In the Matter of:

MARK J. HOFFMAN, **ARB CASE NO. 09-021**

COMPLAINANT, **ALJ CASE NO. 2007-AIR-007**

v. **DATE: March 24, 2011**

NETJETS AVIATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard R. Renner, Esq.; *Tate & Renner,* Dover, Ohio

For the Respondent:
Celeste M. Wasielewski, Esq.; *Duane Morris, L.L.P.,* Washington, District of Columbia[1]

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; concurring and dissenting

FINAL DECISION AND ORDER

[1] NetJets subsequently filed a notice of substitution of counsel on October 15, 2010. Jennifer Beale, associate general counsel, NetJets, Inc., is the new counsel of record.

Mark J. Hoffman alleged that NetJets Aviation, Inc., violated the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)[2] when it retaliated against him for recording his concerns about air safety issues.[3] After a hearing, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Hoffman did not prove retaliation and dismissed his complaint. We affirm.

BACKGROUND

The ALJ provided a detailed recitation of the relevant facts.[4] NetJets manages and maintains a fleet of business jets for the private transportation of investors who own a share of the planes. It operates more than 400 aircraft and employs about 2,700 pilots, including Hoffman, a captain in the Citation X fleet, who began work in 1997.[5] As David F. MacGhee, executive vice president of flight operations, explained, "We do three things in this business . . . we move pilots to aircraft, we move pilots and aircraft to an owner, and then we fly the owner. Two out of those three don't make any money."[6]

In May 2004, Hoffman began tape recording his discussions and conversations with other NetJets employees and managers, agents, and union representatives, out of a concern for "safety issues."[7] Upon learning of these and other pilots' recordings, NetJets became concerned that confidential proprietary business information, which had been shared with the pilots at their regular training meetings, might become public. MacGhee

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[2] 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2010).

[3] Hoffman filed a previous complaint under AIR 21 on March 7, 2005. The ARB affirmed the ALJ's dismissal of that complaint on the basis that Hoffman failed to prove causation. *Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-026 (ARB July 22, 2008). He appealed to the United States Court of Appeals for the Sixth Circuit. *Hoffman v. Solis*, appeal docketed, No. 08-4128 (6th Cir. Sept. 15, 2008). The court remanded the case at DOL's request. The ARB affirmed the ALJ's conclusion that NetJets proved by clear and convincing evidence that it would have not promoted Hoffman absent his protected activity. *Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-026 (ARB June 16, 2009) (*Hoffman I*).

[4] The following abbreviations will be used to refer to the record: Hearing Transcript, TR; Complainant's Exhibit, CX; Respondent's Exhibit, RX; ALJ's exhibit, ALJX; and Recommended Decision and Order, R. D. & O.

[5] RX 25.

[6] TR at 501.

[7] TR at 975.

testified that two union members informed him that some attendees were recording the sessions at which the company president briefed employees on NetJets' financial status and business strategy.[8]

In June 2005, NetJets implemented a policy prohibiting its employees from recording in-person or telephone communications "by, between, or among" other employees "relating in any way to [NetJets] business."[9] The policy added that management could consent to such recordation in its discretion and that failure to comply with the policy would "result in discipline, up to and including discharge."

In August 2005, NetJets and the pilots union agreed to a new promotion program within the company for its various fleets of aircraft, including the Citation X. Hoffman and 62 other Citation X pilots bid for positions known as OCARO (Operational Checks and Restricted Operations) jobs. Chief Pilot David Cimariolli set up a point system based on seniority, flight time, types of aircraft flown, input from the pilots union and the maintenance employees, and an interview. NetJets did not select the top applicants until June 2006. Hoffman ranked 37th on the list with 139 points and was not among the top ten pilots promoted.

At a February 2006 hearing in *Hoffman I*, Hoffman produced eight compact discs (CDs) of approximately 750 conversations recorded from May 2004 through January 2006.[10] Subsequently, NetJets counsel reviewed an unknown number of the recordings and found at least 37 that did not relate to air safety issues.

On April 21, 2006, NetJets managers met with Hoffman, who had recently returned from leave, and his union representatives. Flight operations vice-president Gary E. Hart informed Hoffman that NetJets believed he had "repeatedly violated" its policy by recording conversations with management and non-management personnel and asked him to cease all such recordings "to the extent you are not engaging in protected activity." NetJets issued Hoffman a letter placing him on paid administrative leave while it investigated the locations in which he had made the recordings and their content. The letter added that any recording determined to be protected activity under federal or state whistleblower statutes would not be deemed a violation of NetJets policy and that no discipline would be issued for engaging in protected activity. Hart asked Hoffman to cease recording conversations that did not involve air safety issues.[11] Hoffman testified that he has taped only "safety matters" since *Hoffman I*.[12]

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[8] TR at 492-503.

[9] RX 2.

[10] RX 7.

[11] Many of the recordings involved food orders, ground transportation, dead-heading on commercial flights, hotel stays, return to duty from training, items left on aircraft, scheduling, pager problems, pick-up sites, and no-show passengers.

On May 19, 2006, NetJets issued Hoffman a warning letter and returned him to the flight schedule.[13] The letter stated that NetJets' investigation revealed that Hoffman had made multiple recordings of discussions with employees that did not constitute protected activity, thus violating its policy, and had not sought its consent to record those discussions. The letter warned that further non-compliance would result in additional discipline, up to and including termination. The letter was removed from Hoffman's personnel file in May 2007.

