



Issue Date: 22 December 2011

Case No: 2010-AIR-00001

In the Matter of:

ROBERT BENJAMIN,

Complainant,

v.

CITATIONSHARES MANAGEMENT , LLC,
N/K/A CITATIONAIR,

Respondents.

DECISION AND ORDER

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, (“AIR 21”) and the implementing regulations found at 29 C.F.R. §1979. This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee 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 (“FAA”) or any other provision of Federal law relating to air carrier safety.

The Complainant, Robert Benjamin, is a licensed pilot who was formerly employed by the Respondent, CitationShares Management (“CitationAir” or “Citation”) flying the Cessna Citation Excel passenger jet. He was on duty in Morristown, New Jersey on Saturday, March 21, 2009. Before a scheduled flight he observed that a landing gear strut of the aircraft that he was scheduled to fly was outside the acceptable tolerance for flight. He reported this to the company’s dispatch office, which forwarded the call to Kurt Sexauer, the company’s Chief Pilot. Mr. Sexauer suggested troubleshooting procedures, and a mechanic on the scene attempted to resolve the discrepancy.

After all attempts failed to bring the strut within the acceptable range, Mr. Sexauer agreed with Mr. Benjamin’s determination that the aircraft would have to be grounded. He directed that Mr. Benjamin come to Citation’s headquarters in Greenwich, Connecticut to discuss the incident.

The meeting took place on Tuesday, March 24, 2009. Before the meeting Mr. Benjamin purchased a digital audio recorder and placed it in his pocket in order to record the meeting. During the meeting the device began making noises and when Mr. Benjamin attempted to silence it Mr. Sexauer learned that he had been surreptitiously recording the meeting. Mr. Sexauer immediately ordered Mr. Benjamin to turn in his company key and identification card and had him escorted from the building. Several days later Mr. Benjamin received written notification that his employment was terminated effective March 24, 2009.

Mr. Benjamin filed an AIR 21 complaint with the Occupational Safety and Health Administration (“OSHA”). OSHA found that the complaint had not been filed within the statutory time period and dismissed it on that ground without reaching the merits. Mr. Benjamin filed objections and request for a hearing with the Office of Administrative Law Judges. A hearing was held in Stamford, Connecticut on July 25-29, 2011.¹

STATUTORY PROVISIONS AND BURDEN OF PROOF

The Act provides that

(a) **DISCRIMINATION AGAINST AIRLINE EMPLOYEES.** No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) 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 or any other law of the United States;

49 U.S.C. § 42121(a)(1).

The statute assigns burdens of proof as follows:

(B) REQUIREMENTS.

(i) **REQUIRED SHOWING BY COMPLAINANT.** The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described

¹ The following abbreviations will be used in citing evidence from the hearing:

TR – Hearing transcript

CX – Complainant’s Exhibit

EX – Employer’s Exhibit

in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) **SHOWING BY EMPLOYER.** Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) **CRITERIA FOR DETERMINATION BY SECRETARY.** The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) **PROHIBITION.** Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b)(2)(B).

To prevail under the Act, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity or conduct; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable adverse personnel action; and (4) the protected activity was a contributing factor in the adverse personnel action. If a complainant proves that the employer violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ no. 2003-AIR-028, (ARB Nov 30, 2006)

BACKGROUND

CitationAir flies Cessna Citation jets for private clients, including both businesses and individuals. It offers fractional aircraft ownership shares and other forms of access to its fleet. Customers can schedule flights on an *ad hoc* basis on short notice. They frequently request flights on 12 hours notice, and occasionally even less. (TR 1333)

Because of this flexibility in scheduling, Citation's maintenance management system differs substantially from that of a scheduled airline. A scheduled airline can routinely have its aircraft return to one of its hub facilities to have its own employees perform maintenance. Citation flies to a wide variety of airports, many of which are small and remote, and contracts with outside firms for much of its required maintenance.

Each flight crew is scheduled for seven days of duty followed by seven days off. The flight crew consists of two qualified pilots. Ordinarily a captain will be paired with a first officer, but sometimes two captains will be assigned to serve together for a duty week. Crew

assignments change from one duty period to another, so any given pilot will serve tours with many others in the ordinary course of business.

The dispersed nature of Citation's operations makes it important for the company to identify maintenance issues as early as possible. FAA regulations require a pre-flight inspection. In addition to this federally mandated inspection, Citation requires each flight crew to perform a post-flight inspection at the end of each day's flying. A discrepancy may require overnight work by a contractor and, if it cannot be resolved, may require diverting another aircraft to replace one that is unavailable. The post-flight inspection is designed to ensure that discrepancies can be addressed as soon as possible.

Company policy is that "[t]he post-flight check should mirror a first flight of the day pre-flight with special attention to items that can delay a departure, such as lights, fluid levels, oxygen, static wicks, airframe damage, stall strips, diverter strips, and accumulator pressures." (TR 31) The pilot in command (PIC) is ultimately responsible for the safe operation of the aircraft, including the pre-flight inspection, but can delegate the actual carrying out of the inspection to the second in command (SIC).

EARLIER INCIDENTS

April 2008 lighting issue

In April 2008 Mr. Benjamin flew a tour with another captain. Mr. Benjamin was the more senior of the two pilots. On the second day of the tour he conducted the pre-flight inspection of the aircraft and found a discrepancy concerning the lights on the cabin door steps. The pilots consulted the onboard aircraft manual to determine whether the stair lights were part of the emergency lighting system, and whether the plane could be safely flown with the discrepancy.

When they could not determine the matter to their satisfaction from the manual they called Citation and spoke to maintenance personnel. In addition they spoke to Gary Gmoser, the Assistant Chief Pilot, to the Flight Duty Officer (FDO) who was on duty at the time, and to other pilots of their acquaintance. Eventually their aircraft was taken out of service and another plane was substituted for the assigned flights.

Shortly after this incident Mr. Benjamin was relieved of PIC duties and served as First Officer for the remainder of that tour and told that he would need to discuss the incident of the lighting system discrepancy with Mr. Sexauer. (TR 47-48) The notification of this change in status came from the dispatch department, rather than from a supervisory pilot in Mr. Benjamin's chain of command.

Later in the same tour, the crew was dispatched to Cancun, Mexico to pick up an owner returning to the United States. The flight was delayed as a result of customs paperwork. Mr. Benjamin explained the causes of the delay to the passenger. The passenger was upset that he had not been given notice of the delay before he left his hotel and wished the company to be informed of his concerns. Mr. Benjamin and the other captain drafted an Operations Information

Report (OIR) (EX 6) reflecting the passenger's dissatisfaction. (TR 50-52) The OIR is an internal report for the company's information.

