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2022 Aviation Private Roundtable

# The Aviation Industry And Whistleblowers In Turbulent Times

# Presented By



**Morgan Campbell**  
**Partner, Fox Rothschild LLP**

[mcampbell@foxrothschild.com](mailto:mcampbell@foxrothschild.com)  
703.248.7003



# What's at Stake?

- Press/media coverage
- Public image/reputation
- Employee trust
- Relationships with stockholders/stakeholders
- Damages often not insured

# Scope Of The Protection

- Protects employees who report activity they reasonably believe constitutes a violation of law or regulation
- These laws are intended to rid workplace of illegal and corrupt activity by making each employee their own “Attorney General”

# Laws Affecting Aviation Industry

- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)
- Other federal statutes
- State laws

# AIR21 - Who is an Employee?

- Present or former employee of air carrier or its contractor or subcontractor
- Job applicants
- Anyone whose employment could be affected by an air carrier or contractor or subcontractor

# AIR21 – Watchdogs are Covered

- Authorized users of VDRP systems
- Internal auditors
- Safety Department employees
- Checkairman
- DERs
- QA/QC Employees
- Accountable managers

# Who is an Air Carrier – Citizenship Test

- Citizen of the US undertaking by any means, directly or indirectly, to provide air transportation, includes:
  - Individual citizens
  - Partnerships where each partner is a US citizen
  - Corporations or associations organized under US law
    - President and 2/3+ of BOD and other managing officers are U.S. citizens
    - U.S. citizens exercise actual control
    - At least 75% of voting interests are owned or controlled by persons who are US citizens

# Who is a Contractor or Subcontractor?

- Contractor is a company that performs safety sensitive functions by contract for an air carrier, such as:
  - Repair stations, manufacturers, drug testing labs, training centers
- No citizenship requirement
- Cannot be an individual
- Subs not defined; logically anyone performing safety sensitive functions of a contractor

# Safety Sensitive Functions

- Not defined
- Per the Drug and Alcohol testing regulations, covers:
  - Flight crewmember duties / flight attendant duties
  - Flight instructor duties / dispatcher duties
  - Mechanic duties / inspector duties
  - Security duties / screening duties
  - ATC duties / operational control duties
- Broader in AIR21 context (i.e. manufacturing, drug testing, training providers)

# Covered Air Transportation

- Foreign air transportation
- Interstate air transportation
  - Transportation of passengers or property as a common carrier for compensation, or transport of mail between
    - A state, territory, or possession of U.S. and a place in D.C. or another state, territory, or possession of U.S.
    - Special rules for D.C. / Hawaii / territories / possessions
- Transportation of mail by aircraft

# What is a Common Carrier?

- Must look to FAA guidance and case law
- A service that holds itself out as willing to transport persons or property from place to place for compensation
- Airlines, charter operators, cargo carriers, mail carriers

# What is an Indirect Carrier?

- Indirect air carrier means an entity that holds itself out as providing air transportation to public by:
  - Using the services of a direct air carrier for air transportation
  - Provides services that are integral to the ability of a direct air carrier to provide air transportation
- Hospitals, package delivery services such as tracking services and data management

# AIR21 – Elements of Claim

- Protected activities
- Adverse action
- Nexus

# AIR21 – Protected Activities

- Disclosing violation of airline safety regulations to supervisor, union, or government agency. 49 USC § 42121(a)(1)
- Commencing a proceeding related to violation of airline safety regulations. 49 USC § 42121(a)(2)
- Testifying, assisting or participating in a proceeding related to the violation of an airline safety regulation. 49 USC § 42121(a)(3)(4)
- Refusing to perform an assigned task
  - Good faith/reasonable belief that working conditions are unsafe
  - No adequate explanation from responsible person that the conditions are safe

# OSHA Press Release - March 2018

- OSHA preliminary order in WBPP case
- Pilot of med transport flights refused assignments, citing alleged insufficient rest time
- Pilot terminated
- 60 days later, FAA determined pilot was correct and pursued enforcement action
- OSHA awarded \$133,616.09 in back pay and interest, \$100,000 in compensatory damages, and attorneys' fees

# 49 USC § 42121(a)(1) – Lots to Unpack

“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 FAA or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.”

# 49 USC § 42121(a)(2)(3)(4)

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

# Protected Activity – Proof of Violation Not Needed

- Complainant need not show the complained of activity took place
- Complainant need not show an actual violation
- Concern about potential violation only has to be reasonable
- Good faith/reasonable person standard

# Protected Activities – Report Channels

- Internal safety complaints to management
- Safety complaints to FAA FSDO or FAA inspector
- Complaints to FAA Safety Hotline
- Complaints to TSA hotline
- Other complaints/reports ultimately relayed to decision makers

# Protected Activities – Examples

- Falsification of records
- Violations of flight and rest requirements
- Inadequate required training
- Improper manufacturing procedures or repairs
- Failure to comply with medical qual requirements
- Security breaches
- Defective parts
- PIC judgments (fatigue, turbulence, etc.)

