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WHISTLEBLOWER AND VICTIM'S RIGHTS PROVISIONS OF H.R. 2067, THE PROTECTING AMERICA'S WORKERS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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WHISTLEBLOWER AND VICTIM'S RIGHTS PROVISIONS OF H.R. 2067, THE PROTECTING AMERICA'S WORKERS ACT

Wednesday, April 28, 2010
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 10:07 a.m., in room 2175, Rayburn House Office Building, Hon. Lynn C. Woolsey [chairwoman of the subcommittee] presiding.

Present: Representatives Woolsey, Shea-Porter, Payne, Bishop, Hare, Sablan, and McMorris Rodgers.

Staff Present: Aaron Albright, Press Secretary; Andra Belknap, Press Assistant; Jody Calemine, General Counsel; Lynn Dondis, Labor Counsel, Subcommittee on Workforce Protections; David Hartzler, Systems Administrator; Sadie Marshall, Chief Clerk; Richard Miller, Senior Labor Policy Advisor; Revae Moran, Detailee, Labor; Alex Nock, Deputy Staff Director; James Schroll, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Kirk Boyle, Minority General Counsel; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Alexa Marrero, Minority Communications Director; Brian Newell, Minority Press Secretary; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairwoman WOOLSEY. A quorum is present. The hearing of the Subcommittee on Workforce Protections will come to order.

I will open the hearing with my own remarks and then yield to my ranking member, who is on her way, but she probably doesn't care if she doesn't hear my opening remarks. She will read them, read them in the record.

So, welcome, everybody. Today is Workers Memorial Day, a day when Americans from all walks of life remember and honor workers who have been killed or seriously injured in the workplace. We have in our audience today many, many family members and loved ones of workers who have been killed in the workplace. I thank you for coming. This is an honor for us, the very idea that you would take your time and come here, knowing how important PAWA is

but also how emotional this must be for you, so thank you very much for being here.

Workers Memorial Day started on April 28, 1989, a day which is also the anniversary of the Occupational Safety and Health Act, OSHA. This is the 40th anniversary. Well, this is the 40th year. It is the 39th anniversary.

Unfortunately, over 20 years later, it is the 21st century, and workers continue to die on the job. This past month has been a particularly tragic one for American workers.

Last week, on April 20, 11 workers were lost and 17 injured following an explosion on the Transocean Deepwater Horizon drilling ship leased by British Petroleum, BP, in the Gulf of Mexico 50 miles off the coast of Louisiana.

On April 5, 29 miners were killed and two injured in a massive explosion which ripped through Massey Energy's Upper Big Branch mine in Montcoal, West Virginia.

Three days earlier, on April 2, a blast at the Tesoro Oil Refinery in Anacortes, Washington, caused the deaths of seven workers who were engulfed in a fire wall.

There are thousands of equally tragic deaths that occur in ones and twos away from the limelight.

Last Friday, another West Virginia miner was killed at ICG Beckley Pocahontas mine after he was crushed between a continuous miner and a rib vault.

Last month, the committee held a hearing on the civil and criminal penalties of H.R. 2067, the Protecting America's Workers Act, which we call PAWA, and I will refer to it as that for the rest of the day. It is shorter. These changes are long overdue, and they are changes and reforms to the OSH Act.

Today's legislative hearing will examine the victims' rights and whistleblowers' rights as they are contained in the March 9 discussion draft of the same bill that further improves PAWA. When workers are killed on the job, family members need to be included in the investigations, as they may be a rich source of knowledge. Victims want investigations to get to the whole truth and to ensure that the death of their loved one was not in vain, and they want meaningful changes so that other workers do not meet the same fate.

One of our witnesses today is Tonya Ford. Hi, Tonya. Her uncle fell 90 feet to his death from a continuous-belt-operated man lift at an Archer Daniels Midland plant in Nebraska. The company replaced this one man lift as part of its agreement with OSHA but not the others located throughout the plant and other plants that they own. Tonya's father, who still works at the plant, rides up and down on this inherently dangerous equipment on a daily basis.

Unfortunately, families have been marginalized by the Occupational Safety and Health Administration during the investigations. Families oftentimes get investigation results, and when they do it too often arrives after OSHA has met privately with the employers and reached a closed-door settlement. Some employers will insist the deceased worker is responsible for the tragedy in closed-door meetings with OSHA, yet OSHA informally settles these cases without the benefit of input from the families, those nearest to the

victim, those who could have inside information shared with them by their loved ones.

OSHA's current policy assumes communication with the next of kin. This policy, however, is not consistently implemented and certainly does not meet the needs of families.

The discussion draft of PAWA strengthens existing policy by bringing family members into the process.

The OSH Act recognizes that providing healthy and safe workplaces depends on the willingness of workers to raise concerns with their employers or to blow the whistle by reporting unsafe practices to government agencies if or when the concern is not addressed.

Too often, however, workers are fired, demoted or punished for raising concerns with OSHA; and OSHA fails to protect them enough by recovering their back pay or getting them their jobs back. One of the main reasons for this is that section 11(c) in the OSH Act, as the oldest whistleblower statute, lacks due process and other essential protections and really is stuck back in the 20th century, as a matter of fact. As a result, few cases that are filed are found to have merit, but when they are considered merit cases and OSHA cannot settle the case between the parties, its only option, OSHA's only option is to refer it to a solicitor of Labor. The solicitor then has the sole discretion whether or not to pursue the case in court.

Between October 21, 1995, and October 1, 2009, fewer than 7 percent of the merit cases sent to the solicitor were ever litigated, because it appears that, first, the solicitor's office only takes those cases that have a very high chance of winning and, second, demands on that office far exceed its scarce resources. And, further, agency policies tend to discourage litigation where the amount that can be recovered for the worker or the worker's family is small compared to the resources needed to litigate the claim.

One of our witnesses, Neal Jorgensen from Preston, Idaho, will testify how he lost his job after filing a safety complaint with OSHA. He filed a whistleblower claim; and while OSHA found his case had merit, the solicitor declined to prosecute because it did not think either of the two Federal judges in Idaho, who would be the ones to hear the case, would be receptive to it.

Under current law, Mr. Jorgensen had no right to file a case in court. PAWA modernizes the OSH Act to bring it in line with modern whistleblower laws such as the Consumer Product Safety Improvement Act.

A safe workplace depends on workers reporting unsafe conditions to their employers or the government without fear of retaliation and with the knowledge that the government will be there to back them up if the employer does retaliate. The legislation before us today will achieve that goal.

I am pleased the administration supports the victims' rights and whistleblower provisions and look forward to the testimony from our wonderful panel of witnesses.

With this, I would defer to our ranking member, Cathy McMorris Rodgers, who isn't here yet. She will give her opening statement before we hear from all of our witnesses and before the questioning begins.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn Woolsey, Chairwoman, Subcommittee on Workforce Protections

Today is Workers Memorial Day, a day when Americans from all walks of life remember and honor workers who have been killed or seriously injured in the workplace.

Workers Memorial Day started on April 28, 1989, a day which is also the anniversary of the Occupational Safety and Health Act (OSH Act).

Unfortunately, over 20 years later, in the 21st century, workers continue to die on the job.

This past month has been a tragic one for the American worker.

Last week, on April 20, eleven workers were lost and seventeen injured following an explosion on the trans-ocean deepwater horizon drilling ship leased by British Petroleum in the Gulf of Mexico, fifty miles off the coast of Louisiana.

On April 5, twenty-nine miners were killed and two injured in a massive explosion which ripped through Massey energy's Upper Big Branch mine in Montcoal, West Virginia.

Three days earlier on April 2, a blast at the Tesoro oil refinery in Anacortes, Washington caused the deaths of seven workers who were engulfed in a "firewall."

There are thousands of equally tragic deaths that occur in ones and twos, away from the limelight.

Last Friday another West Virginia miner was killed at the ICG Beckley Pocahontas mine after he was crushed between a continuous miner and the rib wall.

Last month the subcommittee held a hearing on the civil and criminal penalties in H.R. 2067, the Protecting America's Workers Act (PAWA), which makes long overdue reforms to the OSH Act.

Today's legislative hearing will examine the victims' rights and whistleblower provisions as they are contained in the March 9 discussion draft of the same bill that further improves PAWA.

When workers are killed on the job, family members need to be included in investigations, as they may be a rich source of knowledge.

Victims want investigations to get to the whole truth and ensure that the death of their loved one was not in vain.

And they want meaningful changes so that other workers do not meet the same fate.

One of our witnesses today is Tonya Ford.

Her uncle fell 90 feet to his death from a continuous belt-operated manlift at an Archer Daniels Midland plant in Nebraska.

The company replaced this one manlift as part of its agreement with OSHA, but not the others located in the plant.

And Tonya's father, who still works at that plant, rides up and down on this inherently dangerous equipment on a daily basis.

Unfortunately, families have been marginalized by the Occupational Safety and Health Administration (OSHA) during investigations.

Families oftentimes don't get investigation results, and when they do, it too often arrives after OSHA has met privately with the employers and reached a closed door settlement.

Some employers will insist the deceased worker is responsible for the tragedy in closed door meeting with OSHA.

Yet, OSHA informally settles these cases without the benefit of input from families * * * those nearest the victim * * * who could have inside information shared by their loved one.

OSHA's current policy assumes communication with the next of kin.

This policy, however, is not consistently implemented and certainly does not meet the needs of families.

The discussion draft of PAWA strengthens existing policy by bringing family members into the process.

The OSH Act recognizes that providing healthy and safe workplaces depends on the willingness of workers to raise concerns with their employers, or, to 'blow the whistle' by reporting unsafe practices to government agencies, if or when, the concern is not addressed.

Too often, however, workers are fired, demoted or punished for raising concerns with OSHA, and OSHA fails to protect them by recovering their back pay or getting them their job back.

One of the main reasons for this is that section 11(c) in the OSH Act, as the oldest whistleblower statute, lacks due process and other essential protections.

As a result, few cases that are filed are found to have "merit," but when they are considered "merit" cases and OSHA cannot settle the case between the parties, its only option is to refer it to the Solicitor of Labor (SOL).

The Solicitor then has the sole discretion whether or not to pursue the case in court.

Between October 1, 1995 and October 1, 2009, fewer than 7% of the merit cases sent to the Solicitor were ever litigated, because it appears that first, the Solicitor's office only takes those cases that have a very high chance of winning, and second, demands on that office far exceed its scarce resources.

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The legislation before us today will achieve that goal.

I am pleased the administration supports the victims' rights and whistleblower provisions and look forward to the testimony from our witnesses.

I defer to ranking member, Cathy McMorris-Rodgers for her opening statement.

Chairwoman WOOLSEY. Without objection, all Members will have 14 days to submit additional materials for the hearing record.

Now I would like to introduce our panel of witnesses. They are a very distinguished panel, and we are very pleased to have you here this morning. We will start at my left, and that will be the order of the testimony. I will introduce you all, and then we will go from one to the other to the other as we progress through the hearing.

First we have Mr. Jordan Barab, who is the Deputy Assistant Secretary of Labor of the Occupational Safety and Health Administration. He formerly served as a senior labor policy advisor on this committee, so we are really out front with you that we love Jordan very, very much, and we respect his words.

He also worked as a health and safety specialist at the U.S. Chemical Safety Board and served as a special assistant to the OSHA administrator. Prior to his government service, Jordan was the director of Health and Safety at the American Federation of State, County, and Municipal Employees, called AFSCME. He holds a master's degree from Johns Hopkins University and an undergraduate degree from Claremont McKenna College.

Thank you for being here, Jordan.

Ms. Tonya Ford is a resident of Lincoln, Nebraska, and the niece of Robert Fitch, who died, as I told you earlier, in a preventable accident at the Archer Daniels Midland plant in Lincoln. As the family member of a worker killed on the job, she has worked to raise awareness of the need for better workplace safety.

Mr. Dennis Morikawa is a partner in the Morgan, Lewis & Bockius law firm, where he heads the Occupational Safety and Health practice. He represents management regarding labor and employment law issues, focusing on matters arising under the Occupational Safety and Healthy Act and Mine Safety and Health

Act. Mr. Morikawa received his JD from Syracuse University and a BA from Denison University.

Dr. Celeste Monforton is an assistant research professor in the Department of Environmental and Occupational Health at the George Washington University School of Public Health and Health Services. She worked as a policy analyst at OSHA from 1991 to 1995 and at MSHA from 1996 to 2001 as special assistant to the assistant secretary. Dr. Monforton earned a bachelor's degree from the University of Michigan and earned a master's degree and a doctorate of public health from George Washington University.

Mr. Neal Jorgensen. Neal is a whistleblower who lives in Preston, Idaho. He filed a complaint with OSHA under section 11(c) of the Occupational Safety and Health Act in 2004 after being fired from his job at Plastic Industries, and he has a real story to tell us.

Mr. Lloyd Chinn. Mr. Chinn is a partner at the Labor and Employment Law Department at Proskauer Rose law firm. He litigates employment disputes before Federal and State courts, arbitration tribunals, and before administrative agencies. Mr. Chinn received his JD from New York University and a BS from Georgetown University.

Ms. Lynn Rhinehart. Lynn is the general counsel at the AFL–CIO, and her focus is on safety and health law policy. She is a former staffer to Senator Howard Metzenbaum on the Senate Labor Committee and is a member of the Obama Transition Team for the National Labor Relations Board. She has also served as co-chair of the ABA Committee on Occupational Safety and Health Law. Ms. Rhinehart received her BA from the University of Michigan and her JD from Georgetown University.

We are going to stop at this moment, and I am going to introduce our ranking member, Congresswoman McMorris Rodgers, for her opening remarks.

Mrs. MCMORRIS RODGERS. Thank you, Madam Chairwoman. I sincerely apologize for being late. We are going to do a better job, because I have a terrible record here, and I am sorry. I was over on the Senate side, and it just takes a while.

Since today is recognized around the world as Workers Memorial Day, I would like to begin my comments by acknowledging the family members who have come to Washington, D.C., to share their stories about loved ones injured or killed on the job. Yesterday, the House passed House Resolution 375 honoring those who lost their lives in the workplace, and I would like to extend my deepest sympathies and condolences to them.

Turning to the focus of today's hearing, I would like to thank the chairwoman for providing another opportunity to further examine H.R. 2067, the Protecting America's Workers Act. We have before us a large panel of distinguished witnesses; and I look forward to hearing their expertise on two specific issues, whistleblowers and victims' rights.

As I mentioned during our hearing last month, providing a safe workplace should be an employer's number one responsibility; and it should be a shared responsibility, one that reflects partnerships between the Federal, State, local governments, the private sector, employers, and other interested stakeholders.

Notwithstanding these shared efforts, there is no doubt in my mind that workers should be able to report illegal or unsafe practices without fear. I don't think anyone here would have sympathy for an employer who did not take safety seriously.

The provisions in the current OSH Act that protect employees who report these illegal and unsafe practices from retaliation are the subject of today's hearings hearing. I look forward to hearing from our witnesses as to how these protections are implemented, what changes are needed, why they are needed, and why the changes proposed by H.R. 2067 are the most appropriate. I say this because with any legislative proposal, particularly one that changes long-standing policies, we have to be certain that we are not doing more harm than good.

In addition, today's hearing will examine what is known as victims' rights, the information and cooperation afforded to those employees who are injured and families who have lost a loved one in the workplace. We will hear from one family about OSHA's failure to inform them of conclusions reached in fatality investigations, which is unacceptable. Current OSHA policy should have precluded this oversight, and I am interested to learn why these policies were not implemented appropriately.

Finally, I would just like to thank the chairwoman for interest in this topic, for giving us the opportunity to look more closely at workplace safety. This hearing is the latest in a series of hearings looking at the aspects of H.R. 2067, the Protecting America's Workers Act, and the broader issue as how to keep Americans safe and healthy on the job.

I look forward to a productive, lively debate this morning and yield back.

[The statement of Mrs. McMorris Rodgers follows:]

Prepared Statement of Hon. Cathy McMorris Rodgers, Ranking Minority Member, Subcommittee on Workforce Protections

Thank you Madam Chair and good morning everyone.

Since today is recognized around the world as Worker Memorial Day, I would like to begin my comments by acknowledging the family members who have come to Washington, DC to share their stories about loved ones injured or killed on the job. Yesterday, the House passed H. Res. 375 honoring those who lost their lives in the workplace. I would like to extend my deepest sympathies and condolences to them.

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I look forward to a productive, lively debate this morning and yield back.

Chairwoman WOOLSEY. Thank you very much.

Now just for those of you who have not been witnesses in the past, I would like to explain our lighting system.

We will turn on a green light when you begin your testimony, which means you have 5 minutes. When the light turns orange, you know you have 1 minute left, and we would hope you would be wrapping up your testimony at that point. I assure you, the floor does not open up, you do not fall into outer space if you get beyond the 5 minutes, but in order to keep the hearing going and have everybody have time. If you miss some point, then when the members are asking their questions, you can probably get to your point at that time.

So now we are going to hear from our witnesses, starting with Deputy Assistant Secretary Barab.

STATEMENT OF JORDAN BARAB, DEPUTY ASSISTANT SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Mr. BARAB. Thank you, Madam Chair, Ranking Member McMorris Rodgers, and members of the subcommittee.

I recognize the significance of today's hearing being held on the 39th anniversary of the creation of the Occupational Safety and Health Administration, OSHA, and Workers Memorial Day. Today is the day set aside to recognize workers killed, disabled, injured, or sickened by their work; and today we meet under the shadow of three recent tragedies, the loss of 29 miners in West Virginia, 7 refinery workers in Washington State, and the 11 workers still missing from the Deepwater Horizon.

Now more than ever is the time to think seriously and act courageously to ensure that OSHA has the tools it needs to enforce safe working conditions and that this government provides workers and the victims the tools they need to help ensure those safe working conditions.

Secretary Solis' vision for the Department of Labor is good jobs for everyone. Good jobs are safe jobs, but American workers still face unacceptable hazards.

The administration supports the Protecting America's Workers Act, which would make meaningful, substantial, and long-overdue statutory changes in the Occupational Safety and Health Act, providing OSHA with important tools to strengthen and expand its enforcement programs. Two of the critical tools included in PAWA are the enhanced whistleblower protections and increased victims' rights.

OSHA's inspectors are not able to visit more than a small fraction of this Nation's workplaces. The OSH Act therefore relies heavily on workers to help identify hazards at their workplaces. The authors of the OSH Act realize that employees are not likely to participate in safety and health activities if they fear they will lose their jobs. That is why Congress wrote 11(c) to protect employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. Without robust whistleblower protection, these voices may be silenced.

PAWA would strengthen 11(c) by providing workers with basic rights like other, more recent whistleblower laws passed with broad bipartisan support have provided workers. PAWA would better protect the workers' rights to participate in making those working conditions safer by providing workers with a private right of action, an important element that is lacking in OSHA's current 11(c) provision. We believe it is critically important that if an employer fails to comply with an order providing relief, both OSHA and the workers should be able to file a civil action.

PAWA will also grant workers the right to further pursue their case if OSHA does not proceed in a timely fashion, codify a workers' right to refuse to perform unsafe work, protect employees who refuse work because they fear harm to other workers, prohibit employer policies to discourage workers from reporting illnesses or injuries and prohibit employer retaliation against employees for reporting injuries or illnesses.

PAWA would also increase the existing 30-day deadline for filing an 11(c) complaint to 180 days. Over the years many complainants, who might otherwise have had a strong case of retaliation, have been denied protection simply because they did not file within the 30-day deadline.

Finally, PAWA would codify a number of OSHA's high standards for professionalism and transparency and conducting whistleblower investigations that are of critical importance to this administration. For example, PAWA requires OSHA to interview complainants and to provide them with a response and the evidence supporting the respondent's position. PAWA affords complainants the opportunity to meet with OSHA and to rebut the employers statements or evidence.

Turning to victims' rights, OSHA has long known that workers and often their family can serve as OSHA's eyes and ears, identifying workplace hazards. Injured workers and their family often provide useful information to investigators because employees frequently discuss work activities and coworkers with family members.

I want to thank Tonya Ford, whose uncle, Robert Fitch, was killed at Archer Daniels Midland on January 29, 2009, for coming to Washington today to testify and describe the tragic circumstances of Mr. Fitch's death and the unnecessary problems that she and her family faced getting information about what happened. We appreciate her suggestions on how to enforce or how to improve our enforcement proceedings to better involve victims and their families.

It is OSHA's policy to talk to families during the investigation process and inform them about our citation procedures and settlements. Families are normally provided a copy of the citations when issued.

We found, however, that some of OSHA's policies on victims' rights have not always been implemented consistently and in a timely manner. It is also clear that a letter is not adequate. Therefore, we will be strengthening those policies by putting them into a directive and adding them to the field operations manual.

We will also be instructing our area directors to call the family to express condolences, advise that a letter is coming, and assure families that we will be staying in contact. In addition, we will be appointing family liaisons in every one of OSHA's 70 area offices.

In general, OSHA supports the changes in PAWA for victims and their families. Our only concern is that we find a way to both fully ensure family and victim participation without unduly burdening or lengthening the process.

Madam Chair, I appreciate the opportunity today to have discuss PAWA and how it would improve whistleblower protections and victims' rights. I believe stronger whistleblower protections and more substantial rights for victims and their families can lead to safer job sites and, ultimately, more men and women who go home safely to their families at the end of the day.

I would be happy to answer your questions.

[The statement of Mr. Barab follows:]

Prepared Statement of Hon. Jordan Barab, Deputy Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor

Chair Woolsey, Ranking Member McMorris Rodgers and Members of the Subcommittee, thank you for the opportunity to testify today on the Protecting America's Workers Act (PAWA) particularly on the issues of whistleblower protections and victim's rights in OSHA's enforcement process.

I recognize the significance of today's hearing being held on both the 39th anniversary of the creation of the Occupational Safety and Health Administration and Workers Memorial Day. Today is the day set aside to recognize workers killed, disabled, injured or sickened by their work—to honor the men and women who have died on the job and to rededicate ourselves to improving safety and health in every American workplace.

This commitment is especially needed now, as we commemorate this Workers Memorial Day not only to remember the 29 brave miners who lost their lives at the Upper Big Branch mine, the 7 refinery workers who were killed the week before at the Tesoro refinery in Washington, but also the 14 workers who die on the job every day in this country.

This hearing focuses on two areas that are crucial to reaching the goal set by the Occupational Safety and Health Act (OSH Act) to assure safe and healthful working conditions for all working men and women in the United States: 1) ensuring that workers are safe from retaliation for exercising their health and safety rights; and 2) ensuring victims of workplace incidents and their family members have information and a meaningful role in OSHA enforcement activities.

Whistleblower protections

Congress realized that OSHA inspectors would never be able to visit more than a small fraction of the nation's workplaces. The OSH Act therefore relies heavily on workers to help identify hazards at their workplaces. The authors of the OSH Act also realized that employees are not likely to participate in safety and health activities if they fear that they will lose their jobs or otherwise be retaliated against. That is why Congress wrote Section 11(c)—to protect employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. The OSH Act was one of the first safety and health laws to contain a provision for protecting whistleblowers.

Section 11(c) was innovative and forward looking in 1970, but 40 years later it is clearly antiquated and in dire need of substantial improvement. Achieving Secretary Solis' goal of Good Jobs for Everyone includes strengthening workers' voices in their workplaces. Without robust whistleblower protections, these voices may be silenced.

This Administration strongly supports the whistleblower provisions of the Protecting America's Workers Act (PAWA), which expands the OSH Act's anti-retaliation provisions, codifies a worker's right to refuse to perform unsafe work, prohibits employer policies that discourage workers from reporting illnesses or injuries, prohibits employer retaliation against employees for reporting injuries or illnesses, and grants workers the right to further pursue their case if OSHA does not proceed in a timely fashion.

OSHA currently administers the whistleblower provisions of sixteen other statutes, protecting employees who report violations of various trucking, airline, nuclear power, pipeline, environmental, rail, consumer product, and securities laws. In the four decades since the OSH Act became law, Congress has enacted increasingly expansive whistleblower protections in these other laws, leaving section 11(c) of the OSH Act in significant ways the least protective of the 17 whistleblower statutes. It is time to bring OSHA's protections up to the same level of these other laws.

Notable weaknesses in section 11(c) include: inadequate time for employees to file complaints; lack of an administrative forum for the adjudication of cases; lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through the Department of Labor filing an action in U.S. District Court.

PAWA would strengthen section 11(c) by including the full range of procedures and remedies available under the more modern statutes and by codifying certain provisions, such as exemplary damages and the right to refuse work that could result in serious injury or illness, which have been available but not expressly authorized by current statute. There is no reason that workers speaking up about threats to their safety and health should enjoy less protection than workers speaking up about securities fraud or transportation hazards. PAWA would also make explicit that a worker may not be retaliated against for reporting injuries, illnesses or unsafe conditions to employers or to a safety and health committee. This protection is already implicit in the OSH Act, but PAWA would leave no doubt in employers' or employees' minds about this right.

PAWA is an improvement on OSHA's current law in significant ways. It would increase the existing 30-day deadline for filing an 11(c) complaint to 180 days, bringing 11(c) more in line with some of the other whistleblower statutes. Over the years many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline. For example, we received an 11(c) complaint from a former textile employee who claimed to have been fired for reporting to management that he had become ill due to smoke exposure during the production process. The worker contacted OSHA to file an 11(c) complaint 62 days after he was fired, compelling OSHA to dismiss the case as untimely under existing law. Under PAWA, however, OSHA would be able to investigate the merits of cases such as this one. Increasing the filing deadline to 180 days would greatly increase the protections afforded by section 11(c).

PAWA's adoption of the "contributing factor" test for determining when illegal retaliation has occurred would be another significant improvement in 11(c). This test, which examines the employer's decision to take adverse action against the employee following whistleblower activity, is less stringent than the current "motivating factor" test to which OSHA is currently restricted. Adoption of the "contributing factor" test would make 11(c) consistent with other more recently enacted whistleblower statutes and would strengthen the whistleblower protections afforded to America's workers.

The private right of action is another key element of whistleblower protections that is lacking in OSHA's current 11(c) provision and is contained in PAWA. It is critically important that, if an employer fails to comply with an order providing relief, both DOL and the complainant should be able to file a civil action for enforcement of that order in a U.S. District Court. We strongly support this provision.

PAWA also allows complainants to move their case to another prescribed venue if the Department does not make prompt decisions or rulings. For example, PAWA would allow complainants to "kick out" from an OSHA investigation to a de novo Administrative Law Judge (ALJ) hearing if the Secretary has not issued a decision within 120 days from the case filing; "kick out" from an ALJ hearing to district court if an ALJ has not issued a decision within 90 days of the request for a hearing; or "kick out" from an Administrative Review Board (ARB) hearing to district

court if the ARB has not issued a final order within 60 days of the request for an administrative appeal. "Kick-out" provisions have become a standard feature of whistleblower protection statutes, and OSHA believes it is appropriate for 11(c) complainants to have the same right.

The provision in PAWA allowing employees in states administering OSHA-approved plans to choose between Federal and State whistleblower investigations would likely result in a significant increase in the number of Federal complaints. All 22 states and territories that administer private sector plans are required to provide protections at least as effective as Federal OSHA's. We have some reservations about this provision because we are not convinced it would add much protection to workers in those states and it would be a significant drain on OSHA and Solicitor resources. We would welcome further discussions on how to best ensure whistleblower protections in these states.

Finally, PAWA would codify a number of OSHA's high standards for professionalism and transparency in conducting whistleblower investigations that are of critical importance to this Administration. For example, PAWA requires OSHA to interview complainants and to provide them with the respondent's response and the evidence supporting the respondent's position. PAWA affords complainants the opportunity to meet with OSHA and to rebut the employer's statements or evidence. While we train our investigators on the critical importance of conducting thorough interviews with complainants and involving complainants in the rigorous testing of proffered employer defenses, we believe that requiring these investigative steps by statute would assist OSHA in its mission of providing robust protection to occupational safety and health whistleblowers.

These legislative changes in the whistleblower provisions are a long-overdue response to weaknesses that have become apparent over the past four decades. This legislation makes good on the promise to stand by those workers who have the courage to come forward when they know their employer is cutting corners on safety and health and guarantees that they do not have to sacrifice their jobs in order to do the right thing.

Not only do we support the provisions of PAWA intended to improve whistleblower protections, we would like to explore areas where we might want to go further.

I would propose amending the OSH Act to provide for assessment of civil penalties against employers who violate the whistleblower provisions. Currently, while an employer found to be discriminating against an employee must make the employee whole again, there is no provision for civil penalties against employers. The provisions are not in the current version of PAWA but similar provisions were included in the S-MINER Act that was passed by this Committee and the full House of Representatives in 2008. Under such a provision, any employer found to be in violation of Section 11(c) of the Act would be subject to civil penalties of not less than $10,000 and not more than $100,000 for each occurrence of a violation.

Additionally, as conclusion of these cases can often take many months, a provision should be made to reinstate the complainant pending outcome of the case. The Mine Safety and Health Act provides that in cases when the Mine Safety and Health Administration (MSHA) determines that an employee's complaint was not frivolously brought, the Review Commission can order immediate reinstatement of the miner pending final order on the complaint. OSHA's 11(c) complainants should have the same reinstatement rights.

Victims' rights

OSHA has long known that workers, and often their families, can serve as OSHA's "eyes and ears," identifying workplace hazards. Workers injured in workplace incidents and their friends and family often provide useful information to investigators, because employees frequently discuss work activities and co-workers with family members during non-work hours.

We are dedicated to findings ways to involve workers and their families in OSHA's enforcement investigations. Both Assistant Secretary Michaels and I make it a priority to set time aside to talk with victims' families whenever we have the opportunity.

Last month, as part of an effort to reach out and hear from stakeholders on a variety of safety and health issues, we hosted "OSHA Listens." As part of the event, we heard recommendations from the family members of workers killed on the job on how to enhance victims' and families' participation in the enforcement process.

I want to thank Tonya Ford whose uncle, Robert Fitch, was killed at Archer Daniels Midland on January 29, 2009, for coming to Washington today to testify and describe to us the tragic circumstances of Mr. Fitch's death and the unnecessary problems she and her family faced getting information about what happened and

what OSHA was doing. We appreciate the suggestions she has on how to improve our enforcement process and better involve victims and their families.

Katherine Rodriguez, whose father was killed at the BP Texas City Refinery on September 2, 2004, also spoke at OSHA Listens and made several recommendations to OSHA officials on how to enhance the rights of victims' families. She said that before her father died in the hospital her family received information about the incident that might have been useful to OSHA investigators, noting that "fellow coworkers are more willing to talk to the family members than any investigator."

Family members and co-workers are sincerely and understandably interested in learning how an incident occurred, finding out if anything could have been done to prevent it, and knowing what steps employers and employees will take in the future to ensure that someone else is not injured or killed in a similar situation.

It is OSHA's policy to talk to families during the investigation process and inform them about our citation procedures and settlements. OSHA first contacts the family at the beginning of the inspection. All families get a letter from the Area Director discussing the process and advising that they will be kept informed. In some cases the families initially get a phone call. Families are then normally provided a copy of the citations when issued.

However, we have found that some of these policies have not always been implemented consistently and in a timely manner. It is also clear that a letter is not adequate. Therefore, we will be putting these policies into a directive and adding them to our Field Operations Manual. We will also be instructing the Area Directors to call the family to express condolences, advise that a letter is coming, and assure families we will be staying in contact.

In addition, we need to work on interacting with families following a tragedy. As might be expected, many OSHA inspectors understandably have trouble knowing how to interact with a person who has just lost a loved one in tragic circumstances. While brief training on this issue is provided to Compliance Officers at the Initial Compliance Course at the OSHA Training Institute, clearly more training is needed and will be developed. We will also develop webinars and webcasts for training of all compliance officers, team leaders, and Area Directors.

In general, OSHA is supportive of expanding interactions with families and victims. Therefore, the Agency is examining the issue of victims' rights from the administrative level to seek ways to better ensure the rights of victims and their families to participate in OSHA's enforcement efforts. OSHA supports many of the changes to the OSH Act embodied in PAWA for victims and their families.

PAWA would place into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA regarding the investigation and to receive copies of the citation or resulting report at the same time as the employer at no cost. PAWA would also enable victims to be informed of any notice of contest and to make a statement before an agreement is made to withdraw or modify a citation.

However, we also want to ensure—and I think the families would also want to ensure—that the provisions of PAWA do not unduly slow down the inspection, enforcement and adjudication process, which only hurt victims and their families in the long run. We believe therefore that clarification is needed of the provisions allowing victims or their representatives to meet in person with OSHA before the agency decides whether to issue a citation, or the right to appear before parties conducting settlement negotiations. This could be logistically difficult for victims and OSHA's regional and area offices, resulting in significant delays in the negotiations and ultimate citation. OSHA would be happy to work with the Committee to address this issue.

Madam Chair, I appreciate the opportunity to appear today to discuss PAWA and how it would improve whistleblower protections and victim's rights. I believe stronger whistleblower protections and more substantial rights for victims and their families can lead to safer jobsites and ultimately, more men and women who go safely home to their families at the end of the day. I would be happy to answer your questions.

Chairwoman WOOLSEY. Thank you.

Ms. Ford.

STATEMENT OF TONYA FORD, NIECE OF ROBERT FITCH, A WORKER KILLED AT ARCHER DANIELS MIDLAND PLANT

Ms. FORD. Dear Chairman Woolsey, Ranking Member McMorris Rodgers and members of the committee, my name is Tonya Ford; and I live in Lincoln, Nebraska.

I would like to start off by saying thank you so much for this opportunity. It is a great honor to sit here and represent my family and other families who have lost their loved ones due to preventable work-related accidents.

I support the Protect America's Workers Act because of what happened on January 29, 2009, when I lost my Uncle, Robert Fitch, or as I called him, Uncle Bobby, to a horrible, preventable work-related accident at the Archer Daniels Midland plant in Lincoln, Nebraska. My Uncle Bobby was 51 years old.

Our lives changed forever that day when my uncle stepped into a belt-operated man lift in order to go to his work break, fell approximately 40 feet. As he fell, he impacted each wall in the cement elevator shaft and landed on the air duct, hitting it so hard it slid 19 feet from the connection point. At that point, my uncle slid off and fell through a manhole and then fell another 40 feet to the cement ground below. My dad, Uncle Bobby's brother-in-law, found him that day. My dad still works at this ADM plant.

Since that moment, my life has become filled with gathering dates, statistics, evidence, and information. I started our research to answer our family's simple rules or—sorry—questions: What happened? Did he suffer? Did the device malfunction? Was the device too old and unsafe for my uncle and other employees that work at ADM?

Something went terribly wrong that day; and my cousins, Jessica and Jeremy Fitch, my mom, and the rest of our family deserve to know what happened and why.

I have come to the conclusion that if PAWA had been passed when it was first introduced, my uncle might have been alive 3 weeks ago to place a rose on his mother's casket. Instead, when my grandmother passed away last month, we placed a single rose on an empty chair where he should have sat.

PAWA is important not only because it included tougher penalties to discourage companies letting safety problems continue, because it extended additional rights to family members. If PAWA had been in place when my uncle died, my family would not have learned about the findings against ADM from a local news reporter. With the television camera rolling, the reporter asked me, what do you think about the penalties assessed by ADM? I could only respond we are not aware what the penalty is and that the investigation was even closed.

This is how our family learned that ADM was fined $0 for having an old and dangerous belt-operating man lift in their plants. This piece of equipment caused my uncle's death, and that I have since been informed is inherently unsafe and very scary to use, a device that you should require specialized training for anyone to use it and a device that causes many injuries and even deaths. Yet ADM received no monetary penalties for having this deadly equipment in their plants.

We asked why was ADM not fined from OSHA for the device that took my uncle from us? Nine months after hearing about zero penalties assessed to ADM, my family still did not have the answers. I reached out to OSHA for answers in January, 2010, and OSHA agreed to meet with us. I was ready to ask them all the questions that resulted in my months of research in belt-operating man lifts. To my amazement, I learned that OSHA issued two citations to ADM that were classified as serious and specifically related to the dangerous belt-operating man lift. However, as part of the informal settlement between OSHA and ADM, the two citations related to the man lift and the monetary penalties were deleted.

