§ 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 [49 USCS §§ 40101 et seq.] 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 [49 USCS §§ 40101 et seq.] 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 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.

(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 [5 USCS §§ 701 et seq.]. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(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 [49 USCS §§ 40101 et seq.] 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.

History:

(Added April 5, 2000, P.L. 106-181, Title V, § 519(a), 114 Stat. 145.)

History; Ancillary Laws and Directives:
Other provisions

**Applicability of section.** This section applies only to fiscal years beginning after Sept. 30, 1999, pursuant to § 3 of Act April 5, 2000, P.L. 106-181, which appears as 49 USCS § 106 note.

**Notes:**

**Code of Federal Regulations:**

Office of the Secretary, Department of Transportation (Aviation Proceedings)--Rules of conduct in DOT proceedings under this chapter, 14 CFR Part 300.

**Research Guide:**

Federal Procedure:


Am Jur:

82 Am Jur 2d, Wrongful Discharge § 118.
69 Am Jur 2d, Securities Regulation--Federal § 466.

Texts:

4A Environmental Law Practice Guide (Matthew Bender), ch 28A, Workplace Safety and Health § 28A.01.

Law Review Articles:


**Interpretive Notes and Decisions:**

1. Relationship to state law
2. Prima facie case
3. Administrative review
4. Bankruptcy automatic stay
5. Miscellaneous
1. Relationship to state law

Pursuant to 49 USCS § 41713(b)(1), which expressly provides for preemption, and 49 USCS § 42121, which provides for whistleblower protection program, claim under state whistleblower statute by flight attendant, who alleged that she was discharged in retaliation for refusing assignment due to safety violations, was preempted. Botz v Omni Air Int'l (2002, CA8 Minn) 286 F3d 488, 18 BNA IER Cas 811 (criticized in Gary v Air Group, Inc. (2005, CA3 NJ) 397 F3d 183, 22 BNA IER Cas 542, 150 CCH LC P 59959).

As aviation inspector's claim for violation of state Whistleblower Act, Fla. Stat. Ann. § 448.102, was not preempted by Airline Deregulation Act, 49 USCS § 41713, which was limited in scope to airline services, district court's grant of summary judgment in favor of airline was vacated. Branch v Airtran Airways, Inc. (2003, CA11 Fla) 342 F3d 1248, 20 BNA IER Cas 454, 16 FLW Fed C 1028, reh, en banc, den (2003, CA11) 85 Fed Appx 194 and cert den (2004) 540 US 1182, 158 L Ed 2d 86, 124 S Ct 1422, 20 BNA IER Cas 1664.

Where employee's state law retaliatory discharge claim was not preempted by Airline Deregulation Act (ADA), 49 USCS § 41713, Whistleblower Protection Program (WPP), 49 USCS § 42121, did not alter preemption analysis under ADA in any meaningful way, because WPP was silent on issue of preemption. Gary v Air Group, Inc. (2005, CA3 NJ) 397 F3d 183, 22 BNA IER Cas 542.


Where employee notified Federal Aviation Administration of potential safety violations conducted by his employer, and where employer closed employee's department, outsourced employee's job, and did not rehire him, Secretary of Labor conducted investigation and found that employee's actions were protected whistleblower activity and employer engaged in adverse employment action; appellate court certified question of whether issue-preclusive should have been given to Secretary's findings when subsequent administrative process provided employee option of formal adjudicatory hearing to determine contested issues de novo, as well as subsequent judicial review of that determination, but employee elected not to invoke his right to that additional process. Murray v Alaska Airlines, Inc. (2008, CA9) 522 F3d 920, 27 BNA IER Cas 744.

2. Prima facie case

Employer violated Section 519 of Wendell H. Ford Investment and Reform Act for 21st Century when it suspended, transferred, and terminated employee, pilot, who had complained to FAA and employer that employer failed to determine weight aboard planes before flying; evidence showed that employer admittedly knew of
employee's complaints prior to making subject employment decisions and constructively discharged employee by transferring him and them failing to provide him assistance in reaching his new work assignment each morning. Vieques Air Link, Inc. v United States DOL (2006, CA1) 437 F3d 102.