# Continental Airlines v. Admin. Review Bd.

- Unpublished 2016 5th Circuit Decision
- Pilot learned of severe turbulence on prior flight leg flown by separate crew, and logged it and requested inspection
- Pilot was suspected without pay for 21 flight hours, suffered mental health injuries
- Pilot prevailed with ARB and awarded front pay for duration of mental health treatment
- Pilot action appropriate because PIC has the authority to decide if plane safe to operate

# AIR21 – Adverse Actions

- Discharge
- Demotion
- Reprimand
- Harassment / hostile work environment
- Failure to promote
- Transfer
- Denial of overtime / scheduling changes
- An action that might dissuade a reasonable employee from engaging in AIR21-protected activity

# Causal Link between Protected Activity and Adverse Action

- Whistleblower only needs to show that whistleblowing was a contributing factor in the adverse action taken
- Direct or circumstantial

# Circumstantial Evidence

- Temporal proximity
- Falsity of employer's explanation for adverse action taken
- Inconsistent application of an employer's policies
- Employer's shifting explanations for its actions
- Animus or antagonism toward protected activity
- Change in employer's attitude toward whistleblower after protected activity

# Causal Connection Between Report and Adverse Action

- Easy to identify termination, suspension, demotion, lost promotion
- Other adverse employment action regarding terms/conditions of employment???
  - Exclusion or shunning? Nobody talks to employee except for work purposes?
- Not easy to identify “causal connection”
- Supervisor complained to and supervisor who terminates – may be different people
  1. Time sequence between “protected activity” and adverse employment action—often is crucial!
  2. Perception issue
  3. Pretext – other reasons given by employer for termination seem/are suspect

# AIR21 – Employer Knowledge

- The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity
- Can be a person who just provided input to the decision; does not have to be a decision-maker
- In small companies or work groups, knowledge can be attributed to the employer

# No Causal Nexus – *Murray v. Alaska Airlines*

- 2006 Case (2008 appeal denied 9th Cir.) regarding 2004 firing of QA Auditor following closure of Oakland facility
- 2003 raised safety concerns to FAA that weren't addressed
- Filed complaint under WBPP
- DOL dismissed because no causal nexus
- Plaintiff files suit in state court instead of objecting
- No preemption, but collateral estoppel applies

# *In re UAL*, 2008 WL 450457 (Bankr. N.D. Ill. 2008)

- 14 year A/C mechanic fired for 100+ tardiness instances
- Extensive company/union grievance hearings and record
- Lost because could not show that an employee of UAL with authority to take adverse action, or an employee with heavy or substantial input in that decision, had knowledge of the protected activity
- Safety complaints were part of mechanic's job and were addressed

# AIR21 – Remedies

- Reinstatement with previous seniority and benefits
- Back pay for lost wages with interest
- Front pay if reinstatement not feasible
- Compensatory damages (emotional distress, loss of reputation)
- Abatement/injunction
- Attorneys' fees, costs and expert witness fees
- Job hunting expenses
- Neutral reference

# OSHA Process

- Whistleblower must file with OSHA within 90 days of adverse action
- Potential for DOL IG to become involved
- Often OSHA investigates retaliation claim before FAA involvement
- OSHA will inform FAA of any allegations of safety violations
- OSHA required to issue findings in all cases, can order preliminary reinstatement

# OSHA Process

- Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the FAA of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2) (regarding investigation)

# AIR21 – FAA and OSHA Roles

- Per MOU with FAA, FAA investigates complaints relating to air safety
- OSHA investigates elements of the whistleblower claim

# FAA Process – “Whistleblower Protection Program (WBPP)”

- Requires disclosure of complainant; no one is anonymous
- Complainant’s name withheld during investigation
- Post-investigation, all WBPP info is subject to FOIA
- Flight Standards (AFS) investigates WBPP per FAA Order 8900.1, Volume 11, Chapter 3

# How AFS Conducts Investigation

- Interviews complainant
- Interview corroborating witnesses; obtain documents
- Review company manuals
- Take any needed enforcement or corrective action
- If unable to substantiate allegations, close the matter without action
- FAA findings do not necessarily impact how OSHA will decide the case

# AFS Report

- Summarizes investigative process
- Explains results
- Specifies enforcement taken or not taken

# OSHA – Investigator Will Look For

- Did respondent follow its own progressive disciplinary procedures?
- Did complainant's productivity, attitude or actions change after the protected activity?
- Did respondent discipline other employees for the same infraction and to the same degree?

