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# **The Flying Whistleblower: It's Time For Federal Statutory Protection For Aviation Industry Workers**

*Peter R. Marksteiner\**

## **I. Overview**

“Thirty years ago virtually no legal protections existed for whistleblowers. Today the majority of states have created legal protection for whistleblowers either by statute or by judicial decision, and numerous federal statutes contain whistleblower protections as well.”<sup>1</sup> Most employees currently enjoy some form of whistleblower protection. Not employees in the aviation industry. Over one hundred members of Congress proposed legislation creating federal aviation whistleblower protection. Will the Aviation Safety Protection Act be a long overdue measure which furthers the causes of public safety and worker protection, or is it rather a knee jerk political response to a widely held, but factually unfounded opinion that air travel without the benefit of such legislation is unacceptably dangerous?

Congress should enact whistleblower protection for aviation workers. Air travel without the benefit of statutory whistleblower protection for aviation workers is not by any empirical measure demonstrably risky. Neither are aviation workers completely unprotected from whistleblower retaliation. However, the aviation industry is changing dramatically, due in large part to the explosion in the regional and commuter carrier markets. That change has long since outstripped the ability of the Federal Aviation Administration (FAA) to monitor and enforce safety standards. The FAA has turned to the carriers themselves to monitor their own compliance with FAA standards under what is referred to as the “Safety Partnership” program. While the safety partnership program may be a workable solution to the problem of insufficient inspection and enforcement resources in the FAA, a safety partnership program (self-reporting and thereby self-correcting) will not be a reliable way to enforce safety standards unless workers—those people best situated to discover and report safety problems—believe they may report safety violations without threat of reprisal. Although some aviation workers do have whistleblower protection, that protection often depends on a number of complex legal variables too illusive to give would-be whistleblowers much comfort that they can report safety violations without paying for it on the job.

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1. DANIEL P. WESTMAN, *THE LAW OF RETALIATORY DISCHARGE* at vii (1991).

The FAA is the agency charged with monitoring and enforcing aviation industry safety standards. The dual role of the FAA is to promote air commerce, *and* to ensure the highest standards of safety in the airline industry.<sup>2</sup> When carrying out its rule-making function, the FAA must balance safety considerations against what is good for the industry, a practice which earns it regular criticism for bending to the political will of big business at the expense of safety.<sup>3</sup>

The FAA, like other government agencies with fixed budgets and limited resources, is subject to political influence. Proposals dealing with improving safety typically sound warning bells for politically influential aviation industry business leaders, who understand the sound of those bells to signal increased operating costs. The process of passing safety oriented legislation or imposing new safety rules is therefore usually very contentious politically. Traditionally, the aviation industry pleads its case by arguing that unnecessary or redundant safety measures will hurt profitability and therefore *not* promote domestic air commerce.<sup>4</sup> In its rule-making function, the FAA ends up balancing the competing interests of safety and airline profitability.<sup>5</sup>

The FAA may be the fox in the aviation safety hen house when performing its enforcement function. Scarce resources in the FAA led it to create the "Safety Partnership" program which, in short, describes a system whereby the FAA relies to a great extent on carriers voluntarily reporting their own safety violations in order to carry out

2. "The FAA's mission is to provide a safe, secure and efficient global aviation system." 63 Fed. Reg. 61205 (1998).

3. MARY SCHIAVO, *FLYING BLIND, FLYING SAFE 1997* [hereinafter SCHIAVO]. Following a nine-month grand jury investigation into Eastern Airlines' maintenance practices, the U.S. Attorney for New York wrote to the Attorney General of the United States:

This letter is to express my concern regarding the FAA's handling of this matter in particular and its ability to police the airline industry, in general. . . . FAA officials in Washington, for as yet unexplained reasons, inhibited and limited the scope of the . . . investigation . . . . [I]t was apparent that the FAA was unduly influenced by Eastern executives in this matter. . . . [I]t would appear that the regulatees were regulating the regulators! I fear that this relationship may not be unique to Eastern and am concerned generally about the effects of the influence the industry exerts on the FAA. *Id.* at 38.

*See also id.* at 49 (noting in 1985, the Honorable Norman Y. Mineta, chairman of the House Subcommittee on Aviation, blasted the industry for its safety complacency and accused it of "actively resisting and trying to thwart" simple improvements like lighting and fire extinguishers as "not being worth the cost.") *See*, Rod Usher et. al, *Flight or Fright? Passengers Can Now Lessen The Chances of Choosing Airplanes With a Bad Record, But Should They Have To?*, TIME INT'L, June 16, 1997; *Shoddy Carrier Practices and FAA Inaction Scored by Safety Board Sweeping Changes Can Be Expected*, AIR SAFETY WEEK, Aug. 25, 1997. *But see*, Don Phillips, *Students Find Flaws in Book on Air Safety*, WASH. POST, Jan. 27, 1998, at A-15.

4. SCHIAVO, *supra* note 3.

5. At its core, safety isn't cost-effective. Recommendations for changes in airline practices, for new equipment, for improved safety rules were evaluated not in terms of how many accidents they might prevent or lives they might save, but in terms of how many dollars they would cost the airlines, aircraft builders, parts manufacturers or fleet maintenance companies. When the National Transportation Safety Board first advised in 1991 that all planes should have black boxes with advanced recording technology, the FAA wanted to know how much it would cost the airlines in lost revenue while planes were pulled out of service for retrofitting. The FAA had the same response when the NTSB clamored for new fire safety measures—how much would it cost the carriers to buy and install fire and smoke detection systems for cargo holds? How much would it cost to recall all propeller blade models suspected of faulty cracks? To extend the de-icing boot on the wing of ATR planes? To require aircraft manufacturers to run actual tests of safety features on new planes? How much would it cost to require child safety seats, or smoke hoods for every passenger?

*Id.* at 48-49.

its enforcement function. In a perfect world, this sort of system might seem like something less than a wise way of doing business. But in the real world, where resources are allocated according to political pressure and public opinion, it may be the only politically acceptable alternative to the FAA director throwing up his or her hands and saying "we can't do the job." In any case, since the federal agency charged with enforcing aviation safety standards specifically relies on self-reporting, common sense dictates that the people who identify safety problems and report them, internally or to the FAA, should be able to do so without fear of being fired.

Public opinion shapes aviation safety standards with votes and with dollars. First, quite simply, the public votes. If the public believes airline safety standards need improving, and that passing whistleblower protection for airline workers is the way to improve safety, lawmakers respond by proposing measures like H.R. 915.<sup>6</sup> Second, if discretionary air travelers are either priced out or scared out of air travel in favor of alternate means of transportation, literally billions of dollars are lost to the airlines and their goods-purchasing employees.<sup>7</sup> Consequently, as public opinion translates into potentially huge losses for a major U.S. industry, lawmakers intervene, not unreasonably, to restore public confidence and stimulate business. Interestingly, politics and public opinion seem to have much greater influence over the regulation of aviation safety than do fact-based observations about the safety of air travel.

Actual empirical data does play a part in how aviation safety laws, rules and regulations are promulgated and enforced—albeit a small part. Proponents of laws like H.R. 915 could argue most convincingly the need for such a law if they had data supporting the notion that whistleblower protection for workers in the aviation industry would actually make air travel safer. The problem is, when confronted with the numbers, it is difficult for anyone to make a straight-faced argument that there is a safety crisis in commercial aviation. A person who boards a U.S. commercial air carrier enjoys odds better than eight million to one that he will survive the flight and arrive safely at his destination.<sup>8</sup> Since there is almost no evidence that the already minuscule risks posed by flying would be made even more remote if aviation workers had whistleblower protection, the remaining position is that aviation workers need whistleblower protection not as a matter of safety, but simply as a matter of fairness in the conditions of their employment. In the end analysis, whistleblower protection for aviation safety workers is required because of an inseparable mix of safety and worker protection concerns.

Dozens of federal and state statutes and a hodgepodge of common law doctrines provide whistleblower protection for workers in a number of different industries. Some statutes like the Occupational Safety and Health Act<sup>9</sup> provide broad whistleblower

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6. 105th Cong. (1996).

7. See David Field, *USAir Offers Protection to Whistleblowers*, WASH. TIMES, Mar. 18, 1995, available in 1995 WL 2558842.

8. *A Report on Issues Related to Public Interest in Aviation Safety Data*, Jan. 20, 1997, Office of System Safety, Federal Aviation Administration [hereinafter FAA Report]. While public concern about the safety of US commercial aviation is most acute immediately following an airline accident, it also seems to reflect the public's view of the aviation industry in general, and its view of FAA's stewardship of aviation safety. Whether or not those inside the industry believe that these concerns are justified given the high absolute levels of aviation safety, the public's concerns are real and are likely to have a large impact on the discourse about air safety.

9. 29 U.S.C. §§ 651-78 (1994).

protections for workers who report safety violations in a host of different industries. Other industry-specific statutes like the Federal Mine Safety & Health Act<sup>10</sup> provide whistleblower protection for workers in the specific industry covered by the statute.<sup>11</sup> In occupations where whistleblowing is unprotected by either state or federal statutes, common law exceptions to the Employment At Will Doctrine (EAWD) may afford whistleblowers some protection, depending on the jurisdiction where the claim is made.

There is a need for a federal aviation worker whistleblower protection statute. This Article addresses the following questions. What interest should such a law further? What information or data supports the conclusion that H.R. 915, or another law like it, will further that interest? Do any other laws already further that interest?

## II. Possible Reasons A Federal Statute May Be Required

Lawmakers uniformly recognize the need for some form of whistleblower protection for aviation workers. The White House Commission on Aviation Safety and Security ("The Gore Commission"),<sup>12</sup> whose charter specifically mandated that the commission conduct "a comprehensive study of the current state of, and measures to improve, civil aviation safety . . . with respect to both domestic and international aviation."<sup>13</sup> The Gore Commission recommended the enactment of the sort of whistleblower protection contemplated by H.R. 915, concluding:

*1.12. Legislation should be enacted to protect aviation industry employees who report safety or security violations.*

In a number of important industries, statutory protection is provided to "whistleblowers" who report violations of safety procedures. The Commission believes that aviation safety and security will be enhanced if employees, who are a critical link in safety and security, are able to report unsafe conditions to the FAA without fear of retribution from their employers. Some aviation employees are provided protections through contractual agreements. However, the Commission believes that statutory protection, such as that provided to workers under the Occupational Health and Safety Act, would provide uniformity within the industry and provide coverage to those not already protected.<sup>14</sup>

Congressman Clyburn, urging Congress to expedite passage of the Act in 1996, when it was originally proposed, said:

Mr. Speaker, I regret the crash of ValuJet flight 592 was the catalyst for renewed attention on airline safety. However, I hope that a productive dialog on the future safety of the aviation industry will result from this tragedy. For me, a similar tragedy brought home the need for greater air safety measures. July 4th weekend, 1994, a USAir flight that originated in my hometown, of Columbia, SC, crashed

10. 30 U.S.C. §§ 801-962 (1994).

11. 30 U.S.C. § 815 (1994).

12. Established by Exec. Order No. 13015, White House Commission on Aviation Safety and Security, 61 Fed. Reg. 43,937 (1996) (authority continued by Exec. Order No. 13062, Continuation of Certain Federal Advisory Committees, 62 Fed. Reg. 51,755 (1997)).

13. The White House Commission on Aviation Safety and Security Web Site (visited Jan. 25, 1999) <<http://www.aviationcommission.dot.gov/files/charter.html>>.

14. White House Commission on Aviation Safety and Security Final Report to President Clinton at Recommendation 1.12 (visited Jan. 25, 1999) <<http://www.aviationcommission.dot.gov/212fin-1.html>> [hereinafter Gore Commission Report] (emphasis added). See also *supra* note 7 (stating similar recommendation made during January 1995 airline industry aviation summit called by Transportation Secretary Pena).

just outside of Charlotte, NC. Several of my constituents were among the victims. That single event heightened my awareness of aviation safety concerns and prompted me to begin a search for solutions. That search led me to the first step of what I believe is the long journey to restoring public confidence in air travel—the enactment of the Aviation Safety Protection Act of 1996 . . . .<sup>15</sup>

Testifying before the House Transportation and Infrastructure Committee, Patricia Friend, President of the International Association of Flight Attendants, echoed the same argument, saying Americans "would be shocked to learn that flight attendants, pilots and mechanics today can be and are fired for reporting a safety violation. . . . [P]assage of this bill will help restore public confidence in our industry."<sup>16</sup>

Ms. Friend's testimony was not entirely accurate,<sup>17</sup> but the general tone of her and Congressman Clyburn's statements represent a constant theme running throughout almost every piece of printed material documenting the comments of the Act's advocates: public perception about the safety of air travel rather than a factually supportable assertion about the safety of air travel is the real driver behind this legislation.<sup>18</sup> That "perceived need versus actual need" distinction is important, especially if the evil sought to be remedied is a *perceived* safety problem rather than an *actual* safety problem. It is important because enactment of this law would create an entire governmental investigative and enforcement function within the Department of Labor,<sup>19</sup> along with all of the rules, regulations, and administrative support structure that accompany the creation of such a function. Legislation is not the only way—or arguably even the best way—to change public opinion or public perception. Public perception may be altered via a media campaign or the release of information, or some combination of other alternatives that are less costly—and certainly less irreversible—than passing a new law. A nonspecific aversion to the propagation of government bureaucracies is not by itself a justifiable reason to opt against statutory protection for aviation whistleblowers, although some come close to making that argument.<sup>20</sup> But lawmakers ought to add only

15. *The Aviation Safety Protection Act of 1996*, 142 CONG. REC. H5033-7, 5033 (1996).

16. *Aviation Safety Protection Act of 1996: Hearings on H.R. 3187 Before the Subcomm. on Aviation of the House Transportation and Infrastructure Comm.*, 104<sup>th</sup> Cong. (1996) [hereinafter Friend Testimony].

17. Her statement is accurate in that anyone can be fired for any reason. If, however, the reason is an unlawful one (such as racial or religious animus) the employee may get his job back as well as substantial monetary damages for the employer's unlawful conduct.

