

**U.S. Department of Labor**

Office of Administrative Law Judges  
11870 Merchants Walk - Suite 204  
Newport News, VA 23606

(757) 591-5140  
(757) 591-5150 (FAX)



**Issue Date: 07 March 2014**

ARB.No.: 12-029  
CASE NO.: 2010-AIR-00001

*In the Matter of:*

ROBERT BENJAMIN,  
Complainant,

v.

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

**DECISION AND ORDER ON REMAND**

This case arises under the employee protection provisions 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. On December 22, 2011, I issued a decision and order dismissing the complaint. On November 5, 2013, the Administrative Review Board issued an order remanding the matter to me for further proceedings consistent with the Board's decision.

The parties submitted briefs addressing the issues in the Board's remand order on February 7, 2014. On February 20, 2014, each party filed a reply to the other party's initial brief.

On January 29, 2014, the Respondent filed a petition for review of the Board's order with the U.S. Court of Appeals for the Second Circuit. Under 49 U.S.C. § 42121(b)(4)(A), the Court of Appeals has the authority to stay action at the hearing level while the appeal is pending. The Court has not, as of this writing, issued such a stay. Accordingly, I will comply with the Board's order remanding the matter to me for decision.

**BACKGROUND**

The facts of the case are discussed in detail in my earlier decision and in the Board's remand order. A brief summary is sufficient for present purposes.

The Complainant, Robert Benjamin, is a licensed pilot who was formerly employed by the Respondent, CitationShares Management ("CitationAir") 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 CitationAir's headquarters in Greenwich, Connecticut to discuss the incident.

In April of 2008, after reporting a maintenance discrepancy, Mr. Benjamin had been called to a meeting with J.D. Witzig, who was at the time CitationAir's Senior Vice President of Flight Operations, and Mr. Sexauer's immediate superior. After that meeting Mr. Witzig directed that Mr. Benjamin be fired. In a telephone conversation with Mr. Benjamin he relented from that decision. However, he warned Mr. Benjamin that if his name came across Mr. Witzig's desk again he would be fired and immediately before hanging up said "if I were you I would start looking for a new job." (Transcript p. 65)

The meeting concerning the wing strut incident took place on Tuesday, March 24, 2009, and was attended by Mr. Sexauer, another management pilot, and a representative of the Human Resources (HR) Department. Based on Mr. Witzig's earlier statement, Mr. Benjamin believed that he would need a recording of the meeting for his own protection. Before the meeting Mr. Benjamin purchased a digital audio recorder and placed it in his pocket. During the meeting the device began making noises. Mr. Benjamin attempted to silence the device and Mr. Sexauer asked what it was. Mr. Benjamin at first claimed that it was his cell phone, but Mr. Sexauer was suspicious because it did not look like a cell phone. Mr. Benjamin admitted that it was a recording device and that he had attempted to record 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 as of the day of the meeting.

CitationAir maintained a process under which a pilot could request review of an unfavorable action by a Peer Review Panel (PRP) comprised of other pilots. Mr. Benjamin requested that his termination be reviewed by a PRP. Karena E. Kefalas, the company's Senior Vice President for HR, denied this request.

CitationAir has at various times contended that Mr. Benjamin's attempted recording violated federal and/or state law and that the decision to terminate him and to refuse PRP review followed necessarily and inevitably from this supposed illegality. On June 1, 2009, before the present complaint was filed, counsel for Mr. Benjamin sent the company a letter addressing this point. As I discussed in detail in my earlier decision, neither the relevant federal (18 U.S.C. §1511(d)) nor state (Conn. Gen. Stat. § 52-570d) electronic eavesdropping statutes address the conduct in this case, *i.e.* a party to an in-person conversation recording it. Counsel's letter pointed this out, and requested that Mr. Benjamin be reinstated. CitationAir declined to reinstate him, leading to the present complaint.