When we asked why OSHA told us that these dangerous man lifts were not covered by an OSHA standard under an OSHA standard issued in 1971, man lifts installed prior to August 1971 are grandfathered in, meaning that OSHA standards did not apply to them. OSHA explained that because of this grandfather clause they could not have pulled the citation if ADM contested it, but through their settlement with the company ADM agreed to replace the belt-operating man lift that killed my uncle with an elevator.

OSHA thought this was a good compromise, getting ADM to get rid of a highly dangerous piece of equipment and install something safer in its place. That is not good enough and here is why. This ADM facility where my uncle was killed and my dad still works had a total of five of these belt-operating man lifts. Stating they only had to replace just one of them did not get rid of the problem. These man lifts are operating in other ADM facilities across the country. This equipment kills workers. A company like ADM with a stock market value of $18.31 billion should be compelled to replace all of these dangerous lifts immediately.

I urge Congress to pass the Protect America's Workers Act because it would improve OSHA's ability to ensure workers are protected from dangers on jobs. I support the provision to increase OSHA's penalties and have them routinely adjusted for inflation, but penalties are only effective if OSHA has the ability to compel abatement, even if the employers contests the citation and penalties.

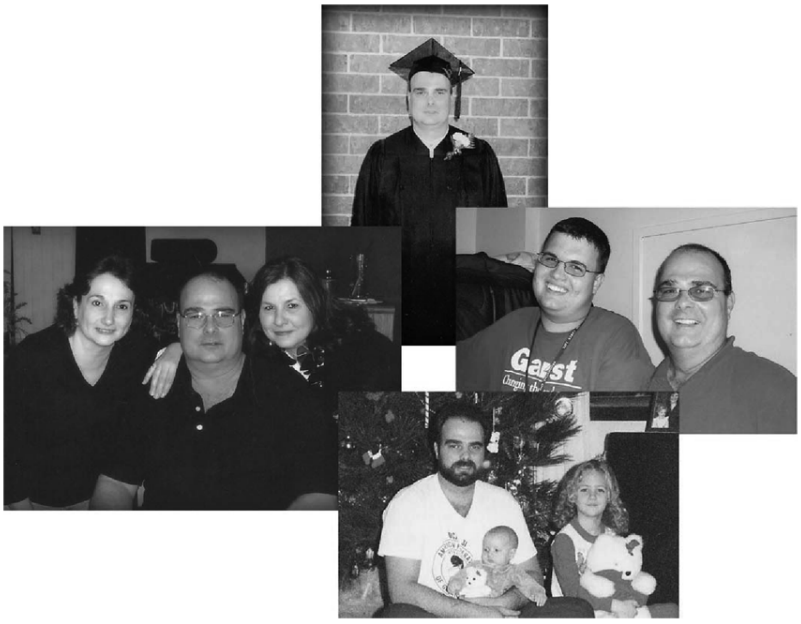
The Federal mine safety agency has this authority for the 300,000 workers it covers, and OSHA needs it for the 111 million workers who rely on its protection. As a family, we believe if we are going to prevent more deaths and hurt, OSHA must be able to force abatement during the contest period.

We strongly support all the provision of PAWA, including the new rights that would be given to family members. We believe it is very important for OSHA to meet with a family or their representatives before the agency finishes its investigation and for the families to have the opportunity to make a victims' impact statement if the case proceeds to the Occupational Safety and Health Review Commission.

My Uncle Bobby gave 32 years to ADM, often working 7 days a week. My dad still works there, as do many other men and women. This month alone we have seen too much deaths and grief because of preventable workplace hazards. If the companies do not set the bar high enough for workers' health and safety, then OSHA must be empowered to do so. Thank you.

[The statement of Ms. Ford follows:]

Prepared Statement of Tonya Ford, Niece of Robert Fitch



DEAR CHAIRWOMAN WOOLSEY, RANKING MEMBER MCMORRIS-RODGERS AND MEMBERS OF THE COMMITTEE: My name is Tonya Ford and I live in Lincoln, Nebraska. I would like to start off by saying thank you so much for this opportunity. It is a great honor to sit here and represent my family and other families who have lost their loved ones due to preventable work-related accidents.

I support the "Protecting America's Workers Act" (PAWA) because of what happened on January 29, 2009 when I lost my Uncle Robert Fitch or as I called him Uncle Bobby to a horrible preventable work-related incident at the Archer Daniel Midland plant in Lincoln, NE. My Uncle Bobby was 51 years old.

Our lives changed forever that day when my uncle stepped onto a belt-operated manlift in order to go on his work break and fell approximately 40 feet. As he fell, he impacted each wall in the cement elevator shaft, and landed on the airduct, hitting it so hard it slid 19 feet from the connection point. At that point, my uncle slid off and fell through a manhole, and then fell another 40 feet to the cement ground below. My dad, uncle's Bobby's brother-in-law found him that day. My dad still works at this ADM plant.

Since that moment, my life has become filled with gathering dates, statistics, evidence, and information. I started my research to answer our family's simple questions:

What Happened?

Did he suffer?

Did the device malfunction?

Was the device too old and unsafe for my uncle and the other employees working at ADM?

I have come to the conclusion that if PAWA had been passed when it was first introduced, my uncle might have been alive three weeks ago to place a rose on his mother's casket. Instead, when my grandmother passed away last month, we placed a single rose on the empty chair where Uncle Bobby should have been seated. PAWA is important not only because it includes tougher penalties to discourage companies letting safety problems continue, but because it extends additional rights to family members. If PAWA had been in place when my uncle died, my family would not have learned about the fines assessed against ADM from a local news reporter.

With the television camera rolling, the reporter asked me "What do you think about the penalty assessed to ADM?"

I could only respond: "We are unaware what the penalty is and that the investigation was closed."

This is how our family learned that ADM was fined $0.00 for having the old and dangerous belt-operated man-lift in their plant. This piece of equipment caused my uncle's death, and that have since been informed it was inherently unsafe and very scary to use. A device that should require specialized training before anyone should use it a device that causes many injuries and even deaths. Yet, ADM received no monetary penalty for having this deadly equipment in their plant.

We asked: Why was ADM not fined by OSHA for the device that took my uncle from us?

Nine months after hearing about zero penalty assessed to ADM, my family still did not have answers. I reached out to OSHA for answers in January 2010, and OSHA agreed to meet with us. I was ready to ask all of the questions that resulted from my months of research on belt-operated manlifts.

To my amazement, I learned that OSHA issued two citations to ADM that were classified as serious and specifically related to their dangerous belt-operated manlift. However, as part of an informal settlement between OSHA and ADM, the two citations related to the manlift and the monetary penalties were DELETED.

When we asked why, OSHA told us that these dangerous manlifts were not covered by an OSHA's standard. Under an OSHA standard issued in 1971 (29 CFR 1910.68.), manlifts installed prior to August 1971 were "grandfathered in," meaning the OSHA standard did not apply to them. OSHA explained that because of this "grandfather clause" they could not uphold the citation if ADM contested it, but through their settlement with the company, ADM agreed to replace the belt-operated manlift that killed my uncle, with an elevator. OSHA thought this was a good compromise: getting ADM to get rid of a highly dangerous piece of equipment and install something safer in its place. That's not good enough. Here's why: This ADM facility where my uncle was killed and where my dad still works had a total of 5 of these belt-operated manlifts. Stating that they only had to replace just one of them does not get to the root of the problem. These manlifts are operating in other ADM facilities across the country. This equipment kills workers. A company like ADM, with a stock market value of $18.31 billion, should be compelled to replace all of these dangerous lifts immediately.

I urge Congress to pass the Protecting America's Workers Act (H.R. 2067 and S.1580) because it would improve OSHA's ability to ensure workers are protected from dangers on the job. I support the provisions to increase OSHA penalties and have them routinely adjusted for inflation. But, penalties are only effective if OSHA has the ability to compel abatement even if the employer contests the citation and penalty. The federal mine safety agency (MSHA) has this authority for the 300,000 workers it covers, and OSHA needs it for the 111 million workers who rely on its protections. As a family, we believe that if we are going to prevent more deaths and hurt, OSHA must be able to force abatement during the contest period.

We strongly support all the provisions of PAWA, including the new rights that would be given to family mem≥bers. We believe it is very important for OSHA to meet with a family or their representative before the agency finishes its investigation and for a family to have the opportunity to make a victims' impact statement if the case proceeds to the Occupational Safety and Health Review Commission.

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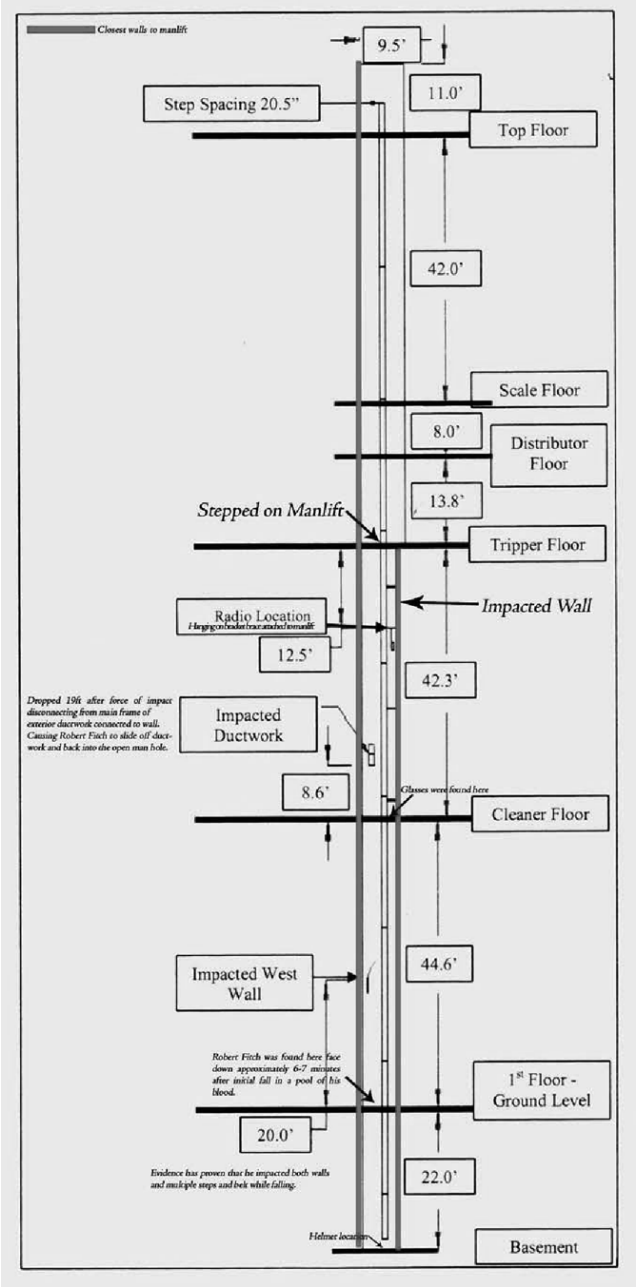
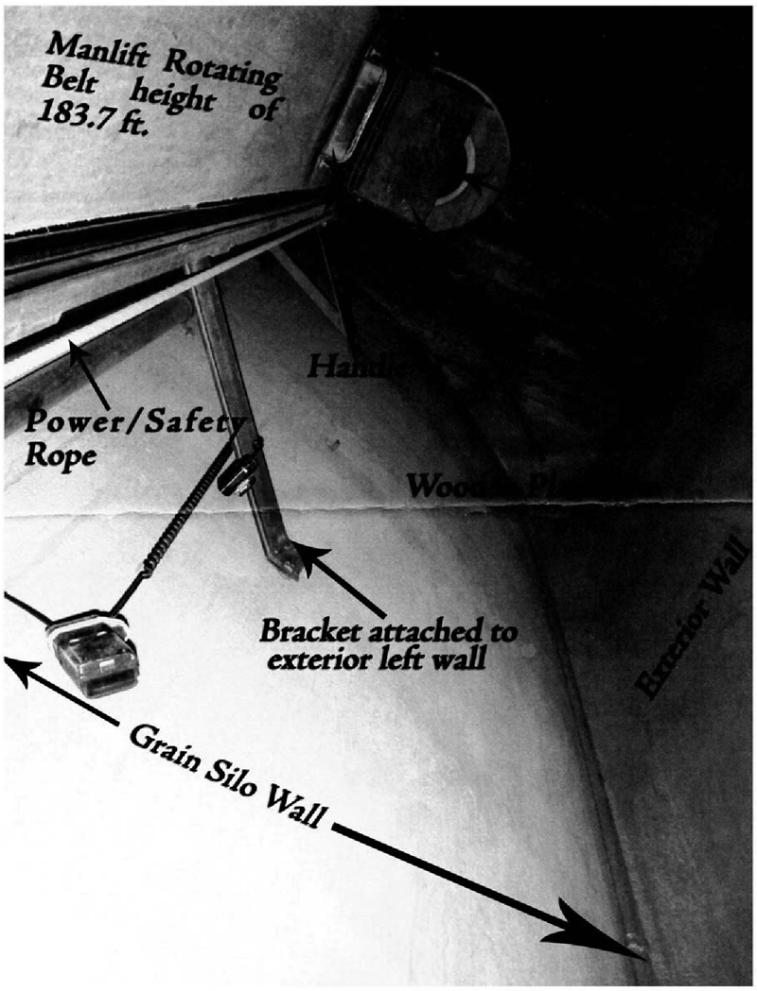
Thank you.


Closest walls to manlift
9.5'
11.0'
Step Spacing 20.5"
Top Floor
42.0'
Scale Floor
8.0'
Distributor Floor
13.8'
Stepped on Manlift
Tripper Floor
Impacted Wall
Radio Location
12.5'
42.3'
Dropped 19ft after force of impact disconnecting from main frame of exterior ductwork connected to wall. Causing Robert Fitch to slide off ductwork and back into the open man hole.
Impacted Ductwork
8.6'
Glasses were found here
Cleaner Floor
44.6'
Impacted West Wall
Robert Fitch was found here face down approximately 6-7 minutes after initial fall in a pool of his blood.
1st Floor - Ground Level
20.0'
Evidence has proven that he impacted both walls and multiple steps and bek while falling.
22.0'
Helmet location
Basement



Chairwoman WOOLSEY. Thank you.

Mr. Morikawa.

STATEMENT OF DENNIS MORIKAWA, MORGAN, LEWIS & BOCKIUS LLP

Mr. MORIKAWA. Thank you very much, Chairwoman Woolsey, Ranking Member McMorris Rodgers, members of the subcommittee, and fellow members of this panel.

My name is Dennis Morikawa, and I am a partner at the Philadelphia law firm of Morgan, Lewis & Bockius. I appreciate the opportunity to appear before you at this hearing to address the victims' rights provisions of the latest draft of the Protecting America's Workers Act legislation. I am testifying today on behalf of the U.S. Chamber of Commerce and my testimony, and comments are

not intended to represent the views of Morgan, Lewis & Bockius or its clients.

On this very special Workers Memorial Day, I want to assure that our thoughts and prayers are with the families and victims who have lost their lives on the job. I think it should be a common goal of all of us to prevent accidents and to end fatalities in the American workplace, and I share Ms. Ford's sentiment with respect to that issue.

As I mentioned, I am a partner with Morgan, Lewis, having been with them since 1974; and during that time I have practiced in the area of Occupational Safety and Health law. As a consequence of that, I have had a good opportunity to see the inner workings of how OSHA works both in the inspection, in the citation, the settlement, and the litigation process of OSHA cases. I have literally represented clients in hundreds of OSHA cases.

However, the aspect of my practice in which I am most proud has been in providing the basis for the creation of coalitions of employers dedicated to cooperating for the purpose of ending accidents and fatalities on the job.

I refer specifically to the work that I did with the Electrical Contractors Transmission and Distribution Strategic Partnership for Safety, better known as the ET&D partnership, which represents a coalition of six of the largest union and nonunion electrical transmission contractors in the United States who, in 2004, banded together to create a unique partnership which matched these contractors with the International Brotherhood of Electrical Workers, the National Electrical Contractors Association, and the Edison Electric Institute.

The express purpose of that partnership was to bring about a substantial reduction in injuries and fatalities in the electrical construction industry and to create rigorous standards for best practices to be utilized by companies in that industry to bring about a real change in the industry safety culture, in other words, to really make a difference.

I am very proud to tell you that the statistics that have been done with respect to the success of this partnership indicate that between 2003 and 2009 fatality rates for ET&D partners declined by almost 80 percent; and the lost workday injury and illness rate for partners was reduced to a remarkable. 89, which represents less than one injury per 100 workers in an industry which has long been characterized by OSHA as a high hazard industry.

It demonstrates that when a coalition of employers and labor and employees and associations get together for the common purpose of ending accidents, stopping injuries, and stopping fatalities on the job, it can, in fact, be effective and be a 21st century model for new safety and health approaches.

Let me make it clear today that my brief comments are intended to focus solely on the issue of victims' rights in section 306 of PAWA. As you are aware, the Chamber has made previous comments earlier on March 16 with respect to broad aspects of this legislation. It is important to point out that the basic substance of victims' rights as set forth in section 306 of PAWA is in many respects a codification of existing procedures already set forth in OSHA's Field Operations Manual, or the FOM, or FOM, as it is referred to.

I think Deputy Assistant Secretary Jordan Barab did an excellent job in talking about and summarizing the OSHA procedures that have been in effect for over 15 years, which address communications with and the provision of information to victims and their family members. We commend Mr. Barab for his recognition that some of the FOM policies have not always been followed by OSHA consistently and in a timely manner, and Mr. Barab has pledged to place new policies into a directive and to make new amendments to the FOM to address these issues.

Mr. Barab also states that OSHA will be revising their training and compliance office to address interactions with victims' families. We applaud OSHA's initiatives in that regard.

But in contrast to the FOM procedure, section 306 now provides that victims and their family members are to be given the right to meet with OSHA prior to OSHA's decision to issue or not issue a citation and requires that, prior to OSHA entering into any agreement to settle a citation, OSHA must notify the victims or the representatives of the victims about the settlement meeting in order to give the victim or their representative an opportunity to appear and make a statement in front of the parties conducting those settlement negotiations.

We agree with Assistant Secretary David Michaels' view expressed on March 16 that victims and their families desire to be more fully involved in the remedial process, but we also agree with Dr. Michaels' comments given to the subcommittee in which he urged that clarification was needed with respect to section 306, particularly as to the provisions allowing victims and their representatives to meet in person with OSHA before the agency decides to issue a citation and also to make statements at contested hearings that follow. Dr. Michaels has pointed out that this could create logistical difficulties for victims as well as OSHA's regional and area offices, which could result in significant delays in the negotiations and ultimate resolution of cases which, according to Dr. Michaels, could hurt the victims and their families in the long run. Deputy Assistant Secretary Barab's comments today strongly support that point.

In addition to the issues identified by Dr. Michaels, we would add that section 306 is made potentially more problematic by the provision for the involvement of representatives of the victim, as that term has not been defined specifically in the section. While section 306 does define victim and family member, the section does not make clear what representatives are contemplated within 306.

Now, Tonya Ford's moving and eloquent tribute to her uncle this morning is an excellent example of where a family member represents the deceased loved one in conveying the thoughts and emotions of her family; and we thank her for those comments. However, we would submit that further clarification needs to be made with respect to whether the "representatives" of the victim contemplated by this section is intended to be somebody other than a family member, such an attorney, for example, the involvement of which may, in the concept of Assistant Secretary Michaels, create delays that could hamper the process.

In conclusion, we urge this committee to more clearly clarify the rights, duties, and responsibilities of the entities covered under dis-

cussion in draft section 306, which purports to address victims' rights, and to determine if section 306 truly advances the interests of safety and health through a fair, efficient, and prompt resolution of matters before OSHA and the Commission.

We would point out that OSHA needs the opportunity to exercise prosecutorial discretion with respect to the matters that they handle. They are an understaffed agency with a very, very big mission. We support their efforts, and we hope that they will continue those efforts towards ending accidents and fatalities on the job.

Thank you.

[The statement of Mr. Morikawa follows:]

Prepared Statement of Dennis J. Morikawa, Partner, Morgan, Lewis & Bockius LLP, on Behalf of the U.S. Chamber of Commerce

Good morning, Chairwoman Woolsey, Ranking Member McMorris Rodgers and members of the Subcommittee. My name is Dennis J. Morikawa and I am a Partner with the Philadelphia office of Morgan, Lewis & Bockius LLP. I appreciate the opportunity to appear before you at this hearing to address the victim's rights provisions in Section 306 of the latest draft of the Protecting America's Workers Act legislation (HR 2067; S 1580). My testimony will largely focus on these provisions but I would be happy to answer questions on any of the important issues raised by this proposed legislation.

I am testifying today on behalf of the U.S. Chamber of Commerce, the world's largest business federation with over three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. Critical to the issues that I will be discussing this morning, approximately 96% of the Chamber's members are small businesses employing 100 or fewer employees. I have been a participant in activities of the Chamber's Labor Relations Committee and have appeared before and participated in meetings of the OSHA Subcommittee. My testimony and comments are not intended to represent the views of Morgan, Lewis & Bockius LLP or any of our clients.

Background and experience in occupational safety and health law

I have been with Morgan, Lewis & Bockius LLP since 1974. In the 36 years that I have practiced law, I have devoted a significant part of my practice to labor and employment matters, specifically focused on workplace safety and health, including matters arising under the Occupational Safety and Health Act ("OSH Act") and OSHA state plans. I am past Management Co-Chair of the American Bar Association Committee on Occupational Safety and Health Law and have participated in numerous panels and symposiums on OSHA Law with representatives from OSHA, the Occupational Safety and Health Review Commission, leading trade associations and labor unions as well as leading practitioners in this field.

Morgan Lewis's OSHA Practice Group, which I lead, has a combined total of more than 100 years of experience and includes among others, the former Acting Assistant Secretary of Labor and Deputy Assistant Secretary for OSHA, Jonathan L. Snare, as well as the past Solicitor of Labor, Howard M. Radzely. Throughout my years of practice, I have represented numerous clients in a wide variety of industries, such as oil refineries, construction, manufacturing, electrical utilities, retail, shipping, shipbuilding, meat packing and poultry processing, supermarkets, healthcare, chemical manufacturing, steelmaking and auto making.

Over the course of my career, I have represented clients in every conceivable type of OSHA-related activity including rulemaking, advice and counseling, strategic planning and handling OSHA inspections and citations. On the enforcement side of my practice, I have participated in all stages of the contested case process before the Occupational Safety and Health Review Commission ("Commission" or "OSHRC"), as well as with OSHA's state plan partners, from the initial contest decision, through discovery and trial, as well as appeals, and including numerous settlement negotiations and mediations. On the compliance side of my practice, I have assisted clients in developing methods and strategies to comply with all applicable OSHA workplace safety and health rules and requirements.

In fact, the area of my OSHA practice in which I have been involved that has given me the greatest sense of achievement has been my work with OSHA compliance and cooperative programs and, in particular, the Electrical Contractors Transmission and Distribution ("ET&D") Strategic Partnership for Safety, a coalition of six of the largest union and non-union electrical transmission construction contrac-

tors in the United States representing over 70% of the employees in that industry. In August of 2004, these contractors, along with OSHA, the International Brotherhood of Electrical Workers (IBEW), the National Electrical Contractors Association (NECA) and the Edison Electric Institute (EEI) created the ET&D Strategic Partnership whose principal purpose was to change the safety culture of their industry in order to reduce injuries and fatalities involving industry workers.

In the six years since the ET&D Partnership was created, there have been dramatic reductions in injuries and fatalities with fatality rates of the Partners being reduced by almost 80% and the Lost Workday Injury Rates of Partners reduced to a remarkable .89 (less than one injury per 100 workers) in an industry which has long been regarded by OSHA as a "high hazard industry." In our view, the ET&D Partnership represents a prototype 21st century model for effective management of workplace safety and health which places the greatest emphasis on the prevention of injuries and fatalities rather than focusing only on OSHA violations. In my view and based on my experience during my 36 years of legal practice, the vast majority of employers do take safety seriously and many employers have made extraordinary efforts to bring about positive changes in their industries as evidenced by the ET&D Partnership.

Comments on the Protecting America's Workers Act victim's rights provisions

At the outset, let me be clear that the brief comments I am offering this morning are not intended to focus on the broad issues set forth in the PAWA discussion draft, but are limited to the issue of Victim's Rights as set forth in draft Section 306. As you may be aware, on March 16, 2010, my Partner, Jonathan Snare, testified with respect to the broad scope of PAWA and its subparts and I do not intend to reiterate the points that he made at that time. Rather, I have been asked today to speak to the issue of what rights should be accorded to a victim or the representative of a victim, either in matters before OSHA or in contested matters pending before the Commission.

While we have some questions, we understand the discussion draft as saying that an employee who has sustained a work-related injury, or a family member on behalf of that employee (because the employee dies on the job or is physically incapacitated and unable to exercise his or her rights under this Section), would be able to meet with the Secretary regarding the inspection or investigation prior to the time that the Secretary has made a decision to issue a citation or to take no action. Thereafter, the victim or his/her representative is entitled to receive copies of any citation or reports issued as a result of the inspection or investigation, to be informed of any Notice of Contest or addition of parties to the proceedings and finally to be provided notification of the date and time of any proceedings, service of pleadings or other relevant documents, as well as to be informed of his/her rights in a proceeding under Section 10(c).

With respect to matters pending before the Commission, it is our understanding that the victim or representative of the victim will, in addition to being notified of the time and dates of any proceedings before the Commission, receive pleadings and any decisions related to the proceedings and will be provided an opportunity to appear and make a statement in accordance with the rules prescribed by the Commission. In addition to the above, Section (c) "Modification of Citation" provides that, before entering into any agreement to withdraw or modify a citation, the Secretary must notify the victim or the victim's representative and provide such person the opportunity to appear and make a statement before the parties conducting settlement negotiations.

The provisions of Section 306 basically codify provisions of OSHA's Field Operations Manual ("FOM") which provides in Chapter 11-12(G) that OSHA must contact the family members of employees who have been involved in fatal or catastrophic occupational accidents or illnesses and provide them with information regarding OSHA's activities with respect to any inspection and citation which may result from the fatal or catastrophic occupational accident or illness. Indeed, Chapter 11-12(G)(4) of the FOM provides that contact persons on behalf of the family should be kept up-to-date on the status of the investigation and OSHA will provide family members or their representatives with a copy of all citations, subsequent settlement agreements or Commission decisions that are issued as a result of the investigations and citations. In compliance with the Freedom of Information Act ("FOIA"), case files and other confidential investigative information assembled by OSHA as part of its investigation and citation are not made available to the family or their representatives until after the litigation has been completed.

As evidenced by the FOM provisions, OSHA has for many years provided to victims or the families of victims' information that is very similar to that which is provided for in Section 306. However, as set forth in the FOM, the procedures for noti-

fying family members with respect to the status of investigations have never required face-to-face meetings with OSHA to discuss possible citations or settlements or opportunities to appear and make statements to the parties prior to any settlement of the citations. Nor have the Commission's rules included the rights of victims to appear at proceedings before the Commission. To that end, we fully concur with the comments of Assistant Secretary of Labor for OSHA, Dr. David Michaels, at this Subcommittee's March 16, 2010 hearing on PAWA, that further clarification needs to be made because provisions for face-to-face meetings and the making of public statements could present logistical challenges which could delay resolution of the citations and, in Dr. Michaels' words, "hurt the victim in the long run." (Michaels Statement at p. 14)

Another issue which needs further clarification is what is intended by the use of the term "representative of the victim." (Section 306, of the discussion draft adding Section 9A(a) to the OSH Act.) The term "victim" is defined in Section 9A(f) to include a "family member" "if" (and thus only if) the victim is deceased or incapacitated and thus cannot appear. The term "representative" is not defined and could be read to include yet another person in the proceedings. Because the structure of Section 9A(f) provides that a representative in the form of a family member may only appear when the victim is deceased or incapacitated, the term "representative of the victim" should be clarified to include only family members. Any broader reading of the term "representative" would fundamentally change the impact of the provision.

For example, a "representative of the victim" could be interpreted to include a private attorney who is involved in third-party litigation related to the matter. The involvement of an attorney could create the potential for further delays as envisioned by Dr. Michaels in his March 16, 2010 testimony (Michaels Statement at p. 14) and exacerbate the settlement process. Further, involving a private attorney in settlement meetings at any level could have a "chilling effect" on those settlement meetings by discouraging the parties from engaging in the candid discussions which are necessary in order to accomplish the settlement of OSHA cases. Because OSHA is committed in the first instance to enforcing OSHA laws and standards on behalf of employees, it stands to reason that OSHA must have the prosecutorial discretion with respect to its investigation to determine what actions it needs to take to enforce OSHA standards, consistent with its resources and priorities, without interference and/or delays related to meetings with outside parties. (Michaels Statement at p. 14) In our view, providing information directly to victims or the victims' families is fully consistent with past practice as set forth in the FOM and has been proven to be a manageable and non-disruptive method for involving victims or victims' families in the OSHA enforcement process.

This discussion of representation at settlement meetings raises another issue in the draft version of PAWA requiring clarification. In my many years of experience I have found that settlements, particularly in the types of complex cases that arise following a fatality, require several meetings to reach settlement. Often the first meeting is an Informal Conference with OSHA. Thereafter, for any contested case before the Commission with penalties over $100,000, such case is assigned to Mandatory Settlement Proceedings including a meeting with an assigned Settlement Judge. Section 9A(c) of the discussion draft provides in the singular that a victim may make "a statement." However, the discussion draft version of PAWA does not address when that statement will be made except that the opportunity must be provided prior to entering into an actual agreement. Thus that version of PAWA is unclear on whether the victim must be provided an opportunity to appear at a particular proceeding or, when there are multiple meetings, whether the victim must be provided the opportunity to appear at multiple proceedings. Consistent with the structure of the discussion draft version of PAWA, the opportunity to appear at a single meeting to make a statement would be consistent with the goals of the legislation and would not be disruptive. On the other hand, requiring that victims, or their representatives, be included in all settlement proceedings would create scheduling difficulties and likely delay proceedings.

By these comments we do not mean to diminish in any way the tragedy of employee injuries and fatalities which have occurred, particularly those in recent weeks. Our thoughts and prayers are with the victims and their families. We are fully supportive of the right of victims or their families to be kept fully informed as to OSHA's inspections, citations and subsequent enforcement actions with respect to any accident or other catastrophe that may have caused serious injuries or death to these employees. However, we are also mindful of the need for OSHA to have the ability to make reasoned and independent prosecutorial decisions with respect to the nature and manner of their investigations and whether, and to what extent, citations should be issued with respect to these investigations. Similarly, decisions

related to settlements or litigation of matters must continue to be within the exclusive province of those entities which are statutorily mandated to enforce the Occupational Safety and Health Act and to act as the "representative" of the employee in terms of assuring that employees are provided with a safe and healthy workplace.

Conclusion

Accordingly, for all of the reasons I have outlined above, I believe further clarification of the rights, duties and responsibilities of the entities covered under discussion draft Section 306, which purports to address Victim's Rights, is necessary to truly advance the interests of safety and health in the workplace. Indeed, as I previously mentioned, we all agree that employees who are injured on the job and families who have lost a loved one due to workplace accidents should be an important part of this process, and we all deeply sympathize with all such employees and their families. In fact the most important goal of any OSHA legislation that this Subcommittee considers, including the Section 306 that we have discussed here today, is whether it will result in the prevention of workplace injuries and fatalities. Preventing injuries and fatalities would reduce the number of injured employees, as well as families of employees who lost their lives, who need to rely upon the victim's rights provisions in Section 306 of PAWA. This should be our ultimate objective.

Thank you for providing this opportunity for me to discuss these important issues with you today, and I would be happy to answer any questions that you may have.

Chairwoman WOOLSEY. Thank you very much.

Dr. Monforton.

STATEMENT OF CELESTE MONFORTON, ASSISTANT RESEARCH PROFESSOR, DEPARTMENT OF ENVIRONMENTAL AND OCCUPATIONAL HEALTH, THE GEORGE WASHINGTON UNIVERSITY

Ms. MONFORTON. Chairwoman Woolsey and members of the subcommittee, I am Celeste Monforton, an assistant research professor at the George Washington University School of Public Health. I appreciate the opportunity to be here today and ask that my written statement be made part of the hearing record.

One of the most rewarding and enlightening experiences of my public health career was my involvement in 2006 in the Sago Mine disaster investigation, and some of those family members are here today. I came to understand and appreciate that family member victims can make a meaningful contribution to the accident investigation process.

I heard then and I still hear today that family members will impede the investigation, that family members have a conflict of interest, or that family members are just too emotional to be useful in fact finding. My experience tells me that nothing is further from the truth.

With Sago, no one paid closer attention to the details, pressed the investigators harder for answers, and raised the bar higher for mine safety reforms. I relish the opportunity in the question and answer period to respond to Mr. Morikawa's comments about having attorneys representing family members.

It is my experience, working with the Sago families and other family member victims that inform my views today. OSHA does have a long-standing policy related to victims' families. From my experience, however, the objective of that policy is vague, leading to vastly different experiences among family members, depending on the OSHA area office or the State plan.

A condolence letter sent to the wife of Ray Gonzalez, for example, was mailed to her in September, 2004, after he suffered burns at

the BP Texas City facility. Mr. Gonzales, however did not die until November, 2004.

In addition, in the second and third paragraphs of the letter, it does not mention her husband but a different deceased worker. Gross and insensitive errors such as this do not give families much confidence in the quality of OSHA's accident investigations.

In my testimony, I describe the experience of Maureen Ravetta, whose husband was killed in September, 2009. No widow should feel incompetent for not understanding or comprehending OSHA's procedures. It should be OSHA's duty to make sure that family members understand their procedures, taking into account how shock and grief can affect one's ability to process information.

I also heard at last month's hearing the witness representing the Chamber of Commerce asserting that involving family members does not appear to add much value other than to sensationalize. That comment is terribly uninformed, particularly with the reality of what families can offer to investigators. Speak to any of the family members present here today. They will impress you with their knowledge of the factors that contributed or caused their loved one's death and their suggestions for ways a worker injury and illness prevention system can be improved.

PAWA could go further and build on provisions for a family liaison, as contained in the Miner Act of 2006. Family liaison requirements must be strengthened and elevated to statutory duties of the agency. Rights for family members and injured workers are too important to be contained in policy.

I fully support PAWA's provisions to reform the whistleblower protections in section 11(c) of the OSH Act. When I worked at OSHA in the early 1990s, it was apparent to me, a newcomer to the Labor Department, that the 11(c) program was a stepchild of the agency. The whistleblower witness here today, Mr. Neal Jorgensen, is an excellent example of why individuals should not be held captive because of Labor Department's failures.

Whether the problems at the DOL are resource constraints, lack of interest, litigation anxiety, or their client is a secretary, not the claimant, health and safety whistleblowers must be afforded a private right of action to pursue their case.

At one time, I thought that the whistleblower protection functions delegated to OSHA could be at the heart of a health and safety protection system, but I no longer believe that to be the case. The subcommittee should consider a bolder reform to improve protection for whistleblowers. I applaud your efforts, Chairwoman Woolsey, and your leadership on this crucial issue; and I support your proposal from the 110th Congress to create a separate, independent agency to administer all Federal whistleblower statutes.

Vigilant defense of workers who exercise their whistleblower rights, especially issues related to health and safety, is fundamental to an effective occupational injury and illness prevention system. I am pleased to answer your questions.

[The statement of Ms. Monforton follows:]

Prepared Statement of Celeste Monforton, DrPH, MPH, Department of Environmental & Occupational Health, School of Public Health and Health Services, George Washington University

CHAIRWOMAN WOOLSEY, RANKING MEMBER RANKING MEMBER MCMORRIS-RODGERS AND MEMBERS OF THE COMMITTEE: I am Celeste Monforton, an assistant research professor in the Department of Environmental and Occupational Health at the George Washington University School of Public Health & Health Services, and immediate past chair of the Occupational Health & Safety Section of the American Public Health Association.