18. Congressman Clyburn, Ms. Friend, and most of the other commentators also make reference to the law being important as a means by which employees can be assured of protection when they report safety violations. See, e.g. *Aviation Safety Protection Act of 1996: Hearings on H.R. 3187 Before the Subcomm. on Aviation of the House Transportation and Infrastructure Comm.*, 104<sup>th</sup> Cong. (1996) (Lewis Jordan, President, Valujet Airlines Inc. stating that "to the extent that there is any perception in the airline industry or in the flying public that employees are punished for reporting safety concerns, this legislation serves the important goal of putting these concerns to rest.") [hereinafter Jordan testimony].

19. H.R. 915, 105th Cong. § 42121(b) (1996).

20. See *Whistleblower Bill Would Help FAA With Enforcement, Unions Say*, AVIATION DAILY, Jul. 15, 1996 at 71, available in 1996 WL 11113297. (reporting that the Air Transport Association argued that airline employees with safety-related functions "are already overwhelmingly unionized and therefore are protected by mandatory grievance and arbitration procedures." Even if an employee is unrepresented and not working under a contract, many states allow employees to bring wrongful employment termination lawsuits, said Robert Warren, ATA senior VP and general counsel. And formal complaints and enforcement proceedings might impede rather than encourage reporting of safety problems by introducing "an unhealthy rigidity," Warren told the panel). See also, *Fact Finding Report, Commission on the Future of Worker-Management Relations*, May 1994, Department of Labor & Department of Commerce,

sparingly and with good reason to the already existing body of "federal whistleblower protection statutes [which] have been criticized because of the variance in substantive protection, statutes of limitation, investigative agencies, and remedies."<sup>21</sup>

### A. Backdrop: The Politics of Safety

Regulators should beget more regulators and more regulations only when required to do so in order to meet a genuine public purpose or need. Doing otherwise constitutes a waste of resources that are becoming increasingly scarce. In the aviation safety world, there is often a disconnect between safety requirements identified by the technical experts in the various aviation specialties and the law or regulation that is ultimately put in place to address those requirements. Safety consultant Anthony J. Broderick argues the politicization of safety in aviation generally renders the rules and regulations ultimately enacted only moderately effective.<sup>22</sup> He makes a number of observations which the facts and circumstances surrounding the debate about the proposed Act bear out. First, he points out that whether public concern over aviation safety is well founded on empirical evidence or not, it tends to drive most legislative and regulatory changes in the area of aviation safety, a phenomenon he suggests is counterproductive.

If the public cares about it, so do politicians. If the public fears something, politicians search for quick ways to address those fears. People who propose quickly to address a public concern about an air crash stand a good chance of getting the publicity that is associated with wide coverage of the event. Thus, we have a formula for precisely the opposite of what makes technical sense. . . . There are so many who seek publicity that when more sensitive and sensible people take a prudent course of action, waiting to get the facts before reaching a conclusion, the media will turn elsewhere for comment.<sup>23</sup>

Second, Broderick argues that politics, rather than empirical studies, drive the end product of most safety initiatives coming out of the FAA. The FAA is the arm of the Department of Transportation whose expertise is air transportation. The paramount mission of the FAA is to ensure air safety. The FAA dedicates huge amounts of resources to perform that mission, including research specialists whose primary function it is to look for ways to make air travel safer. As those technical specialists identify needs, they propose solutions, and those proposed solutions make their way up the chain from laboratories to administrative offices, where, according to Broderick, they are often watered down so much that the end product may bear little resemblance to the technician's original, fact-based recommendation.

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at 135 (showing increase in employment law litigation from 1980 to 1993).

21. WESTMAN, *supra* note 1, at 75 (citing Fidell, *Federal Protection of Private Sector Health and Safety Whistleblowers*, 2 ADMIN. L.J. 84 (1988)). See also Susan Sauter, *The Employee Health and Safety Whistleblower Protection Act and the Conscientious Employee: The Potential For Federal Statutory Enforcement of the Public Policy Exception to Employment At Will*, 59 U. CIN. L. REV. 513, (1990) (arguing that litigation in the various fora demonstrates that varied standards between the different statutes lead to unpredictable and erratic results).

22. Anthony J. Broderick, *The Politics of Aviation Safety*, Address at Aviation Safety: Confronting the Future, a Joint Meeting of the Flight Safety Foundation and International Air Transport Association (Nov. 3-6, 1977) [hereinafter Broderick].

23. *Id.*

[The Office of the Secretary of Transportation] serves as a filter to the views of the Administrator, deciding whether or not they represent a politically acceptable position for him or her to take. The political acceptability of a technical position provided by a subordinate is, of course, a necessary fact of life. . . . Unfortunately, it only serves to bog down the decision-making process when, in addition to the President, the Administrator has to cater to the views of the Secretary, as interpreted by the OST staff who are not aviation safety specialists, and who may care more about how a given decision reflects on the Secretary in the press, than whether it advances air safety.

Broderick sternly cautions against making hasty decisions in the aftermath of an accident. Although Whistleblower protection for aviation workers is not a new idea,<sup>24</sup> its resurgence into the legislative machinery occurred in a fashion Broderick characterizes as usual; it followed closely on the heels of an aviation accident while emotions and political attention were running high.<sup>25</sup> Witnesses who testified before the subcommittee taking testimony on H.R. 915 made impassioned sweeping statements about the vulnerability of aviation employees who report safety violations<sup>26</sup> and argued that such a state of affairs was untenable from the safety perspective. In actuality, the facts were not quite so alarming when viewed dispassionately. While it may be true that some aviation employees fall into the zone of vulnerability Ms. Friend described, most do not. Rather, many aviation employees have whistleblower protection according to the just cause provisions in the Collective Bargaining Agreements governing the terms and conditions of their employment. Other protections may be available under state whistleblower protection laws or common law exceptions to the EAWD. The real question is, do these measures provide the amount and type of protection aviation workers need, or should Congress enact a law that will protect all aviation employees according to a single, clearly defined standard?

It is hard to determine whether whistleblower protections currently available under the Railway Labor Act (RLA) and other sources are adequate or whether a new whistleblower protection specifically tailored to air carriers is required unless Congress's objective is at least reasonably identified. The Act, as it has been proposed, has the potential of furthering one or more of the following objectives: remedying the public's perception that air travel is unsafe, actually making air travel more safe, and providing workers increased protection from unfair management practices. These objectives are not mutually exclusive, but neither do they dovetail so neatly that a law that is good for safety will also necessarily be good, unconditionally, for workers and vice versa.<sup>27</sup> The first step in examining the merits of the proposed legislation is to

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24. See Friend Testimony, *supra* note 16 (calling for enactment of federal whistleblower protection before the same subcommittee in 1988).

25. See 142 CONG. REC. H5033 (daily ed. May 14, 1996) (quoting the Hon. Clyburn: "Mr. Speaker, I regret the crash of ValuJet flight 592 was the catalyst for renewed attention on airline safety. However, I hope that a productive dialog on the future safety of the aviation industry will result from this tragedy. . . . In light of this American tragedy, I urge Congress to expedite approval of the Aviation Safety Protection Act, so that we can begin to rebuild the public's confidence in our aviation industry.") [hereinafter Clyburn].

26. See, e.g., Friend Testimony, *supra* note 16.

27. The divergence of interest between safety and worker protection is a frequently debated topic in aviation safety circles. For example, a new U.S. program designed to "collect and monitor digital flight data recorder (DFDR) information" would enable the FAA and other safety organizations to analyze data automatically transmitted from the black boxes aboard aircraft to collection centers, where



determine which objective it is intended to achieve.

### B. Remediating Public Perception About Safety

Passing a law in order to address a public perception about safety, rather than to correct an actual safety problem, *may* be a completely reasonable public purpose, because negative perceptions translate into mountains of dollars lost for the airline. In those terms, public perception for its own sake may be a sufficiently compelling legislative purpose because of the impact perception has on commerce. Whether or not the perception is well founded, “[n]othing can be more harmful to an airline in the marketplace than a perception that it is unsafe.”<sup>28</sup>

After the September 1994 crash of USAir Flight 432, following two other American Eagle turboprop crashes that same year, passenger bookings for USAir dipped by \$40 million.<sup>29</sup> According to the airline’s corporate safety officer, retired Air Force General Robert C. Oaks, USAir voluntarily adopted a whistleblower protection policy “in part to respond to media suggestions that the airline’s financial woes had led it to cut corners on safety or maintenance. The airline has lost more than \$2 billion since 1988.”<sup>30</sup> A comprehensive study prepared for the FAA confirmed how such a phenomenon (like the media suggestions described by General Oaks) could actually impact safety. Potential passengers who assume that a financially troubled carrier may be cutting corners elect to travel on that carrier’s competitors, motivating the carrier to cut where it believes it can do so, essentially contributing to what could become a sort of self-fulfilling prophecy.<sup>31</sup>

All in all, remediating perception may be a legitimate objective, but only a marginally compelling one, and it is not a sufficiently compelling reason to pass a new law like H.R. 915. The idea that Congress should pass H.R. 915 in order to address a public perception problem rests on the incorrect notion that perceptions about the safety of air travel will somehow impact the entire industry because people will simply choose not to fly at all, causing borderline carriers to cut safety corners to stay com-

the data can be analyzed to identify potential safety problems. The technology exists and is ready to be implemented.

A recent agreement among the . . . FAA, the U.S. airline industry and airline pilots calls for development of Flight Operations Quality Assurance (FOQA) programs. The programs, which are in widespread use by airlines based in Europe, are designed to use a wealth of DFDR parameters to monitor operations for unsafe or unauthorized practices and to allow airlines to implement corrective actions to prevent incidents and accidents.

*FSF Urges Creation of Neutral Forum For Information Collected in Expanded Flight Data Recorder Program*, Flight Safety Foundation, Release Date Mar. 6, 1995, 95-4.

What is unusual about the proposed program is that “[t]he FAA has agreed not to use data collected in the programs in enforcement actions against airlines or flight crews.” Although there is at least a plausible explanation for why information gathered via the DFDR program, should perhaps not be used against individual flight crews, there is certainly no principled reason for “guarantee[ing] the data will not be used in FAA enforcement actions. . . .” against an airline. Essentially, such an agreement immunizes an airline that consistently violates a rule or regulation, as determined by the analysis of DFDR data, from any enforcement repercussions.

28. Field, *supra* note 7 at A13 (quoting USAir Chairman and CEO, Seth Schofield).

29. *Id.*

30. *Id.* The Article did not specify what a “voluntarily adopted whistleblower protection policy” actually is. Presumably, it has something to do with language included in a CBA or some other indicia of permanence or enforceability. Otherwise, as it is a voluntary policy, there’s no sanction preventing the airline from declining to follow it.

31. See FAA Report *supra* note 8.

petitive and, in general, negatively impact commerce and the economy. First, air travel is incredibly safe, and by comparison to the alternatives, indispensably convenient. And although telecommuting over the internet and phone lines may eventually cut into the business traveler market, the time when such a practice is commonplace is at least several years down the road. Moreover, that eventuality is going to cut into the business traveler market anyway, regardless of how safe air travel is perceived to be because telecommuting is cheaper than flying, and if there's a cheaper alternative, businesses will use it. Second, to the extent that perceptions about air safety do discourage people from flying; they most likely do so only with respect to the specific airline perceived to operate unsafely. There is no mention in the coverage of H.R. 915 that the billions lost to USAir during the period described by General Oaks were lost to the entire industry, only to the airline the public thought was unsafe. Unless lots of airplanes start falling out of the sky, people will continue to fly. The suggestion that H.R. 915 is necessary to remedy public perception about the safety of air travel is unpersuasive and detracts from the real reason aviation whistleblower protection should be passed.

### **C. Actually Improving Safety**

#### *1. Numbers Say Air Travel Is Already Safe*

If proponents of the laws like H.R. 915 continue to argue that public perception requires enactment of H.R. 915 rather than presenting Congress with empirical evidence that its passage will correct safety flaws in the system, it is most likely they do so because the facts simply do not suggest alarm about the safety of air travel is called for at this juncture. According to a report prepared for the Federal Aviation Administration:

[T]he risk of death or serious injury for air travelers is exceedingly small . . . [the] risk fell dramatically between the 1970s and the 1980s, and has remained at these lower levels since then. For example, a passenger who randomly chose a U.S. domestic jet flight between 1967 and 1976 would have a one in two million chance of dying. This death risk fell to one in seven million in the decades 1977-1986 and 1987-1996. Using data from 1990 to present, the death risk falls to one in eight million. Stated somewhat differently, if a passenger facing a death risk of one in eight million chose one flight at random each day, he should, on average, go for 21,000 years before perishing in a fatal crash.<sup>32</sup>

One way to demonstrate that the protections the Act would create are genuinely required to make air travel safer would be to illustrate with anecdotal evidence how violations that went unreported in a past case would have actually been reported if the proposed Act were already law. Proponents of H.R. 915 have yet to do so, but probably with good reason. For starters, it is highly unlikely that anyone would ever step forward after a crash and say "I would have reported the unsafe condition that caused the crash if only . . ." By and large, people just do not voluntarily accept that type of responsibility and the social opprobrium that goes along with it. Aside from human nature, there is a systemic reason that firm anecdotal evidence is hard to come by. During the 1996 hearings, Susan Clayton argued that producing such evidence is difficult if not impossible<sup>33</sup> because the threat of whistleblower retaliation operates as an

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32. *Id.* at 8.

33. *Aviation Safety Protection Act of 1996: Hearings on H.R. 3187 Before the Subcomm. on Avi-*

“unwritten gag order.”<sup>34</sup> That same threat of reprisal preventing airline employees from reporting safety violations also prevents them from providing the type of evidence which would demonstrate a whistleblower protection law is necessary. Stated differently, “[t]he very fact that [airline employees] do not have whistleblower protection precludes the [supporters of the Act] from bringing these [employees] forward to share their stories . . . .”<sup>35</sup> Potential whistleblowers, she argues, will not provide testimonials about how the lack of whistleblower protection has affected them or the safe operations of their employers until they have whistleblower protection for doing so.<sup>36</sup> The argument is circular, but believable.

