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DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

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Good morning Chairman Thompson, Ranking Member King, distinguished Members of the Committee, ladies and gentlemen. Thank you for the opportunity to appear before you today to speak to you about OSHA's administration of the whistleblower provisions of fourteen statutes. Also, I understand the Committee would like the Department's views on the "Rail and Public Transportation Security Act of 2007." The Administration does not yet have an official position on the legislation so I will not be able to comment on specific provisions in the bill. As a general matter, however, we would caution that an overly broad expansion of covered protected activity, particularly combined with a broad definition of adverse action, could result in the Department of Labor becoming the arbiter of another agency's employment disputes, which could also be resource-intensive for the Department.

Organization and Responsibilities

When the Occupational Safety and Health Act became law in 1970, OSHA had no specific program for investigating complaints filed under the Act's whistleblower provision, Section 11(c). Initially, complaints were investigated by Compliance Safety and Health Officers in the field. By 1974, it had become apparent that specialized skills were needed to conduct retaliation investigations, and in 1975, a central whistleblower investigation office was established. This office consisted of two supervisors and ten investigators, all located in the ten regional offices around the country. By 1980, there were over 70 investigators and supervisors. In 1981, the whistleblower program was again decentralized, with responsibility delegated to each of the ten Regional Administrators. Currently, the whistleblower program employs 72 full-time field investigators, nine supervisors, and one program manager in the field.

Under my direction, the Office of Investigative Assistance (OIA) develops policies and procedures for the Whistleblower Protection Program, administers appeals of cases dismissed under 11(c), the Asbestos Hazard Emergency Response Act of 1986 (AHERA), and the International Safe Container Act (ISCA), develops and presents formal training for Federal and State field staff, and provides technical assistance and legal interpretations to field investigative staff. OIA employs six staff.

Twenty-six states operate state plans pursuant to Section 18 of the Occupational Safety and Health Act of 1970, which provides that any state that desires to assume responsibility for development and enforcement of occupational safety and health standards may do so. To establish a state plan, a state must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Private-sector employees in state plan states may file occupational safety and health retaliation complaints with either federal OSHA or the state or both. Complaints under any of the other thirteen whistleblower statutes administered by OSHA fall under the jurisdiction of Federal OSHA.

History of Delegation of Statutes to OSHA

In the 1980s and 1990s, because of the perceived expertise of the OSHA retaliation investigators, whistleblower investigative and administrative responsibilities under the Surface Transportation Assistance Act of 1982 (STAA), ISCA, and AHERA were delegated to OSHA to administer. For similar reasons, in 1997, under an agreement with the Department's Wage & Hour Division, the enforcement of the whistleblower provisions of six environmental statutes and the nuclear safety statute, the Energy Reorganization Act (ERA), was delegated to OSHA.

In 2001, the enforcement of the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) was added, and in 2002, the enforcement of the whistleblower provisions of the Sarbanes-Oxley Act, (SOX) and the Pipeline Safety Improvement Act of 2002 (PSIA) was also added.

The Fourteen Whistleblower Statutes Administered by OSHA

The whistleblower provisions of the following statutes are administered and enforced by the primary agency. For example, OSHA enforcement officers investigate the safety or health complaints underlying a whistleblower complaint, the FAA investigates airline safety complaints, the Federal Motor Carrier Safety Administration investigates violations of commercial motor carrier safety complaints, and the SEC investigates allegations of corporate fraud.

- Section 11(c) of the Occupational Safety and Health Act of 1970 (11(c))
- Asbestos Hazard Emergency Response Act of 1986 (AHERA)
- Clean Air Act of 1977 (CAA)
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)
- Energy Reorganization Act of 1978 (ERA)
- Federal Water Pollution Control Act of 1972 (aka Clean Water Act) (FWPCA)
- International Safe Container Act of 1977 (ISCA)
- Pipeline Safety Improvement Act of 2002 (PSIA)
- Surface Transportation Assistance Act of 1982 (STAA)
- Safe Drinking Water Act of 1974 (SDWA)
- Solid Waste Disposal Act of 1976 (SWDA)
- Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX)
- Toxic Substances Control Act of 1976 (TSCA)
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)

