr. Cimarolli, Complainant was not disciplined regarding this issue and he did not report the incident to the Director or Assistant Directors of Operations, or to any member of Employer's management team. (CX-14 at 9). Mr. Cimarolli also did not relate this information to Mr. Decker in June of 2004 when he sought input from Mr. Cimarolli, as chief

pilot, regarding Complainant's IOE Instructor bid. (CX-14 at 11). Mr. Cimarolli admitted that he may have told Billy Smith about this situation, since Mr. Smith and Mr. Cimarolli work together every day, but he did not have a specific recollection. (Tr. at 12). Mr. Cimarolli indicated that as a captain, Complainant has a legal right and an obligation to write up the latches if he feels they are unsafe. (CX-14 at 33). Mr. Cimarolli did not recall being angry with Complainant although he was told that Mr. Michael had already testified that Mr. Cimarolli used foul language in reference to the latch incident. (CX-14 at 34).

Mr. Price also recalled Mr. Cimarolli commenting to Complainant about latches "being stuck up his ass." (Tr. at 266). When asked whether he has ever witnessed Mr. Cimarolli verbally abuse or berate an individual or use profanity, Mr. Price responded,

> I've witnessed him with heated arguments in a room, yes. But berating, he – he – he gave, as well as he took, you know.
>
> In my relationship with him, I can tell you, prior to that, you know, we've – we've had some heated discussions.

(Tr. at 267).

Mr. Price recalled Mr. Cimarolli "getting loud" with Complainant, but was not able to say that Mr. Cimarolli berated Complainant. (Tr. at 268).

Airport Closure Incident

Mr. Thomas Bell was Complainant's first officer on January 8, 2001. (Complainant Exh. 2 at 4). On that date, the airport that Complainant and Mr. Bell were to land at was closed by a Notice to Airmen ("NOTAM"). Mr. Bell testified that a NOTAM relating to an airport being closed is a safety related flight issue and that it is illegal to depart from a closed airport. (Tr. at 9). Mr. Bell corroborated Complainant's testimony, that Complainant contacted Employer's Program Manager, Rick Weeks, while Mr. Bell called the Robinville Flight Service Station and confirmed the NOTAM of closure of the airport. (Bell Depo. at 9-10). Mr. Bell testified that he filed a safety report with the Union regarding the incident. (Complainant Exh. 2 at 11).

According to Complainant's testimony, Mr. Weeks wanted Complainant to fax him the letter from Mr. Brown, the airport manager, authorizing Complainant to take off from the closed airport, so that Employer could use this letter as authority. (Complainant Exh. 2 at 17). Mr. Bell agreed with Complainant that Mr. Weeks was attempting to have the two men take off from a closed airport, where it would have been illegal to do so. (Complainant Exh. 2 at 14). Mr. Bell testified that Mr. Brown has no authority to permit an aircraft to take off from a closed airport. (Complainant Exh. 2 at 17).

On cross-examination, Mr. Bell testified that his report to the Union stated that there was diminishing visual flight rules, it was raining lightly, the runway was wet and there were two to four feet snow banks along the taxiway. (Complainant Exh. 2 at 23). Mr. Bell admitted that he was not disciplined as a result of this incident.

At Mr. Weeks' deposition, he testified that he has "a vague recollection that there was some issue that went on at Belmar…as far as direct remembering and specifics, I don't." (CX-13 at 6). Mr. Weeks did not report this incident to Mr. Cimarolli, Mr. Decker, Mr. Martin, Mr. Nichols or Mr. Smith. (CX-13 at 8-9). When asked about Federal Aviation Regulation ("FAR") 91.139, Mr. Weeks stated, "the NOTAM system is used to warn air crewmembers of potential hazardous situations at an air terminal or some type of air facility." (CX-13 at 11). He went on to explain that a NOTAM is issued by the Administrator and once it is issued, "no person may operate an aircraft or regulated device governed by the regulation concerned, within the designated air space except in accordance with the authorized terms and conditions prescribed in the regulation covered by the NOTAM." (CX-13 at 11-12). Mr. Weeks understood that Complainant was not comfortable flying on the authority of a letter from Mr. Brown, and according to Mr. Weeks' testimony, that is why the issue was elevated to the chief pilot (CX-13 at 22). The following exchange took place:

> Q. So, therefore, if the FAA cannot waive a NOTAM, then certainly an airport manager cannot. Would you agree?
>
> A. Well, I agreed back during the incident, that's why we got the chief pilot involved and started looking at the options that we had at that point.