Hoffman filed three complaints dated May 15, June 7, and August 22, 2006, with the DOL's Occupational Safety and Health Administration (OSHA). He alleged that NetJets retaliated against him for making the recordings by placing him on paid leave, issuing him a warning letter, and failing to select him for a promotion. Hoffman also alleges that NetJets subjected him to a hostile work environment (HWE). OSHA found all three complaints to be meritless on March 30, 2007. Hoffman timely requested a hearing, which the presiding ALJ held on January 14-18 and April 15, 2008, in Columbus, Ohio. Prior to the hearing, both parties submitted numerous evidentiary motions and requested summary decision on several issues. *See* discussion below.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.[14] In AIR 21 cases, the ARB reviews the ALJ's findings of fact under the substantial evidence standard.[15] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16] Thus, if substantial evidence supports the ALJ's findings of fact, they shall be conclusive.[17] The ARB reviews the ALJ's legal conclusions de novo.[18] The ARB generally defers to an ALJ's

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[12] TR at 803.

[13] CX 170.

[14] *See* Secretary's Order 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110.

[15] 29 C.F.R. § 1979.110(b).

[16] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

[17] *Malanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008, slip op. at 6 (ARB July 2, 2009).

[18] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

credibility determinations, unless they are "inherently incredible or patently unreasonable."[19]

DISCUSSION

AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

> provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided 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 under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States . . . .[20]

An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity.[21]

To prevail under AIR 21, Hoffman must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the adverse personnel action.[22] If Hoffman proves that his protected activity was a contributing factor, he is entitled to relief unless NetJets demonstrates by clear and convincing evidence that it would have taken the same unfavorable actions in the absence of Hoffman's protected activity.[23]

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19 *Jeter v. Avior. Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

20 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(b)(1).

21 29 C.F.R. § 1979.102(b).

22 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *see Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006).

23 49 U.S.C.A. §§ 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a).

Initially, we note that the ALJ accepted the parties' 36 factual stipulations, some of which were material.[24] The parties stipulated that NetJets implemented a recordation policy on or about June 23, 2005, that prohibited tape recording conversations of "in-person or telephone communications by, between, or among N[etJets] employees and relating in any way to business of N[etJets]" without NetJets' consent. Pursuant to the stipulations, Hoffman admitted to tape recording conversations with "N[etJets] management and non-management personnel, agents, employees and representatives of the Teamsters as well as the OSHA investigator assigned to *Hoffman I*." The parties also stipulated that NetJets believed that Hoffman recorded "some 400 conversations" after NetJets implemented the policy. In mid-February 2006, as part of his discovery response, Hoffman provided NetJets with eight compact discs of recordings. On April 21, 2006, after Hoffman took an extended family medical leave, NetJets met with Hoffman and read a statement to him that expressly acknowledged that some of the recordings were "protected activity" but that NetJets had "reason to believe that [Hoffman was] not engaged in protected activity each and every time" he recorded a conversation. The written statement also notified Hoffman that he would be placed on paid administrative leave while NetJets investigated the recordings.[25]

The ALJ found that not all of the recordings were protected activity because some were recorded conversations about travel plans, food orders, and hotel reservations and did not relate to air safety.[26] In addition, the ALJ found that NetJets' actions in placing Hoffman on a month's paid administrative leave and failing to select him for promotion were adverse actions, but the warning letter was not.[27] In the end, if none of Hoffman's protected activity caused or contributed to the paid administrative leave, the warning letter, or Hoffman's unsuccessful bid for promotion, then his claims fail to the extent they are based on such employment actions. We believe that Hoffman failed to prove such causation. Therefore, we need not address any other issues related to the paid administrative leave, the warning letter, and lack of promotion. We will separately address Hoffman's hostile work environment claim, procedural issues, the ALJ's summary decisions, and motions.[28]

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[24] R. D. & O. at 9-12.

[25] ALJ 1.

[26] R. D. & O. at 38. *See* footnote 5.

[27] R. D. & O. at 9-12.

[28] Without any analysis, the ALJ concluded that NetJets had demonstrated by clear and convincing evidence that it would have denied Hoffman an OCARO promotion and placed him on administrative leave absent any protected activity. R. D. & O. at 36, 41. Because substantial evidence supports the ALJ's ultimate conclusion that Hoffman failed to prove by a preponderance of the evidence that his protected activity was a contributing factor to NetJets' adverse actions, we need not address the ALJ's conclusions except to note that only if Hoffman had met his burden of proof would NetJets have had to prove by clear and

Causation

A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision."[29] The contributing factor standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in a personnel action.[30] Therefore, a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected" activity.[31]

Administrative leave

Hoffman argues on appeal that all his recordings constituted protected activity because (1) they were made to gather evidence of air safety violations and (2) were produced during discovery in *Hoffman I*.[32] Therefore, because all the recordings constituted protected activity and NetJets placed him on paid administrative leave while it investigated whether the recordings violated policy, Hoffman's protected activity of recording contributed to the adverse actions.[33]

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convincing evidence that it would have taken its adverse actions absent Hoffman's protected activity. *See Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 5 (ARB Dec. 31, 2007); *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006).

[29] *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR 027, slip op. at 7 (ARB Sept. 30, 2010).

[30] *Allen v. Stewart Enter., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062, slip op. at 17 (ARB July 27, 2006).

[31] *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007).

[32] Complainant's Brief at 24-25.