On April 29, 2008, after the end of this tour, Mr. Benjamin was called to a meeting with J.D. Witzig, Senior Vice President of Flight Operations. Mr. Witzig expressed concern over the lighting incident and the OIR that the crew had filed after the flight from Cancun. He believed that the uncertainty over whether the light at issue was part of the emergency lighting system reflected poor systems knowledge. In addition he believed that in submitting the OIR Mr. Benjamin was taking the owner's side against the company and being unduly critical of the company. Mr. Benjamin replied that he had reported the owner's words and that the owner had wanted to have the company informed of his dissatisfaction. (TR 57-59) In his hearing testimony Mr. Witzig testified that if a customer is upset with the flight or with the company's services, the company wants to have the incidents reported. (TR 1089-1090) However, at the April 29 meeting he was dissatisfied with the report of the customer's concerns that Mr. Benjamin had filed.

After the meeting Mr. Benjamin spoke to Mr. Gmoser and several other pilots who were in the building at the time. Jennifer Johnson, a member of the Human Resources Department, was in the vicinity. She told Mr. Witzig that Mr. Benjamin had bragged about having put one over on him (TR 64).

Ms. Johnson testified that she had not known Mr. Benjamin before this meeting and that she saw him speaking to Tim Frazier, the Vice President of Training, after his meeting with Mr. Witzig. She said "I didn't really participate in the conversation. And that's really -- I mean, Tim asked him how it went, and Bob was very kind of casual about it, and it didn't appear to be anything major at all. He was just -- the way it appeared to me, he was very cavalier about it." (TR 1378-1379)

She described recounting the conversation to Mr. Witzig:

Q Now, did you subsequently talk to J.D. about what you observed?

A I did.

Q And what did -- did you tell J.D. what you just told us?

A Yes, I did.

Q And was it -- you know, why did you go tell J.D. about what you had observed?

A Really just because I was a little bit -- because the conversation, according to Bob, seemed to be very laid-back, just it appeared to be a very casual approach to it that he took. So I was just kind of taken back a little bit by it, that it was so casual. And so then I just said to J.D., I just went in and asked him how it went and then proceeded to tell him what I just said.

(TR 1379)

Mr. Witzig prepared a debriefing memorandum on April 30 (EX 8), summarizing his meeting of the day before. He wrote that “[m]y focus was on three specific areas; the unnecessary grounding of his aircraft due to lack of system knowledge and unwillingness to accept guidance, his negative OIR relating to Owner Services and his improper handling of the situation with the customer, and his verbal tirade directed at members of the Flight Management department.” He went on to describe the meeting as “polite, respectful and courteous.”

In his testimony in the hearing Mr. Witzig expressed satisfaction with the April 29, 2008 meeting, repeatedly referring to it as “great” “wonderful” and “fantastic.” “As far as I was concerned, Bob and I had a great conversation. He had a solid understanding and was very accepting of the fact that there were other things going on and he really could have acted differently than what he did.” (TR 1098)

On April 30, 2008, Mr. Witzig sent an email (CX 7) to a number of senior pilots, including Mr. Sexauer and Mr. Gmoser. In this email he expressed disappointment with how Mr. Benjamin and his co-pilot had handled the stair lighting incident. He described Mr. Benjamin as “the latest example of many that currently need coaching, counseling and guidance from their ACPs [Assistant Chief Pilots] in every fleet.”

The next day, May 1, 2008, he said in an email that “[a]fter follow-up discussion with Gmoser, I have decided to terminate Bob Benjamin effective today. Gary is compiling his notes from his conversation. Upon receipt I will be making the phone call. I would like a representative from HR [Human Resources] present.” (CX 7)

The day after that, May 2, 2008, Mr. Witzig issued a written warning (CX 7) to Mr. Benjamin. The letter began “All employees at CitationShares are expected to conduct themselves in a professional, courteous and respectful manner at all times. Be advised that your behavior while conducting duties as a CitationShares Captain does not meet company standards.” It ends “CitationShares will not tolerate disrespect, unprofessional behavior or any behavior deemed to be outside the established company guidelines going forward. If any similar behavior is demonstrated by you in the future, you will be subject to further disciplinary action up to and including termination.”

While he was on his off-duty week after the meeting with Mr. Witzig, Mr. Benjamin received a call from Mr. Gmoser, who wished to know how the meeting had gone. Mr. Benjamin was still upset over the fact that his reassignment from Captain duties during the previous tour had been initiated by the dispatch department, and during this conversation he referred to the dispatch supervisor as a “bitch.” In later conversations with management he acknowledged that this language was improper and unprofessional, as he did in his testimony. (TR 59-61) While he apologized for his use of language, he believed that she improperly intruded on his decision making in areas that were within his authority as PIC on various occasions, including the incident with the stair lighting.

During the same off-duty week he received a call from Mr. Witzig. Mr. Witzig was angry and in a conversation lasting approximately 20 minutes, accused Mr. Benjamin of having bragged about pulling one over on him, based on Ms. Johnson's report. He said that Mr. Benjamin did not have a job at Citation anymore. (TR 64-65) When Mr. Benjamin denied having bragged about pulling one over on him, Mr. Witzig clarified it somewhat "[H]e said, well, she didn't say that you said it, she said your body language interpreted it." (TR 65) Mr. Benjamin stated that he was sorry if Ms. Johnson had misinterpreted his body language, but what she interpreted as bragging was probably his relief that the meeting had gone so well.

Eventually Mr. Witzig relented from his stated intention to fire Mr. Benjamin but warned him:

I'll tell you what, if you want to continue working here you will come to work, you will shut your [DELETED] mouth, you will do as you're told, and if the FDO tells you to fly those [DELETED] airplanes you'll get in that seat and you'll do it, do you understand that, to that effect.

I said, yes, sir. He asked me one last -- he said, do you have any questions for me, and I said, no, sir. And he said, I've got one last thing for you, if I were you I would start looking for a new job. And the phone went click.

(TR 64-65)

In his testimony at the hearing Mr. Witzig did not give a reason for changing his mind after the April 29 meeting and deciding to fire Mr. Benjamin. Specifically, he did not remember having had a conversation with Ms. Johnson about Mr. Benjamin. Further, he did not remember having the telephone conversation that Mr. Benjamin described. (TR 1106-1107)

Mr. Gmoser was present in Mr. Witzig's office and heard his side of the call. He did not quote the language given by Mr. Benjamin. When asked whether Mr. Witzig spoke to Mr. Benjamin in a way that he himself would not have done Mr. Gmoser replied laconically, "We have different styles." He did acknowledge that during this call Mr. Witzig made it clear that Mr. Benjamin's job was in jeopardy and that "a future problem would result in termination." (TR 1221)

Mr. Benjamin's girlfriend, Megan Erickson, was present during this call, and heard his side of the conversation. He was visibly upset during the conversation, and after it was over "when Bob got off the phone, he said that J.D. told him to go to work, do his job, fly the planes, and if his name came across his desk one more time he would not have a job." (TR 182)

Mr. Witzig testified that he did not remember a telephone call with Mr. Benjamin, but acknowledged "Clearly something happened between the time that I had written my debrief of what I thought took place and the time I wrote that e-mail [directing that Mr. Benjamin be fired]." (TR 1150) After this conversation Mr. Benjamin received a written warning (CX 7).