(CX-13 at 24-25).

Eventually the NOTAM was lifted and Complainant and Mr. Bell legally departed from Belmar Airport.

Denial of the IOE Instructor Position

In August of 1998, Complainant was promoted to LOT Captain of the Citation V Ultra fleet. (Tab F, Exhibit 5403). It is clear from the record that the LOT Captain position was the predecessor to the Initial Operating Experience ("IOE") Captain position, and the duties of the two positions are virtually indistinguishable. (Tr. at 21, 23, 203). However, it is also clear that when a pilot transfers from one fleet to another, he loses his title as an instructor and must bid for an instructor position within his new fleet. (Tr. at 213).

The evidence clearly establishes that Complainant later transferred to the Citation CE-750 fleet and was denied an IOE Instructor position for which he applied in 2004, and that denial is the subject of this litigation. The job announcement, posted on May 3, 2004, stated that successful candidates "will be type rated and have been assigned duties as Pilot in Command in the airplane with NJA for at least six months, have advanced knowledge of the airplane systems, and NJA procedures." (JX-2). However, there is evidence in the record that Employer was seeking candidates with international flight experience. (Tr. at 208, 215[6]).

[6] Mr. Decker testified that JX-2 came about because in a weekly meeting, he was notified that the crew planning group was having difficulty qualifying people to fly international routes, especially to Europe. There was a group of people who were making international trips

According to Jacob Decker, the Director of Flight Standards, a point system was developed in early 2004 in order to make the selection process more objective. (Tr. at 199-200). Each pilot was scored in three categories: international experience, program manager feedback and peer feedback. Employer has four international lists, one for Hawaii, one for Central America, one for Europe and one for the North Pacific. Pilots received a point in the NJA International column each time their name appeared on one of these lists. (Tr. at 223). Pilots could score a maximum of three points, even if their names appeared on all four lists, in order to keep the weight of each score consistent. (Tr. at 224). Complainant received a score of zero in the international experience column, since his name did not appear on any of the four lists. As to the program manager column, it is apparent that each applicant was rated on a scale of one to three by five program managers, and it seems that any applicant who received an average score below a 1.0, was assigned a final score of zero in this category, while any candidate receiving an average score of 1.0 was assigned a final score of one, any pilot with an average score between 1.0 and 1.5 was assigned a final score of two, and any candidate who had an average score greater than 1.5 was assigned a final score of three. As Complainant had an average score of 0.6, his final score for this category was a zero. As to the peer review scores, it seems that Employer erred in that some candidates with an average score of 1.2 were assigned a final score of one, while others with an average score of 1.2 were assigned a final score of two in this category. However, this does not affect Complainant's score, since his average score was a 1.0, and he and the eight other candidates with an average score of 1.0 were all assigned a final score of one. In addition, neither of the two pilots who had a score of 1.2 rounded up to two were selected for the position, and therefore this mistake did not prove to be an unfair advantage.

When the scores in each of the three categories were added together, Complainant and two other applicants received a total score of one, while one applicant received a total score of zero. The other twenty-six candidates scored higher than Complainant. (JX-3).

On July 9, 2004, Employer issued a memorandum listing the seven successful candidates. This list did not include Complainant. (JX-5). However, when comparing the seven successful candidates listed on JX-5 with the scores listed on JX-3, it is clear that of the thirty candidates, seven had international flight experience, and of those seven, five were successful.

Complainant filed a grievance on August 5, 2004, alleging violations of multiple provisions of the collective bargaining agreement. In the section provided in the grievance form to provide the facts of the case, Complainant provided the following:

> Since April 98, I have been denied several instructor positions in the Ultra, Hawker 800XP, & the CE-750. In MANY of these cases the awarded positions were given to junior pilots with much less experience in all categories. Also, instructor positions were given

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regularly, but because these individuals were not IOE captains, they could not sign off for others to do the trips. Therefore, it was necessary to have IOE captains with international flight experience so they could train individuals in the correct procedures for flying across the North Atlantic. (Tr. at 220).

> to pilots who never submitted any resumes or bids for the positions as required by the job postings.

(JX-6). This grievance was given an internal tracking number of 235-04 by Employer and a hearing was held on August 23, 2004. Mr. Okey and Complainant participated in the hearing by telephone. Following the hearing, Employer denied Complainant's grievance, finding that the collective bargaining agreement had not been violated. (JX-8).

Subsequently, Complainant appealed Employer's decision to the Systems Board of Adjustment ("Systems Board" or "Board"),[7] and a hearing was held on November 3, 2004. According to Richard Meikle, Employer's Director of Safety and Government Relations, the Board consists of two officials of Employer and two Union members. (Tr. at 15). Mr. Meikle was a member of the Board. Following the hearing, the Board found that the collective bargaining agreement had not been violated but the Systems Board made the following recommendation: Complainant's "qualifications and performance [should be] be re-evaluated to include a [sic] in-person interview. If is it determined that [Complainant] is qualified for the position, he should be awarded an instructor position." (JX-9). However, Mr. Meikle testified that when the Systems Board makes a recommendation, it is just that and not a mandate. (Tr. at 19-20; 46-47).

Nonetheless, Employer followed the recommendation of the Systems Board and the interview was held November 16, 2004. When asked if he recalled what happened during Complainant's interview, Mr. Decker testified, "It was a typical panel interview. We have a standard list of questions that we had used for the instructor pilot, we had taken that and modified it to this situation as we saw fit. It was cordial…nothing out of the ordinary stuck out." (Tr. at 231). Mr. Decker indicated that no-one was aggressive or confrontational when interviewing Complainant but after Complainant left the panel decided unanimously that Complainant was not the best suited candidate for the position. (Tr. at 232).

Likewise, Mr. Billy Smith, who also sat on the interview panel, indicated that he asked questions about aircraft systems as well as regulatory questions, and specifically, he asked how Complainant would explain a ferry permit to a new pilot. He found Complainant's answers to his questions to be unsatisfactory. (Tr. at 184). Mr. Smith denied asking Complainant questions in an aggressive or confrontational manner. (Tr. at 185). In Mr. Smith's opinion, Complainant did not demonstrate the level of knowledge that Employer would expect of an IOE Instructor. (Tr. at 186).

Mr. Martin has been working for Employer for over eight years and is presently the Director of Training. He also participated in the November 16, 2004 interview of Complainant. (Tr. at 475). He testified that he was not give any instruction from the Board regarding how the meeting should be conducted. (Tr. at 475). Mr. Decker led the interview but all of the

[7] Mr. Meikle explained the System Board of Adjustment in the following way, "If the grievance is denied and the individual feels that a subsequent review is necessary then they may appeal the Company's decision with respect to the grievance to the System Board of Adjustment." (Tr. at 45).

participants asked questions. Mr. Martin testified that Mr. Smith did not ask questions in a confrontational or aggressive manner. (Tr. at 476). When asked whether Complainant answered his questions correctly during the interview, Mr. Martin responded, "Not completely. They were fuzzy on the details…" (Tr. at 477). He testified that he opined, based on the interview, that Complainant was not suited for the position. (Tr. at 477). When asked how Complainant could have been qualified to serve as a LOT Instructor but not an IOE Instructor, Mr. Martin replied, "Uh, looking at the way the Company has changed on the people putting in for it, that based in the group, [Complainant] may not have been the most qualified in the group that we were selecting from." (Tr. at 485).