Summary judgment was granted in favor of former employer in former employee's action under Sarbanes-Oxley Act, 18 USCS §§ 1514A et seq., against employer after employee was terminated from his position as buyer; employee was not able to show by preponderance of evidence that his protected activity was contributing factor in termination as was required of employee under burden of proof standard set forth in 49 USCS § 42121(b)(2)(B)(iii). Sussberg v K-Mart Holding Corp. (2006, ED Mich) 463 F Supp 2d 704, 25 BNA IER Cas 449, 88 CCH EPD P 42614.

Reporting alleged violations of mail or wire fraud by other employees did not have to relate to shareholder fraud under 18 USCS § 1514A(a)(1), and because genuine issues of fact existed on whether plaintiff Hispanic former employees would have been fired in absence of their reporting of such activity, defendant former employer was denied summary judgment on employee's retaliation claims. Reyna v ConAgra Foods, Inc. (2007, MD Ga) 506 F Supp 2d 1363.

Complainant under statute, which protects airline employees providing air safety information, must prove that he is employee covered under statute, that he engaged in activity protected by statute, and that air carrier or contractor or subcontractor of air carrier subjected him to unfavorable personnel action because he engaged in protected activity; requirement that protected activity must have contributed to respondent's decision to take unfavorable action assumes that respondent knew about complainant's protected activity. Peck v Safe Air International, Inc. d/b/a Island Express (2004) ARB Case No. 02-028, 2004 DOL Ad Rev Bd LEXIS 10.

To prevail, complainant must prove by preponderance of evidence that he engaged in activity that statute protects, that respondent subjected him to unfavorable personnel action, and that protected activity was contributing factor in unfavorable personnel action; requirement that protected activity must have contributed to respondent's decision to take unfavorable action assumes that respondent knew about complainant's protected activity. Lebo v Piedmont-Hawthorne (2005) ARB Case No. 04-020, 2005 DOL Ad Rev Bd LEXIS 92.

Unpublished Opinions

Unpublished: Administrative Review Board of Department of Labor properly dismissed employee's complaint under § 806 of Corporate and Criminal Fraud Accountability Act of 2002, 18 USCS § 1514A, because there was no protected activity established in that her employer did not express intent to change stock rating given by employee and employee never expressed belief that change would violate securities law; thus, employee failed to establish prima facie case under 49 USCS § 42121. Getman v Admin. Review Bd., United States DOL (2008, CA5) 2008 US App LEXIS 3126.

3. Administrative review

Since court found that employee's Fla. Stat. ch. 448.102(1) claim was preempted by 49 USCS § 41713(b)(1) and employee admitted that he had not filed timely

Where terminated employee filed complaint with Secretary of Labor under \texttt{18 USCS § 1514A} and Secretary failed to issue notice required by \texttt{18 USCS § 1514A(b)(2)} and \texttt{49 USCS § 42121(b)(1)} and did not investigate or issue written findings within 60 days of receipt, as required by \texttt{18 USCS § 1514A(b)(2)} and \texttt{49 USCS § 42121(b)(2)(A)}, fact that Secretary did not act as if she had received complaint was insufficient to rebut presumption that she received complaint. Murray \textit{v} TXU Corp. (2003, ND Tex) 279 F Supp 2d 799.

Although procedures for making claims under \texttt{49 USCS § 42121}, part of Whistleblower Protection Act, were not mandatory, once employee elected to initiate administrative complaint and had obtained final decision from Secretary of Labor, employee was then obligated to exhaust available administrative remedies, and thus, employee's pre-termination whistleblower claims were barred; employee could not collaterally attack adverse ruling from Secretary by filing new civil action in district court. Fadaie \textit{v} Alaska Airlines, Inc. (2003, WD Wash) 293 F Supp 2d 1210, 174 BNA LRRM 2139.

Where Department of Labor (DOL) issued preliminary findings on former employee's Sarbanes-Oxley Act administrative complaint 199 days after complaint was filed and 13 days after employee had notified DOL of intent to file suit in district court, employee was not required to appeal DOL's findings to administrative law judge under \texttt{49 USCS § 42121(b)(2)(A)} before filing suit; plain language of \texttt{18 USCS § 1514A(b)(1)(B)} allows plaintiff to bring whistleblower complaint in district court where Department of Labor has not issued final decision within 180 days of filing of administrative complaint. Hanna \textit{v} WCI Cmtys., Inc. (2004, SD Fla) 348 F Supp 2d 1322.


Authority of Secretary to review ALJ's decision under \texttt{49 USCS § 42121(b)(3)} has been delegated to Administrative Review Board. Lebo \textit{v} Piedmont-Hawthorne (2005) ARB Case No. 04-020, 2005 DOL Ad Rev Bd LEXIS 92.