In place of the kind of hard evidence a lawmaker presumably would like to have when considering passing a law like H.R. 915, there are but a few reported cases on point and a handful of anecdotal accounts found in Congressional Hearing testimony<sup>37</sup> and in news reports<sup>38</sup> wherein people familiar with air carrier operations recounted

*ation of the House Transportation and Infrastructure Committee*, 104<sup>th</sup> Cong. (1996) (statement of Susan Clayton, Local Executive President of the Association of Flight Attendants for ValuJet Airlines) [hereinafter Clayton Testimony].

34. Note also that Ms. Clayton has been dismissed by other witnesses who testified before the subcommittee as the chicken little of the whistleblower protection crusade. See, e.g., *Aviation Safety Protection Act of 1996: Hearings on H.R. 3187 Before the Subcomm. on Aviation of the House Transportation and Infrastructure Comm.*, 104<sup>th</sup> Cong. (1996) (testimony of Joan Auch, Vice-President of Inflight Services ValuJet Airlines) [hereinafter Auch Testimony]. For example, Ms. Clayton has appeared on national television and claimed that ValuJet ordered flight attendants to return to work when their ears were bleeding. On *Nightline*, when asked about whether ValuJet flight attendants were concerned about safety, she responded:

Absolutely. I think safety comes in different forms. The way that ValuJet treats its employees is one of its safety concerns, because it's a direct reflection on how it maintains the aircraft. And, you know, when you see flight attendants coming in and they're so exhausted and they're sitting there begging to be released, and the supervisors are saying, 'No, you go back to work and you fly,' and you see flight attendants coming with blood coming out of their ears, asking to be released, and they're being told no, they have to go back to work. I would like the Members of the Subcommittee and the public to know that we investigated this allegation and found no report or complaint of my flight attendant ever being asked to fly when blood was coming out of his or her ears. We would never ask a flight attendant to fly . . . .

*Id.*

35. Friend Testimony, *supra* note 16.

36. *But see Aviation Safety: Weaknesses in Inspection and Enforcement Limit FAA in Identifying and Responding to Risks*, Government Accounting Office, Report Number: RCED-98-6, Feb. 27, 1998 (concluding that “[D]uring FY 1990 through FY 1996, FAA inspectors opened nearly 110,000 enforcement cases to follow up on reports of violations from their inspections and from noninspection sources finding 45 percent of the 110,000 enforcement cases were initiated as a result of inspections conducted by FAA . . . . FAA inspectors also followed up on reports of violations from outside sources, which accounted for 41 percent of the enforcement cases opened.”) (emphasis added).

The GAO Report finding could be read to rebut Mr. Friend's assertion that additional protections are required in order to free up airline employees to report violations. If 41% of the reported violations are coming from sources other than FAA inspectors—presumably airline employees—the “unwritten gag order” Ms. Clayton described during hearings on the bill may not shush airline employees to the extent she suggested.

37. See Friend Testimony, *supra* note 16.

38. See *The News* (MSNBC television broadcast, Jan. 22, 1977), available in 1997 WL 2782393. (broadcasting anchor Brian Williams reporting that “David Jordan says he was forced by a SabreTech supervisor to sign off on work that was never performed. [on an aircraft. He also called the FAA's safety hotline to report that he had been ordered to falsify those records.] Jordan was later fired . . . .”); Gil Klein, *Airlines Targeting Whistle-Blowers?*, RICHMOND TIMES-DISPATCH Jul. 14, 1996, available in 1996 WL 2304928 (reporting the case of Richard Bunch, who “says he was fired as a ValuJet flight attendant because he had reported a safety violation to the Federal Aviation Administration after the airline did nothing about it. He says a passenger was persuaded to hold a 5 year-old

events they had witnessed or heard about from others.<sup>39</sup> While the accounts are unsettling,<sup>40</sup> they are more hearsay and rumor rather than testimony about actual, verifiable incidents.<sup>41</sup>

## 2. Common Sense v. Statistical Evidence

From a lawmaker's perspective, stories like those told to the media and before congressional committees demand action. Although no one has been able to produce a witness to testify that "I would have reported the unsafe condition and averted the accident if I had only had whistleblower protection," common sense dictates that if the people who witnessed all of the alleged unsafe conditions (and FAA regulatory violations) felt free to report them without threat of reprisal, the violations would have been corrected. Further, the risks presented by the violations of FAA rules and regulations would have been eliminated. Empirical analysis, however, has yet to bear out that common sense conclusion, at least insofar as such analysis has been performed by the FAA.

In January 1997, the FAA commissioned a report to consider ways that safety information could be made available to the public without compromising safety.<sup>42</sup> This report concluded that no statistical evidence exists to support the argument that "safety indicators," like those reported in the news and before the congressional committee, are useful predictors of future accidents or mishaps. The authors reported:

Some have argued that it is possible to identify or compile 'safety indicators' that provide insights as to whether a carrier is more or less likely to undertake unsafe practices. Researchers . . . [focusing] on . . . pilot competence, maintenance quality, financial stability, [and] management attitude . . . concluded that there were no comparable and objective measures of relationships between airline safety and these four areas. [The study concluded equivocally] [t]he degree of compliance with FAA regulations *might be* an indicator of an airline's diligence in the safety arena.

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child during a flight to open a seat for an off-duty ValuJet pilot . . . . When he brought the incident to the attention of the company, he said he was told it didn't happen. So he called the FAA safety hotline. About a week later he was fired."); Macon Morehouse, *Whistleblower Shield: Aviation Workers Want Protection When They Report Trouble*, ATLANTA J. & ATLANTA CONST., June 3, 1996, available in 1996 WL 8213831, (reporting that "[f]light attendant Nancy Chagares says when she heard that a ValuJet plane, just deemed to be unairworthy by a pilot, had taken off with a new crew and passengers, she didn't hesitate to report it to her supervisors. For her effort, she says she was forced to resign. 'If you raise questions about anything, by God, they are going to get rid of you,' she says. . . . ValuJet flight attendant Anna Wooten said on ABC's *Nightline* last month that 'flight attendants are afraid to say anything.' When the reporter mentioned that she was still working for the airline, she replied, 'Probably won't be after this interview.'").

39. Cf. Friend Testimony, *supra* note 16, (stating that "[f]light attendants have witnessed equipment failures that were brushed aside when brought to the airline's attention. At some carriers, an aircraft will continue to be utilized even when its safety is compromised. For example, an aircraft flew a transatlantic charter flight with inoperative navigational equipment an another took off with emergency lighting not functioning. In addition to equipment failures, some airlines continue to encourage children over the age of two to be held on their parents' laps. In each of these incidents, airline management warned flight attendants not to report the incidents to the FAA."); See also *The News*, *supra* note 38; Klien, *supra* note 38; Morehouse, *supra* note 38.

40. Morehouse, *supra* note 38 (reporting Susan Clayton giving testimony about "a plane that flew from Washington to Tampa after an engine had been damaged when the plane had run off the runway. . . . a plane that had flown with a paintbrush stuck in one of the doors . . . a plane that flew when an attendant could see blue sky through an opening in a door that had not properly sealed.").

41. See Auch testimony, *supra* note 34 (Ms. Auch vigorously attacks Susan Clayton's credibility).

42. See FAA Report, *supra* note 8.

It must be noted, however, that there *may be no relationship* between inspection results and the probability that a carrier will have an accident in the future, especially if carrier operations improve as a result of FAA findings.<sup>43</sup>

The quoted passage makes two points. First, even if the stories about aircraft flying with inoperative equipment or about management's reluctance to follow safety regulations are true, no statistical evidence exists that the number or frequency of such incidents are reliable predictors of future accidents by a given carrier. It is noteworthy that the report does not categorically discount the correlation completely; rather it concludes that there *may be* no relationship between the indicators mentioned and future safety performance. Second, and more importantly for purposes of this article, the "no correlation" conclusion is based at least partially on the notion that once a carrier is put on notice of violations — once it gets caught — it will improve its operations as a result. This logic makes perfect sense in the abstract. Unfortunately, the FAA is too under-funded and too understaffed to "catch" most violations, and the FAA inspection and enforcement component is growing increasingly reliant on air carriers to self-report these sorts of violations. There is little incentive for airlines to self-report their own violations when the FAA is incapable of policing the industry. The report concluded that there is no positive correlation between these safety indicators and a carrier's future safety performance. This conclusion is flawed, however, because if aviation workers cannot report safety violations without fear of reprisal, they will not report these violations at all. Under these conditions, the self-reporting and self-correcting model will not work.<sup>44</sup>

### *3. Effective Enforcement of Worker Protection and Public Protection Laws Depends on the Cooperation of Front Line Employees*

Throughout the evolution of federal whistleblower protection laws, Congress has recognized the importance of maintaining open lines of communication between those closest to the operation of the businesses being regulated and those doing the regulating. One of the earliest whistleblower protections enacted was a provision included in the National Labor Relations Act specifically prohibiting employers from discriminating against employees who sought to exercise their rights under the Act.<sup>45</sup>

<sup>D</sup> The rationale for this provision [was] that the NLRB could not adequately enforce the NLRA if employers were allowed to discourage their employees from participating in NLRB proceedings. . . . [T]he NLRA recognized that employee participation in the enforcement proceedings of the NLRB was essential to implement the policies of the Act, and that discrimination by employers against employees who

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43. *Id.* at 4 (emphasis added).

44. Several commentators have argued that statutes intended to protect whistleblowers and to further the purposes of the underlying laws do neither effectively. See Thomas M. Devine & Donald G. Alpin, *Whistleblower Protection—The Gap Between the Law and Reality*, 31 *HOW. L.J.* 223 (1988); Terry Morehead Dworkin & Janet P. Near, *Whistleblower Statutes: Are They Working?* 25 *AM. BUS. L.J.* 241 (1987). Dworkin and Near, after considering several state whistleblower protection statutes, conclude "that whistleblowing statutes are not having the effects intended by the legislatures that passed them." *Id.* at 260. The authors note, for example, that whistleblowers were treated more favorably in states where only common law remedies, as opposed to statutory remedies, were available. *Id.* at 259. However, the authors cautioned that their conclusions were tentative ones, due to "the small number of cases available for analysis." *Id.* at 260.

45. National Labor Relations Act, ch. 372, 49 Stat. 449, sec. 8(4) (1935) (codified as amended at 29 U.S.C. sec. 158(a)(4) (1994)).

participate in NLRB proceedings must be prohibited so that such participation was not undermined.<sup>46</sup>

As the scope of government regulation expanded into other areas of business conduct, including civil rights, consumer protection, workplace safety, environmental pollution and public health, Congress has also enacted whistleblower protections in one form or another to enable employees to report violations without threat of reprisal, thereby assisting in the enforcement of these statutes.<sup>47</sup> Under all of the whistleblower protection schemes, people who report legal or regulatory violations to the agencies charged with enforcing those laws and regulations are protected from being retaliated against for making the reports. Similarly, in the aviation industry, the FAA recognizes that employee participation is essential to implement the FAA policy of insuring that air travel is as safe as possible for the traveling public. What is missing in the aviation industry is recognition that the FAA will not be adequately able to enforce its safety policy unless the workers upon whom the FAA relies are confident they can report violations without fear of reprisal.

Additionally, whistleblower protection laws assist regulatory agencies in identifying problems in the industries they regulate by insuring free and open communication. Some of the statutes containing whistleblower protections emphasize preserving the health, safety, welfare or rights of workers themselves, such as the Federal Mine Safety and Health Act<sup>48</sup>, and the Occupational Safety and Health Act<sup>49</sup>. Other statutes, such as the Safe Drinking Water Act<sup>50</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act<sup>51</sup>, protect, more generally, the public at large and have a secondary effect of protecting workers' employment rights. While both types of schemes are socially important, laws that benefit the public at large in addition to workers promise to have a more sweeping impact on the collective social good. As government resources become increasingly scarce, laws that do the most good for the most people should take priority over laws that benefit only certain groups. Whistleblower protection for aviation workers falls into the latter category.

#### *4. The FAA Relies on Workers to Voluntarily Report Information at the Risk of Unemployment*

What makes the current absence of clearly defined whistleblower protection in the aviation industry even more curious than suggested by Congressman Clyburn and Ms. Friend, is the extent to which the FAA relies on voluntary reporting to carry out the safety-oriented part of its mission.<sup>52</sup> "An important development in FAA's man-

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46. WESTMAN, *supra* note 1, at 6.

47. *Id.* at 7.

48. 30 U.S.C. § 801 *et seq.* (1994).

49. 29 U.S.C. § 651 *et seq.* (1994).

50. 42 U.S.C. § 300f *et seq.* (1994)

51. 42 U.S.C. § 9601 *et seq.* (1994); See also WESTMAN, *supra* note 1, at 188-97 for a comprehensive listing of the federal statutes protecting employees from retaliation for whistleblowing activity.

52. The Honorable John McHugh echoed this concern when he said:

In light of the recent disaster in Florida, it is essential that there are multiple checks and balances in the system for inspecting the safety of airplanes. The people who work on the airplanes have the access and expertise necessary for detecting problems before they become disasters . . . This legislation will enhance aviation safety by allowing information relating to violations to become more readily available to the appropriate regulatory agency.

agement of aviation safety efforts is the safety partnership program, which will allow FAA to leverage its finite inspector resources. . . . [as its] objectives shift from a reactive, learning approach, based on the analysis of past accidents, to a proactive, preventive approach devoted to identifying and remedying potential causes of future accidents."<sup>53</sup> The ability to gather non-accident information is critical for the FAA. According to Ms. Friend, aviation employees will begin to report much more of that type of information if whistleblower protection is enacted.<sup>54</sup>

The FAA relies on voluntary reporting by airline employees to compile and track much of the data it needs in order to perform its safety function.<sup>55</sup> A January 1997 Report prepared for the FAA's Office of System Safety specifically called attention to the importance of the FAA-carrier relationship, citing the "high degree of trust between the FAA and its *safety partners*"<sup>56</sup> necessary for the agency to be able to carry out its safety mission as "its resources [are] increasingly constrained [and] as the industry becomes more complex . . . ."<sup>57</sup> Compounding the FAA's shrinking resource problem is what Congressman Clyburn referred to as the explosion in smaller commuter lines.<sup>58</sup> "Due to the growing competitiveness among airlines, the number of aircraft of all sizes that have entered the market is growing exponentially."<sup>59</sup> The sheer volume and diversity of new carriers and new airframes entering the market is overwhelming the FAA's already threadbare inspection and enforcement resources.<sup>60</sup> The

*Rep. McHugh Favors Legislation to Provide Protection for Airline Employees and the Flying Public*, Government Press Release, 7/2/96, 1996 WL 11124087.