January 2009 landing gear tire incident

During a tour in January, 2009, Mr. Benjamin and his first officer had concerns over the condition of a landing gear tire. (TR 77- 79) He described part of the tire as looking like it had been grated with a cheese grater. A photograph of the tire (CX 28) shows uniform wear over most of the tire surface, with a section approximately 2 inches wide that is more deeply and much more roughly abraded.

They reported the condition of the tire when the aircraft was at a large airport, in the hopes that it would be replaced where maintenance would be readily available, rather than having to be replaced later when they might be at a smaller facility with more limited maintenance capability. The maintenance department asked whether there was cord showing through the rubber of the tire and when told that there was not, replied that “we're trying to get the life out of the tires so run them until you see cords and call us when they're -- you know, we'll fix them then.” (TR 80)

Mr. Benjamin did not believe that the condition of the tire made the aircraft unsafe or unairworthy, but believed that it would be most appropriate to conduct the maintenance while the aircraft was at a major hub, where it could be done more quickly and economically. During the tour he and his first officer checked the tires especially carefully on their pre-flight and post-flight inspections.

Later during the same tour they landed at Fort Lauderdale, Florida at the end of the duty day. On post-flight inspection the first officer found the tires to be in the same condition, with no cord showing. Both pilots concluded that there was no point in renewing the request to replace the tire because they had been told that it would not be replaced until there was cord showing. (TR 82-83)

The next morning the aircraft was in the same position that they had left it. They conducted a pre-flight inspection and were about to take off. The first officer removed the wheel chocks in preparation for take-off and observed cord showing on the part of the tire that had been covered by the chocks. (TR 83, 510-511) Pulling the chocks to examine the portion of the tire concealed by them is not part of the pre-flight inspection. (TR 509, 977, 1211).

Mr. Benjamin called Citation's maintenance department to report that they had observed cord showing that had been concealed by the chocks. The maintenance representative asked him to take a picture of the tire with his cell phone and send it to the company. CX 29 contains the cell phone photographs that Mr. Benjamin took, showing white specks on the tire surface that he identified as cord. He had never before been asked by a representative of the maintenance department to submit photographs of a discrepancy. (TR 83-85) Later Mr. Sexauer called Mr. Benjamin to discuss the incident and directed Mr. Benjamin to call him if there was a mechanical issue at departure time that would delay departure. (TR 86-88). Mr. Benjamin had never before heard of a requirement for a pilot to report flight interruptions to a management pilot.

MARCH 2009 LANDING GEAR STRUT INCIDENT

Events of March 20, 2009

Mr. Benjamin was assigned to begin a tour with Val Riordan on Friday, March 20, 2009. Mr. Riordan was a senior captain assigned to the tour as a check airman. A check airman flies with and evaluates the performance of the other pilot. Being senior to Mr. Benjamin, Mr. Riordan was listed as the PIC but, because he was assessing Mr. Benjamin's performance of the duties of a captain, he performed the duties ordinarily performed by a first officer.

At the start of the tour their assigned aircraft was in Morristown, New Jersey. They were not scheduled to fly on the first day of the tour. They went to the hangar and found mechanics were changing an engine on the aircraft. It was also undergoing a Continued Service Inspection (CSI), an inspection performed periodically on CitationAir's aircraft and scheduled by the company's maintenance department. (TR 88-91) The CSI is not required by the FAA. It is a voluntary program conducted by CitationAir, in which each aircraft is inspected every 7 to 10 days. (TR 1025) The checklist for a CSI includes examining the landing gear struts. (CX 32) According to Sean Toth, CitationAir's Senior Vice President of Fleet Management the CSI includes a non-intrusive visual inspection of the strut to ensure that "everything looks good." (TR 1027) The aircraft was signed off as passing the CSI on March 20. (CX 23)

When major maintenance such as changing an engine is ongoing the characteristics or appearance of the aircraft may change, so an inspection by the flight crew is of limited value. Both pre- and post-flight inspections are generally performed after the maintenance personnel have signed off on the work. Mr. Toth testified concerning inspections during and after major maintenance:

Q [I]f a plane is in active maintenance, engine is being worked on, is the pilot supposed to be doing a pre-flight, do you know?

A You mean by active maintenance, you mean actually the airplane is being physically in work?

Q Correct.

A Yeah. No, not at all.

Q They're not supposed to?

A No.

Q So on the next day you come to a plane that has been -- right engine has now been fixed --

A Uh-huh.

Q -- and CSI inspection has been done --

A Right.

Q -- you're supposed to be more vigilant, right?

A Well, it's best practices. People were in your aircraft. So, yeah, it's best practices.

(TR 1056-1057)

Although the aircraft was still in maintenance, Mr. Benjamin did a partial inspection, examining the exterior where he could do so without getting in the way of the maintenance personnel.

EX 59 is a photograph of the left wing landing gear strut on a Citation Excel jet. Each strut has a piston that absorbs the shock of landing by recessing into a pressurized cylinder, similar in principle to an automobile shock absorber. When the aircraft is on the ground a length of shiny chrome on the piston shows how far it can compress. If the exposed chrome is too long the landing gear may not retract properly. If it is too short there may be insufficient shock absorbing capacity and the impact of landing can damage the aircraft.

The acceptable range for chrome showing is between 1.8 and 4.5 inches. (CX 1) None of the CitationAir pilots who testified in the hearing, other than Mr. Sexauer, knew those figures offhand before this incident, although the notoriety of this case within the company has caused many of them to learn them since then. Curiously, although these tolerances are specified in tenths of an inch, none of the pilots testified to carrying a ruler or other measuring device, nor was any device for measuring the strut piston a part of standard flight deck equipment. (TR 798, 804, 1232)

Experienced pilots who inspect the aircraft several times during each duty day develop an ingrained awareness of the acceptable range. All of the pilots who testified on this point said that they can tell by looking, or using three fingerwidths for an approximate measurement, when the strut is near the middle of the acceptable range, as it usually is. (TR 797-798, 978, 1233) It is only in the rare cases when the length of the exposed chrome is near either end of the range that there would be a need to measure it. However, as noted, they do not carry a measuring device.