Administrative Review Board reviews ALJ's recommended grant of summary decision de novo, and same standard that ALJ applies in initially evaluating motion for summary decision governs Board's review. Ferguson \textit{v} Boeing Company (2005) ARB Case No. 04-084.

\textbf{Unpublished Opinions}

Unpublished: Where pilot's petition for review of administrative law judge's (ALJ) decision was untimely because it was not received by Administrative Review Board
within 15 days of date of ALJ's decision, as required under 29 C.F.R. § 1979.110(a), pilot failed to establish existence of "extraordinary circumstances" to support equitable tolling of limitations period based upon delivery company's alleged to deliver petition in timely manner. Herchak v United States DOL (2005, CA9) 125 Fed Appx 102.

4. Bankruptcy automatic stay

Where employee is sole prosecuting party in case brought under whistleblower protection of 49 USCS § 42121, and OSHA takes no role in proceedings other than as investigator of employee's initial complaint, case is subject to bankruptcy automatic stay and is not exempt from such stay pursuant to 11 USCS § 362(b)(4), which applies to actions and proceedings by governmental unit to enforce its police and regulatory authority. Davis, et al. v United Airlines, Inc., et al. (2003) ARB Case Nos. 02-105, 02-088, 03-037 and 02-054, 2003 DOL Ad Rev Bd LEXIS 37.

Bankruptcy Code's automatic stay provision, 11 USCS § 362(a)(1), applies to cases that are litigated by private parties arising under 49 USCS § 42121. Merritt v Allegheny Airlines, Inc. (2005) ARB Case No. 05-084, 2005 DOL Ad Rev Bd LEXIS 85.

5. Miscellaneous

Where employee filed administrative complaint under Wendell H. Ford Aviation Investment and Reform Act for 21st Century (AIR21) because employee's state law wrongful discharge claim was completely preempted by AIR21, employee was entitled to equitable tolling because complete preemption of state claim established complete identity of claims; completely preempted state law claim became federal claim. Turgeau v Admin. Review Bd. (2006, CA10) 446 F3d 1052, 24 BNA IER Cas 818.

Court vacated preliminary injunction to enforce order of reinstatement issued by plaintiff Secretary of Labor upon finding that employee's firing violated 18 USCS § 1514A, as § 1514A conferred no judicial enforcement power over preliminary orders of reinstatement; none of provisions of § 1514A authorizing judicial enforcement reference 49 USCS § 42121(b)(2)(A), under which Secretary of Labor issues preliminary orders (nor, in absence of such specific reference, could any of potentially relevant statutory text be read reasonably as conferring federal judicial power to enforce orders that were preliminary). Bechtel v Competitive Techs., Inc. (2006, CA2 Conn) 448 F3d 469, 24 BNA IER Cas 641, 87 CCH EPD P 42342.


Petitioner former employees' claim under § 806 of Sarbanes Oxley Act, 18 USCS § 1514A, against intervenor employer, under which legal burdens of proof of 49 USCS § 42121(b) applied, failed because employer did not intentionally cause computer problem as to calculating interest, did not conceal it, and attempted to correct it, thus, reasonable person could conclude that there was no violation of federal law as to fraud against shareholders and order of respondent United States Department of
Labor's Administrative Review Board that affirmed administrative law judge's
decision dismissing employees' whistleblower complaint was affirmed. Allen v Admin.

In former employee's action that was brought pursuant to 18 USCS § 1514A, there
was no preliminary order of reinstatement for court to enforce because, inter alia, at
point it became clear that ALJ order was preliminary order of reinstatement, former
employer had already appealed ALJ decision, and when employer filed petition for
appeal, it was not clear that employer actually had been ordered to reinstate
employee because ALJ's supplemental recommended decision and order (SRDO)
merely recommended reinstatement; therefore, employer had insufficient notice that
it should have moved to stay order because language only recommended that
Secretary of Labor enter order granting proposed relief. Welch v Cardinal Bankshares

Where plaintiff petitioned district court for enforcement of order of reinstatement
issued by Administrative Law Judge (ALJ), court found that because ALJ's order was
preliminary order, statutory grants of jurisdiction in 49 USCS § 42121(b)(5)-(6)
failed to grant jurisdiction to it; further, due to jurisdiction-conferring nature of 49
USCS § 42121, inconsistent agency interpretations, including 29 CFR § 1980.113,
cannot inform court's interpretation of statute; lack of authority of district court to
immediately enforce preliminary orders of reinstatement while appeal was pending
before administrative review board ensured that appeals went through all levels of
administrative process before reaching federal court; thus, plaintiff's petition to
enforce order of reinstatement was denied. Welch v Cardinal Bankshares Corp.