Mr. Decker denied having any knowledge that Complainant had lodged any safety complaints with either the Company or the FAA. (Tr. at 233). Further, at his deposition, Mr. Decker testified that while he was gathering input in connection with the May 2004 IOE Instructor bid and the November 2004 instructor interview, no-one from Employer approached him regarding an airport closure incident, the fact that Complainant had been released to captain with only 35.5 hours, the Jerry Seinfeld autograph incident, or the nose bay latch incident. (CX-16 at 4-7). Likewise, according to Mr. Smith, following Complainant's panel interview, there was no discussion about safety matters that Complainant had raised. (CX-15 at 6). In addition, Mr. Smith testified credibly that he did not urge anyone to deny Complainant the position ,and his superiors did not give him instructions to ask difficult questions or urge him not to select Complainant for the position. (Tr. at 186). Mr. Martin also was not aware at the time of the panel's decision that Complainant had lodged a safety complainant against Employer. (Tr. at 478). At his deposition, Mr. Martin again testified that at the time of the interview, he had not been made aware of an airport closure incident, an incident in which Complainant was released as a pilot in command with only 35.5 hours, the Seinfeld incident, or the incident concerning the latches. (CX-17 at 4-5).

After reviewing the audio evidence of this interview, which was submitted by Complainant, I find that the interview was conducted in a non-threatening and professional manner. In fact, after Employer and Complainant had completed the question-and-answer session, Complainant and the interviewers engaged in small talk and Mr. Smith made hotel arrangements for Complainant.

During the panel interview, Complainant was asked about his international flight experience and was also asked what he thought his peers and supervisors would say about him if asked for feedback. I find these questions and Complainant's response thereto to be significant since these are the precise factors that were used to deny Complainant the promotion to IOE Instructor in the first place. Complainant admitted that while he had flown to the Caribbean and South America, he had not flown to Europe or Hawaii. Furthermore, when asked about what kind of feedback he thought he would receive, Complainant's response demonstrated that he was not confident in what others would say about him.[8]

[8] Although Complainant went on to say that he hopes others would describe him as a professional who does not compromise on safety and who is diligent, he began by stating that he has had personality conflicts with other members of his current fleet.

Of the questions asked of Complainant, I found one to be troublesome. Complainant was asked what his restrictions and obligations are in relation to a ferry permit. In the course of his response, Complainant indicated that if he had any problems in relation to a ferry permit, he would go up the chain of command. He was then asked once he exhausted the chain of command by calling Mr. Hart, would he go any further, to which Complainant responded that he would go as far as he felt necessary. (Complainant's Recording 19).

On January 5, 2005, Complainant filed another grievance, which was assigned an internal tracking number of 12-05, because he was not awarded the IOE instructor position after being interviewed by the panel. In a letter of January 25, 2005,[9] Mr. Okey explained that the Systems Board had denied Complainant's earlier grievance, and Complainant had no further rights to pursue the matter. In addition, the letter states the following:

> I will relay a few of the reasons you were not selected for the most recent Instructor positions. The Company ranks applicants based on peer and supervisor feedback as well as experience and when an interview is conducted, the interview process itself is used in the decision. Your ranking was 27th out of 30 applicants. Your peer feedback was poor as was the feedback from your supervisors. During your interview your answers to some technical and situational questions is described as "fair at best." Answers on headset usage and transfer of aircraft control were not completely incorrect; however, the interviewers believed the answers were not at the level expected of an IOE candidate. During the interview you apparently demonstrated only fair communication skills. To quote, "getting his point across in a clear and concise manner was not demonstrated." All of these factors combined demonstrate to me you are not qualified for the Instructor position for which you applied.
>
> Your grievance, number 12-05 is without contractual merit; consequently, it is denied.

(CX-4).

Complainant again appealed to the Systems Board. On May 12, 2005, a hearing was held, but the Systems Board affirmed Employer's decision, finding that Employer had granted Complainant an interview and reevaluated his qualifications, and thus had complied with its recommendations. (CX-5).