[33] Hoffman also argues that NetJets' recordation policy in its Flight Operation Manual (FOM) was unlawful because it interfered with the protected activity of recording air safety violations and that section 4.6.1 of the FOM requiring pilots to consult with management before reporting safety violations violated Federal Aviation Regulation (FAR) 91.3. Complainant's Brief at 13-23. The ALJ rejected Hoffman's contentions, Order on Respondent's Cross Motion for Summary Decision, ALJ No. 2007-AIR-007, slip op. at 7 (ALJ Jan. 10, 2008). *See* discussion, *infra* at 17.

The ALJ rejected Hoffman's argument. He reasoned that while Hoffman's participation in *Hoffman I* discovery was protected, the recordings themselves were not protected simply because of their production in that case.[34] The ALJ found that the sole reason for the paid administrative leave was NetJets' reasonable belief that Hoffman's recordings had included non-safety related conversations and potential confidential financial information.[35] NetJets' suspicions proved true and formed the sole basis for the warning letter. The ALJ concluded that Hoffman failed to show that NetJets' reasons for investigating the recordings were a pretext for retaliation and therefore failed to establish that his protected activity was a contributing factor to the company's decisions.[36]

Substantial evidence supports the ALJ's findings. The parties' stipulations corroborate that NetJets suspected some of the recordings were not protected activity and that this suspicion arose before it placed Hoffman on paid administrative leave. The ALJ believed NetJets' explanation and rejected Hoffman's argument that it was pretext. NetJets' suspicions were not unreasonable given that there were eight compact discs containing 750 recordings. To be clear, the number of recordings is not by itself a concern. The record demonstrates that it was reasonable for NetJets to believe that some of the recordings did not involve protected activity.

Further, there was evidence that NetJets was concerned about recordings of confidential financial information.[37] Prior to listening to Hoffman's recordings, NetJets' concerns caused it to scale back the amount of confidential information it disclosed to the employees. Hoffman admitted that he had recorded portions of the meetings during which the company's financial status and business strategy were discussed. The evidence established that at least 37 recordings were not related to safety concerns and were not protected.[38] In the end, the ALJ concluded that NetJets placed Hoffman on paid administrative leave because it was concerned that he was recording confidential information and non-safety related conversations.

The May 21, 2006 warning letter also expressly stated that protected activity was exempt from the recordation policy, and that the 37 non-protected recordings formed the sole basis for the letter. Hoffman acknowledged that following the warning letter he ensured that his recordings concerned only air safety issues, which did not violate NetJets' policy.

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[34] R. D. & O. at 38.

[35] *Id*. at 37-40.

[36] *Id.* at 41.

[37] TR at 502-07.

[38] TR at 518-21.

While we affirm the ALJ's factual findings as supported by substantial evidence, we nonetheless emphasize that the lawful taping of conversations to obtain information about safety-related conversations is protected activity and should not subject an employee to any adverse action. We stated in *Mosbaugh* that tape recording to gather evidence of activities that are protected under the whistleblower statutes is also protected.[39] But the facts in this case differ from those in *Mosbaugh*. In *Mosbaugh*, the complainant had engaged in "selective recordings." Hoffman's indiscriminate and excessive recording of topics unrelated to air safety, including the company's business strategy and finances, created an independent and legal basis for the paid leave and subsequent warning letter.[40] Therefore, we agree with the ALJ that Hoffman has failed to prove by a preponderance of the evidence that his protected activity was a contributing factor in NetJets' personnel actions.

Denial of promotion

The ALJ noted that Hoffman was not promoted to the OCARO position because he was not one of the top ten applicants on the basis of a cumulative score consisting of points awarded for the number of flight hours, a telephone interview, seniority, an adjusted union rating, and input from NetJets maintenance workers. Hoffman ranked 37th of the 65 applicants.[41] The ALJ concluded that Hoffman failed to prove that the point system was pretext and therefore failed to show that his protected activity contributed to the denial of a promotion.[42]

Hoffman argues that NetJets' scoring system was "unworthy of credence" and that managers designed the system to justify discrimination against Hoffman because of

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[39] *See Melendez v. Exxon Chems. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 18 (ARB July 14, 2000), citing *Mosbaugh v. Georgia Power Co.*, Nos. 1991-ERA-001, -011, slip op. at 7-8 (Sec'y Nov. 20, 1995).

[40] The ALJ's finding that the warning letter was not adverse action preceded the ARB's decision in *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 11 (ARB Dec. 29, 2010), holding that warning letters in AIR 21 cases are presumptively adverse as part of a disciplinary process. Because we affirm the ALJ's conclusion that Hoffman failed to establish an essential element of his complaint, we need not address the issue here. We note, however, that the parties stipulated that NetJets removed the warning letter from Hoffman's personnel file on May 19, 2007. R. D. & O. at 12. *See Agee v. ABF Freight Sys. Inc.*, ARB No. 04-182, ALJ No. 2004-STA-040, slip op. at 5 (ARB Dec. 29, 2005) (ARB cannot redress an alleged injury from a warning notice that no longer has any disciplinary or other effect).

[41] R. D. & O. at 33, RX 20. Hoffman ranked 17th in flight time and 54th in seniority. RX 20.