53. FAA Report, *supra* note 8 at 13; See also Jordan Testimony, *supra* note 18 ("As you know, the FAA has adopted a very successful 'self-disclosure' program, in which airlines on their own initiative report potential regulatory violations to the FAA.")

54. Friend Testimony, *supra* note 15; See also Clayton Testimony, *supra* note 33.

55. See *Aviation Safety: Weaknesses in Inspection and Enforcement Limit FAA in Identifying and Responding to Risks*, General Accounting Office, Report Number: RCED-98-6, Feb. 27, 1998, General Accounting Office.

Through voluntary self-disclosure and partnership programs, the aviation industry provides FAA with the results of its internal monitoring and takes steps to correct and prevent violations of the Federal Aviation Regulations. In exchange, FAA generally agrees not to take legal action in response to reported unintentional violations. The oldest self-disclosure program, the Aviation Safety Reporting Program (ASRP), was established in April 1975 for pilots and is administered by the National Aeronautics and Space Administration (NASA). Under the Voluntary Disclosure Program instituted in March 1990, FAA agrees not to impose a fine when a certificate holder promptly discloses a violation to FAA and takes immediate action to prevent its repetition.

*Id.*, at Ch. 1:2.1, See also (visited Jan. 25, 1999) <<http://frwebgate.access.gpo.gov/cgi-in/useftip.cgi?Ippaddress=waisback.access.gpo.gov&filename=rc98006.txt&directory=/diskb/wais/data/gao>>.

56. FAA Report, *supra* note 8, at 16 (emphasis added).

57. *Id.*

58. Clyburn, *supra* note 25.

59. *Id.*

60. See *Aviation Safety: Targeting and Training of FAA's Safety Inspector Workforce*, General Accounting Office, Report Number: T-RCED-96-26, Apr. 30, 1996.

Because of the magnitude of inspectors' workloads, targeting is essential because FAA may never have enough resources to inspect all pilots, aircraft, and facilities. Although FAA has been working since 1991 to develop a \$31 million system to target resources for aviation inspections, data quality problems, such as information on the results of safety inspections, jeopardize the system's potential benefits. During the past decade, GAO and others have reported on problems with the technical training of inspectors, including those performing inspections for which they lacked proper credentials. Inspectors have been unable to take courses that they believe are necessary for them to do their jobs. Cuts in FAA's budget have reduced the money available for technical training by 42 percent during fiscal years 1993-96. FAA projects that it will have a shortfall of \$20

Report<sup>61</sup> carefully avoids stating outright that smaller carriers are more risky, but it does mention “[a] recent FAA study . . . [that] identified the need for more intense surveillance of *new carriers* and of *low cost carriers* in general.”<sup>62</sup>

There may be valid reasons to avoid jumping to conclusions about air safety legislation when the facts present an unclear picture.<sup>63</sup> However, with competition so intense, and with profit margins so thin<sup>64</sup>, it is perfectly reasonable to be concerned that businesses operating right at the edge of financial survival might occasionally be tempted to cut safety corners, as David Jordan alleged,<sup>65</sup> in order to quickly return to a revenue-generating status. Although it may well be true that many carriers faithfully monitor their safety programs, “judging by the number of fines, groundings and investigations by the FAA, we know that some airlines do cut corners and compromise safety.”<sup>66</sup>

All of the proponents of the Act who appeared at the July, 1996 hearings made reference to a finding which Congress appeared to have recognized as early as the 1930's: reliance on front-line employees to report violations of laws or rules is an indispensable asset to regulatory agencies whose ability to regulate effectively is limited by finite resources. The benefits from those front-line employees are potentially lost if they must choose between reporting essential information to the FAA and the possibility of losing their jobs.<sup>67</sup>

#### D. Protecting Workers

Because of the important role safety partnerships play in the FAA's safety monitoring and enforcement functions, the questions of whether the law's primary objective ought to be furthering safety or protecting workers are inseparable. Workers need the

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million for technical training that FAA had earlier deemed essential.

*Id.*

61. FAA Report, *supra* note 8 at 13.

62. *Id.* (emphasis added). But *See*, SCHIAVO *supra* note 3 (noting that demand for flights, already unprecedented, will continue to skyrocket over the next decade. Major carriers will add planes to their fleets and flights to their itineraries to meet the demand. Discounters, commuter airlines and air taxis will expand to offer competitive prices and secondary routes. Start-up airlines in all categories will continue to emerge and enlarge to exploit the market. Many of the smaller carriers will buy used planes, equipment and parts. Competition will encourage the practice of pushing pilots, mechanics and inspectors to get planes in and out of the gate in twenty-five minutes. Rivalry will spur cost-cutting habits like farming out maintenance and repairs to contractors. Taken together, this economic growth means the flying public can expect an increase in the number of accidents. More planes will crash, the experts warn, even if the safety rates remain the same.)

63. *See* Broderick, *supra* notes 22-24 and accompanying text.

64. There is a lesson to be learned here for all others smitten with the romance and glamour of the airline industry. Commercial aviation is admittedly a difficult business. The margins are razor thin, the competition is fierce and traffic comes and goes with the economic cycles. It only takes the addition of one passenger per flight to make the difference between making a profit and not making a profit. Just one passenger per flight. With margins this tight, it is no wonder that the airline business is so competitive.

Darryl Jenkins, *Speedy Growth Led to WestPac's Demise*, ROCKY MOUNTAIN NEWS, Feb. 23, 1998.

65. *See* Jordan Testimony *supra* note 18.

66. *See* Friend Testimony, *supra* note 16.

67. The FAA's Safety Partner is designed to specifically rely on airlines, rather than front-line employees, to contact the FAA. Generally, the FAA relies on internal safety offices to self-report violations. In turn, those internal safety monitoring functions are supported by front-line employees identifying safety violations.



protections offered by this law if they are expected to act as an extension of the FAA's safety inspection component.

Congress should not enact a new law that addresses the same issues as an already existing law. Doing so creates potential confusion for courts and litigants while threatening to produce erratic and unpredictable results.<sup>68</sup> Aviation workers, at least those workers covered by a collective bargaining agreement, are subject to the Railway Labor Act (RLA),<sup>69</sup> which includes a grievance procedure for employees seeking redress for workplace wrongs such as allegations of whistleblower reprisal. Additionally, a patchwork of state statutory and common law protections may also protect aviation whistleblowers. However, while RLA and common law protection are available theoretically, litigants seeking protection under these remedies confront a maze of tactical legal and administrative defenses that are sure to exhaust all but the most tenacious and well-financed.<sup>70</sup> In sum, although a remedy may be available, if that remedy is unclear and only available after a protracted and potentially costly fight, it provides the potential whistleblower little assurance that he can report safety violations without fear of reprisal.

### *1. Exceptions to the Employment At Will Rule*

A whistleblower who is retaliated against for making disclosures may seek redress based on one or more of three legal theories. If a statute specifically protects whistleblowing activities, his first choice is to pursue a remedy under the statute. If the aggrieved employee can find no statute on which to base his complaint, his second option is to bring an action in contract. Employees who believe they have been wrongfully discharged may bring suits based on the "implied contract" between themselves and their employers.<sup>71</sup> "For example, when the conduct and statements of the parties, or other relevant evidence, indicates that they intended to impose some limitation on an employer's traditional authority over its employees, such as the right to terminate for any reason or no reason whatsoever, the facts are said to imply that the parties contracted to the limitation."<sup>72</sup>

The employee's third option is to bring a wrongful or abusive discharge claim sounding in tort. To do so, the employee must be able to show that his termination was based on a violation of an important public policy. The employee's choice of which option will afford him the best remedy depends on the specific facts and circumstances of his case, as well as the requirements outlined in any whistleblower protection statute under which he claims protection and the jurisdiction and forum in which he brings his claim.

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68. See Sauter, *supra* note 21.

69. 45 U.S.C. §§ 151-160 (1994).

70. See Phillip Kolczynski, *New Legislation Encourages Aviation Whistleblowers?* COMMUTER/REGIONAL AIRLINE NEWS, Sept. 22, 1997 (reporting that "in many jurisdictions aviation employees who are demoted or terminated because of safety complaints . . . must pay for their own attorney and expert witnesses when filing a difficult breach of employment lawsuit against his/her employer for wrongful demotion or termination.").

71. Workers covered by a collective bargaining agreement may also have some contractual recourse against whistleblower reprisal under the terms of such agreement.

72. STEWART H. BOMPEY ET AL., *WRONGFUL TERMINATION CLAIMS: A PREVENTIVE APPROACH* 19 (2nd ed. 1991).

The Employment at Will Doctrine (EAWD) is the regime governing the avenues of redress available to an aggrieved employee who believes he has been fired for whistleblowing activity. According to the EAWD an employer may fire an employee for any reason. The doctrine emerged in the United States during the late 1800's, and though numerous statutory and judicial exceptions have been carved out of the general rule, it is still very much alive. An employee who wants to challenge his employment termination is well-advised to be prepared to point to a specific exception to that long standing rule. If not, it is likely that his case will be dismissed for failing to state a cause of action.<sup>73</sup>

*a. Statutory Protection*

The idea of protecting workers who act in the public interest is neither new nor novel. Twenty-seven federal statutes "regulate the conduct of businesses with respect to the environment, workplace safety, and public health. To enhance their enforcement . . . these statutes protect employees who complain about violations under varying circumstances."<sup>74</sup> Additionally, twenty-four states have public sector whistleblower protection statutes, and sixteen of those states also extend whistleblower protections to private sector employees.<sup>75</sup> The basic idea behind each of these statutes is the same.<sup>76</sup> Workers who act responsibly, and in the public interest, should not suffer adverse consequences from their employers.

*b. Contract Theory Protection*

Generally, there are two potential types of contract protection available to aviation industry whistleblowers: protection afforded to bargaining unit employees pursuant to a collective bargaining agreement and protection claimed pursuant to a common law contract theory.

*(1) CBA Protection.*

First, protection may be available under a collective bargaining agreement covering the terms and conditions of the whistleblower's employment. For example, almost all collective bargaining agreements contain a provision guaranteeing that employees will only be discharged for "just cause," and it is highly unlikely an employer could characterize firing an employee for reporting a safety concern a "just cause" discharge.

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73. See *Wise v. Modern Talking Picture Service Inc.*, 1990 U.S. Dist. LEXIS 5684 (D.D.C. 1990). (Addressing an earlier case in which the court had recognized an exception to the employment at-will rule for an employer's termination of an employee for involvement in making a Title VII claim, the court held:

The District of Columbia does not recognize the tort of wrongful termination for at-will employees . . . . This Court has determined that *Alder* has been cited only once for the proposition that the District of Columbia recognizes a public policy exception to the employment at-will termination doctrine. The case relying on *Alder* was *Buttell*. *Buttell* has never been cited for that proposition. Consequently, it is clear to this Court that the District of Columbia *does not recognize a public policy exception* to the at-will employment doctrine, and plaintiff's reliance upon *Alder* and *Buttell* is misplaced.

*Id.* at 7 (emphasis added)).

74. WESTMAN, *supra* note 1, at 72. See also WESTMAN, Appendix C, for a comprehensive list of those statutes and short synopses of their respective whistleblower protection provisions.

75. *Id.* at appendices A & B, at 177-87.

76. Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 117 nn. 62-63 (1995).

(2) *Common Law Contract Theory.*

A few jurisdictions recognize employment relationships to be contracts that engender an implied covenant of good faith and fair dealing. In those jurisdictions, an employer's right to terminate an employee at-will is limited by the implied covenant of good faith and fair dealing. According to that implied covenant, an employer may not terminate an employee for reasons "motivated by bad faith or that frustrate the purposes of the employment agreement itself."<sup>77</sup>

In *Fortune v. NCR*,<sup>78</sup> Orville Fortune was a salesman for the National Cash Register Company (NCR). He worked for NCR pursuant to a salesman's contract, which was terminable at-will, without cause, by either party. According to the salesman's contract, Fortune was to receive bonus commissions as follows: 75% of sales if the territory in which the sale was made was assigned to him at the date of the order, 25% if the territory was assigned at the date of delivery, and 100% if the territory was assigned to him at both times.<sup>79</sup> After reluctantly beginning to pay Fortune the bonuses he was due on a \$5 million sale, NCR terminated him before all the deliveries were made, thereby avoiding its obligation to pay him an additional \$45,000 he would have been entitled to under the salesman's contract. The Court held that in spite of the fact that Fortune had been paid all he was entitled to at the time of his termination, and in spite of the fact that the employment relationship was terminable at-will by either party, NCR breached its duty of good faith and fair dealing by terminating him.<sup>80</sup>

In *Pugh v. Sees Candies, Inc.*,<sup>81</sup> Wayne Pugh was fired after thirty-two years of good service. Pugh started work for the company in 1941 washing pots and pans. Three decades later he was vice president of production and a member of the board of directors. During his career he had received numerous promotions and raises, and had never been put on notice that his performance was anything other than excellent. Pugh suspected he was fired because he had openly voiced some concerns about a possible deal that Sees was considering with the union whereby Sees would gain a competitive advantage over its competitors by paying seasonal employees lower wages.<sup>82</sup> Finding that Pugh had an implied-in-fact contract for continued employment, the court said factors giving rise to such implied-in-fact contracts include "the personnel policies or practices of the employer, the employee's longevity of service, actions or communica-

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77. See BOMPEY, *supra* note 72, at 40.

78. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977).

79. *Id.*

80. *Id.* at 1257. Note that the court specifically limited the holding in this case to the specific facts of this case, "[w]here the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent." *Id.* See also *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311 (1981) ("court inferred an agreement requiring just cause for termination from the length of plaintiff's employment, his commendations and promotions, and employer assurances that as long as the plaintiff was loyal and did a good job, his position was secure.") *Bompey, supra* note 71 at 34).

81. 116 Cal. App.3d 311 (1981).

82. *Id.* At the opening of a contract negotiation between, among others, Pugh's replacement and union representatives, Pugh's replacement was reported to have said "[n]ow we've taken care of Mr. Pugh. What are you going to do for us?"

tions by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.”<sup>83</sup>

*c. Public Policy*

Courts have also imposed a limit on an employer’s right to terminate an at-will employment relationship if the employer’s actions would violate an important public policy.

In *Monge v. BeeBee Rubber*,<sup>84</sup> Olga Monge was harassed and eventually fired for refusing to date her foreman at BeeBee Rubber Company. She sued alleging a violation of an oral contract of employment, and the trial court awarded her damages of two thousand five hundred dollars. Citing the long standing EAWD, the defendant moved to set aside the verdict and moved for judgment notwithstanding the verdict. On appeal the New Hampshire court rejected the defense’s position, reasoning that “a termination by the employer of a contract of employment at-will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.”<sup>85</sup>

In *Peterman v. Teamsters*,<sup>86</sup> Peterman was a business agent of the International Brotherhood of Teamsters, working for the Union in California in the late 1950s. When he was subpoenaed to testify before a state governmental committee,<sup>87</sup> his supervisor directed him to deliver false testimony. Peterman declined to follow those instructions and instead answered questions truthfully. The day following his testimony, Peterman was fired. Holding that “the right to discharge an [employee at-will] may be limited . . . by considerations of public policy,”<sup>88</sup> the court recited a number of various definitions of “public policy”, including:

[N]o citizen can lawfully do that which has a *tendency to be injurious to the public* or against the public good . . . the principles under which *freedom of contract* or private dealing is restricted by law for the *good of the community*. . . whatever contravenes good morals or *any established interests of society* is against public policy.<sup>89</sup>

Peterman’s discharge was held to be a violation of public policy.

In *Frampton v. Central Indiana Gas Co.*<sup>90</sup> the Indiana Supreme Court carved out an exception to the EAWD to protect workers who try to take advantage of benefits the legislature specifically intended to make available to them. Dorothy Frampton injured her arm at work but was reluctant to make a claim for workmen’s compensation because she worried her employer might fire her for doing so. Nineteen months after her injury she filed a claim. A month later she was terminated without reason. The policy behind the workmen’s compensation act was clear. “One of the purposes of the Workmen’s Compensation Act is to transfer from the worker to the industry in

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83. *Id* at 925-926.

84. 316 A.2d 549 (N.H. 1974).

85. *Id.* at 551.

86. 344 P.2d 25 (Cal. Ct. App. 1959).

87. Assembly Interim Committee on Governmental Efficiency and Economy of the California Legislature

88. *Peterman*, 344 P.2d at 25.

89. *Id.* at 27.

90. 297 N.E.2d 425 (Ind. 1973).

which he is employed and ultimately to the consuming public a greater portion of economic loss due to industrial accidents and injuries."<sup>91</sup> Having identified the public policy at stake, the court acknowledged it was acting without firm precedent, but then imported a principle from landlord tenant law pertaining to retaliatory eviction:

Courts in several jurisdictions have held that "retaliatory evictions" offend public policy. "Retaliatory evictions" usually result from a tenant's reporting health or safety code violations to an appropriate administrative body. The tenant, quite often unable to motivate the landlord to make necessary repairs and improvements, reports the violations. The landlord, angered by the tenant's temerity, either gives the tenant notice to quit or effectively evicts the tenant by raising the rent to an unreasonable level. . . . Retaliatory discharge and retaliatory eviction are clearly analogous. Housing codes are promulgated to improve the quality of housing. The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy.<sup>92</sup>

As the public policy exception to the employment at will rule matured, potential recovery remedies gradually expanded to include tort remedies. In *Tameny v. Atlantic Richfield Co. (ARCO)*.<sup>93</sup> Gordon Tameny, a regional sales representative, sued Atlantic Richfield alleging that ARCO had wrongfully discharged him because he refused to cajole franchisees in his territory to fix prices at their service stations. The principle handed down by the California Court in *Tameny* represented a summary of the development of the public policy exception to the employment at will rule in much of the nation at that time: "[T]he relevant authorities both in California and throughout the country establish that when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions."<sup>94</sup>

Notably, not all jurisdictions recognize a public policy exception to the EAWD. Alabama, Florida, Georgia, Maine, New York, and the District of Columbia still do not recognize such an exception<sup>95</sup> even when it is based on the refusal to commit illegal

91. *Id.* at 427.

92. *Id.* at 428.

93. 610 P.2d 1330 (Cal. 1980).

94. *Id.* at 1331. As a result of the court's ruling in *Tameny*, the possibility of tort damage recovery in employment contract cases has been significantly limited. The clear majority of jurisdictions have either expressly rejected the notion of tort damages for breach of the implied covenant of good faith and fair dealing in employment cases or impliedly done so by rejecting any application of the covenant in such a context. Mark A. Rothstein & Lance Liebman, CASE AND MATERIALS ON EMPLOYMENT LAW at 938 (3d. ed. 1994). See also, *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (limiting damages in such a suit to contract damages).

95. See WESTMAN, *supra* note 1. Of the eight states referenced by Westman in Appendix D that had declined as of 1991 to recognize a public policy exception to the employment at-will rule, as of the writing of this Article two of those states, Rhode Island and Mississippi, have carved out narrow exceptions. In *Cummins v. EG & G Sealol, Inc.*, 690 F. Supp. 134 (D.R.I. 1988), the United States District Court for the District of Rhode Island carved out a narrow exception to the rule that at-will employees may be fired for any reason whatsoever. In *Cummins*, the court held that "under Rhode Island law an employee-at-will possesses a cause of action in tort against an employer who discharges the employee for reporting employer conduct that violates an express statutory standard." *Id.* at 139. In *McArm v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993), the Supreme Court of Mississippi carved out the following two exceptions to the employment at-will doctrine:

We are of the opinion that there should be in at least two circumstances, a narrow

acts.<sup>96</sup>

## 2. No Specific Protection

Aviation Industry employees fall under the provisions of the Railway Labor Act (RLA) insofar as the RLA requires employees with minor grievances to pursue redress through the mandatory arbitral process of the RLA.<sup>97</sup> The RLA was extended in 1936 to cover the airline industry.<sup>98</sup> It establishes a mandatory arbitral mechanism to handle disputes "growing out of grievances or out of the interpretation and application of agreements concerning rates of pay, rules, or working conditions . . ."<sup>99</sup> Although many aviation employees are limited to the RLA mandatory arbitral process when seeking a remedy for wrongs done to them in the course of their employment,<sup>100</sup> they enjoy no specific statutory protection for whistleblowing.<sup>101</sup>

The RLA contemplates a two-tiered grievance resolution system. First, "disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" are referred to boards of adjustment, com-

public policy exception to the employment at will doctrine and this should be so whether there is a written contract or not: (1) an employee who refuses to participate in an illegal act . . . shall not be barred by the common law rule of employment at-will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer. To this limited extent this Court declares these public policy exceptions to the age old common law rule of employment at-will.

*Id.* at 607.

96. See *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981); *Gil v. Metal Serv. Corp.*, 412 So. 2d 706 (La. Ct. App. 1983), *cert. denied*, 414 So. 2d 379 (La. 1982) *Guy v. Travenol Laboratories*, 812 F.2d 911 (4th Cir. 1987); *O'Beill v. ARA Servs., Inc.*, 457 F. Supp. 182 (E.D. Pa. 1978); *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953).

97. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.

45 U.S.C. § 182 (1998).

All of the provisions of Title I of this Act, except the provisions of section 3 thereof are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 181 (1998) (emphasis added).

98. See Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; 45 U.S.C. §§ 181-88.

99. 45 U.S.C. § 153 (1987).

100. See *Jordan Testimony*, *supra* note 16. (stating that "[M]ost employees of scheduled carriers are already covered by the grievance provisions of the Railway Labor Act . . .").

101. Railroad employees are specifically protected from retaliation for whistleblowing activities under Title 49 of United States Code:

A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has --

(1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety . . . or (2) testified or will testify in that proceeding.

49 U.S.C. § 20109(a) (1998).

posed of labor organization and industry members.<sup>102</sup> Second, "dispute[s] concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference" and "[a]ny other dispute not referable to an adjustment board" fall under the jurisdiction of the National Mediation Board.<sup>103</sup> Disputes are categorized as major and minor disputes by the Act, and all minor disputes are subject to the mandatory arbitral process.

Thus, aviation employees are in a uniquely vulnerable position. The average industrial worker who feels he has been retaliated against for whistleblowing activity has federal statutory protection, enforceable by a court, under OSHA. Railroad employees are limited to the mandatory arbitral process of the RLA, but even in that forum, they have two layers of protection. First, most CBA's include some sort of "just cause" termination standard, and under all but the most strained reasoning, retaliating against a whistleblower would not amount to just cause. Second, in the absence of language in a CBA protecting whistleblowers, railroad carriers are prohibited by federal statute from taking adverse action against whistleblowers. Aviation whistleblowers, by contrast, may be limited to the same mandatory arbitral process as are railroad workers but without the additional safety net of statutory protection.<sup>104</sup>

### 3. RLA Preemption of State Law Based Claim-Norris

In the leading case on RLA preemption of state law-based unlawful discharge claims, *Hawaiian Airlines, Inc. (HAL) v. Grant T. Norris*<sup>105</sup> the employer argued that a wrongful discharge claim was a minor dispute, and therefore the plaintiff's claim under state law was preempted by the RLA arbitral procedure. Grant Norris was an aircraft mechanic licensed by the FAA. His aircraft mechanic's license authorized him to clear aircraft for return to service after maintenance had been performed. He was covered by a CBA negotiated between HAL and the International Association of Machinists and Aerospace Workers. While performing maintenance on a DC-9 aircraft, he discovered that one of the axle sleeves was scarred, a condition that could have caused the landing gear to malfunction. He alerted his supervisor that the aircraft should not fly until the gear problem was repaired, "but his supervisor ordered that it be sanded and returned to the plane. *This was done*, and the plane flew as scheduled."<sup>106</sup> At the

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102. See 45 U.S.C. § 185, directing the creation of adjustment boards like those described in 45 U.S.C. § 153.

103. 45 U.S.C. § 183.

104. Although the Norris case stands for the proposition that aviation workers are not limited to the RLA arbitral process, the case arose in a state with statutory whistleblower protection and which recognized a public policy exception to the EAWD.

105. *Hawaiian Air Lines, Inc. v. Norris*, 512 U.S. 246 (1994).

106. *Id.* at 249 (emphasis added). The facts, as recited in the case, do not clearly indicate whether Norris actually sanded the part and returned it to the plane, or whether another mechanic performed that task. One of the employer's cited reasons for discharging Norris was a violation of the CBA provision that stated a mechanic "may be required to sign work records in connection with the work he performs." *Id.* at 250 (emphasis added). Fairly read, it appears that Norris sanded the axle and returned it to the plane. The distinction, although subtle, is significant. Consider how the difference in the fact pattern makes Norris look more or less noble in his motivation for calling the FAA.

Assuming Norris did the work (sanding the axle and returning it to the plane), he looks a little less sympathetic as a plaintiff. There is no indication he would have notified the FAA had he not been fired. If he did in fact sand the axle and return it to the plane, then as mechanic that performed the work, he could be required to sign off on the work records according to the terms of the CBA. When asked to do so he refused. If he was acting out of concern for the safety of the aircraft's occupants, the time to refuse was when the supervisor directed him to do something with the wheel axle

end of respondent's shift, the supervisor ordered Norris to sign off the maintenance record, certifying that the repair had been made satisfactorily and that the plane was fit to fly. Norris refused. His supervisor immediately suspended him pending a termination hearing. Norris went home and contacted the FAA to report what had happened with regard to the maintenance on the axle sleeve.

Initially, Norris tried to use the grievance procedure. He presented his case at a grievance hearing, "rely[ing] on the CBA's guarantees that an employee may not be discharged without just cause and may not be disciplined for refusing to perform work that is in violation of health or safety laws. The hearing officer terminated [Norris] for insubordination"<sup>107</sup> Norris appealed through the next step of the grievance process, and in the interim HAL offered to mitigate its action to suspension without pay; the offer was accompanied by a stern warning that any further failure to perform his duties would result in Norris's discharge.

Norris failed to respond to HAL's offer and elected not to pursue the grievance procedure any further, choosing instead to file suit in state court. He alleged two wrongful discharge state tort actions: violation of the public policy as stated in the Federal Aviation Act and implementing regulations and discharge in violation of Hawaii's Whistleblower Protection Act.<sup>108</sup> In two different suits in state court, one against HAL and one against three of its officers, the Hawaii Supreme Court reversed the trial courts' holdings that Norris's whistleblower and public policy claims were preempted by the RLA mandatory arbitral process.<sup>109</sup> The United States Supreme Court agreed with the Hawaii Supreme Court, holding that since Norris's claims arose entirely independently of the CBA covering the terms and conditions of their employment, they were not preempted by the RLA.