Jurisdiction

Investigators must confirm that complaints fall within the jurisdiction of a whistleblower statute administered by OSHA. Investigators review every new case upon assignment to ensure the

complaint was timely filed, that a *prima facie* allegation is present under one of the statutes, and that the case has been properly docketed and all parties notified. If he or she has not already done so, the investigator checks on prior or current retaliation, safety and health, or other regulatory cases related to either the complainant or the employer. This enables the investigator to coordinate related investigations and obtain additional background data pertinent to the case at hand. If the complaint fails to meet any of the elements of a *prima facie* allegation, or if other jurisdictional issues preclude the continuation of the investigation, the complaint must be dismissed, unless it is withdrawn.

The Elements of a Violation

Under the whistleblower statutes, employers are not permitted to retaliate against an employee for engaging in activities protected by statute. To prove a violation, each of the four elements of a *prima facie* allegation must be proven. The elements are:

Protected Activity

It must be established that the complainant engaged in activity protected by the specific statute(s) under which the complaint was filed. Protected activity generally falls into four broad categories: providing information relating to an alleged violation of the law to a government agency (e.g., OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, DOT), a supervisor (the employer), a union, health department, fire department, Congress, or the President; filing a complaint or instituting a proceeding provided for by law, for example, a formal occupational safety and health complaint to OSHA under Section 8(f); testifying in proceedings; and, under some of the statutes, refusing to perform an assigned task on the basis of a reasonable apprehension of death or serious injury or refusing to perform a task that is deemed illegal under the specific statute(s).

Employer Knowledge

The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity. For example, a respondent manager need not have specific knowledge that the complainant contacted a regulatory agency if the complainant's previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant.

Adverse Action

The evidence must demonstrate that the complainant suffered some form of *adverse employment action* initiated by the employer. Although the language of the statutes may differ, they frequently use the terms "discharge or otherwise discriminate." The phrase *adverse employment action* has been defined in the decisions of many courts, including the Supreme Court. This is an area of the law that is currently in flux, and investigators and supervisors regularly review decisions to keep up-to-date on case law. Examples of retaliatory employment actions include discharge, demotion, reprimand, harassment, lay-off, failure to hire or recall, failure to promote, blacklisting, transfer to a different job, change in duties or responsibilities, denial of overtime, reduction in pay, denial of benefits, and constructive discharge, wherein the employer *deliberately* created working conditions that were so difficult or unpleasant that a reasonable person in the employee's situation would have felt compelled to resign.

Nexus

A causal link—nexus—between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence, such as animus (exhibited animosity) toward the protected activity. It may also involve proximity in time between the protected activity and the adverse action (timing), disparate treatment of the complainant in comparison to other similarly situated employees, false testimony or manufactured evidence, or a pretextual defense put forth by the respondent.

Under ten of the statutes administered by OSHA, a complainant must prove by a preponderance of the evidence that the alleged adverse action was motivated by the alleged protected activity in order to establish that the law was violated. Under four of the statutes, a complainant must prove by a preponderance of the evidence that the alleged protected activity was a contributing factor to the alleged adverse action. Once a complainant establishes a prima facie case that his or her protected activity was either a motivating or contributing factor in the adverse action, the burden of production shifts to the respondent to articulate a reason for the adverse action. The burden then shifts back to the complainant to establish that the respondent's articulated reason was a pretext for discrimination or that the respondent's reason, while true, is only one of the reasons for its conduct, and that another reason was complainant's protected activity. To avoid liability in a "mixed motive" case, the respondent must demonstrate, depending on the statute, either by a preponderance of the evidence or by clear and convincing evidence, that it would have taken the same adverse action notwithstanding the complainant's protected activity.

Investigating Complaints

DOL does not represent either the complainant or the respondent; as neutral fact-finders, investigators must test both the complainant's allegation and the respondent's non-retaliatory reason for the alleged adverse action. It is on this basis that relevant and sufficient evidence is identified and collected in order to reach the appropriate disposition of the case. If the complainant is unable to prove by preponderance of the evidence any of the elements of a *prima facie* allegation, the case is dismissed.