# OSHA – What Complainant Must Show

1. Employee engaged in AIR21 protected activity
2. The respondent knew or suspected that the employee engaged in AIR21 protected activity
3. The employee suffered an adverse action
4. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action

If so, OSHA asks for position statement from respondent and investigates

If not, OSHA dismisses and advises complainant of right to request a hearing before ALJ

# If Prima Facie Case Shown, Burden Shifts

- Employer needs to prove by clear and convincing evidence that it would have taken the same action in the absence of the protected activity
  - Reorganizations
  - Mass layoffs
  - Poor performance
  - Misconduct

# OSHA – Basis for Merit Findings

- Merit Finding
  - Reasonable cause to believe protected activity was a contributing factor in the adverse action
  - Adverse Action is “any factor which tends to affect in any way the outcome of the decision”
  - So even if primary factor was incompetence, tardiness, etc., OSHA might issue a merit finding

# OSHA – After the Merit Finding

- In discharge cases, Assistant Secretary must order immediate, preliminary reinstatement
- Can object to OSHA prelim orders within 30 days (stays all relief except reinstatement)
- Objections heard de novo before DOL ALJ in full hearing on the record with discovery permitted
- If don't object, findings become final and not subject to court review
- If hearing occurs, review of ALJ decision can be sought from Administrative Review Board. If ARB declines to review, can appeal to U.S. court of appeals within 60 days

# WBPP Preemption – Majority View

- *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003)
  - A/C inspector told Airtran maintenance manager that engine overheated and needed to undergo detailed inspection
  - Instead, manager conducted high powered runs with alleged unqualified techs
  - Engine overheated on next flight and taken out of service
  - A/C inspector told FAA of regulatory violation and filed union grievance
  - One week later, accused of falsifying time card
  - Florida whistleblower action not preempted

# WBPP Preemption – Branche Case

- Claim did not relate to transport of passengers or any bargained for element of airline services
- Employment standards fall within state police power
- Safety is not a basis of airline competition
- The likely consequence of reporting the unauthorized high powered run is an investigation, not grounding
- Refusal to allow a takeoff would present closer question

# What Is Not Prohibited Retaliation?

- Retaliation does not include every offensive utterance, slight, or social ostracism by co-workers
- Personnel actions generally applicable to many employees, such as a reorganization
- Routine changes in work duties or schedules are not retaliatory if employer can show that they are consistently applied to all employees. **NOTE: Always have and be ready to demonstrate an objective, business based reason for the action**
- **Note:** The severity of an action's ultimate impact (such as loss of pay or status) goes to the issue of damages, not liability

# Advice For the Real World

A decorative graphic in the bottom right corner consisting of several overlapping, semi-transparent circles and a large arrow pointing towards the right. The circles are arranged in a way that they appear to be part of a larger, abstract design.

# What Employers Can Do

- All supervisors must take **all** “complaints” seriously
- Maintain clear system for receiving and processing complaints
- Investigate **all** complaints if possible and advise employee of the results of the investigation – no violation
- Document performance issues promptly and routinely
- Use anonymous reporting systems

# Preventing Retaliation: Recognize Warning Signs

- Sudden realization that the employee has a history of bad performance
- Sudden implementation of new performance standards
- Sudden urge to monitor the employee more closely/carefully
- Sudden recognition that the employee *is not a team player or has a “bad attitude”*
- Sudden need for employee with different job qualifications
- Sudden need to reorganize the department and layoff that person
- Other purported reason for a “layoff” of complaining worker

# Best Practices for Avoiding Retaliation

- **Review** and update your policies
- **Train** managers
- **Limit disclosure** of complainant's identity to those who need to know
- **Discuss** non-retaliation policy during investigations
  - Remind accused and accuser of non-retaliation policy
  - Discuss how to handle perceived retaliation
  - Document your discussions
- **Follow up** after investigations
  - Set schedule to follow up with complainant, nip problems in bud, create record of non-retaliation

# Prudent Employer and Human Resource Practices

- ***Scrutinize reviews and disciplinary action*** carefully after a complaint has been made
  - Review performance record: be suspicious of new problems or criticism that follow a complaint
  - Can criticism be substantiated?
  - Does the punishment fit the crime?
  - How does review/discipline compare with supervisor's treatment of similarly situated employees?
  - If possible, involve neutral evaluator with no knowledge of complaint
- Be ***very careful*** about changing **anything** after an employee files a complaint
- ***BUT don't be afraid*** of making legitimate and necessary changes that can be justified

# Homework – Items for Review

- Your safety reporting systems
- Your HR reporting systems
- Are these systems working during the pandemic?
- Your audit schedule
- Record-keeping
- Who is in charge of monitoring compliance

# Thank You

If you have any questions, please contact:



**Morgan Campbell**  
**Partner, Fox Rothschild LLP**

[mcampbell@foxrothschild.com](mailto:mcampbell@foxrothschild.com)  
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