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Issue Date: 20 August 2019

Case No.: 2018-AIR-00041

In the Matter of

KARLENE PETITT
Complainant

v.

DELTA AIR LINES, INC.
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR PROTECTIVE ORDER

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979.

I. Summary of Facts

On June 6, 2016, Complainant filed her AIR 21 complaint with OSHA. Petitt Depo. at 70-71. On July 13, 2018, the Secretary issued his findings. OSHA, acting on behalf of the Secretary, found that the parties are covered under the Act, but there was insufficient evidence to establish reasonable cause that a Respondent violated AIR 21. On August 1, 2018, Complainant filed an appeal to the Secretary's findings. On August 28, 2018, the undersigned issued a Notice of Assignment and Conference Call. On September 27, 2018, the Tribunal issued a Notice of Hearing and Pre-hearing Order. As part of this Order, the Tribunal required Complainant to file a Pleading Complaint. On October 17, 2018 Complainant filed her Pleading Complaint ("PC").[1] On November 19, 2018 Respondent provided its response to the complaint.

On September 28, 2018, at the request of the parties, the Tribunal issued a Proposed Protective Order. Having received no objections to the proposed order, it became a Protective Order on October 5, 2018. Thereafter over the proceeding months, Complainant deposed several

[1] On December 5, 2018, Complainant requested leave, which Respondent opposed, and was granted permission to amend her complaint. *See* Order Granting Complainant's Motion to Amend Her Pleading Complaint (Jan. 17, 2019).

senior members of Respondent's management, including Captain Graham, Captain Dickson, and Chief Executive Officer Bastian.

The hearing on this matter was held on March 25 to March 29, 2019, April 25, 2019, and April 29 to May 1, 2019. On the first day of the hearing, the Tribunal addressed admitting the deposition transcripts of Mr. Bastian and Mr. Dickson. Tr. at 29, 210-11. Towards the end of the hearing the Tribunal reiterated that it had admitted the deposition transcripts of Mr. Bastian and Mr. Graham in lieu of their live testimony.[2] Tr. at 1282, 2119. After Captain Graham's testimony there was discussion about how to proceed with his cross-examination as it was not going to be completed during the first week of the hearing. Tr. at 1257. As for Captain Graham, the Tribunal informed the parties at the hearing the following:

> [I]f Captain Graham can't get out here to Seattle, I am receptive to, first and foremost, a video, whether it be Facebook, FaceTime, something of that nature, telephonic is another option. I will tell the parties, I can't, quote/unquote call it a "gag order," but you're not to use his transcript in any fashion, even if one is to be produced, except for these proceedings, until the conclusion of his testimony. It would be fundamentally unfair to not have him give -- to cure any perceived inconsistencies that need to be ameliorated on redirect and recross. So, you're not to use his testimony in any fashion, except for trial preparation, of course, until he has completed his testimony. And these are public proceedings, and at the appropriate time, that's fine, but not before he has completed his testimony.

Tr. at 1258-59.

Complainant's counsel then offered that they could complete Captain Graham's testimony via telephone or video and Respondent's counsel indicated that was a possibility. Tr. at 1260. Thereafter the parties discussed the logistics of obtain the rest of Captain Graham's testimony. Tr. at 1265. When the hearing reconvened, the parties represented that Captain Graham's testimony would occur via video-teleconference on April 25, 2019. Tr. at 1265-66. Unfortunately, when the hearing reconvened on April 25, 2019, Respondent was unable to establish a video-teleconference link between Respondent's location in Atlanta, where Captain Graham and it counsel were located, and Seattle, where the undersigned, Complainant, and Complainant's counsel were located and prepared to proceed.[3]

Apparently, sometime following the hearing, Complainant's counsel posted the video records of Mr. Bastian and Captain Graham on to the internet. Resp. Mot. at 5.

On May 17, 2019, the Tribunal received a letter from Complainant and attached to that letter was a flash drive purportedly containing the depositions for Mr. Graham and Mr. Bastian.[4]

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[2] Captain Graham initially testified in person during the first week of hearing but for whatever reason he was not available for his cross-examination and the parties agreed that Complainant could offer his deposition testimony as substantive evidence instead of requiring his presence for cross-examination or striking his earlier testimony.

[3] There were also members of the public in the room.

[4] The Tribunal believes that it asked a member of its staff to contact the parties to see if an electronic

Upon inspection of the files contained in the thumb drive the Tribunal has discovered that it contains video files, not document files. Accordingly, the Tribunal did not open those files.

On July 19, 2019, Respondent filed a Motion for Protective Order requesting the Tribunal order Complainant's counsel to remove the deposition videos from the Internet, prohibit further publication or disclosure of the deposition videos, and requesting an immediate injunctive order mandating removal of the deposition videos from the Internet pending the Tribunal's resolution of Respondent's motion. Respondent does not object to Complainant's use of the hearing transcripts on the Internet and does not object to replacing the video recordings with. Respondent asks the Tribunal to order Complainant's counsel to remove the deposition videos from the internet and other places where he has previously published them, and prohibit further publication or disclosure of the deposition videos.