Contrary to the foregoing evidence, Mr. Jacob, who is the Assistant Director of Flight Standards, testified that the interview process was "more subjective than objective." (Tr. at 304). When asked whether he had knowledge of individuals being awarded instructor position without

[9] The date reflected on the letter in CX-4 is January 25, 2004, but it is clear from the record that the letter was actually written on January 25, 2005.

ever specifically bidding on the position, he stated that "There was a situation where we had a chief pilot basically create an IOE Program that did not exist previously." (Tr. at 305). Upon further questioning, he indicated the program was labeled the International IOE Program, that this occurred in approximately the fall of 2004, and that it was Mr. Lampert who created this program. (Tr. at 305). According to Mr. Jacob, when Flight Standards learned of the program, they tried to intervene but "politics ran away with it again." (Tr. at 305). When asked when the point system was put in place, Mr. Jacob stated, "It came about, is my understanding, was from a grievance that was filed by a couple pilots, I believe you were one of them." (Tr. at 308). Mr. Jacob testified that he has witnessed a corporate culture in which employees are punished for being disloyal. (Tr. at 312).

On cross-examination, Mr. Jacob admitted that when he was the Assistant Director of Standards in 2004, the Director of Standards stepped down and he applied for the position, but it was awarded to Mr. Decker. (Tr. at 314-15). Mr. Jacob did not apply for the IOE Instructor position, was not involved in the selections process and was unaware of the criteria used to evaluate applicants. (Tr. at 315-16). Mr. Jacob admitted that he was not with Mr. Decker when Mr. Decker created JX-3 and it was possible that he actually made it long before the November 4 Systems Board decision. (Tr. at 316).

Crew Rot

Complainant testified that he "sat without being assigned an aircraft or First Officer from approximately July 11, 2005 to October 7, 2005. (Tr. at 148). He also testified that shortly after making a complaint to Employer, around October 20, he began flying again. (Tr. at 149).

Mr. Okey, Employer's Director of Labor Relations, explained that in February of 2005, Employer implemented the "Prospective Rest" policy, requiring Employer to brief pilots as to how much rest they will get and the date and time when they are to report to duty following that rest. (Tr. at 491-92). The old collective bargaining agreement did not require pilots to call in the day before they were to report to duty for their schedule, which presented a problem since Employer is an "on-demand" airline, as opposed to commercial airlines which have set flight schedules. (Tr. at 492). Because the airline did not have the schedule well in advance, they had to schedule pilots to show up using a scattered approach—having some show up just past midnight, some show up at approximately 3 a.m. and others showing up at approximately 8 a.m. (Tr. at 494). Subsequently, Employer was able to get a provision added to the contract requiring pilots to call in the day prior to the day they were to report for duty. (Tr. at 494-95). However, prior to the implementation of this policy, pilots were regularly required to report to the airport for duty before four a.m. According to Mr. Okey, pilots would sometimes sit there all day without ever receiving an assignment, and thus, the pilots termed this "crew rot." (Tr. at 495). According to Mr. Okey, the Union accused Employer of using punitive measures, when Employer was really reacting to a major shift in the way business was being conducted. (Tr. at 497). The new collective bargaining agreement was signed on November 17, 2005. (Tr. at 499).

When asked if a paper that references discrimination would raise a red flag, Mr. Okey testified, "Well, not if it was coming from you, Mark. And I'm not being – you know, I'm not being flip when I say that. But you—you seem to find discrimination in a lot of things that I