Early Resolution

OSHA makes every effort to accommodate early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. An early resolution is often beneficial to both parties, since potential losses are at their minimum when the complaint is first filed. Consequently, the investigator is encouraged to contact the respondent immediately after completing the evaluation interview if he or she believes an early resolution may be possible. However, the investigator must first determine if an inspection or investigation under the substantive provisions of the various statutes is planned prior to any contact with a respondent, so as not to inadvertently give notice to the respondent of an imminent OSHA (or FAA or other) inspection. Thereafter, at any point the investigator can explore how an appropriate settlement may be negotiated and the case concluded.

On-site Investigation

Personal interviews and collection of documentary evidence are conducted on-site whenever practicable. Generally, investigators personally interview all appropriate witnesses during a single

site visit. The respondent's designated representative has the right to be present for all management interviews, but interviews of employees are to be conducted in private. In limited circumstances, testimony and evidence may be obtained by telephone, mail, or electronically.

Interviewing the Complainant

The investigator generally arranges to meet with the complainant as soon as possible to interview and obtain a statement detailing the complainant's allegations.

The complainant is asked to provide a list of witnesses and all documentation in his or her possession relevant to the case. The investigator also ascertains the restitution sought by the complainant and advises the complainant of his or her obligation to seek employment, in order to mitigate any possible damages, and to maintain records of interim earnings.

Contact with the Respondent

Following receipt of OSHA's letter notifying the respondent of the complaint, the respondent submits a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. However, in most cases, the investigator needs to visit the respondent's worksite to interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense.

The investigator generally interviews all company officials who had direct involvement in the alleged protected activity or retaliation, and attempts to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. While at the respondent's establishment, the investigator makes every effort to obtain copies of, or at least review and document in a memorandum to file, all pertinent data and documentary evidence which the respondent offers and which the investigator determines is relevant to the case.

If necessary, subpoenas may be obtained for testimony or records when conducting an investigation under §11(c) or AHERA. The other whistleblower provisions do not authorize subpoenas. If the respondent fails to cooperate or refuses to respond, the investigator evaluates the case as best as possible and makes a determination based on the available evidence.

Analysis

After having gathered all relevant evidence available and resolved any discrepancies in testimony, the investigator evaluates the evidence and draws conclusions based on the evidence and the law, according to the requirements of the statute(s) under which the complaint was filed.

Upon completion of the field investigation and after discussion of a non-meritorious case with the supervisor, the investigator again contacts the complainant in order to provide him or her the opportunity to present any additional evidence the complainant deems to be relevant. If the complainant offers any new evidence or witnesses, the investigator then ascertains whether such information is relevant, and if so, what further investigation might be necessary prior to final closing of the case.

Documenting the Investigation

Investigators document any and all activities associated with the investigation of a case, developing a substantial case file that contains the original complaint; the respondent's response(s); all of the documentary evidence; memoranda to the file about every contact with any party or witness that is otherwise not documented, such as through a witness statement; all correspondence to or from the parties, other government agencies, or others; results of any research conducted; the Final Investigative Report; and a copy of the Secretary's Findings or other correspondence closing the case.

Issuance of Secretary's Findings and Orders, if Appropriate

Once the Final Investigative Report is written, the investigator forwards it, together with the case file, to the supervisor for review and concurrence, so that Secretary's Findings can be issued. This allows either dismissal of the case or a finding of a violation of the relevant statute. If there is a violation, the investigator, where appropriate, broaches the subject of settlement with the respondent. If the respondent is amenable, settlement negotiations may be initiated. The appropriate remedy in each individual case will already have been carefully explored and documented by the investigator.

Remedies

The remedies available and permitted vary according to statute, and are subject to legal interpretations and decisions. Remedies not only involve corrective actions for the individual who filed the complaint, but also address the impact of the violation on the entire work force. Thus, to prevent a chilling effect or to ensure that a similar violation does not recur, orders may include requirements for posting, management training, and informational speeches to workers and their representatives.

Full relief of the complainant's loss is generally sought during settlement negotiations, but compromises may be considered in appropriate cases to accomplish a mutually acceptable and voluntary resolution of the matter. If settlement is reached, an agreement is signed and the case is closed. If an equitable settlement is impossible, OSHA issues to the respondent Secretary's Findings and an Order, by way of which the complainant is made whole. Restitution may encompass any or all of the following, and it is not necessarily limited to these:

- Reinstatement or preliminary reinstatement—depending on the statute under which the complaint was filed—to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation.
- Wages lost due to the adverse action, offset by interim earnings.
- "Front pay," which encompasses future wage losses, calculated from the end-date of back-wages, and projected to an agreed-upon future date in cases where reinstatement is not feasible.
- Expungement of all warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in the complainant's personnel file or other records.
- Respondent's agreement to provide a neutral reference to potential employers of the complainant.
- Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief.

- Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, or property loss resulting from missed payments.
- Compensatory damages under certain statutes, such as for pain and suffering, including mental anguish, the loss of a home, loss of reputation, etc.
- A lump-sum payment to be made at the time of the signing of the settlement agreement as agreed by the parties.
- Punitive damages, under certain statutes, when a management official involved in the adverse action knew about the relevant whistleblower statute before the adverse action or when the respondent's conduct is egregious.

The Surface Transportation Assistance Act of 1982, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), the Sarbanes-Oxley Act of 2002 (SOX), and the Pipeline Safety Improvement Act of 2002 (PSIA) authorize the Secretary to order preliminary reinstatement based on her investigative findings. However, in the last few years, the Secretary and complainants have experienced some difficulty in compelling recalcitrant employers to comply with preliminary reinstatement orders issued by either OSHA or the Office of Administrative Law Judges under AIR21 and SOX. Although AIR21 (as well as SOX, by incorporating AIR21) expressly provides that the filing of objections does not stay the Secretary's preliminary order reinstating the employee, the jurisdictional provisions of the statute reference only a section entitled "final orders." Accordingly, a number of judges have held that they lack authority under the statute to enforce preliminary reinstatement orders even though the statute explicitly states that those orders are not to be stayed during the administrative adjudication. Those judges have interpreted the statute as providing the Secretary and whistleblowers with a cause of action to enforce only *final* orders of the Secretary.

Hearings and Appeals

Because of OSHA's role as a neutral fact-finder, many of its findings are not challenged. Complainants or Respondents who object to OSHA's findings under the Energy Reorganization Act of 1978, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the Sarbanes-Oxley Act of 2002, the Pipeline Safety Improvement Act of 2002, the Surface Transportation Assistance Act of 1982, and the environmental statutes may request a *de novo* hearing before a Department of Labor Administrative Law Judge (ALJ). After a decision is issued by an ALJ, review of the case is by the Administrative Review Board (ARB), which is authorized to issue final orders of the Secretary of Labor. Depending on the whistleblower law involved, the ARB either reviews the entire ALJ decision under a *de novo* standard of review, or *de novo* on matters of law, and a "substantial evidence" standard of review on the ALJ's findings of fact. Judicial review of final agency decisions is in the U.S. Courts of Appeals.

Actions under OSHA, AHERA, and ISCA are enforced by the Secretary in district court. There is no statutory right to appeal OSHA, AHERA, and ISCA determinations by OSHA. The agency-level decision is the final decision of the Secretary of Labor. However, if a complaint is dismissed, the complainant may request from the Director of the Directorate of Enforcement Programs (DEP) a review of the case file. This review is not *de novo*. Rather, a committee

constituted of staff of the Office of Investigative Assistance and the Office of the Solicitor's Occupational Safety and Health Division (the Appeals Committee) reviews the case file and findings for proper application of the law and for substantial evidence. If the investigation is found to be lacking, the case is remanded to the field to be reopened for further investigation.