The Court traced how the preemption doctrine evolved under the RLA and the LMRA, ultimately concluding that although there were significant differences in the language, history, and purposes of the two acts, "[t]he common purposes of the two statutes, the parallel development of RLA and LMRA pre-emption law . . . and the desirability of having a uniform common law of labor law pre-emption . . . support the

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that he believed would endanger the crew and passengers flying on the aircraft. By following his supervisor's directions, he simply acquiesced in what he believed to be an unsafe practice, presumably believing his supervisor would be responsible for the decision. Then later, after he had already performed the maintenance and returned the plane to flight status, was he concerned when he learned that *he* might have to verify in writing the actions he took. In sum, on these facts, so long as no one could find out what happened with regard to the maintenance performed on the axle, he had no objections.

Assuming Norris did not perform the work, he looks much more sympathetic as a plaintiff. If someone other than Norris sanded the axle and returned it to the plane without Norris's knowledge, it would be entirely appropriate for Norris to refuse to sign records for work he did not perform. Additionally he would have a good argument that he contacted the FAA not out of spite or self interest, but in order to alert the agency about an unsafe practice that he was unable to stop on his own.

107. Norris, 512 U.S. at 250.

108. *Id.*

109. Initially, Norris sued HAL based on three grounds: (1) discharge in violation of the Hawaii Whistleblower Protection Act; (2) discharge in violation of public policy; and (3) violation of the CBA. HAL removed the action to Federal Court, where the CBA violation claim was dismissed on the ground that it was preempted by the RLA, and the other two actions were remanded to state court. The state court dismissed the public policy claim based on RLA preemption and certified the question for immediate appeal. While all that was happening, Norris had also filed suit against three HAL officers, also basing his actions on public policy and state whistleblower protection grounds; the trial court dismissed all counts based on RLA preemption. *See Id.*, at 250-51.



application of the Lingle standard"<sup>110</sup> in RLA cases as well.

The Norris case illustrates exactly the position in which many aviation employees find themselves when they discover safety deficiencies while performing their duties.<sup>111</sup> Like many of those aviation employees, Norris had a range of options with regard to how he pursued his case. He was fortunate in that Hawaii had a whistleblower statute affording protection to people in his predicament; only a little over half the states have such a law. His case also illustrates how claimants in states without whistleblower protections can seek redress under a public policy tort theory exception to the EAWD.

The complicated procedural maze Norris negotiated was time consuming and probably very costly. He, or more accurately his lawyer(s), brought several different actions in federal and state courts, and between the time he was fired and the time he eventually won his case, nearly seven years passed. The ultimate outcome is not as relevant to the discussion about whether H.R. 915 technically is redundant with existing protections as is the ordeal Norris had to weather to get to that outcome. He started out trying to use the grievance process in his workplace, only to learn, according to the official hearing on his grievance, that the CBA governing his employment apparently allowed him to be fired for contacting the FAA with a safety concern—notwithstanding its language to the contrary.<sup>112</sup> Stung by the discovery that he was not as protected as he thought, he sought protection from a court of law, citing a clearly worded and easily understandable statute in the state where he lived and worked. Although that law clearly made what his employer did to him illegal, he, most likely along with all of his potentially whistleblowing coworkers, learned that the courts were closed to him, and that his only recourse was through the minor dispute resolution process of the Railway Labor Act. Although the ultimate holding of Norris's case is promising for workers seeking redress for whistleblower retaliation outside the RLA's mandatory arbitral process, the Norris case did not create a bright line rule against RLA preemption.<sup>113</sup>

#### 4. ADA / FAA Preemption of State Law Based Claims

An aggrieved airline employee who tries to bring a claim in a state court may also be preempted by another federal law, the Airline Deregulation Act (ADA). The preemptive language in the ADA reads:

Except as provided in this subsection, a State, political subdivision of a State or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of an air carrier that may provide air transportation under this subpart.<sup>114</sup>

A second provision in the ADA, referred to as the "savings clause," seems to open up potential recovery for whistleblowers under state law, stating: "[a] remedy under this part is in addition to any other remedies provided by the law."<sup>115</sup>

110. *Id.* at 263 n.9.

111. *See supra* notes 39, 40.

112. *Norris*, 512 U.S. at 250 ("[Norris] relied on the CBA's guarantees that an employee may not be discharged without just cause and may not be disciplined for refusing to perform work that is in violation of health or safety laws.")

113. *See infra* note 153.

114. 49 U.S.C. § 41713(b) (1994) (emphasis added).

115. 45 U.S.C. § 1506 (1994) ("Nothing . . . in this chapter shall in any way abridge or alter the

The Supreme Court has ruled in two cases specifically construing these sections of the ADA. Although neither case deals squarely with whether an airline employee who brought a whistleblower complaint under a state law would be preempted by the ADA, together they set the tone for how the lower courts deal with ADA preemption issues.

*a. Morales*

In *Morales v. Trans World Airlines Inc.*,<sup>116</sup> the Court considered preemption in the context of the extent to which States may regulate advertisement of air fares. In 1987, the National Association of Attorneys General<sup>117</sup> adopted air travel enforcement guidelines detailing the standards to which air carriers should be held when advertising their premium customer programs (frequent flyers) and policies for compensating passengers who took voluntary bumps.<sup>118</sup> The Attorney General of the State of Texas<sup>119</sup>, over the objection of the Department of Transportation and the Federal Trade Commission on preemption grounds, contacted the major airlines, in what was referred to as an advisory opinion, threatening to commence enforcement actions under the state's deceptive trade practices act if the airlines did not bring their practices into compliance with the NAAG guidelines. The airlines responded by filing suit in Federal District Court seeking a declaratory judgment that the guidelines were pre-empted by section 1305(a)(1) and requesting an injunction restraining Texas from taking any enforcement action under its law pertaining to routes, services, or the airlines' advertising and marketing of the same. The District Court granted the injunction, and the Court of Appeals affirmed.

The Supreme Court phrased the question presented as "whether enforcement of the NAAG guidelines on fare advertising through a State's general consumer protection laws is pre-empted by the ADA."<sup>120</sup> The Court's preemption analysis turned on the meaning of the words "that relate to" in the preemption language of section 1305(a)(1).<sup>121</sup> The Court determined that those words "that relate to" should be given the same expansive reading the Court had given to similar language in the Employee Retirement Income Security Act (ERISA) preemption case.

We have said, for example, that the "breadth of [that provision's] pre-emptive reach is apparent from [its] language . . . that it has a "broad scope . . . and an "expansive sweep," . . . and that it is "broadly worded," . . . "deliberately expansive," . . . and "conspicuous for its breadth."<sup>122</sup>

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remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.").

116. 504 U.S. 374 (1992).

117. "[A]n organization whose membership includes the attorneys general of all 50 States, various Territories, and the District of Columbia." *Morales* at 379.

118. These guidelines do not purport to "create any new laws or regulations" applying to the airline industry, rather, they claim to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Id.*

119. Along with the Attorneys General of seven other States.

120. *Morales* at 383.

121. Section 1305(a)(1) expressly pre-empts the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . ." For purposes of the present case, the key phrase is "relating to." *Id.* at 383.

122. *Id.* at 384. The Petitioners argued the phrase "that relate to" in the ERISA context was applied broadly not because of Congress's choice of phraseology, but rather because of the "wide and

Focusing on the other pertinent statutory language, the petitioner then argued that the "savings clause" in the ADA is broader than its ERISA counterpart, which preserved the states' right to prohibit deceptive advertising. But the Court rejected that argument as well, reasoning that the "general" savings clause language was merely a "relic of the pre-ADA preemption regime"<sup>123</sup> and that "it is commonplace of statutory construction that the specific governs the general . . . a canon particularly pertinent here, where the "savings" clause is a relic of the pre-ADA/no pre-emption regime."<sup>124</sup>

The Court also rejected petitioner's argument that only state laws specifically addressed to the airline industry are pre-empted, and that it should not be read to pre-empt laws of general applicability as most whistleblower protections would be.

Lastly, the Court pointed out that even where state and federal law are consistent, federal law preempts the field. "Nothing in the language of § 1305(a)(1) suggests that its "relating to" pre-emption is limited to inconsistent state regulation . . . 'The pre-emption provision . . . displac[e]s all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.'"<sup>125</sup>

As applied to the facts of a case like *Norris*, the *Morales* language cited above gives a defendant air carrier potentially powerful language standing for the proposition that an aggrieved employee's state law claim is preempted by the ADA. A court that considers whistleblower protection that is both "related to" safety, and that safety is "related to services" may find an aviation worker's whistleblower protection claims preempted by the ADA.<sup>126</sup> Particularly discouraging for whistleblowers claiming a state cause of action, according to *Morales*, is that state laws are preempted whether they are consistent with the federal preemptive law or not.

The Supreme Court notes that despite its broad reading of ADA preemption, the bounds are not limitless. On the facts of this case, the "related to" language does not have to be stretched very far to encompass that which the NAAG guidelines attempt to regulate. By contrast, a reviewing court would have to read the words "related to" much more broadly than the Supreme Court read them in *Morales* in order to cover the type of worker protection contemplated by state whistleblower laws.<sup>127</sup> The Court

inclusive sweep of the ERISA scheme." In other words, the Petitioners argued that Congress used the words "that relate to" because the ERISA scheme *itself* is so expansive, and lawmakers wanted to ensure that federal preemption touched all elements of that expansive ERISA scheme. The Court rejected that argument, holding instead that the preemptive phrase "that relate to" does not merely address the expansive reach of specific ERISA provisions, but extends further into all those nonspecific areas of the law that may intersect with the ERISA scheme generally.

123. *Id.* at 385.

124. *Id.*

125. *Id.* at 387.

126. See generally *Marlow v. AMR Services Corp.*, 870 F. Supp. 295, 299 (D. Hawaii 1994) (explaining that Hawaii's whistleblower protection claim was preempted by the ADA because it related to the defendant's ability to terminate an employee whose work was "integral" to air services).

127. Justice Stevens, writing for the dissent, argues that the Court reads "relating to" too broadly, adding:

Even if I were to agree with the Court that state regulation of deceptive advertising could "relat[e] to rates" within the meaning of section 105(a) if it had a "significant impact" upon rates, ante, at 390, I would still dissent. The airlines' theoretical arguments have not persuaded me that the NAAG guidelines will have a significant impact upon the price of airline tickets.

*Morales*, 504 U.S. at 426.

acknowledged “[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner” to have pre-emptive effect.”<sup>128</sup>

The interpretation of the words “related to” is certain to be the focus of ADA preemption cases in the future. If whistleblower protections are read as related to “safety” then the Supreme Court’s broad reading of “related to” would mean that the FAA’s role in enforcing safety restrictions preempts state laws purporting to address the same area through whistleblower protections, though the laws would be consistent. On the other hand, if whistleblower laws are read as worker protection devices, a good argument exists that whistleblower protections would not be preempted. Under such interpretation, protection of workers’ rights is a subject clearly outside the ADA’s regulatory and enforcement reach.

*b. Wolens*

In *American Airlines v. Wolens*,<sup>129</sup> plaintiffs were participants in American Airlines AAdvantage (frequent flyer) program. They challenged certain changes American made to the rules of the program, alleging that the new rules not only prospectively altered the terms and conditions of the frequent flyer program, but that the changes also devalued mileage credits they had already accumulated. The plaintiffs alleged that in so doing American’s actions constituted a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and constituted a breach of contract. The airline objected, claiming federal preemption under 49 U.S.C. sec. 1305(a)(1). Finding that the plaintiffs’ monetary claims related only tangentially or tenuously to rates, routes, or services, the Illinois Supreme Court ruled that the plaintiffs’ contract claims were not preempted.<sup>130</sup> The Illinois Supreme Court read *Morales* to require ADA preemption of state claims only if the claims involved matters “essential” to an airline’s operation.

Upon review, the United States Supreme Court held that while the Consumer Fraud claim was preempted, the lower court contract claim was not.<sup>131</sup> The Court rejected the Illinois Supreme Court’s “peripheral—essential” distinction, holding instead that while the “ADA’s preemption prescription bars state-imposed regulation of air carriers, [it] allows room for court enforcement of contract terms set by the parties themselves.”<sup>132</sup> The Court drew the following distinction: “The ADA . . . does not bar court adjudication of routine breach of contract claims. The preemption clause leaves room for suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline’s breach of its own, self-imposed undertakings.”<sup>133</sup>

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128. “In concluding that the NAAG fare advertising guidelines are pre-empted, we do not, as Texas contends, set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly “relat[e] to” rates; the connection would obviously be far more tenuous.” *Id.* at 390.

129. 513 U.S. 219 (1995).

130. 513 U.S. at 225.

131. *Id.* at 234.

132. *Id.* at 234.

133. *Id.* Here the Court is discussing the airline’s self-imposed undertakings via its agreement with its customers. The court’s discussion of why this particular contract claim is not preempted revolves around the central theme that Congress did not intend to preempt this type of claim, one between the business (airline) and its customers (passengers), because the ADA was intended to move the government out of that relationship in order to free up market competition. It may be unwise, therefore, to attempt to use this language in support of a worker’s assertion that his claim is not preempted because Congress did not intend to preempt contract claims; absent an impact on free market issues, such an

*Wolens* is, for the most part, a wash for aviation whistleblowers. The Supreme Court decided that the contract claim was not preempted based primarily on how contracts between airlines and their customers impact the market. Since the ADA was aimed at opening up markets, airlines should be free to the maximum extent possible to strike deals necessary based on business judgments. Requiring airlines to abide by the deals they strike according to ordinary principles of contract law, reasoned the Court, would not encroach on Congress's deregulatory purpose underpinning the ADA.

While *Wolens* is not truly a help or a hindrance to whistleblower litigants, some dicta in the Court's conclusion may be very helpful to whistleblowers arguing against federal preemption of state actions.

Responding to our colleagues' diverse opinions dissenting in part, we add a final note. This case presents two issues that run all through the law. First, who decides (here, courts or the DOT, the latter lacking contract dispute resolution resources for the task)? On this question, all agree to this extent: *None of the opinions in this case would foist on the DOT work Congress has neither instructed nor funded the Department to do.*<sup>134</sup>

The passage above persuasively stands for the proposition that just as Congress did not intend to foist upon the DOT certain functions, Congress certainly did not intend to foist on the DOT disputes alleging violation of employment contracts or state tort law that fall well outside the economic issues governed by the ADA.