wouldn't necessarily." (Tr. at 507). Mr. Okey went on to explain that showing up at the airport and not having a plane to fly is not discrimination. (Tr. at 507). Mr. Okey testified that if a pilot sat for three months without being assigned to an airline or a tail number, that would be unusual. Complainant testified, "The only thing I was assigned to do between July 11, 2005 and October 7, 2005, was on or about August 16th, I – I sat one day in crew rot, if you will, early in the morning of August 17th…I quickly received a – a change in brief to where I had to airline to Columbus to attend an Aircraft Recurrent Session because somebody else called in sick." (Tr. at 513). Complainant went on to state, "I was not even – I wasn't given an airline, I wasn't given a First Officer. I certainly wasn't given an airplane. And – uh, I never left St. Louis for that matter." (Tr. at 514). When again asked whether that is normal, Mr. Okey testified, "Uh – it seems unusual to me, I will say that, it seems unusual that you would have absolutely no assignment for three months. But, I've got grievances from other people claiming the same thing during 2005." (Tr. at 516). When asked whether it was normal to require a Captain to report at two in the morning with no aircraft and no First Officer, Mr. Okey responded that, "That was normal during the period following prospective rest implementation. That was normal, because that's where the term 'crew rot' came from." (Tr. at 516).

Dr. Benson began working for Employer in August of 2001 and is currently the Manager of Financial Planning and Analysis. (Tr. at 530-31). At the direction of Employer's counsel, Dr. Benson researched pilots with low flight activity during the period May 20 through October 10, 2005, and focused on the five pilots in each fleet with the lowest activity during that period. (Tr. at 531).

There were seventy pilots who Dr. Benson found to have flown less than Complainant during the time period in question. (Tr. at 533; CX-9). Dr. Benson also conducted analysis of Complainant's duty days between May 20 and October 10, 2005. (Tr. at 535-36; CX-10). This analysis revealed that Complainant took time off from June 9 through June 19, July 28 through August 7, and October 4 through October 6. In addition, the aircraft he was scheduled to fly had to undergo maintenance on ten separate days. On fourteen different days, Complainant was moved to another base. Finally, between August 18 and August 22, Complainant underwent training and was unavailable to fly. (CX-10). I note also that Complainant was on a 7/7 schedule, indicating that he was on duty for seven days followed by seven days off. (Tr. at 537). He was therefore only available to fly one half of the days between July 11 and October 7.

Dr. Benson also researched Complainant's flight activity from October 10, 2005 through December 31, 2005. (Tr. at 542). According to Dr. Benson, from Thanksgiving to year's end is one of the busiest times for Employer, with Thanksgiving being the busiest day of the year. (Tr. at 542-43). Dr. Benson found that Complainant captained an aircraft on ten days between October 10, 2005, and December 31, 2005.

Claims of General Hostility

Complainant, Mr. Hart, Ms. Baumgardner, Mr. Price and Mr. Okey met on October 6, 2004, to discuss Complainant's allegations of a hostile work environment. Mr. Hart recalled that he addressed improper language used by Mr. Cimarolli with him and did in fact speak to Mr. Cimarolli after that meeting. (Tr. at 97).

Complainant testified that he had expressed concerns about harassment and safety problems several times to Mr. Okey, but Mr. Okey did not respond to Complainant's concerns until Complainant accused Employer of falsifying documents. (Tr. at 241-42). When asked why he waited so long to investigate, Mr. Okey replied, "I'm certainly no expert, but you, quite often, Mr. Hoffman, will refer to conversations as harassing that – that after you've explained them to me, I – I don't take them as harassing conversations." (Tr. at 244). Mr. Okey admitted that he had knowledge of Mr. Cimarolli using profanity. (Tr. at 256). He also testified that he relayed Complainant's hostile environment claim to Ms. Baumgardner, an Employee Relations Manager, and she investigated the claim and found it to have no merit. (Tr. at 263-64).

Ms. Baumgardner recalled discussing on October 5, 2004, Complainant's suspension for contacting the FAA in July of 2004, the fuel leak incident, the incident with the latches. (Tr. at 323, 326). Ms. Baumgardner also admitted that she and Complainant "discussed several incidents where he felt that a hostile or an unconducive [sic] work environment was demonstrated, and the fuel leak incident was one of the incidents that he brought to me, as well as outlining that Mr. Cimarolli had used unprofessional behavior as it related to being a problem in his fleet." (Tr. at 330). Ms. Baumgardner testified that after she met with Complainant on October 5, 2004, she investigated his claims by looking for documentation of discipline in his personnel file. (Tr. at 333).