When Mr. Benjamin examined the strut on March 20, 2009, it appeared to him to be within tolerances. He did not measure it, but based the determination on his experience with the aircraft. The maintenance personnel were still working on the engine when he and Mr. Riordan went to their hotel for the night. (TR 93-95)

Events of March 21, 2009

Their first scheduled flight for the morning of March 21 was an operational check flight without passengers to test the newly-installed engine. Mr. Benjamin performed captain duties and Mr. Riordan performed first officer duties, including the pre-flight inspection of the aircraft. After the pre-flight Mr. Riordan took his seat in the cockpit. Mr. Benjamin left the aircraft to do a walk-around of his own. As he was removing the chocks from the left main wheel he noticed that the length of chrome showing on the landing gear strut was significantly shorter than when he had examined it the day before. (TR 97-98)

He mentioned it to Mr. Riordan, who examined it and agreed that it looked low. They discussed it and agreed that the discrepancy should be called in. They could not find the specification for the strut extension in the flight manual in the aircraft. At the beginning of the duty week Mr. Benjamin received a FedEx package with updates to the flight manual. (TR 203) He had these documents (CX 1) in his personal satchel. Those papers listed the range of 1.8 to 4.5 inches. Mr. Riordan was not comfortable relying on those papers because he did not know their source or whether they were current. They called the FDO. The FDO was not an Excel pilot and could not find the correct tolerances in the materials available to him. (TR 101-105)

Mr. Sexauer was not in the office and the call was patched through to his cell phone. He testified that the FDO "called and asked me if I was familiar with the strut measurement requirements for the aircraft and that Bob Benjamin had a question, and I said put Bob through. I said hello, Bob, and Bob explained to me the situation that he had. And he said that he had a piece of paper in his hand that said that the strut extension needed to be between 1.8 and 4.5 inches, and he asked me if that was accurate. And I told him yes." (TR 877) Mr. Sexauer testified that he told Mr. Benjamin "unless you have 1.8 inches you're not going to be able to go anywhere. I suggested he could try to have the airplane moved on the ramp to see if the strut actually extends beyond that, but I explained that, unless he has 1.8 inches, he can't go." (TR. 878) He regarded it as possible that, if the aircraft was tilted, moving it to level ground might cause the strut to extend to the required length. (TR 1291)

Mr. Sexauer asked him whether he had inspected the strut the day before. Mr. Benjamin told him that he had, and that it had looked sufficient. Mr. Sexauer asked what the measurements were. After explaining that he had not used a tape measure, Mr. Benjamin gave an estimate. According to his testimony he told Mr. Sexauer "that they could have been an inch, inch and a half, as possibly two inches, I don't know other than they looked airworthy to me on Friday [March 20] but they don't today." (TR 106-107) When Mr. Benjamin gave this range, indicating that there may have been as little as one inch of chrome showing the day before Mr. Sexauer "locked onto the one inch, and that was -- the conversation, you know, went south from there, shall we say. . . . he had locked onto that the plane was broke Friday and I had admitted that it was broke Friday and did nothing about it as far as writing it up at that point." (TR 107-108)

According to Mr. Benjamin, Mr. Sexauer began yelling at this point, and accused him of knowing the day before that the plane was broken and not reporting it then. (TR 107-108) Mr. Benjamin denied this. Mr. Sexauer described this portion of the conversation as follows:

At the end of that conversation, Bob added that he had seen the airplane the day before and he had noticed that it was about an inch. And I asked the question at that point, Bob, if you noticed it yesterday why didn't you bring it to our attention then. And he didn't have a response.

Q What else do you remember on that call?

A I remember I believe I asked the question again, and he didn't have a response. And I said, Bob, you know, you could try what I suggested but you need to have 1.8, otherwise you can't go.

(TR 879)

The crew moved the plane from where it was parked and the strut extension went down further. The crew called the company to notify them that the problem was worse and all concerned agreed that the aircraft had to be grounded. A maintenance contractor was summoned and worked on the strut. Both the left and right main gear struts were found to have approximately one-half inch of chrome showing. (CX 23, TR 368) The mechanic jacked up the plane and serviced the struts. It was necessary to burn off 1,000 pounds of fuel before the plane could be jacked up. (TR 395-96) The mechanic was able to get the nitrogen pressure up to the required level, but even at the proper pressure, and with the reduction in weight from burning off fuel, the strut extension was only 1.75 inches, still below the minimum tolerance. (TR 109-110) A strut with a leak such that it cannot be brought within the required tolerance is not repairable in the field and requires replacement. (TR 1031-1032)

Mr. Sexauer did not speak to Mr. Benjamin again that day, but spoke to the FDO and learned that the strut could not be brought within the acceptable tolerances and the plane had been grounded. He expressed a desire to discuss the incident with Mr. Benjamin. Mr. Benjamin was in Morristown, near the company's headquarters in Greenwich, and Mr. Sexauer asked for another pilot to be assigned to fly the tour of duty with Mr. Riordan and to have Mr. Benjamin come to headquarters for a face-to-face discussion. (TR 880-881)

When Mr. Benjamin was told of this decision there were "comments about the delay, the timing that it took to write the airplane up, why it took the time that it did, why it was not caught on Friday, the maintenance issue, if it was broke on Friday why didn't you write it up, there were some issues there." (TR 116) Mr. Sexauer testified that his desire to discuss the incident in person resulted in part from the January incident involving the landing gear tire. (TR 859-861)

On March 22, 2009, Mr. Benjamin filed an ASAP report on the incident. (CX 3) This is a self-report procedure for calling attention to safety and airworthiness issues. (TR 647-649) In the report Mr. Benjamin wrote:

I feel that the indirect pressure being put on the pilots to keep these planes flying is putting us all in a potentially dangerous spot when we feel we can't write up an unforeseen maintenance item at departure. This could cause a crew to fly broken airplane and put the PAX [passengers] and crew in potentially unsafe situation. This in the long run could be very devastating to our company and for all our careers should this result in an accident.

In the same report he recounted his conversation with Mr. Sexauer on March 21. He said that in response to Mr. Sexauer's question about the condition of the strut on March 20, he had said that there was "inch to inch and half."

Mr. Benjamin spent Sunday, March 22 in his hotel room "staring at walls, going crazy." (TR 127) Based on the threats that he had received from Mr. Witzig after the stair lighting

incident, he expected to be fired. He spoke to a number of pilots, including Mr. Gmoser, over the weekend.

On Monday, March 23 he was told to report to the company's headquarters at 2:00 P.M. the next day to meet with Mr. Sexauer in his office. Before the meeting he purchased a small digital audio recorder from an office supply store.

Meeting on March 24, 2009

Mr. Benjamin met with Mr. Sexauer, Mr. Gmoser, and Ms. Johnson. The presence of a member of the Human Resources Department, and in particular the one whose perception of his "body language" the year before had almost gotten him fired, reinforced Mr. Benjamin's impression that the meeting would not be limited to aviation safety and maintenance issues and that termination or some other adverse personnel action was planned. (TR 134) He had been uncertain whether to use the recorder, but when he saw that Ms. Johnson was going to be in the meeting he believed that he would need a recording to protect himself and turned it on. (TR 335)

The meeting began with a discussion of the wing strut incident. Mr. Sexauer asked why, if only an inch of chrome was showing on Friday, Mr. Benjamin had not written it up as a discrepancy then. Mr. Benjamin replied that it might have been more than an inch and, based on his experience flying the aircraft, the amount showing when he examined the strut on Friday was sufficient for flight. (TR 134-135)

During this discussion, the recorder began making static noises. Mr. Benjamin reached into his pocket to attempt to silence it. It began to make noise again and he pulled it out of his pocket to try to turn it off. Mr. Sexauer asked what it was and Mr. Benjamin said that it was his cell phone. It did not look like a cell phone and Mr. Sexauer asked if Mr. Benjamin had been recording the meeting. He admitted that he had.

Mr. Benjamin described the next few moments as follows:

Q And then what happened?

