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PREEMPTION—THE PREEMPTIVE SCOPE OF THE AIRLINE DEREGULATION ACT AS AMENDED BY THE WHISTLEBLOWER PROTECTION PROGRAM: *WRIGHT V. NORDAM GROUP, INC.*

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IN *WRIGHT V. NORDAM Group, Inc.*,[1] the U.S. District Court for the Northern District of Oklahoma erred in holding that *all* state law whistleblower claims based on retaliation for raising safety concerns in the airline industry were completely preempted by the Airline Deregulation Act (ADA), as amended by the Whistleblower Protection Program (WPP).[2] By disregarding customary principles of interpretation of legislative intent, the district court has misinterpreted the purpose of the WPP and thereby denied many airline employees their right to redress under state law whistleblower protections.

In 1978, Congress enacted the ADA in an effort to encourage the utmost "reliance on competitive market forces" in the airline industry.[3] To ensure that states could not interfere in the deregulation of the airline industry, Congress included within the ADA an express preemption provision in § 41713, specifically prohibiting states from enforcing any law "related to a price, route, or service" of any airline.[4] The Supreme Court has

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[1] No. 07-CV-0699-CVE-PJC, 2008 WL 802986 (N.D. Okla. Mar. 20, 2008).

[2] Airline Deregulation Act, 49 U.S.C. § 42121 (2000).

[3] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992).

[4] 49 U.S.C. § 41713(b)(1). This broadly-phrased express preemption provision has created a significant amount of litigation since its enactment. *See generally* Ann K. Wooster, Annotation, *Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. § 41713), Pertaining to Preemption of Authority over Prices, Routes, and Services*, 149 A.L.R. FED. 299 (1998) (discussing the ways courts have handled issues of ADA preemption regarding various state law causes of action).

given § 41713 broad preemptive force;[5] yet, the Supreme Court has also cautioned that the ADA's preemptive scope is not boundless and does not preempt state law claims that are "too tenuous[ly]" related to the services of an airline.[6] Thus, for the first twenty–two years following passage of the ADA, if a state law whistleblower claim was not related to the services of an airline, the claim was not expressly preempted by § 41713.[7] However, when Congress enacted the WPP and created a federal whistleblower cause of action,[8] the courts were forced to address the issue of whether Congress intended to *expand* the preemptive scope of § 41713 such that *all* state law whistleblower claims falling within the WPP's scope are preempted.[9] In *Wright*, the district court was confronted with this critical issue.

Keith L. Wright was an employee of NORDAM Group, Inc.[10] On September 19, 2007, Wright was terminated for allegedly refusing to "alter or indorse documentation of an unauthorized unapproved repair on a military aircraft."[11] After his termination, Wright filed a complaint against NORDAM in the Tulsa County District Court alleging, among other things, wrongful termination under Oklahoma state law.[12] NORDAM removed the case to the U.S. District Court for the Northern District of

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[5] *Wright*, 2008 WL 802986, at *2; *see also Morales*, 504 U.S. at 384.

[6] *Morales*, 504 U.S. at 390

[7] For example, in *Anderson v. American Airlines, Inc.*, the Fifth Circuit held that a state law retaliatory discharge claim alleging that American Airlines terminated the plaintiff for filing a worker's compensation suit was not preempted by § 41713 because the state law claim was too tenuously related to the services of American Airlines. Anderson v. Am. Airlines, Inc., 2 F.3d 590, 594 (5th Cir. 1993).

[8] The WPP provides, in relevant part, as follows:

> No 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 . . . (1) provided, caused to be provided, or is about to provide . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration.

49 U.S.C. § 42121(a)(1).

[9] *See, e.g.*, Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1263–64 (11th Cir. 2003); Botz v. Omni Air Int'l, 286 F.3d 488, 492–98 (8th Cir. 2002); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1216–17 (W.D. Wash. 2003).

[10] *Wright*, 2008 WL 802986, at *1.

[11] *Id.*

[12] *Id.*

Oklahoma on the grounds that Wright's wrongful termination claim under state law was completely preempted by the WPP.[13]

Upon removal of the case, Wright did not challenge NORDAM's assertion that the WPP completely preempted his state law wrongful discharge claim.[14] However, because the doctrine of complete preemption provided the grounds for the district court's subject matter jurisdiction, the court had an independent obligation to review the basis of its subject matter jurisdiction even if such jurisdiction was not in dispute.[15] In addressing whether or not Wright's state law whistleblower suit was completely preempted by the ADA, as amended by the WPP, the district court applied the following two part analysis: (1) does the ADA, as amended by the WPP, preempt the state law whistleblower claim relied upon by Wright; and (2) did Congress intend to allow removal in such cases, as manifested by the creation of a replacement cause of action?[16] This discussion will only address the first prong of the test as it is the only prong pertinent to the critical issue discussed above.