Ms. Baumgardner admitted that she recommended that Mr. Cimarolli go through coaching or counseling and also that someone outline for him the Company's zero tolerance for hostility or harassment policy. (Tr. at 334). To Mrs. Baumgardner's knowledge, the training did occur. Ms. Baumgardner testified that Mr. Cimarolli had been coached before due to inappropriate or unprofessional behavior. (Tr. at 335). She also admitted that there was a perception that Mr. Cimarolli was aggressive towards pilots. (Tr. at 336).

On cross-examination, Ms. Baumgardner testified that she thoroughly investigated Complainant's complaint of a hostile work environment. Her investigation turned up no evidence that he was discipline regarding the October 17, 2001 fuel leak incident or the June 2004 latches incident. The only discipline she found was the August 2, 2004 suspension.[10] (Tr. at 338). Ms. Baumgardner concluded that there was no merit to Complainant's allegation of a hostile work environment. (Tr. at 339). She also stated that Mr. Cimarolli did not discriminate in his management style, but rather, he used profanity and was inappropriate or unprofessional no matter who he was dealing with. (Tr. at 339).

Mr. Swint has been working for NetJets since December of 1997 and has been a captain on the Citation XL aircraft since March of 2000. He has been a certified flight instructor since 1991 and holds multiple instructor designations. (Tr. at 290). Mr. Swint indicated that he feels there is a corporate culture in which pilots are pushed to fly airplanes unsafely. (Tr. at 292). He feels that if you strictly adhere to the regulations rather than being loyal to a program manager or

[10] Likewise, Mr. Hart testified that he took Complainant's personnel file without the knowledge of Mr. Cimarolli, and he found no adverse information contained within, which lead the Company to dismiss Complainant's claims of a hostile work environment. (Tr. at 121-22).

chief pilot, you are less likely to be promoted. (Tr. at 293). Mr. Swint testified that his impression is that if you follow the rules you are essentially punished. (Tr. at 296).

Complainant admitted that he has contacted Mr. Cimarolli regarding maintenance issues and Mr. Cimarolli instructed him to write the aircraft up. (Tr. at 383-84). In addition, to Mr. Smith's knowledge, no pilot in 28 years was ever disciplined or terminated because he refused to fly an aircraft he deemed unsafe. (Tr. at 415).

Mr. Cimarolli admitted to knowing of the terms "A Team" and "B Team" and explained that there has been a perception among the pilots for years that some pilots receive preferential treatment and these pilots are referred to as the "A Team." However, Mr. Cimarolli testified that there is no such preferential treatment within his office or his staff. (Tr. at 142).

ANALYSIS

The Act provides that no air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against him because he has lodged a safety complaint. 49 U.S.C. § 42121(a). In order to establish that an employer has violated the Act, the complainant must prove by a preponderance of the evidence that he engaged in protected activity (i.e. he made a safety complaint) and the protected activity was a contributing factor in the adverse employment action taken by the employer. 49 U.S.C. § 42121(B)(i); *see also Peck v. Safe Air International, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Once the claimant has proven these factors by a preponderance of the evidence, the burden of proof shifts to the respondent employer to show by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of the employee's protected activity. *Id*. 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." (citation omitted) *Brune v. Horizon Air Industries, Inc*., ARB No. 04-037, ALJ No. 02-AIR-8, slip op. at 13 (ARB Jan. 31, 2006)…

If the employer is found to have violated the Act, the complainant is entitled to (1) an order directing the employer to abate the violation, (2) reinstatement to his former position with back pay and (3) compensatory damages. (B)(ii). However, if the employer is able to show by clear and convincing evidence that it would have taken the same unfavorable employment action absent complainant's engagement in protected activity, the complainant is not entitled to relief. 49 U.S.C. § 42121(B)(ii)and (iv).

A. Protected Activity

If Complainant had an objectively reasonable belief that Employer violated a federal law relating to air carrier safety, and provided information of such violation to his employer or the federal government, he has engaged in protected activity. "For a finding of protected activity, it is sufficient that Complainant carried out his required, safety-related duties." *Sievers v. Alaska Airlines Inc.*, 2004-AIR-28, Slip op. at 24 (ALJ May 23, 2005).