[42] R. D. & O. at 35.

his protected activity. In support, Hoffman points to the ALJ's factual errors and omissions regarding the system and contends that NetJets' failure to promote him was retaliatory.[43]

We reject Hoffman's arguments regarding the ALJ's alleged fact-finding errors and omissions because substantial evidence supports his relevant findings. Even if accurate, Hoffman's list of alleged errors and omissions would have no impact on the ALJ's conclusion that Hoffman produced insufficient evidence to demonstrate that his protected activity contributed to intentional incorrect scoring.[44]

For example, Hoffman alleges that the ALJ erred because he failed to consider that other applicants were given scores that did not apply, which wrongly and artificially elevated their scores in relation to his.[45] Hoffman offered no evidence that other applicants were incorrectly scored and admitted that the scores for seniority, flight time, and the interview were correct.[46] Hoffman also admitted that even if he had been awarded all the 169 points to which he thought he was entitled, he would have tied for 25th position on the list and thus would not have been selected.[47]

Hoffman argued to the ALJ[48] that NetJets' consideration of flight time disfavored a pilot who engaged in protected activity because by writing up maintenance problems he lost time in the air and thus had less flying time than other pilot applicants. Substantial evidence supports the ALJ's findings that Hoffman's reduced flying time in the first half of 2006 resulted from his two months of medical leave to care for his ailing mother, several weeks of vacation, training time, and the month of paid leave.[49]

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[43] Complainant's Brief at 28-31.

[44] R. D. & O. at 34.

[45] Brief at 29.

[46] TR at 952-53.

[47] RX 20; TR at 953-54.

[48] Hoffman's 32-page Petition for Review listed 64 separate exceptions and reiterated the arguments made to the ALJ; his brief on appeal referred us to his post-hearing brief. *See* Brief at 28. Ordinarily, we would consider arguments not properly briefed to be waived, but we address them here in the interests of judicial economy. *Cf .Florek v. Eastern Air Cent., Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 6 (ARB May 21, 2009).

[49] R. D. & O. at 33 n.53.

Hoffman argued that the union's ratings proved NetJets' retaliation because NetJets did not check the accuracy of the union scorecard, and he did not receive the number of points he should have. Substantial evidence supports the ALJ's finding that NetJets' failure to verify the accuracy of the union scoring affected all applicants and thus did not show any animus to Hoffman. Further, even if Hoffman did receive fewer points than he should have, Hoffman offered no evidence that his protected activity motivated the union scoring. To the contrary, assistant chief pilot Anderson testified that the company was trying to obtain union input on a variety of levels, and chief pilot David Cimarolli testified that the union scoring had included points for military service, but these were deducted to ensure fairness for those who had not served in the military.[50]

Finally, Hoffman argued that NetJets consulted the maintenance controllers to deny him a promotion as shown by the fact that he received no points from them because of his protected activity. Substantial evidence supports the ALJ's finding that these scores were not calculated to discriminate against Hoffman for protected activity but were a legitimate and sensible method of determining which applicants to promote because pilots must work closely with the controllers to ensure that all aircraft systems operated properly.[51]

Maintenance controller Virgilio Paez testified that he awarded Hoffman zero points because he "wasn't very helpful" and recorded his telephone calls, which Paez considered a lack of trust. Paez stated that Hoffman was the only pilot who would not access the IMT system in the cockpit and tell him what the monitors were showing so that he could decide on what parts and personnel were needed to make repairs.[52] Mark Glowa stated in his deposition that he based his scoring on his familiarity with the individual pilots, and he had no name recognition of Hoffman.[53] Marshall Harvey gave Hoffman no score because of his unwillingness to "help troubleshoot the aircraft" by accessing the IMT. Randy Kemmer stated that he did not score Hoffman because he had never met him. Stephen Siegel stated that he gave scores for the pilots he was familiar with and with whom he communicated easily.[54]

Having reviewed the scoring and ranking, we note that the four pilots who had the highest scores from the maintenance employees did not have enough points to make the

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50 TR at 1087-89, 396-98.

51 R. D. & O. at 34.

52 TR at 463-71.

53 Exhibit M to Respondent's Opposition to Motion for Partial Summary Decision and Cross-Motion for Summary Decision.

54 *Id*., Exhibits N-P.

top ten. And even if Hoffman had received the highest awarded score (55) from these employees, he would still have fallen into 11th place and would not have been selected.[55]

Hostile work environment

A hostile work environment complainant is required to prove: 1) protected activity; 2) intentional harassment related to that activity; 3) harassment sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) harassment that would have detrimentally affected a reasonable person and did detrimentally affect the complainant. Circumstances germane to gauging a 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."[56]

The ALJ found that Hoffman had engaged in protected activity but failed to prove that any harassment, even if intentional, was severe or pervasive enough to change the conditions of employment or create an abusive working environment that would have affected a reasonable person.[57]

On appeal, Hoffman argues that the ALJ erred in "disaggregating the long history of hostility against" him and failing to infer "motive from the totality of circumstances." Hoffman contends that the ALJ missed "the aggregated effect" of management's actions "that needlessly harassed" Hoffman.[58]

Hoffman generally alleged that NetJets managers subjected him to interrogation, investigation, and harassment as well as adverse assignments, discipline, deception, and loss of flight time in retaliation for his protected activity.[59] As an example, he testified that while he was on leave caring for his terminally ill mother, a February 16, 2006 e-mail informing him that he had to meet Hart on February 20 in Columbus, Ohio, upset

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55 RX 8-13, 19.

56 *Brune*, ARB No. 04-037, slip op. at 10-11, citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) and *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 1997-CAA-002, -009, slip op. at 16-17 (ARB Feb. 29, 2000).

57 R. D. & O. at 43-44.

58 Complainant's Brief at 43-44. Hoffman also cited 11 "actions" of alleged harassment, but failed to explain if and how these discrete actions interfered with his work performance or created an abusive working environment that detrimentally affected him.