Former employee's claim that his termination by former employer was unlawful
retaliation for engaging in protected whistleblowing activities, in violation of
Sarbanes-Oxley Act, 18 USCS § 1514A, failed because, even assuming employee
established prima facie retaliation case under 49 USCS § 42121(b)(2)(B)(i), (1)
undisputed facts clearly and convincingly reflected that employer would have
terminated employee for reasons unrelated to his alleged protected activity, to wit,
for employee's admitted disdain for, and deliberate disregard of, employer's policies
and procedures, (2) employee himself admitted that hiring of temporary employee
without appropriate and required authorization from employer's human resources
department created appearance of conflict of interest, and violated company policy,
(3) employee's actions in this regard constituted "cause" to fire employee within
meaning of his employment contract, which provided further support for idea that
employee would have been terminated regardless of allegedly protected activity, and
(4) there was no evidence in record that employer's stated reasons for firing
employee were pretextual. JDS Uniphase Corp. v Jennings (2007, ED Va) 473 F Supp
2d 705.

Because, pursuant to 49 USCS § 42121, order from action filed under Title VIII of
Sarbanes-Oxley Act of 2002 (SOX), 18 USCS § 1514A, cannot be collaterally
attacked, discharged employee's discrimination claims filed in district court after key
factual matter was resolved in administrative proceeding under SOX, was subject to
collateral estoppel. Tice v Bristol-Myers Squibb Co. (2007, WD Pa) 515 F Supp 2d
580, 101 BNA FEP Cas 1079, 90, 90 CCH EPD P 42961.

Ninety-day limitation period for filing complaint (49 USCS § 42121(b)) is not
jurisdictional and may, therefore, be subject to equitable tolling; however, because
Congress, not courts or administrative agency, was entrusted with responsibility to determine statutory time limitations, restrictions on equitable tolling must be scrupulously observed. Ferguson v Boeing Company (2005) ARB Case No. 04-084.

Wendall H. Ford Aviation Investment and Reform Act for 21st Century is not retroactive to cover adverse actions that occurred before its effective date. Brune v Horizon Air Industries, Inc. (2006) ARB Case No. 04-037.

Continuing violation theory is not applicable to cases brought under Wendall H. Ford Aviation Investment and Reform Act for 21st Century. Brune v Horizon Air Industries, Inc. (2006) ARB Case No. 04-037.

Continuing violation doctrine does not apply in whistleblower cases brought under 49 USCS § 42121. Sassman v United Airlines and Alliant Credit Union (2007) ARB Case No. 05-077.

Proper standard for determining whether whistleblower complaint states claim is that set out in Fed. R. Civ. P. 12(b)(6); under this standard, although complaint does not need detailed factual allegations, it still must provide factual allegations that indicate grounds for complaint. Powers v Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (2007) ARB Case No. 04-111.

Warning letter to employee does not constitute adverse action for purposes of 49 USCS § 42121. Simpson v United Parcel Service (2008) ARB Case No. 06-065.

Unpublished Opinions

Unpublished: Finding that airline employee's complaint under whistleblower protection program in 49 USCS § 42121 was untimely as it was filed more than 90 days after he received disciplinary advisory--even though it was not filed more than 90 days after his termination--was upheld as neither agency's statutory interpretation nor its application were erroneous pursuant to review under 5 USCS § 706(2)(A); clear line of authority recognized distinction between discriminatory action and subsequent consequences or effects of such action, and consistency of agency's approach bespoke permissible construction of limitations provision. Rollins v Admin. Review Bd. (2008, CA10) 2008 US App LEXIS 7260.

Unpublished: Employee did not seek damages for delay in his reinstatement, and employee should not have been allowed to interject request for such relief at late date just to circumvent mootness of case since employee's new claim was plainly late and there were good reasons not to excuse deficiency since governing statute, 49 USCS § 42121 did not even appear to authorize such claim; therefore, district court's refusal to enforce preliminary reinstatement order was affirmed. Rollins v Am. Airlines (2008, CA10 Okla) 2008 US App LEXIS 11463.