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July 18, 2011

WHISTLEBLOWER ALERT

FOR EMPLOYERS COVERED BY AIR21

Employer Fired Employee Because He Was "loud, angry, … looming and intimidating," Not Because He Reported Aviation Safety Concerns

While the federal aviation whistleblower protection law (AIR21) prohibits employers from disciplining or firing employees because they reported aviation safety concerns or otherwise engaged in "protected activity," employers sometimes find themselves in a pickle when they need to fire an employee who engaged in protected activity but who is also disruptive and offensive. Those situations are difficult to address and turn on the particular facts presented, but a recent decision by an Administrative Law Judge (ALJ) ended in a ruling for the employer in such a case.

The employer, Securaplane, designs and manufactures smoke detection systems, camera systems, and battery chargers for airlines and manufacturers. The complainant, Leon, was an engineering technician. Securaplane fired him for his erratic and hostile workplace behavior, about which other employees complained. Leon claimed he was fired for pointing out dangerous shortcomings in the design of an electrical component Securaplane was designing for Boeing's new 787.

After a trial, the ALJ ruled that Leon had engaged in AIR21-protected activity when he complained that design documents for the component contained discrepancies, including a discrepancy between the intended design and the design as represented on the schematic. The schematic also may have depicted a short in the component's circuit board. Securaplane argued that these concerns were not protected because the discrepancies were not actually nonconformities and because discrepancies among multiple drawings at the design stage are common, not problems. The ALJ disagreed:

> Leon need not have been right, nor need he have articulated specific laws he thought Securaplane was violating, he just needed to communicate a concern about air safety to someone at Securaplane or the FAA that was subjectively and objectively reasonable. An employee need not wait until an actual violation of air safety law has occurred, but need only have a reasonable belief a violation is about to occur. Likewise, an employee's whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer's conduct constitutes a violation of air safety laws.

Although Leon engaged in protected activity, he did not prove that he was punished for it. The ALJ first rejected Leon's complaint that Securaplane created a hostile work environment in retaliation for his concerns. In particular, Leon claimed that Securaplane "released his birth date to co-workers by sending him a birthday card over his express objections." (Leon's argument confirms the golden rule of labor law: no good deed goes unpunished.) This bothered Leon, apparently, because it "allowed co-workers a way to research his overturned felony conviction, which made them afraid of Leon and subjected Leon to discrimination and hostility at work." The ALJ found that the CEO sent the birthday card *before* Leon's protected activity, so it could have not have been retaliatory.

The ALJ then concluded that Leon did not prove that his protected activity contributed to his termination. Even if it had, Securaplane proved by clear and convincing evidence that it fired Leon for his behavior, not because he expressed safety concerns.

Among the ALJ's comments:

- "While AIR 21 in particular and whistleblower protection laws in general give complainants significant latitude in bringing their complaints and expressing frustration when an employer retaliates or fails to respond to the whistleblower's concerns, there are limits. Intemperate, hostile, or violent behavior by an employee that happens around the time of a protected activity doesn't prevent an employer from taking disciplinary action against an employee for that behavior."

- "When he was unhappy with [his supervisors'] work and decisions, whether it was about their response to his protected activities or any other management decision, Leon's reaction was to complain, call [them] names, impugn their competence, and insult them to others. He insulted [his supervisors] to their faces, to other employees, and to Securaplane's customers. Leon was loud, angry, and his co-workers perceived him as looming and intimidating."

The ALJ concluded: "Leon wasn't a whistleblower who got worked up about his complaint and was understandably upset over his employer's reactions. He was someone who disrupted the workplace; made a significant number of his coworkers, Securaplane managers, and customers uncomfortable; and refused to change his behavior. The evidence clearly and convincingly shows … Securaplane was motivated by Leon's behavior, not his protected activity."

The case is *Leon v. Securaplane Technologies*, No. 2008-AIR-12. Please contact us if you would like us to send you a copy of this recent decision or for more information about AIR21:

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