

# Blowing the Whistle



By Kent S. Jackson  
kjackson@jetlaw.com

## Lessons learned after 10 years

Nearly 10 years ago, Congress created the “Whistle-blower Protection Program” for “airline employees.” The law applies to “air carriers” so it covers FAR Parts 121 and 135 but not pilots flying under Part 91. The law prohibits “discrimination” by an air carrier against an employee with respect to compensation, terms, conditions or privileges of employment because the employee:

(1) Provided, or is about to provide (with any knowledge of the employer) 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 or any other law of the United States;

(2) Has filed, or is about to file (with any knowledge of the employer) 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 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.

Now that the program has some history, what have we learned? Has it contributed to the safety of air carrier operations? Is it fair to both labor and management? Like beauty, safety and fairness cannot always be measured objectively.

The best way to answer these philosophical questions is to look at the cases. Here is a good example: In 2004, the Department of Labor (the agency that adjudicates these whistle-blower cases) ruled in favor of a pilot who was fired for questioning a change in his aircraft’s max gross weight. The pilot called the dispatcher to question an increase in the maximum gross weight of the aircraft he was to fly from 105,000 to 108,000 pounds. The pilot was referred to a captain who assured the pilot that he was confident that the increase was correct and in compliance with FAA regulations. The pilot requested that appropriate written documentation be faxed to him, but the captain directed the pilot to fly the aircraft. The pilot refused and the captain directed him to report to the company’s offices the next day to turn in his manuals and identification.

The administrative law judge in this case commented on the need for this whistle-blower program, because the Pilot Records Improvement Act can have a negative effect on safety. Traditionally, a pilot facing the dilemma of reporting irregularities or antagonizing management could resign or accept termination rather than comply with pressure to overlook dangerous conditions. Before 1996, a pilot who

resigned or was terminated in these circumstances could apply to another air carrier and give his own explanation for the previous job separation or loss. The Pilot Record Improvement Act of 1996 (PRIA) complicates the pilot’s situation, because PRIA requires air carriers to report the records of former employees to prospective airline employers. The DOL judge stated that “An unfavorable entry in the employment record, especially one that an air carrier terminated the pilot for ‘unsatisfactory performance,’ becomes permanent and public, with little meaningful opportunity for explanation, and potentially ruinous consequences for honest and competent pilots.”

But there are also cases that show the darker side of whistle-blower protection. Someone who was truly fired for cause can claim that they were fired for being a whistle-blower, and the company will have to go through the time and expense of the case. For example, a pilot who flunked a psychological examination claimed that he was being punished because he had written a letter to the FAA complaining that the company had failed to remove the checked luggage of two passengers who had been detained for currency violations. Unfortunately for the pilot’s case, he also decided to copy Osama bin Laden “in absentia” with a “continuation” of the letter. Because of this, and other strange events, the pilot was taken out of service and placed on paid status pending the results of a psychological evaluation. Eventually the pilot was placed on long-term sick leave. The judge and the review board agreed with the company that the “whistle-blower” letter about the baggage removal violation was not the reason for the company’s decision to send the pilot for psychological evaluation, it was the fact that the pilot felt the need to tell Osama bin Laden about the issue.

Although management and labor may not be able to agree on the overall effectiveness of the whistle-blower program, they can agree on one indisputable consequence: more paperwork.

If a company failed to promote a pilot *solely* because he did not “interview well,” then virtually any prior whistle-blowing by the pilot could make for a good case. Companies need to have clear written standards, point systems and multiple interviewers in order to show an objective basis for all employee-related decisions.

Whistle-blower protection does enhance safety. The real price of this safety is the burden of documenting that a pilot’s career is not harmed or ended if the pilot takes a stand to prevent a violation. But companies do need to be reminded that the pilot who refuses a flight for the right reasons is an asset that needs protection. ■

To read a digest of pilot  
whistleblower cases, go to:  
[www.oalj.dol.gov/PUBLIC/  
WHISTLEBLOWER/REFERENCES/  
REFERENCE\\_WORKS/AIR21.HTM](http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/AIR21.HTM)