*c. Hodges-ADA Preemption Not Applicable to Some Tort Actions*

In *Hodges v. Delta Airlines*,<sup>135</sup> the Fifth Circuit further parsed the language of Section 1305(a). The plaintiff, Frances Hodges, sued Delta Airlines in tort for injuries she suffered when a fellow passenger opened an overhead bin and several bottles of rum fell cutting Hodges's wrist and arm. Hodges sued alleging negligent operation of the aircraft caused her injuries. Delta argued her suit was preempted by Section 1305(a)(1) of the ADA.

The divided court found that Congress intended the ADA to "prevent the states from frustrating the goals of deregulation by establishing or maintaining *economic regulations* of their own . . . ."<sup>136</sup> The majority reasoned that although controlling Supreme Court precedent held that the language of section 1305(a)(1) was to be very broadly applied to matters that relate to rates, routes, or services, the Court had not defined the term "services."<sup>137</sup> The majority then focused on another provision of the ADA, section 1371(q), which requires airlines to maintain liability insurance for injuries, death, or property damage resulting from the operation or maintenance of aircraft. The majority and the dissent agreed that because section 1371(q) specifically required carriers to maintain insurance for suits resulting from operation or maintenance, Congress clearly intended that such suits *not* be preempted. If they were, pointed out the

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argument would likely fail. The Court cited language from *Morales*: "In 1978, however, Congress enacted the Airline Deregulation Act (ADA), 92 Stat. 1705, which largely deregulated domestic air transport to ensure that the States would not undo federal deregulation with regulation of their own." *Id.*

134. *Wolens* at 234.

135. 4 F.3d 350 (5th Cir. 1993), *reh'g en banc granted*, 12 F.3d 426 (5th Cir. 1994), *rev'd*, 44 F.3d 334 (5th Cir. 1995).

136. *Hodges*, 44 F.3d at 335.

137. *Id.*, at 336.

majority, "this argument would suggest that a lawsuit following a fatal airplane crash could relate to 'services'"<sup>138</sup> and therefore be preempted.

*d. Marlow-Morales Preemption Applicable If There is a Connection to Services*

In *Marlow v. AMR Services Corporation*,<sup>139</sup> the U.S. District Court for the District of Hawaii held that an employee of a jetbridge maintenance company who was fired for bringing safety concerns to the attention of his supervisors was preempted under the Airline Deregulation Act<sup>140</sup> from seeking protection under Hawaii's WBPA or under a public policy exception to the EAWD. In *Marlow*, Scott Marlow, a supervisor for AMR Services Corp (AMR), was hired by AMR "to supervise the company's operations at the Kahului Airport in Maui."<sup>141</sup> In late December of 1992, he notified AMR in writing about 25 serious health and safety violations he observed in the Jetbridge Maintenance facility, asking for a written response as to how AMR intended to remedy the unsafe conditions. Four days later he was fired.

He brought suit in Hawaii state court alleging violations of the HWBPA and wrongful discharge in violation of a clear public policy against such terminations. The matter was removed to federal court based on diversity jurisdiction, and in October 1994, the Court granted AMR's motion to dismiss "based on the grounds that plaintiff's HWPB and [public policy] claims [were] preempted by section 1305(a)(i)(d) of the Airline Deregulation Act of 1978 . . . ."<sup>142</sup> The court, following the Supreme Court's analysis of the phrase "that relate to" in § 1305(a)(1) in *Morales*, held that "jetbridge maintenance and service is included within the meaning of carrier 'services,' as that term is used in section 1305(a)."

The district court distinguished almost completely without discussion *Hodges* and another line of cases argued by the plaintiff, wherein other courts had found tort claims asserted against airlines not preempted.<sup>143</sup>

*4. A Final Note on Preemption-Alexander & Gilmer*

Even if lawmakers pass the Aviation Safety Protection Act, they should be aware that the status quo for many aviation employees (since most are covered by the RLA) may not change at all; the sole avenue of redress for minor disputes arising out of the employment relationship is the mandatory arbitral process of the RLA. For example, although Title VII of the Civil Rights Act of 1964 creates a personal right not to be discriminated against on the basis of sex, an aviation worker claiming she was discriminated against because she was a woman may find that she has no hope of having a jury hear her claim.<sup>144</sup>

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138. *Id.* at 338.

139. 870 F.Supp. 295 (D. Haw. 1994).

140. 49 U.S.C. § 1301 (1988).

141. *Marlow*, 870 F. Supp. at 296.

142. *Id.* at 297.

143. *Hodges v. Delta Airlines*, 4 F.3d 350 (5th Cir. 1993); *Bayne v. Adventure Tours USA, Inc.*, 841 F. Supp. 206 (N.D. Tex. 1994); *Chouest v. American Airlines, Inc.*, 839 F.Supp. 412 (E.D. La. 1993); See also Kyle Volluz, *The Aftermath of Morales & Wollens: A Review of The Current State of Federal Preemption of State Law Claims Under the Airline Deregulation Act of 1978*, 62 J. AIR L. & COM. 1195 (1997).

144. See *Hirras v. National Railroad Passenger Corp.*, 10 F.3d 1142 (5th Cir. 1994) (holding that Hirras's Title VII sex discrimination claim and state law-based intentional infliction of emotional distress claim grew out of her employment relationship, were "minor disputes," and were therefore subject

Two lines of cases in a rapidly expanding body of federal jurisprudence render uncertain whether an employee asserting a federal statutory cause of action may sue his employer in court or whether his remedy may be limited to some form of alternative dispute resolution. In *Alexander v. Gardner-Denver*,<sup>145</sup> the Supreme Court held that an employee claiming his discharge was racially motivated was not limited to his collective bargaining agreement's grievance process when seeking a remedy. Harrell Alexander had initially grieved his discharge, but he had also filed a complaint with the Equal Employment Opportunity Commission (EEOC) just prior to going to the arbitration hearing. After the arbitrator found his discharge was for just cause and not for racially discriminatory reasons, Alexander pursued his claim through the EEOC and eventually Federal District Court. The District Court granted Gardner-Denver's motion for summary judgment, holding that Alexander was limited, pursuant to the terms of his collective bargaining agreement, to the grievance process spelled out therein, and the Court of Appeals affirmed. The Supreme Court reversed, holding that Alexander's right to pursue a Title VII claim in the courts was not foreclosed by the arbitration clause of a CBA that forbids essentially the same sort of racial discrimination.

By contrast, in *Gilmer v. Interstate Lane Corp.*,<sup>146</sup> the Supreme Court held that under certain circumstances, an employee's statutory claims could be subject to binding arbitration with no recourse to the courts. Robert Gilmer was a securities representative for Interstate, a position which required him to sign a registration agreement with the New York Stock Exchange (NYSE). That agreement contained an agreement to arbitrate disputes when required to do so by NYSE rules. Interstate terminated Gilmer's employment when Gilmer turned 62, and Gilmer filed a charge with the EEOC and brought suite in Federal District Court claiming violation of the Age Discrimination in Employment Act (ADEA) of 1967.<sup>147</sup> Interstate moved to compel arbitration because NYSE Rule 347 required arbitration for controversies arising out of a representative's employment or termination. Following *Alexander*, the District Court denied the motion.

The Court of Appeals reversed and the Supreme Court affirmed. The Court began its analysis of Gilmer's case by referring to the Federal Arbitration Act,<sup>148</sup> and that Act's purpose of reigning in "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."<sup>149</sup> The Court then focused on the ADEA, finding nothing about compulsory arbitration pursuant to collective bargaining agreements inconsistent with the Act's wording, purpose, or legislative history. The Court then went on to distinguish *Alexander*.

The primary distinction between *Alexander* and its progeny and *Gilmer*, according to the Court, was the fact that *Alexander* and the line of cases following *Alexander* involved the inherent tension between collective interests of the union and the individual interests of employees who are by statute guaranteed certain rights. Specifically,

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to the mandatory arbitral mechanism of the RLA).

145. 415 U.S. 36 (1973).

146. 500 U.S. 20 (1991).

147. 29 U.S.C. § 621 et seq.

148. 9 U.S.C. § 1 et seq.

149. *Gilmer*, 500 U.S. at 23.

whereas Gilmer was held to be bound by the terms of an agreement he entered individually, Alexander, as part of a bargaining unit, and thereby subject to the terms of a CBA he may not have agreed with, was held not to be so bound.

Since *Gilmer*, a number of courts and scholars have sought to derive or identify a clear set of rules governing the circumstances under which a person may be limited to a mandatory arbitration process for resolving employment disputes based on statutory rights.<sup>150</sup> Regardless of whether there may be a clear way to define when an employee will have access to the courts and when he will be stuck with what he may perceive as a not-so-neutral alternative dispute resolution process, the bottom line for potential aviation whistleblowers, today, is the same: it is anyone's best guess. It is just that type of uncertainty that will prevent aviation employees from doing what the Federal Aviation Administration relies on them to do.

### III. Analysis

No one from industry or government disagrees with the proposition that aviation workers who report unsafe practices to the FAA should be protected from retaliation on the job for doing so. Everyone recognizes the FAA's safety enforcement scheme is growing more and more reliant on self-reporting. Likewise, there is no dispute that the "safety partnership" model depends absolutely on the willingness of workers in the industry to provide data and information the FAA needs to carry out its safety mission. While there is little argument about the need for aviation whistleblower protection, and while legislators have taken small steps recognizing that need,<sup>151</sup> there is, as of now, no dependable and uniformly enforceable standard.

A mishmash of statutory and administrative schemes provide potential protection for whistleblowers, but none of them are predictable or certain enough to motivate aviation workers to bring anything but the most serious safety concerns to the attention of the FAA. Consider the following example.

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150. *Cf. Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1996); *Austin v. Owens-Brockway Glass Container Incorporated*, 78 F.3d 875 (4th Cir. 1995); *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569 (D. Conn. 1997); *Martin v. Dana Corp.*, 114 F.3d 421 (3rd Cir. 1997); *Brisentine v. Stone & Webster Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997); Hayford & Evers, *The Interaction Between the Employment-at-will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-will Employers*, 73 N.C. L. REV. 444 (1995).

151. *Cf.*, Federal Aviation Reauthorization Act, Pub. L. 104-264, § 1216, 110 Stat. § 213. Section 402 reads:

In General, notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator finds that—(1) the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and (2) withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities.

While the public law recognizes the need to protect voluntarily provided information, and while it says the FAA can withhold the identity etc. of people who voluntarily provide information the FAA needs to carry out its safety function, it does not provide any substantive protections. For example, in the *Norris* case, discussed herein, Norris's supervisors would have likely known Norris called the FAA whether the FAA identified him as a whistleblower or not. The authority of the FAA to withhold the identity of aviation whistleblowers is not much of a protection at all.



Assume John Smith, newly hired aircraft mechanic for airline X, notices what appears to be a serious mechanical problem involving a component while servicing an aircraft between flights at a crowded airport in a large U.S. city. He brings the problem to the attention of his supervisor, telling him that it looks like the aircraft will have to be grounded until the component can be replaced, and that job will take about three hours. His supervisor tells him that although the technical manual directs replacement of the entire component, that manual is old; the new model of these particular components is much sturdier than the model that was being used at the time the technical manual was written. He emphasizes that with some minor repair work (that will take about fifteen minutes) this component will work just fine. He tells Smith that they have been doing it this way for quite some time and directs him to make the repairs and return the aircraft to flight status.

Smith objects at first, taking issue with his supervisor's direction because, as he puts it, "although the risk presented may be slim, the consequences, if the component fails, are potentially catastrophic." Smith points out that the requirements of his profession (licensed aircraft mechanic) require him to abide by printed directives like the one he brought to his supervisor's attention. Lastly, Smith reminds his supervisor that "keeping safety job one" is a recurrent theme in numerous company pamphlets, posters, and posted policy statements. Smith's supervisor, aware that two hundred and fifty passengers will be bumped to other flights if this aircraft does not fly, and that his airline is coming under increased criticism for late takeoffs etc., starts to get a little agitated and questions Smith's judgment. Smith eventually caves in, completes the repair as directed and returns the plane to flight status.

Some time later, Smith calls the FAA hotline and reports what he believes is his employer's unsafe practice of repairing parts that should, in the interest of safety, be replaced. The FAA investigates, and the documentation that would support the facts Smith reported is mysteriously missing.<sup>152</sup> The FAA completes a cursory investigation and fines the airline a small sum for improperly maintaining documentation. As soon as the dust settles, Smith is fired, allegedly for being insubordinate or for some other equally amorphous charge. Smith and, by now, all of his coworkers believe he has been fired not for insubordination, but for doing exactly what the FAA depends on people in his position to do, reporting what he believed was an unsafe practice so the condition would be corrected before an accident occurred.

Smith feels certain he may not lawfully be fired for doing what he did, so he decides to fight his discharge. If he is a bargaining unit employee, his first option is through the grievance procedure under his CBA, which will most likely call for his grievance to be reviewed by another person who works for the employer that just fired him. Labor representatives report that such systems are little comfort to aggrieved workers.<sup>153</sup>

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152. See *supra* note 38, (Nancy' Chagares's account:

She said she was working in the airline's Atlanta operations center Dec. 31 when a pilot came in and told the operations supervisor that his plane needed several days worth of maintenance and he would not fly it. The pilot was assigned to a different plane, she said, but 15 minutes later "they boarded up the (first) plane with another crew and they left," she said. . . . The next day, she told her supervisor and refused to fly again until she got answers about what happened. "We took her concerns very seriously," Valujet's Kenyon said. He said *the airline investigated but found no records of maintenance problems in the log books.* "We took her concerns very seriously," he said. "We found no discrepancies and nothing wrong with the aircraft.")

