

OSHA ORDERS REINSTATEMENT AND BACK PAY IN TWO “AIR21” WHISTLEBLOWER CASES AGAINST AIR CARRIERS

Occupational Safety & Health Act Alert
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Section 11(c) of the Occupational Safety and Health Act affords protection to employees from being discriminated against or retaliated against for engaging in protected activities, such as making complaints to their employers about workplace safety or reporting perceived safety violations to OSHA. OSHA also administers and enforces similar whistleblower provisions contained in twenty-one other federal statutes. Generally speaking, employers who violate any of these various whistleblower statutes may be required to expunge wrongfully imposed discipline or reinstate terminated employees, and the employer can also be held liable to the employee for applicable damages, such as back pay and lost benefits. In appropriate cases, and where authorized by statute, employees may also be awarded attorneys’ fees, compensatory damages, punitive damages, or other non-monetary relief fitting to the circumstances.

One of the other twenty-one federal whistleblower statutes administered by OSHA is the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, more commonly referred to as “AIR21.” AIR21 prohibits air carriers from discriminating against air carrier industry employees who report information relating to air carrier safety either to their employer or the Federal Aviation Administration (FAA) based on a reasonable belief that a particular policy, circumstance, or event constitutes a violation of FAA regulations or federal law. While the FAA will investigate the air carrier safety issues identified in complaints made to it, OSHA is charged with the responsibility of investigating any job-related allegations of discrimination that may follow from the reporting. On December 1, 2015, OSHA and the FAA entered into a Memorandum of Understanding to share information about safety complaints and whistleblower investigations under AIR21, which helps ensure that both agencies have notice of matters that fall within their respective jurisdictions.

In March 2018, OSHA issued news releases indicating it had handed down two significant AIR21 preliminary orders which directed reinstatements of a pilot and a flight attendant who were terminated after reporting safety concerns. The first case involved a pilot who initially expressed concern about a new flight scheduling policy implemented by Respondents, Jet Logistics Inc. (JLI) and New England Life Flight

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Inc., d/b/a Boston MedFlight (BMF), a non-profit 501(c)(3) organization that provides critical care medical transportation through contracted air services with JLI. The policy was designed to ensure 24/7 flight coverage for BMF. The pilot believed the policy did not afford pilots the required amount of FAA-mandated rest time, and sent several emails to JLI and BMF setting forth his concerns. After being met with resistance, the pilot requested an opinion from the FAA. While awaiting that opinion, he declined two flight assignments for insufficient rest time, after which he was terminated. He promptly filed an AIR21 whistleblower complaint. Two months later, the FAA determined that the pilot’s allegations about the scheduling policy were substantiated and advised it would be taking enforcement action. OSHA’s investigation determined that the pilot had engaged in protected activity and there was reasonable cause to believe a violation of AIR 21 occurred. OSHA preliminarily ordered his reinstatement and expungement of the discharge, with an award of \$133,616.09 in back pay and interest, \$100,000 in compensatory damages for pain and suffering, and attorneys’ fees.

The second case involved a situation spawned by a JetBlue passenger who made a remark about alcohol use and the flight crew having just left the bar. Although the passenger was interviewed and stated she was joking, a flight attendant expressed discomfort with how the matter was handled. After obtaining approval from the captain to contact a supervisor, she exited to the jet bridge, out of earshot of other passengers, and made the call. In the meantime, other passengers had become aware of the situation and were becoming frightened and upset, and some were discussing alcohol use and making their own accusations. Without a solution from the supervisor, the complainant, a second flight attendant, and the captain decided to request a sobriety test for the crew. The process took two hours and they all passed. The complainant was subsequently terminated for leaving the plane and making the call from the jet bridge in violation of FAA regulations, and for allegedly lying during the investigation. OSHA determined that reasonable cause existed to believe a violation of AIR21 had occurred, even noting that while the flight captain thought all three flight attendants should be commended and requested complainant not be disciplined, JetBlue “viewed all facts in the least favorable way toward Complainant.” OSHA preliminarily ordered JetBlue to reinstate her, clear her personnel file, and pay the flight attendant an award of \$68,783.23 for back pay and bonuses, interest, and medical and job search expenses, an award of attorneys’ fees, plus an additional \$75,000 for pain and suffering.

While the air carriers have the right to file objections and appeal these preliminary determinations through formal hearing pursuant to 29 C.F.R. § 1979.106, the two cases are significant in several respects. There are few publicly reported whistleblower cases involving AIR21, which was adopted in 2000. The case law is thus sparse and undeveloped, and publicly available details about specific AIR21 complaints are typically quite limited. OSHA itself hasn’t issued a news release about an AIR21 case in nearly five years, and the March 2018 announcements are the first issued during this Presidential Administration. This may be a signal about the agency’s direction regarding air carrier safety, or whistleblower claims generally. Whistleblower claims very much turn on the facts and circumstances of individual cases. But, the facts highlighted by OSHA in these and older AIR21 news releases seem to reflect a continuing pattern of protecting airline crews in situations where a reasonable judgment call is being made that relates to the safety of equipment, compliance with FAA regulations, or crew qualifications. Indeed, such employees may be best positioned in certain circumstances to recognize a potential safety deficiency and initiate immediate actions intended to protect themselves, their co-workers, the general public, and the airline industry at large.