In addressing the first prong of the test, the district court did not propound its own analysis of the preemptive scope of the ADA, as amended by the WPP.[17] Rather, the court adopted the holding in *Turgeau v. NORDAM Group, Inc.*,[18] which, in turn, unconditionally adopted the in-depth analysis provided by the Eighth Circuit in *Botz v. Omni Air International*.[19] In applying the reasoning set forth in *Botz*, the district court found that Wright's state law retaliatory discharge claim was completely preempted

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[13] *Id.* The complete preemption doctrine recognizes that the preemptive scope of some federal statutes "is so powerful as to displace entirely" an area of state law. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). Thus, any claim allegedly based on the preempted state law may be removed to federal court on the premise that federal preemption makes the state law claim "necessarily federal in character." *Id.* at 67.

[14] *Wright*, 2008 WL 802986, at *3 n.5.

[15] *Id.* (citing Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1048 (10th Cir. 2006)).

[16] *See* Schmeling v. NORDAM, 97 F.3d 1336, 1343 (10th Cir. 1996) (establishing the Tenth Circuit test for complete preemption).

[17] *Wright*, 2008 WL 802986, at *3.

[18] *Id.* (citing Turgeau v. NORDAM Group, Inc., No. 02-CV-965-H(M), slip op. at 5–11 (N.D. Okla. Apr. 8, 2003)).

[19] *See* Botz v. Omni Air Int'l, 286 F.3d 488, 491–98 (8th Cir. 2002). It must be noted that *Turgeau* provided little analysis of its own regarding the preemptive scope of the ADA, as amended by the WPP. *Turgeau*, No. 02-CV-965-H(M), slip op. at 7. *Turgeau* basically adopted the Eighth Circuit's analysis provided in *Botz*. *Id.*

by the ADA, as amended by the WPP, because his claim could have been brought in federal court under the WPP.[20] Consequently, the district court *expanded* the scope of § 41713 to expressly preempt *all* state law whistleblower claims falling within the scope of the WPP.[21] The court stated that the exclusive grounds for this holding was that it found the ruling in *Turgeau* to be "well-reasoned."[22] Therefore, by extension it necessarily follows that the court also found the Eighth Circuit's analysis of the preemptive scope of the ADA, as amended by the WPP, to be highly persuasive. Thus, this discussion will focus on the Eighth Circuit's analysis in *Botz.*

In *Botz,* the Eighth Circuit concluded that the WPP preempts *all* state law whistleblower claims falling within its scope.[23] The court's judgment was based on the following arguments: (1) in enacting the WPP, Congress intended to create a uniform means of resolving whistleblower claims falling within its scope;[24] and (2) Congress "only" would have included an additional, express preemption clause in the WPP itself if Congress had intended the WPP to *not* wield any preemptive force upon state law whistleblower claims.[25] The court first reasoned that Congress furthered its objective in ensuring reliance on competitive market forces in the airline industry by creating a "single, uniform standard" for addressing state law whistleblower claims.[26] The court then rejected the argument that if Congress had intended the WPP to preempt state law whistleblower claims, it would have included an express preemption provision in the WPP itself.[27] Instead the Eighth Circuit determined that such an argument "turns the proper logic on its head" because, when it enacted the WPP, Congress was unquestionably aware of: (1) the existence of § 41713; and (2) the Supreme Court's previous interpretation of § 41713 to have a "broad application."[28] Accordingly, Congress would not have thought it necessary to include another express preemption provision in the WPP itself.[29] Thus, the Eighth Circuit concluded that the WPP's

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[20] *Wright,* 2008 WL 802986, at *3.
[21] *Id.*
[22] *Id.*
[23] *Botz,* 286 F.3d at 498.
[24] *Id.* at 497.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

silence with regard to preemption indicates that Congress naturally expected the WPP to preempt *all* state law whistleblower claims falling within its scope.[30]

The district court in *Wright* erred in adopting the reasoning as set forth by the Eighth Circuit in *Botz*. The Eighth Circuit's reasoning is flawed because it: (1) ignored customary rules of interpretation;[31] (2) based its arguments on purported congressional knowledge that renders Congress's intent merely ambiguous and reveals nothing of Congress's view of the scope of § 41713;[32] and (3) read a mandatory, federal cause of action into the WPP when the WPP actually contains only a permissive cause of action.[33]

First, the Eighth Circuit's argument that Congress intended to preempt *all* state law whistleblower claims falling within the scope of the WPP so as to create a single, uniform means of resolving whistleblower claims is unfounded because it overlooks established principles of the interpretation of legislative intent.[34] As the Eleventh Circuit in *Branche v. Airtran Airways, Inc.* recognized, the glaring gap in the Eighth Circuit's argument is that it ignores the presumption that it is usually improper to imply preemption from a statute's substantive provisions when Congress has chosen to explicitly address the issue of preemption in that statute.[35] When the Eighth Circuit inferred that the mere enactment of the WPP demonstrated legislative intent to preempt *all* state law whistleblower claims, the Eighth Circuit was necessarily implying preemption.[36] However, such an implied preemption is not permissible because the ADA

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[30] *Id.*

[31] Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1263-64 (11th Cir. 2003).

[32] *Id.* at 1263.

[33] Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1217 (W.D. Wash. 2003).

[34] *See Branche*, 342 F.3d at 1263–64.

[35] *See id.* The Supreme Court established this presumption in stating:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (internal quotations omitted). However, the Supreme Court has also noted that *Cipollone* is not an ironclad rule. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995).

[36] *Branche*, 342 F.3d at 1263.

already has an express preemption provision in § 41713.[37] Further, as the Eleventh Circuit recognized, it is possible to point to a number of federal statutes that have parallel state equivalents.[38] Thus, the creation of a federal cause of action cannot be the sole grounds "to expand the scope of an express pre-emption provision to encompass and pre-empt *all* equivalent state remedies."[39]

Second, the Eighth Circuit's argument that Congress would only have included an express preemption provision in the WPP if it had intended to limit the preemptive force of the WPP is speculative in that the WPP's silence with regard to preemption is "ambiguous" at best.[40] Therefore, such silence should not serve as a basis for expanding the scope of § 41713 to cover *all* state law whistleblower claims.[41] The Eighth Circuit's argument relies on two premises: (1) Congress must have known of the existence of § 41713 when it enacted the WPP; and (2) Congress knew that the Supreme Court had interpreted § 41713 broadly.[42] As the Eleventh Circuit recognized, neither of these premises manifests a clear congressional intent regarding the preemptive scope of the ADA, as amended by the WPP.[43] First, Congress's knowledge of § 41713 and the Supreme Court's broad interpretation thereof certainly does not imply that Congress intended to expand the scope of § 41713 to encompass all state law whistleblower claims.[44] In fact, Congress's knowledge implies nothing regarding Congress's view of the scope of § 41713.[45] Second, if Congress is to be charged with knowledge of the Supreme Court's broad interpretation of § 41713, it must also be charged with the knowledge that the majority of courts addressing the issue before the enactment of the WPP held that state law whistleblower claims were *not preempted* by § 41713[46] (*i.e.*, that such claims did not ordinarily relate to the services of

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[37] *Id.* at 1263–64.

[38] *Id.* at 1264.

[39] *Id.*

[40] *Id.* at 1263.

[41] *Id.* at 1264.

[42] Botz v. Omni Air Int'l, 286 F.3d 488, 497 (8th Cir. 2002).

[43] *Branche*, 342 F.3d at 1263.

[44] *Id.*

[45] *Id.*

[46] *Id.*; *see also id.* at 1259–60 (citing numerous cases decided before the enactment of the WPP that held that state law whistleblower claims are not preempted by the ADA.).

an airline).[47] Thus, "an equally compelling argument could be made that Congress was indicating its acquiescence in the view that such state law [whistleblower] claims are *not* pre-empted."[48]

Finally, as the U.S. District Court for the Western District of Washington noted, filing a complaint under the WPP is not mandatory.[49] In relevant part, the WPP simply states that "a person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) *may* . . . file . . . a complaint with the Secretary of Labor alleging such discharge or discrimination."[50] Thus, if Congress had intended the WPP to preempt *all* state law whistleblower causes of action falling within its scope, Congress certainly would have thought to require that those claims *must* be brought in the federal courts.[51]

The U.S. District Court for the Northern District of Oklahoma, in *Wright*, should not have unconditionally relied upon the Eighth Circuit's reasoning in holding that *all*, including Wright's, state law whistleblower claims falling within the scope of the WPP are preempted. Considering the extensive gaps in the Eighth Circuit's analysis as addressed above, the district court should have held that the ADA, as amended by the WPP, does *not* preempt *all* state law whistleblower claims falling within the WPP's scope. If the district court continues to ignore the strong arguments advocated against the adoption of the Eighth Circuit's reasoning, numerous airline employees will be denied their right to redress under state whistleblower laws.

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[47] Airline Deregulation Act, 49 U.S.C. § 41713 (2000).

[48] *Branche*, 342 F.3d at 1263 (emphasis added).

[49] Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1217 (W.D. Wash. 2003).

[50] *Id.* (citing 49 U.S.C. § 42121(b)(1)).

[51] *See id.*


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