On July 21, 2019, Complainant responded to the above motion by letter.[5] Complainant notes that she agreed to the transcripts because Mr. Bastian was too busy to attend. As for Captain Graham, he was supposed to testify during his cross-examination via video-teleconference, but due to Respondent's inability to ensure a connection occurred, the parties agreed to use his deposition transcript instead.

II. <u>Discussion</u>

Respondent argues that the video recordings of Mr. Bastian and Captain Graham are not entitled to a presumption of public access, and the public's access to the written transcripts suffice. Further, it argues that any public interest in the videos themselves is outweighed by significant privacy and public policy concerns. Respondent rightly argues that there is a distinction between documents admitted as evidence and discovery material not admitted. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). Respondent argues that only the written transcript was admitted in this case, not the video depositions.

Respondent cites to *Apple iPod iTunes Antitrust Litigation*, 75 F. Supp. 3d 1271, 1275 (N.D. Cal. 2014), where the judge denied an intervenor's requests to access the video recordings of the pretrial deposition testimony of Apple's CEO. That court found that, although the video records were shown to the jury, the depositions were presented in lieu of live testimony due to the witness's unavailability and thus should be treated in the same manner as any other live testimony offered at trial. Respondent argues that even if the videotapes were played during the hearing there would still not be available as they would not constitute a "judicial record." Resp. Mot. at 9. At best, this case can be used by analogy for this Tribunal's records are not judicial records, they are agency records. For example, this Tribunal's records are subject to the Freedom of Information Act while federal courts records are not, because they are not an Agency as defined by the Act. *See* 5 U.S.C. 551; 29 C.F.R. 70.2(e).

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copy of their depositions were available for use when the Tribunal prepared its decision. It was not the intent of the Tribunal to acquire the videotaped version of the depositions, only a .pdf version of the documents.

[5] The Tribunal has previously cautioned the parties that motions and responses should be captioned as such. The Tribunal is confident that neither any future motions or responses will be in this format.

Here, the parties agreed to a protective order, which this Tribunal issued on September 28, 2018. Therefore, the parties are bound by its terms. And by Order dated January 28, 2019 the Tribunal addressed whether videotaped depositions in this case are subject to the Protective Order: they are. That Order noted that while Dickson's deposition was protected by the terms of this Tribunal's September 28, 2018 Protective Order, it would not remain confidential if offered as evidence and admitted at the hearing.[6] Having been admitted in these proceedings, the deposition transcripts of Mr. Bastian and Captain Graham lost all confidentiality afforded by the Protective Order. Thus, the present issue is whether, in light of the deposition transcripts being admitted at the hearing, the video recordings of those depositions is protected under the terms of the protective order. For the reasons that follow, the Tribunal finds that they are not.

The Tribunal notes that the purpose for offering Mr. Bastian's deposition was Respondent's representation that he was a busy person and too important to Respondent's operations to attend the hearing. Complainant acquiesced to this request and the Tribunal accepted Mr. Bastian's deposition in lieu of his testimony. Had an accommodation not occurred, this Tribunal could have ordered Mr. Bastian's presence at the hearing. Similarly, for Captain Graham, admission of the deposition became an issue because of Respondent's inability to produce him for his second day of hearing testimony. The Tribunal was ready to proceed with his continued testimony but Respondent's efforts to obtain a communication link failed. The parties thereafter stipulated to use of Captain Graham's testimony in lieu of cross-examination and redirect. Had the parties not agreed to submission of deposition testimony and the Tribunal ordered Bastian and Graham appearances, the public would have had the opportunity to observe their testimony. And in this case, there were members of the public in attendance.

But the heart of the issue is the underlying purpose of protective orders, which ordinarily precludes disclosure of confidential or privileged information to any person or entity not subject to the litigation. Protective Orders are generally issued *to protect certain information from being disclosed* to the public, *not the manner in which that information is conveyed.* The substance of the Bastian and Graham depositions is now publicly available because they are exhibits in these proceedings and not subject to the protective order. Here, essentially Respondent is complaining about the format of publicly available information, one Respondent apparently does not like. But the medium of the information is not the focus of the protective order or the rationale for issuing a protective order. And Respondent's speculation that the medium could be altered is just that—speculation. Such occurrences would be no more within the control of the Tribunal than if the written transcript was altered and published on the Internet. As such, any argument as to annoyance, embarrassment, oppression, or undue burden carries little weight. Here, any issues as to the confidential nature of the information contained in depositions were waived once the substance of the deposition is exposed. And the depositions were used in lieu of live testimony for the convenience of Respondent, not Complainant. Therefore, the Tribunal finds that the substance of the deposition itself, be it in written or videotaped form, is no longer covered by the protective order.

For the above reason, Respondent's motion for a protective order is DENIED.

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[6] The Protective Order prevents dissemination of the deposition once designed as confidential by a party, unless offered as evidence at the hearing. *See* Protective Order at 3.

There remains one issue that must be addressed. The actual videotaped deposition was never admitted the hearing. In Complainant's efforts to comply with the Tribunal's request, counsel appears to have provided the videotaped version of the deposition. As that form of the deposition was never admitted, the Tribunal will not view the videotaped deposition and will return the thumb drive to Complainant's counsel. However, the Tribunal continues to request that a copy of the deposition testimony of Mr. Graham, Mr. Dickson, and Mr. Bastian be provided the Tribunal in .pdf format.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey