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# COMMITTEE NEWS

## Aviation and Space Law

## Mayday, Mayday! Minimizing air carriers' exposure by protecting their whistleblowers – lessons gleaned from AIR21

### A. The Cost of Not Protecting Whistleblowers

The price of not creating a safe environment to foster, fully investigate, and tend to air carrier-related whistleblower input, can be staggering. Take, for example, the lives and money lost in connection with the Boeing 737 Max 8. On October 29, 2018, one such aircraft plummeted into the Java Sea in Indonesia. All 189 people onboard died. Less than 5 months later on March 10, 2019 in Ethiopia, another Boeing 737 Max 8 aircraft crashed. All 157 people onboard died bringing the total number of fatalities in the two crashes to 346.

The Boeing 737 Max aircraft have been grounded since these accidents, and Boeing's woes don't end there. Multiple airlines are suing Boeing for their lost use of the aircraft. According to *Business Traveler*, in settling one such suit alone, that

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brought against Boeing by Southwest Airlines, Boeing paid $125 million. *The Hill* reported that Boeing also settled with American Airlines for a confidential sum.

According to the *Associated Press*, on or about July 8, 2019, Boeing lost a contract valued at up to $5.9 billion. Flyadeal, an arm of Saudi Arabian Airlines, cancelled an order valued at that price for Boeing 737 Max 8 aircrafts. The company took its business elsewhere, purchasing its entire fleet from one of Boeing's rivals.

In July 2019, *The New York Times* reported that as of that time, Boeing advised that the charges related to the grounding of the 737 Max aircraft would soon reach $8 billion. *The Wall Street Journal* reported in December 2019, that Boeing announced it would suspend production of the 737 MAX jetliner in January 2020. *The Wall Street Journal* cited Luke Tilley, the Chief Economist at Wilmington Trust, as estimating that Boeing's one-quarter aircraft production hold would by itself lower the United States quarterly annualized GDP growth by .3%. According to the same article, General Electric said it expects the jetliner's grounding to drain up to $1.4 billion from its cash flow this year, and that's still not all. There are also multiple Congressional investigations concerning the 737 Max fleet including one into how the FAA reportedly permitted Boeing to partly certify the aircraft.

There are also lawsuits by the families of the victims of these tragedies.

According to a news report in *Ars Technica*, whistleblowers had raised issues with the FAA (Federal Aviation Administration) safety inspection process for the Boeing 737 Max aircraft *before* the crashes. In fact, FAA leadership was informed of their concerns as far back as August of 2018, two months before the first crash. *CNN Politics* reported that after the first crash, a government analysis found the jets were at a significant risk of crashing in the future, but the FAA still did not ground the planes until after the second crash.

## B. AIR21, the Federal Law Protecting Whistleblowers in the Airline Industry

We don't know what might have happened if the whistleblowers' concerns had been fully investigated, but it's possible the accidents could have been prevented. That is why AIR21 – the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West) – was enacted, to protect whistleblowers and save lives in the airline industry.

AIR21 protects whistleblowers by prohibiting air carriers, and their contractors and subcontractors, from firing or otherwise discriminating against them for raising a

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complaint about violations (actual or alleged) regarding air carrier safety. Specifically, AIR21 provides that:

> "No air carrier or contractor or subcontractor of an air carrier may discharge … or otherwise discriminate against an employee [because that employee told his or her employer or the federal government] information relating to any violation or alleged violation of … of Federal law relating to air carrier safety …."

Under AIR21, if an air carrier employee claims a FAA law, order, or regulation was broken, the air carrier cannot fire, demote, or otherwise discriminate against the whistleblower.

***1. The Damages Available to Whistleblowers under AIR21***

An employee who is nevertheless retaliated against for such whistleblowing may file a complaint within 90 days with the Department of Labor Occupational Safety and Health Administration (OSHA). In such an action, the whistleblower may potentially recover, among other remedies:

a. attorneys' fees and costs;
b. back pay;
c. reinstatement or front pay; and
d. compensatory damages.

***a. Attorneys' fees and costs***

From the filing of the whistleblower's complaint to a final decision, OSHA proceedings can take over 10 years and that is before potential appeals to federal court. The whistleblower's attorneys' fees and costs alone over such a time period can be very high.

***b. Back pay***

The amount of back pay to which a whistleblower may be entitled can be sizeable, too. The whistleblower may need years to obtain new employment, and/or the new job may pay less. In either case, the air carrier or its contractor or subcontractor-employer may be liable for the difference in the monies the fired whistleblower would have made, absent termination.

The amount of recoverable back pay runs from the date of termination to the date of a judgment. As noted, that time period can be over 10 years. During that time, the former employer can ask in discovery how long the whistleblower was unemployed and what salary and benefits he or she got at the new job.

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Normally, an economist provides an expert opinion on the amount of back pay owed. In running the calculations, the economist can factor-in all raises, bonuses, and benefits the whistleblower could reasonably have expected to make on the job, had he or she not been fired.

The amount awarded can be over a million dollars. In 2012, OSHA ordered AirTran Airways to pay a pilot more than $1 million in back wages and interest. According to OSHA's news release, its investigation found reasonable cause to believe that the pilot's termination was in retaliation for his reporting of mechanical malfunctions to the airline.

### *c. Front pay*

An air carrier and its contractors and subcontractors' exposure for front pay can be even greater than that for back pay. *Hagman v. Washington Mutual Bank*, 2006 DOLSOX LEXIS 130, (Dec. 19, 2006) dealt with front pay compensation. Front pay is available where reinstatement is not appropriate or possible, such as where the respondent-employer harbors such hostility toward the whistleblower, the work environment would be dysfunctional.

Front pay is typically awarded for the amount of time it will take the complainant-whistleblower to reach the salary and benefits he or she would have received, had he or she not been unlawfully terminated. *Id.* Front pay is compensation for the employee's loss of future earnings and earning capacity until such time as the employee can reach the compensation level the air carrier would have paid.

Here again, an economist normally provides an expert opinion concerning the amount of monies owed. The calculations will depend on how much the whistleblower is earning at the time of trial and how long it is expected it will take the whistleblower's work-related compensation to rise to the level the whistleblower would have been making had there been no firing. Depending on those factors, the claimed front pay damages can be in the millions of dollars.

### *d. Compensatory damages*

The whistleblower may also be entitled to compensatory damages. These damages are awarded to compensate for emotional pain and suffering (referred to in AIR21 matters as emotional and mental distress) and for out-of-pocket losses sustained from the termination.

Emotional distress damages tend to not be quite as large as the other recoverable damages. To establish emotional distress damages, the whistleblower testifies to the emotional pain and suffering their termination caused them. They can also call their mental health care provider to provide expert testimony about the emotional

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and mental toll their termination took on them. Afterwards, the whistleblower will argue for the amount of emotional distress damages they seek by analogizing to the written AIR21 opinions they claim are most factually similar to theirs and distinguishing other cases.

A case brought under the Surface Transportation Assistance Act (STAA) containing similar language for recovering compensatory damages as AIR21, *Bishop v. United Parcel Service*, 2013-STA-00004 (November 15, 2013), offers insight into the amount of emotional distress damages that may be available. The complainant in *Bishop* was awarded $100,000 in compensatory damages after testifying that the loss of his job led him to feel embarrassed, depressed, lose hobbies, depend on his family members for financial support, lose health insurance, and to have to face more onerous work requirements in his new job. While this is one of the larger compensatory damages awards for emotional distress, a whistleblower who suffered greater emotional distress could argue entitlement to a larger recovery.

As noted, the whistleblower may also claim compensatory damages for out-of-pocket costs sustained from the termination. Those can be large as well.

On top of that, a prevailing whistleblower is entitled to interest on all the above categories of damages and may also be entitled, among other remedies, to an order requiring the air carrier to refrain from terminating or discriminating against other whistleblowers.

A whistleblower may also claim additional protections – and additional damages – against a former employer under other statutes and the common law, and may assert claims for such damages in separate venues, outside of OSHA. Thus, air carriers and their vendors can wind up fighting a whistleblower's lawsuits in multiple venues, and at the same time.

## C. Having a Plan in Place to Protect Whistleblowers

As is apparent, the potential liabilities of not having a plan in place to protect whistleblowers cannot be overstated. To minimize exposure to AIR21 claims, air carriers and their contractors and subcontractors should retain counsel experienced in AIR21 litigation to ensure that their hiring, promotions, and disciplinary actions are in accordance with the law and defensible in administrative and legal proceedings.

Before firing a whistleblower, air carriers should reasonably investigate – and thoughtfully consider – their complaints with such counsel. Doing so may save lives, the company's reputation, and millions of dollars. The investigations should be prompt – starting soon after the complaints are made – and well documented,

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to prevent tragedies and assist the employer should the whistleblower pursue an AIR21 action against it.

Prior to terminating a whistleblower, air carriers should turn to such counsel to take a critical look at why the employee is being fired. The attorney should assess whether the firing is in fact being done for an appropriate, legitimate, defensible reason, or due to the employee's complaints about alleged air safety issues. Counsel should evaluate whether there is sufficient documentation to support the termination. This will require an analysis of not only the employee's personnel file but the employer's personnel policies and procedures.

Air carriers and their contractors and subcontractors should also make sure that their supervisors and managers are given training about AIR21 and clear, written instructions reviewed by their attorney. The policies and training should emphasize that no one may retaliate against an employee for making air safety complaints and underscore the very serious consequences that will befall the company – and them – should they not follow those policies.

The message should be loud and clear that rather than retaliating against whistleblowers, supervisors and managers should foster a safe and welcome environment for employees to offer what may be life and company-saving input about their air safety concerns. Supervisors and managers should also be given training and clearly established, written procedures approved by counsel, on how to properly respond in the event of a whistleblower complaint.

These procedures should include a process for monitoring and reviewing terminations with counsel to make sure employees are not being fired for blowing the whistle on air safety problems. Exit interviews should be conducted, checking why each employee thinks he or she is being fired and whether there were air safety complaints made that may have led to the termination. These exit interviews should be meticulously documented with remedial procedures in place to address situations where counsel advises that, in fact, retaliation may have occurred.

To prevent such a problem from occurring, there should be a process for employees to confidentially report suspected air safety problems without fear of retribution.

Also, counsel should carefully review prior terminations. One of the best weapons whistleblowers may get in discovery is proof that an employer had a pattern of retaliating against those who reported air safety problems. Employers with a track record of firing whistleblowers should request that their counsel assist them in minimizing their exposure moving forward.

Should a whistleblower – or a number of whistleblowers – file a lawsuit under AIR21, air carriers and their contractors and subcontractors should seek counsel who are experienced in AIR21 and related whistleblower litigation, to defend them. Such attorneys are in the best position to navigate the laws' complexities and minimize their exposure to such claims.

## D. Conclusion

Air carriers and their vendors should make sure they have a comprehensive set of practices and procedures in place to ensure that: (1) whistleblower complaints are thoroughly investigated, and (2) whistleblowers are protected from retaliation. Experienced AIR21 practitioners can assist them. The costs of not doing so are too great to ignore.