A He visibly was upset and asked why, why did I tape the meeting, and I referred back to my phone call with J.D. that, you know, the yelling I took that I was going to -- you know, there was nobody really -- I said something like, you know, I didn't -- in case you started yelling at me like J.D. did and I wanted to have some documentation of it. And, you know, there was no representation really for me other than myself.

Q And then what happened?

A Kurt asked me to stand up, and he looked at Gary and he asked Gary, Gary, would you escort Mr. Benjamin to the front door. And Gary I think said yes -- or, I think he said yes, sir. I reached to grab my recorder. Kurt said leave it.

And I explained to him it was mine. He explained that it was CitationShares' property now, that I had brought it onto their property. There was a little back-and-forth. I don't know if I went to turn with it or not, but he -- at one point he kicked kind of his chair back a little bit and stands up, just to be more of an aggressive stance because he was sitting down up until that point.

And it felt to me it was close to confrontational. So I put the recorder on his desk and I said, that's fine, you can have it. And he said, well, why don't you just leave your key and I.D. with it. I complied, turned around and left and went to the front door with Gary.

Q Was there -- do you know why Kurt wanted to keep the recorder?

A Well, I mean, I don't know his thoughts, I mean, but obviously it was a disciplinary meeting and I felt there was threatening tones from him from the beginning so maybe there was something on there that concerned him. I'm not -- I don't know why Kurt decided to keep it.

(TR 137-138)

I turned and I grabbed my recorder, and then there was back-and-forth a couple, three times with Kurt about the recorder. I grabbed it and said -- you know, and he said leave it, and I said it's mine. He said it's ours. I said no, it's mine. He said you brought it on CitationShares property, it's now CitationShares' property.

(TR 342)

In the course of this discussion Ms. Johnson stated that Mr. Benjamin had broken federal law by attempting to record the meeting. (TR 342-343)

Mr. Sexauer directed Mr. Benjamin to leave his company identification card and aircraft key as well as the recorder, and Mr. Gmoser escorted him out of the room. There is a dispute among the participants concerning what was said about Mr. Benjamin's employment status. According to Mr. Benjamin, it was never stated during the meeting that he was fired.

Mr. Sexauer testified that he made the decision to terminate Mr. Benjamin on his own authority without consulting anyone else, and made the decision when Mr. Benjamin admitted that the device was a recorder "I said, why are you recording a conversation, and he said I thought you were going to yell at me. And I said me? I replied, me? And that's when I sat back in my chair, I thought about what had occurred, and at that point I stood up. I asked Mr. Benjamin for his key and his I.D. He handed it to me. I turned it around, I placed it behind me on my -- behind my desk, and he asked me, well, what does that mean. And I said you no longer work at CitationShares." (TR 853) In addition he testified that during the meeting Ms. Johnson stated that it was illegal to record a conversation. (TR 854)

Ms. Johnson wrote notes on the meeting the next day. According to those notes (CX 24), Mr. Sexauer said “Bob, give me your keys and your badge, you’re done here” and then asked Mr. Gmoser to escort him out of the building. In her account of the meeting, when asked why he had brought the recording device, Mr. Benjamin said “Well the last time I came into the office JD [Witzig] yelled at me and I thought you were going to do that too.” In CX 24 she quotes herself as having said “It’s illegal to record someone without their knowledge.” She testified in the hearing that she understood from Mr. Sexauer’s statement that Mr. Benjamin was fired, and that she believed that Mr. Benjamin also had that understanding. (TR 1389-1390)

Regardless of the specific words that may have been said, Mr. Benjamin inferred from the order to turn in his key and company ID card that he had been fired. He recounted his conversation with Mr. Gmoser after leaving Mr. Sexauer’s office as follows:

I remember saying to Gary, that's great, I just lost my job. And Gary goes, well, why do you say that. And I said, well, they took my key and I.D.

Gary's response was, well, they didn't -- he said, well, he didn't use the word fired or terminated. He goes, obviously Kurt is upset with you, but, you know, he says -- you know, we discussed something else. And the other comment I remember is I said, I mean, how am I going to pay for my mortgage, you know, it's -- there's no jobs right now, it's March of '09.

And he's like, well, let's just not get ahead of ourselves, we've still got the PRP [Peer Review Panel], just -- you know, we sat out in the lobby for a little bit and, you know, he tried to, I don't know, I guess calm me down a little bit from the event.

(TR 139)

Mr. Gmoser denied having said anything to cause Mr. Benjamin to doubt that he had been terminated. He testified that he “asked him why he had not listened to the ideas and thoughts that I had given him over the weekend, that he should be comfortable in the meeting he was going to, and that I felt that he had let me down in that sense that I gave him good advice and he didn't take it. And the matter regressed from there.” (TR 1200) He confirmed that he and Mr. Benjamin had discussed the possibility of the PRP (TR 1240)

After the meeting Mr. Benjamin called Ms. Erickson and several CitationAir pilots. According to Ms. Erickson he “said that he thought he had just lost his job. And I said, what do you mean, you think you just lost your job. And he said, well, I don't know, they took my key and my I.D. and Gary took me out to the lobby. And he told me about the conversation that him and Gary had had in the lobby while he was waiting for the car, that Gary said let's -- you know, tried to calm Bob down, let's not get ahead of ourselves, they didn't fire you, Kurt's really angry right now, let's just see where this all goes.” (TR 183-184)

Three pilots testified about their telephone conversations with Mr. Benjamin. All of them recounted similar accounts of Mr. Benjamin being unsure, in light of what Mr. Gmoser had said to him after the meeting, of whether or not he had been fired. (TR 468-469, 606, 806)

Mr. Benjamin asked to speak to Bill Grimes, the Senior Vice President for Safety, before leaving the building. After speaking to Mr. Grimes, he was driven to a hotel where he awaited a flight home that had been arranged for him the next day.

After Mr. Gmoser and Mr. Benjamin left Mr. Sexauer's office Ms. Johnson took the recorder with her. She later told Mr. Sexauer that there was nothing audible on it. (TR 958-960, 1392)

Aftermath

After his flight home, Mr. Benjamin paid a visit of several days to family members. He returned home on March 31, 2009, to find a FedEx envelope waiting. This contained a letter (CX 22) notifying him that his employment was terminated effective March 24, 2009, and directing that he return items of company property. On April 1, 2009, Ms. Johnson sent him a letter (CX 20) returning the recording device.

Jason Tabor, a former CitationAir pilot, received a call from Mr. Sexauer shortly after the meeting. He knew Mr. Benjamin and had heard from mutual acquaintances that he had been fired. In the course of the conversation the subject came up:

Q Did Kurt tell you whose decision it had been to terminate Bob Benjamin's employment?

A Kurt said that when Bob broke the law in front of human resources that he didn't have any control over the decision that was made.

Q And he suggested that it was human resources that had made that decision?

A That's what I gathered. He said that he felt bad about what happened because Bob and him used to be friends and that you can't come into the office and break the law in front of human resources, and that there was nothing he could do. I remember him specifically saying his hands were tied.

(TR 552)

On April 4, 2009, Mr. Benjamin filed a request for review of his termination by a Peer Review Panel. The PRP is a procedure set up by the company to "resolve problems or issues at work, in a way that encourages your involvement, input and voice." (CX 15, pp. 43-45). The PRP procedure permits a pilot to file a complaint related to, among other issues, written disciplinary action and termination. A Peer Review Panel consists of four line pilots selected

from a pool of volunteers, and one management pilot. After reviewing a case the Panel has the authority to provide a wide range of remedies, including ordering reinstatement of a terminated pilot.

On April 8, 2009, Karena E. Kefalas, Senior Vice President for Human Resources, wrote a letter to Mr. Benjamin denying his request to have his complaint referred to a PRP. In the letter she stated:

I have reviewed your request and find that your complaint is not subject to Peer review for the reason that termination as a result of attempting to engage in or engaging in an illegal action is not eligible to be tried before Peer Review.

In a separate letter on the same date, she wrote:

Per your recent request, I have included below a statement explaining the reason for your termination:

As informed on your termination date, March 24, 2009, you were terminated for wrongfully engaging in the action of recording a conversation without consent of all parties within the state of Connecticut, an All-Party Consent State.

(CX 21)

Ms. Kefalas testified that as Senior Vice-President of Human Resources she makes the decision of whether a case is entitled to peer review. (TR 1521)

On June 1, 2009 Mr. Benjamin's attorney wrote a letter to the President of Citation requesting that Mr. Benjamin be reinstated. (CX 19) This letter challenged the company's assertion that the attempted recording of the meeting violated either federal or state law, with a citation to Conn. Gen. Stat. § 52-570d(a), which is discussed below.

TIMELINESS OF THE COMPLAINT

A complaint of a violation of the Act must be filed "not later than 90 days after the date on which such violation occurs." 49 U.S.C. § 42121(b)(1). 29 C.F.R. §1979.103(d) defines the date of a violation of the Act as "when the discriminatory decision has been both made and communicated to the complainant." In whistleblower cases the statute of limitations begins to run when the employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054 (ARB Aug. 31, 2005); *Rollins v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-9 (ARB Apr. 3, 2007).

Mr. Benjamin filed his complaint on June 23, 2009. This was less than 90 days after the refusal of his request for peer review so there is no issue of timeliness with regard to that action.

The filing was more than 90 days after the March 24 meeting, but less than 90 days after the termination letter reached his home. Therefore, the crucial inquiry for purposes of timeliness of the complaint as it relates to his termination is on what date the decision to terminate him was both made and communicated to him.

The recording device might have been of use in this regard, but there was apparently nothing audible on it. This is plausible, since it was precisely the malfunctioning of the recorder that led to its discovery and to the abrupt end of the meeting. However, because of Mr. Sexauer's insistence that Mr. Benjamin surrender the device we have only the word of company representatives that the recording was not audible. Any residual suspicion on that point would rest on Mr. Benjamin rather than on Citation if he had been allowed to retain the recorder.

Mr. Sexauer stated that the recorder was Citation's property because Mr. Benjamin had brought it on to Citation's property. This is a somewhat idiosyncratic view of personal property law, and one which Mr. Sexauer did not apply consistently. He did not claim, for instance, that title to Mr. Benjamin's wallet, watch, actual cell phone, or any other item of property transferred to the company by virtue of having been brought into the headquarters building. The only item of Mr. Benjamin's property that Mr. Sexauer insisted be surrendered was the one that might have revealed what was said in the meeting. It apparently had no such record because of the malfunction and static, but Mr. Sexauer had no way of knowing that when he insisted that it be left behind.

Without a recording we can only rely on the testimony of the four participants in the meeting, none of whom are disinterested. Fortunately, many of the events of the meeting are undisputed. Mr. Benjamin was directed to surrender his company identification card and keys and he did. Everyone in the meeting agreed that Mr. Sexauer said "you're done here" or words to that effect, and everyone, including Mr. Benjamin, interpreted Mr. Sexauer's words, along with the order to turn in company property and to leave the premises, to mean that Mr. Benjamin was fired.

The interpretation that he was fired is the commonsense interpretation of what happened, and is what Mr. Benjamin believed at the time. The asserted ambiguity did not arise during the meeting but after he and Mr. Gmoser left the room. Mr. Benjamin states that Mr. Gmoser told him that he was not necessarily fired and that Mr. Sexauer might relent. Mr. Gmoser denies this.

Equitable tolling of the statute of limitations may excuse untimely filing of a complaint. *Halpern, supra; Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26, at 20 (ALJ) (Feb. 23, 2007). Among the situations in which equitable tolling applies are those in which a respondent actively misleads a complainant respecting the cause of action or the duration of the filing period.

Mr. Benjamin's account of the conversation with Mr. Gmoser does not suggest that Mr. Gmoser intended to mislead Mr. Benjamin about his employment status or his legal rights. The

overall impression is of Mr. Gmoser trying to defuse an emotionally charged scene and raise Mr. Benjamin's spirits in a profoundly distressing situation. However, these words of encouragement from a member of management appear to have introduced an ambiguity into Mr. Benjamin's understanding of his employment status.

Mr. Benjamin immediately called not only Ms. Erickson but several of his fellow pilots and told them that he was not certain whether he had been fired. 29 C.F.R. §1979.107(d) provides that "[f]ormal rules of evidence shall not apply" in AIR 21 hearings. However, even if the hearsay rule applied with full force the testimony of the pilots concerning what Mr. Benjamin told them would be a clear example of an out of court statement that is admissible to rebut a claim of recent fabrication. *See* Fed.R.Evid. 801(d)(1)(B).

Any motive for Mr. Benjamin to falsify or embellish what Mr. Gmoser said about his prospects with the company would only have arisen after the AIR 21 claim was filed on the 91st day after the meeting and the company challenged the filing on the ground of timeliness. However, he called his colleagues to state his uncertainty immediately after the meeting. The alternative explanation for these calls—that Mr. Benjamin knew unambiguously that he had been fired but made all of these calls in order to set up an alibi for missing a future filing deadline—falls under its own weight.

By June 1, 2009, several weeks before the end of the filing period, Mr. Benjamin had retained an attorney who drafted a four-page letter citing to both employment law and the state wiretap statute. An initial complaint under AIR 21 is much simpler to draft than the June 1 letter. If Mr. Benjamin had known unambiguously that his filing period under AIR 21 began to run on the date of the meeting he would be much more likely to meet the statutory filing date than to stage an elaborate charade of telephone calls to justify later missing the date by a single day.

While I repeat that there is no indication that Mr. Gmoser intended to mislead Mr. Benjamin, I find that his remarks after the meeting led Mr. Benjamin to be uncertain of whether he had been terminated. That uncertainty was not finally resolved until he received CX 22 on March 31, 2009 and the statute of limitations was equitably tolled until that date. He filed his complaint within 90 days of that date and it is therefore timely.

DISCUSSION

After the stair lighting incident in April 2008 Mr. Witzig called Mr. Benjamin to company headquarters for a meeting. The meeting took place on April 29, 2008. On April 30, 2008, Mr. Witzig drafted a debriefing memorandum and an email to senior management pilots summarizing the meeting. On May 1, 2008, he sent an email directing that Mr. Benjamin be terminated effective that day. On May 2, 2008, he relented and issued a warning letter to Mr. Benjamin.

Mr. Witzig had no explanation for this mercurial course of action and, indeed, no memory of what motivated him to reverse himself twice in as many days. Since he does not remember why things deteriorated so rapidly after a meeting that he repeatedly described as “great” and “wonderful” it is necessary to rely on the other witnesses involved in the events, primarily Mr. Benjamin, Mr. Gmoser and Ms. Johnson.

After the meeting Mr. Benjamin was speaking to Mr. Gmoser and other pilots. Ms. Johnson, who had never met Mr. Benjamin and therefore had no idea of what the normal baseline of his demeanor was, decided that his body language was “cavalier.” She reported this to Mr. Witzig, who decided to fire Mr. Benjamin.

Mr. Witzig called Mr. Benjamin and berated him for bragging about having put one over on him. When Mr. Benjamin denied this Mr. Witzig relented and did not fire him. However, in an obscenity-laced tirade he ordered Mr. Benjamin to keep his mouth shut and if the FDO tells him to fly the planes, to get in the seat and do it. He added that if Mr. Benjamin’s name came across his desk one more time he would be fired.

In late March 2009 Mr. Benjamin’s name came across the desk of Mr. Witzig’s immediate subordinate, Mr. Sexauer, and it could reasonably be assumed that if it had not literally come across Mr. Witzig’s desk, it soon would. Mr. Sexauer denies having had any intention to fire Mr. Benjamin before the meeting, and that may be true. However, Mr. Benjamin’s belief that the meeting had been called to fire him was a reasonable expectation, and perhaps the most reasonable expectation available to him in light of his past involvement with senior management.

When Mr. Benjamin examined the strut on March 20, 2009, the aircraft was undergoing both an engine replacement and a CSI. The CSI is intended to be a more thorough examination than the pilot’s pre-flight, but it did not record the discrepancy in the strut. Mr. Riordan, who was the pilot in command and conducted the pre-flight inspection on March 21, did not note the discrepancy. Mr. Riordan was assigned another co-pilot and flew the remainder of the scheduled tour while Mr. Benjamin was removed from the flight assignment and ordered to company headquarters. Everything about the weekend’s events was calculated to reinforce the impression that Mr. Benjamin was being singled out for disciplinary action and, based on Mr. Witzig’s earlier remarks, probably for termination.

LEGAL STATUS OF CLANDESTINE RECORDING

The initial claim on behalf of the Respondent by Ms. Johnson during the March 24 meeting was that Mr. Benjamin’s attempted recording of the meeting violated federal law. 18 U.S.C. §1511 prohibits electronic interception of communications, but provides that

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any

criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. §1511(d).

As this section implicitly acknowledges, state laws on the subject of intercepting conversations to which one is a party vary. States are broadly divided between those that require all parties to consent to recording and those that permit recording with the consent of only one party. Ms. Kefalas' letter denying Mr. Benjamin's request for peer review does not reiterate Ms. Johnson's claim of violation of federal law, but contends that Mr. Benjamin violated Connecticut state law.

The characterization of Connecticut as an all-party consent state relies on a state statute that provides:

Action for illegal recording of private telephonic communications.

(a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.

Conn. Gen. Stat. § 52-570d(a).

The statute goes on to provide that “[a]ny person aggrieved by a violation of subsection (a) of this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fee.” Conn. Gen. Stat. § 52-570d(c). Surreptitious recording of a telephone call is thus clearly established as a statutory tort in Connecticut. However, the statute is silent on the issue raised in this case, involving recording an in-person conversation. Mr. Benjamin's counsel brought this to CitationAir's attention in his June 1, 2009 letter, in which he cited Section 52-570(d).

The Connecticut Penal Code provides that the felony of eavesdropping is committed when a person “unlawfully engages in wiretapping or mechanical overhearing of a conversation.” Conn. Gen. Stat. §53a-189. The Code defines “mechanical overhearing” as “the intentional overhearing or recording of a conversation or discussion, **without the consent of at least one party thereto, by a person not present thereat**, by means of any instrument, device

or equipment.” Conn. Gen. Stat. §53a-187(a) [emphasis added]. The Connecticut General Assembly has thus declined to include circumstances of the type involved here in either the tort of illegal telephone recording or the crime of eavesdropping.

In addition to these statutory provisions, Connecticut has judicially recognized the tort of invasion of privacy. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982). This tort involves four distinct categories: “(a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public.” 188 Conn. 107, 128.

The only one of those categories arguably at issue in this case is the first. None of the management personnel at the meeting anticipated the meeting being recorded. It might have been prudent to do so, given Mr. Witzig's standing threat to fire Mr. Benjamin, which had been motivated by Ms. Johnson's report to Mr. Witzig, but they did not. However, it is not clear that they expected “seclusion” within the meaning of *Goodrich*. The meeting was not anticipated to delve into the personal lives of anyone or the professional behavior of anyone other than Mr. Benjamin. The meeting was arranged so that company management would have three witnesses while Mr. Benjamin would have none. Whatever anyone said would be heard by three other people. These circumstances do not suggest that any of the participants had an expectation of privacy sufficient to give rise to a cause of action under the common law tort of invasion of privacy as recognized in Connecticut. Even if such a cause of action were found to exist, it is a far cry from the unambiguous violation of “state law” making Connecticut an “All Party Consent State” on which the company based both the termination and the refusal of peer review.

The Administrative Review Board has addressed the question of surreptitious recording in the context of AIR 21. In *Hoffman v. NetJets Aviation, Inc.* ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB March 24, 2011) the Board held “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.” See also *Mosbaugh v. Georgia Power Co.*, No. 1991-ERA-001, (Sec'y Nov. 20, 1995).

The complainant in *Hoffman* produced at a hearing eight compact discs containing approximately 750 conversations recorded over more than a year and a half. Many of these recordings involved proprietary business information and other matters unrelated to air safety. The employer had a policy prohibiting such recording of conversations, but acknowledged that any recording determined to be protected activity under whistleblower statutes would not be a violation of the policy. After being warned about the policy, including the exception for protected whistleblowing activity, the complainant continued recording, although on a more modest scale. The administrative law judge found that disciplinary action was based on 37 recordings that were outside the scope of protected activity and held that disciplinary action did not violate AIR 21. The Board affirmed this decision.

Although *Hoffman* involved a vast number of recordings, the Board's decision was not based on the number of recordings but their indiscriminate nature. To constitute protected activity a recording must not only be lawful under the relevant state law but be intended to obtain

information about safety-related conversations. This requirement holds as true for the single attempted recording in this case as it did for the multitude of recordings in *Hoffman*.