59 TR at 734, 1216.

him because he felt that NetJets was "needling" him and "interfering with my personal life on a grand scale."[60] However, in a February 20 e-mail, Hart canceled the meeting, expressed his sympathies, and explained that he had not realized Hoffman was on medical leave when he scheduled the meeting.[61]

Hoffman also alleged that he was harassed by a May 3, 2006 e-mail that again ordered him to meet with Hart in Columbus, but when he got there, Hart stated that he knew nothing about any meeting.[62] Hoffman admitted that Hart told him the meeting notice was a mistake in scheduling, but Hoffman testified that he was afraid that he was going to be fired and that the e-mail was just another form of harassment. Hoffman testified that he received two other e-mails about training schedules during his leave that he regarded as harassing.[63]

While Hoffman may have been upset by these and other e-mails while he was on leave, substantial evidence supports the ALJ's finding that NetJets' treatment of him while on leave and thereafter was insufficiently severe or pervasive to establish a hostile work environment. Substantial evidence also supports the ALJ's finding that NetJets did not harass Hoffman by intentionally reducing his flight time during 2006.[64] Accordingly, we affirm the ALJ's conclusion that Hoffman failed to establish a hostile work environment.

Procedural issues

The ALJ issued an order on September 24, 2007, limiting discovery to matters occurring after January 1, 2006.[65] The ALJ applied res judicata to the facts and events taking place prior to Hoffman's initial March 7, 2005 complaint and those at issue in *Hoffman I*. The ALJ stated that facts and events occurring between March 7, 2005, and the ALJ's *Hoffman I* decision on August 4, 2006, would be considered in support of Hoffman's claim of a hostile work environment in his May 19, 2006 complaint. The ALJ also admitted into evidence the entire record in *Hoffman I* as background.[66]

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60 TR at 778-80, CX 66.

61 CX 63.

62 TR at 792-95.

63 TR at 779-82.

64 *See* R. D. & O. at 33 n.53, 42 n.67, 43.

65 *See* 29 C.F.R. § 1979.103(d).

66 R. D. & O. at 3-9; TR at 1059-60.

On appeal, Hoffman raises procedural and evidentiary points of error and argues that the ALJ's res judicata ruling was not fair. Hoffman also argues that the ALJ denied him a fair hearing because he refused to compel discovery of NetJets' electronic records of other employees' discipline and air safety violations and investigations, and applied res judicata principles to exclude relevant evidence developed in *Hoffman I*.[67]

Hoffman states first that the ALJ should have admitted CX 27, 82, 105, 119, 122, 220, 229, 230, and 239 into evidence.[68] Hoffman also quarrels with many of the ALJ's evidentiary rulings during the hearing on January 14-18 and April 15, 2008, in Columbus, Ohio, specifically TR1[69] at 211-13, 221, and 297; and TR2 at 224-26, 315-16, 327-30, 667, 673, 751-56, 838-44, 1057-63, 1105-08, 1117-18, 1158-63, 1177-83, and 1220-23. Finally, Hoffman contends that the ALJ erred in excluding Ty Nishikawa's testimony and the February 14, 2006 e-mail about Hoffman's paid administrative leave.[70]

The ARB reviews an ALJ's determinations on procedural issues under an abuse of discretion standard, i.e., whether, in ruling as he did, the administrative law judge abused the discretion vested in him to preside over the proceedings.[71] Section 18.402 of the Rules of Practice and Procedure before the Office of Administrative Law Judges provides that evidence that is not relevant is not admissible; section 18.403 provides that relevant evidence[72] may be excluded if the probative value of such evidence is "substantially outweighed" by the risk of confusing the issues, misleading the trier of

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[67] Complainant's Brief at 37-42. Res judicata, or collateral estoppel, "refers to the effect of a judgment in foreclosing a relitigation of a matter that has been litigated and decided." *Muino v. Florida Power & Light Co.*, ARB Nos. 06-092, -143; ALJ Nos. 2006-ERA-002, -008, slip op. at 9 (ARB Apr. 2, 2008).

[68] Complainant's Brief at 31-36, 37-42. Hoffman also argues that two recordings made on February 17, 2006, CX 16-17, show that NetJets was moving to discipline him immediately after the February 7-8, 2006 hearing in *Hoffman I*. *Id*. at 42. The ALJ found an inference of causation based on temporal proximity between Hoffman's protected activity and the notice of the February hearing, but determined that the inference was insufficient to establish causation. R. D. & O. at 41 n.65.

[69] The transcript in *Hoffman I* was admitted as background. ALJX 3 and 3a. The ALJ properly ordered that the parties could not re-litigate the issues in Hoffman's earlier complaint.

[70] Complainant's Brief at 38-42.

[71] *Barber v. Planet Airways, Inc.,* ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 8 (ARB Apr. 28, 2006).

[72] Section 18.401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." 29 C.F.R. § 18.401.

fact, or causing "undue delay, waste of time, or needless presentation of cumulative evidence."[73]

Our review of the excluded exhibits shows that two of the disputed exhibits were not moved into evidence, and the others were properly rejected as irrelevant or collateral to the issues in the case. We can find no abuse of discretion in the ALJ's rejection of the Complainant's exhibits. Indeed, Hoffman received full and complete discovery of relevant documents and other information pertinent to the issues in his complaint. NetJets produced more than 3,300 documents through 50 interrogatories and 70 requests for admissions. Discovery occurred over eight months, with numerous motions from both parties submitted to and decided by the ALJ.[74] Thus, we reject Hoffman's argument that the ALJ abused his discretion during discovery.

Hoffman also objects to some of the ALJ's evidentiary rulings but does not specify what is erroneous.[75] The hearing transcript shows that the ALJ properly excluded as irrelevant testimony about (1) NetJets Large Aircraft because Hoffman did not work for this company (TR at 224-26); (2) a Value Jet accident in 1996 and the FAA's delay in implementing a better oversight system (315-16); (3) check lists, aircraft flight manuals, and maintenance write-ups in general (327-30); (4) the "crew rot" issue and decreased flying time in 2005 because the issue was litigated in *Hoffman I* (751-56); (5) NetJets' procedure in keeping safety write-ups by aircraft instead of serially and its response to producing records of other pilots' discipline (838-44); (6) pilots' alleged lack of access to follow-up maintenance (1105-08); (7) NetJets' discharge of a pilot for being late (1117-18); (8) a settlement agreement with another pilot in 2002 (1158-63); (9) the discharge of another pilot after being placed on administrative leave in 2008 (1177-83); and (10) a falsified maintenance write-up in January 2008 (1220-23).

Finally, Hoffman challenges the ALJ's exclusion of the February 14, 2006 e-mail in which managers and NetJets' counsel discussed Hoffman's request for medical leave and the testimony of Ty Nishikawa, a NetJets pilot who also recorded work conversations

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[73] 29 C.F.R. §§ 18.402, 403.

[74] Hoffman also argues that the ALJ erred by refusing to compel NetJets to produce copies of 162 missing safety write-ups he had requested, but the ALJ ordered the company to look for the documents, which they then produced. TR at 838-41, 1079-81. In addition, Hoffman challenges the ALJ's overruling of his objection to the admission of excerpts from the collective bargaining agreement, RX 1, yet Hoffman's attorney admitted that he and NetJets' attorney had discussed including just excerpts. TR at 667-69. Hoffman argued that the ALJ refused to compel disclosure of Hoffman's previous employer's record, but he indicated to the ALJ that he was "fine" with the ALJ's deferred ruling on the document. TR at 673. Hoffman contends that the ALJ did not properly identify the exhibits in ALJX 3, but the ALJ permitted Hoffman to submit other exhibits as ALJX 3a. TR at 1057-63.

[75] Complainant's Brief at 38-41.

with other employees and a meeting with his chief pilot. The ALJ excluded this testimony because it covered events prior to March 7, 2005, but noted that he had considered Nishikawa's statements and concluded that his testimony did not affect the outcome of the case.[76] Further, the February 14 e-mail was withheld from production because it was privileged pursuant to the federal rule on trial preparation material.[77] It is undisputed that Hoffman requested the medical leave on February 13, 2006, and that Hart e-mailed him on February 16 about a meeting.[78]

In essence, the ALJ followed the mandate of the ARB that in retaliatory intent cases based on circumstantial evidence, fair adjudication "requires a full presentation of a broad range of evidence that may prove or disprove retaliatory animus and its contribution to the adverse action taken."[79]

Summary decisions

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Prior to the hearing, Hoffman moved for summary decision and NetJets filed an opposition and cross-motion for summary decision. The ALJ granted NetJets' motion for summary decision on (1) Hoffman's TSCA complaint and on his claims that (2) NetJets recordation policy in its Flight Operation Manual (FOM) was unlawful, and (3) that FOM section 4.6.1 violated a federal aviation regulation (FAR § 91.11). The ALJ dismissed the TSCA claim because Hoffman had offered no evidence of timely acts of retaliation that were motivated by the 2001 fuel venting incident.

The ALJ then refused to issue declaratory orders regarding the lawfulness of NetJets' policies and determined that he would consider only whether NetJets had applied its policies to Hoffman in a manner that violated AIR 21. The ALJ noted that Hoffman did not allege that NetJets took adverse action based on his refusal to follow section 4.6.1 and concluded that there were no genuine issues of material fact.[80]

The ARB reviews an ALJ's recommended decision granting summary decision de novo; the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review. An ALJ may issue a summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact,

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[76] R. D. & O. at 9.

[77] *See* F.R.C.P 26(b)(5), CX 218.

[78] CX 15, 62.

[79] *Seater v. S. Calif. Edison Co.*, ARB No. 96-013, ALJ No. 1995-ERA-013, slip op. at 5 (ARB Sept. 27, 1996).

[80] *Hoffman v. NetJets Aviation, Inc.*, ALJ No. 2005-AIR-026, slip op. at 7 (Jan. 10, 2008).

and the moving party is entitled to prevail as a matter of law.[81] Accordingly, the ARB will affirm an ALJ's recommended granting of summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.[82]

On appeal, Hoffman again argues that the ALJ erred in dismissing his TSCA claim because he engaged in protected activity by writing up a plane that vented jet fuel during a flight and that incident "forever set these parties on different sides of the safety issue."[83] While jet fuel is certainly toxic, the record supports the ALJ's finding that Hoffman produced no evidence of discrimination or retaliation stemming from this incident. Further, this issue was fully litigated in *Hoffman I*. Therefore, the ALJ properly granted summary decision.