I find that Complainant has undoubtedly engaged in protected activity numerous times during his career with Employer. Complainant constantly voiced safety concerns to management, including when he refused to take off from a closed airport, when he refused to put the landing lights on the MEL, and when he wrote up an aircraft because he felt the nosebay latches were unsafe.

B. Adverse Employment Action

The Act classifies "discharge and other discrimination involving an employee's compensation, terms, conditions or privileges of employment" as adverse employment actions. I find that a denial of a promotion is an adverse employment action. Because the final denial of the promotion to IOE Instructor occurred within ninety days of Complainant filing his claim, it will be considered herein. The other discrete adverse actions alleged by Complainant, such as his 3-day suspension related to the ferry permit issue, are time-barred and will be discussed only if they are found to be relevant to Complainant's claim of a hostile work environment. [11]

C. Causation

A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1979.109(a).

Here, I find that Employer has established by clear and convincing evidence that it would not have promoted Complainant to the IOE Instructor position even absent Complainant's engagement in protected activity. Mr. Decker showed that every candidate was evaluated using the same scale, and I find it irrelevant that the scale contained subjective factors. Complainant scored twenty-seventh of thirty applicants using the scale. Furthermore, in the one component that was completely objective (the international flight experience component), Complainant scored a zero.

In addition, after Complainant was granted a panel interview in order for his qualifications to be reevaluated, the panel agreed that Complainant was not qualified for the IOE Instructor position. I find that the interview was conducted with professionalism, that Complainant provided less than satisfactory answers to some interview questions, and that the panel decided based on qualifications alone that Complainant was not worthy of the promotion. Although I find that Complainant was asked a question about ferry permits that I deem

[11] Complainant has offered testimony regarding other incidents, such as his release as a Pilot in Charge of the Citation X fleet with an insufficient amount of hours in that aircraft, and an incident in which he was questioned regarding whether he was the crewmember who asked Jerry Seinfeld for an autograph. However, I find that these incidents were neither protected activity, adverse employment actions, nor representative of a hostile work environment. Thus, they are not discussed further.

inappropriate, I do not find that his answer to such question contributed to him being denied the position.

Because Employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of any protected activity, Complainant's claim as it relates to the denial of the promotion to IOE Instructor fails.

D. Ongoing Violation/Hostile Work Environment

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; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2elec. Op. at 42 (ARB Feb. 28, 2003); Williams v. Mason & Hanger Corp., ARB No. 9-030, ALJ Nos. 97-ERA-14 et al., elec. op. at 13 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, elec. Op. at 16-17, 21-22 (ARB Feb. 29, 2000).

Discourtesy and rudeness and the sporadic use of abusive language do not amount to harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

"Hostile environment claims are different in kind from discrete acts…The 'unlawful employment practice'…cannot be said to occur on any particular day.'" *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). Therefore, a claim of continuing violations cannot be used to save a claim of a discrete adverse employment action that would otherwise be time barred. *See Id.* at 112-13; *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).

First, I find that Complainant has offered only discrete acts that are time barred, and has offered no evidence of a pattern of discrimination.[12] Secondly, as regards Complainant's claim that he was constructively discharged during the "crew rot" period, I find that Complainant faced an unfortunate situation that many pilots were facing at that time, and Employer was not on this score retaliating against him.

[12] In addition, I note that even if these discrete adverse actions alleged by Complainant were not time barred, claims related thereto would have little merit. For example, regarding Complainant's allegation that Mr. Cimarolli spoke to him in an unacceptable manner and used profanities, I find that to be true. However, the record indicates that Mr. Cimarolli has a record of speaking to his subordinates in an unprofessional way, and he has been disciplined for this action before. I find that this isolated incident of abusive language does not amount to discrimination or a hostile work environment.

ORDER

The claim of Mark J. Hoffman is DENIED.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

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, Room S-4309, 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).

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).