In its remand order, the Board held that both Mr. Benjamin's report of the strut discrepancy and his attempt to record the meeting constituted protected activity under the Act. It further held that his protected activity contributed to adverse employment actions, including the termination of his employment and the denial of his request for PRP review. In remanding the matter to me the Board wrote:

The burden now shifts to CitationAir to demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected activity. Typically, respondents meet this burden of proof by showing what they would have done if protected activity had never actually occurred. Arguably, that is an impossible burden in this case. Here, Benjamin's report of safety concerns arguably was the single catalyst for the adverse actions taken against him. Consequently, in remanding this case, we leave open the question of whether the statute permits CitationAir to meet its burden under AIR 21 by showing with clear and convincing evidence that it would have taken the same action based solely on non-retaliatory and legitimate reasons, rather than proving what it would have done if protected activity had never occurred. If CitationAir fails to meet its burden, the ALJ must then determine the issue of damages on remand.

### **THE AFFIRMATIVE DEFENSE**

With regard to the first issue identified by the Board, AIR 21 provides that relief may not be ordered "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)(iv). CitationAir cannot satisfy this standard. It repeatedly, over a period of years, proffered as the reason for the adverse actions the attempt to record the meeting, which the Board has held to have been protected activity under the Act.

Mr. Sexauer, who made the decision to terminate Mr. Benjamin said at the time that his "hands were tied" because of the alleged violation of federal law. (Transcript p. 552). In denying Mr. Benjamin's request for a PRP review, Ms. Kefalas wrote, "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." (Complainant's Exhibit 21). In describing the reason for the termination Ms. Kefalas testified at the hearing that "I would say that it's about engaging in recording a conversation without consent of all parties." (Transcript p. 1584) In closing argument Respondent's counsel stated that "if he hadn't engaged in the recording, he never would have been fired". (Transcript p. 1660). With regard to the denial of peer review he emphasized the attempted recording, stating ". . . ultimately Ms. Kefalas made the determination on the peer review. There's no dispute why she made it." (Transcript p.1662). From the 2009 meeting to the 2011 hearing CitationAir consistently argued that the attempted recording was the motive for terminating Mr. Benjamin.

The closest thing to an assertion of any other ground for the firing was Mr. Sexauer's testimony that "I terminated him for the reasons which I stated, that he recorded the conversation without my consent or knowledge *and then when I asked him about it he lied to me.*" (Transcript

pp. 965-966) [emphasis added]. All accounts of the meeting agree that Mr. Sexauer was upset with the discovery of the recording device and that the order to surrender company property and leave the building followed immediately.

It is entirely reasonable that a supervisor who learned that a subordinate was secretly recording a meeting would have an immediate and strong negative reaction, as all the witnesses agree that Mr. Sexauer did. It is equally reasonable to believe that this reaction would be further aggravated by the subordinate having lied about making the recording. Mr. Sexauer's decision was a spur-of-the-moment response to a startling and upsetting discovery. His testimony that both the recording and the falsehood about it were factors in that decision is plausible on its face. However, that statement giving two reasons for his decision expressly denies the separation of bases for adverse action that the affirmative defense requires.

Mr. Sexauer testified that at the start of the meeting he did not intend to fire Mr. Benjamin. That may well be true, since his subjective intentions at the time are unknowable. However, it may be noted in passing that if so, his intention flew in the face of the guidance that his immediate superior, Mr. Witzig, had provided the year before. In addition, even if Mr. Sexauer did not intend to fire Mr. Benjamin, he had to assume that Mr. Benjamin expected to be fired, based on Mr. Witzig's earlier actions and statements.

In its brief CitationAir argued that "[s]everal pilots have met with Mr. Sexauer to discuss issues but only one was terminated: Mr. Benjamin. The difference between Mr. Benjamin and others was clear: he lied to Mr. Sexauer's face." (Respondent's Post-Remand Brief, p. 18). However, there is at least one other difference. As far as the record shows, none of the other pilots called in to meet Mr. Sexauer had standing threats of firing from Mr. Sexauer's boss.

The mixing of motives to which Mr. Sexauer testified not only does not establish the affirmative defense raised by the remand order, it negates it. As the Board noted, the defense requires an employer "to demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected activity." On the facts of this case, the protected activity and the assertedly separate basis for the adverse action are inextricably linked. If he had not been caught trying to record the meeting, Mr. Benjamin could not have falsely denied doing so.

Mr. Sexauer testified to a mixing of motives in the decision to terminate Mr. Benjamin. Ms. Kefalas did not hint at any such ambiguity in the decision to deny peer review. Both at the time and in her testimony at the hearing she made it unambiguously clear that her decision was based solely on the attempt to record the meeting.

The falsehood about the recording could not have happened without the protected act of recording having happened first. The Board noted in its order that CitationAir's burden was "[a]rguably . . . impossible" to meet. As a simple matter of logical causation, it is difficult to see how Mr. Benjamin's unprotected act of denying that he was attempting to record the meeting could possibly be severable from his protected activity as a legitimate basis for adverse action.

Even assuming for the sake of argument that it would be logically possible to separate the protected from the unprotected activity under some other fact situation, on the facts of this case it cannot be done. It is clear from all of the other evidence that the affirmative defense cannot be applied. Mr. Sexauer's contemporaneous claim that his "hands were tied" because of the attempted recording and Ms. Kefalas' statement of the reason for denial of peer review both agree that the adverse actions were taken on the basis of the attempted recording of the meeting. CitationAir has not shown, and cannot show, by clear and convincing evidence that it would have taken the same adverse actions in the absence of activity that the Board has determined to have been protected under the Act.

## DAMAGES

While they disagree on the merits of the case, the parties have agreed to some aspects of the damages issue that the Board remanded. They have agreed on the figure of \$450,000.00 for Mr. Benjamin's economic losses through the end of February, 2014. That figure includes lost wages, benefits, and interest. Mr. Benjamin is currently employed by another air carrier at a lower salary than he would be earning if he were still employed by CitationAir. Based on his current employment, the parties have agreed that \$1,893.75 per month is an accurate figure for the difference in earnings going forward, from the end of February until May, 2014. The stipulated figures appear to be an accurate measure of economic damages and will be included in the award of damages.

In addition to economic damages, the Complainant has argued that an award for compensatory damages for emotional distress is appropriate. The Board has upheld such awards in other whistleblower cases, noting that "[c]ompensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby v. Georgia Power Co.* ARB No. 98-166, 98-169, ALJ No. 90-ERA-30 (ARB Feb. 9, 2001). *See also Van v. Portneuf Medical Center*, ARB Nos. 11-028, 12-043, ALJ No. 2007-AIR-002 (ARB Jan. 31, 2013); *Negron v. Vieques Air Link*, ARB No. 04-021, ALJ No. 2003-AIR-010 (ARB Dec. 30, 2004).

In the present case, Mr. Benjamin and his fiancé testified concerning the effect on their lives of his termination. They had had to sell items of personal property, and Mr. Benjamin withdrew funds from his 401(k) retirement account. He lacked medical insurance and had to leave medical conditions untreated. At the time of the hearing in 2011 he had been unable to obtain employment in the aviation industry and was working as a real estate broker. In 2012 he took additional jobs installing roofs and selling mortgages. In October of 2012, more than three and a half years after being terminated by CitationAir, he obtained the job as a pilot that he currently holds. Under the circumstances I find that compensatory damages of \$50,000.00 for emotional distress are appropriate in addition to the damages for pecuniary loss to which the parties have stipulated.

## ORDER

**IT IS HEREBY ORDERED** that Respondent, CitationShares Management:

1. Promptly reinstate Robert Benjamin's employment, with restoration of all terms, conditions, and privileges associated with his former employment, including all seniority rights;
2. Pay Mr. Benjamin \$450,000.00 for lost wages, benefits, and interest through February 2014;
3. Pay him \$1,893.75 per month, prorated as appropriate for any fraction of a month, for the period from March 1, 2014 until his reinstatement takes effect;
4. Pay him \$50,000.00 for damages from emotional distress;
5. Notify its pilots that it will not take any adverse action against a pilot as a result of the pilot raising safety concerns or attempting to document safety concerns.
6. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Sixty days is hereby allowed to Complainant's counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon Respondent must accompany the application. Respondent will have thirty days following receipt of such application within which to file any objections.

KENNETH A. KRANTZ  
Administrative Law Judge

Newport News, Virginia  
KAK/ecd/mrc

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition is considered filed on the date of its postmark,

facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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