ASSERTED PROTECTED ACTIVITY

Grounding of the aircraft on March 21, 2009

The Complainant has asserted several times that he engaged in protected activity by grounding the aircraft on March 21, 2009. This is not supported by the evidence submitted at the hearing, or by the facts known to Mr. Benjamin at the time. During their telephone conversation that day Mr. Sexauer confirmed that 1.8 inches was the minimum tolerance for the strut extension. He made it clear that if the troubleshooting measures he suggested were ineffective the airplane would have to be grounded. He did not display either disagreement with or disapproval of the decision to ground the aircraft.

According to Mr. Benjamin's testimony, Mr. Sexauer only became agitated when Mr. Benjamin told him that the extension the day before had been between one and two inches. When he was removed from flying status and told to report to headquarters for a meeting the reasons for the meeting did not involve the grounding itself, but "the timing that it took to write the airplane up, why it took the time that it did, why it was not caught on Friday." The necessity of grounding the aircraft when it could not be brought within tolerances on March 21, 2009 was the unanimous consensus of everyone involved, including Mr. Sexauer, the most senior manager involved.

At this late date no one will ever know how much chrome was showing on the landing gear strut on Friday, March 20, 2009. Mr. Benjamin examined it without measuring it, and this was apparently common practice among pilots flying the Excel. Also, like the other Excel pilots who testified, he did not have the acceptable range memorized at that time. Based on his experience flying the Excel it appeared to him to be within the acceptable length but he could not then, and cannot now, say how long it was.

When he examined the strut on March 21, 2009 it appeared to him and to Mr. Riordan to be showing too little chrome. They could not find the tolerances in the flight manual in the cockpit. Mr. Benjamin checked the flight manual pages that he had among his personal papers, which indicated that the required range was from 1.8 to 4.5 inches.

Armed with this information he called the company to verify the requirement. He was eventually patched through to Mr. Sexauer, who confirmed the figures of 1.8 to 4.5 inches. Mr. Sexauer asked whether Mr. Benjamin had examined the strut the day before and Mr. Benjamin said that he had. Mr. Sexauer then asked how much chrome had shown the day before. Their testimony differs on the response to this question. Mr. Sexauer said that Mr. Benjamin said "about an inch," while Mr. Benjamin said that he said "an inch, inch and a half, possibly two inches." In the ASAP report that Mr. Benjamin drafted the next day he said that he had told Mr. Sexauer that there was an inch to an inch and half of chrome showing. Giving Mr. Benjamin the benefit of the doubt and accepting his hearing testimony as the most accurate account, it appears

that immediately after hearing what the minimum tolerance was he said that the day before the length had been somewhere between far below the minimum and just barely above it.

Early identification of maintenance issues is desirable for any air carrier. In the fractional ownership sector of the industry it is even more important, for reasons discussed above and well known to a pilot as experienced as Mr. Benjamin. Mr. Sexauer's curiosity about the condition of the strut the day before was predictable, in light of the company's policy of performing post-flight inspections that are not required by the FAA. Mr. Sexauer had no reason, other than Mr. Benjamin's own choice of words, to believe that he had done an inadequate inspection on March 20.

The decision to ground the airplane was within the authority of the pilots, but in this case input was sought from others, and the grounding was unanimously agreed to as necessary by everyone at the time and since. As a consensus decision agreed to by everyone concerned, the grounding of the aircraft was not protected activity by Mr. Benjamin.

Mr. Benjamin was on notice that the scheduled meeting was intended to address the fact that the discrepancy had not been reported on March 20, rather than the fact that it had been reported, and the aircraft grounded, on March 21. This was clear both from Mr. Sexauer's statements during their telephone conversation and from what Mr. Benjamin testified to being told when the meeting was scheduled.

It is impossible to judge at this point whether Mr. Benjamin adequately inspected the aircraft on March 20, and it is arguable whether he should even have attempted to inspect it while it was undergoing a major maintenance evolution. However, it is clear, and was clear to him at the time, that the issue for the meeting was the sufficiency of the inspection, and not the grounding the following day.

As noted, the FAA does not require an inspection at the end of the day. CitationAir's internal requirement of such an inspection is primarily concerned with the company's need for efficient maintenance management. A post-flight inspection certainly does not degrade safety. To the extent that it affects safety at all it tends to enhance it. A meeting to discuss the adequacy of a pilot's post-flight inspection is not, on the face of it, likely to reveal a corporate inclination to compromise safety. With regard to the specifics of this case, Mr. Benjamin could not have expected that Mr. Sexauer, having said on Saturday that the plane would have to be grounded, would criticize him on Tuesday for grounding the plane.

Attempted recording of the March 24, 2009 meeting

For a surreptitious recording of a conversation to constitute protected activity it must not only be legal in the jurisdiction where it took place, it must be intended to obtain information about safety-related conversations. *Hoffman, supra*. After the universally agreed to grounding of the aircraft there was no remaining safety issue with regard to the incident. There was, however, an issue, raised by Mr. Benjamin's own description of what he did on March 20, concerning the adequacy of the inspection.

If the meeting had not been interrupted by the noise from the recording device there are any number of possible outcomes. Mr. Benjamin might have convinced Mr. Sexauer that he misspoke when he said an inch or an inch and a half was showing and that the length of the strut extension on March 20 was sufficient and airworthy, as he has always maintained it was. It is not clear from the record that Mr. Sexauer knew that the aircraft was undergoing both an engine replacement and a CSI when Mr. Benjamin examined it on March 20. Mr. Benjamin might have satisfied Mr. Sexauer that an inspection while those evolutions were taking place would not have been useful. In the alternative, Mr. Sexauer might have persisted in the belief that Mr. Benjamin had performed his duties inadequately and imposed corrective or disciplinary action. Such action could have gone as far as termination. However, whether the outcome would have been favorable or unfavorable to Mr. Benjamin it is clear, and was clear from the information available to him at the time, that the action would have been based on what happened on March 20, not on the grounding on March 21.

When Mr. Sexauer asked why he had attempted to record the meeting, Mr. Benjamin said “in case you started yelling at me like J.D. did and I wanted to have some documentation of it.” As understandable as this concern might be given his history with Mr. Witzig and the intimidating format that Mr. Sexauer had arranged for the meeting, it reinforces the impression given by all of the other circumstances that the recording was not expected or intended to preserve evidence of a compromise of safety.

If there is no protected activity there is no further analysis to be done under the AIR 21 standards of proof. CitationAir may have violated its own policy by denying Mr. Benjamin’s request for peer review on the sole ground of violation of Connecticut state law, but AIR 21 does not provide a remedy for such a violation of internal company policy.

CONCLUSION

The Complainant has proven by a preponderance of the evidence that he attempted to make an audio recording of his meeting on March 24, 2009 and that CitationAir knew that he did so. He has similarly proven that he subsequently suffered the unfavorable adverse personnel actions of being terminated and having his request for peer review denied. Further, CitationAir has unequivocally acknowledged that the attempted recording was not only a contributing factor but the decisive factor in both adverse personnel actions.

However, for reasons discussed above, I do not find that either the attempted recording, the grounding of the aircraft, or any other actions done before the termination of his employment constituted protected activity under AIR 21. Accordingly, the Complainant’s employment retaliation complaint is **DENIED**.

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc