U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210

MAR 31 1997

MEMORANDUM FOR: GREG WATCHMAN
Acting Assistant Secretary
for Occupational Safety and Health

FROM: JOHN J. GETEK
Assistant Inspector General
for Audit

SUBJECT: Nationwide Audit of OSHA's Section 1l(c)
Discrimination Investigations
Final Report No. 05-97-107-10-105

The attached final audit report presents the results of our audit of the OSHA 11(c) whistleblower protection program. An essential part of the OSH Act requires an effective whistleblower protection program be maintained which provides an environment conducive for employees to alert their employers, co-workers, or OSHA of the existence of work place hazards without fear of reprisal. We performed an audit of the program's performance and operational effectiveness for the period FY 1995.

Based on the results of our audit, we recommend you work with the Office of the Solicitor to reevaluate your cooperative efforts for ensuring workers receive "all appropriate relief' as intended under the provisions of Section 11(c), and ensure that needed changes are made to OSHA's management information system to make it a more useful tool for reporting and managing 11(c) operations and program results.

We would appreciate receiving your response to our audit findings and recommendations within 60 days. You should be aware that the report, including your written comments, is subject to disclosure under the Freedom of Information Act and/or as part of discovery proceedings in the event of litigation.

I would like to thank OSHA National Office, Regional Office and District Office staff for their excellent cooperation during this audit.

If you have any questions regarding this audit, please contact Preston Firmin, Regional Inspector General for Audit, Chicago Regional Audit Office, at (312) 353-2416.

Attachment

U.S. Department of Labor
Office of Inspector General
Office of Audit

Nationwide Audit of OSHA's Section 11(c) Discrimination Investigations

Report No. 05-97-107-10-105
Date Issued: March 31, 1997

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ABBREVIATIONS/ACRONYMS

ADR	Alternative Dispute Resolution
BCLR	Boston College Law Review
DOL	Department of Labor
FOM	Field Operations Manual
FY	Fiscal Year
H.R.1834	Proposed Safety and Health Improvement and Regulatory Reform Act of 1995
HHS	U.S. Department of Health and Human Services
IMIS	Integrated Management Information System
OIG	Office of Inspector General
OMDS	Office of Management Data Systems
OSH Act	Occupational Safety and Health Act of 1970
OSHA	Occupational Safety and Health Administration
PPS	Probability Proportional to Size
RSI	Regional Supervisory Investigator
RSOL	Regional Solicitor
S.1423	Proposed Occupational Safety and Health Reform and Reinvention Act
Sec.11(c)	Section 11(c) of the Occupational Safety and Health Act of 1970, often referred to as “whistleblower” protections
Sec.405	Section 405 of the Surface Transportation Assistance Act, also providing “whistleblower” protections to truck drivers and administered by DOL
SOL	Office of the Solicitor
STAA	Surface Transportation Assistance Act

EXECUTIVE SUMMARY

Among the more visible components of the Department of Labor's mission is the responsibility to protect employee safety and health on the job. Although the Occupational Safety and Health Administration (OSHA) is responsible for enforcing safety and health standards by inspecting work places and fostering voluntary compliance through onsite consultation, changes in safety standards and reduced resources have resulted in fewer programed inspections. Furthermore, no amount of resources would enable OSHA to identify all potential health and safety hazards that might exist. For these reasons, it is critical that workers feel free to raise health and safety concerns without fear of discrimination by their employers.

The Occupational Safety and Health (OSH) Act of 1970 [Public Law 91-596, Section 11(c)] prohibits retaliation by employers against workers who "blow the whistle" by exposing health and safety hazards. Workers who believe they were unfairly treated because they complained about unsafe or unhealthy working conditions can file a complaint with OSHA. If, upon investigation, OSHA finds the allegation has merit, OSHA attempts to negotiate a settlement between the worker and employer. If a settlement cannot be reached, OSHA refers the case to the Office of the Solicitor (SOL) to consider filing a civil action in the U. S. District Court.

If workers believe the system established by OSHA adequately protects them from retaliation, they will be more willing to report hazards. Likewise, if employers believe they will suffer financial consequences (i.e., payment of back wages, and/or punitive damages) for retaliating against whistleblowers, they will be less likely to retaliate.

AUDIT RESULTS

We performed an audit of OSHA's Section 11(c) whistleblower protection program for the period October 1, 1994 to September 30, 1995. Our audit found:

- ♦ workers in general, but particularly those with small companies, are vulnerable to reprisals by their employers for complaining about unsafe/unhealthy work conditions. In addition, proposed legislation to amend the OSH Act may result in more discrimination complaint cases being filed. The severity of the discrimination is highlighted by the fact that for 653 cases included in our sample, nearly 67 percent of the workers who filed complaints were terminated from their jobs;

- ♦ OSHA operating practices and SOL coordination present obstacles to gaining "all appropriate relief" as provided by the OSH Act for complainants with merit cases. Without SOL input, many cases may be settled too early because of legislated time constraints for conducting an investigation. In addition, many case files contained incomplete documentation of worker loses in back wages, and cases referred for

litigation were too often rejected. We also found that 81 percent of the cases referred to SOL were not promptly acted upon; and

- ♦ OSHA's automated case management system is ineffective for reporting and managing 11(c) cases. The system is not consistently relied on, does not help field offices manage their operations, and may not convey to interested parties information about how well OSHA enforces Section 11(c) program provisions.

RECOMMENDATIONS

We recommend that the Assistant Secretary for Occupational Safety and Health:

-- consult with SOL to reevaluate and agree upon criteria for deciding which cases warrant legal advice and/or litigation considerations to ensure workers receive their entitlement of "all appropriate relief" as provided by the Act; and

-- ensure that changes are made to OSHA's management information system to make it a useful tool for reporting and managing 11(c) operations and program results.

OSHA's Response

OSHA's response to the draft report did not include comments addressing Chapter 1 or Chapter 3.

For Chapter 2, OSHA indicated agreement with our conclusion that its customers may be underserved by using predetermination settlements and by settling cases too soon. However, OSHA disagreed with the effectiveness of our recommendations, citing instead the Alternative Dispute Resolution (ADR) program proposed by DOL. OSHA stated that our recommendations were appropriate in theory, but did not conform to DOL's emphasis on ADR.

OIG Conclusion

We fully understand that negotiated settlements are a necessary and integral part of OSHA 11(c) settlement operations and cannot be abandoned. We are also aware of the Department's emphasis on the use of ADR as a means of achieving program goals while reducing costly and time consuming litigation. While it is true that ADR may reduce or replace whistleblower case litigation at the District Court level, it is unlikely to replace the 11(c) office level compromise and settlement operations currently practiced. Our recommendations address improvements in those settlements as well.

OSHA's response to the draft report is included in its entirety as Appendix II of the report.

STATUS OF PRIOR AUDIT RECOMMENDATIONS

Our prior audit report (Report No. 05-88-083-10-105, dated February 21, 1989) addressed two areas in need of improvement.

Finding 1. The 90-day legislated time frame for making determinations on complaints was not met a significant portion of the time.

Corrective action: OSHA has implemented a 12-point plan to expedite investigations. The plan calls for reliance on fax machines to assign investigators and telephones for interviews, use of a shortened report format and movement toward conciliatory meetings to resolve complaints.

While improvements have been made, 22.8 percent of determinations (149 of 653) exceeded the 90-day time frame in FY 1995. More than 120 days expired for 15.6 percent of determinations (102 of 653).

Finding 2. The manual management information and case tracking system provides only partial analysis of program results. Further, the automated system is not used for reporting and has virtually been abandoned as a management tool.

Corrective action: OSHA has completed implementing the 11(c)/405 portion of the Integrated Management Information System (IMIS). The system is revised to expand the types of information collected and to decentralize its point of data entry to the area office level. However, OSHA has not fully utilized the system's capabilities for reporting and program results analysis. OIG's comments are detailed in Chapter 3 of this report.

CHAPTER 1

Workers, Particularly With Small Companies, Are Vulnerable To Reprisals By Their Employers For Complaining About Unsafe/Unhealthy Work Conditions

Workers who complain about workplace safety/health hazards are frequently the targets of reprisals by their employers. Particularly vulnerable were workers who brought complaints to the employers rather than to OSHA, and workers with small firms. Since small employers are not subject to OSHA's regular cycle of programed safety inspections, workers for these companies can generally seek abatement of workplace hazards only by lodging complaints, or by waiting until a serious accident occurs that would initiate an OSHA inspection.

.Setting and Criteria

In the annual Labor-HHS appropriations' rider, Congress has always exempted small employers [1] (companies with no more than 10 employees) from regular OSHA inspections. Congress has included this rider in every appropriations bill since 1978.

For larger employers, the Act provides for regular routine inspections as well as specially requested inspection of the employers' facilities when workers notify OSHA of unsafe/unhealthy conditions. The OSHA inspection could take place whether or not the worker first notified the employer of the safety hazards.

Two proposed pieces of legislation could significantly impact the willingness of workers to "blow the whistle" on employers with unsafe work conditions. Provisions contained in the proposed Safety and Health Improvement and Regulatory Reform Act of 1995 (H.R. 1834) **require** employees who are aware of safety and health hazards in the work place to work with the employer to correct the problem **before contacting OSHA.**

[1] These employers must also have better than average safety and health records.

Also, the proposed Occupational Safety and Health Reform and Reinvention Act (S. 1423) would require workers to submit written complaints and to state whether the alleged violation was brought to the attention of the employer, and whether the employer has refused to remove the hazard.

Either of these proposals, if enacted, may increase the number of whistleblower protection cases OSHA receives. The importance of this protection is highlighted by the statements of top DOL officials. Former Secretary of Labor Robert B. Reich, in his testimony on June 28, 1995, before the U.S. House of Representatives Subcommittee on Workforce Protections and the Committee on Economic and Educational Opportunities, said:

> *One of the core premises of the OSH Act is that where workers fear retaliation from their employers, they have a right to seek OSHA's help in addressing workplace hazards.*

In earlier testimony on February 10, 1994, before the U.S. House of Representatives Subcommittee on Labor Standards, Occupational Health and Safety, Committee on Education and Labor, former Assistant Secretary Joseph A. Dear voiced similar concerns.

> *If employees hesitate to exercise their rights for fear of losing their jobs, these rights are meaningless. Section 11(c) of the OSH Act is designed to prevent discharge or discrimination but in practice workers have not been adequately protected.*

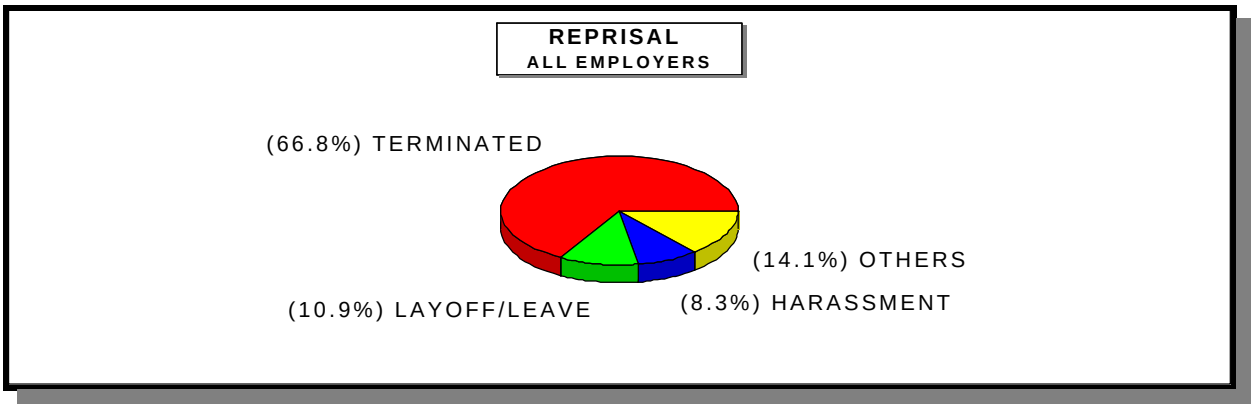
Most 11(c) complaints are filed by employees who brought their safety/health complaints to their employers and were subjected to reprisals

Although legislative changes are currently being proposed to require that workers must notify their employers about workplace hazards before contacting OSHA, our analysis shows that most workers are already following this course of action. When whistleblower discrimination is alleged, it is more likely to come from workers who complained to their employers rather than from workers who complained to OSHA directly. More than 51 percent of the cases in our sample involved workers who first notified their employers of the workplace safety hazard, rather than contacting OSHA. Only 26 percent of the workers clearly went to OSHA first with their safety complaints.

Our analysis of 11(c) cases shows that when workers complained regarding unsafe/unhealthy work conditions, the discriminatory act most often levied against the worker was job termination.[2] Other adverse actions taken against workers included demotions, undesirable changes in work

[2] Our analysis only includes instances when workers filed 11(c) complaints. We have no way of knowing the number of cases where employees have worked with the employer harmoniously to correct workplace hazards, and these workers were not discriminated against. We also have no information when workers were discriminated against, but failed to complain.

hours, harassment, and other unacceptable job actions. However, terminations were by far the most prevalent reprisal, occurring in nearly 67 percent of the 11(c) discrimination cases.



Workers who feel threatened by workplace hazards generally appeal either to the employer to correct the problem, to OSHA to inspect the facility and abate the hazard, or to some other outside state or local safety agency for assistance. We sampled 653 settled, dismissed and withdrawn cases of workers who felt they were discriminated against because they complained about unsafe work conditions.

We analyzed the 11(c) cases to determine whether the alleged discrimination by the employer was different when workers complained to their employers rather than to OSHA. We focused on two principal areas: the number of workers terminated when **complaints were filed with the employers** rather than with OSHA, and the number of workers with **settled cases** within this group (see Exhibit A). We then examined whether significant differences appeared with small employers in each of these groups (see Exhibit B).

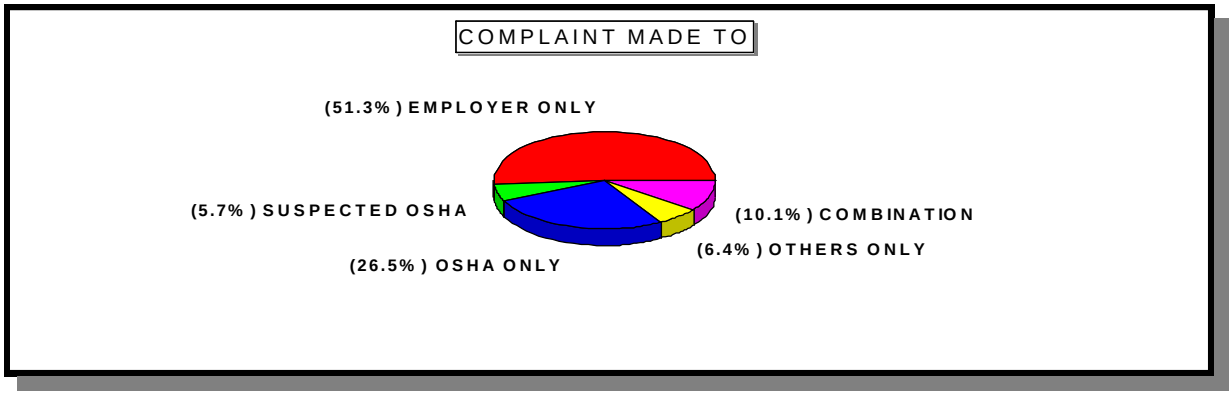
Complaints to Employers rather than OSHA

Approximately 51 percent (335 of 653) of our sample cases involved workers who complained to the employers rather than to OSHA to correct the alleged safety hazard. Nearly 82 percent (276 of 335) of these workers felt they were fired from their jobs because they complained about workplace hazards.

When workers complained to OSHA, without notifying their employer, the number of terminations declined. Approximately 26 percent (173 of 653)[3] of our cases included workers who complained to OSHA for assistance (either formally or informally) in abating the workplace safety/health hazards. About half of these workers (51 percent) alleged they were improperly

[3] The 173 does not include 37 workers suspected of having complained to OSHA, of whom 16 were terminated.

terminated from their jobs. Although the incidence of terminations is still very high, it suggests that OSHA's involvement may have a dampening effect on this severe discriminatory act by employers.



Settled Cases

We focused a portion of our analysis on settled cases, because these cases more clearly suggested that a violation of 11(c) provisions had occurred. Overall, OSHA settles or has positive outcomes in approximately 23 percent of the cases it investigates. In such cases, OSHA has sufficiently investigated the case to prove the 11(c) violation, or the employer agreed to a settlement based on prima facie evidence before the investigation was completed (see Chapter 2). These cases are not absolute proof of wrongdoing on the part of the employer. Likewise, these cases do not indicate complete satisfaction by the worker with the settlement outcome. However, they indicate that OSHA has been successful in redressing in some fashion the purported discrimination suffered by the employee.

Our analysis shows that the settled cases reflect the same trends and outcomes present in our overall sample. For example, in **all 11(c) cases**, **51 percent** of the workers complained to the employers, and in **67 percent** of all cases, the workers were terminated. In the **settled cases**, **52 percent** of the workers complained to the employer, and in **69 percent** of these cases, the workers were terminated.

In evaluating our sample cases, without using employer size as a factor, the overall results showed that job termination was the most frequent discriminatory act taken by employers against their workers. However, OSHA intervention tended to decrease the number of terminations. We found this same pattern when we examined worker allegations from small employers.

OSHA's 11(c) Program Impacts Those Not Usually Protected By OSHA Programmed Inspections - Workers with Small Firms

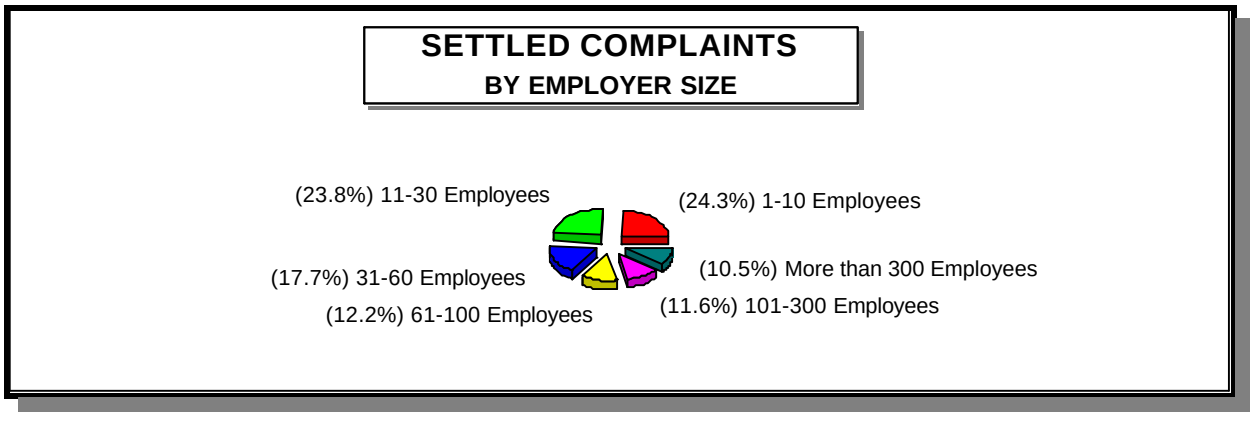
We were able to determine the size of the employer from detail file information or summary data for 564 of the 653 cases in our sample (see Exhibits B and C). Of these, 128 complaints had been filed by workers employed by firms with 10 or fewer employees.

We paid particular attention to this group of small employers in our analysis because of their general exemption from OSHA inspections. Companies with 10 or fewer workers and better than average safety records are exempt from OSHA's enforcement program of cyclical workplace safety inspections. Therefore, workers in these firms can avail themselves of OSHA inspections to identify and abate safety hazards only by making complaints. The only other exception is when OSHA inspects the workplace in response to a serious injury or alleged health concern.

Small companies comprise a significant segment of the 11(c) whistleblower protection cases OSHA received and settled. Our analysis suggests that complainants with settled cases have nearly a one in four chance of working for a small employer (company with 10 or fewer employees). The same ratio of settled complaints originated from workers employed by companies with 11 to 30 employees.

Generally, small employers are more likely than large employers to have a discrimination complaint settled with benefits accruing to the claimant. Not only do small employers comprise the largest segment of settled cases overall (24 percent), they have the second lowest dismissal rate.

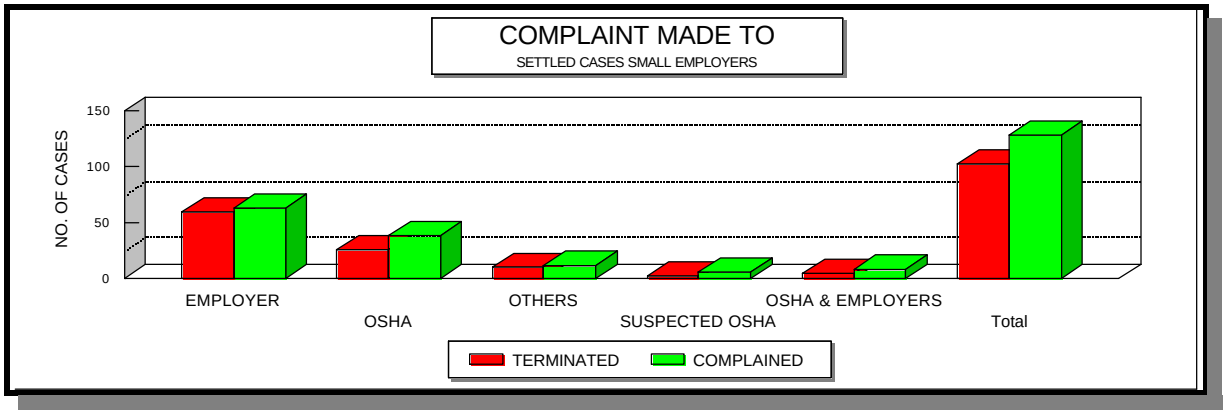
The chart below depicts the percentage of cases settled by employer size.



Our further analysis of these cases clearly depicts the risk workers with small employers face when they complained to their employers, rather than OSHA, about safety/health hazards. In approximately 49 percent (63 of 128) of cases, the worker complained to the employer rather than to OSHA. We found that in more than 95 percent (60 of 63) of these cases, the workers were terminated. When we looked at just the settled cases for this group, the percentage remains at 95 percent (20 of 21).

Our sample showed that workers from small companies complained to OSHA instead of the employers approximately 30 percent of the time. In these cases, the employee was terminated some what less frequently. Workers lost their jobs 67 percent (26 of 39)[4] of the time. This reduction in terminations parallels our overall finding for 11(c) cases when OSHA is involved. Our analysis indicates that OSHA 11(c) protection activities appear to be most successful, and has the greatest impact with the small employers.

The following graph shows the number of settled cases from workers of small employers who complained to their employers, OSHA, other agencies, or a combination of the three.



Conclusion

The whistleblower protection offered by the OSH Act more frequently applied in protecting those employees who, rather than having complained to the Government, complained to their employers and, as a result, were terminated or otherwise disciplined for having done so. Based on the worker termination rates in the 11(c) cases, many employers are not receptive to requests for abatement of workplace hazards, and feel free to discipline workers who seek abatement.

[4] The 39 cases do not include 6 workers suspected of having complained to OSHA, of whom two were terminated.

OSHA was more successful in providing redress for terminations of workers in small and mid-size firms. Without OSHA's whistleblower protection, these employees would have little choice but to work in hazardous environments, or risk almost certain termination for complaining.

With the proposed changes in legislation, it may become even more important to ensure that workers have adequate whistleblower protection. Our analysis suggests that if more workers reported safety/health hazards to employers, rather than to OSHA, they would be more vulnerable to employer reprisals. If the proposed legislation is enacted into law, incidents of workers claiming discrimination would likely increase overall, and particularly among small employers.

OSHA's Response

OSHA's response to the audit report did not include comments relating to Chapter 1 of the report.

CHAPTER 2

OSHA Operating Practices and SOL Coordination Present Obstacles to Gaining All Appropriate Relief for Complainants with Merit Cases

Section 11(c) of the OSH Act provides for enforcement through the U.S. District Court System. However, we found that the U.S. District Court (hereinafter referred to as "Court") is rarely presented 11(c) discrimination cases by the DOL Solicitor's Office (SOL). A number of factors contribute to the relative lack of 11(c) cases heard in the Court, among them are:

- OSHA settles merit cases, without SOL involvement, perhaps at less than "all appropriate relief" as provided for in the Act.

- Case file information is incomplete to verify attempts at recovering lost wages.

- Cases were not promptly acted upon by the SOL.

- Many predetermined settlements do not include conclusive evidence of an 11(c) violation and many referred cases were returned to OSHA because the SOL believed the cases lacked merit.

Setting and Criteria

Public Law 91-596, Section 11(c)(2) provides, in part: "...If upon ...investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." (Emphasis added.) The meaning of the phrase "all appropriate relief" was recently interpreted by a court.

The Boston College Law Review (BCLR), in March 1995, reported: "...in Reich v. Cambridgeport Air Systems, Inc., the United States Court of Appeals for the First Circuit held that the authority of a district court under section 11(c) of the OSHA [sic] to order "all appropriate relief" in a retaliatory discharge action embraced both compensatory and punitive damages." The BCLR continued: "The Secretary contested Cambridgeport Air Systems' characterization of the damages as punitive, and although conceding that the award of double damages in an OSHA retaliatory discharge claim was unprecedented, insisted that the case represented the first time the Secretary actually requested such a remedy." Finally, the BCLR concluded: "The First Circuit's bold, well-reasoned proclamation that punitive damages are

available in OSHA retaliatory discharge actions forms the most significant component of the *Cambridgeport* decision."

OSHA settles merit cases, without SOL involvement, perhaps at less than "all appropriate relief" as provided for in the Act

Merit cases are those cases where OSHA determines, as a result of their investigation, that a violation of Section 11(c) has occurred. For merit cases, OSHA attempts to reach a settlement acceptable to both parties. However, on rare occasions[5], OSHA accepts unilaterally an employer's offer to settle a discrimination complaint.

The settled case files we reviewed do not definitively demonstrate that workers have been "made whole" by recoveries obtained for them when the case was settled by OSHA. For example, the files seldom addressed whether or not it was appropriate to seek compensatory damages for lost fringe benefits, or punitive damages in recompense for retaliatory actions. In our opinion, any settlement that does not provide "all appropriate relief" considerations (as defined in the *Cambridgeport* decision) in a merit case has not met the requirements of the Act.

We fully understand that negotiated settlements are a necessary and integral part of OSHA 11(c) settlement operations, and cannot be abandoned. However, OSHA must be cognizant of the influence provided by the *Cambridgeport* decision, and use this stronger position in negotiating settlements. Moreover, OSHA's actions to settle merit cases without referring them to the SOL for litigation considerations limit the participation of the courts in developing the discrimination provisions of the OSH Act.

It is evident from the facts of the *Cambridgeport* decision that participation of the courts is necessary in order to develop the parameters of the law, and provide guidance to the SOL and to OSHA regarding actions authorized to enforce the provisions of Section 11(c). The BCLR article discloses that the Secretary had not previously sought punitive damages; indeed, had not even recognized that such damages were available to enforce the discrimination provisions of the Act.

Even though compensatory and punitive damages are included in the appropriate relief, a large preponderance of the cases settled by OSHA seek and obtain back wages only. Efforts are seldom made to assess punitive damages to "punish" the offender who violated the law. When one worker sought more than back wages, he was informed by OSHA that it could not obtain compensation for damages and the recovery is limited to reinstatement and back wages.

OIG realizes that negotiations for damages could be difficult to complete within the 90-day legislated time frame for investigating a case. However, we believe that the law's requirement to obtain "all appropriate relief" should not be preempted at the 11(c) office level for expediency.

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[5] OSHA Instruction DIS .4B provides for unilateral settlements. Two such cases were included in our sample, one in Region 5 and another in Region 7.

Employees are entitled to the full range of relief most appropriate to their cases. Our concern is that OSHA does not consider punitive damages for even the most well supported cases.

Case file information is incomplete to verify settlement attempts at recovering lost wages

We believe that when settlements are always made for less than full recovery, the wrong message may be inferred to both the worker and the employer. OSHA should always attempt full recovery to make the worker whole, not just any recovery.

We acknowledge that negotiated settlements will not often achieve recovery of all lost wages (back wages) due the complainant. However, 11(c) case files should completely and accurately document the amount of back wages lost, so that a comparison can be made between these losses and the amount recovered in the settlement.

We determined that 130 of the 197 settlement cases we reviewed included monetary recoveries. Our examination of the 130 cases disclosed that 60 case files (46 percent) had insufficient information to determine back wages. Information missing included data to specify the period of unemployment or average hours worked prior to the worker's termination from the job. Other needed information missing from the file concerned the workers subsequent employment, such as: start date, hourly wage, average hours worked, amounts received and period of unemployment compensation.

We examined file documentation in 31 settled cases that appeared to contain sufficient information to compute back wages. We computed lost wages from the workers' termination dates to the date of the settlement agreement.[6] Our computation of lost wages totaled $117,726 more than the settlement amount for these 31 cases. This indicates that OSHA's recoveries do not fully compensate workers for their losses. However, as previously shown in approximately 46 percent of the settled cases we examined, file documentation of worker losses was often incomplete; thus, an independent determination could not be made whether workers fully recovered lost wages.

Cases were not promptly acted upon by the SOL

OSHA Instruction DIS.4B requires that SOL inform the Regional Administrator who referred the case within 90 days whether or not the case is suitable for litigation. To test adequately whether this directive was met, we expanded our scope of review beyond FY 1995 to include two additional years, FY 1993 and FY 1994. This was done because a very small number of the randomly chosen files in our sample included cases referred to the SOL.

[6] We used a set of different dates if the case file provided a rationale justifying the alternate dates.

We reviewed 47 cases that had been referred to SOL and the final disposition action took place between FY 1993 and FY 1995. We found that for 38 of these cases (81 percent), SOL issued the legal analysis to OSHA more than 90 days after the cases were referred. These delinquent cases ranged from 96 to 375 days with an average delinquency rate of 188 days.

In one extreme time-delayed case (not included in the 47 cases), the complaining worker died in the interim and the case was not pursued. He filed his timely complaint on June 26, 1990. OSHA completed the investigation and issued its Final Investigative Report on October 18, 1990, recommending the case for litigation. On February 10, 1994, the RSOL returned the case as unsuitable for litigation because the complainant had died and without the complaining worker's testimony, success was deemed to be unlikely.

In another time-delayed case, SOL's legal analysis stated that: "Only one year has elapsed since the filing of the 11(c) claim..." and described it as a "rather modest delay."

The consequences of having long undue delays in settling cases are: the quality of the evidence tends to erode with the passing of time, key witnesses may no longer be available, and worker financial hardships tend to increase because of the lack of timely compensation. Moreover, investigators may be more inclined to seek quick inappropriate settlements rather than have workers wait for long periods to obtain their recompense.

Many predetermined settlements do not include conclusive evidence of an 11(c) violation, and many referred cases were returned to OSHA because the SOL believed the cases lacked merit

Strong and convincing evidence is necessary to establish an 11(c) merit case, and is crucial to successfully litigate a case in U. S. District Court. We found that OSHA's operating procedures allow for predetermined settlements based on prima facie evidence gathered by the investigators. Although this evidence is often sufficient to prompt an employer to seek an early settlement with the employee, the evidence may not be suitable for litigation.

OSHA often seeks informal settlements without obtaining **conclusive** evidence to support the four essential elements needed in a merit case. This practice, sometimes called predetermined settlement, accounted for 50 per cent (99 of 197) of the settlement cases OIG sampled. In the predetermined cases we reviewed, a full investigation was not conducted to develop sufficient evidence to support the presence of the four essential elements because the employer agreed to a quick settlement.

In predetermined cases, relief is obtained before a violation is conclusively determined. This option is often attractive to the employer because further costs in preparing a defense are avoided. More importantly, this option provides the employee some measure of relief as soon as possible.

To prove merit in a case, OSHA must show the presence of four essential elements. They are: (1) the complainant engaged in protected activity, (2) the employer knew about the protected activity, (3) the employer retaliated against the employee, and (4) nexus, a connection between the protected activity and the retaliation.

Although the term "predetermined settlement" generally means that no violation determination was made at the time of the settlement, some case files had developed the four essential elements needed for a merit case, while other case files lacked one or more of the essential elements. We found the investigation reports for 41 percent (41 of 99) of the predetermined settlements prepared by OSHA lacked one or more of the four essential elements needed for a case to have merit. These 41 cases included 34 settlements for back wages.

We broadened our examination from our original sample to include additional cases referred to SOL for litigation. There were 86 cases referred to SOL during the 3-year period FY 1993 through FY 1995. These cases were referred to the SOL for litigation because OSHA believed they were merit cases, and the employer refused to negotiate a settlement with OSHA. Thirty-three of the 86 referred cases were rejected because SOL believed they lacked merit.

The reasons SOL refused to pursue litigation of these referred cases were explained in the SOL's legal analysis of the case. The reasons cited included a lack of evidence proving one or more of the following: protected activity, employer knowledge, reprisal and/or nexus.

Eleven of the SOL's legal analyses for the 33 cases indicated that the cases were rejected based on review of the investigation file. This indicates that SOL and OSHA disagreed on the adequacy and/or weight of the evidence needed to prevail in litigating the cases in U. S. District Court. These cases in most instances were subsequently either dismissed or withdrawn.

OIG concluded that OSHA may be underserving its "customers" by limiting the relief it seeks for the workers who come for protection from discrimination; and, by obtaining predetermined settlements, OSHA may be settling complaints too soon, without important SOL input that could improve the level of the negotiated resolution. Early advice from SOL may also help ensure that only those cases most appropriate are referred for litigation.

RECOMMENDATIONS

We recommend that the Assistant Secretary for Occupational Safety and Health:

- consult with SOL to reevaluate and agree upon criteria for determining which cases should be negotiated and settled outside the judicial domain, or referred for litigation;

- require that documentation be maintained in case files specifically identifying "all appropriate relief" due to the complainant;

- ensure that punitive as well as compensatory damages are considered when evaluating complainants' entitlements to "all appropriate relief;" and

- confer with SOL on a means to accelerate action taken on merit cases.

OSHA's Response

OSHA agreed with our overall conclusion that the agency "may be underserving its customers by using predetermination settlements and settling complaints too soon." However, OSHA did not believe that more SOL involvement and litigation would improve settlement outcomes. OSHA referred to the ADR program presently proposed by DOL as an alternate to district court litigation. OSHA stated "the whole basis of Alternate Dispute Resolution (ADR) is compromise."

OSHA also cited its lack of resources as a problem, which was recently exacerbated when it assumed jurisdiction (without assuming added resources) for seven whistleblower statutes which had previously been administered by the Employment Standards Administration's Wage and Hour Division. Program regulations require investigations under these statutes be completed within 30 days.

In summary, OSHA stated:

> *In theory, the report's recommendations in Chapter Two are appropriate. In terms of protecting employees and conforming with the Department's decision to emphasize Alternate Dispute Resolution, they are not.*

OSHA's complete comments are contained in Appendix II of the report.

OIG Conclusions

We fully understand that negotiated settlements are a necessary and integral part of OSHA 11(c) settlement operations and cannot be abandoned. We are also aware of the Department's emphasis on the use of ADR as a means of achieving program goals while reducing costly and time consuming litigation. While it is true that ADR may reduce or replace whistleblower case litigation at the District Court level, it is unlikely to replace the 11(c) office level compromise and settlement operations currently practiced. Our recommendations address improvements in those settlements as well.

We continue to believe that OSHA should publicize and use the stronger position provided by the *Cambridgeport* decision in negotiating settlements. This will make it clear to employers that they may suffer financial consequences (i.e., payment of back wages, compensatory and/or punitive damages) for retaliating against whistleblowers. Thus, employers may be less likely to retaliate.

CHAPTER 3

OSHA's Automated Case Management System is Ineffective for Reporting and for Managing 11(c) Cases

OSHA's automated case management system tracks the disposition of complaints lodged by workers who alleged their employers discriminated against them for citing safety and health hazards. We found the system is ineffective because:

- the IMIS is not consistently relied on for federal and state-plan states' 11(c) program reports;

- the IMIS does not provide program and case management capabilities to the 11(c) field offices; and

- OSHA's output-oriented report may not convey to interested parties information about how well OSHA enforces the provisions of Section 11(c).

Consequently, the system does not meet all the requirements necessary for effective program management and oversight.

Setting and Criteria

Our prior audit report (Report No. 05-88-083-10-105, dated February 21, 1989) addressing the 11(c) program reported that: "The manual management information and case tracking system allows only partial analysis of program results. Further, the automated system is not used for reporting purposes and has virtually been abandoned as a management tool." That report further recognized corrective action under way at the time, stating that: "The 11(c)/405 portion of the Integrated Management Information System (IMIS) is being revised to expand the type of information collected and to decentralize its point of operation to the area office level." That portion of the IMIS which accumulates 11(c) program data will be referred to herein as simply "IMIS."

We believe that as of FY 1995, OSHA's efforts to revise the IMIS had achieved limited results.

OSHA had the IMIS in place in time to track the FY 1995 11(c) data from the Federal and state plan jurisdictions. Federal and state field offices entered data into the system. Moreover, we were informed at the onset of this audit that the system was the officially relied-on source for FY 1995 case information. However, we found that neither the national office nor the field offices (including regions and area offices) used methods for collecting the FY 1995 annual statistics that relied exclusively on the data in the system.

The IMIS provides detail information for the cases summarized in OSHA's monthly and year-to-date 11(c) activity report. The report includes output information covering the number of cases carried forward, currently received, currently disposed of and presently in process. The information includes the current determinations, or dispositions of cases, including: no full field investigation (or screened out), withdrawn, dismissed, referred for litigation, settled by OSHA and settled by another agency. There are no reported statistics indicating how well workers were served.

The IMIS is not consistently relied on for Federal and state-plan states' 11(c) Program reports

Two management reports describe OSHA's activities in carrying out the provisions of Section 11(c). The first of these reports is the performance measures included in DOL's annual financial statements. The second is the monthly report of Section 11(c) activities which includes year-to-date cumulative activities.

Performance Measures

OIG's recently issued report (Report No. 12-97-001-10-001) pointed out that 5 of the 25 state-plan jurisdictions provided their Section 11(c) performance measures information verbally. These data were included in OSHA's performance measures reported in DOL's FY 1995 financial statements, but were not supported by detailed listings needed to verify the accuracy of the total numbers. These states had been provided access to the IMIS, but did not use it as had the other state-plan jurisdictions.

Monthly (and year-to-date) Section 11(c) Statistics Report

Each of the Federal regional offices provided output statistics to the National Office of 11(c) Programs. The statistics were accumulated into the FY 1995 11(c) activity report. We attempted to obtain from both the national office and the field 11(c) offices we visited a detail list of cases from the IMIS supporting the numbers provided in the national report. No such detail list was available from either of the sources.

We reconciled reported numbers to IMIS and manual data at the regional and area offices we visited in order to identify all cases settled, dismissed and withdrawn in FY 1995. For example, our reconciliation required us to adjust total reported dismissed cases in four of the five regions we visited.

We found at one region the reported totals were primarily obtained from manual records. Only 65 percent of the manually identified FY 1995 cases had been entered into the IMIS because the cases had been rejected by the host computer, and regional personnel were not familiar enough with the system to correct data items causing the rejection.

At another region, we reconciled the reported figures to detail listings without adjustment. Regional personnel said no adjustment was needed because the IMIS was the source of

the reported numbers. However, manual records identified some dismissed and withdrawn cases in FY 1995, that had not been entered into the IMIS. Regional officials explained that the system had come on line after the start of the fiscal year. As a result, some actions which were not settlements and had occurred early in the year were not back loaded to the IMIS.

Another region used only the IMIS. However, even for this region we could not duplicate the reported figures by extracting detail listings from a more current version of the 11(c) automated system database.

The IMIS does not provide program and case management capabilities to the 11(c) field offices

At most of the field offices visited, there was an evident lack of familiarity with the IMIS and its uses for case and program management. Very few of the 11(c) program officials could provide us with the detail scan report that shows for each case the data resident in the database. Most complained that the system could provide either an all-case listing, or no information was available from the system.

Most of the field personnel recognized the potential for using the IMIS data to assist in carrying out responsibilities such as staff management, monitoring case progress, monitoring status of cases referred to SOL, and preparing press releases. However, they needed to be able to exclude some of the database fields from reports in order to construct one useful for those purposes. They were unable to make these adjustments, and believed the system did not provide them such capability.

One Regional Supervisory Investigator (RSI) expressed it well for all of his colleagues, when he wrote in March of 1996:

> *Reports generated from the micro computer would serve as a useful management tool for evaluation of investigators productivity and tracking of overdue cases. For said purposes it would be desirable for* ***"Investigation Reports"****, to permit file sorts to include only cases opened or closed within specific date parameters. As of this time sorts of specific fields appear unable to exclude dates or months prior to those desired.*

OSHA's output-oriented report may not convey to interested parties information about how well OSHA enforces the provisions of Section 11(c)

OSHA's current classification of cases is sometimes misleading and may be inaccurate. In addition, the current monthly and year-to-date reporting format does not provide "quality of service" information regarding enforcement of Section 11(c) provisions. More consistent case classification and more quality of service information would enhance program reporting.

OSHA classifies cases in its management information system as settled, dismissed, or withdrawn. However, some cases do not fit neatly into any of these three classes. For example, we found cases that were settled through withdrawal of the complaint. We also found withdrawn complaints which were dismissed in order to preserve the worker's appeal rights. From region to region, the same circumstances in a case may result in very different case classifications.

Although OSHA takes pride in the number of settled cases, a settlement does not necessarily mean the complainant was satisfied, or even agreed with the resolution of the case. Settled cases include such outcomes as back pay and/or reinstatement for the worker on one extreme, or on the other extreme a simple agreement that the employer will not give the employee a bad reference after termination.

Reports that simply provide the numbers of 11(c) cases settled do not convey information about what the settlement accomplished for the worker. We found that one region's reported settlement involved a case resolved during litigation, which gained for the complainant $14,000 and other considerations. Another region also reported a settlement when OSHA simply phoned the employer and was told the worker was not fired, as alleged, and should return to work. Each of these results is reported as a "settlement," but they differ in many respects. They are different, for example, in the degree of harm suffered by the worker, the degree of effort OSHA and SOL put into obtaining the result, and whether the results obtained made the worker whole.

Does reporting each of these cases in a class labeled "settlement" provide any understanding to report readers as to OSHA's success in enforcing Section 11(c) provisions? We think not. We believe it is more important to report how much of the entitlement was recovered.

In like manner, we reviewed cases that were classified as dismissed, but the cases had very different outcomes. For example, some cases are dismissed with little or no investigation because OSHA had no jurisdiction, while others, after extensive investigation were pursued under Section 405, Surface Transportation Assistance Act (STAA).

The overlap between Section 11(c) and 405 cases is not disclosed in the output reports. Discrimination cases are sometimes dual filed under the provisions of both Section 11(c) of the OSH Act and under Section 405 of the STAA. Dual filings are reported in both the report sections dealing with Section 405 STAA activities and 11(c) activities. In these cases, one investigation finds the appropriate legislation under which to obtain relief. When relief is sought through application of Section 405 STAA, a referral to SOL for litigation under that Act may be reflected in the Section 11(c) statistics as a dismissed case, because the 11(c) provisions had not been invoked. This type of dismissed case is not distinguishable from dismissals where only the provisions of 11(c) could have been invoked.

Rather than merely noting disposition, report data should include more specific outcome information concerning the quality of relief provided to the employee. For example, we suggest that information should include:

For settled cases - the percentage of relief entitlement that was obtained through settlement.

For dismissed cases - which of the four merit case essential elements were found missing as a result of OSHA's investigation.

For withdrawn cases - the reason provided by the complainant for having withdrawn his complaint.

Including such information would provide more "quality of service" information to management, congressional overseers and interested members of the public.

Conclusion

The 11(c) field personnel viewed the automated system as a report to headquarters, not a program and case management tool for the field. Most of them relied more on the manual log and other manual records and files, such as entries on 3" x 5" filing cards.

The accuracy and reliability of the IMIS data are largely dependent on the field users' perception of how useful the system is to them. Much of the information maintained in manual records duplicate data in the IMIS, yet many of the field offices place greater reliance on the manual records for information they need rather than on the IMIS. The IMIS data must be useful to the field officials and available to them in the formats they need to obtain their fidelity to the automated system, and overcome their dependence on their trusted manual records.

Moreover, we believe that management, Congress and the public need improved information regarding the nature of OSHA's 11(c) program and its outcomes. We also believe that the Government Performance and Results Act requires that OSHA develop better ways to report 11(c) program outcomes than is currently provided by the output statistics reports.

RECOMMENDATIONS

We recommend that the Assistant Secretary for OSHA:

- establish policies and procedures to retain detail listings for national, state plan and regional reports to support reported totals by identifying the individual transactions which are accumulated to the totals reported;

- obtain OSHA field officials' specific program and case management requirements and adjust the IMIS to ensure the system provides the data and information needed to meet those requirements;

- ensure that OSHA field officials are adequately trained in the maintenance and uses of the IMIS to engender their confidence in the accuracy and usefulness of the system for their program and case management needs; and

- conduct a review of the current reporting documents and their supporting information systems to develop better reporting on OSHA's Section 11(c) program outcomes.

OSHA's Response

OSHA's response to the audit report did not include comments relating to Chapter 3 of the report.

APPENDIX I

BACKGROUND

OBJECTIVES, SCOPE AND METHODOLOGY

STATISTICAL SAMPLING PLAN

EXHIBITS

BACKGROUND

An essential part of the OSH Act (Public Law 91-596) requires OSHA to operate an effective whistleblower protection program which provides an environment in which employees can alert their employers, co-workers, or OSHA of the existence of a workplace hazard without fear of reprisal. However, as stated in testimony by the Assistant Secretary of Labor for Occupational Safety and Health, "If employees hesitate to exercise their rights for fear of losing their jobs, these rights are meaningless. Section 11(c) of the OSH Act is designed to prevent discharge or discrimination but in practice workers have not been adequately protected." The OSH Act provides for litigation as the only means of protecting worker's rights. OSHA does not have other enforcement tools that are available to state plan states. Under the state plans, employees may file private actions in court. OSHA has no such provisions.

OIG's prior review of the 11(c) program revealed that it had not received high priority by OSHA management. OIG found significant backlogs of cases awaiting investigation beyond the 90-day legislative time frame and a virtual abandonment of the automated reporting system in favor of the manual management and case tracking system for reporting and analysis. In response to these findings, OSHA reported corrective action was already under way.

In Fiscal Year (FY) 1994, OSHA adopted a 12-point plan to eliminate the 11(c) backlog. The plan called for reliance on fax machines to assign investigators and telephones to conduct interviews, condensed reporting, and conciliation meetings to resolve complaints. The plan was aimed at expediting investigation and processing of discrimination whistleblower complaints. These procedures depart significantly from the instructions in the Field Operations Manual (FOM). 11(c) offices are permitted to continue using the existing procedures in the FOM as long as they meet the agency goal of completing all investigations within statutory time frames.

In FY 1995, OSHA had completed implementation of the redesigned automated reporting system in the 11(c) offices, replacing the existing automated system.

The OSHA statistical report reveals that during FY 1995, Federal OSHA processed 2,358 complaints (down from 3,445 complaints in FY 1994) of which 78 percent were accepted for investigation after preliminary screening. Of the cases investigated, 23 percent were settled or had some positive outcome, and 3 percent were referred to SOL to be considered for litigation. In those cases without positive outcomes, 20 percent were withdrawn by the employees and 55 percent were dismissed by OSHA after investigation.

The above information was not available for the state plan states' 11(c) programs as some states did not submit their data.

OBJECTIVES, SCOPE AND METHODOLOGY

Objectives

The audit objectives were to examine the extent to which OSHA protected worker's rights under Section 11(c) of the OSH Act; to gain an understanding of the nature of the issues involved and the "customers" served; and, to review the reasonableness and adequacy of OSHA's actions resulting in decisions to settle, dismiss, or withdraw complaints filed under Section 11(c).

Scope and Methodology

Statistical reports of complaints processed by OSHA's Federal Regional Offices under the provisions of Section 11(c) of the OSH Act, and Section 405 of the Surface Transportation Assistance Act (STAA) are provided to National Office management each month and include the fiscal year-to-date outputs. Likewise, states which carry out the provisions of the OSH Act under local jurisdiction provide information about their whistleblower activities to OSHA management.

We obtained the monthly report for September 1995 11(c)/405 activities which included the FY 1995 year-to-date activities. We also obtained information and data about the state plan states' whistleblower activities. Based on our review of the FY 1995 data obtained, we learned that the states had not all provided data to OSHA's automated 11(c) data system, and each state's activities are carried out differently under the states' legislation. We determined that the states' operations were sufficiently different from one another, as well as from the Federal program, and therefore did not represent a homogeneous universe. We, therefore, limited our review of the states' whistleblower activities to the preliminary information obtained, and supplemental information gathered by other OIG auditors examining OSHA's FY 1995 performance measures.

Our preliminary work provided information about the Section 405 STAA program that prompted us to focus our attention primarily on only the 11(c) case files. Many of the 405 cases are dual filed, when they meet the requirements of both Acts, in order to provide maximum protection for employees who complain about discrimination. Therefore, many of these cases appear as a statistic on both 11(c) and 405 activity reports. A single investigation documented in a single file determines which legislation to apply. We came to the conclusion that by focusing on the 11(c) cases, we would encounter a sufficient number of 405 cases to alert us to any problems with Section 405 cases that differ significantly from the problems surfacing with respect to the 11(c) cases.

Using the FY 1995 year-to-date information, we requested data output from the automated 11(c) information system (a part of OSHA's IMIS) in order to reconcile the data to the reported activities for 11(c) cases which were settled, dismissed and withdrawn during the period. Because OSHA did not retain a copy of the data file that supported the reported activities, we could not reconcile the numbers in both sources. However, we compared the results from each source for

each of the 10 Federal regions and identified our universe for sampling based on the highest number of transactions indicated by either of the two sources.

We developed a statistical sampling plan to examine case files. Following that plan, we made visits to 5 of OSHA's 10 regions, 4 of them operating on a centralized basis, and 1 operating in a decentralized manner with several Area Offices within the region. At each office we visited, we confirmed the universe for that office (region or area office) to local records, both automated and manual, and randomly selected case files for detailed review.

The case files did not contain evidence of the complaining employees' satisfaction with OSHA's efforts on their behalf, except for the employees' signatures on settlement agreements and withdrawal request documents. We initially intended to confirm with the complaining employees their satisfaction with OSHA's efforts. However, after consultation with program officials, we determined that the results of such an effort would not be conclusive. Therefore, we amended our plans to eliminate mailing confirmations to employees who had submitted discrimination complaints to OSHA.

Our field work was performed during the period October 12, 1995 to December 31, 1996. Our work was accomplished at: New York, NY; Philadelphia, PA; Chicago, IL; Cincinnati, Cleveland and Toledo, OH; Calumet City, IL; Appleton and Milwaukee, WI; Kansas City, MO and Dallas, TX.

The audit was conducted in accordance with Government Auditing Standards (1994 Revision) issued by the Comptroller General of the United States.

STATISTICAL SAMPLING PLAN

Population: The universe consisted of 375 settled cases, 1,050 dismissed cases, and 369 withdrawn cases for FY 1995.

Sampling Unit: The sampling unit is a case.

Sampling Design: Two stage stratified random sampling was used for this audit. In the first stage, the selection of regions was made using random sample since PPS (probability proportional to size) was not feasible because different sources indicated different universe sizes. Therefore, it was necessary to use estimated universe sizes. Five regions were selected for this stage.

In the second stage, random case samples were drawn from each of the selected regions using disposition type as the strata. One of the primary units selected was region 5 which was treated separately as a stratum since the dispositions were distributed among different area offices. A two stage sampling was used to draw samples from this region. In the first stage, six sites were selected using PPS and systematic sampling. The systematic sampling plan was adopted over random sampling to facilitate sampling without replacement. In the second stage, samples were drawn from each of the selected sites.

Sample Size: Our original sample size was 588. All sample sizes were estimated using 90 percent confidence level and 5 percent sampling precision. The sample allocation was achieved using uniform sampling fractions or proportional allocation methods. Additional case files (65) were added to the sample size as a result of adjustments for actual universe sizes found at the offices visited. The total random sample size was 653. In addition, 86 cases referred to SOL for litigation were judgmentally selected to provide further coverage in selected areas to meet our audit objectives.

EXHIBITS

EXHIBIT A - SAMPLED CASE PROTECTED ACTS AND RETALIATION

EXHIBIT B - SAMPLED SMALL EMPLOYER CASE PROTECTED ACTS AND RETALIATION

EXHIBIT C - SAMPLED CASES BY EMPLOYER SIZE

EXHIBIT A

NATIONWIDE AUDIT OF OSHA'S
SECTION 11(c) DISCRIMINATION INVESTIGATIONS
SAMPLED CASE PROTECTED ACTS AND RETALIATION

	Settled	Dismissed	Withdrawn	Total
Workers Who Complained to Employers Only	103	172	60	335
Workers Suspected of Complaining to OSHA	12	18	7	37
Workers Who Complained to OSHA Only	55	75	43	173
Workers Who Complained to Others Only	12	20	10	42
Workers Who Complained to a Combination	15	37	14	66
Totals	197	322	134	653
Workers Who Were Terminated	135	230	71	436
Other Discriminatory Acts	62	92	63	217
Of the Workers Complaining to Employers Only:				
Workers Who Were Terminated	85	144	47	276
Other Discriminatory Acts	18	28	13	59
Of the Workers Suspected of Complaining to OSHA:				
Workers Who Were Terminated	6	10	0	16
Other Discriminatory Acts	6	8	7	21
Of the Workers Complaining to OSHA Only:				
Workers Who Were Terminated	29	45	14	88
Other Discriminatory Acts	26	30	29	85
Of the Workers Complaining to Others:				
Workers Who Were Terminated	7	13	4	24
Other Discriminatory Acts	5	7	6	18
Of the Workers Complaining to a Combination:				
Workers Who Were Terminated	8	18	6	32
Other Discriminatory Acts	7	19	8	34

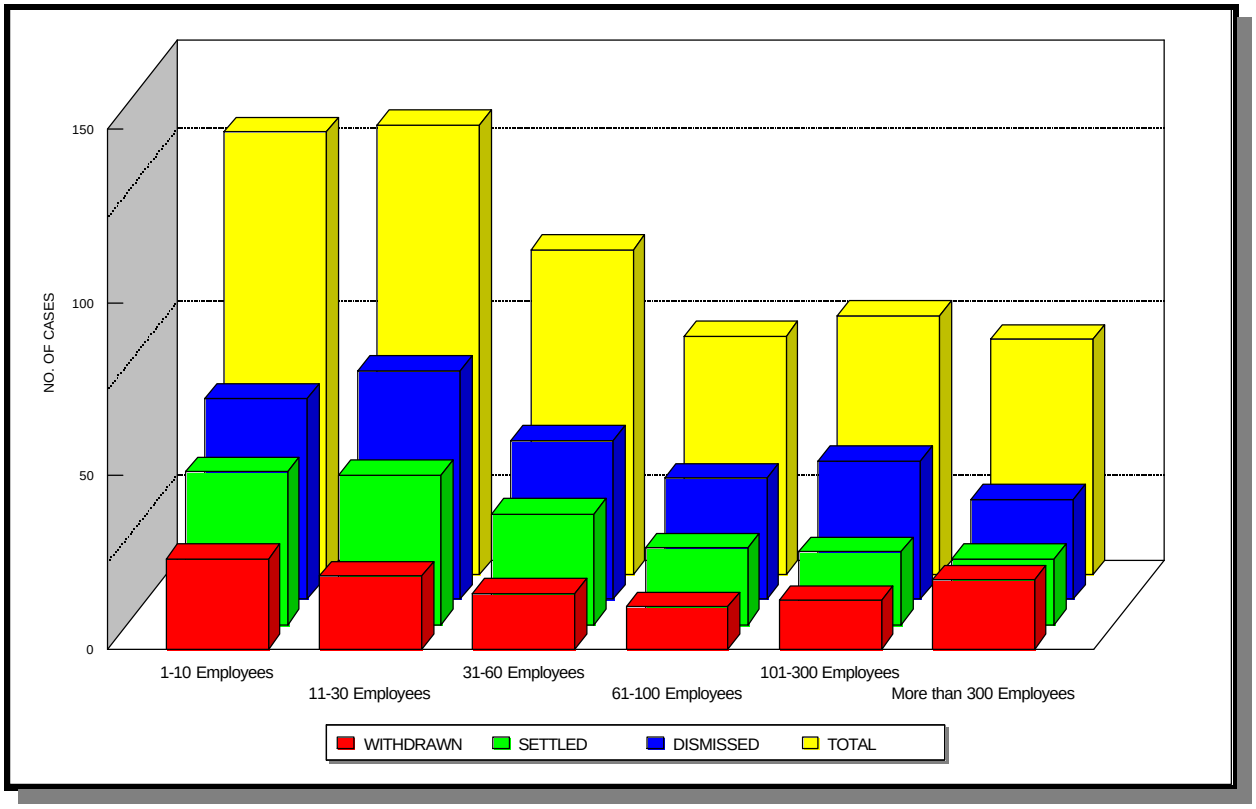
EXHIBIT B

NATIONWIDE AUDIT OF OSHA'S
SECTION 11(c) DISCRIMINATION INVESTIGATIONS
SAMPLED SMALL EMPLOYER CASE PROTECTED ACTS AND RETALIATION

	Settled	Dismissed	Withdrawn	Total
Workers Who Complained to Employers Only	21	30	12	63
Workers Suspected of Complaining to OSHA	1	3	2	6
Workers Who Complained to OSHA Only	16	15	8	39
Workers Who Complained to Others Only	5	6	1	12
Workers Who Complained to a Combination	1	4	3	8
Totals	44	58	26	128
Workers That Were Terminated	37	49	17	103
Other Discriminatory Acts	7	9	9	25
Of the Workers Complaining to Employers:				
Workers That Were Terminated	20	28	12	60
Other Discriminatory Acts	1	2	0	3
Of the Workers Suspected of Complaining to OSHA:				
Workers That Were Terminated	1	1	0	2
Other Discriminatory Acts	0	2	2	4
Of the Workers Complaining to OSHA:				
Workers That Were Terminated	11	11	4	26
Other Discriminatory Acts	5	4	4	13
Of the Workers Complaining to Others:				
Workers That Were Terminated	5	5	0	10
Other Discriminatory Acts	0	1	1	2
Of the Workers Complaining to a Combination:				
Workers That Were Terminated	0	4	1	5
Other Discriminatory Acts	1	0	2	3

EXHIBIT C

NATIONWIDE AUDIT OF OSHA'S
SECTION 11 (c) DISCRIMINATION INVESTIGATIONS
SAMPLED CASES BY EMPLOYER SIZE



APPENDIX I I

AGENCY COMMENTS

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the Attention of:

February 19, 1997

MEMORANDUM FOR: Joseph Ganci, Director
Division of Audit Operations

FROM Thomas J. Buckley, Director
Office of Investigative Assistance

SUBJECT: DRAFT - Nationwide Audit of OSHA's Section 1l(c) Discrimination Investigations

After the briefing provided by your staff and a review of the draft report which you provided, I would like to offer some comments. I have been advised that our Office of Management Data Systems (OMDS) may provide separate comments relating to Chapter III dealing with your conclusion that OSHA's automated case management system is ineffective for reporting and managing 11(c) cases.

The only real problems I found with your report deals with Chapter Two, concerning OSHA's settled cases. As your investagation clearly found, an extremely low number of 11(c) cases are settled through litigation. OSHA investigators 'negotiate" approximately 99% of all remedies received by employees who file complaints under Section 11(c). There is no disputing the fact that employees who obtain a negotiated settlement do not receive everything they may be entitled to under the Act. However, your research should look at what employees receive when their cases are litigated. While there may be one or two cases in which an employee received 100% of what he is entitled to under the Act, through litigation, most cases are "settled out" for a fraction of the entitled remedy.

The voluntary settlement process used by OSHA is necessary to provide at least some form of prompt recourse for employees who suffer retaliation for involvement in workplace safety or health issues. The reasons for this process is based on the following:

* Toofew of cases in which OSHA finds merit are ever accepted by SOL for litigation.
* Cases which are litigated normally take several years to move through the court system (most impacted employees are out of work or out of finds and cannot afford to wait).
* U. S. District Court Judges do not want whistleblower cases in their courts.
* No settlement is ever accepted unless the impacted employee agrees to the settlement.
* OSHA investigators are acting under a statutory 90-day deadline to complete cases (OIG and GAO have for years been pressing OSHA on this topic).
* OSHA compliance cases are routinely settled for significantly less than thier initial penalties.

The report indicates that any settlement that does not provide "all appropriate relief" to the worker in a merit case has not met the requirements of the Act. This conclusion does not take into consideration the reality of having to provide employees with whistleblower protection under the Act. Voluntary settlements are by their very nature a compromise between the employer and employee. Without some benfit to both sides. settlements cannot be achieved. If we cannot get prompt relief for the employee and the employer can see no savings in a settlement, we will loose what benefits we now get for impacted employees.

The conclusion m the report stating that OSHA's actions to settle merit cases without referring them to SOL for litigation limits the participation of the courts in developing the discrimination provisions of the Act, clearly indicates a failure to discuss this issue with SOL or with U.S. District Court Judges, whose dockets a filled with a Ml-range of federal litigation. The Attorney General of the United States chaired a briefing in June 1996, on the need for "Alternate Dispute Resolution". Two U.S. District Court Judges specifically identified whistleblower cases as the types of case they want to get out of the Courts. The whole basis of Alternate Dispute Resolution (ADR) is compromise. The Department of Labor presently has a proposal for a DOL ADR Program with whistleblower cases being the primary focus of the Program. This action by the Department flies in the face of the reports recommendation for more litigation and seeking "all appropriate relief.

The portion of the report dealing with predetermination settlements finds that OSHA seeks informal settlements without evidence to support the four essential elements of a Section 11(c) violation. This is simply not true. In a predetermination settlement the investigator has interviewed the employee and found that a prima-facie allegation has been made. That prima-facie allegation covers the four essential elements of a violation. Based on that initial finding, the investigator goes to the employer and lays out the prima-facie allegation and offers the employer the opportunity to settle the complaint without further investigation. This process cuts down on the amount of monetary exposure to the employer and gets a prompt remedy for the employee. It also precludes the opportunity for either side to expand their opposition to a prompt resolution of the issues involved Both parties benefit from these predetermination settlements.

With regard to the portion of the report dealing with cases sent to the SOL, the finding seems to be that these cases are not receiving an adequate review before being sent to SOL and that is the reason for the high rejection rate. These cases are reviewed by a supervisory investigator or area director and are then reviewed by regional office staff before forwarding to SOL. While SOL may not agree with OSHA's findings, it is incorrect to assert that cases are sent for litigation without having covered the four basic elements of a violation.

I agree with your Conclusion for Chapter Two -- that OSHA may be under serving its customers by using predetermination settlements an settling complaints too soon. However, the Recommendations to have SOL review all settlements to determine whether they should be litigated and/or have SOL confer with OSHA on all settlements will result in less, rather than more protection for employees. You have only to look at how few of the whistleblower eases that OSHA refers to SOL are litigated to get an idea of how few of the cases they would review would get settled. Think — if SOL looks at our settlements and recommends that we go for "ail appropriate relief", then settlement falls through, will SOL then litigate those cases to get the full remedy for the employees - not very often if ever.

Finally, OSHA assumed jurisdiction on February 3, for seven whistleblower statutes which had been under the jurisdiction of the ESA's Wage and Hour Division. OSHA did not receive any additional resources to handle this workload which involves protection for environmental and nuclear whistleblowers. To compound OSHA's probleem, 29 CFR 24 requires that the investigation of all seven of the new statutes be completed within 30-days. It is apparent that this new workload has not been factored into your recommendations.

In theory, the report's recommendations in Chapter Two are appropriate. In terms of protecting employees and conforrning with the Department's decision to emphasize Alternate Dispute Resolution, they are not.

CC: John B. Miles, Jr.
Richard Fairfax
Frank Frodyma