Program Performance

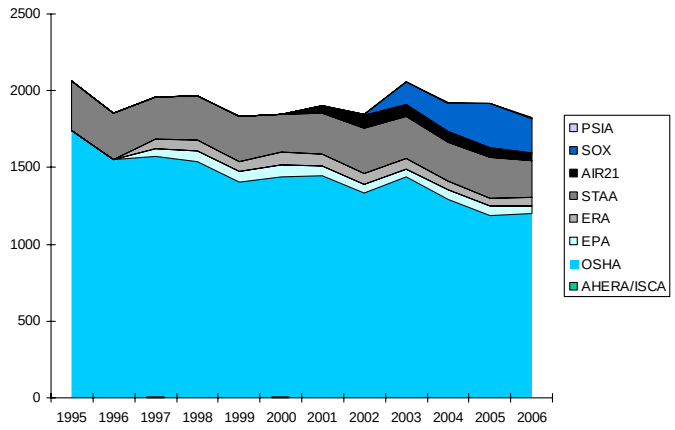
The complexity of complaints filed under the more recently enacted statutes has resulted in longer OSHA investigations that exceed in length their statutory timeframes.

Statute	Time-frame	Average Days to Complete	Total Cases
EPAs	30 days	102	57
STAA	60 days	85	246
AIR21		121	54
SOX		150	250
PSIA		84	7
OSHA	90 days	89	1233
AHERA		211	1
Total			1901

Average Days to Complete Compared to Statutory Timeframes

This discrepancy between the timeframes prescribed in the statutes and agency practice is not limited to the investigative stage. The Office of Administrative Law Judges and the Administrative Review Board face the same challenges. Indeed, two years ago, when Congress amended the Energy Reorganization Act of 1978 (ERA), it added, among other things, the "kick-out" provision allowing complainants to remove a case to U.S. District Court if the Department of Labor failed to issue a final decision within a year, so long as the delay is not due to the bad faith of the complainant. Although the ERA amendments in 2005 did not change the statutory 90-day timeframe for issuing final decisions, we believe that in setting a one-year timeframe for removal to district court, Congress recognized that it is not unreasonable for the Department to take up to one year to complete the investigatory and adjudicative processing of a whistleblower complaint under the ERA.

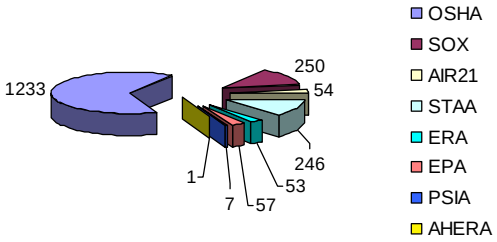
Despite the increased numbers of statutes and increasing numbers of complaints filed under the newer statutes, the total number of complaints filed annually remains relatively steady at 1,800 to 2,100 complaints per year. However, the proportion of the more complex cases has grown in relation to the simpler cases under the other statutes (see graph below).



Cases Received from Fiscal Year 1995 through 2006

Fiscal Year 2006 Performance

OSHA received 1,825 cases in fiscal year 2006. The chart below represents cases completed in fiscal year 2006, broken out by statute.



Complaints Completed in Fiscal Year 2006

The outcomes of OSHA's investigations for fiscal year 2006 are consistent with those of the past five or more years. The results do not vary more than five percentage points from year to year. Twenty-two percent of the investigations resulted in a disposition favorable to the complainant ("merit" cases). Of these, 66% were settled by OSHA, 28% were settled by the parties themselves, and in the remainder—7%—OSHA issued findings or preliminary orders in favor of complainants. In addition, 65% were dismissed, and 14% were withdrawn. Generally, investigations leading to dismissal of claims entail as much work and last as long as those leading to findings of violations. OSHA does not track the length of investigations broken out by length of investigation.

The State Plan States had similar results with their 11(c)-type complaints in fiscal year 2006—60% were dismissed; 20% withdrawn; and 20% were meritorious, of which 75% were settled.

Conclusion

I hope that my testimony has shed some light on the complex process by which whistleblower complaints are resolved. Not only do our investigators juggle the competing demands of numerous open cases at any one time, they must have knowledge and expertise in applying numerous related statutes and implementing regulations (beyond the 14 whistleblower statutes and their particular implementing regulations). Investigators must know the parlance of, for example, federal criminal fraud statutes, federal securities laws and regulations, Federal Aviation Administration regulations, other Department of Transportation regulations, Nuclear Regulatory Commission regulations and many others.

I look forward to answering any questions you might have.