153. See Klein, *supra* note 38. Patricia Friend, President of the Association of Flight Attendants

It is important to note here that even if Smith's discharge was validly warranted (if he was, for example, insubordinate), that message will likely be lost on his coworkers who will see his discharge as punishment for reporting a safety problem, especially if Smith's sole avenue of redress is through other management officials acting as grievance reviewers. If workers like Smith do not think they can get a fair shake in an internal system with no provision for investigation or adjudication by a third party neutral (like a Department of Labor Investigator), the FAA's safety partnership program, which relies on self-reporting, will not work the way it is supposed to.

If Smith is not a bargaining unit employee, or if he is a bargaining unit employee who does not have much faith that his CBA will protect him from retaliation for reporting safety violations,<sup>154</sup> he may think about bringing a wrongful termination action in state court. If he does, he faces several obstacles. First, only a little over half the states have whistleblower protection laws on the books; in the remainder his best hope would be to argue wrongful termination under either the public policy exception to the EAWD or on the theory that his employer violated the covenant of good faith and fair dealing that applies to his implied in fact employment contract.<sup>155</sup>

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told the House subcommittee on aviation that she has "received reports of incidents from several other airlines where supervisors have threatened and harassed flight attendants in an effort to deter the reporting of safety violations." She said they are told by supervisors, "don't call the FAA, don't go over my head, don't make this public, or you will be in trouble." *Aviation Safety Protection Act of 1996: Hearings on H.R. 3187 Before the Subcomm. On Aviation of the House Transportation and Infrastructure Committee*, 104<sup>th</sup> Cong. (1996) (Testimony of Edward Wytkind, Executive Director, Transportation Trades Department, AFL-CIO July 10, 1996: "If aviation employees remain unprotected, they will continue to be subjected to firing or extreme disciplinary measures for simply reporting legitimate safety concerns."); 31 July 1997 Letter from Patricia Friend, President, Association of Flight Attendants, AFL-CIO: "It is through diligence and hard work that many lives have been saved in critical safety incidents. Yet, without federal protection, flight attendants and other aviation workers are forced to risk their careers when they report safety violations. . . . Under current law, aviation workers who report serious safety violations at their airlines can be subjected to harassment, threats and termination." See also, Macon Morehouse *Whistleblower Shield Aviation Workers Want Protection When They Report Trouble*, ATLANTA JOURNAL AND CONSTITUTION, Monday, June 3, 1996, LOCAL NEWS "Valujet flight attendant Anna Wooten said on ABC's "Nightline" last month that "flight attendants are afraid to say anything." When the reporter mentioned that she was still working for the airline, she replied, "Probably won't be after this interview." 1996 WL 8213831.

154. See, for example, the facts of the *Norris* case.

155. If arguing the public policy exception to the EAWD, Smith should cite the public policy in favor of ensuring safety from where ever he can draw the information. He should cite, for example, the Gore Commission Report, which specifically recommended whistleblower protection for aviation workers. Additionally, he should refer to Public Law 104-264, section 401, which eliminated the FAA's dual role and made "assigning, maintaining, and enhancing safety as the highest priorities in air commerce." Most importantly, Smith should point to the FAA's internal memoranda, some of which are mentioned in this Article, that outline the extent to which the FAA relies on airlines (and their employees like Smith) voluntarily self-reporting safety problems as part of its "safety partnership" program.

If arguing a violation of an implied covenant of good faith and fair dealing in an employment contract, Smith should point to factors like those described by the Massachusetts court in *Fortune* or the California court in *Pugh*. To recap, those factors include: personnel policies or practices, actions or assurances by the employer reflecting assurances of continued employment, longevity of the employment relationship, and the practices of the industry in which the employee is engaged. The best argument for Smith, or others in his position, is that the very existence of the safety partnership program unambiguously dictates that although discharge for any number of reasons may be allowable pursuant to the terms of the implied-in-fact contract, discharge for reporting a safety concern clearly is not. Stated differently, the federal agency responsible for policing safety in the industry openly relies on self-reporting by industry members in order to carry out its Congressionally mandated function. Self reporting is therefore the industry standard. It would strain credibility for an employer to argue that it did not violate the covenant of good faith and fair dealing in the employment contract by firing an

Second, even in those states with statutory whistleblower protection, Smith will have to overcome his employer's "preemption under the RLA" defense. Although the *Norris* case is promising for Smith, there are no guarantees a whistleblower will be free from preemption under the Court's holding in *Norris*.<sup>156</sup> The Court held that since *Norris*'s claim arose under state tort law, rather than "solely under the CBA" his claims were not preempted. *Norris* had a strong argument that his claims were grounded in rights completely independent of the CBA; Hawaii had a whistleblower protection statute, and that statute was clear indication of the public policy against retaliating against whistleblowers. In other states before different judges, *Norris* might not be much help to an aviation worker like Smith. Although forty-four states recognize a public policy exception to the EAWD,<sup>157</sup> only twenty-two have interpreted the public policy doctrine to protect whistleblowers.<sup>158</sup>

Third, even if Smith's case is not preempted by the RLA, it may be preempted by the Airline Deregulation Act.<sup>159</sup> Under the Supreme Court's expansive reading of the ADA's preemption language, a state law that "relates to" rates routes or services is preempted. At least one court considering an employee's whistleblower retaliation claim found such claim to be preempted by the ADA under *Morales*.<sup>160</sup>

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employee for complying with an industry standard that the employer, by participating in the safety partnership program, openly endorses.

156. See Kathryn A. Stieber, *Hawaiian Airlines, Inc., v. Norris: Railway Labor Act Preemption of State-Law Claims*, 61 J. AIR L. & COM. 757 (1996) for a thorough analysis of post-*Norris* RLA preemption; *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269 (8th Cir. 1994) (RLA does not preempt handicap discrimination claim); *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316 (7th Cir. 1994) (RLA does not preempt claim for retaliatory discharge in violation of state statute); *Hogan v. Northwest Airlines, Inc.*, 880 F. Supp. 685 (D. Minn. 1995) (RLA does not preempt a disability discrimination claim based on the employer's failure to hire employee for another position while on layoff); *Arnold v. Air Midwest, Inc.*, 877 F. Supp. 1452 (D. Kan. 1995) (RLA does not preempt wrongful termination, defamation, and tortious interference claims); *Cooper v. Norfolk & Western Ry.*, 870 F. Supp. 1410 (S.D. W. Va. 1994) (RLA does not preempt claim under state anti-discrimination statute); *Pratt, Bradford & Tobin, P.C. v. Terminal R.R. Ass'n*, 876 F. Supp. 1034 (S.D. Ill. 1994) (RLA does not preempt tortious interference claim challenging railroad's FELA investigation practices) *Id.*, at note 255.

See also *Gay v. Carlson*, 60 F. 3d 83 (2<sup>nd</sup> Cir. 1995) (state-law claims of defamation, prima facie tort and conspiracy are not pre-empted by RLA). *Monroe v. Missouri Pacific RR Co.*, 115 F.3d 514 (7<sup>th</sup> Cir. 1997) (employees' wrongful discharge claims, including inter alia claims of fraud, conspiracy . . . and damages under FELA for injuries he sustained on the job was preempted by RLA). *Fry v. Airline Pilots Assn.*, 88 F.3d 831 (10<sup>th</sup> Cir. 1996) (Pilots' state law claim required reference to CBA to be preempted RLA. The Court held "[T]he [Supreme] Court's ruling in *Norris* did not change the fundamental fact that employment-related "minor disputes" will continue to be subject to the exclusive and mandatory jurisdiction of system boards of adjustment. Nor did *Norris* necessarily narrow the scope of federal preemption under the RLA as the plaintiffs contend. . . . Thus, plaintiffs' claims are minor disputes if they depend not only on a right found in the CBAs, but also if they implicate practices, procedures, implied authority, or codes of conduct that are part of the working relationship."); *Johnson v. Norfolk Southern Co.*, 953 F.Supp. 364 (N.D. Ala 1997) (Employee's suit for wrongful discharge in state court alleging he was fired for serving jury duty was not preempted by RLA.)

157. See WESTMAN, *supra* note 94.

158. WESTMAN, *supra* note 1 at Appendix D.

159. Marlow v. AMR Services Corp, 870 F.Supp 295 (D. Hawaii. 1994).

160. *Id.*

#### IV. Conclusion

##### A. Generally: Congress Should Pass Aviation Whistleblower Protection

Congress should pass some form of aviation whistleblower protection because the FAA's safety monitoring and enforcement functions depend on aviation employees' willingness to report safety violations. Remedying public perception, the reason most frequently offered by proponents of the current bill, is not a sufficiently compelling reason to enact the new law. Not a single commentator has been able to point to empirical data showing that the public perceives air travel to be unsafe, or that such a perception—even if one existed—is a circumstance sufficiently troubling to warrant a legislative fix.

By comparison, increasing worker protection against unfair treatment is a relatively compelling reason to pass whistleblower protection. Many aviation workers are prohibited by rules governing their professions from operating or authorizing the operation of, equipment they believe to be unsafe. Yet in an intensely competitive industry like commercial air transportation there is constant pressure to keep the planes flying without delay or schedule interruptions. In such an environment, workers should not have to choose between risking their professional credentials and being fired or disciplined for exercising caution.

Improving worker protection would be, standing alone, a sufficiently compelling reason to pass aviation whistleblower protection. What makes this particular type of worker protection legislation so important is that in the commercial air transportation business worker protection is inextricably linked to preserving public safety. The FAA depends on workers to report unsafe conditions to perform its safety monitoring and enforcement functions. Without a single, predictable, uniformly enforced standard, employees will not feel free to report safety concerns, and the FAA's ability to effectively monitor and enforce safety standards in the aviation industry will erode. It is impossible to predict the extent to which whistleblower protection would improve safety. But in an industry so unforgiving of hazardous conditions, where the actions of single persons who feel pressured to, for example, sign off on a maintenance log, can result in hundreds of deaths, cautious common sense should govern the rule making process. So long as the FAA relies on any type of self-reporting model, common sense requires clear, unambiguous whistleblower protection for aviation workers.

##### B. Recommended Modifications to H.R. 915.

Whether H.R. 915, as currently proposed, is the appropriate form of whistleblower protection is another question. The draft legislation should be changed in two important respects.

First, the law should protect people who report safety concerns to their superiors within their companies, as well as people who report safety concerns to the FAA. The proposed law affords whistleblower protection only to people who report safety violations to the FAA,<sup>161</sup> excluding from protection a worker who brings safety concerns

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161. § 42121(a).

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) pro-

to the attention of his superiors or his company's internal safety monitoring system.<sup>162</sup> Most airlines have sophisticated and extensive safety monitoring programs, the principle missions of which are to identify and correct *potential* safety problems before they become *actual* safety problems. Whatever criticisms there may be about the efficacy of internal safety monitoring programs in general, it is hard to imagine that the public would be better served by requiring workers to make reports to the overburdened investigative arm of the FAA than to company-managed safety programs. Restated, if the FAA is relying on a self-reporting model anyway, should not workers who report safety concerns to their own employers enjoy the same protection as workers who report safety concerns directly to the FAA? The answer seems to be yes.

The law should not protect aviation whistleblowers who report safety concerns to the media or to other "public" sources because of the potential such information has to unfairly injure an airline's business.<sup>163</sup> The proposed law contains a provision designed to discourage false malicious reporting by permitting the Secretary of Labor to award a prevailing employer reasonable attorney's fees, not exceeding \$5,000 "[i]f the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith."<sup>164</sup> The dollar figure sounds daunting. As Patricia Friend put it during hearings on H.R. 915, "on a flight attendant's salary \$5,000 is a significant deterrent against frivolous complaints."<sup>165</sup>

However, although the dollar figure may sound daunting, the improbability that even very dubious complainants would ever be sanctioned renders toothless the frivolous complaint provision of H.R. 915. History teaches that the obstacle separating "colorable claims" from frivolity or bad faith in employment disputes is, for an aggrieved employer, nearly insurmountable. Consequently, a worker with an ax to grind, who also has statutory protection, will have in his corner a number of advantages not currently available to him. First, he will have a federal cause of action carrying with it traditional employment law remedies, such as back pay and benefits, along with the newly created possibility of uncapped compensatory damages.<sup>166</sup> Second, he will be aware that as long as he can articulate some minimally colorable claim that if he, at one time or another, said anything to anyone that he believed "caused to be provided . . . to the Federal Government information relating to air safety . . ." his risk of financial penalty is almost nonexistent.<sup>167</sup> Third, he will know that the specter of safety-oriented bad public relations for an airline is the business equivalent of having a cold sore at a high school dance.<sup>168</sup> (As long as he provides or causes to be provided information to the Federal Government etc., there's nothing that prevents him from "irretrievably damag[ing]"<sup>169</sup> his employer in the media.) On balance, without some sort

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vided, caused to be provided, or is about to provide or cause to be provided to the Federal Government information relating to air safety under this subtitle or any other law of the United States . . . .

162. See Marlow, 870 F. Supp. at 295.

163. See Jenkins note 64; Field, *supra* note 7.

164. H.R. 3187, 104th Cong. § 42121(b)(3)(c) (1996).

165. See Friend Testimony, *supra* note 14 at 9.

166. H.R. 3187, 104th Cong. § 42121(b)(3)(B)(iii) (1996).

167. H.R. 3187, 104th Cong. § 42121(a)(1) (1996).

168. See Field, *supra* note 28.

169. Kolczynski, *supra* note 70, at 2-3. The Aviation Safety Whistleblower Protection Act of 1997, if passed, may have a significant impact on aviation safety or create questionable distractions for aviation businesses. . . . If the bill is enacted, care must be taken to require that the complaint process

of provision conditioning the law's protection on confidentiality until the allegations can be investigated, industry objection to the legislation is not wholly unwarranted.

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and investigations be kept confidential. All submissions to the Department of Labor, under this Act, should be deemed non-discoverable, under exemptions from The Freedom of Information Act, until the Labor Department's administrative process can determine whether the complaints are frivolous. Otherwise, an air carrier's reputation could be irretrievably damaged.