Hoffman also argues that FOM § 4.6.1 violates FAR § 91.11 because it requires pilots to inform management before writing up safety issues and that NetJets' recordation policy is unlawful because it does not specifically exclude protected activity under AIR 21 and thus deters pilots from reporting air safety violations. Hoffman urges the ARB to reverse the ALJ and compel NetJets to rescind both policies.[84]

Under AIR 21, the Secretary of Labor has the authority, delegated to the ARB, to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order the employer to take affirmative action to abate the violation.[85] Because Hoffman failed to prove a violation of AIR 21, the ARB has no power to declare NetJets' employee policies invalid or unlawful. The ARB determines only whether substantial evidence supports the ALJ's findings regarding the required elements of Hoffman's whistleblower claim and whether the ALJ has acted in accordance with law. Thus, we agree with the ALJ that he had to determine only whether NetJets discriminated or retaliated in applying its policies to Hoffman.[86]

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81 *See* 29 C.F.R. § 18.40(d).

82 *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 4 (ARB June 30, 2010).

83 Complainant's Brief at 37.

84 Complainant's Brief at 15-16.

85 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(d).

86 The ARB has a well-established policy against issuing advisory opinions. *See, e.g. A-Gard, Inc.*, ARB Nos. 06-049, -050, ALJ No. 2006-CBV-001, slip op. at 4 n.14 (ARB July 31, 2008); *Agee*, ARB No. 04-182, slip op. at 3; *Edmonds v. Tenn. Valley Auth.*, ARB No. 05-002, ALJ No. 2004-CAA-015, slip op. at 2 (ARB July 22, 2005); *Migliore v. Rhode Island Dep't of Envt'l Mgmt.*, ARB No. 99-118; ALJ Nos. 1998-SWD-003, 1999-SWD-001,

Other motions

Hoffman filed a motion with the ARB to supplement the record with newly discovered evidence that first became available during a February 24, 2010 arbitration hearing between NetJets and the pilots union. The evidence is a July 10, 2006 e-mail from Mark Okey to a union official explaining the recordation policy. At the time, Okey was NetJets' labor relations director.

The ARB's standard of review does not permit examination of any new evidence to be submitted in this case. Thus, granting leave to reopen the record is committed to the sound discretion of the ALJ.[87] In this case, the July 10, 2006 e-mail is part of a thread of e-mails already in the record, having been part of a document dump on November 30, 2007.[88]

On June 2, 2009, Hoffman moved to consolidate this case with his earlier complaint filed on March 7, 2005. Hoffman's motion is now moot as that case was finally decided on June 16, 2009.[89]

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's factual findings underlying his conclusion that Hoffman failed to establish that his protected activity contributed to NetJets' adverse personnel actions. Therefore, the ALJ correctly determined that NetJets did not violate AIR 21. Furthermore, we have considered, but rejected, Hoffman's additional arguments on appeal. Accordingly, we **DISMISS** Hoffman's complaint.

-002, slip op. at 4 (ARB July 11, 2003); *see also Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6 (ARB Jan. 31, 2001) (ARB affirmed the ALJ's refusal to order the Department of Energy to comply with complainant's Freedom of Information Act (FOIA) request because DOL has no jurisdiction to rule on FOIA matters).

[87] *Dalton v. Copart, Inc.*, ARB Nos. 04-027, -138; ALJ No. 1999-STA-046, slip op. at 6-7 (ARB June 30, 2005); *see* 29 C.F.R. § 18.54(c) (2010).

[88] We deny NetJets' request for an attorney's fee to cover the cost of culling the voluminous record for this e-mail because we find that Hoffman's motion was neither frivolous nor brought in bad faith. *See* 49 U.S.C.A. § 42121(b)(3)(C). *See also* 29 C.F.R. § 1979.109(b) (ALJ award); 29 C.F.R. § 1979.110(e) (ARB award).

[89] *See* n.3.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

Joanne Royce, Administrative Appeals Judge, concurring and dissenting:

With respect, I narrowly dissent on one finding above and, as a consequence, would award relief as stated below.

The ALJ found that non-retaliatory reasons alone motivated NetJets' decision to place Hoffman on paid administrative leave. The non-retaliatory reasons cited by the ALJ included (1) NetJets' concern that, given the large number of recordings, they may have contained confidential information; (2) NetJets wanted to determine whether Hoffman had violated the recordation policy; and (3) it was not unreasonable to place Hoffman on paid administrative leave, as provided under the collective bargaining agreement, to facilitate NetJets' investigation of the contents of the recordings.[90]

I do not question that legitimate business reasons may have motivated NetJets and that they constituted, in fact, "responsible management action," as stated by the ALJ.[91] However, I cannot decipher from the ALJ's findings how he was able to completely eliminate protected activity as a contributing factor in NetJets' decision to put Hoffman on paid administrative leave. Indeed, given the particular facts of this case, it is all but impossible to sort out the motives and separate the legal from illegal ones. NetJets' stated reasons and other undisputed facts establish that NetJets necessarily sought to review the tapes to separate the non-protected activity from protected activity, thereby requiring a mixed motive analysis. Put another way, Hoffman's *protected* safety recordings were presumptively a contributing factor to the administrative leave because they were inextricably linked to and such a large part of the recordings, which triggered the investigation and prompted NetJets to put him on leave.[92]

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90 R. D. & O. at 38-39.

91 *Id.* at 39.

92 *See Marano*, 2 F.3d at 1141.

