

DEPARTMENT OF LABOR**Occupational Safety and Health Administration****29 CFR Part 1979**

RIN 1218-AB99

Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century**AGENCY:** Occupational Safety and Health Administration, Labor.**ACTION:** Final rule.

SUMMARY: This document provides the final text of regulations governing the employee protection ("whistleblower") provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), a Federal Aviation Administration reauthorization bill, enacted into law April 5, 2000. This rule establishes procedures and time frames for the handling of complaints under AIR21, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration ("OSHA"), investigations by OSHA, appeals of OSHA determinations to an administrative law judge ("ALJ") for a hearing de novo, hearings by ALJs, appeal of ALJ decisions to the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary's final decision.

On April 1, 2002, OSHA published an interim final rule (67 FR 15454) which provided for rules of procedure and time frames to implement Section 519 of AIR21. At that time the agency requested comments concerning the interim final rules, and in response several comments were received from interested parties. OSHA has reviewed the comments and now adopts this final rule which has been revised in part to address problems perceived by the agency and the commenters.

DATES: This final rule is effective on March 21, 2003.

FOR FURTHER INFORMATION CONTACT: John Spear, Director, Office of Investigative Assistance, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3603, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2199.

SUPPLEMENTARY INFORMATION:**I. Background**

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

Century ("AIR21"), Public Law 106-181, was enacted on April 5, 2000. Section 519 of the Act, codified at 49 U.S.C. 42121, provides protection to employees against retaliation by air carriers, their contractors and their subcontractors, because they provided information to the employer or the Federal Government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other law relating to the safety of air carriers, or because they are about to take any of these actions. These rules establish procedures for the handling of complaints under AIR21.

II. Summary of Statutory Provisions

The AIR21 whistleblower provisions include procedures which allow a covered employee to file, within 90 days of the alleged discrimination, a complaint with the Secretary of Labor ("the Secretary").¹ Upon receipt of the complaint, the Secretary must provide written notice to both the person named in the complaint who is alleged to have violated the Act ("the named person") and the FAA of: The allegations contained in the complaint, the substance of the evidence submitted with the complaint, and the rights of the named person throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the named person an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation. However, the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the alleged discriminatory behavior was a contributing factor in the unfavorable personnel action alleged in the complaint and the named person has not demonstrated, through clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior. This provision is similar to the 1992 amendments to the ERA, codified at 42 U.S.C. 5851.

After investigating a complaint, the Secretary shall issue a determination

¹ Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Secretary's Order 5-2002 (67 FR 65008, October 22, 2002); Secretary's Order 1-2002 (67 FR 64272, October 17, 2002). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board. See Secretary's Order 1-2002.

letter. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that discriminatory behavior has occurred, the Secretary must notify the named person of those findings along with a preliminary order which requires the named person to: Abate the violation, reinstate the complainant to his or her former position and provide make-whole relief and compensatory damages to the complainant, as well as costs and attorney's and expert fees reasonably incurred. The complainant and the named person then have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing on the record. The filing of objections under AIR21 shall stay any remedy in the preliminary order except for preliminary reinstatement. This provision for preliminary reinstatement after the investigation is similar to the employee protection provision of STAA, 49 U.S.C. 31105. If a hearing before an administrative law judge is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, AIR21 requires the hearing to be conducted "expeditiously." The Secretary then has 120 days after the "conclusion of a hearing" in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, complainant and the named person may enter into a settlement agreement which terminates the proceeding. The Secretary shall assess against the named person, on the complainant's request, a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees, reasonably incurred by the complainant in bringing the complaint to the Secretary or in connection with participating in the proceeding which resulted in the order on behalf of the complainant. The Secretary also may award a prevailing employer an attorney's fee, not exceeding \$1,000, if he or she finds that the complaint is or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation. Finally, AIR21 makes persons who violate these newly created whistleblower provisions subject to a