

ORDER: 8400.10 and 8300.10

APPENDIX: 4

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for Air Transportation (FSAT) and
Airworthiness (FSAW)

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BULLETIN TITLE: Whistleblower Protection Program

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 THIS BULLETIN REQUIRES PTRS INPUT. SEE ITEM #5.

1. PURPOSE. This bulletin provides guidance and information to aviation safety inspectors (ASI) about the new Whistleblower Protection Program that provides protection against discrimination for employees of an air carrier, or contractor or subcontractor of an air carrier, who report air safety information to the employer or the Federal Government.

2. BACKGROUND.

A. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, signed into law on April 5, 2000, 49 USC Section 42121, provides for the protection of employees that provide, caused to be provided, or are 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 Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety or any other law of the United States; or 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.

B. Prior to the enactment of this law, airline employees who reported safety violations were not protected from discrimination by the Department of Labor (DOL).

C. Currently, FAA Order 2150.3, Compliance and Enforcement Program, chapter 13, paragraph 1302, contains FAA policy and procedures on providing immunity from enforcement action, in some cases, to persons who provide information about violations. In relation to enforcement matters, information regarding regulatory violations occasionally is offered to an FAA inspector or attorney along with a request that, in exchange for the information, the person making the offer be granted "immunity from prosecution" for his participation in the violations. The phrase "immunity from prosecution" ordinarily refers only to criminal matters. The individual usually is seeking an assurance that limited or no FAA civil enforcement action will be taken against him for admitted violations in exchange for information concerning violations by his employer or other members of the aviation community. The term "special enforcement consideration" (SEC) is used in this Bulletin instead of the term "immunity from FAA civil enforcement action" and covers mitigation of sanction as well as a determination that no enforcement action is warranted.

D. To be eligible for Whistleblower Protection under the program, an airline employee must file a complaint with DOL within 90 days of the date of the alleged discrimination.

3. DISCUSSION.

A. 49 USC Section 42121 provides protection against employer discrimination for employees who provide safety information. See the Appendix, which contains Section 519 of Public Law 106-181, The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.

B. This law also provides for civil penalties to be assessed against persons that violate the new whistleblower protection provisions (49 USC Section 46301).

C. Additionally, paragraph (b)(3)(c) contains a frivolous complaint provision. If the Secretary of Labor finds that a complaint filed under paragraph 42121 B(1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to

the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

D. FAA and DOL are developing new whistleblower regulations and coordination procedures. In the interim, any whistleblower questions should be addressed to Gene Kirkendall, AFS-200, at (202) 267-7701.

4. ACTION.

A. An employee of an air carrier, contractor, or subcontractor may contact an FAA inspector with information regarding a violation or an alleged violation of an FAA order, regulation, or standard, or any other provision of Federal law relating to air carrier safety. The employee may also request whistleblower protection by DOL. In order for inspectors to adequately investigate these safety concerns and be knowledgeable of the whistleblower protection program, the inspector should:

(1) Review this bulletin to become familiar with the new Whistleblower Protection Program.

(2) Review Order 2150.3, paragraph 1302, for information about immunity and SEC.

(3) Review the Appendix, Whistleblower Protection Program, 49 USC section 42121.

B. Questions regarding the Whistleblower Protection Program should be directed to Gene Kirkendall, AFS-200, or James Tegtmeier, AGC-300.

C. A whistleblower complaint investigation should be opened when a complaint is received by FAA HQ from DOL, reported directly to the FAA, or received by the FAA from any other federal source. Complaints that FAA HQ receives from DOL will be assigned a tracking number and then forwarded to the appropriate regional office for investigation. Regional offices will forward the complaint to the appropriate FSDO to initiate the investigation. FAA personnel that receive potential whistleblower complaints directly from the employee or other federal source should notify AFS-200 to initiate coordination procedures with DOL and receive a tracking number. Inspectors should use the PTRS codes specified in paragraph 5 below.

5. PROGRAM TRACKING AND REPORTING SUBSYSTEM (PTRS) INPUT. For all activities associated with the Whistleblower Protection Program, Operations and Cabin Safety Inspectors should enter the PTRS code 1737, maintenance inspectors should enter the PTRS code 3740, and Avionics inspectors should enter the PTRS code 5740. All whistleblower complaints will be assigned a tracking number to be entered in the National Use Field. In the Misc. Data field, enter WHISTLE. When the complaint is closed out, enter the results of the investigation in the

comments section and use the assigned tracking number in the National Use Field on all associated PTRS actions (e.g., EIR's).

6. INQUIRIES. This bulletin was developed by AFS-200 and coordinated with the Office of the Assistant Chief Counsel, Enforcement Division, AGC-300. Inquiries should be directed to Gene Kirkendall, AFS-200, at (202) 267-7701.

7. EXPIRATION. This bulletin will expire one year from its effective date.

/s/
L. Nicholas Lacey
Director, Flight Standards Service

Attachment

Appendix

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

PUBLIC LAW 106-181 – APRIL 5, 2000

SEC. 519. PROTECTION OF EMPLOYEES PROVIDING AIR SAFETY INFORMATION.

(a) GENERAL RULE- Chapter 421 is amended by adding at the end the following:

‘SUBCHAPTER III--WHISTLEBLOWER PROTECTION PROGRAM

‘Sec. 42121. Protection of employees providing air safety information

‘(a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES- No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

‘(1) 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 Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

‘(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 Federal Aviation Administration 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.

‘(b) DEPARTMENT OF LABOR COMPLAINT PROCEDURE-

‘(1) FILING AND NOTIFICATION- A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. 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 Federal Aviation Administration 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).

‘(2) INVESTIGATION; PRELIMINARY ORDER-

‘(A) IN GENERAL- Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

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`(B) REQUIREMENTS-

`(i) REQUIRED SHOWING BY COMPLAINANT- The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

`(ii) SHOWING BY EMPLOYER- Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted 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.

`(iii) CRITERIA FOR DETERMINATION BY SECRETARY- The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

`(iv) PROHIBITION- Relief may not be ordered under subparagraph (A) 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.

`(3) FINAL ORDER-

`(A) DEADLINE FOR ISSUANCE; SETTLEMENT AGREEMENTS- Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

`(B) REMEDY- If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--

`(i) take affirmative action to abate the violation;

`(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

`(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

`(C) FRIVOLOUS COMPLAINTS- If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000.

`(4) REVIEW -

`(A) APPEAL TO COURT OF APPEALS- Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

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`(B) LIMITATION ON COLLATERAL ATTACK- An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

`(5) ENFORCEMENT OF ORDER BY SECRETARY OF LABOR- Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

`(6) ENFORCEMENT OF ORDER BY PARTIES-

`(A) COMMENCEMENT OF ACTION- A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

`(B) ATTORNEY FEES- The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

`(c) MANDAMUS- Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

`(d) NONAPPLICABILITY TO DELIBERATE VIOLATIONS- Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.

`(e) CONTRACTOR DEFINED- In this section, the term `contractor' means a company that performs safety-sensitive functions by contract for an air carrier.'

(b) CONFORMING AMENDMENT- The analysis for chapter 421 is amended by adding at the end the following:

`SUBCHAPTER III--WHISTLEBLOWER PROTECTION PROGRAM

`42121. Protection of employees providing air safety information.'

(c) CIVIL PENALTY- Section 46301(a)(1)(A) is amended by striking `subchapter II of chapter 421' and inserting `subchapter II or III of chapter 421'.