NetJets' MacGhee testified: "It didn't really matter how many he made if they were all AIR-21 [protected]. He can make 2,000. He could have made one."[93] NetJets claimed Hoffman was entitled to make as many tape recordings as he liked, as long as they were safety-related; yet NetJets attempts to justify the investigation by claiming the large number of recordings led NetJets to suspect that they may have included unprotected recordings in violation of their policy.[94] In *Mosbaugh v. Georgia Power Co.*, the Secretary straightforwardly held that the duration and scope of recordings do not remove them from being protected activity. [95] Consequently, I do not believe that the sheer number or size of Hoffman's recordings provided a legitimate reason to justify placing him on administrative leave to investigate the contents of the recordings.[96]

Even assuming NetJets undertook the investigation into Hoffman's recordings in good faith,[97] it nevertheless engaged in illegal retaliation when it did so. Admittedly, there is substantial evidence that legitimate business reasons motivated NetJets to place Hoffman on paid leave. However, there is also substantial evidence that Hoffman was placed on administrative leave because of protected activity.[98] The ALJ correctly

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93 TR at 525.

94 *Id.* The ALJ likewise found that the large number of recordings, not the protected activity aspect of their content, motivated NetJets to place Hoffman on administrative leave and review the recordings to determine if proprietary information had been taped and to enforce its recordation policy. R. D. & O. at 38.

95 *Mosbaugh,* 1991-ERA-001, -011, slip op. at 7.

96 Nevertheless, NetJets had every right to review the recordings since they were produced in discovery. Once NetJets had determined that the recordings contained unprotected recordings they were entitled to issue Hoffman a warning letter for violating the recordation policy.

97 The ALJ concedes that "NJA was motivated to undertake the investigation because of the recordings' existence" but reasons they were entitled to do so because their actions were not motivated by "retaliatory animus." R. D. & O. at 38. However, retaliatory animus is not a necessary condition to a finding of causation. The Board has adopted the definition of "contributing factor" stated in *Marano,* 2 F.3d 1137 at 1140, interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1). *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 7 (ARB May 31, 2006). As *Marano* explains, proof of "retaliatory motive" is not necessary to a determination of whether protected activity was "a contributing factor" to adverse action. *Id.* "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistle-blowing." S.Rep. No. 413, 100th Cong., 2d Sess. 16 (1988) (accompanying S. 508).

98 At Hoffman's first hearing, Okey responded to one of Hoffman's questions as follows: "You taped a grievance hearing? Oh, yeah, that's right, you've been doing that. Okay. That's all right. I'll talk about that later." Complainant's Brief at 9; TR at 771.

inferred causation given the temporal proximity between Hoffman's protected recordings and his placement on administrative leave.[99] However, without addressing any additional evidence submitted by Hoffman, the ALJ proceeded to the wholly unsupported legal conclusion that Hoffman's hundreds of protected recordings played no part in his placement on administrative leave.

In the final analysis, the ALJ's error was one of law not fact. As explained above, a mixed motive framework is here dictated because Hoffman's protected recordings were so intertwined with his unprotected recordings. In mixed motive cases, the employer bears the risk that legal and illegal motives cannot be separated.[100] The relevant facts herein demonstrate just such a case where, as a matter of law, the employer must bear the risk of inseparable motives.

Accordingly, I would reverse the ALJ in part and find NetJets liable for illegally placing Hoffman on administrative leave. Nevertheless, a remand would not be necessary,[101] since the evidence fails to support an award of damages. Hoffman was paid during the course of his leave, the collective bargaining agreement allowed the leave,[102] the ALJ found that NetJets did not act out of retaliatory animus, and substantial evidence supports the ALJ's finding that Hoffman did not provide persuasive evidence that he lost more than a negligible amount of flight time due to his protected activity.[103]

Although Hoffman is entitled to no monetary relief, he has asked for certain other relief. He argues that NetJets' recordation policy is unlawful because it does not specifically exclude protected activity under AIR 21 and thus deters pilots from engaging in protected activity to document air safety violations. Hoffman urges the ARB to reverse the ALJ and compel NetJets to rescind the policy.[104]

Hoffman additionally testified that Okey approached him shortly after the hearing on February 8, 2006, and repeated his admonition that "I'll be talking with you later." TR at 772.

99 "Therefore, I find that temporal proximity, sufficient to infer causation, is present between Complainant's protected activities and the adverse employment actions." R. D. & O. at 33.

100 *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984).

101 *Dantran, Inc., v. U.S. Dept. of Labor*, 171 F.3d 58, 75 (1st Cir. 1999)(an appellate court need not remand when facts admit of only one plausible legal conclusion).

102 R. D. & O. at 39-40.

103 *Id.* at 33, n.53.

104 Complainant's Brief at 13-16.

The Board is authorized to order affirmative relief as a remedy for an AIR 21 violation, pursuant to 49 U.S.C.A. § 42121, which provides as follows in relevant part:

> (B) Remedy.--If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--
>
> (i) take affirmative action to abate the violation;
>
> (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
>
> (iii) provide compensatory damages to the complainant.

NetJets' recordation policy prohibits employees from recording communications relating in any way to the business of NetJets.[105] NetJets recognizes that recording communications regarding safety issues is protected activity.[106] Nevertheless, their recordation policy, as written, fails to state explicitly that protected activity is exempt from the policy. By threatening discipline for recording even safety-related communications, the policy chills employee efforts to document air safety violations and thereby undermines enforcement of AIR 21. Effective enforcement of AIR 21 dictates affirmative relief.[107] I would order NetJets to amend its current recordation policy to exempt employee tape recording to collect evidence of air safety violations or unlawful retaliation.

JOANNE ROYCE
Administrative Appeals Judge

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105 R. D. & O. at 10, RX 2.

106 *Id.* at 11, RX 23.

107 *See Earwood v. Dart Container Corp.*,1993-STA-16 (Sec'y Dec.7, 1994), slip op. at 3. ("I find that effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result.").