Today, people around the globe are marking Worker Memorial Day, the day set aside to remember workers killed, disabled, injured or made unwell by their work, and to act to improve protections for the world's workers. In the U.S, if we compare our occupational fatality injury rate to those, for example, in Germany or Norway, their rates are 82% and 150% better than ours. [See Appendix A] We can do much better. Let's honor the men, women and young workers whose lives were cut short or irreparably harmed by on-the-job conditions by making needed changes to our nation's worker health and safety system. The Protecting America's Workers Act (H.R. 2067) is a step in the right direction. I appreciate the opportunity to appear before you today to discuss provisions of the bill, in particular those related to whistleblowers' and victims' rights.

Section 306: Victims' rights

One of the most rewarding and enlightening experiences in my public health career was my involvement in the 2006 Sago mine disaster investigation. I came to understand and appreciate that family-member victims can make a meaningful contribution to the accident investigation process. There is no one more interested in finding the truth about the cause of an on-the-job death than a worker's loved one.

I heard then (and still hear today) that family members will impede the investigation, that family members have a conflict of interest, and that family members are too emotional to be useful in the fact-finding. My experience tells me that nothing is further from the truth. With Sago, no one paid closer attention to details, pressed the investigators harder for answers, or raised the bar higher for mine safety reforms than those daughters, wives and brothers.

Putting oneself in the family members' shoes, you realize that dozens of people (people you don't know and have never met) are learning the circumstances that led to your loved one's death, but you—his parent, his wife, his child—are left in the dark. As I talked with family members in the early days of the Sago investigation, as these interviews were first taking place, I realized that we needed to balance the families' right to know with the needs and the legal responsibilities of technical investigators. Although not ideal for the families because they were forced to wait until all interviews were completed, we gave each family a complete set of the transcripts. Despite the unease and anxiety expressed by some, including the historically based assertion that such disclosures would impede the investigation, no calamity ensued. In fact, some of the family members devoted long days and nights to studying the transcripts and were able to alert us to inconsistencies in witnesses' testimony and identify topics deserving closer scrutiny.

It is my experiences working with the Sago miners' families and since that time providing advice and encouragement to other family-member victims that inform my views.

At the subcommittee's hearing on March 16, 2010, OSHA assistant secretary David Michaels indicated that OSHA:

"* * * for the past 15 years has informed victims and their families about our citation procedures and about settlements, and talked to families during the investigation process."[1]

It's true that OSHA has a policy about sending a condolence letter and giving family members an opportunity to discuss the circumstances of their loved one's work-related death.[2] From my experience, however, the objective of that policy is vague, leading to vastly different experiences among family members depending on the OSHA area office or State Plan. Some of policy's failures are illustrated by the errors contained in the condolence letters sent by OSHA. For example, a letter sent to the wife of Ray C. Gonzalez, 54, by the OSHA area office expressing sympathy for her loss was sent to her in September 2004 shortly after he suffered severe burns at the BP Texas City facility. Mr. Gonzalez did not die, however, until November 12, 2004. In addition, the letter mentioned her husband, Ray Gonzalez, in the first paragraph, but in the second and third paragraphs, it listed Mr. Maurice Moore, Jr., another worker who was fatally injured in the deadly incident. Gross

and insensitive errors such as this do not give families much confidence in the quality of OSHA's work, let alone its accident investigation.

Other failures involve the appropriateness or usefulness of the information provided to a family. For example, Ms. Maureen Ravetta's husband Nicholas, 32, was killed on September 3, 2009 in an explosion at a U.S. Steel plant in Clairton, PA. Maureen recalls receiving a condolence letter from OSHA and knew that they were investigating the circumstances surrounding his death. In mid-March, she had been corresponding on the social networking site Facebook with other family members and wanted advice on how to find out the status of OSHA's investigation. Before contacting her, I did a little research and discovered that OSHA finished their investigation and closed the case on February 2nd (exactly six months after their investigation began.)

Tammy Miser of United Support and Memorial for Workplace Fatalities (USMWF) and I immediately called Maureen Ravetta to tell her what I'd learned about her husband's case. She was shocked to learn the case was closed and hurt that she didn't know it. She said something like:

"I feel like a fool. I've been sitting around waiting for OSHA to call or let me know, and now I find out they closed the case 5 weeks ago."

I dreaded hearing, but anticipated her next question: "What did OSHA find?"

Regretfully, I explained that information I found on OSHA's website indicated that U.S. Steel was not cited for any violations related to her husband's death and no monetary penalties were assessed. I tried to explain both OSHA's investigation process and their focus on identifying violations of specific safety standards. I could tell that none of that was making any sense to her; she was numb from the news.

I asked if she had received a letter from OSHA following her husband's death and if it explained the agency's procedures. She recalled the letter, but said it didn't mention anything about a six-month deadline for issuing citations. Ms. Ravetta said:

"Had I known about the six-month deadline, I would have picked up the phone on that exact date and called OSHA to hear what they found. Instead, I've been waiting for them to contact me."

She repeated again, "I feel like a fool."

No widow should feel incompetent for not comprehending OSHA's procedures. It should be OSHA's duty to make sure that family members understand their procedures, taking into account how shock and grief can affect our ability to process information. For some individuals, a simple letter may suffice, but for others, perhaps most, OSHA may need to follow up with a phone call, or to check in from time to time during the investigation and contest period to see if the family has questions or concerns. I hear about the luncheons and speeches that OSHA officials attend across the country throughout the year to keep trade associations and business groups apprized of OSHA activities. Surely, frequent and open communication with victims' families should take a higher priority.

At the subcommittee's hearing last month, the witness representing the U.S Chamber of Commerce asserted that involving family members "does not appear to be much value * * * other than to sensationalize presumably already emotional and sensitive matters." That comment is terribly uninformed, particularly to the reality of what family members can offer to investigators. I would invite Members of this Subcommittee to speak to any of the family members present here today. They will impress you with their knowledge of factors that contributed to or caused their loved ones' deaths, and their suggestions for ways our worker injury and illness system can be improved.

I've reviewed the victims' rights provisions of the discussion draft of H.R. 2067. It will offer family members the following opportunities to be involved in the investigation process:

1. Meet with the Secretary's representative (e.g., OSHA official) before a decision is made to issue a citation or take no action. This is particularly important for those family members who may have information or physical evidence that may be germane to OSHA's investigation.

2. Receive any citations or other documents at the same time as the employer receives them. This should eliminate the situation experienced by numerous victims' families who learn through a news report that their loved one's employer received a citation and penalty (or none at all), rather than being informed directly by OSHA.

3. Be granted the opportunity to appear and make a statement before OSHA and the employer during informal and formal settlement negotiations. This will shine a light on the process, allowing victim's families the chance to observe how OSHA, DOL Solicitor's Office lawyers and company attorneys bargain over classification of violations and penalty amounts.

4. Be afforded the right to appear and make a victim's impact statement before the Occupational Safety and Health Review Commission (OSHRC) in those instances when a case proceeds to it for adjudication.

At the subcommittee's hearing on March 16, 2010, the OSHA assistant secretary's testimony noted that the provision requiring OSHA to meet with family members before a citation is issued or to appear before parties in settlement negotiations "could be logistically difficult for victims and OSHA's regional and area offices." Under the current statute, OSHA has six months to conduct inspections, including fatality investigations. I find it hard to believe that during this six-month period, OSHA field staff would not be able to coordinate a time to meet or speak on the phone with the victim's family. In fact, some OSHA area offices already do this, and the affected families sincerely appreciate it.[3]

It's true that OSHA is under certain time constraints. There is a 15 working day time period in which the employer and OSHA may negotiate an informal settlement in lieu of a formal contest before the OSHRC. We know that many cases are handled through this informal conference process, with OSHA and the employer motivated to have the hazards abated and resolve the citations and penalties. This motivation compels the parties to identify a date and time to meet during this three-week window, whether in person or by phone.

It's only fair that family members who've lost so much because of workplace hazards have a chance to witness negotiations to reduce penalties and/or the severity classification of violations. PAWA would give the victim's family the right to be notified about these meetings and be given an opportunity to attend and make a statement during them.

Just as many employers will juggle their schedules in order to meet with OSHA during this pre-contest period, I believe family members would do the same. Ms. Deb Koehler-Fergen, whose son Travis was asphyxiated in a confined space incident in February 2007, told me:

"I would have done anything to be at a meeting between NV-OSHA and Boyd Gaming when they discussed Travis' case. If my boss told me I couldn't have the day off of work, I would have quit my job to be at that meeting."

I do not believe that the rights extended to family members under PAWA would be as "logistically difficult" as OSHA officials claim.[1]

Furthermore, OSHA may find that participating family members turn out to be their best allies for securing health and safety improvements. Family members may endorse the terms of the informal settlement if they believe that the employer's proposed corrective actions will substantially improve safety for their loved one's coworkers. In fact, the mantra I hear from family members more often than any other is this:

"We don't want this to happen to any other family; we don't want them to go through what we've been through."

I believe that involving family members in finding solutions to workplace hazards has the potential to substantially advance occupational injury and illness prevention in the U.S.

I support PAWA's provisions to provide family members copies of citations or reports at no costs. I would go further and recommend that family members be given access to all documents gathered and produced as part of the accident investigation, including records prepared by first responders and state and federal officials. In addition, all fees related to the production of documents should be waived for family members. The release of this information should be prompt, and no later than the day that any citations are issued to the employer. Exceptions should be permitted when bona fide evidence demonstrates that a criminal investigation could be hampered by such release.

PAWA could go further and build on the provision for a family liaison contained in the MINER Act of 2006.[4] Congress should consider directing the Secretary to appoint a Department of Labor official to serve as a family liaison in cases of worker fatalities or serious injuries. Some OSHA area offices already make sincere efforts to provide information and timely updates to family members, but the agency's and the State Plan States' performance in this regard is inconsistent and needs to be improved. Family liaison requirements must be strengthened and must be elevated to statutory duties of the agencies. Rights for family member and injured worker are too important to be contained only in policy.

Title II: Whistleblower protections

I fully support PAWA's provisions to reform and improve the whistleblower protections in Section 11(c) of the OSH Act. I applaud Chairwoman Woolsey for her leadership on whistleblower protection legislation, and for this Subcommittee's focus on this critically important topic.

I agree that whistleblowing is a vital safeguard for our democracy and ensuring justice, and that individuals who stand up for what is right often suffer devastating personal consequences.[5] As we read the recent newspaper accounts of deaths and injuries in U.S. workplaces, and we hear President Obama emphasize that workers need to be empowered to report safety problems,[6] it's vital that we have the laws in place to protect whistleblowers.

When I worked at OSHA in the early 1990's, it was apparent to me, a newcomer to the Labor Department, that the 11(c) program was a step-step child of the agency. At that time, OSHA only had a few statutes to administer; now it's responsible for 17 whistleblower laws. Still, about 60% of all the complaints filed are related specifically to workers exercising their health and safety rights, rights allegedly protected under Section 11(c) of the OSH Act. Defending workers in these situations is essential to OSHA's core mission, yet this program continues to be treated worse than a second-class citizen. My characterization is based on investigations conducted by the Government Accountability Office (GAO), Congressional teams, independent researchers and individuals who have attempted to use the system on behalf of aggrieved workers.

PAWA's whistleblower provisions will substantially improve the protections and procedures for workers who raise concerns about safety and health problems. They will revise the law to make it comparable to other more modern whistleblower statutes. Most importantly, it will allow workers to pursue their discrimination case independently, if the Solicitor of Labor (acting on behalf of the Secretary) declines to take the case or fails to act in a timely manner. This private right of action is already granted to workers employed in the nation's mining industry,[7] and simple fairness warrants its extension to workers covered by the OSH Act. The whistleblower witness here today, Mr. Neal Jorgensen, is an excellent example of why individuals should not be held captive because of the Labor Department's failures. Whether the problems at the Labor Department are resource constraints, lack of interest, litigation anxiety or that their client is the Secretary, not the claimant, health and safety whistleblowers must be afforded a private right of action to pursue their case. PAWA would do just that, and this improvement is sorely needed.

The Subcommittee should consider a bolder reform to improve protections for whistleblowers. I support Chairwoman Woolsey's proposal from the 110th Congress, the Private Sector Whistleblower Protection Streamlining Act (H.R. 4047) to create a separate independent agency or bureau to administer all federal whistleblower statutes. From my 20 years of observing the administration of the whistleblower program at OSHA, it is subordinate to the agency's core mission, thus individuals with valid whistleblower complaints are relegated to a system without independent leadership and commitment. The small staff of investigators and program managers is responsible for 17 different statutes,[8] [and will soon (if not already) be adding the whistleblower provisions contained in "The Patient Protection and Affordable Care Act"[9]] yet it is constrained within a deep administrative hierarchy and a system riddled with "inadequate internal controls."[8]

At one time, I thought that the whistleblower protection functions delegated to OSHA could be at the heart of our worker health and safety protection system, but I no longer believe that is possible. Vigilant defense of workers who exercise their whistleblower rights—especially on issues related to health and safety——is fundamental to an effective enforcement system. As Jason Zuckerman of the Employment Law Project warned that failing to aggressively investigate and pursue allegations of discrimination will embolden these lawbreaking employers.[10] I believe Congress should consider creating an independent bureau or agency to administer all the federal whistleblower statutes. With dedicated leadership, specialized investigators and skilled attorneys it could operate efficiently by focusing exclusively on the investigation and defense of valid whistleblower complaints.

Investigations of worker fatalities and serious injuries

PAWA would direct OSHA to investigate worker fatalities and serious injury events, and require employers to notify OSHA promptly of these incidents. This is a needed improvement to the OSH Act; however, I recommend an important modification. Under the MINER Act of 2006, the law was changed to require miner operators to notify MSHA within 15 minutes of the time that the employer realizes that the death of an individual has occurred, or an injury or entrapment has occurred which has a reasonable potential to cause death."[11] Under OSHA's current regulations, employers are given 8 hours to report such events, potentially delaying the commencement of their investigation by a day or more. Worker deaths and life-threatening injuries would receive the public attention can spur much-needed regulatory reforms, if immediate notification were required of all employers, not just those in the mining industry.

Injury and illness prevention requires abatement of hazards

Under the OSH Act, employers are not required to correct a hazardous condition(s) until the citation(s) assessed by an OSHA inspector become(s) a final order of the OSHRC.[12] PAWA would change this situation and require abatement of hazards—hazards that can kill or injure workers—while the employer contests them. If a person gets pulled over for violating a traffic law, such as driving without a license, that person isn't allowed to get right behind the wheel and proceed to break the law just because s/he plans to challenge the ticket. Likewise, if a health inspector finds evidence of live rodents and roaches, or cross-contamination of raw and prepared meats, the restaurant owner has to fix the problem immediately if it wants to open its doors for business. The same should hold true when OSHA inspectors identify violations of health and safety standards.

OSHA inspectors should have comparable authority to that extended to their counterparts at the Mine Safety and Health Administration (MSHA). Under the Mine Act, when a federal mine inspector identifies a violation of an MSHA standard or regulation, mining companies are required to begin fixing the problem immediately. Employers in the mining industry have the right to challenge citations and penalties before the Mine Safety and Health Review Commission (MSHRC), but an employer's decision to litigate an inspector's finding and/or the proposed penalty does not give that employer permission to let workplace hazards persist. OSHA needs comparable authority, and PAWA would provide it. I strongly support this provision of PAWA.

Currently, an employer cited by OSHA has the right to contest four aspects of the citation: (1) the classification of the violation (e.g., serious, willful); (2) the OSHA rule, standard or statutory clause affixed to the violation; (3) the abatement date; and/or (4) the proposed penalty. Briefly, when an employer receives an OSHA citation and penalty, s/he has 15 working days to (1) accept the citation, abate the hazards and pay the penalties; (2) schedule an informal conference with the local OSHA area director to negotiate an informal settlement agreement; or (3) formally contest the citation and/or penalty before the OSHRC.

Instead of formally contesting one of these aspects, an employer may request to meet with the director of the local OSHA office for an informal conference before the 15-day period to file a notice of contest expires. The majority of employers who receive OSHA citations participate in informal conferences, and the majority of OSHA inspection cases are resolved this way. The adverse consequence, however, is that OSHA's managers in its local offices across the country often have to choose between levying a tough penalty or getting a hazard corrected quickly.

OSHA's area directors have the authority to reclassify violations (e.g., downgrade from willful to serious, serious to other-than serious); withdraw or modify a citation, an item on a citation or a penalty; and negotiate the proposed penalty. If both parties agree to the negotiated terms, the employer must then abate the hazard in the agreed-upon time period; if no agreement is reached, the employer will likely choose to formally contest it through the OSHRC system and can refrain from correcting the safety problem in the meantime.

When cases move through the OSHRC system, the administrative law judges and Commissioners typically reduce the penalty amount proposed by OSHA. (OSHA proposes a penalty amount, but the OSHRC determines the final penalty.) In practical terms, when a citation is contested, years can pass before an employer can be compelled to abate the workplace safety or health problem. Even if the employer doesn't succeed in its OSHRC appeal, they have bought substantial time (and saved money) by not correcting the hazard during the appeal process. Furthermore, by holding in abeyance the correction of hazardous conditions, these employers have gained an economic advantage over their competitors: employers who do obey OSHA standards and regulations.

OSHA's area directors offer penalty reductions and reclassifications of citations (e.g., from serious to other-than-serious) in order to compel prompt correction of the hazard. From a local OSHA manager's perspective, s/he would rather get the dangerous situation rectified so that workers at the site are protected from potential harm, rather than risk a chance that the employer will contest the citation and penalty.

OSHA's inspectors and local managers are truly in a difficult position because the citations and penalties are linked to hazard abatement. The principle of prevention must be enshrined in our workplace OHS regulatory system. This means providing OSHA the authority to compel immediate abatement of hazards that are known to contribute to serious injury, illness or death. We can't make advances in preventing harm to workers when our system forces local OSHA staff to bargain with employers for worker protections that they are already required to implement. The informal settlement process should not only expedite abatement of the hazard, but also

give OSHA leverage to require employers to implement measures that go above and beyond what is required by OSHA.

Further, PAWA discussion draft, provides employers with a right to seek an expedited review of abatement if they believe it is unwarranted. This due process protection will ensure that employers are not forced to make investments where they can argue it is unnecessary. This is intended to prevent a backlog of cases before the OSHRC and avert the situation now experienced by the Mine Safety and Health Review Commission.

Civil and criminal penalties

Ultimately, our nation's health and economy would be served best by an occupational health and safety regulatory system that prevents work-related injuries and illnesses. In a regulatory system like OSHA's, penalties must be severe enough to compel violators to change their behavior, and to deter lawbreaking by those who might be tempted to flout safety and health regulations in an effort to increase production or cut costs.

Our occupational health and safety (OHS) regulatory system should require the equivalent of "points on their permanent record." Employers who flagrantly, willfully or repeatedly violate laws designed to protect workers from injuries and illnesses should see their finances and reputations suffer. Our system should take advantage of the times when such employers are caught, and capitalize on these grievous situations for their value as a deterrent for companies nationwide. It may not deter other bad actors, but it will catch the attention of those who might be tempted to cut a few corners when under pressure.

I believe the majority of employers respect worker health and safety laws and intend to comply with them. At times, however, competing forces color their judgment, and they break a rule because the likelihood of causing harm is low, as is the risk of getting caught. Responsible employers know that workplace OHS standards are based on lessons learned and have a public health and safety purpose. But, from time to time, when certain competing forces weigh on them, they make a calculation. They weigh the risk of suffering harm or causing harm to another and the likelihood of getting caught breaking the law.

The deterrent effect of OSHA's penalty system could be amplified to outweigh the influence of competing forces. This is particularly relevant today; the U.S. needs an effective system to prevent occupational injuries and illnesses, but OSHA's responsibilities are grossly mismatched with its budget and resources. I strongly support PAWA's provisions to increase OSHA penalties and ensure they are adjusted regularly for inflation. I also endorse the proposed criminal provisions, especially the classification from misdemeanor to felony, and the extension to include serious bodily injuries, not just worker fatalities. OSHA's penalty calculation should also include a specific factor that assesses the economic benefits reaped by an employer for violating health and safety regulations, which will level the economic playing field for firms that invest in progressive, effective OHS labor-management systems.

The OSH Act places a duty on employers to provide safe and healthy workplaces,[13] but it imposes no obligation on them to address hazards on a company-wide basis. Congress should mandate such a duty on large companies. When a serious hazard has been identified by OSHA at one facility, the firm should be required to conduct an audit to determine whether the same hazard exists at other facilities. If comparable hazards or violations are found at another site, citations for those violations should be classified using the new category of "reckless disregard." The corresponding civil penalty should be hefty (e.g., $220,000 as provided in the MINER Act of 2006).[14]

I appreciate the opportunity to appear before you today, and would be pleased to answer any questions you may have.

APPENDIX A

COMPARISON OF FATAL INJURY RATES FOR SELECTED NATIONS (2005–2007)*

	2005	2006	2007
Canada	6.8	5.9	6.3
France	2.7	3.0	3.4
Germany	2.4	2.5	2.2
Norway	2.1	1.3	1.6
Russian Federation	12.4	11.9	12.4
Sweden	1.6	1.6	1.7
United States	4.01	4.01	4.01

*Per 10,000 workers.

Source: International Labour Organization (ILO), LABORSTA.

ENDNOTES

[1] Assistant Secretary of Labor David Michaels. Written testimony before the Workforce Protections Subcommittee of the House Education and Labor Committee, March 16, 2010.

[2] OSHA. Field Operations Manual, CPL 02-00-148, page 11-12.

[3] For example, Mrs. Diane Lillicrap, whose son Steven, 21 was killed on a construction site while disassembling a crane, was invited by the OSHA area director in St. Louis to meet with his entire staff. She was able to talk about her son, and share information that was potentially valuable to the front-line investigators. I understand the meeting was a valuable experience for all; sometimes we need very personal reminders of why we chose a career in public service. Her meeting with the OSHA St. Louis office took place a number of weeks before OSHA issued citations to the employer. It did not delay the investigation.

[4] Section 7 of the Mine Improvement and New Emergency Response Act of 2006. Public Law 109-236.

[5] Christy Carpenter, Introductory Remarks, "Anyone Can Whistle: The Essential Role of the Whistleblower in American Society," sponsored by the Government Accountability Project and the Paley Center for Media, February 17, 2010.

[6] Remarks by the President on Mine Safety, White House Rose Garden, April 15, 2010.

[7] Section 105(c) of the Federal Mine Safety & Health Act of 1977. Public Law 95-164.

[8] See GAO report " Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency," GAO-09-106; January 2009. *http://www.gao.gov/new.items/d09106.pdf*

[9] Public Law 111-148.

[10] Zuckerman JM. Submission to OSHA Docket 2010-0004, "OSHA Listens," February 28, 2010.

[11] Section 5 of the Mine Improvement and New Emergency Response Act of 2006. Public Law 109-236.

[12] Section 10(b) of OSH Act.

[13] Section 5(a) of OSH Act.

[14] Under the Miner Act of 2006, Congress created a new violation category called "flagrant" representing "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." A civil penalty of up to $220,000 can be assessed. Since the law was passed, MSHA has used the "flagrant" classification 92 times with assessed penalties totaling $14,552,400.

Chairwoman WOOLSEY. You get the prize. You didn't even go all the way for 5 minutes, but we will get you later.

Mr. Jorgensen.

STATEMENT OF NEAL JORGENSEN, WHISTLEBLOWER AND FORMER EMPLOYEE, PLASTIC INDUSTRIES

Mr. JORGENSEN. Thank you for inviting me here today. My name is Neal Jorgensen. I live in Preston, Idaho. I became a whistleblower after being fired by Plastic Industries for filing a complaint with OSHA about the company's safety problems.

Here are some things to think about while I am giving my testimony. If you are my friend and you had violations in your workplace and you came to me and asked my opinion, I would say, work safe, look for a new job. You work safe so you don't get hurt and look for a new job because it will cost you your job and twice as much as it cost the employer.

The company fired me 2 weeks after I filed the complaint because OSHA went to the company and conducted a safety inspection and found eight safety violations, including two serious, considered serious, by OSHA and one for not having machine guards on a band saw and one for not having proper shut-off controls on a bailing machine and a pressure washer. After the company fired me, I filed another complaint with OSHA known as a whistleblower complaint. Filing that complaint did not work well for me. I was not protected by OSHA law.

The reason I am here to tell my story is that my employer got away with firing me without any consequences. Although OSHA in-

vestigated the facts of my case, found it was sound, and tried to collect the wages I would have earned if I had not been fired, the government lawyers decided not to take my case to court. Under OSHA law, only the government can take these cases to court. That does not seem fair to me.

It also does not seem fair that the only thing that the owner of the company, Rex Pitcher, was asked to pay was the fines for the violations OSHA found during this safety inspection; and those fines were later reduced, a lot. OSHA initially asked the company to pay $2,550, but it was later reduced to $1,500.

OSHA recommended the government lawyers take my case to court, but they decided not to. The main reason they gave was it was a resource-intensive case and two judges in Idaho who would get these cases were not likely to decide in my favor.

I was advised that lawyers sent a memo which says, we believe we have an approximate 25 percent chance of success. There are two U.S. District Court judges in Idaho, one of whom routinely is not well disposed towards government cases and the other who can go either way.

It is sad to me that the company can treat an employee this way and get off scot-free. Isn't the purpose of the whistleblower laws to protect workers who report unsafe conditions?

I thought I did the right thing, but the system did not work for me. The OSHA law did not provide the protections I needed; and the only lesson the owner of the company learned is that he can treat his employees any way he likes, then lie about it and nothing will happen to him, nothing.

Would I recommend that someone would file a whistleblower complaint? No way. Absolutely not. The way the law is written, not a chance.

I have found in my life for something that will really make an impression it has to have teeth in it. When I was 5 years old, I followed some friends on my trike up to a pond to go frog hunting. My parents found me and my tricycle, and my tricycle got a ride home with mom. I got to ride a switch home in front of Dad all the way home.

The next time I went to that pond, I was about 11 years old, and it was winter, no chance of drowning there. I think OSHA needs a "switch", something with some teeth in it.

Thank you for letting me tell my story. I hope you are able to do something to improve the OSHA law that is supposed to protect workers.

[The statement of Mr. Jorgensen follows:]

Prepared Statement of Neal Jorgensen, Whistleblower and Former Employee, Plastic Industries

Thank you for inviting me here today.

My name is Neal Jorgensen. I live in Preston, Idaho. I became a whistleblower in 2004 after being fired by Plastic Industries for filing a complaint with OSHA about the company's safety problems.

Here's something to think about while I'm giving my testimony. If you were a friend and you had violations in your place of work and asked my opinion, I would say "work safe, so you don't get hurt, and look for a new job, because it will cost you your job and twice as much as the employer is fined if you report the violations."

The company fired me two weeks after I filed the complaint because OSHA went to the company and conducted a safety inspection, and found eight safety violations—including two that were considered "serious" by OSHA: one for not having machine guards on a bandsaw, and one for not having the proper shut-off controls on a baling machine and a pressurized washer. OSHA originally fined the company $2,550 for these violations. After the company fired me, I filed another complaint with OSHA known as a "whistleblower" complaint. Filing that complaint did not work out well for me—I was not protected by the OSHA law.

The reason I am here to tell my story today is that my employer got away with firing me without any consequences. Although OSHA investigated the facts of my case, found it was sound, and tried to collect the wages I would have earned if I had not been fired, the government lawyers decided not to go to court on my behalf to enforce the law. I found out that I could not have taken the company to court, even if I could have afforded it. The OSHA law does not allow individuals who file these types of whistleblower complaints to go to court—only the government can take these cases to court. That does not seem fair to me.

It also does not seem fair that the only thing the owner of the company, Rex Pitcher, was asked to pay was the fines for the violations OSHA found during its safety inspection. And those fines were later reduced a lot. Although OSHA initially asked the company to pay $2,550, it was later reduced to $1,500.

I filed my whistleblower complaint and an investigator from OSHA interviewed several people at the company to check out the facts. However, the owner, Rex Pitcher, lied to OSHA. First, he told OSHA I was fired because I was a temporary employee and had found another job. Then, he changed his story and said I was fired for poor performance.

Luckily, the OSHA investigator was pretty good and said the company's explanations for my firing were inconsistent and not believable. He also found there was no evidence to support the company's claim that I was only given a job until I found work elsewhere. The only reason I got a second job was because I needed it to support my family. The owner knew I had gotten a second job and had no problem with it.

The OSHA investigator found no evidence of any of my so-called performance problems in the company files. He also found out that, after I filed the whistleblower complaint, Rex Pitcher asked a shift foreman to write a letter to the company about my work. He did, but when the investigator showed the foreman the typewritten letter and asked him if he wrote it, the foreman said he sent a handwritten letter to the company and that the good things he said about my work were deleted. The foreman said the company must have removed the positive comments before typing it up and giving it to OSHA! Again, the owner of the company lied.

In October 2004, OSHA completed its investigation and decided that my case was worth pursuing. OSHA tried to get the owner to pay me back wages of $2,912, but he refused.

October 2004 was a pretty bad month for me. In addition to Rex Pitcher refusing to agree to pay the back wages I was owed, my wife left me and filed for divorce. I also found out that her lawyer was also representing my former employer in my whistleblower case! I told the OSHA investigator about this. He contacted the government lawyer and asked about this apparent conflict of interest. The lawyer said it wasn't a problem because he was "against Neal either way." At that point, I felt I could not win.

In December 2004, OSHA sent the case to the Department of Labor's lawyers and recommended that they take the company to court. Sadly, the lawyers decided not to pursue my case. They sent it back to OSHA to do more digging. After OSHA did this, the government lawyers decided not to go to court.

The main reason they gave was that the two judges in Idaho who get these cases were not likely to decide in my favor. The lawyers stated—and I'm quoting here:

> "we believe we have an approximate 25% chance of success. There are two U.S. District Court judges in Idaho, one of whom is routinely not well disposed towards the government's cases, and the other who can go either way."

I have attached a copy of their report to the written version of my testimony.

It's sad to me that the company could treat an employee this way and get off scot free. Isn't the purpose of the whistleblower laws to protect workers who report unsafe conditions?

I thought I did the right thing, but the system did not work for me. The OSHA law did not provide the protections I needed and the only lesson the owner of the company learned is that he can treat his employees any way he likes, and then lie about it, and nothing will happen to him. Nothing.

Would I recommend that someone file a whistleblower complaint with OSHA? Absolutely not, the way the law is written.

I have found to really make an impression on someone, there has to be some real consequences. Let me illustrate.

When I was 4 or 5, I followed my neighbors to a pond to go frog hunting. My parents found out and found me on my tricycle just before I got to the pond. Mom took my trike home and Dad chased me home with a switch. The next time I even thought of going to that pond I was 11 and it was winter, so there was no chance of drowning. OSHA needs a "switch" to provide more help to workers to keep them safe.

I have also worked for companies that have had dealings with the EPA, which seems to be able to deal with possible safety and health problems better than OSHA. For example, at the company where I work now, the manager found there was a floor drain under the extruder, so the water that flows into the drain could have been contaminated. Because the company had previously been fined by EPA for a similar situation, it decided to spend a lot of time and money to recycle the water back to the extruder so the drain could be closed, which eliminated the chance of violating EPA's rules. The EPA has some teeth, unlike OSHA, which needs to be able to provide more help to workers to keep them safe.

Thank you for letting me tell my story. I hope you are able to do something to improve the OSHA law that is supposed to protect workers.

Chairwoman WOOLSEY. Thank you, Mr. Jorgensen.

Mr. Chinn.

STATEMENT OF LLOYD CHINN, PARTNER, PROSKAUER ROSE LLP

Mr. CHINN. Yes. Thank you. Good morning, Chairwoman Woolsey.

Chairwoman WOOLSEY. I don't believe you have your microphone on. If you do, put it closer to you.

Mr. CHINN. My apologies for that. If that's the worst trouble I get into today, that would probably be a successful day. In any event, I will start again.

Good morning, Chairwoman Woolsey, Ranking Member McMorris Rodgers, members of the subcommittee, my fellow panel members, and representatives of employers in the audience, as well as the individuals in the audience who are family members of those who have been killed or injured terribly while working on the job.

My name is Lloyd Chinn; and I am a partner in a law firm, Proskauer Rose. I practice labor and employment law. I advise employers as to what they need to do to comply with the laws. I litigate disputes between employers and their employees.

A significant component of my practice is the litigation of what may generically be referred to such as whistleblower or retaliation claims; and it is a privilege and an honor for me to speak with you today about this important topic, this topic as it is addressed in the Protecting American Workers Act, or, as I believe we have license to call it from the chairwoman, PAWA.

I am going to focus on Title II of PAWA, which I think we would all agree completely rewrites the current section 11(c) of the OSH Act.

The first question for me is what exactly is motivating this complete rewrite of the statute. I mean, at the end of the day, it may well make sense to do some of this, but I think it is an appropriate question at the outset to pose.

The purpose of the statute, as stated in the statute and as everyone on this panel would agree, is to advance workplace safety. It

is not to promote employment litigation. This is not an employment litigation statute as such, like Title VII of the Civil Rights Act.

The claim apparently is that the current whistleblower protections in the statute are inadequate, but what is the evidence to support that claim? There are something like 1,200 to 1,300 claims per year made under 11(c) of the OSH Act. And while it tugs at the heartstrings to listen to Mr. Jorgensen's story, and I admit that, one, I don't think it is appropriate to formulate policy based on one example or perhaps an example in Ms. Rhinehart's paper of a Mr. Wood who had an incredible odyssey through the legal system that lasted something like a decade in the 1990s. I don't think it makes sense to base policy involving thousands of claims made per year based on minimal anecdotes, a minimal number of anecdotes like that.

And while it may be unpopular to say this in this room, for every example like Mr. Jorgensen's, there are hundreds of meritless claims filed per year, and everybody, if people are being honest, Mr. Barab, who is currently in this role at OSHA, will agree that the overwhelming majority of claims, measured by any objective standard filed with OSHA, are meritless. And, for that matter, that is true for virtually every statute, employment statute on the books, and there really is no disputing this.

Now, again, this story about meritless claims and the expenses associated with those claims, or defending those claims, is not the sort of story that is going to bring a tear to your eye, as did Ms. Ford's as I was listening to it.

But in a time when we have approximately 10 percent unemployment in this country, it strikes me that it is at least relevant, it is at least worth putting into the mix, into the arguments being considered, every action you take, like these whistleblower protections in PAWA, will be an additional expense to employers. That is, it will make it more expensive to employ someone should you enact these provisions.

Now, you may decide, as one might be willing to do, that it is worth it. But I think that it is at least worthwhile to have that issue on the table. And the primary way in which PAWA will increase the expenses of litigation is that PAWA bestows significant new rights of action on 11(c) complainants.

PAWA's simultaneously provides section 11(c) whistleblowers the opportunity to take their claims to the OALJ, the Office of Administrative Law Judges, or to the Administrative Review Board and sets very tight timelines within which those bodies must reach final decisions on those claims. This is not realistic. Of the total whistleblower claims under all statutes addressed by OSHA per year, those filed under 11(c) account for a large majority, approximately 65 percent in 2007. This is a potential tripling of the pool of cases that will be going through the OALJ and ARB system; and I am unaware, although Mr. Barab may be able to address this, of any plans to expand those bodies in a significant fashion to address these additional claims.

So what this means, in reality, is that every OSH whistleblower will really have an immediate right to go to court, because OALJ and ARB will never meet these timelines that are in the statute currently, and nobody in this room can debate that. I really don't

think that is a debatable point. Liberal academics writing in the field agree completely with what I am saying right now.

So what we have here is this logjam that already exists in the OALJ and ARB. It will be worsened dramatically by this addition of new cases, so everything goes to Federal court then.

My understanding is that there is a lot of criticism of the time it takes for these complaints to be addressed. Well, for those of you who litigate in Federal court in this room, I assure you that the Federal litigation process is not the most efficient for resolving disputes of this matter. It is very lengthy, very time-consuming, and very expensive.

If you look at the GAO's recent report, interestingly enough the most efficient procedure described in that report is the appeals committee that addresses 11(c) complaints. That appeals committee addresses matters on a far rapid, far more efficient basis than either OALJ, ARB, and certainly the Federal courts.

In closing, I would simply ask the subcommittee to maintain an open mind with respect to certain particulars of the statute, which we will be talking about more during the course of the hearing.

Thank you very much.

[The statement of Mr. Chinn follows:]

Prepared Statement of Lloyd B. Chinn, Partner, Proskauer Rose LLP

Good morning Chairwoman Woolsey, Ranking Member Rodgers and Members of the Subcommittee. My name is Lloyd Chinn, and I am a partner with the law firm Proskauer Rose LLP in its New York City office. It is an honor to appear before you at this hearing to address the Protecting America's Workers Act ("PAWA"), specifically Title II "Increasing Protections for Whistleblowers." My testimony is not intended to represent the views of Proskauer or any of the firm's clients.

Although I practice out of my firm's New York City office, I have handled employment matters in federal and state courts and administrative agencies around the country. My eighteen year legal career has been almost exclusively devoted to the representation of employers in employment matters, whether engaged in counseling for the purpose of avoiding employee disputes or litigating those disputes as they arise. Throughout, I have advised and represented clients in connection with litigating or avoiding retaliation and whistleblower claims.

PAWA's rewriting of the OSH Act whistleblower provisions

Title II of PAWA re-writes Section 11 (c) (29 U.S.C. 660 (c)) of the Occupational Safety and Health Act, fundamentally changing the statute in a variety of ways including:

- Adding an entirely new form of protected whistleblower activity—an employee's refusal to perform his or her duties—that is (i) unprecedented among the seventeen statutes whistleblower statutes administered by OSHA; and (ii) supplants an already comprehensive and reasonable OSHA regulatory scheme on the topic.
- Modifying the current statute of limitations by triggering the commencement of the running of limitations period not only upon the date of the alleged violation but alternatively upon the date that a complainant "knows or should reasonably have known" that a violation occurred.
- Allowing any a complaint to bring any time-barred claims (other than a termination claim) provided that just one alleged adverse action is timely.
- Lengthening the current limitations period from 30 to 180 days.
- Providing the right for a de novo hearing before an administrative law judge.
- Providing the right for an administrative appeal to the Secretary of Labor (in effect, the Department of Labor's Administrative Review Board).
- Providing a complainant the right to bring a de novo action in a United States District Court, if either the administrative law judge or the Secretary of Labor has failed to meet very strict (and unrealistic time periods).
- Providing a right of appeal to the United States Court of Appeals following a final decision.

• Allowing either the Secretary of Labor or the complainant to commence an action in the United States District Court to enforce any order—even if preliminary—issued under this statute.

• Adopting a complainant-favorable burden of proof, requiring only that the complainant prove that his or her protected activity was a "contributing factor" in the alleged adverse action.

• Providing a variety damages recoverable by a complainant including, in addition to backpay, unlimited "consequential" damages and attorneys' fees and costs—while notably providing no right of recovery of costs or attorney's fees by a prevailing employer.

• Prohibiting (at least arguably) pre-dispute arbitration agreements, whether executed by individual employees or contained within a collective bargaining agreement.

Where is the empirical rationale?

Before turning to the more problematic of these provisions, a rather obvious question is "Why?" The stated purpose of the Occupational Safety and Health Act of 1970 is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). None of the provisions alluded to above bears directly on the question of workplace safety; rather, they all enhance the position of complainants in employment litigation. If PAWA is, in fact, about workplace safety, it is only by virtue of several unstated assumptions: (i) that Occupational Safety and Health whistleblowers ("OSH whistleblowers") contribute to overall workplace safety by bringing to light dangerous conditions; (ii) OSH whistleblowers will only come forward if there are adequate legal protections to prevent retaliation and; (iii) the current legal protections for such whistleblowers are inadequate. While it may be fair to assume the truth of assumptions (i) and (ii), at least for the sake of argument, the third proposition rests on a questionable empirical judgment about the inadequacy of protections provided under the current law.

I am unaware of any empirical data supporting the assertion that the current statute fails to protect occupational safety and health whistleblowers. Indeed, my concern is that this assumption is supported by nothing more than cherry-picked anecdotes or conclusory assertions that occupational safety and health OSH whistleblowers do not "win often enough." According to data for fiscal year 2007, OSHA received 1205 OSH whistleblower complaints under the Occupational Safety and Health Act alone. U.S. Gov't Accountability Office, "Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency," 26 (2009) [hereinafter 2009 GAO report]. Pointing to one or even a handful of anecdotes is of no statistical significance when addressing numbers like this.

Moreover, to decry the fact that the "win rate" for OSH whistleblowers is "low" assumes that either that there is an objective standard for judging whether the "win" rate is high or low—and there isn't—or that there has been a study of case outcomes, and (based on some objective criteria) those outcomes incorrectly favored employers. The recent GAO study of OSHA's Whistleblower Protection Program expressly disavowed undertaking any such analysis, "[W]e did not address the quality of [OSHA's] investigations or the appropriateness of whistleblower outcomes because these aspects were beyond the scope of the engagement." 2009 GAO report, at 4-5.

In fact, although PAWA apparently posits access to the federal courts as a panacea for OSH whistleblowers, there is no reason to believe the "win" rate there will be any better than before OSHA. Indeed, in every administrative forum and court system in which I've practiced as an employment lawyer, it has been well understood that, in the aggregate, employment litigation plaintiffs lose more often than they win. This state of affairs is not, in my opinion, because of any particular bias in any of these court or administrative systems against plaintiffs; rather, it is simply because in the context of a particular employment statute, there is some substantial number of meritless claims filed.

And finally, if assumptions (i), (ii) and (iii) were each valid, then one would expect (all other things being equal) that inadequate OSH whistleblower protections have led to a less-safe workplace. But Bureau of Labor Statistics data support no such conclusion. According to BLS, both nonfatal injuries as well as fatalities in the workplace have continually declined over the past decade. See BLS, *http://www.bls.gov/iif/oshwc/cfoi/cfch0007.pdf; http://www.bls.gov/iif/oshwc/osh/os/osnr0032.txt.*

Particular concerns regarding PAWA

Given the degree to which PAWA re-writes Section 11 (c), one could go on at some length about the proposed changes. I will focus my remarks on a few sections that, in my view, merit some discussion.

Refusal to Work

PAWA amends 29 U.S.C. 660(c), to add an entirely new form of protected activity under the act. It prohibits the discharge or any other form of discrimination against an employee "for refusing to perform the employee's duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee, or other employees." To receive protection under the section, the complainant must merely conclude, as a "reasonable person" would, that there is "bona fide danger of a serious injury, or serious impairment of health, resulting from the circumstances." Id.

It is, of course, a sensible proposition that an employee should not have to engage in work that will result in his or her injury or death. But PAWA's particular definition of protected activity appears to be unprecedented in federal whistleblower statutes.[1] And, moreover, OSHA regulations already address the issue of when an employee may refuse to work due to work conditions in a comprehensive and reasonable fashion.

Current OSHA regulations already prohibit discrimination against an employee who refuses to work. 29 CFR § 1977.12. But the regulations make clear that "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 CFR § 1977.12(b)(1). The regulations recognize that "an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards." Id. To avoid frivolous employee complaints and work stoppages, OSHA regulations provide that for an employee's refusal to work to be protected, a reasonable person must agree that there is "a real danger of death or serious injury." 29 CFR § 1977.12(b)(2). The employee must also demonstrate that he or she has refused to work in "good faith." Id. In addition, before discontinuing work, OSHA regulations require that an employee take various steps to place the employer on notice of the unsafe working conditions: (i) apprise the employer of the alleged hazard, if possible; (ii) ask the employer to rectify the danger; and (iii) unless there is insufficient time, "resort to regular statutory enforcement channels." Id.

Section 202 of PAWA's use of the "reasonable apprehension" standard and its failure to incorporate the employer protections contained in the OSHA regulations have the potential to encourage excessive litigation and false claims. If it is truly necessary to address this issue through legislation, the standards set forth in the OSHA regulations should be used as a guide.

Statute of Limitations Issues

Section 203 of PAWA amends the existing statute of limitations provision in three ways: (i) by incorporating an alternative "discovery rule" concept for triggering the limitations period; (ii) by permitting "continuing violation" claims of virtually any sort, without regard to whether there is any connection between the timely assertions and the untimely ones; and (iii) by extending the current limitations period from thirty (30) to one hundred—eighty (180) days.

The most dramatic of these statute of limitation changes permits a complaint to be filed on the later of either the "date on which the alleged violation occurs" or "the date on which the employee knows or should reasonably have known that such alleged violation occurred."[2] The latter option, a "discovery rule", is a foreign concept in employment law. For example, of the seventeen OSHA-enforced whistleblowing laws, the statute of limitations under all of these statutes only begins to run when the alleged violation occurred. A discovery rule is not only unprecedented

[1] Although some states recognize, either at common law or by statute, a cause of action for being retaliated against for failing to perform certain job duties, these states generally limit the protection to a refusal to perform unlawful activities. For instance, under Texas law, employees may refuse to work in unsafe work environments if they were to perform an illegal act that carries criminal penalties. See Hancock v. Express One Intern., Inc., 800 S.W.2d 634, 636 (Tex. App. Dallas 1990), writ denied, (Nov. 11, 1992). Likewise, N.Y. LAB. LAW § 740 prohibits employers from taking retaliatory action against an employee who "objects to, or refuses to participate in an activity, policy or practice of the employer that is in violation of law, rule or regulation," if "the violation creates and presents a substantial and specific danger to the public health or safety."

[2] Proposed paragraph 4(A) in Section 203 refers to "paragraph (3)(A)", although there does not appear to be a subparagraph (A) to paragraph 3.

with respect to the OSHA-enforced whistleblowing statutes, it is not expressly adopted in any other federal employment statute, including the staples of employment discrimination law: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act. It is hard to imagine how an OSH whistleblowing claim so unique that it would be alone among federal employment laws to apply a discovery rule.

Legislatures and courts have presumably rejected a discovery rule in employment litigation because it is a bad idea. "One can never be sure exactly when on that continuum of awareness a plaintiff knew or should have known enough that the limitations period should have begun. A discovery rule thus substitutes a vague and uncertain period for a definite one." J.D. Hamilton v. 1st Source Bank, 928 F.2d 86, 88 (4th Cir. 1990). As a discovery rule has no firm outer limit, it would permit claims to be asserted years after the fact. Over the course of time, witnesses become unavailable and memories fade. Records are lost as electronic storage systems change. Moreover, it is not at all clear how a discovery rule benefits workplace safety—stale claims advanced many months or years after the fact will unlikely have any effect whatsoever on a practice that may well have changed with time. Indeed, that is precisely why the OSHA-enforced whistleblower statutes contain relatively brief (30—180 day) statutes of limitation—so to encourage the prompt reporting of conduct that is allegedly violative of the underlying statutes. While one can imagine the rationale behind a discovery rule in the context of certain personal injury-type cases (e.g., a surgical instrument left inside a person following surgery), there is no similar imperative in the employment litigation field.

Section 203 also provides that, for statute of limitations purposes, except for a termination, any series of alleged violations is timely provided that one alleged violation occurred within the limitations period. Although this subparagraph is labeled "Repeat Violation", it really should be referred to as "Continuing Violation." In the Title VII context, the Supreme Court has held quite clearly that discrete discriminatory acts outside the limitations period are time barred, even if related to alleged acts that are timely. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002); see also Delaware State College v. Ricks, 449 U.S. 250 (1980). Even the more liberal approaches to the continuing violation doctrine adopted by the circuit courts of appeal that existed prior to Morgan required some relationship between the timely allegations and the untimely ones. See, e.g., Morgan v. Amtrak, 232 F.3d 1008, 1015-1016 (9th Cir. 2002). Under PAWA, no such requirement exists. A complainant could theoretically link an act taken years earlier, of a completely different nature, by different managers, in response to a totally distinct complaint, to a timely adverse action and proceed against the company with respect to both claims.

Finally, PAWA extends the existing statute of limitations period by a factor of six, from 30 to 180 days. In other words, of the OSHA-administered whistleblower statutes, the OSH whistleblower provision is now among the longest instead of among the shortest. As noted above in a different context, it is unclear how this lengthening of the limitations period improves workplace safety, given that it encourages complainants to sit on claims instead of advancing them promptly.

New rights of action

Currently, 29 U.S.C. § 660 (c) allows a complainant to file a complaint with the Secretary of Labor, which the Secretary of Labor is to investigate. The Secretary may then bring an action in the United States district court against the employer. By regulation, an employee submits his or her initial complaint to OSHA, and it is investigated. 29 CFR § 1977.15. Once an initial determination is made, only the whistleblower (not the employer) may request a review by OSHA's Appeals Committee. The Appeals Committee either returns the matter for further investigation or denies the appeal.

While it is true that, of the 17 OSHA-administered whistleblower statutes, only three follow this particular procedure (the other two are the Asbestos Hazard Emergency Response Act and the International Safe Container Act), there is a sensible policy rationale for employing this process for the OSH whistleblower provisions. The substantive OSH Act is, after all, the area of law most familiar to the typical OSHA investigator. It is the one substantive Act (out of the seventeen) on which all OSHA whistleblower investigators are trained. 2009 GAO report, at 39.

Permitting OSH whistleblowers to take their claims before the Department of Labor's Office of Administrative Law Judges ("OALJ") and Administrative Review Board ("ARB") will have a significant impact on these bodies. OSH whistleblower claims make up, by far, the largest number of whistleblower claims addressed by OSHA under the 17 whistleblower statutes. For fiscal year 2007, of the 1,864 whistleblower complaints addressed by OSHA, 1,205 (approximately 65%) were OSH whistleblower claims. In essence, the adoption of PAWA would increase by approxi-

mately 200 percent the number of potential cases to be addressed by the OALJ and ARB. So doing will undoubtedly cause substantial delays in the processing of these claims. It is unclear how such delays will result in a safer workplace. What is certain is that employers will be forced to expend substantial sums defending OSH whistleblower claims through these additional processes—the majority of which will ultimately be found to be meritless.

Of course, PAWA would permit OSH whistleblowers to proceed to United States district court if the OALJ has not issued a decision and order within 90 days of a hearing request or if the ARB has not issued a decision within 60 days of receiving the administrative appeal. Given that the vast majority of cases handled by the OALJ and ARB do not currently meet these timelines, it seems particularly unlikely they will do so once their pool of cases is dramatically increased. So the assumption under PAWA should be that every OSH whistleblower will at least have the opportunity to take his or her claims to United States district court. Again, it is not at all clear how this expansion of United States district court jurisdiction will improve workplace safety, but subjecting employers to federal court litigation in 1200 potential additional cases per year will certainly cost employers dearly.

Chairwoman WOOLSEY. Thank you.

Before we go to Ms. Rhinehart, those with placards, you need to hold them down and please don't stand up. Thank you very much. I mean, yes, in front of you but just not up. Thank you. Thank you.

Ms. Rhinehart.

STATEMENT OF LYNN RHINEHART, GENERAL COUNSEL, AFL–CIO

Ms. RHINEHART. Thank you, Chairwoman Woolsey, Ranking Member McMorris Rodgers, and the other members of the panel for holding this hearing and for inviting me here today to testify on the need to strengthen the anti-retaliation whistleblower protections in the Occupational Safety and Health Act.

My name is Lynn Rhinehart, and I am the general counsel at the AFL–CIO. We are a labor federation representing about 11 million workers across the United States, and we are in strong support of the Protecting America's Workers Act and the provisions in it to strengthen the penalties and strengthen the whistleblower protections in the law. We really appreciate your holding this hearing today on Workers Memorial Day, a day when we honor and pay tribute to workers who are killed on the job.

I want to acknowledge the family members who are here on the panel and here in the room and express our sympathies for their loss. We are all here for the same reason, which is that we believe strongly that those fatalities should not have occurred in vain and that we need to redouble our efforts to take measures, strengthen the law, do what we need to do to make sure that further fatalities don't happen in America's workplaces; and, frankly, we have a lot of work to do.

Still today, 5,000 workers, more than 5,000 workers, die on the job each year. That is 14 workers each and every day who are killed from workplace hazards, and millions more are injured. Five thousand workers a year is the population of many small towns across America, and it is that number of workers killed on the job each and every year from workplace hazards. It is just an unacceptable level of tragedy in America's workplaces that we have much work to do to address.

I think everybody on the panel would agree that in order to address workplace hazards and to try to get preventive actions in

place before injuries, illnesses, and fatalities occur, that you need the full and active involvement of workers. Workers are the eyes and ears in the workplace. It is their jobs. They see the hazards. They know the hazards. They know what solutions might be put in place to address those hazards.

So employers who are being proactive about health and safety in their workplaces want and need the full and active involvement of their workers in identifying hazards, and especially given the fact that OSHA can't be everywhere at all times. In fact, it would take them 137 years to be in each workplace just once, all the more reason why we need the active and full involvement of workers in identifying hazards and protecting their health and safety on the job.

In order to have that active involvement, workers need to feel secure that if they raise a hazard, if they bring a concern forward, if they file a complaint with OSHA, that their jobs are going to be secure. They are not going to be fired or demoted or transferred or suffer other retaliation for speaking out. The system really depends on that.

And, unfortunately, we don't have that situation today. As Mr. Jorgensen's story so painfully shows, workers today do not have a right to speak out about job hazards without retaliation and have a remedy behind them for speaking out and pursuing their rights.

It is even more important in today's bad economy that the law be strengthened. The fear of retaliation, the fear of losing one's job is even more intense when you are looking at an almost 10 percent unemployment situation, and that just exacerbates workers' fears of speaking out.

Workers who are covered by a union contract are in a better position because they have their union in that contract backing them up if they suffer retaliation for reporting job hazards. But, unfortunately, that is protection that is only afforded this moment to a minority of workers in America's workplaces.

So most workers are left with the protections of the Occupational Safety and Health Act; and these protections, by any measure, are exceedingly weak. They are the weakest of any of the 17 whistleblower laws that OSHA itself enforces. How ironic that the weakest law enforced by OSHA is the OSH Act.

I attached a chart to my testimony that laid out some of the ways that the OSH Act's anti-retaliation whistleblower protections fall short of the standard laid out in so many other laws, including Sarbanes-Oxley, including the Surface Transportation Act, including the recent health care reform that was adopted. By any meaningful measure, the OSH Act whistleblower protections fall short of the mark.

The statute of limitations is exceedingly short, only 30 days. There is no right under the OSH Act for workers to get their job back, for preliminary reinstatement while their cases are pending, and they have no right to get a hearing before an administrative law judge or a court. They are completely dependent on the Secretary of Labor bringing their cases forward; and, as we have heard, that rarely happens.

And the burdens on the Department of Labor are significant as well. They can't pursue an administrative process themselves. They

need to go to Federal District Court to pursue these whistleblower cases in court.

So the law is extremely weak. There is a saying in the law that rights without remedies are really no rights at all; and, frankly, that is what we are talking about here with the whistleblower protections and the Occupational Safety and Health Act. The provisions are so weak as to really be meaningless.

So we support the provisions in the Protecting America's Workers Act. We think that they would make a real, positive difference in protecting workers' ability to raise safety and health hazards on the job. It would update the law, bring it up to par with other anti-retaliation protections in other laws, including laws that have been passed over the past 5 years with bipartisan support and signed into law by both Republican and Democratic Presidents. We think that these measures would give workers more meaningful rights to participate in safety and health on the job and bring about preventive efforts before injuries, illnesses, and fatalities occur.

I would like to make just two other brief comments in the time that I have. One is that, while we fully support the provision in the Protecting America's Workers Act that would give workers a right to pursue their own case before an ALJ or a Federal court if the Secretary did not pursue their case or if the case was proceeding too slowly, we don't do that right as a substitute for the Secretary of Labor still having her own robust anti-retaliation whistleblower program. We think that you need both. You need the agency program, and you need the private right of action.

The other comment I would make is that it really seems to me that employers ought to support the provisions, the anti-retaliation provisions in this legislation, because employers who want their workers to feel secure speaking out about job hazards should support there being a law to back workers up when they do step forward and exercise those rights.

These are modest measures. They are not novel. They are not radical. They would simply bring the OSH Act into the mainstream and make it more uniform with other anti-retaliation whistleblower laws that have been passed by Congress over the years. So we think it is necessary, we think it is overdue, and we urge their prompt adoption.

Thanks very much.

[The statement of Ms. Rhinehart follows:]

Prepared Statement of Lynn Rhinehart, General Counsel, AFL–CIO

Chairman Woolsey, Ranking Member Rodgers, and Members of the Subcommittee:

My name is Lynn Rhinehart, and I am the General Counsel of the AFL–CIO, a federation of 56 national unions representing more than 11.5 million working men and women across the United States. Thank you for the opportunity to testify today about the urgent need to strengthen the anti-retaliation provisions in the Occupational Safety and Health Act (OSH Act), and about how H.R. 2067, the Protecting America's Workers Act, addresses this need.

Today is Workers Memorial Day, a day unions and others here and around the globe remember those who have been killed, injured and made ill on the job. The recent tragedies at the Massey coal mine in West Virginia, the Tesoro refinery in Washington State, and the Kleen Energy Systems facility in Connecticut, are vivid and painful reminders of the need to continue and redouble our efforts to assure safe and healthful working conditions for all workers. In 2008, the last year for which comprehensive data are available, 5,214 workers were killed on the job—an

average of 14 workers each day, and millions of workers were injured. Clearly, more needs to be done to bring about the OSH Act's promise of safe and healthful jobs for all workers. We greatly appreciate your holding this hearing today, on Workers Memorial Day, to focus attention on workplace safety and health, on shortcomings in the existing law, and on proposals to strengthen it.

Today marks the 39th anniversary of the day the Occupational Safety and Health Act took effect. In the nearly 40 years since the OSH Act's enactment, it has never been significantly amended or strengthened.[1] As a result, many provisions in the law, including its penalty provisions and its anti-retaliation provisions, have fallen far behind other worker protection, public health, and environmental laws. It is past time for these provisions to be updated and strengthened.

There is universal agreement about the importance of workers being involved in addressing safety and health hazards at the workplace. Workers see first-hand the hazards posed by their jobs and their workplaces, and they are an important source of ideas for addressing these hazards. But in order for workers to feel secure in bringing hazards to their employer's attention, they must have confidence that they will not lose their jobs or face other types of retaliation for doing so. All too often, fear of retaliation for "rocking the boat" leads workers to stay quiet about job hazards, sometimes with tragic results, as we saw with the Massey mine explosion earlier this month.[2]

The importance of workers being able to raise concerns about workplace hazards with their employers without risking their jobs is especially acute under the OSH Act, because, given limited resources and the vast number of workplaces under OSHA's jurisdiction, actual inspection and oversight of workplaces by OSHA inspectors is quite rare. In its most recent annual report on the state of workplace safety and health, released today in conjunction with Workers Memorial Day, the AFL–CIO found that, according to the most recent statistics, it would take 91 years for federal and state OSHA inspectors to conduct a single inspection of each of the 8 million workplaces in the United States.[3] Given the paucity of inspectors and inspections, OSHA needs workers to be the eyes and ears on the ground, bringing problems and hazards to the attention of their employers to bring about prompt, corrective action before injuries, illnesses, and fatalities occur.

Unfortunately, the anti-retaliation provisions in the OSH Act are exceedingly weak. Ironically, they are far weaker than the other 16 anti-retaliation laws that are also enforced by OSHA, and they are weaker than the anti-retaliation provisions in the Mine Safety and Health Act. As a consequence, workers who are fired or face other retaliatory action for filing an OSHA complaint or raising concerns about workplace hazards are left with very little recourse, unless they are fortunate enough to be covered by a union contract, which provides far stronger protections and quicker remedies.

The U.S. Government Accountability Office (GAO) surveyed seventeen whistleblower statutes enforced by OSHA and found that the OSH Act contains much weaker whistleblower provisions than these other federal laws.[4] Four weaknesses are particularly problematic: (1) the Act's short statute of limitations for filing whistleblower complaints; (2) the absence of preliminary reinstatement while cases are proceeding through the system; (3) the lack of an administrative process for hearing cases; and (4) the absence of a private right of action for workers to pursue their own cases before the agency or in federal court in situations where the Secretary of Labor fails or chooses not to act.

Short Statute of Limitations. Under the OSH Act, workers must file a retaliation complaint within 30 days or their claims are barred by the statute of limitations. This is an exceedingly short statute of limitations when compared to other laws, which provide a minimum of 60 days and more typically 180 days for workers to file a complaint.

Indeed, many of the whistleblower statutes enforced by the Department of Labor—ranging from the Surface Transportation Assistance Act (which protects whistleblowers who complain about violations of federal truck safety regulations) to the Energy Reorganization Act (which protects whistleblowers who work at nuclear facilities) to the Sarbanes-Oxley Act (which protects whistleblowers who report corporate fraud) to the whistleblower provisions contained in the newly-passed Patient Protection and Affordable Care Act (which protects whistleblowers who complain about violations of the health care law) allow employees between 60 and 180 days to file a complaint.[5] And, of course, the many anti-discrimination statutes enforced by the Equal Employment Opportunity Commission (EEOC), such as Title VII and the Americans with Disabilities Act, allow employees either 180 or 300 days (depending on the state) to file a charge based on retaliation for complaining about discrimination.

The OSH Act's exceedingly short statute of limitations makes it far more likely that workers who face discharge or other retaliation will miss the deadline for filing a complaint, meaning that they will have no real recourse under the OSH Act.

No Preliminary Reinstatement. The second major shortcoming in the OSH Act's anti-retaliation provisions is the absence of language authorizing preliminary reinstatement of a worker while his or her case is pending and working its way through the process. Here again, almost all of the other anti-retaliation laws enforced by OSHA authorize the Secretary to order preliminary reinstatement where she finds reasonable cause, after an initial investigation, to believe that a violation has occurred. The preliminary reinstatement provisions in the Federal Mine Safety and Health Act are even stronger. They call for the Federal Mine Safety and Health Review Commission to order immediate preliminary reinstatement in all cases unless the Secretary determines that the complaint was frivolously brought. 30 U.S.C. § 815(c).

Preliminary reinstatement is an important component to a meaningful anti-retaliation process, because it means that a worker will not be out of work losing pay and benefits while the case is pending. It is a common feature of other anti-retaliation statutes, including statutes enforced by OSHA, and it has proven workable. It should be added to the OSH Act.

No Administrative Process. Unlike most other whistleblower laws enforced by OSHA, there is no administrative process for pursuing anti-retaliation claims under the OSH Act. Instead of conducting an investigation and issuing a preliminary order, with review before an administrative law judge within the agency, as is the case with most other whistleblower laws, the Secretary must file suit on the worker's behalf in federal district court—a costly, resource intensive, and time-consuming process that the Secretary rarely pursues.

According to data provided by OSHA, in FY 2009, OSHA received 1,280 complaints alleging violations of the 11(c) anti-retaliation provisions in the OSH Act, 29 U.S.C. § 659(c). The majority were dismissed. Nearly 20 percent of the cases (246 cases) settled. OSHA recommended that the Secretary pursue litigation in 15 cases; 4 cases were actually brought. Since 1996, the Secretary of Labor has filed only 32 cases in federal district court under Section 11(c). And, because the OSH Act does not authorize workers to pursue their cases on their own, workers in the thousands of cases the Secretary did not pursue were left without meaningful recourse.

The absence of an administrative process greatly weakens the effectiveness and utility of the anti-retaliation provisions in the OSH Act.

No Right of Appeal or Private Action. The fourth major shortcoming in the OSH Act's anti-retaliation provisions is the absence of a right for workers to get a hearing or pursue their own case before an administrative law judge or the court. Under the OSH Act, workers are entirely dependent on the Secretary of Labor to pursue their cases, because there is no administrative process for them to access and no right to bring their case in federal district court if the Secretary elects not to proceed. As the statistics outlined above reveal, the Secretary pursues only a handful of cases each year, leaving the rest of workers without a forum to pursue their own cases.

The absence of a private right of action for workers to pursue their own cases before an administrative agency or the court makes the OSH Act's anti-retaliation provisions far weaker and far outside the mainstream of other anti-retaliation laws. As the chart attached to this testimony shows, other whistleblower provisions enacted by Congress provide workers with the ability to seek a hearing before an administrative law judge, or a de novo hearing before a federal district court, or both. In contrast, an employee who brings a whistleblower complaint under the OSH Act is wholly dependent on the Secretary of Labor to vindicate his or her rights; if the Secretary delays or declines to pursue the employee's case—which, as explained above, is what happens in the vast majority of cases—the whistleblower has no recourse under the law. This is a serious shortcoming that greatly undermines the effectiveness of the OSH Act and its anti-retaliation provisions.

The case of whistleblower Roger Wood illustrates the problem. Wood was an experienced electrician who worked at a chemical weapons disposal facility, a facility where the working conditions were described by a federal court as "probably as dangerous as any undertaken in the world."[6] Wood repeatedly complained about unsafe working conditions, including inadequate safety equipment, resulting in an OSHA investigation and the employer being cited for two serious safety violations. Subsequently, Wood was fired after he refused to work in a toxic area without adequate safety equipment.[7] Wood filed a whistleblower complaint with the Department of Labor, and a regional Department of Labor official recommended that the agency file suit on Wood's behalf. But after over five years of internal review, the Department ultimately declined to pursue Wood's case. Wood sued in federal court seeking

to force the Department of Labor to file suit on his behalf. A full ten years after he was fired, the U.S. Court of Appeals for the D.C. Circuit denied Wood's claim, finding that the Occupational Safety and Health Act's whistleblower provision left all determinations as to whether to bring suit solely in the hands of the Department of Labor.[8]

The Anti-Retaliation Provisions in the Protecting America's Workers Act Will Help Bring the OSH Act's Protections into the Mainstream

The Protecting America's Workers Act (PAWA) will update and improve the OSH Act's anti-retaliation provisions and bring them up to par with other anti-retaliation laws enforced by OSHA. By providing more meaningful anti-retaliation protections to workers, PAWA will help encourage employees to speak out when they become aware of hazardous workplace conditions, which will help bring about corrective action and prevent injuries, illnesses, and deaths on the job.

PAWA accomplishes these goals by making the following common-sense changes, as reflected in the March 9, 2010 Discussion Draft of Modifications to H.R. 2067:

• It extends the statute of limitations for filing complaints from the current 30 days to 180 days;

• It establishes clear and reasonable timeframes for the Secretary of Labor to complete her investigation and for administrative law judges to hear and decide cases, and authorizes workers to pursue their cases before an ALJ or federal court when these deadlines are missed;

• It provides for preliminary reinstatement of workers after an investigation and determination by the Secretary of Labor. The Secretary is given 90 days to investigate cases and issue a preliminary order. In cases where the Secretary of Labor finds reasonable cause to believe that a violation of the anti-retaliation provisions has occurred, the bill allows the Secretary to issue a preliminary order reinstating the employee to his or her position, along with other relief;

• In the event that the Secretary dismisses a complaint, or does not issue a timely preliminary order, i.e., within 120 days, PAWA permits an employee to request a hearing before an administrative law judge;

• If an administrative law judge does not timely issue a decision (i.e., within 90 days), or there is no timely decision on an internal appeal of an ALJ decision, PAWA authorizes workers to bring their case to federal district court;

• PAWA codifies the longstanding rule that workers are protected against retaliation when they refuse in good faith to perform work they reasonably believe poses an imminent danger to their health or safety. OSHA's regulations to this effect have been upheld by the U.S. Supreme Court, see Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); PAWA codifies these rules;

• PAWA also codifies OSHA's existing regulations providing that the OSH Act's anti-retaliation protections extend to workers who report injuries and illnesses, 29 CFR § 1904.36. The General Accountability Office has found that fear of discharge or other retaliation is a significant factor in workers being reluctant to come forward to report workplace injuries and illnesses.[9] Explicitly stating that workers are protected against retaliation for reporting injuries will help ensure that workers are not discouraged from coming forward when they are injured on the job;

• PAWA clarifies the remedies that are available to workers who are victims of unlawful retaliation. These remedies are well-established, even in the few cases that have been brought under the OSH Act, but including them in the statute removes any doubt about their availability.

In sum, there is nothing novel about any of these improvements to the OSH Act's anti-retaliation protections. Rather, all of PAWA's proposed improvements are well-established means to protecting whistleblowers that Congress has routinely included in other federal statutes in the four decades since the Occupational Safety and Health Act was passed. It is essential that Congress incorporate these sound and proven protections into the Occupational Safety and Health Act, so that workers who raise concerns about hazardous working conditions receive the same basic protections against retaliation as those who complain about corporate malfeasance, environmental or transportation hazards, or health care fraud.

As the Subcommittee considers legislative change to improve worker protections, including the ability to speak out about job hazards without retaliation, we suggest that the Subcommittee also look at additional measures for protecting these rights, such as the civil penalty provisions for violations of the anti-retaliation provisions of the Mine Safety and Health Act that were adopted by Congress in 2008 as part of the S-MINER Act, H.R. 2768. The S-MINER Act authorized civil penalties of not less than $10,000 and not more than $100,000 for each violation of the Mine Act's anti-retaliation provisions. Adopting a civil penalty for violations, in addition to the individual remedies provided for in the Protecting America's Workers Act, would strengthen the tools for enforcing these rights and help deter violations of them.

The AFL–CIO urges prompt action on the Protecting America's Workers Act. It is past time to update and strengthen the Occupational Safety and Health Act so that workers in this country will be better protected from job hazards and better protected when they speak out about them.

Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.

ENDNOTES

[1] The OSH Act's civil penalties were last increased in 1990 as part of the omnibus budget reconciliation bill. P.L. No. 101-508.

[2] Dan Barry, et al., "2 Mines Show How Safety Practices Vary Widely", N.Y. Times (April 22, 2010). See also Peter Kilborn, "In Aftermath of Deadly Fire, a Poor Town Struggles Back," N.Y. Times (Nov. 25, 1991) (workers at the Imperial Food chicken processing plant, where 25 workers died in a fire, did not raise safety complaints because they feared losing their jobs).

[3] AFL–CIO, Death on the Job: The Toll of Neglect (April 2010).

[4] Government Accountability Office, Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency 50-65 (Jan. 2009).

[5] See id. at 51; see also P.L. 111-148, 124 Stat. 119 (2010).

[6] Wood v. Department of Labor, 275 F.3d 107, 108 (D.C. Cir. 2001).

[7] Id.

[8] Id. at 111-12.

[9] GAO, Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data (Oct. 2009).

Chairwoman WOOLSEY. Thank you very, very much.

I need to say, before we start our questions, I have two committees that are both marking up legislation. So if I get up and leave, I will be back. It is because I have to go vote at another committee, and one of our members will take the chair. So please don't take it personally. But so far, so good.

So I am going to begin the questioning with you, Jordan.

At last month's committee hearing on OSHA penalties, Assistant Secretary Michaels testified that OSHA had reservations about certain victims' rights provisions in PAWA, namely, allowing a family member to meet with OSHA before the agency decides to issue a citation and family members appearing before the parties conducting settlement discussions. You have also reiterated this in your testimony today.

So, you know, the family members are here. You have heard from them. We have all—we can't question whether what we are doing is necessary or not necessary. What we want to find out is how to do it so it works, works for them, and doesn't get all bogged down. We have learned some things from MSHA. So how does the MSHA's experience relate to your reservations and how can we settle those reservations? Or do we need to continue discussion on it? What would you think would be the best way to proceed?

Mr. BARAB. Well, first of all, let me clarify. Dr. Michaels expressed—I wouldn't—I would say we have not even reservations. We have some concerns. We obviously need the law, and everybody needs the law—workers, families—to work as efficiently as possible.

But I want to reiterate that we fully support family involvement. We fully support the provisions in this law. In fact, we are already going to be implementing some of the provisions of this law even before it is passed, which we hope will happen soon. So our statements of concern, you know, are in no way—should in no way communicate that we are not fully in support of this or fully in support of family participation.

We do want to talk to—we have been actually talking to MSHA. We realize MSHA has learned some important lessons certainly from Sago and Crandall Canyon on how to relate to families and how this can be done best, and we will be talking to them. We are talking to them, we will be talking to them more, and we will be learning from them.

We learned an incredible amount just from the families that are here today. They came into town. They talked with Secretary Solis yesterday. We are in frequent contact with them.

We have already, you know, told our field staff not only to make sure that we implement what we already have consistently, but we will be actually assigning OSHA staff to be family liaisons. We do want to improve the way we are doing things; and, again, we fully support what is in the law.

So I don't want it to be taken, because we have expressed some concerns that this work right, that we aren't—we don't have full confidence that that can be done, either through the law or through the regulatory process.

Chairwoman WOOLSEY. Okay. I hear that. But tell us how, what needs to be fixed to work right, with the idea that this administration follows 8 years of not giving a hoot. So how do we make sure we put into place the right programs, the right policies that will carry on from administration to administration?

Mr. BARAB. Okay. Just one example that was raised today that Ms. Ford has raised, which I think was quite legitimate, that she and her family found out about the settlement we reached with ADM through the news media.

Now we followed the letter of our instructions of informing the family immediately. But by "inform", we meant we dropped a letter in the mail. Obviously, that was not adequate. That was, in retrospect, particularly inexcusable. That is no way to inform a family of a settlement, and we are going to be changing that.

And we are going to be redefining the word "inform" to you call them. You call the family. You talk to the family before the media is notified, certainly.

We are going to be doing training for our field staff to make sure that they are comfortable. Some of the problem we have is people, you know, understandably are just not comfortable dealing with family members who are in the midst of tragedy, and we are going to be dealing with that as well.

So there are a number of actions we are going to take, a number of things we have learned and have been learning. And, again, we fully support what you are doing here.

Chairwoman WOOLSEY. Congresswoman McMorris Rodgers.

Mrs. MCMORRIS ROGERS. Well, again, just let me say thank you to everyone for being here. Your testimony is extremely helpful to us as we are working on this legislation. And the previous administration, the 8 years before this administration, I believe that we actually saw both injury and workplace-related death rates decrease.

And, as I sit here, I think that part of the key is making sure that we have better partnerships between everyone that is involved and working together, because we do have a shared goal, and not make it adversarial.

Mr. Jorgensen, I wanted to ask, because I understand that these whistleblower complaints are to be anonymous, and I just wanted to ask how you think your employer learned that you were the one that had brought the case forward.

Mr. JORGENSEN. Previous to my blowing the whistle——

Chairwoman WOOLSEY. Do you have your microphone on, Mr. Jorgensen?

Mr. JORGENSEN. Previous to my turning in the complaint, my wife and a friend of hers had worked there, and they quit quite fiery. And when the complaint come down, it was kind of—I think it was kind of obvious the route that it came from. They were disgruntled. I was upset because I had talked to a couple of the employees there who had had their finger cut in the band saw, which was my concern, but I think they kind of figured it out because my wife and her friend had quit.

Mrs. MCMORRIS ROGERS. Okay. Thank you.

Mr. Chinn, your testimony highlighted the many provisions in the draft legislation that would make changes to the current whistleblower system. Are there any provisions that you believe merit more attention?

Mr. CHINN. Yes, I do. Thank you for that question, because I think there are a couple of areas that—even if you accept everything that has been said so far in the testimony, I think there are a couple of areas here that deserve some attention, and maybe it is the sort of attention that only a lawyer who lives these kind of phrases and words and provisions in litigation, you know, can appreciate, I suppose.

One area that I think deserves some particular attention is the limitations area, that is, the statute of limitations. And I will save for last my comments on what has been the focal point so far, and that is simply the increase in the period from 30 to 180 days.

What I would like to focus on first is, in this statute there is a novel, at least as employment law goes, insertion of something that lawyers refer to as a discovery rule for the purpose of commencing the limitations period. That is, the limitations period begins either within a certain period of the alleged violation itself, that is the norm, or the date on which the employee knows or reasonably should have known that such a violation occurred. And it is that second component that I think is troubling.

To my knowledge, it is a foreign concept in employment litigation, completely. It is a vague and uncertain standard; and, moreover, it doesn't really make any sense in the context of retaliation and whistle blowing. It might make sense in the context of, like, a medical malpractice case where a surgical instrument is left inside a person and it is not discovered for years afterwards. But here we are talking about the whistleblower context.

Think about what Mr. Jorgensen described. We are talking about cause and effect. We are talking about—and that is the crux of a whistleblower complaint. That is, I complained and something happened to me because of that complaint. It is not a mystery. There is not some mysterious—if it really is true, if someone is being fired because they are a whistleblower, there is going to be some temporal connection between those concepts. So there is no need for—

even if this weren't foreign to employment law, there is no need for it here.

Secondly, with respect to the limitations period provisions in the statute, there is an extremely broad continuing violation provision lurking behind a heading called repeat violations. And essentially, what that means, as written, is if you have one timely——

Chairwoman WOOLSEY. Finish your thought.

Mr. CHINN. Okay. If you have one timely complaint to make, you may also complain about any untimely complaints that you want to going back as many years as you want to relating to any sorts of incidents, prior complaints, prior actions you want to.

Chairwoman WOOLSEY. Okay. Mr. Hare.

Mr. HARE. Thank you, Madam Chairman.

Mr. Chinn, I don't know if you noticed when you were testifying but several of the people in the audience were holding up pictures of their families, family members. I want to be very honest with you. A couple of times, you know, you were talking about the expense to the employers and things of this nature and that this—you know, about the numbers of meritless cases.

It would seem to me, from my opinion, that looking at these families—these are sisters, brothers, husbands, wives, dads, grandfathers. We just lost 29 miners because you had an employer that cared more about profits than he cared about keeping the people safe. And we have had four of those.

And I have to be honest with you. I don't know. I am much less interested in the expense to the employers to keep their workers safe than keeping the workers actually safe. I mean, I think that every employer has a responsibility and I think every worker has every right to assume that when they go into work every day that they are going to go to work under safe circumstances, as best they can, and be able to come home to their families. I don't think it is rocket science.

I also think that when you referred to Mr. Jorgensen's case, here is a guy that saw something and reported it and lost his job. And then he was told, you can't even—basically, because you got a couple of lawyers out there you are probably going to roll the dice on whether or not you are going to be able to prevail in your case.

This system is upside down. It is completely upside down.

I would much rather look at the statistics, as was mentioned, that 5,000 people every year die in this country. And I think there are a number of good employers in this country. But they have an obligation, those that aren't, to clean up their act. And if they don't, they shouldn't just be fined. They ought to end up in prison if they are not going to change what they are doing, the way they are acting. They would rather pay fines than keep people safe. I think that is—I don't know how these guys can go to sleep at night, to be honest with you.

But I just wanted to ask, if I could—the person from the AFL–CIO, you were kind of shaking your head when some of that was being testified—I am sorry—Ms. Rhinehart—the testimony that will lead to excessive litigation and false claims and those kinds of things. I wondered if, you know, you didn't get an opportunity to, but you could probably tell this is a very emotional issue to me. I came out of a factory.

I would like to hear your take maybe to respond to what Mr. Chinn had to say. Maybe I got it wrong, but I was shaking my head, too, to be honest with you.

Ms. RHINEHART. Thank you for the opportunity to address some of those points. I tried not to shake too hard, but I couldn't help myself.

A couple of things. In terms of the concern that actually giving workers a remedy for these rights would lead to false claims, I completely disagree. Workers are not going to file these claims lightly. Filing a claim about retaliation with the government is a big deal. Workers know that they can lose their jobs. They know that these cases take a long time to be pursued. They know that there is no assurance that they are going to win at the end of the day.

What we get in this legislation is workers get a fair shot. They get a fair shot to bring their case forward and to try to prove up their case, which is much more than they have right now under current law.

The information that we have shows the problem isn't frivolous claims. The problem is workers don't have the right right now to bring forward their claims, and that is the problem that the PAWA legislation is seeking to address and the reason why we fully support it.

If I could just say a word about the notion that the statute of limitations in the legislation is somehow an outlier and bizarre in the area of employment law. That is just not the case. The discovery rule that the statute of limitations is from the time of the act or from the time the victim discovered the act is well settled in employment law, in Title VII law, even under the Occupational Safety and Health Act for whistleblower cases, and so it is just not accurate to say that this is a novel or bizarre concept in the area of labor and employment law.

If I could make just one final point, which is one of the premises of Mr. Chinn's testimony seemed to be that whistleblower protections don't have anything to do with safety and health. They have to do with employment litigation, but they don't have anything to do with worker safety and health.

We couldn't disagree more. We think they have everything to do with workers feeling secure to speak out, raise hazards, and be involved in protecting their health and safety on the job before injuries and illnesses occur.

Mr. HARE. Well, I know I am out of time, but it would just seem to me that if Mr. Jorgensen or any worker sees something that is dangerous, that could be harmful to people that they work with, and they report it and they get fired for doing that, A, that is obscene to fire the person. And B, it doesn't allow the employer to do anything to correct the problem for the people that are there in the plant or wherever to keep them out of harm's way. It makes absolutely no sense to me.

Chairwoman WOOLSEY. Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you very much.

I have several concerns that I heard in front of me.

First, I would like to start, Ms. Ford, and say I am very sorry about your loss. And I wondered if you have spoken to other fami-

lies that are in the same situation, and do they feel like they have been shut out.

Ms. FORD. I have spoken to many of the families behind me. I have spoken to many families in Nebraska, many families. I have spoken to an individual that actually fell from a grain elevator after my uncle passed in the accident. And they said, we can't come forth because he still works there. I don't think that is right.

Ms. SHEA-PORTER. So you think having a voice and allowing them to speak early would help other families as well?

Ms. FORD. Oh, yes. I mean, from day one after this accident I started my research and there was so much I had found out. And if I had understood about the whole 6-month time frame this outcome would have been so different. I mean, I sat at my kitchen table and spoke to the OSHA representative and said, no, this was not grandfather-claused in. And it wasn't. I was right. And I find out in January, 2010, that I was right; and it could have been prevented. Things could have changed.

Ms. SHEA-PORTER. You could have had a voice at the table.

Ms. FORD. Yes.

Ms. SHEA-PORTER. And, Dr. Monforton, what about that 8-hour rule that they have that they don't have to report a death or something that could have led to a death in 8 hours? What is your concern about that?

Ms. MONFORTON. That is a very big disparity between the Mine Safety Act and the OSHA law. Under the Mine Safety Act, it was immediate notification of a fatality, which was fuzzy language. So after the Miner Act passed, they stipulated that within 15 minutes of the employer learning of the incident, not just of a fatality but for a serious injury that is likely to cause a death, and under the OSHA statute it is 8 hours for a fatality which, for many reasons, is problematic, including, you know, the employer could actually change the scene of the crime, so to speak.

And, also, under OSHA, it is only if there are three or more people that are hospitalized. So there are huge disparities between the two statutes.

And I think something that this subcommittee could look at is how do we take some of the things that are terrific in the Mine Act and extend them to all workers and vice versa, OSHA to MSHA.

Ms. SHEA-PORTER. And, in all fairness, it could be accidental, where they don't realize over the 8-hour period of time that they are changing or interfering with some evidence. So it could be accidental, simply trying to clear things up.

Ms. MONFORTON. Right. Maybe just, you know, cleaning up the scene.

Ms. SHEA-PORTER. But the point is that the evidence should be intact, I think is what you are getting at.

Ms. MONFORTON. Exactly. So as soon as OSHA knows, you know, if it is the type of thing they hear the initial information, they may want to give the employer some instruction about what to do or what not to do.

Ms. SHEA-PORTER. Okay. Thank you.

I also had a question for you. The U.S. Chamber of Commerce testified at a recent hearing that small businesses should have the right to recover attorneys' fees from employees who file whistle-

blower claims and then fail to prevail at a hearing. Do you think that would have any kind of chilling effect? Do you have any concerns about the loser having to pay?

Mr. BARAB. Yeah, I think it is clear it would have a chilling effect. Workers already face enough intimidation about filing complaints, and I think the fact that they not only might lose that or be fired due to a failure to sustain a whistleblower complaint but to think that they also might be essentially fined for that I think would have a chilling effect. We don't want to just allow workers to file whistleblower complaints or file health and safety complaints. We want to encourage them to do that. And this goes in exactly the opposite direction.

Ms. SHEA-PORTER. Thank you.

Do you agree, Mr. Chinn?

Mr. CHINN. Do I agree as to the attorneys' fees provision?

Ms. SHEA-PORTER. Yes.

Mr. CHINN. As PAWA is written, I don't see that there is any possibility of an employer recovering, if the employer prevails.

Of course, in Federal court, if the action proceeds to Federal court, the matter would be governed by rule 11 of the Federal Rules of Civil Procedure. If the matter were frivolous, an employer could recover attorneys' fees under that provision.

Ms. SHEA-PORTER. But I wondered if you just agreed with the chambers perspective on that.

Mr. CHINN. Well, if what Ms. Rhinehart said was true, I don't agree with what was just stated. Ms. Rhinehart said that employees will not bring forward meritless claims. Now, we know statistically that that is just an incorrect statement. I mean, even under the Obama OSHA, claims are rejected as meritless.

But if Ms. Rhinehart were accurate, then claimants have nothing to fear, because they will always win under this legislation. Therefore, there should be, at least for small businesses or, at a minimum, if the matter is frivolous or brought in bad faith, there should be some provision for attorneys' fees, but nobody here should be concerned about it because, as Ms. Rhinehart said, no action will ever be brought without merit.

Ms. SHEA-PORTER. And in all fairness then you would also have to say that, since cases are found to be meritless, that there is enough protection in there for business as well.

Thank you. I yield back.

Chairwoman WOOLSEY. Congressman Payne.

Mr. PAYNE. Thank you very much.

Mr. Barab, looking at the testimony, although I didn't hear it, but Mr. Jorgensen testified that he had filed a complaint with OSHA regarding unsafe working conditions, and he was terminated a week after the inspection. Despite the employer claiming that he was fired for poor performance, the OSHA inspector discovered that the employer altered job performance documents which they gave to OSHA omitting anything positive about Mr. Jorgensen.

So I guess my question is, is it correct that OSHA investigators found that Mr. Jorgensen's case had merit? And, if so, did Mr. Jorgensen have a strong case? And how do you feel about the way the law treats Mr. Jorgensen and other people like him?

Mr. BARAB. Thank you, Mr. Payne.

Yes, OSHA did find merit. OSHA found that it was a strong case. And as Mr. Jorgensen related, the solicitors decided not to take that, not to litigate that case.

Quite frankly, I am appalled by this. I am appalled that in the 21st century, 40 years after the Occupational Safety and Health Act was passed, that workers still have to be afraid to exercise their rights under this law. I am not going to sit here—I mean, we did find merit. The solicitors didn't take it. I am not going to sit here and certainly condemn the solicitors. They have their own priorities. They have their own resource decisions. They have to make some very difficult decision about this, and I am sure it hurts them as much as it hurts us that this wasn't taken forward.

The fact is, though, that we are both—both us, OSHA, the solicitors, and certainly workers are operating in what is now basically a dysfunctional system. It just doesn't work. And what we are asking you to do, what PAWA is asking you to do, what PAWA would do is really fix that system so that workers actually have a chance to exercise their rights under the law and succeed if they are discriminated against for that.

Mr. PAYNE. Since you brought up the solicitors, let me ask you this. And you indicate they have a tough time. But over the past 14 years the Solicitor's Office has brought suit in only 7 percent of the 467 merit cases it sent to OSHA and declined to prosecute 60 percent of those cases. Is Mr. Jorgensen's case an isolated one, or do you believe there are other meritorious claims which have been left by workers who were left, really, without any real recourse, sort of left high and dry? Why do you feel that the Solicitor's Office has such a low rate of success?

Mr. BARAB. Well, I think clearly Mr. Jorgensen's case is not an isolated case. There are many, many cases on those. I mean, the figures speak for themselves. And I am not with the Solicitor's Office. I am not going to really testify for the solicitors. But I do want to kind of outline the general environment that we all work in.

I mean, the solicitors have to make—they have got, you know, X amount of resources. They have to make some difficult decisions. They may have, for example, class action suits that may affect thousands of workers. They may have a very difficult penalty case, settlement case for a worker fatality that they have to deal with. And then they also may have whistleblower cases that may only affect one worker for a few thousand dollars.

I am not saying at all that these aren't important certainly to that worker who is unfairly fired for exercising his health and safety rights. But the fact is that there are some difficult decisions that have to be made here.

But, again, let me reiterate that those difficult decisions are forced upon them because we are working in this dysfunctional system, and that is what we need to change. We need to change the system.

Mr. PAYNE. Well, let me say that I also feel that we need to strengthen the system. We should really be protecting workers. Even worse, back about 10 or 15 years ago, there was a move afoot by the then-controlled Republican Congress to have OSHA have inspections done and that the company would pay for the inspections and that the results would be given to the company without the

public knowing what was in it; and, therefore, the company then would supposedly use this as a working tool to go and try to correct problems that the OSHA inspector found.

Of course, it, fortunately, really did not get off the ground, because it is difficult enough under the environment that we currently have for the workers to get justice. If you had the company paying for the inspection, it would be total injustice, in my opinion.

So, with that, thank you and I will yield back the balance of my time.

Chairwoman WOOLSEY. We are going to have a second round of questions, and I will yield to Congresswoman McMorris Rodgers.

Mrs. MCMORRIS ROGERS. Thank you, Madam Chairwoman.

Much of the work of this subcommittee focuses on how we can get employers and employees to work more proactively to prevent accidents and illnesses from occurring and encourage that participation. And Mr. Morikawa mentioned the results of your electrical contractors transmission and distribution strategic partnership for safety and the success of it. I wanted to ask you how you believe we could translate that experience into OSHA's everyday practices, especially as the agency has announced cuts in this area.

Mr. MORIKAWA. Thank you very much for that question.

The work with the ET&D partnership has been particularly positive and reinforcing because you took parties who were traditional adversaries and competitors and you pulled them all together for a common purpose and that common purpose was to reduce injuries and fatalities on the job. So it starts with that philosophy. It is an attitude. It is a desire to make a cultural change in an industry, which is very significant. As you can see, when you get everybody together in a cooperative basis, join hands to try to reduce injuries and fatalities and to find the causes and to stop them, you can have dramatic effect.

Now, the issue I am concerned with is the fact that—first of all, I don't take issue with the fact that OSHA needs to have a strong and vibrant enforcement program. Neither the chamber nor I personally have ever taken the view that an enforcement program should be replaced by cooperative programs. What I think should be done, however, is that groups of employers or individual employers that have indicated a commitment to prevention of accidents and fatalities on the job should be encouraged by OSHA. They should be incented to do the right thing.

Now, commonly, there is the notion that companies that go into partnerships are supposed to gain some sort of strategic advantage, that they are looking for some type of immunity or they are looking for some sort of special treatment from OSHA. ET&D is an excellent example of that. These issues came up at the time we formed ET&D. The question was asked by OSHA, what sorts of immunity, what special treatment would you like as a result of it? Is that what you are really after here?

And, resoundingly, the members of the partnership—again, remember this, union, non-union companies, together with one of the largest labor unions in America, along with these trade associations—got together and said, no, we are not looking for any special treatment. In fact, we are not looking for inspection immunity, citation immunity. We are not looking for special points and privilege,

et cetera. We are looking for your cooperation so that we can get together as a group and solve these problems as a group and not do it by fighting with each other.

Again, the partnership never took the position that they shouldn't be cited if they violated OSHA standards. But what we did do is we focused on compliance cooperatively, and you can see the dramatic impact that has had. OSHA should be encouraged to do that.

Mr. BARAB. Just for the record, we fully support that partnership. We love that partnership. We think it has been very effective, and we have not cut back funding for these partnerships.

Mrs. MCMORRIS ROGERS. Okay. Great. Great. Thank you.

And, Madam Chairwoman, I have a case I would like to submit for the record. This is on April 19, 2010, the National Labor Relations Board found that the International Union of Operating Engineers, local 513, in violation of the National Labor Relations Act for fining a union member for reporting another union member's safety violation to their employer. IUOE had fined an employee $2,500 for informing his employer that a fellow employee and union member had violated a safety protocol, and I would like to submit that for the record.

Chairwoman WOOLSEY. Without objection.

[The information follows:]

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International Union of Operating Engineers, Local 513, AFL–CIO *and* Ozark Constructors, LLC, A Fred Weber—ASI Joint Venture. Case 14–CB–10424

April 19, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND PEARCE

The single issue in this case is whether the Respondent violated Section 8(b)(1)(A) of the Act by fining employee Mark Overton $2500 because, in compliance with the Charging Party Employer's safety rules, which are incorporated by reference in the parties' collective-bargaining agreement, Overton reported a safety violation by another employee to the Employer.[1] The judge found the violation as alleged.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[2]

The Respondent contends that by disciplining Overton it did not restrain or coerce him in the exercise of his rights under Section 7 of the Act because Overton acted alone and not concertedly. The Board has consistently found Section 8(b)(1)(A) violated, however, where a union disciplines an employee for reporting a work-rule infraction by another employee, if the disciplined employee is under a duty to make such reports, notwithstanding that the disciplined employee acted alone. See *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997); *Carpenters District Council of San Diego (Hopeman Bros.)*, 272 NLRB 584 (1984); *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977), enfd. mem. 588 F.2d 838 (7th Cir. 1978). We find these precedents controlling.[3]

We reject as untimely the Respondent's argument, raised for the first time on exceptions, that Overton exceeded his collective-bargaining agreement obligations by reporting both the safety incident and the person responsible for it. We find that by failing to make this argument to the judge below, the Respondent has waived it. See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 195 (2006).

Finally, for the reasons stated by the judge, we reject the Respondent's contention that it disciplined Overton for "abusive" conduct toward fellow Operating Engineers, not for reporting a safety violation.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Operating Engineers, Local 513, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. April 19, 2010

Wilma B. Liebman,	Chairman
Peter C. Schaumber,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] On September 4, 2009, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent Union filed exceptions and a supporting brief, the General Counsel and the Charging Party Employer filed answering briefs, and the Respondent filed a reply brief.

[2] The judge's proposed notice has been modified to conform to the Board's standard remedial language. *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB 769, 770–771 (2003).

[3] Accord. *Teamsters Local 896 (Anheuser-Busch)*, supra (finding unlawful union's threat to discipline employees who complied with contractual duty to report fellow employees' safety violations where, inter alia, threat contravened Act's basic policy of promoting collective bargaining). We do not rely on the judge's conclusion that an employee who complies with an employer's rule to report co-employee misconduct is deemed to engage in Sec. 7 activity because that employee has refrained from joining fellow employees in ignoring an outstanding order. See *Teamsters Local 439 (University of the Pacific)*, supra, 324 NLRB at 1096 fn. 1 (omitting the judge's "refraining from" analysis from the 8(b)(1)(A) rationale).

[4] We correct two errors in the judge's characterization of precedent. The judge stated that the Board found concerted activity in *Teamsters Local 439 (University of the Pacific)*, supra, and *Chemical Workers Local 604 (Essex International)*, supra. The Board did not so find in either case.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Federal law provides that labor organizations may set their own internal rules regarding acquisition and retention of union membership and governance of their internal affairs, including the imposition of internal discipline on members. Such procedures, however, may not be improperly used to affect the union members' employment relationship.

We represent certain employees of Ozark Constructors, LLC (Ozark), and have entered into collective-bargaining agreements or contracts with Ozark concerning those employees. Our current contract incorporates by reference Ozark's safety rules. Those safety rules provide that covered employees have the responsibility to report to management any safety "accidents/incidents." Thus, making such reports is part of covered employees' contractual and work duties.

Since our members covered by this contract have the obligation to report to management any safety accidents/incidents, and since this obligation may include the responsibility to report on fellow union members, we give our members, all of whom have this responsibility, the following assurances.

WE WILL NOT impose a fine on any employee because he or she reports another employee-member to his or her employer for safety rule infractions, at a time when doing so is part of the work duties of the employee who makes the report.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above, which are guaranteed you by Federal labor law.

WE WILL rescind in full the fine levied against Mark Overton on or about January 20, 2009.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the internal union proceedings against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and WE WILL, within 3 days thereafter, notify Overton in writing that this has been done and that we will not use this matter against him in any way.

WE WILL, within 14 days from the date of the Board's Order, request that the International Union of Operating Engineers purge its records of the proceedings brought against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and WE WILL concurrently furnish Overton with a copy of this request.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 513, AFL–CIO

Rotimi Solanke, Esq., for the General Counsel.
Jeffrey E. Hartnett, Esq. and James F. Faul, Esq. (Bartley Goffstein, LLC), of St. Louis, Missouri, for the Respondent.
Russell Riggan, Esq. (Lewis, Rice & Fingersh, LLC), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in St. Louis, Missouri, on May 18, 2009. The charge was filed January 21, 2009, and the amended charge was filed March 25, 2009. The complaint issued March 31, 2009. It alleges that the Respondent, International Union of Operating Engineers, Local 513, AFL–CIO, violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by filing an internal union charge against employee Mark Overton, and fining him $2500 because, in compliance with the collective-bargaining agreement and safety policies in effect, he reported a safety violation by an employee to the employer and thereby engaged in protected concerted activity within Section 7 of the Act.[1]

At the conclusion of the General Counsel's case-in-chief, the Union moved to dismiss the complaint on the basis that no prima facie case was presented. The Union presented no evidence in its defense.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party, a Missouri limited liability company with an office and place of business in St. Louis, Missouri, has been engaged in the construction industry with a construction

[1] All dates are from November 2008 to April 2009 unless otherwise indicated.

jobsite at the Taum Sauk upper reservoir dam in Missouri. During the 12-month period ending February, the Charging Party, in conducting its business operations at the Taum Sauk upper reservoir dam jobsite, purchased and received goods valued in excess of $50,000 directly from points outside the State of Missouri. The Union admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act and that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Taum Sauk Reservoir Project

Fred Weber, Inc. (FWI), of St. Louis, Missouri, is a union-affiliated heavy and highway construction company. ASI Constructors, Inc. (ASI), a nonunion dam construction company from Pueblo, Colorado. In 2007, FWI and ASI entered into a joint venture (the Company) for the purpose of reconstructing the Taum Sauk Reservoir in southeast Missouri (the project).

The Taum Sauk Reservoir is a hydroelectric facility containing five operating plants and a large crushing plant.[2] The Company serves as the project's general contractor. The project has, at times, employed up to 700 people. Roger Gagliano, of FWI, and Lee Schermerhorn, of ASI, serve as the project's construction managers. Gagliano generally handles the personnel and collective-bargaining issues, while Schermerhorn oversees the day-to-day construction operations. Andy Westbrook and Kevin Delo serve as the project's two general superintendents. The project's general superintendents, safety manager, and engineering manager report to Gagliano and Schermerhorn. Leadmen, also known as working foremen, are embedded with work crews on the project.[3]

The equipment at issue in this controversy involves the telebelt, a heavy piece of construction equipment operated by the project's operating engineers. An attached conveyer belt, spanning approximately 130 feet, transfers materials such as roller-compacted concrete, coarse aggregate, and other materials for the various parts of the project site. The telebelt sits on a truck and is stabilized by four steel legs, called outriggers. The outriggers have to be fully extended on level ground to prevent the telebelt from overturning.[4]

B. The National Maintenance Agreement

Since 1971, some form of a National Maintenance Agreement (NMA) has been utilized by labor organizations, management, and owners on construction projects employing members of the International Union of Operating Engineers. Effective April 2, 2007, the Union, the Company and the project's owners adopted the "Revised 1996" version of the NMA as the general collective-bargaining agreement applicable to the operating engineers on the project. The NMA incorporates by reference the local collective-bargaining agreement previously entered into between FWI and the Union for a 5-year term commencing May 1, 2004. The local collective-bargaining agreement covers work at various Missouri locations, including the project site, and automatically renews for additional 1-year periods until such time as either party provides 60-days' prior notice of termination. Accordingly, union members working on the project are governed by the NMA and local collective-bargaining agreement.[5]

The Union, one of four labor organizations on the project, represents the approximately 200 operating engineers employed there. Approximately 6 of those operating engineers are members of operating engineers' locals specializing in dam construction in other parts of the country and work on the project pursuant a traveler permit. The issue of "travelers" has been a sore topic with the Union, given the fact that travelers are being hired for the project in lieu of unemployed union members.[6]

The NMA recognizes the applicability of the Company's safety rules and regulations at article XVII: "The employees covered by the terms of this Agreement shall at all times while in the employ of the Employer be bound by the safety rules and regulations as established by the Owner, the Employer, this agreement, or by applicable Safety Laws."[7]

C. The Company's Safety Regulations

The Company's Safety Orientation check-off sheet (safety orientation) contains a comprehensive list of the safety topics discussed during employee orientation. The safety orientation includes, in pertinent part, the following employee responsibilities:

> 32. Employees MUST report all accidents/incidents to their supervisor immediately, no matter how slight. This allows us to provide prompt care, and investigate & eliminate hazards that may cause others to be injured.
>
> 35. Employees are expected to learn and comply with all project safety rules, regulations and policies applicable to their specific work tasks, as a condition of employment.

The last page of the safety orientation consists of a signed acknowledgement by the employee that he or she participated in the safety orientation during which all of the safety topics were discussed, fully understands all of the Company's safety policies, rules and regulations, and knows where to find the safety manual. Every operating engineer on the project signed the safety orientation acknowledgment sheet. In addition, the Company holds daily meetings onsite to discuss various safety issues. The failure to report a safety violation subjects an employee to discipline.[8]

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[2] GC Exh. 3.

[3] I found the General Counsel's witnesses—Gagliano, Overton, and Westbrook—to be credible witnesses and nearly all of their testimony went unrefuted. (Tr. 31–38, 40–42, 47–52, 62, 101–102.)

[4] The testimony of Gagliano and Overton regarding the proper and safe set up of the telebelt was not disputed. (GC Exhs. 7(a), 7(b), and 10; Tr. 45–46, 58–60, 106–108, 125.)

[5] GC Exhs. 4–5.

[6] That the Company was able to employ travelers given the negative views of the Union indicates that otherwise eligible, but unemployed, union members were not previously trained to operate a telebelt. See art. XIX of the NMA and sec. 3.03(C) of the local collective-bargaining agreement. (GC Exh. 4 at p. 11; GC Exh. 5 at p.15; Tr. 35–40, 67–68, 162.)

[7] GC Exh. 4 at p. 11.

[8] The safety orientation and the NMA both refer to the Company's safety rules and regulations, but no written proof of such rules or a

D. Overton is Issued a Traveler Permit

Mark Overton, a Colorado resident, has worked as an operating engineer for ASI on dam construction projects in several states. He is a member of the International Union of Operating Engineers, Local 953, AFL–CIO (Local 953), based in Albuquerque, New Mexico. In December 2007, ASI hired Overton to work on the project as a telebelt operator and trainer. As a telebelt operator, Overton receives directives from supervisors on the placement of telebelts on the project site, coordinates the placement and operation of the project's four telebelts, and trains others in the operation of the telebelts.

Upon arriving at the project, Overton applied for union membership by attempting to transfer his membership from Local 953. Given his position on the employment of nonbargaining unit members on the project, Stephen Gunter, the Union's business representative, denied Overton's application on the ground that the hall was "overfull," but issued him a traveler permit to work as an operating engineer at the project site pursuant to the terms of the local collective-bargaining agreement. As such, Overton is paid by Ozark as an hourly employee in accordance with the pay scale set forth in the local collective-bargaining agreement.[9]

E. Overton Becomes a Working Foreman

In September 2008, Overton was promoted to the job classification of a working foreman. In that capacity, he leads a crew of about nine operating engineers and laborers who work with telebelts and pump trucks. Although he has training duties and reports directly to the superintendents, Andy Westbrook and Kevin Delo, Overton does not have supervisory functions or responsibilities, as he does not have the authority to hire, fire, or discipline employees. As such, he remained part of the collective-bargaining unit. In fact, working foreman have filed grievances against the Company and have been represented by the Union in that regard.[10]

Prior to November 20, Overton's performance as a working foreman had been relatively uneventful. There were two instances during the summer of 2008 when Pat Kammer, a shop steward and foreman, complained to Overton that laborers were performing the bargaining unit work of operating engineers. However, neither Kammer, nor anyone else, ever complained to the Company about Overton's treatment of bargaining unit members.[11] Gunter would have had an opportunity to express such concerns during his weekly meetings with Gagliano and Westbrook, as well as the monthly tripartite meetings with them and the project's owners to discuss work, safety, and personnel matters. Yet, he never did at any time prior to March 2009.[12] On the other hand, Overton's status on the project as a traveler has evoked criticism by Gunter and other union representatives and members.[13]

F. The Allison Safety Violation

As he arrived at the project site during the morning of November 20, Overton observed a telebelt with an outrigger that was not fully extended. As a shortened outrigger could cause the telebelt to become unstable and overturn, resulting in serious personal injury or property damage, this condition constituted a safety violation.[14]

Being required to report the incident, as explained during safety orientation, Overton immediately went to the office of Jim Andrews, the Company's safety officer. Overton and Andrews then proceeded to the telebelt and measured the outriggers. They found that the fully extended outrigger measured 64 inches, while the shortened outrigger measured only 30 inches. After confirming the safety violation, Overton sought to determine who operated that telebelt. Overton called Steve Newton, a union steward, who reported that Ryan Allison, an operating engineer and union member, was the last one to operate the telebelt. Overton also spoke with Dwayne Wehner, another operating engineer and union member, who reported that he helped Allison set up the telebelt that night.[15]

On the same day, Overton reported the safety violation to Westbrook. Westbrook then directed Overton to prepare an incident report, as employees were instructed to do during safety orientation. The failure to report the incident would have subjected Overton to discipline.[16]

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disciplinary policy were offered in evidence. Nevertheless, in the absence of testimony or evidence by the Union to refute the testimony of the General Counsel's witnesses that the Company had such rules in place, I find that they existed. (GC Exhs. 6, 11; Tr. 42–44, 60–61, 108–109, 151–154.)

[9] Overton's testimony regarding his background and communication with the Union was also credible and unrefuted. (Tr. 98–122.)

[10] I considered, but did not end up giving much weight to Gagliano's reference to Overton as a "working supervisor" in his protestation letter to the Union, dated December 11. Consistent with an evaluation as to an employee's potential supervisory status in these cases, I considered all of the actual functions served by Overton on the project. (GC Exh. 9; Tr. 41–42, 47–48, 52, 74–76, 97, 100–102, 116, 158–159.)

[11] Westbrook credibly testified that, except for one comment about how Overton was leading his crew, he never received a complaint about Overton's treatment of bargaining unit members. While the General Counsel offered two exhibits containing vague statements about Overton's allegedly abusive behavior, the record contains no specific examples of any abusive conduct by Overton. (GC Exhs. 8B and 17; Tr. 63–64, 157, 165–166.) In fact, it was not until March 2009, well after the unfair labor practice charges were filed, that Gunter complained at a tripartite meeting about the alleged mistreatment of bargaining unit members by Overton. (Tr. 66–67, 155–157.)

[12] Despite no mention of problems with Overton, Gunter has filed several grievances and raised other issues with Gagliano. (Tr. 61–66).

[13] Although it was conceded that Overton had a "gruff" nature, the lack of union testimony leaves me to rely solely on the testimony of Overton and Westbrook that there were no complaints by the Union or other employees of abusive conduct prior to the filing of the Company's unfair labor practice charge. (Tr. 122–123, 142, 144, 156–157; GC Exh. 10.)

[14] Overton's description of the positioning of the outriggers was not disputed. (Tr. 110–111,147, 152; GC Exhs. 10, 14.)

[15] Wehner's role in helping Allison set up the telebelt was never clarified. However, coupled with the information he received from both Wehner and Newton, I find that Overton reasonably concluded that Allison was primarily responsible for the telebelt setup. (Tr. 60, 111–116.).

[16] The testimony of Overton and Westbrook that any employee would have been required to report the safety violation was credible, corroborated by item 32 of the safety orientation and not refuted by any other evidence. (Tr. 60–61, 115–116, 151–152.)

After confirming the incident with the safety department, Westbrook issued a letter, dated November 20, suspending Allison for 3 days on the following ground:

> During the set up of the equipment, you failed to follow established safety instructions by not having the outriggers of the equipment fully extended. It is the responsibility of each operator to operate his or her equipment in a safe and conscientious manner. Your failure to follow established protocols could have resulted in serious injury to one of your coworkers as well as extensive damage to the equipment.

The suspension letter was copied to Gagliano and Kemmer, and faxed to Gunter on November 21. Allison did not grieve the discipline and served a 3-day suspension from November 21 to 23.

G. The Union Retaliates Against Overton

Upon receiving the suspension letter on November 21, Kemmer faxed a copy of it to Gunter. The next business day, November 24, Gunter filed internal union charges against Overton for "violation of Article XXI, Section 21:01, subdivision (F) Gross disloyalty or conduct unbecoming a member". The charge further stated, in pertinent part:

> Mark Overton wrote up Ryan Alliso for failing to have an outrigger fully extended on the telebelt, when he had already been informed that Duane Wehner was the operator who had failed to fully extend the outrigger.
>
> The above isn't the first incident of Mark Overton being adversarial with Local 513 operators. There has been an ongoing problem with him screaming at and speaking in an abusive manner to his brother operators, which he has been warned about repeatedly. Also, numerous operators have run the telebelt for an extended period of time and he eventually finds a way to get rid of them.
>
> It appears that Mark Overton has been dissatisfied with working in Local 513's jurisdiction ever since he was informed, some months ago, that he wouldn't ne allowed to bring his buddies in from other states to run the telebelts, but instead he would have to train Local 513 operators on them. This is no way justifies Mark Overton's misconduct and behavior.[17]

By letter dated the same day, Dan McNamee, the Union's recording secretary, provided Overton with a copy of the union charges and informed Overton of his right to respond in writing to the charges within 3 weeks of receipt of the letter. McNamee's letter further informed Overton of the Union's procedural process:

> You will be required to appear before the Executive Board, at a later date, at which time a pre-trial hearing will be held to determine if the charges have merit, and in hopes that the charges may be resolved at this pre-trial hearing.
>
> You will be notified of the time and place of when the next Executive Board meeting will be held.
>
> Failure to appear at this pre-trial hearing or to notify us in time of a reason why cannot appear on the scheduled date may convince the Board of your guilt, and will obligate the Board to forward the charges to the membership for consideration and a vote as to your guilt [or] innocence of the charges.[18]

Overton provided Gagliano with a copy of the Union's charges. Gagliano responded with a letter to McNamee, dated December 11, with copies to Dick Dickens, the Union's president, and Gunter. In his letter, Gagliano disputed the charges by questioning why the Union did not comply with the NMA's dispute resolution procedures or file a grievance challenging the discipline. He also noted that the Union made no previous mention of abusive treatment of its members by Overton at any project meetings, suggested that the union charges were an attempt to intimidate the working foremen on the project, and demanded the Union withdraw the charges.[19]

The Union did not respond to Gagliano's letter. Instead, McNamee sent Overton a letter, dated January 6, 2009, informing him that the Union would proceed to the next step at its January 20 executive board meeting:

> You are requested to appear before this meeting at which time the charges that have been filed against you will be reviewed and a pretrial held, so that we may determine if the charge has merit to present to the entire membership at the next regular meeting.
>
> Failure to appear before the meeting may convince the boar of your guilt, and will then recommend that the charges be presented to the entire membership to vote and decide you're your guilt or innocence.[20]

Overton did not attend the Union's executive board meeting on January 20. The minutes reflect that "[m]erit was found in charges and a fine of $2500 was recommended if he wishes to not go to trial by the membership."[21] However, McNamee's letter on behalf of the Union, dated January 26, indicated, in pertinent part, that it was more than a recommendation:

> This letter is to inform you that merit was found in the charges of November 24, 2008 and a fine of $2,500.00 was levied against you.
>
> If you wish not to accept this fine, you also have a right to trial at the next Local Union Meeting. Please notify me immediately so I know whether to set up a trial at the next Local Meeting.
>
> It is also my duty to inform you that you have a right to file an appeal with the General Executive Board in

[17] GC Exh. 8B.

[18] Again, while Overton learned that Wehner had a role in helping Allison set up the telebelt, Allison did not grieve his suspension and, as such, took full responsibility for the safety violation. Given that documentary background, Overton's credible testimony and the lack of any testimony by Allison or Wehner, I find that Overton reasonably believed that Allison either had primary or sole responsibility for setting up the telebelt. (GC Exh. 8A; Tr. 116–117.)

[19] GC Exh. 9.

[20] GC Exh. 12.

[21] GC Exh. 16.

> Washington, D.C., but before you may appeal, you must first have paid the fine, in accordance with Article XXIV, Subdivision 7, Section (f) of the International Constitution.[22]

On January 21, 2009, the Company responded by filing an unfair labor practice charge against the Union. The Company's amended charge (GC Exh. 1(d)) alleged the Union

> [R]estrained and coerced employees of Ozark Constructors, LLC in the exercise of rights guaranteed to them in Section 7 of the Act, as amended by filing internal union charges and assessing a $2,500 fine against employee Mark R. Overton in retaliation for reporting to his employer a violation of safety standards.[23]

In its March 2 position statement responding the charges, the Union insisted that its internal charges against Overton were not related to the Allison discipline. It states, in pertinent part:

> [T]he charges against Mr. Overton were based upon his abusive treatment of fellow members. The Board refused to consider matters relating to safety. Overton was found guilty of verbal abuse of fellow members, conduct of which the company had been made aware on numerous occasions by several individuals.
>
> As to Ryan Allison, Overton was told by another member at the time of the incident that it was that member, not Allison, who committed the purported safety violation. Overton told the member that he was going to charge the violation to Allison anyway. This was simply another incident of Mr. Overton being abusive to fellow members. His conduct toward Allison is not "employment" related, but an abuse of a fellow member.[24]

Legal Analysis and Discussion

Section 8(b)(1)(A) of the Act recognizes the right of a labor organization to "prescribe its own rules with respect to the acquisition or retention of membership therein." In that regard, the Board has consistently held that a union has a legitimate interest in promoting harmony within its ranks and may lawfully seek to protect this interest by imposing internal union discipline pursuant to a properly adopted rule prohibiting members from reporting misconduct by fellow members to their employer. *Communications Workers Local 5795 (Western Electric Co.)*, 192 NLRB 556 (1971); *Letter Carriers Local 3825*, 333 NLRB 343, 345 fn. 4 (2001); *Letter Carriers (Postal Service)*, 316 NLRB 1294, 1303–1304 (1995); *Electrical Workers Local 1547 (Redi Electric)*, 300 NLRB 604, 607 (1990).

Such a right is limited, however, to the extent that the discipline affects a member's employment status. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 195 (1967). In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Supreme Court subsequently refined that test to a determination as to whether the union discipline or rule: (1) is geared to a legitimate union interest; (2) impairs no policy imbedded in the labor laws; and (3) is reasonably enforced against a union member who is free to leave the union. In both cases, employees had been fined by a union when they engaged in concerted activities.

More recently, in *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418–1419 (2000), the Board articulated its latest approach for reviewing the propriety of union discipline under Section 8(b)(1)(A):

> [W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

In determining whether an internal union rule is geared to a legitimate union interest or affects a member's employment status, the Board must determine whether enforcement of the rule has an external effect and, thus, tends to restrain or coerce employees in the exercise of their Section 7 rights. Circumstances of union discipline that have an unlawful external effect fall into two areas. The first includes instances where union members make statements pursuant to the grievance process. *Cement Workers D-357 (Southwestern Portland Cement)*, 288 NLRB 1156 (1988). The other instance, applicable here, is where an employee is required by his employer to report certain information that contravenes the interests of the union or its members. *Oil Workers Local 7-103 (DAP, Inc.)*, 269 NLRB 129, 130–131 (1984). The reason that union discipline would unlawfully coerce or restrain in the latter instance is because it would affect the union member's employment status. See *Scofield v. NLRB*, supra at 428; *NLRB v. Allis-Chalmers Mfg. Co.*, supra at 195. Accordingly, the Board has typically held that a union commits an unfair labor practice if it disciplines a member who reports a work rule infraction by a co-employee to his employer when that member is required to do so by his employer. See *Shipbuilders Local 9 (Todd Pacific)*, 279 NLRB 617 (1986); *Carpenters (Hopeman Bros.)*, 272 NLRB 584 (1984); *Chemical Workers Local 604 (Essex International)*, 233 NLRB 1239 (1977), enfd. 588 F.2d 838 (7th Cir. 1978).

It is undisputed that Overton reported a safety violation by another employee-member, which he was required to do pursuant to the Company's safety rules and the NMA that incorporated them as part of employees' terms and conditions of employment. Overton's failure to report the incident could have resulted in his discipline and, thus, affected the employer relationship. Moreover, it is reasonable to expect that Overton's failure to act on a safety violation, which could have resulted in serious personal injury or death, would have contravened the NMA, as well as numerous Federal and State labor laws involving worker safety. Lastly, Overton was faced with the classic Hobson's choice, since he was required by the NMA to be a member of the Union—albeit under the status of a permitted "traveler"—and, thus, was not reasonably free to simply "leave" the Union and remain employed on the project.

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[22] GC Exh. 13; Tr. 119–121.

[23] GC Exh. 1(a), (d).

[24] The Union essentially reiterated this position at trial. (GC Exh. 17; Tr. 89.)

Overton's Section 7 Activities

The Union contends that Overton was not engaged in concerted activity because he acted alone in reporting Allison's safety violation. The Union's strict construction of the statute is certainly consistent with the Supreme Court's decision in *Meyers Industries*, 268 NLRB 493, 497 (1984), which clarified that, generally, "concerted" activity consisted of an employee's activity engaged with or on the authority of other employees, and not solely by and on behalf of the employee. Such interpretation, however, does not reflect the evolution of court and Board decisions providing Section 8(b)(1)(A) with a much broader scope than those analyzed under Section 8(a)(1). See *Elevator Constructors (Otis Elevator Co.)*, 349 NLRB 583, 596–597 (2007) (employee-member's conduct in following supervisor's direction to stand aside while subcontractor's employee performed bargaining unit work considered Sec. 7 activity); *Teamsters Local 439 (University of the Pacific)*, 324 NLRB 1096 (1997), enfd. 175 F.3d 1173 (9th Cir. 1999) (newly appointed leadman-member engaged in concerted activity by reporting, as required, nonperformance of fellow union member); *Chemical Workers Local 604 (Essex International)*, above; employee-member engaged in concerted activity by reporting, as required, fellow member's work rule violation). *Communications Workers Local 13000 (Verizon Communications)*, 340 NLRB 18 (2003) (potential disobedience by an employee-member of union rule requiring members to refuse "mandatory" overtime).

An employee who complies with an employer's rule to report coemployee misconduct is deemed to engage in concerted activity within the context of Section 8(b)(1)(A) because Section 7 also gives employees "the right to refrain from any or all such activities" by refusing to join with other employees who wished to ignore the employer's outstanding orders. Even where nonsupervisory leadmen act alone, the Board has broadly interpreted Section 8(b)(1)(A) if compliance with the Union's actions or mandate would affected the employee-member's employment status. See *Teamsters Local 439*, supra at fn. 1, and *Carpenters (Hopeman Bros.)*, above. Under the circumstances, Overton was engaged in Section 7 activity when he reported, as required, Allison's safety violation.

Overton's Discipline

The Union contends that the General Counsel failed to establish a prima facie case by offering testimony that a fine was actually imposed on Overton. It also argues that, without such testimony, the documentary evidence merely establishes that a fine was merely recommended and not imposed. This defense is unfounded in two respects.

First, the actual imposition of union discipline is not required in order to find a violation of Section 8(b)(1)(A). A union's mere threat of internal discipline violates an employee-member's Section 7 rights where: (1) it reasonably tends to restrain or coerce members from exercising their Section 7 rights to complain concertedly to management about safety violations, including those committed by a fellow member; or (2) reasonably would compel union members to act in contravention of a collective-bargaining agreement. See *Anheuser-Busch, Inc.*, 339 NLRB 769 (2003); *Stationary Engineers Local 39 (San Jose Hospital)*, 240 NLRB 1122 (1979). Clearly, the internal Union charges served on Overton conveyed the message that any he needed to refrain from exercising his Section 7 rights in the future by not reporting, as required, coworker safety violations. Moreover, by failing or refusing to report the safety violation in contravention of the Company's safety rules, he would have been violating the provisions of the applicable labor agreements.

In any event, notwithstanding counsel's contentions, the record evidence demonstrates that Overton was tried and issued a fine on January 20 because he reported a safety violation by another union member. While I indeed sustained a form objection when Overton was asked about the fine,[25] the undisputed record evidence reveals that, on January 20, the Union's executive board pronounced that "merit was found in the charges and a fine of $2500 was levied against [Overton]."[26] It is true that the fine was merely a recommendation, but the testimony of Overton establishes that he took no further action to appeal the action. By its terms, the letter clearly indicated that the "levied" fine certainly did not go away.

The Position Statement

The General Counsel's offered the position statement as evidence of the Union's reason for engaging in conduct violative of Section 8(b)(1)(A). The Union objected that it was irrelevant and merely sets forth the Union's generalized statement of position. I overruled the objection and received the position statement in evidence in accordance with longstanding Board law. The Union, having lost that argument, advances the novel argument that, based upon its position statement, "standing without comment, and supported by the record in the General Counsel's case, the General Counsel has failed to carry its burden. The charge must be dismissed."[27]

Position statements are frequently received as evidence in Board cases as admissions against interest if those assertions conflict with the party's current litigation position or the testimony of the party's witness. *Union-Tribune Publishing Co.*, 353 NLRB No. 2 slip op. at 13 (2008); *Jerry Ryce Builders*, 352 NLRB 1262, 1264 fn. 6 (2008); *Evergreen America Corp.*, 348 NLRB 178, 187–188 (2006); *Rogers Corp.*, 344 NLRB 504 (2005); *United Scrap Metal, Inc.*, 344 NLRB 467, 468 (2005); *Smucker Co.*, 341 NLRB 35, 40 (2004); *Tarmac America, Inc.*, 342 NLRB 1049, 1049 fn. 2 (2004); *Navigator Communications Systems*, 331 NLRB 1056, 1058 fn 10 (2000); *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998).

The fact that the Union did not call any witnesses, while the position statement was offered on the General Counsel's case, presents an interesting issue. The position statement alleges, in essence, that the Union brought charges against Overton because of his abusive conduct toward fellow union members and that the safety violation report was the last straw in that sequence of events. The General Counsel offers as relevant evidence only that portion of the position statement that asserts that the Union charges Overton because he reported Allison.

[25] Tr. 121
[26] GC Exh. 16
[27] U. Br. at 17

The Union, on the other hand, suggests that the portion of the position statement alleging abusive behavior by Overton is somehow fatal to the General Counsel's prima facie case.

I tend to agree with the General Counsel on this point. The position statement contained an admission by the Union that, at least in part, explains that its motivation for charging Overton was due to his reporting Allison's safety violation. Such an allegation corroborates the testimony of the General Counsel's witnesses. While it also contains allegations that the General Counsel denies, the fact is that the General Counsel did not offer the document for that purpose. The position statement thus contains a mixed bag of allegations—some favorable to the General Counsel and some not. Contrary to the Union's assertions, however, the portions of the position statement that are unfavorable to the General Counsel's case did not go undenied, uncontradicted, or unimpeached. The record contains credible and unrefuted testimony by Overton, Gagliano, and Westbrook that there were no complaints by the Union or other employee-members about abusive treatment by Overton. Accordingly, I disagree with the Union's contention that its position statement defeats the General Counsel's prima facie case. Under the circumstances, the Company's actions constituted a violation of Section 8(b)(1)(A).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Union was the exclusive bargaining representative within the meaning of Section 9(a) of the Act of the Company's employees, including the operating engineers.

4. By the fine levied against him on or about January 20, 2009, the Union restrained and coerced Mark Overton and other similarly situated employees within the meaning of Section 8(b)(1)(A) of the Act.

REMEDY

Having found the Union engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the purposes of the Act. Thus, my recommended Order requires that the Union rescind the fine it levied against Mark Overton on January 20, 2009. Moreover, the Union is required to remove from its records any reference to the internal proceedings against Overton which are the subject of this case and notify Overton in writing that this action has been taken and that this matter will not be considered in any future proceedings. The Union is also required to request that the International Union of Operating Engineers purge its records of this matter and furnish Overton with a copy of that request. Finally, the Union is required to post official notices to members concerning this matter and to provide signed copies of that notice to the Company for posting if it so desires.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Union, International Union of Operating Engineers, Local 513, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Imposing a fine on any employee because he or she reports another employee-member to his or her employer for work rule infractions, at a time when it is part of the work duties of the employee who makes the report to do so.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind in full the fine levied against Mark Overton on or about January 20, 2009.

(b) Within 14 days from the date of this Order, remove from its files any and all references to the internal union proceedings against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and within 3 days thereafter notify Overton in writing that it has done so and that it will not use this matter against him in any way.

(c) Within 14 days from the date of this Order, request that the International Union of Operating Engineers purge its records of the proceedings brought against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and concurrently furnish Overton with a copy of this request.

(d) Within 14 days after service by the Region, post at its office in St. Louis, Missouri, and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Union's authorized representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by the Company, if willing, at all places where its notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union has taken to comply.

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT impose a fine against an employee-member because he or she reports another employee-member to his or her employer for work rule infractions, at a time when the employee-member's work duties require such reports.

WE WILL fully rescind the fine levied against Mark Overton on or about January 20, 2009.

WE WILL, within 14 days from the date of this Order, remove from our files any, and ask the Company to remove from the Company's files, all references to the internal union proceedings against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and within 3 days thereafter notify the employee it has been done.

WE WILL, within 14 days from the date of this Order, request that the International Union of Operating Engineers purge its records of the proceedings brought against Mark Overton in connection with the fine levied against him on or about January 20, 2009, and WE WILL furnish Overton with a copy of this request.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 513, AFL–CIO

Mrs. MCMORRIS ROGERS. And I would like to ask, Ms. Rhinehart, if the AFL is examining any changes to protect whistleblowers within the union.

Ms. RHINEHART. Thanks for the question. I am not familiar with the case that you just mentioned, but I will take a look at it.

The stronger whistleblower protections in PAWA would apply to unions as employers just as they apply to private sector employers, and we fully support that.

Mrs. MCMORRIS ROGERS. Okay. And I yield back.

Chairwoman WOOLSEY. I was quite surprised that Mr. Chinn can sit here this morning and ask what motivates updating PAWA, why bringing section 11(c) into the 21st century, 11(c) of the OSH Act, is—what motivates us to do that, after hearing the Secretary and hearing the witnesses before you and knowing the stories of the family members sitting behind you. That just—I find that very hard to believe. So then the idea that—from that statement to during times of bad economic situations around the country, 10 percent unemployment—that we can't upgrade and fix what is so necessary to our workers and for our workers. So I would like to ask the members—the witnesses if they think there is a time and place when it is too—we can't afford to take care of our workers and we can't afford to update their worksites and our laws that protect them. Starting with you, Ms. Rhinehart.

Mr. JORGENSEN. May I speak for a second?

Chairwoman WOOLSEY. Oh, sure. Mr. Jorgensen.

Mr. JORGENSEN. Two points here. First of all, OSHA should be a police officer. And, you know, just for the record, I am on the minority side of the House when it comes to my political group.

Chairwoman WOOLSEY. Oh, gosh. Then we are not going to listen to you. Go ahead.

Mr. JORGENSEN. I think, you know, if a person comes forward and says something and he gets beat up for it, he is going to tell all his friends and nobody else is going to come forward. Bottom line.

Like I said, I took my—you know, when I was asked, was talked about coming here, I went to my employer, my current employer, which is Sunoco out of South Carolina. I explained what had happened to me, what was—what I knew of what the law was for and said, should I go? Because, you know—and mentioned, you know, I know it will be a good experience. And my manager said, you should go, not just because it is a good experience, because it is right.

Chairwoman WOOLSEY. Oh, thank you to that manager. Thank you for sharing that, Mr. Jorgensen.

Ms. Rhinehart.

Ms. RHINEHART. Thank you. Just a couple of comments.

One is, there is a desperate need to update and strengthen this law. And I just want to reinforce a point that has sort of come out in the course of this discussion but that really needs to be made clear, and that is what an outlier the whistleblower protections in the OSH Act are relative to really virtually any other law and the absence of a private right of action and ability of workers like Mr. Jorgensen to bring their case forward if the Secretary of Labor can't act. It is—the OSH Act is way out of the mainstream, and it is past time to bring it into the mainstream of other whistleblower laws. So thank you for your efforts to that end.

Chairwoman WOOLSEY. Okay. Thank you.

Dr. Monforton.

Ms. MONFORTON. As a professor of public health and someone who studies history, I mean, we have heard through the time of the OSHA law that there is, you know, you never have a perfect time to reduce injuries and illnesses. If you listen to the business community and you look at the difficult time that OSHA has had in regulating many, many hazards, you know, we would never get anything done if people were looking for the perfect time.

And I also would like to draw people's attention to the hearing yesterday in the Senate which focused also on worker health and safety. And it came through loud and clear that during the most difficult time, when our economy is in the tank, that is the exact time that workers are most at risk of being exploited, and that is when we need very strong whistleblower protection laws. And people will take risks if they are afraid of losing their job or they are laid off, and that is why we really need these strong whistleblower protections.

Chairman WOOLSEY. Thank you.

Mr. Morikawa—I am going to take the prerogative of the chair and let Ms. Ford and Jordan speak, also—would you like to respond to that?

Mr. MORIKAWA. Well, first of all, I think that PAWA is an act which has significant merit. There is no question that there are issues that have been raised, that have led everybody here to this meeting today. I think what we are discussing really are aspects of PAWA which we think just don't necessarily work in real practice, and what we have tried to inject into the discussion today is a real-life experience that places us in a somewhat unique position of actually agreeing with each other.

I am actually talking to Mr. Barab, who I have known for many years, and we have had differences in the past, but we certainly

have no disagreement here about the impact that certain aspects of this legislation can have in terms of taking an agency which is really faced with a difficult mission of trying to enforce laws for so many millions of workplaces in America with a very, very small staff. And, as a consequence of that, they are faced with a challenge of trying to decide which cases to pursue, how to pursue them and when to pursue them, issues of timing, resource deployment, et cetera. And in that respect we certainly respect and we give deference to the prosecutorial discretion that agencies such as OSHA and the Solicitor's Office need to have in order to enforce the laws that they have been charged to enforce. So, in that respect, they really are acting and should be acting as the representative of employees in these types of cases.

Chairman WOOLSEY. Okay. Thank you.

Ms. Ford.

Ms. FORD. Like Dr. Monforton said, I would have to agree, there is probably no time, the best time to fix to make safety. However, in saying that, I hope the employers know that it was the hard work of people like my uncle and my father who make these companies what they are today. They have the name, but it is the people that make it, and if it was not for them, they wouldn't be where they are.

Chairman WOOLSEY. Thank you very much.

Secretary Barab.

Mr. BARAB. Thank you.

I have been working in this field for close to 30 years, and one thing that is more and more obvious to me is that OSHA doesn't work and workplace health and safety doesn't work unless workers are actively involved, and the only way workers are going to be actively involved is if they do not fear retaliation. And that is not the situation now.

Now, I just want to mention one thing. It is true that OSHA only finds merit in 25 percent of these cases. That does not mean, however, and I certainly don't agree with the fact that OSHA thinks that the other 76 percent of these cases are frivolous. All this means is that these workers—nor does it mean that these workers didn't actually have a good-faith belief that there was a health and safety problem or that there was a health and safety problem. It simply means that, under the way the law is written now, they could not assemble the kind of evidence that they needed to prevail in the case. So, again, I totally reject that that figure means that these cases were frivolous.

And, secondly, just in terms of responding to Mr. Morikawa, I do understand, obviously, we all understand, that there are serious resource problems. And I will take your comments as an endorsement for increasing our resources. But I also want to say that just for that reason is why we need Protecting America's Worker's rights, why we need a private right of action and the other elements that are in the whistleblower provisions of this law. So this is—it has been 40 years now since this law was passed. There are some very clear, very obvious problems that are keeping workplaces from being as safe as they can be, and now it is high time to actually make those changes.

Chairwoman WOOLSEY. Okay. It appears I am really out of time.

Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you.

I just have a quick question, but, first, I wanted to say that I do know that most companies are very interested in keeping their workers safe; and I think that, you know, they do everything they can. I did work in factories through college, and I saw some pretty awful things, and I saw some pretty wonderful employers. I think that really reflects, you know, what the world is like; and that is why we have to have a strong agency for the few who would not follow the rules. But, mostly, I think that we have come a long way since I was in college, and I am happy to see that.

I do go to factories and I look very closely at so many markers that maybe other people wouldn't know to look for, and I appreciate that I had seen a tremendous improvement.

Having said that, Ms. Rhinehart, I felt I needed to give you an opportunity to respond to Mr. Chinn's comments at the end of my last 5 minutes. Because I agree with Mr. Barab about what those numbers really signify, but I wanted to give you a chance to talk about whether they are frivolous suits and exactly what is happening out there, in your opinion.

Ms. RHINEHART. Thank you.

Really, very little is known about the reasons why the cases were dismissed by OSHA, withdrawn by the complainant, not processed further through the system. In a good number of cases, I imagine the worker missed the statute of limitations, which is a problem that is addressed by the pending legislation to lengthen the exceedingly short statute of limitations that currently exists in the OSH Act.

If a worker was fired for filing an OSHA complaint and filed their whistleblower complaint on day 35 as opposed to day 30, that case would have been dismissed. It wouldn't have merit under the current law, but it doesn't mean that the worker wasn't wrongfully terminated. They just missed the statute of limitation. So that is just one example.

There are a lot of things that go into whether or not a case is withdrawn, dismissed, or doesn't proceed further through the system. So I think that you can't just assume that they they all didn't proceed because they were not meritorious or they were frivolous. There is just no evidence to support that.

And, as I said earlier on this point, workers don't bring these cases forward lightly. They know the consequences of coming forward and filing a claim with the government against their employer and what that could mean for them in their job and future jobs and so forth. They don't bring these claims forward lightly, which is all the more reason why we need a stronger law to protect them when they do come forward to raise these concerns. Thank you.

Ms. SHEA-PORTER. Thank you.

And, also, I would add that sometimes has an impact on them in their community, in their social life because of the role, if it is a very prominent role, that the business has in a community. So I would agree that, for the most part, they don't step forward lightly. It is a serious issue.

Thank you, and I yield back.

Chairwoman WOOLSEY. Well, in closing, I would like to thank this wonderful panel of witnesses. Every one of you participated absolutely to the degree that we were hoping. We have learned from you, and your testimony will make a difference. And thank you, families, again, for being here and loved ones and friends of those who have died at the workplace.

Today, as we said, is Workers Memorial Day, a day when we honor fallen workers and recommit ourselves to ensuring the safety and health of all workers. As our witnesses have testified, it has been 40 years since the OSH Act was amended and, well, passed in the first place and fully amended. In those 40 years, we have learned a lot about working and what needs to be changed; and PAWA will modernize the OSH Act, give workers and their families the protections they need to report unsafe and unhealthy practices and be involved in the process when an incident causes a fatality or a serious injury.

I am looking forward to our bill, PAWA, proceeding through the committee and the floor for a vote. It wouldn't have been possible without your input and without your interest, and I thank you all very much for that and thank you for coming.

As previously ordered, members have 14 days to submit additional materials for the hearing records. Any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 14 days.

Then I ask unanimous consent to include the following 14 items into the hearing. So, without objection, I would like to place the following letters into the record: 1, the discussion draft for Protecting America's Workers Act of March 9, 2010; 2, data on the Solicitor of Labor's disposition of 11(c) retalitaion cases from 1995 through 2009; 3, statistics and outcomes on whistleblower cases filed with OSHA for 2008; 4, OSHA's actions on 11(c) cases completed in fiscal year 2009; 5, DOL's letter to Neal Jorgensen dated April 7, 2005; 6, the ADM Miling Company informal settlement agreement; 7, an e-mail from OSHA to Ms. Ford; 8, the Kansas Supreme Court Case, Flenker v. Willamette Industries, Inc.; 9, the Missouri Court of Appeals case, Shawcross v. Pyro Products, Inc.; 10, the U.S. Court of Appeals case, Wood v. Department of Labor; 11, an Administrative Law Journal article by Eugene Fidell, titled Federal Protection of Private Sector Health and Safety Whistleblowers; 12, an Employee Rights and Employment Policy Journal by Jarrod Gonzalez titled, A Pot of Gold at the End of the Rainbow: An Economic Incentives Based Approach to OSHA Whistleblowing; 13, a GAO report titled Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency; and, finally, 14, Comparison of Anti-Retaliation Provisions in Other Laws, prepared by AFL–CIO; and 15, National Labor Relations Board case dated April 19 of 2010.

[The information follows:]

[DISCUSSION DRAFT]

[AS OF MARCH 9, 2010]

[Modifications to HR 2067, Protecting America's Workers Act]

111TH CONGRESS
2D SESSION

H. R. _____

To amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MS. WOOLSEY introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for certain violators, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protecting America's Workers Act".

SEC. 2. REFERENCES.

Except as otherwise expressly provided, wherever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

TITLE I—COVERAGE OF PUBLIC EMPLOYEES AND APPLICATION OF ACT

SEC. 101. COVERAGE OF PUBLIC EMPLOYEES.

(a) IN GENERAL.—Section 3(5) (29 U.S.C. 652(5)) is amended by striking "but does not include" and all that follows through the period at the end and inserting "including the United States, a State, or a political subdivision of a State.".

(b) CONSTRUCTION.—Nothing in this Act shall be construed to affect the application of section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667).

SEC. 102. APPLICATION OF ACT.

Section 4(b) (29 U.S.C. 653(b)(1)) is amended—

(1) by redesignating paragraphs (2), (3), and (4) as paragraphs (5), (6), and (7), respectively; and

(2) by striking paragraph (1) and inserting the following:

"(1) If a Federal agency has promulgated and is enforcing a standard or regulation affecting occupational safety or health of some or all of the employees within that agency's regulatory jurisdiction, and the Secretary determines that such a standard or regulation as promulgated and the manner in which the standard or

regulation is being enforced provides protection to those employees that is at least as effective as the protection provided to those employees by this Act and the Secretary's enforcement of this Act, the Secretary may publish a certification notice in the Federal Register. The notice shall set forth that determination and the reasons for the determination and certify that the Secretary has ceded jurisdiction to that Federal agency with respect to the specified standard or regulation affecting occupational safety or health. In determining whether to cede jurisdiction to a Federal agency, the Secretary shall seek to avoid duplication of, and conflicts between, health and safety requirements. Such certification shall remain in effect unless and until rescinded by the Secretary.

"(2) The Secretary shall, by regulation, establish procedures by which any person who may be adversely affected by a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1) may petition the Secretary to rescind a certification notice under paragraph (1). Upon receipt of such a petition, the Secretary shall investigate the matter involved and shall, within 90 days after receipt of the petition, publish a decision with respect to the petition in the Federal Register.

"(3) Any person who may be adversely affected by—

"(A) a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1); or

"(B) a decision of the Secretary denying a petition to rescind such a certification notice under paragraph (1),

may, not later than 60 days after such decision is published in the Federal Register, file a petition challenging such decision with the United States court of appeals for the circuit in which such person resides or such person has a principal place of business, for judicial review of such decision. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary's decision shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(4) Nothing in this Act shall apply to working conditions covered by the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.).".

TITLE II—INCREASING PROTECTIONS FOR WHISTLEBLOWERS

SEC. 201. EMPLOYEE ACTIONS.

Section 11(c)(1) (29 U.S.C. 660(c)(1)) is amended by inserting before the period at the end the following: ", including the reporting of any injury, illness, or unsafe condition to the employer, agent of the employer, safety and health committee involved, or employee safety and health representative involved".

SEC. 202. PROHIBITION OF DISCRIMINATION.

Section 11(c) (29 U.S.C. 660(c)) is amended by striking paragraph (2) and inserting the following:

"(2) No person shall discharge or in any manner discriminate against an employee for refusing to perform the employee's duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees. The circumstances causing the employee's apprehension of serious injury or serious impairment of health shall be of such a nature that a reasonable person, under the circumstances confronting the employee, would conclude that there is a bona fide danger of a serious injury, or serious impairment of health, resulting from the circumstances. In order to qualify for protection under this paragraph, the employee, when practicable, shall have sought from the employee's employer, and have been unable to obtain, a correction of the circumstances causing the refusal to perform the employee's duties.".

SEC. 203. PROCEDURE.

Section 11(c) (29 U.S.C. 660(c)) is amended by striking paragraph (3) and inserting the following:

"(3) COMPLAINT.—Any employee who believes that the employee has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) or (2) may seek relief for such violation by filing a complaint with the Secretary under paragraph (5).

"(4) STATUTE OF LIMITATIONS.—

"(A) IN GENERAL.—An employee may take the action permitted by paragraph (3)(A) not later than 180 days after the later of—

"(i) the date on which an alleged violation of paragraph (1) or (2) occurs; or

"(ii) the date on which the employee knows or should reasonably have known that such alleged violation occurred.

"(B) REPEAT VIOLATION.—Except in cases when the employee has been discharged, a violation of paragraph (1) or (2) shall be considered to have occurred on the last date an alleged repeat violation occurred.

"(5) INVESTIGATION.—

"(A) IN GENERAL.—An employee may, within the time period required under paragraph (4)(B), file a complaint with the Secretary alleging a violation of paragraph (1) or (2). If the complaint alleges a prima facie case, the Secretary shall conduct an investigation of the allegations in the complaint, which—

"(i) shall include—

"(I) interviewing the complainant;

"(II) providing the respondent an opportunity to—

"(aa) submit to the Secretary a written response to the complaint; and

"(bb) meet with the Secretary to present statements from witnesses or provide evidence; and

"(III) providing the complainant an opportunity to—

"(aa) receive any statements or evidence provided to the Secretary;

"(bb) meet with the Secretary; and

"(cc) rebut any statements or evidence; and

"(ii) may include issuing subpoenas for the purposes of such investigation.

"(B) DECISION.—Not later than 90 days after the filing of the complaint, the Secretary shall—

"(i) issue a decision on whether to order relief; and

"(ii) notify, in writing, the complainant and the respondent named in the complaint of such decision.

"(6) PRELIMINARY ORDER FOLLOWING INVESTIGATION.—If, after completion of an investigation under paragraph (5)(A), the Secretary finds reasonable cause to believe that a violation of paragraph (1) or (2) has occurred, the Secretary shall issue a preliminary order providing relief authorized under paragraph (14) at the same time the Secretary issues a decision under paragraph (5)(B). If a de novo hearing is not requested within the time period required under paragraph (7)(A)(i), such preliminary order shall be deemed a final order of the Secretary and is not subject to judicial review.

"(7) HEARING.—

"(A) REQUEST FOR HEARING.—

"(i) IN GENERAL.—A de novo hearing on the record before an administrative law judge may be requested—

"(I) by the complainant or respondent within 30 days after receiving notification of a decision or preliminary order for relief issued under paragraph (5)(B) or (6), respectively;

"(II) by the complainant within 30 days after the date the complaint is dismissed without investigation by the Secretary under paragraph (5)(A); or

"(III) by the complainant within 120 days after the date of filing the complaint, if the Secretary has not issued a decision under paragraph (5)(B).

"(ii) REINSTATEMENT ORDER.—The request for a hearing shall not operate to stay any preliminary reinstatement order issued under paragraph (6).

"(B) PROCEDURES.—

"(i) IN GENERAL.—A hearing requested under this paragraph shall be conducted expeditiously and in accordance with rules established by the Secretary for hearings conducted by administrative law judges.

"(ii) SUBPOENAS; PRODUCTION OF EVIDENCE.—In conducting any such hearing, the administrative law judge may issue subpoenas. The respondent or complainant may request the issuance of subpoenas that require the deposition of, or the attendance and testimony of, witnesses and the production of any evidence (including any books, papers, documents, or recordings) relating to the matter under consideration.

"(iii) DECISION.—The administrative law judge shall issue a decision not later than 90 days after the date on which a hearing was re-

quested under this paragraph and promptly notify, in writing, the parties and the Secretary of such decision, including the findings of fact and conclusions of law. If the administrative law judge finds that a violation of paragraph (1) or (2) has occurred, the judge shall issue an order for relief under paragraph (14). If review under paragraph (8) or (11) is not timely requested, such order shall be deemed a final order of the Secretary that is not subject to judicial review.

"(8) ADMINISTRATIVE APPEAL.—

"(A) IN GENERAL.—Not later than 30 days after the date of notification of a decision and order issued by an administrative law judge under paragraph (7), the complainant or respondent may file, with objections, an administrative appeal with the Secretary (or an administrative review body designated by the Secretary).

"(B) STANDARD OF REVIEW.—In reviewing the decision and order of the administrative law judge, the Secretary (or designated administrative review body) shall affirm the decision and order if it is determined that the factual findings set forth therein are supported by substantial evidence and the decision and order are made in accordance with applicable law.

"(C) DECISION.—If the Secretary grants the administrative appeal and finds that a violation of paragraph (1) or (2) has occurred, the Secretary shall issue, within 60 days of receipt of the administrative appeal, a final decision and order providing relief authorized under paragraph (14), and such decision and order shall constitute a final agency action.

"(9) SETTLEMENT IN THE ADMINISTRATIVE PROCESS.—

"(A) IN GENERAL.—At any time before issuance of a final order, an investigation or proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by—

"(i) the Secretary or an administrative law judge conducting a hearing under this subsection;

"(ii) the complainant; and

"(iii) the respondent.

"(B) PUBLIC POLICY CONSIDERATIONS.—The Secretary or an administrative law judge conducting a hearing under this subsection may not accept a settlement that contains conditions conflicting with the rights protected under this Act or that are contrary to public policy, including a restriction on a complainant's right to future employment with employers other than the specific employers named in a complaint.

"(10) INACTION BY THE SECRETARY OR ADMINISTRATIVE LAW JUDGE.—

"(A) IN GENERAL.—The complainant may bring a de novo action described in subparagraph (B) if—

"(i) an administrative law judge has not issued a decision and order within the 90-day time period required under paragraph (7)(B)(iii); or

"(ii) the Secretary has not issued a decision and order within the 60-day time period required under paragraph (8)(C).

"(B) DE NOVO ACTION.—Such de novo action may be brought at law or equity in the United States district court for the district where a violation of paragraph (1) or (2) allegedly occurred or where the complainant resided on the date of such alleged violation. The court shall have jurisdiction over such action without regard to the amount in controversy and to order appropriate relief under paragraph (14). Such action shall, at the request of either party to such action, be tried by the court with a jury.

"(11) JUDICIAL REVIEW.—

"(A) TIMELY APPEAL TO THE COURT OF APPEALS.—Any party adversely affected or aggrieved by a final decision and order issued under this subsection may obtain review of such decision and order in the United States Court of Appeals for the circuit where the violation, with respect to which such final decision and order was issued, allegedly occurred or where the complainant resided on the date of such alleged violation. To obtain such review, a party shall file a petition for review not later than 60 days after the final decision and order was issued. Such review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the final decision and order.

"(B) LIMITATION ON COLLATERAL ATTACK.—An order and decision with respect to which review may be obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

"(12) ENFORCEMENT OF ORDER.—If a respondent fails to comply with an order issued under this subsection, the Secretary or the complainant on whose

behalf the order was issued may file a civil action for enforcement in the United States district court for the district in which the violation was found to occur to enforce such order. If both the Secretary and the complainant file such action, the action of the Secretary shall take precedence. The district court shall have jurisdiction to grant all appropriate relief including, injunctive relief, compensatory or exemplary damages, and reasonable attorneys' fees and costs.

"(13) BURDENS OF PROOF.—

"(A) CRITERIA FOR DETERMINATION.—In adjudicating a complaint pursuant to this subsection, the Secretary or a court may determine that a violation of paragraph (1) or (2) has occurred only if the complainant demonstrates that any conduct described in paragraph (1) or (2) with respect to the complainant was a contributing factor in the adverse action alleged in the complaint.

"(B) PROHIBITION.—Notwithstanding subparagraph (A), a decision or order that is favorable to the complainant shall not be issued in any administrative or judicial action pursuant to this subsection if the respondent demonstrates by clear and convincing evidence that the respondent would have taken the same adverse action in the absence of such conduct.

"(14) RELIEF.—

"(A) ORDER FOR RELIEF.—If the Secretary or a court determines that a violation of paragraph (1) or (2) has occurred, the Secretary or court, respectively, shall have jurisdiction to order all appropriate relief, including injunctive relief, compensatory and exemplary damages, including—

"(i) affirmative action to abate the violation;

"(ii) reinstatement without loss of position or seniority, and restoration of the terms, rights, conditions, and privileges associated with the complainant's employment, including opportunities for promotions to positions with equivalent or better compensation for which the complainant is qualified;

"(iii) compensatory and consequential damages sufficient to make the complainant whole, (including back pay, prejudgment interest, and other damages); and

"(iv) expungement of all warnings, reprimands, or derogatory references that have been placed in paper or electronic records or databases of any type relating to the actions by the complainant that gave rise to the unfavorable personnel action, and, at the complainant's direction, transmission of a copy of the decision on the complaint to any person whom the complainant reasonably believes may have received such unfavorable information.

"(B) ATTORNEYS' FEES AND COSTS.—If the Secretary or a court grants an order for relief under subparagraph (A), the Secretary or court, respectively, shall assess, at the request of the employee against the employer—

"(i) reasonable attorneys' fees; and

"(ii) costs (including expert witness fees)) reasonably incurred, as determined by the Secretary or court respectively, in connection with bringing the complaint upon which the order was issued.

"(15) PROCEDURAL RIGHTS.—The rights and remedies provided for in this subsection may not be waived by any agreement, policy, form, or condition of employment, including by any pre-dispute arbitration agreement or collective bargaining agreement.

"(16) SAVINGS.—Nothing in this section shall be construed to diminish the rights, privileges, or remedies of any employee who exercises rights under any Federal or State law or common law, or under any collective bargaining agreement.

"(17) ELECTION OF VENUE.—

"(A) IN GENERAL.—An employee of an employer who is located in a State that has a State plan approved under section 18 may file a complaint alleging a violation of paragraph (1) or (2) by such employer with—

"(i) the Secretary under paragraph (5); or

"(ii) a State plan administrator in such State.

"(B) REFERRALS.—If—

"(i) the Secretary receives a complaint pursuant to subparagraph (A)(i), the Secretary shall not refer such complaint to a State plan administrator for resolution; or

"(ii) a State plan administrator receives a complaint pursuant to subparagraph (A)(ii), the State plan administrator shall not refer such complaint to the Secretary for resolution.".

SEC. 204. RELATION TO ENFORCEMENT.

Section 17(j) (29 U.S.C. 666(j)) is amended by inserting before the period the following: ", including the history of violations under section 11(c)".

TITLE III—INCREASING PENALTIES FOR VIOLATORS

SEC. 301. POSTING OF EMPLOYEE RIGHTS.

Section 8(c)(1) (29 U.S.C. 657(c)(1)) is amended by adding at the end the following new sentence: "Such regulations shall include provisions requiring employers to post for employees information on the protections afforded under section 11(c).".

SEC. 302. EMPLOYER REPORTING OF WORK-RELATED DEATHS AND HOSPITALIZATIONS AND PROHIBITION ON DISCOURAGING EMPLOYEE REPORTS OF INJURY OR ILLNESS.

Section 8(c)(2) (29 U.S.C. 657(c)(2)) is amended by adding at the end the following new sentences: "Such regulations shall require employers to promptly notify the Secretary of any work-related death or work-related injury or illness that results in the in-patient hospitalization of an employee for medical treatment. Such regulations shall also prohibit the employer from adopting or implementing policies or practices by the employer that have the effect of discouraging accurate recordkeeping and the reporting of work-related injuries or illnesses by any employee or in any manner discriminates or provides for adverse action against any employee for reporting a work-related injury or illness."

SEC. 303. NO LOSS OF EMPLOYEE PAY FOR INSPECTIONS.

Section 8(e) (29 U.S.C. 657(e)) is amended by inserting after the first sentence the following: "Time spent by an employee participating in or aiding any such inspection shall be deemed to be hours worked and no employee shall suffer any loss of wages, benefits, or other terms and conditions of employment for having participated in or aided any such inspection.".

SEC. 304. INVESTIGATIONS OF FATALITIES AND SIGNIFICANT INCIDENTS.

Section 8 (29 U.S.C. 657) is amended by adding at the end the following new subsection:

"(i) INVESTIGATION OF FATALITIES AND SERIOUS INCIDENTS.—

"(1) IN GENERAL.—The Secretary shall investigate any significant incident or an incident resulting in death that occurs in a place of employment.

"(2) APPROPRIATE MEASURES.—If a significant incident or an incident resulting in death occurs in a place of employment, the employer shall promptly notify the Secretary of the incident involved and shall take appropriate measures to prevent the destruction or alteration of any evidence that would assist in investigating the incident. The appropriate measures required by this paragraph do not prevent an employer from taking action on a worksite to prevent injury to employees or substantial damage to property or to avoid disruption of essential services necessary to public safety. If an employer takes such action, the employer shall notify the Secretary of the action in a timely fashion.

"(3) DEFINITIONS.—In this subsection:

"(A) INCIDENT RESULTING IN DEATH.—The term 'incident resulting in death' means an incident that results in the death of an employee.

"(B) SIGNIFICANT INCIDENT.—The term 'significant incident' means an incident that results in the in-patient hospitalization of 2 or more employees for medical treatment.".

SEC. 305. PROHIBITION ON UNCLASSIFIED CITATIONS.

Section 9 (29 U.S.C. 658) is amended by adding at the end the following:

"(d) No citation for a violation of this Act may be issued, modified, or settled under this section without a designation enumerated in section 17 with respect to such violation.".

SEC. 306. VICTIMS' RIGHTS.

The Act is amended by inserting after section 9 (29 U.S.C. 658) the following:

"SEC. 9A. VICTIM'S RIGHTS.

"(a) RIGHTS BEFORE THE SECRETARY.—A victim or the representative of a victim, shall be afforded the right, with respect to an inspection or investigation conducted under section 8 to—

"(1) meet with the Secretary regarding the inspection or investigation conducted under such section before the Secretary's decision to issue a citation or take no action;

"(2) receive, at no cost, a copy of any citation or report, issued as a result of such inspection or investigation, at the same time as the employer receives such citation or report;

"(3) be informed of any notice of contest or addition of parties to the proceedings filed under section 10(c); and

"(4) be provided notification of the date and time or any proceedings, service of pleadings, and other relevant documents, and an explanation of the rights of the employer, employee and employee representative, and victim to participate in proceedings conducted under section 10(c).

"(b) RIGHTS BEFORE THE COMMISSION.—Upon request, a victim or representative of a victim shall be afforded the right with respect to a work-related bodily injury or death to—

"(1) be notified of the time and date of any proceeding before the Commission; and

"(2) receive pleadings and any decisions relating to the proceedings; and

"(3) be provided an opportunity to appear and make a statement in accordance with the rules prescribed by the Commission.

"(c) MODIFICATION OF CITATION.—Before entering into an agreement to withdraw or modify a citation issued as a result of an inspection or investigation of an incident under section 8, the Secretary shall notify a victim or representative of a victim and provide the victim or representative of a victim with an opportunity to appear and make a statement before the parties conducting settlement negotiations. In lieu of an appearance, the victim or representative of the victim may elect to submit a letter to the Secretary and the parties.

"(d) SECRETARY PROCEDURES.—The Secretary shall establish procedures—

"(1) to inform victims of their rights under this section; and

"(2) for the informal review of any claim of a denial of such a right.

"(e) COMMISSION PROCEDURES.—The Commission shall establish procedures relating to the rights of victims to be heard in proceedings before the Commission.

"(f) DEFINITION.—In this section, the term 'victim' means—

"(1) an employee, including a former employee, who has sustained a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, or

"(2) a family member (as further defined by the Secretary) of a victim described in paragraph (1), if—

"(A) the victim dies as a result of a incident that is the subject of an inspection or investigation conducted under section 8; or

"(B) the victim sustains a work-related injury or illness that is the subject of an inspection or investigation conducted under section 8, and the victim because of incapacity cannot reasonably exercise the rights under this section.".

SEC. 307. RIGHT TO CONTEST CITATIONS AND PENALTIES.

Section 10 (20 U.S.C. 659) is amended—

(1) in the first sentence of subsection (b)—

(A) by inserting ", with the exception of violations designated as serious, willful, or repeated," after "(which period shall not begin to run";

(2) in subsection (c)—

(A) in the first sentence—

(i) by inserting after "that he intends to contest a citation issued under section (9)" the following: "(or a modification of a citation issued under this section)";

(ii) by inserting after "the issuance of a citation under section 9" the following: "(including a modification of a citation issued under such section)";

(iii) by inserting after "files a notice with the Secretary alleging" the following: "that the citation fails properly to designate the violation as serious, willful, or repeated, that the proposed penalty is not adequate, or";

(B) by inserting after the first sentence, the following: "The pendency of a contest before the Commission shall not bar the Secretary from inspecting a place of employment or from issuing a citation under section 9."; and

(C) by amending the last sentence—

(i) by inserting "employers and" after "Commission shall provide"; and

(ii) by inserting before the period at the end ", and notification of any modification of a citation".

(3) by adding at the end the following:

"(d) CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS; ABATEMENT PENDING CONTEST AND PROCEDURES FOR A STAY.—

"(1) PERIOD PERMITTED FOR CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS.—For each violation which the Secretary designates as serious, willful, or repeated, the period permitted for the correction of the violation shall begin to run upon receipt of the citation.

"(2) FILING OF A MOTION OF CONTEST.—The filing of a notice of contest by an employer—

"(A) shall not operate as a stay of the period for correction of a violation designated as serious, willful, or repeated; and

"(B) may operate as a stay of the period for correction of a violation not designated by the Secretary as serious, willful, or repeated.

"(3) CRITERIA AND RULES OF PROCEDURE FOR STAYS.—

"(A) MOTION FOR A STAY.—An employer may file with the Commission a motion to stay a period for the correction of a violation designated as serious, willful, or repeated.

"(B) CRITERIA.—In determining whether a stay should be issued on the basis of a motion filed under subparagraph (A), the Commission shall consider whether—

"(i) the employer has demonstrated a substantial likelihood of success on its contest to the citation;

"(ii) the employer will suffer irreparable harm absent a stay; and

"(iii) a stay will adversely affect the health and safety of workers.

"(C) RULES OF PROCEDURE.—The Commission shall develop rules of procedure for conducting a hearing on a motion filed under subparagraph (A) on an expedited basis. At a minimum, such rules shall provide:

"(i) That a hearing before an administrative law judge shall occur not later than 15 days following the filing of the motion for a stay (unless extended at the request of the employer), and shall provide for a decision on the motion not later than 15 days following the hearing (unless extended at the request of the employer).

"(ii) That a decision of an administrative law judge on a motion for stay is rendered on a timely basis.

"(iii) That if a party is aggrieved by a decision issued by an administrative law judge regarding the stay, such party has the right to file an objection with the Commission not later than 5 days after receipt of the administrative law judge's decision. Within 10 days after receipt of the objection, a Commissioner, if a quorum is seated pursuant to section 12(f), shall decide whether to grant review of the objection. If, within 10 days after receipt of the objection, no decision is made on whether to review the decision of the administrative law judge, the Commission declines to review such decision, or no quorum is seated, the decision of the administrative law judge shall become a final order of the Commission. If the Commission grants review of the objection, the Commission shall issue a decision regarding the stay not later than 30 days after receipt of the objection. If the Commission fails to issue such decision within 30 days, the decision of the administrative law judge shall become a final order of the Commission.

"(iv) For notification to employees or representatives of affected employees of requests for such hearings and shall provide affected employees or representatives of affected employees an opportunity to participate as parties to such hearings.".

SEC. 308. CONFORMING AMENDMENTS.

(a) SECTION 17.—Section 17(d) (29 U.S.C. 666(d)) is amended to read as follows:

"(d) Any employer who fails to correct a violation designated by the Secretary as serious, willful or repeated and for which a citation has been issued under section 9(a) within the period permitted for its correction (and a stay has not been issued by the Commission under section 10(d)) may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues. Any employer who fails to correct any other violation for which a citation has been issued under section 9(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay of avoidance of penalties) may be assessed a civil

penalty of not more than $7,000 for each day during which such failure or violation continues.".

(b) SECTION 11(A).—The first sentence of section 11(a) (29 U.S.C. 660(a)) is amended by—

(1) by inserting "(or the failure of the Commission, including an administrative law judge, to make a timely decision on a request for a stay under section 10(d))" after "an order" ;

(2) by striking "subsection (c)" and inserting "subsections (c) and (d)"; and

(3) by inserting "(or in the case of a petition from a final Commission order regarding a stay under section 10(d), 15 days)"after "sixty days".

SEC. 309. CIVIL PENALTIES.

(a) IN GENERAL.—Section 17 (29 U.S.C. 666) is amended—

(1) in subsection (a)—

(A) by striking "$70,000" and inserting "$120,000";

(B) by striking "$5,000" and inserting "$8,000"; and

(C) by adding at the end the following: "If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than $250,000 for each such violation, but not less than $50,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than $25,000 for each such violation.";

(2) in subsection (b)—

(A) by striking "$7,000" and inserting "$12,000"; and

(B) by adding at the end the following: "If such a violation causes the death of an employee, such civil penalty amounts shall be increased to not more than $50,000 for each such violation, but not less than $20,000 for each such violation, except that for an employer with 25 or fewer employees such penalty shall not be less than $10,000 for each such violation.";

(3) in subsection (c), by striking "$7,000" and inserting "$12,000";

(4) in subsection (d), by striking "$7,000" and inserting "$12,000";

(5) by redesignating subsections (e) through (l) as subsections (f) through (m), respectively; and

(6) in subsection (j) (as redesignated by paragraph (5)), by striking "$7,000" and inserting "$12,000;".

(b) INFLATION ADJUSTMENT.—Section 17 (29 U.S.C. 666) (as amended by subsection (a)) is further amended by inserting after subsection (d) the following:

"(e) Amounts provided under this section for civil penalties shall be adjusted by the Secretary at least once during each 4-year period to account for the percentage increase or decrease in the Consumer Price Index for all urban consumers during such period.".

SEC. 310. OSHA CRIMINAL PENALTIES.

(a) IN GENERAL.—Section 17 (29 U.S.C. 666) (as amended by section 309) is further amended—

(1) by amending subsection (f) to read as follows:

"(f)(1) Any employer who knowingly violates any standard, rule, or order promulgated under section 6 of this Act, or of any regulation prescribed under this Act, and that violation caused or contributed to death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (i), punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 20 years, or by both.

"(2) For the purpose of this subsection, the term 'employer' means, in addition to the definition contained in section 3 of this Act, any officer or director.";

(2) in subsection (g), by striking "fine of not more than $1,000 or by imprisonment for not more than six months," and inserting "fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 2 years,";

(3) in subsection (h), by striking "fine of not more than $10,000, or by imprisonment for not more than six months," and inserting "fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years,";

(4) by redesignating subsections (j) through (m) as subsections (k) through (n), respectively; and

(5) by inserting after subsection (i) the following:

"(j)(1) Any employer who knowingly violates any standard, rule, or order promulgated under section 6, or any regulation prescribed under this Act, and that vio-

lation causes or contributes to serious bodily harm to any employee but does not cause death to any employee, shall, upon conviction, be punished by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 5 years, or by both, except that if the conviction is for a violation committed after a first conviction of such person under this subsection or subsection (e), punishment shall be by a fine in accordance with section 3571 of title 18, United States Code, or by imprisonment for not more than 10 years, or by both.

"(2) For the purpose of this subsection, the term 'employer' means, in addition to the definition contained in section 3 of this Act, any officer or director.

"(3) For purposes of this subsection, the term 'serious bodily harm' means any circumstance, deficiency, or shortfall that could result in an injury or illness including, risk of death, unconsciousness, physical disfigurement, or loss or impairment (whether permanent or temporary) of the function of a bodily member, organ, or mental facility.".

(b) JURISDICTION FOR PROSECUTION UNDER STATE AND LOCAL CRIMINAL LAWS.—Section 17 (29 U.S.C. 666) (as amended by subsection (a)) is further amended by adding at the end the following:

"(o) Nothing in this Act shall preclude a State or local law enforcement agency from conducting criminal prosecutions in accordance with the laws of such State or locality.".

TITLE IV—EFFECTIVE DATE

SEC. 401. EFFECTIVE DATE.

(a) GENERAL RULE.—Except as provided for in subsection (b), this Act and the amendments made by this Act shall take effect not later than 90 days after the date of the enactment of this Act.

(b) EXCEPTION FOR STATES AND POLITICAL SUBDIVISIONS.—The following are exceptions to the effective date described in subsection (a):

(1) A State that has a State plan approved under section 18 (29 U.S.C. 667) shall amend its State plan to conform with the requirements of this Act and the amendments made by this Act not later than 12 months after the date of the enactment of this Act. The Secretary of Labor may extend the period for a State to make such amendments to its State plan by not more than 12 months, if the State's legislature is not in session during the 12-month period beginning with the date of the enactment of this Act. Such amendments to the State plan shall take effect not later than 90 days after the adoption of such amendments by such State.

(2) This Act and the amendments made by this Act shall take effect not later than 36 months after the date of the enactment of this Act in a State, or a political subdivision of a State, that does not have a State plan approved under section 18 (29 U.S.C. 667).

Solicitors' Dispositions of OSHA 11(c) Merit Cases From 10/1/1995 to 10/1/2009

Between 10/1/1995 to 10/1/2009 (14 years) 6.9% of the cases referred to SOL were litigated. Out of 467 cases OSHA referred to SOL in this period, only 32 lawsuits in 11(c) cases have been filed. Two hundred and seventy-nine merit cases have been rejected.

CASES REFERRED TO SOL 10/1/1995 TO 3/24/2009

	Region 1	Region 2	Region 3	Region 4	Region 5	Region 6	Region 7	Region 8	Region 9	Region 10	Total
Litigated and lost	1	1	0	0	1	0	0	0	0	0	3
Litigated and won	1	5	1	0	0	1	0	0	0	0	8
Rejected by SOL	20	16	42	29	70	67	9	18	6	2	279
Settled before litigation	14	12	5	15	42	26	9	20	1	12	156
Settled during litigation	0	9	0	1	2	1	1	0	0	7	21
Total Referred	36	43	48	45	115	95	19	38	7	21	467
Percent Litigated	5.6%	34.9%	2.1%	2.2%	2.6%	2.1%	5.3%	0.0%	0.0%	30.3%	6.9%

(Data from IMS Activity Measures Report)

STATISTICS AND OUTCOMES ON WHISTLEBLOWER CASES FILED WITH OSHA

[Break-out of meritorious]

FY 2008	Cases Received	Cases Completed		Withdrawn	Dismissed	Total Meritorious	Litigation or Findings	Settled by OSHA	Settled by Parties
AHERA/ISCA	2	0.09%	1	0	1	0	0	0	0
AIR21	82	3.72%	65	5	50	12	3	7	2
CPSIA	0	0.00%	0	0	0	0	0	0	0
Environmental	52	2.36%	50	6	37	10	1	6	3
ERA	39	1.77%	30	2	23	5	0	1	4
FRSA	42	1.90%	16	2	12	2	1	1	0
11(c)	1,388	62.95%	1,259	227	834	261	15	203	43
NTSSA	18	0.82%	6	0	7	0	0	0	0
PSIA	3	0.14%	1	0	1	0	0	0	0
SOX	232	10.52%	189	24	128	42	0	15	27
STAA	347	15.74%	322	30	183	116	8	94	14
Totals	2,205	.....	1,939	296	1,276	448	28	327	93
Total Determinations*	.....	.....	.....	.....	.....	2,020	.....	.....	.....

*This number doesn't equal Cases Completed because each complainant recieves his or her own findings, so where a case has mutiple complainants, it has mutiple outcomes.

Source: DOL.

OSHA's Actions on 11(c) Cases Completed in FY 2009

In FY 2009, federal OSHA completed 1,205 11(c) cases and recommended that the Department of Labor's Office of the Solicitor (SOL) litigate 24 of the cases (2%); state-plans states completed 999 11(c) cases and recommended that 50 of the cases (5%) be litigated.

FY 2009	Total cases completed	Withdrawn by OSHA[a]	Dismissed by OSHA[a]	Settled by OSHA[a]	Settled the parties	Litigation recommended[b]
Fed OSHA	1,205 (100%)	188 (16%)	729 (60%)	210 (17%)	54 (4%)	24 (2%)
States	999 (100%)	151 (15%)	662 (66%)	106 (11%)	30 (3%)	50 (5%)
Total	2,204 (100%)	339 (15%)	1,391 (63%)	316 (14%)	84 (4%)	74 (3%)

[a] Cases shown as withdrawn, dismissed, and settled by OSHA include cases withdrawn, dismissed, and settled by the state safety and health enforcement agencies in state-plan states.

[b] Cases sent to the SOL for litigation may later be settled by the SOL or the courts.

U. S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101 - 3212
Telephone No. 206-553-5930
Fax No. 206-553-6499

Via Certified Mail, Return Receipt Requested

April 7, 2005

Neal Jorgensen
60 East First S., Apt. C
Preston, ID 83263

Re: Plastic Industries, Inc./Jorgensen/0-0160-04-018

Dear Mr. Jorgensen:

Your complaint of discrimination alleging a violation of Section 11(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 USC §660(c), has been reviewed by the Office of the Solicitor. As a result of the Solicitor's review, it was determined that there is insufficient evidence to support a finding of a violation of Section 11(c) of the Act by the respondent in this case. Therefore, the case was deemed unsuitable for litigation. The complaint is hereby dismissed.

Any appeal of this determination must be filed by letter with:

Mr. Richard Fairfax, Director
Directorate of Enforcement Programs
U.S. Department of Labor-OSHA
200 Constitution Avenue, N.W.
Room N 3603
Washington, D.C. 20210

with a copy to:

Vicky Coleman
Team Leader/Lead Investigator
Federal-State Operations
U.S. Department of Labor-OSHA
1111 Third Avenue, Suite 715
Seattle, WA 98101-3212

This appeal must be received in Washington, D.C. within 15 days from your receipt of this letter.

Sincerely,

Vicky Coleman
Team Leader/Lead Investigator
Office of Federal and State Operations

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City, State, ZIP+4

Neal Jorgensen
60 East First S., Apt. C
Preston, ID 83263

7004 2510 0000 6676 6583

PS Form 3800, June 2002 — See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

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- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Neal Jorgensen
60 East First S., Apt. C
Preston, ID 83263

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Neal Jorgensen
C. Date of Delivery 4/18/03

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. 7004 2510 0000 6676 6583

PS Form 3811, August 2001 Domestic Return Receipt 102595-02-M-1540

U.S. DEPARTMENT OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

In the Matter of: A D M MILLING CO

OSHA No.(s): 311465157 Serious Citation 1

INFORMAL SETTLEMENT AGREEMENT

The undersigned Employer and the undersigned Occupational Safety and Health Administration (OSHA), in settlement of the above citation(s) and penalties which were issued on 03/13/09, hereby agree as follows:

1. The Employer agrees to correct the violations as cited in the above citations or as amended below.

2. The Employer agrees to pay the proposed penalties, if any, as issued with the above citation(s), or, if amended by this agreement, as amended below.

3. The Employer and OSHA agree that the following citations and penalties, if any, are not being amended: N/A

4. OSHA agrees that the following citations and penalties are being amended as shown below: Citation 1 - Items 1, 2, 3

5. The employer, by signing this informal settlement agreement, hereby waives its rights to contest the above citation(s) and penalties, as amended in paragraph 4 of this agreement.

6. The employer agrees to immediately post a copy of this Settlement Agreement in a prominent place at or near the location of the violation(s) referred to in paragraphs 3 and 4 above. This Settlement Agreement must remain posted until the violations cited have been corrected, or for 3 working days (excluding weekends and Federal Holidays), whichever is longer.

7. The employer agrees to continue to comply with the applicable provisions of the Occupational Safety and Health Act of 1970, and the applicable safety and health standards promulgated pursuant to the Act.

8. The employer agrees to comply with the requirements of 29 CFR 1903.19 for all citation related to this settlement agreement.

9. The Employer agrees to improve it's overall safety and health program to meet or exceed the guidelines as given in OSHA's "Safety and Health Management Guidelines" ~~(Federal Register, Vol. 54, No. 16, January 26, 1989, pp. 3904 - 3916).~~ Specifically, the company will put into place Action Plans that ensure effective implementation of these elements:

   a. Management commitment and employee involvement.
   b. Worksite analysis to identify existing hazards.
   c. Hazard prevention and control.
   d. Safety and health training of all personnel.

10. In settlement of the citations issued for the manlift the employer agrees to remove and replace the belt manlift in Elevator "C" with alternate means other than a belt manlift. Alternate means such as a caged elevator, stair system, approved ladder system or a combination of alternate means. The Employer will complete installation within one year of this agreement and provide quarterly updates of the progress to this office. The employer will put this information in writing and submit to this office.

For The Employer

BEN BARE, CIH
For The Occupational Safety
And Health Administration

3/26/09
Date

3/26/2009
Date

NOTICE TO EMPLOYEES

The law gives you or your representative the opportunity to object to any abatement date set for a violation if you believe the date to be unreasonable. Any contest to the abatement dates of the citations amended in paragraph 3 of this Settlement Agreement must be mailed to the U.S. Department of Labor Area Office at 6910 PACIFIC STREET, OVERLAND WOLF CENTRE, STE. 100, Omaha, NE 68106, within 15 working days (excluding weekends and Federal Holidays) of the receipt by the Employer of this Settlement Agreement. You or your representative also have the right to object to any of the abatement dates set for violations, which were not amended, provided that the objection is mailed to the office shown above within the 15-working-day period established by the original citation.

2/7

——Original Message——

From: Bare, Ben—OSHA [mailto:Bare.Ben@dol.gov]
Sent: Monday, February 01, 2010 11:35 AM
To: tford@neb.rr.com
Subject: RE: Emailing: Establishment Search Results Page.htm
Dear Ms. Ford,
Thank you for the note of sympathy for Mr. Wilson's family. We will let his family know.
To follow-up on the information for the manlift fatalities and the number of inspections for ADM, we found *21 manlift fatalities and 9 injuries for the period 1972 to present.*
For the ADM inspection history, we could only run a query back to 1999. For this period, there are 87 inspections. Running a report from 1972 to present causes an error due to the great number of hits using several name variations for ADM. Please let me know if the inspection history from 1999 to present meets your needs. If not, I can have the reports run in 10-year periods. It will require a couple more days to get the information.

I hope the manlift fatality information meets your needs.
Please let me about the inspection history.
Thank you
Ben

——Original Message——

From: tford@neb.rr.com [mailto:tford@neb.rr.com]
Sent: Sunday, January 31, 2010 9:18 AM
To: Bare, Ben—OSHA
Subject: RE: Emailing: Establishment Search Results Page.htm
Dear Mr. Bare,
I know you are probably very busy with the death of Mr. Tim Wilson, and I know the death was caused by a lift accident as well, however I know they are very different lifts. I am sure that you are someone else will speak with the family. I would greatly appreciate if you could give them our condolences.
Thank you
Tonya Ford
Bare wrote:
Thank you
Talk with you next week

From: tford@neb.rr.com [mailto:tford@neb.rr.com]
Sent: Sat 1/30/2010 9:56 AM
To: Bare, Ben—OSHA
Subject: RE: Emailing: Establishment Search Results Page.htm
Dear Mr. Bare,
No I am sorry for the confusion I received the accident report and investigations that you guys were doing regarding my Uncles accident on January 29, 2009.
Please let me know if you have any more questions.
Thanks
Tonya Ford
Bare wrote:
Dear Ms. Ford,
Just so I clearly understand your message below, you have received the paperwork needed for the number of ADM inspections? If so, do you still want me to get the information?
I just want to make sure I'm getting what you need.
Sincerely,
Ben

From: tford@neb.rr.com [mailto:tford@neb.rr.com]
Sent: Fri 1/29/2010 11:45 PM
To: Bare, Ben—OSHA
Subject: RE: Emailing: Establishment Search Results Page.htm
Dear Mr. Bare,
I want to thank you for all your time and effort in researching this, I did receive the inspection paperwork today and I thank you for that as well.
Thank you and I look forward to receiving this information
Tonya Ford
Bare wrote:
Dear Ms. Ford,
I'm still collecting and verifying the information. I apologize this is taking longer than expected.
The data shows 21 manlift fatalities inspections and 9 accident inspections that involved injuries. That is for all industries not just grain. The ADM inspection data is more sensitive due the possible spelling of the name and volume of establishments with ADM etc as part of the company name. I want to provide the best possible information and I need another day or two next week to finalize the information.
Thanks for your understanding,
Ben

——Original Message——

From: Bare, Ben—OSHA
Sent: Thursday, January 28, 2010 5:13 PM
To: 'tford@neb.rr.com'
Subject: RE: Emailing: Establishment Search Results Page.htm
Dear Ms. Ford,
Just wanted to touch base and let know I haven't the information for the ADM inspection numbers and manlift fatalities. Should have the information tomorrow afternoon.
Sorry for the delay,
Ben

——Original Message——

From: tford@neb.rr.com [mailto:tford@neb.rr.com]
Sent: Wednesday, January 27, 2010 12:21 PM
To: Bare, Ben—OSHA
Subject: Re: Emailing: Establishment Search Results Page.htm
Thank you so much for explaining how this lovely site works....I have to admit my background is Web design and this baffled me. Thank you and I look forward to getting the other information
Tonya Ford
Bare wrote:
Dear Ms. Ford
Below is the inspection information involving your Uncle.
To run this report go to establishmnet search, enter the A D M Milling. Use spaces between the letters. Select open case option. The prefilled date range should be correct. Below is the result I got I have asked for additional assistance to help identify the number of manlift fatalities and the total number of ADM inspections. I should the aditional information for you in a day or two.
Hope this helps.
Sincerely,
Ben

SUPREME COURT OF KANSAS

DAVID FLENKER, APPELLANT, *v.* WILLAMETTE INDUSTRIES, INC., APPELLEE.

No. 80,408; 266 Kan. 198; 967 P.2d 295; 1998 Kan.

CASE SUMMARY

PROCEDURAL POSTURE: The United States Court of Appeals for the Tenth Circuit certified the action initiated by appellant employee to the court to determine whether the remedy provided by OSHA, 29 U.S.C.S. § 660(c), precluded the filing of a state common law discharge claim against appellee employer. Appellant contended that he was discharged in retaliation for filing OSHA complaints.

OVERVIEW: Appellant employee filed OSHA complaints against appellee employer. Appellant was subsequently terminated by appellee. The federal court certified the action to the court to determine whether the remedy provided by OSHA, 29 U.S.C.S. § 660(c), precluded the filing of a state common law wrongful discharge, pursuant to the Kansas Act Against Discrimination, Kan. Stat. Ann. § 44-1001, et seq., claim against appellee. The court held that OSHA did not occupy state common-law retaliation claims and did not conflict or preempt such state law. Pursuant to the alternative remedies doctrine, OSHA would be substituted for the state retaliation claim if the substituted statute provided an adequate alternative remedy. The court held that OSHA's alternative remedies were not adequate and that OSHA did not preempt appellant's state wrongful discharge claim. The court answered the federal court's determination and held that OSHA did not provide an adequate alternative remedy under the circumstances.

OUTCOME: The court answered the federal court's determination and held that OSHA did not provide an adequate alternative remedy to appellant employee's state common law wrongful discharge claim filed against appellee employer pursuant to the Kansas Act Against Discrimination. The court held that OSHA did not occupy state common-law retaliation claims and that the federal statute did not conflict or preempt the state law.

CORE TERMS: retaliatory discharge, alternative remedy, collective bargaining agreement, public policy, common-law, public policy exception, retaliation, dis-

charged, at-will, certified question, cause of action, certification, state law, common law, statutory scheme, statutory remedy, deems appropriate, appropriate relief, arbitration, preemption, aggrieved, corrugated, plant, remedy provided, employee's right, wrongful discharge, violation of state, adequately protected, civil action, termination

At-will employment is the general rule in Kansas. In the absence of a contract, expressed or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party.

There public policy exceptions to the at-will employment doctrine, including the whistle-blower's exception. Termination, in retaliation for the good faith reporting of a co-worker's or employer's serious infraction of rules, regulations, or law pertaining to public health, safety, and the general welfare, is an actionable tort. However, exceptions to the at-will employment doctrine should be limited to situations where there is no adequate alternative remedy.

The availability of remedies for wrongful discharge under Kansas Act Against Discrimination, Kan. Stat. Ann. § 44-1001, et seq., precludes expanding the remedies available at common law.

The trial court must investigate the adequacy of an alternative remedy before classifying a situation as being under the public policy exception to the employment-at-will doctrine. Kansas Act Against Discrimination, Kan. Stat. Ann. § 44-1001, et seq., provides an adequate and exclusive state remedy for violations of the public policy against wrongful termination of whistleblowers.

A retaliatory discharge action for filing a workers compensation claim is based on a violation of state public policy independent of a collective bargaining agreement. An arbitration procedures provided for in the collective bargaining agreement are a "limited remedy," and might not result in the employee's right being "adequately protected."

Preemption is an application of law concept in which federal law must be applied to the exclusion of state law for uniformity of interpretation.

The alternative remedies doctrine, referenced sometimes as preclusion, is a substitution of law concept. Under the alternative remedies doctrine, a state or federal statute would be substituted for a state retaliation claim if the substituted statute provides an adequate alternative remedy. The question to ask in resolving recognition of a state tort claim for retaliatory discharge is whether the statutory remedy is adequate and thus precludes the common-law remedy.

See 29 U.S.C.S. § 660(c)(1) and (2).

In Ohio, an at-will employee who is discharged or disciplined for filing a complaint with OSHA, 29 U.S.C.S. § 660, et seq., concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy.

OSHA, 29 U.S.C.S. § 660, et seq., only allows an employee to file a complaint with the Secretary of Labor who then decides whether to bring an action on the employee's behalf. 29 U.S.C.S. § 660(c)(2). The employee's right to relief is even further restricted in that the complaint must be filed within 30 days of the discrimination or discharge. The decision to assert a cause of action is in the sole discretion of the Secretary of Labor and the statute affords the employee no appeal if the secretary declines to file suit. Although an employee may obtain any type of relief possible under the Fair Labor Standards Act through the employee's own actions, the relief available under OSHA is limited to what the Secretary of Labor deems appropriate. Unless an employee acts immediately and files a complaint with the Secretary of Labor, there is no remedy available without the public policy exception.

All appropriate relief in OSHA, 29 U.S.C.S. § 660, et seq., includes punitive damages, and the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

OSHA, 29 U.S.C.S. § 660, et seq., says that the secretary shall cause such investigation to be made as he deems appropriate, and if upon such investigation, the secretary determines that the provisions of the section have been violated, he shall bring an action. No guidance is given as to what factors the secretary must or may consider to constitute an investigation. The Secretary's discretion is a significant limitation on the employee's right of redress. In addition, the limitation period for filing an OSHA, 29 U.S.C.S. § 600, et seq., complaint is 30 days from discharge.

OSHA, 29 U.S.C.S. § 660, § 11(c) (1) declares discharge in retaliation for filing a complaint to be a violation of OSHA.

The factfinding process in arbitration does not equate with judicial factfinding. Rules of evidence do not usually apply; the rights and procedures common to civil trials such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. The same observation can be

made about the investigation that the Secretary of Labor is directed to make under OSHA, 29 U.S.C.S. § 660, § 11(c).

Under OSHA, 29 U.S.C.S. § 660, § 11(c), the decision to pursue an employee's claim of retaliatory discharge is made by an administrative agency. Unless there is some kind of administrative appeal of OSHA's decision not to pursue the complaint, an employee is limited to voting against an incumbent legislator or against the current administration. A ballot box exercise provides less recourse than a suit against one's labor union in federal or state trial court.

Under the Energy Reorganization Act (ERA), 42 U.S.C.S. § 5851, et seq., if the complainant has made a prima facie showing, 42 U.S.C.S. § 5851(b)(3)(A), upon receipt of a complaint the secretary shall conduct an investigation without OSHA's "as he deems appropriate" language of the violation alleged. 42 U.S.C.S. § 5851(b)(2)(A). If the ERA investigation reveals the complaint has merit and after a public hearing, the secretary shall order preliminary relief and may order compensatory relief after a final order is entered. 42 U.S.C.S. § 5851(b)(2)(A) and (B). Further, an employee is given the right to file suit in federal court to require compliance with such an order. 42 U.S.C.S. § 5851(e).

Under the adequate alternative remedy test, the administrative remedy provided by OSHA, 29 U.S.C.S. § 660, § 11(c), is less adequate than the remedy under the Energy Reorganization Act, 42 U.S.C.S. § 5851, et seq. Although OSHA entitles an employee to file a complaint under 29 U.S.C.S. § 600, § 11(c), there is no provision for an employee to bring a private action in federal court.

See 42 U.S.C.S. § 2000e-5(b).

See U.S.C.S. § 2000e-5(f)(1).

Under Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000a, et seq., an aggrieved person is not left without a remedy if the administrative agency does not pursue the complaint; the complainant is given permission to sue. Also, there is no agency discretion language in the Title VII provision providing for agency investigation. The employee's remedy is more effective under Title VII than it is under OSHA, 29 U.S.C.S. § 660, et seq.

An employee is adequately protected contractually from retaliatory discharge. Employees who are fully covered and protected by a collective bargaining agreement are barred from bringing an action in tort for a retaliatory discharge.

Syllabus by the Court

The remedy provided by the Occupational Safety and Health Administration § 11(c) (29 U.S.C. § 660[c] [1994]) for employees who allege that they have been discharged in retaliation for filing complaints under that statute does not preclude the filing of a Kansas common-law wrongful discharge claim under Kansas's public policy exception to at-will employment.

On a certification of a question of law from the United States Court of Appeals for the Tenth Circuit, ROBERT H. HENRY, judge.

COUNSEL: Stephen J. Dennis, of Overland Park, argued the cause and was on the brief for appellant.

Rody P. Biggert, of Seyfarth, Shaw, Fairweather & Geraldson, of Chicago, Illinois, argued the cause, andJohn L. Vratil, of Lathrop & Gage, L.L.C., of Overland Park, was with him on the brief for appellee.

JUDGES: The opinion of the court was delivered by SIX, J.

OPINION BY: SIX

OPINION

[*198] [**297] The opinion of the court was delivered by

SIX, J.: The United States Court of Appeals for the Tenth Circuit has certified the following question to this court under K.S.A. 60-3201:

"Does the remedy provided by OSHA § 11(c) [***2] [29 U.S.C. § 660(c) (1994)] for employees who allege that they have been discharged in retaliation for filing complaints under that statute preclude the filing of a Kansas common law wrongful discharge claim under Kansas's public policy exception to at-will employment?"

The answer is, "no."

This case arises out of the March 11, 1994, firing of David Flenker, a worker at Willamette Industries, Inc.'s (Willamette) corrugated paper manufacturing plant. Willamette's basis for firing Flenker was that he failed to comply with the terms of the rehabilitation agreement he had signed under Willamette's alcohol and drug use policy. Flenker contends that he was fired because he [*199] reported unsafe working conditions to Willamette and the Occupational Safety and Health Administration (OSHA).

Our analysis of the certified question is advanced by posing and answering two secondary questions.

1. Does the rule in Coleman v. Safeway Stores, Inc., 242 Kan. 804, 812-13, 752 P.2d 645 (1988), extend to situations other than the collective bargaining agreement context? The answer is "yes."

2. If Coleman extends beyond the collective bargaining context, is the remedy in OSHA § 11(c) "adequate"? [***3] The answer is "no."

FACTS

The Tenth Circuit Certification Order informs us that:

"Mr. Flenker worked as a Class C mechanic for Willamette, a corrugated paper manufacturer. After a dispute with his temporary supervisor concerning the safety of a piece of machinery known as a corrugated downstacker device, Mr. Flenker made it known at the plant that he intended to file a complaint with OSHA regarding the machinery.

"Mr. Flenker received a disciplinary warning as a result of the dispute with his temporary supervisor. The next day, Mr. Flenker received a three-day suspension from his supervisor for his improper installation of gauges and for the improper repair of sprockets on the bandler line.

"Mr. Flenker later filed his OSHA complaint, alleging violations concerning the safety of the corrugated downstacker and other matters. OSHA subsequently made a surprise investigation of the Willamette plant. Although the downstacker met OSHA safety standards, OSHA found that several of Mr. Flenker's other complaints were valid.

"About a month later, plant manager Dale McGinnis terminated Mr. Flenker's employment, contending Mr. Flenker failed to obey the terms of a Rehabilitation Agreement [***4] he had signed under Willamette's Alcohol and Drug Use Policy. Mr. Flenker claims he was fired because he reported unsafe working conditions to Willamette and to OSHA.

[**298] "Shortly after his termination, Mr. Flenker filed a section 11(c) retaliatory discharge complaint with OSHA, which he later withdrew. Mr. Flenker was informed, presumably by an OSHA employee, that because he had fixed the machine in question, which had been a part of his section 11(c) claim, he no longer had a claim under OSHA. In September 1995, he filed this action in state court. Willamette removed the action to federal court pursuant to 28 U.S.C. § 1446(b).

"Mr. Flenker claims that he was discharged because he exercised his statutory right to report unsafe working conditions to his employer. He seeks compensatory damages for lost wages and benefits and emotional pain and suffering."

[*200] Flenker chose to litigate his claims in state court; however, Willamette removed the lawsuit to federal court.

DISCUSSION

We restate the certified question:

Does the remedy provided by OSHA § 11(c) for employees who allege that they have been discharged in retaliation for filing complaints under that statute preclude the filing [***5] of a Kansas common law wrongful discharge claim under Kansas' public policy exception to at-will employment?

At-Will Employment and Exceptions

At-will employment is the general rule in Kansas. We said in Johnston v. Farmers Alliance Mutual Ins. Co., 218 Kan. 543, 546, 545 P.2d 312 (1976): "In the absence of a contract, expressed or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party."

We have recognized public policy exceptions to the at-will employment doctrine. For a review of the Kansas case law, see Worth and Landis, Fire at Will? The Status of Judicially Created Exceptions to Employment-at-Will in Kansas, 64 J.K.B.A. 22 (1995). The so-called whistle-blower's exception was first announced in Palmer v. Brown, 242 Kan. 893, 752 P.2d 685 (1988). Termination, in retaliation for the good faith reporting of a co-worker's or employer's serious infraction of rules, regulations, or law pertaining to public health, safety, and the general welfare, is an actionable tort. 242 Kan. at 900. Palmer involved an employee's reporting of allegedly improper medicaid billing practices [***6] to "unspecified authorities." 242 Kan. at 894.

Willamette argues that Flenker has no independent state law tort claim, relying on Polson v. Davis, 895 F.2d 705 (10th Cir. 1990). Federal courts in Kansas have followed Polson's interpretation of Kansas law (exceptions to the at-will employment doctrine should be limited to situations where there is no adequate alternative remedy), e.g., Conner v. Schnuck Markets, Inc., 906 F. Supp. 606, 614 (D. Kan. 1995).

[*201] Polson observed that Kansas federal district courts were split on whether the public policy exception should be extended to cover conduct protected under a statutory scheme, specifically the Kansas Act Against Discrimination (KAAD), K.S.A. 44-1001 et seq. 895 F.2d at 709. Wynn v. Boeing Military Airplane Co., 595 F. Supp. 727 (D. Kan. 1984) held that the public policy exception permitting an independent cause of action should apply in cases in which a worker's termination is alleged to stem from conduct proscribed by KAAD. Judge Theis in Wynn reasoned that the fact that the various remedies might differ is sufficient to require recognition of a state common law remedy. 895 F.2d at 709. [***7]

In contrast, Judge Rogers in Tarr v. Riberglass, Inc., 1984 U.S. Dist. LEXIS 19784, No. 83-4234, 1984 WL 1481 (D. Kan. February 3, 1984), and Judge O'Connor in the lower Polson decision, 635 F. Supp. 1130 (D. Kan. 1986), and Robinson v. Colt Indus. Operating Corp., No. 84-2471 (unpublished D. Kan. March 5, 1986), held that the availability of remedies under KAAD precludes expanding the remedies available at common law. 895 F.2d at 709.

Polson chose to follow the preclusive approach, discerning in Coleman v. Safeway Stores, Inc., 242 Kan. at 813-14, a reliance on "inadequacy of arbitration to compensate employees for torts committed by employers." 895 F.2d at 709. Polson [**299] concluded: "It appears that we must investigate the adequacy of the alternative remedy before classifying a situation as being under the public policy exception to the employment-at-will doctrine." 895 F.2d at 709. Polson reasoned that this court would adopt the view that KAAD provides an adequate and exclusive state remedy for violations of the public policy at issue. 895 F.2d at 709. We note, however, that Polson seems to employ a strict view of "adequate," finding there is no evidence that the [***8] remedies provided for in KAAD were "constitutionally inadequate to compensate plaintiff," or "so inadequate to enforce the stated public policy as to require bolstering by a common law cause of action." 895 F.2d at 709-10.

Coleman v. Safeway Stores

Our discussion of Polson necessarily leads to a review ofColeman. Coleman is important here because our answer to the certified [*202] question is based on our precedent, not on federal rulings interpreting Kansas law.

Coleman overruled Cox v. United Technologies, 240 Kan. 95, 727 P.2d 456 (1986), Smith v. United Technologies, 240 Kan. 562, 731 P.2d 871 (1987), and Armstrong v. Goldblatt Tool Co., 242 Kan. 164, 747 P.2d 119 (1987). The overruled cases involved the interrelationship of Kansas tort law and the law of labor union contracts. In each of the three overruled cases: (1) a discharged employee was covered by a collective bargaining agreement, (2) the agreement prohibited the employee's discharge except for just cause, and (3) the employee was held not to have a cause of action in tort for wrongful discharge. Colemanreasoned that a retaliatory discharge action for filing a workers compensation [***9] claim is based on a violation of state public policy independent of a collective bargaining agreement. 242 Kan. 804, Syl. P1, 752 P.2d 645. Coleman also concluded that the arbitration procedures provided for in the collective bargaining agreement were a "limited remedy," and might not result in the employee's right being "adequately protected." 242 Kan. at 813-14.

Preemption and Alternate Remedies Preclusion

Preemption is not an issue here. Willamette does not contend that OSHA preempts state common-law retaliation claims. The Tenth Circuit in a footnote to its certification order says "Congress did not intend for OSHA § 11(c) to occupy this field of law, nor does OSHA conflict with state law, thereby preempting it. See, Schweiss v. Chrysler Motors Corp., 922 F.2d 473, 475-76 (8th Cir. 1990)." Preemption is an application of law concept in which federal law must be applied to the exclusion of state law for uniformity of interpretation. English v. General Electric Co., 496 U.S. 72, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990); see also, Annot., Federal Pre-Emption of Whistleblower's State-Law Action For Wrongful Retaliation, 99 A.L.R. Fed. 775, 810.

The alternative remedies [***10] doctrine at issue here, referenced sometimes as preclusion, is a substitution of law concept. Under the alternative remedies doctrine, a state or federal statute would be substituted for a state retaliation claim if the substituted statute [*203] provides an adequate alternative remedy. Bair v. Peck, 248 Kan. 824, 838, 811 P.2d 1176 (1991). Masters v. Daniel, Intern. Corp., 917 F.2d 455, 457 (10th Cir. 1990), relied on Polson.The question to ask in resolving recognition of a state tort claim for retaliatory discharge is whether the statutory remedy is adequate and thus precludes the common-law remedy. 917 F.2d at 457 (held the Energy Reorganization Act, 42 U.S.C. § 5851 et seq. [1994], provided an adequate alternative remedy).

Willamette argues that "the majority of other jurisdictions that have addressed the issue preclude common law retaliatory discharge claims when there is an adequate alternative state or federal remedy." The large number of cases Willamette cites is misleading. Most of them simply state the court's conclusion without an analysis of why the alternative remedy is adequate. See Walsh v. Consolidated Freightways, Inc., 278 Ore. 347, 563 P.2d 1205, 1208 [***11] ("We feel that existing remedies are adequate.") Furthermore, two of Willamette's cases, List v. Anchor Paint Mfg. Co., 910 P.2d 1011, 1014 (Okla. 1996) (finding that the Age Discrimination in Employment Act, 29 U.S.C. § 621 et [**300] seq. [1994], precludes retaliatory discharge claim), and Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D. Pa. 1977) ("The legislature would have provided additional relief in the [Human Rights] statute if it thought it necessary.") evaluate the adequacy of statutory schemes other than OSHA. Listand Wehr are not controlling of the ultimate question here, whether OSHA, in particular, provides an adequate alternative remedy. Because of the Coleman rule that an alternative remedy must be adequate, whether a statute other than OSHA is adequate is irrelevant here. The question is whether OSHA's remedy is adequate.

The Sub-issues

We now examine whether Coleman extends to situations other than collective bargaining agreements. The parties have skirted this inquiry by focusing on Polsonand other federal cases, in which the interrelation of state law and usually federal statutory schemes was directly presented. [***12] Coleman's reasoning is a dominant influence in answering the certified question. Although Coleman arose in the collective bargaining context, we extend its ruling to employees [*204] protected by statutory schemes such as OSHA. In Coleman, we said: "Our recognition of such causes of action is limited to wrongful discharge in violation of state public policy clearly declared by the legislature or by the courts." 242 Kan. 804, Syl. P4, 752 P.2d 645. Applicability of the Coleman rule here, therefore, depends on whether whistle-blowing is protected by a clearly declared public policy. It is. Palmerheld: "It is declared the public policy of the State of Kansas to encourage citizens to report infractions of the law pertaining to public health, safety, and the general welfare." 242 Kan. 893, Syl. P1, 752 P.2d 685.

Having extended Coleman's shadow beyond the facts of collective bargaining, we next ask: Is the remedy in OSHA § 11(c) [29 U.S.C. § 660(c)] "adequate"? We conclude it is not.

OSHA § 11(c) states:

"(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding [***13] under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

"(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such 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 court 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." 29 U.S.C. § 660(c)(1) and (2) (1994).

Willamette cites six cases in which the statutory remedies in OSHA were held to be adequate: [***14] Miles v. Martin Marietta Corp., 861 F. Supp. 73 (D. Colo. 1994); King v. Fox Grocery Co., 642 F. Supp. 288, 290 (W.D. Pa. 1986); Grant v. Butler, 590 So. 2d 254 (Ala. 1991); Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. App. 1984); Burnham v. Karl & Gelb, P.C., 1997 Conn. Super. LEXIS 645, *11-15, 1997 WL 133399 *5-6 (Conn. Super. Ct. 1997); Walsh v. Consolidated Freightways, [*205] 278 Ore. 347, 563 P.2d 1205 (1977). None of the six cases focuses on a Coleman-style search for an adequate alternative remedy.

Willamette acknowledges four cases from New Jersey and California support Flenker's position that OSHA's remedies should not preclude a state common-law claim for retaliatory discharge: Jenkins v. Family Health Program, 214 Cal. App. 3d 440, 262 Cal. Rptr. 798 (1989); Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, [**301] 538 A.2d 1292 (1988); and Lepore v. National Tool and Mfg. Co., 224 N.J. Super. 463, 540 A.2d 1296 (1988).

The Ohio Supreme Court has also permitted a common-law tort retaliatory discharge claim in an OSHA setting. Kulch v. Structural Fibers, Inc., 78 Ohio St. 3d 134, [***15] 677 N.E.2d 308 (1997). Kulch held that "an at-will employee who is discharged or disciplined for filing a complaint with OSHA concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy." 78 Ohio St. 3d at 162.

The Missouri Court of Appeals in Shawcross v. Pyro Products, Inc., 916 S.W.2d 342 (1995), a retaliatory discharge preemption case, has analyzed the inadequacy of OSHA's remedy:

"OSHA only allows an employee to file a complaint with the Secretary of Labor who then decides whether to bring an action on the employee's behalf. 29 U.S.C. § 660(c)(2) (1985). The employee's right to relief is even further restricted in that the complaint must be filed within thirty days of the discrimination or discharge. Id. The decision to assert a cause of action is in the sole discretion of the Secretary of Labor and the statute affords the employee no appeal if the Secretary declines to file suit. Id. It is obvious from the language of the two statutes that although an employee may obtain any type of relief possible under FLSA [Fair Labor [***16] Standards Act] through the employee's own actions, the relief available under OSHA is limited to what the Secretary of Labor deems appropriate. It should also be noted that unless an employee acts immediately and files a complaint with the Secretary of Labor, there is no remedy available without the public policy exception." 916 S.W.2d at 345.

Because of Coleman's specific requirement that an alternative remedy be "adequate," we examine OSHA § 11 (c) in detail. The remedy under § 11(c), as Shawcross observes, is the right to file a complaint with the Secretary of Labor. Willamette overstates what [*206] happens next. Willamette suggests that upon receiving the complaint, "the Secretary is directed to investigate the complaint," and if the Secretary finds a violation, the Secretary "shall bring an action in any appropriate district court" to recover "all appropriate relief." Willamette cites cases that hold that "all appropriate relief" in the statute includes punitive damages,e.g., Reich v. Skyline Terrace, Inc., 977 F. Supp. 1141 (N.D. Okla. 1997), and that the "federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant [***17] to a federal statute." Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 71, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992).

Willamette neglects to point out clearly that OSHA § 11(c) says that the Secretary "shall cause such investigation to be made as he deems appropriate," and "if upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action." (Emphasis added.) As the certification order notes no guidance is given "as to what factors the Secretary must or may consider to constitute an investigation." Flenker correctly comments that the Secretary's discretion is a significant limitation on the employee's right of redress. What would, in a common-law tort action, be the decision of the plaintiff and plaintiff's counsel is, under § 11(c), the decision of a government employee. The concerns of the government employee could range from budget constraints to political pressure. In addition the limitation period for filing an OSHA § 11(c) complaint is 30 days from discharge.

The Tenth Circuit in its certification order remarked: "This remedy [section 11(c)] has been recognized as a 'limited' [***18] one, providing only for administrative proceedings and suit in federal court which may be brought by the Secretary if the Secretary so elects. Holmes v. Schneider Power Corp., 628 F. Supp. 937, 939 (W.D. Pa.), aff'd 806 F.2d 252 (3d. Cir. 1986)." We agree.

The facts here illustrate the type of agency ruling for which the employee cannot receive redress. The certification order says that after Flenker filed his complaint with OSHA, "Mr. Flenker was informed, presumably by [**302] an OSHA employee, that because he had fixed the machine in question, which had been a part of his section [*207] 11(c) claim, he no longer had a claim under OSHA." Section 11(c) (1) declares discharge in retaliation for filing a complaint to be a violation of OSHA. Fixing the defective equipment in question does not cancel the wrong of retaliatory discharge. The OSHA statute, however, does not appear to provide a second chance for Flenker to try to convince the agency to see things his way.

The inadequacy of the OSHA remedy is not outweighed by the factors cited by Willamette. Willamette suggests that under OSHA (1) there is a lower burden of proof, (2) the Secretary of Labor has considerable resources and expertise [***19] in investigating the complaint, (3) the available federal discovery process is for gathering evidence for use at trial, and (4) the employee has the Secretary's experienced representation at trial without cost to the employee. If the complaint is only half-

heartedly investigated, or a suit is not filed by the Secretary of Labor, the OSHA factors do not benefit the discharged employee at all.

In evaluating the collective bargaining remedy we held to be inadequate in Coleman, we noted: "The factfinding process in arbitration does not equate with judicial factfinding. Rules of evidence do not usually apply; the rights and procedures common to civil trials such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable." 242 Kan. at 814 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-57, 39 L. Ed. 2d 147, 94 S. Ct. 1011 [1974]). The same observation can be made about the investigation that the Secretary of Labor is directed to make under OSHA § 11(c).

We noted in Coleman that the decision to enter a collective bargaining agreement is made by majority vote. Such agreements are not designed to protect [***20] individual workers, but to balance the individual against the collective interest. We said:

"The potential result of a union's emphasis on the collective good is that, in some cases, the employee may be left without a remedy for an employer's violation of state public policy. Here, Coleman's union has decided for the good of the union not to support Coleman's claim by arbitration. If there is no independent state action for retaliatory discharge, and no avenue for Coleman to pursue her state public policy right against her employer, Coleman is limited to proceeding against her representative, the union, in federal or state court under * * * the [*208] [Labor Management Relations Act] for her union's breach of its duty of fair representation." 242 Kan. at 814-15.

Similarly, under OSHA § 11(c), the decision to pursue an employee's claim of retaliatory discharge is made by an administrative agency. Unless there is some kind of administrative appeal of OSHA's decision not to pursue the complaint, which neither party has suggested exists, an employee is limited to voting against an incumbent legislator or against the current administration. A ballot box exercise provides less recourse than [***21] a suit against one's labor union in federal or state court, which we found inadequate in Coleman. 242 Kan. at 814-15.

Other Federal Statutory Remedies

It is instructive to compare OSHA § 11(c) to other federal statutory remedies. Under the Energy Reorganization Act (ERA), if "the complainant has made a prima facie showing," 42 U.S.C. § 5851(b)(3)(A), "upon receipt of a complaint * * * the Secretary shall conduct an investigation [without OSHA's 'as he deems appropriate' language] of the violation alleged." (Emphasis added.) § 5851(b)(2)(A). If the ERA investigation reveals the complaint has merit and after a public hearing, the Secretary shall order preliminary relief and may order compensatory relief after a final order is entered. 42 U.S.C. § 5851(b)(2)(A) and (B). Further, an employee is given the right to file suit in federal court to require compliance with such an order. 42 U.S.C. § 5851(e).

Under the adequate alternative remedy test, the administrative remedy provided by OSHA § 11(c) is less adequate than the remedy under the ERA. Although OSHA entitles an employee to file a complaint under [**303] § 11(c), there is no provision for an employee to bring a private [***22] action in federal court.

We next turn to examine the employment discrimination provisions of the Civil Rights Act. 42 U.S.C. § 2000a et seq. (1994). Title VII provides in part:

"Whenever a charge is filed * * * alleging that an employer * * * has engaged in an unlawful employment practice, the [Equal Employment Opportunity] Commission shall serve a notice of the charge * * * and shall make an investigation thereof." 42 U.S.C. § 2000e-5(b) (1994).

[*209] "The person * * * aggrieved shall have the right to intervene in a civil action brought by the Commission. * * * If a charge filed with the Commission * * * is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action under this section * * * the Commission * * * shall so notify the person aggrieved and within 90 days * * * a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1).

Under Title VII, the aggrieved person is not left without a remedy if the administrative agency does not pursue the complaint; the complainant is given permission to sue. [***23] Also, there is no agency discretion language in the Title VII provision providing for agency investigation. The employee's remedy is more effective under Title VII than it is under OSHA.

Polson was correct in surmising the Kansas rule to be that an adequate alternative remedy precludes a common-law retaliatory discharge action. However, neither the Polson facts nor KAAD is before us here. This is an OSHA case. We are not reviewing Polson's conclusion that we would find that KAAD provided an "ade-

quate and exclusive state remedy for violations of the public policy enunciated therein." 895 F.2d at 706.

Coleman, while never specifically saying so, assumes that an adequate alternative remedy would preclude a common-law cause of action for retaliatory discharge. The cases overruled by Coleman (Cox, Smith,and Armstrong) make the same assumption.

In Cox, we said: "An employee is adequately protected contractually from retaliatory discharge." (Emphasis added.) 240 Kan. at 99. In Smith we said, "In Cox, we declined to extend the tort of retaliatory discharge * * * [citation omitted] to include an employee adequately protected [***24] contractually from such discharge by a collective bargaining agreement." (Emphasis added.) 240 Kan. at 572. In Armstrong, we held that the decision in Cox controlled, and plaintiffs who are "fully covered and protected by a collective bargaining agreement" are barred from bringing an action in tort for a retaliatory discharge. (Emphasis added.) 242 Kan. at 168.

The Colemanmajority found the arguments in the Cox and Armstrong dissents persuasive, and, applying the adequate alternative [*210] remedy test, held that Cox "did not fully recognize the limited remedy afforded the injured employee through collective bargaining." 242 Kan. at 813. Thus, Coleman overruled Cox, Smith, and Armstrong on the ground that the overruled cases wrongly found the remedy under the collective bargaining agreements to be adequate, not on the ground that "adequacy" was not the test. Coleman, Cox, Smith, and Armstrong apply the same "adequate remedy" test.

We answer the certified question in the negative, on the ground that OSHA § 11(c) (29 U.S.C. § 660[c]) does not provide an adequate alternative remedy under the facts certified [***25] here.

SANDRA SHAWCROSS, AND GAYE BAILEY, PLAINTIFFS/APPELLANTS, VS. PYRO PRODUCTS, INC., DEFENDANT/RESPONDENT.

NO. 67859

COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT, DIVISION FOUR
916 S.W.2d 342; 1995 Mo. App. LEXIS 2126

December 26, 1995, OPINION FILED

PRIOR HISTORY: [**1] Appeal from the Circuit Court of Jefferson County. Hon. John L. Anderson.

DISPOSITION: We reverse and remand for further proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former employees sought review of a decision of the Circuit Court of Jefferson County (Missouri), which dismissed, for failure to state a claim upon which relief could be granted, their petition against defendant former employer for wrongful discharge under Missouri's public policy exception to the employment at-will doctrine, based on their allegation that they were fired in retaliation for complaints about safety problems.

OVERVIEW: The employees alleged that the employer's fireworks production factory was unsafe. When their employer learned that they had contacted the United States Department of Labor to determine if any of the conditions at the factory plant violated the Occupational Safety and Health Act (OSHA), they were fired. The employer argued that OSHA provided their exclusive remedy. The court reversed the trial court's dismissal of their petition against the employer for wrongful discharge. The court held that the employees' allegations were sufficient to state a claim for wrongful discharge under Missouri's public policy exception to the employment at will doctrine for a discharge precipitated by an employee's report of violations of law or public policy. Under OSHA, 29 U.S.C.S. § 660(c)(2), an employee could file a complaint for wrongful discharge within 30 days after the discharge, but the Secretary of Labor had sole discretion to determine whether to bring a wrongful discharge action in federal court. Because OSHA did not provide a complete remedy, it did not displace the common law remedy under Missouri's public policy exception to the employment at will doctrine.

OUTCOME: The court reversed the circuit court's dismissal of the employees' petition.

CORE TERMS: public policy exception, at-will, wrongful discharge, statutory remedy, state law, pre-emption, wrongful discharge, occupational safety, cause of action, retaliatory discharge, reporting, working conditions, plant, Health Act OSHA, Energy Reorganization Act, federal law, common law, state remedies, employee's rights, remedy provided, remedy available, sole discretion, remedial measures, reinstatement, discharging, discharged, pre-empted, pre-empts, contacted, factory

In reviewing a trial court's dismissal of an action, the appellate court accepts as true the facts properly pleaded, giving the averments a liberal construction and making those reasonable inferences fairly deducible from the facts stated. Viewing the pleadings in this light, the court determines if the pleader has demonstrated any basis for relief.

An employer may discharge an at-will employee, with or without cause, and not be subject to wrongful discharge liability. However, while employers may terminate employees at-will for no reason, or for an arbitrary or irrational reason, there is no right to discharge an employee for an unlawful reason or purpose which goes against public policy.

When the discharge of an at-will employee violates a clear mandate of public policy, the employee has a wrongful discharge claim. Missouri courts have recognized four categories of cases under the public policy exception: (1) discharge of an employee because of his or her refusal to perform an illegal act; (2) discharge because an employee reported violations of law or public policy to superiors or public authorities; (3) discharge because an employee participated in acts that public policy would encourage, such as jury duty, seeking public office, asserting a right to collective bargaining, or joining a union; and (4) discharge because an employee filed a worker's compensation claim. Missouri courts have limited the public policy exception to apply only to those cases when the discharge of an employee violates a constitutional provision, a statute, or a regulation based on a statute.

The Occupational Safety and Health Act (OSHA) prohibits employers from discharging or discriminating in any way against an employee because that employee has filed a complaint, instituted an action, or otherwise exercised any right available under OSHA. 29 U.S.C.S. § 660(c)(1).

The Occupational Safety and Health Act permits an employee to file a complaint with the Secretary of Labor within 30 days after the discrimination or discharge has occurred. 29 U.S.C.S. § 660(c)(2). The Secretary has sole discretion in deciding whether to bring an action in federal court regarding the employee's rights. 29 U.S.C.S. § 660(c)(2). Should the Secretary choose to do so, the statute allows for reinstatement of the employee to the employee's former position with back pay. 29 U.S.C.S. § 660(c)(2). The statute provides no means of appeal for an employee whose complaint is not acted upon by the Secretary. 29 U.S.C.S. § 660(c)(2).

The Occupational Safety and Health Act does not bar a state wrongful discharge claim.

The remedial measures provided for in the Occupational Safety and Health Act do not preempt a state law wrongful discharge claim.

Preemption can occur when (1) federal law expressly preempts state law; (2) federal law occupies the field so completely that preemption may be inferred; or (3) there is a conflict between federal and state law.

The Occupational Safety and Health Act only allows an employee to file a complaint with the Secretary of Labor who then decides whether to bring an action on the employee's behalf. 29 U.S.C.S. § 660(c)(2). The employee's right to relief is even further restricted in that the complaint must be filed within 30 days of the discrimination or discharge. 29 U.S.C.S. § 660(c)(2). The decision to assert a cause of action is in the sole discretion of the Secretary of Labor and the statute affords the employee no appeal if the Secretary declines to file suit.

A statutory remedy shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelopes the remedies provided by common law.

JUDGES: CLIFFORD H. AHRENS, Presiding Judge. James A. Pudlowski and Stanley A. Grimm, JJ., concur.

OPINION BY: CLIFFORD H. AHRENS

OPINION

[*343] Plaintiffs appeal the circuit court's dismissal of their petition for wrongful discharge against their employer under Missouri's public policy exception to the employment at-will doctrine for failure to state a claim upon which relief can be granted. Plaintiffs alleged defendant violated public policy by firing them in retaliation for filing complaints regarding the safety problems in defendant's factory. We reverse and remand.

In reviewing a trial court's dismissal of an action, "we accept as true the facts properly pleaded, giving the averments a liberal construction and making those reasonable inferences fairly deducible from the facts stated." Petersimes v. Crane Co., 835 S.W.2d 514, 515 (Mo. App. 1992). Viewing the pleadings in this light, we deter-

mine if the pleader has demonstrated any basis for relief. Luethans v. Washington University, 838 S.W.2d 117, 119 (Mo. App. 1992).

Plaintiffs, in [**2] their petition, alleged the following facts: Plaintiffs, Sandra Shawcross and Gaye Bailey were employed by defendant Pyro Products, Inc., in its fireworks production factory in Jefferson County, Missouri. Plaintiffs concede they were employees at-will. On numerous occasions prior to March 23, 1994, they complained to defendant that working conditions in defendant's plant were unsafe. Plaintiffs also contacted the United States Department of Labor to determine if any of the conditions at defendant's plant violated the Occupational Safety and Health Act ("OSHA"). On March 23, 1994, plaintiffs met with Ronald Walker, an officer of defendant, discussed their concerns regarding safety in the plant, and informed Mr. Walker that they had contacted the Department of Labor. On March 24, 1994, defendant discharged plaintiffs as a direct result of their contacting the Department of Labor.

Generally, an employer may discharge an at-will employee, with or without cause, and not be subject to wrongful discharge liability. Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. 1985). However, this court, while recognizing that employers may terminate employees at-will "for no reason, or for an arbitrary or [**3] irrational reason," has specifically determined that there is no right to discharge an employee for an unlawful reason or purpose which goes against public policy, and has recognized the public policy exception to employment at-will. Petersimes, 835 S.W.2d at 516.

When the discharge of an at-will employee violates a clear mandate of public policy, this court has determined that the employee has a wrongful discharge claim. Id. The courts of this state have recognized four categories of cases under the public policy exception: (1) discharge of an employee because of his or her refusal to perform an illegal act; (2) discharge because an employee reported violations of law or public policy to superiors or public authorities; (3) discharge because an employee participated in acts that public policy would encourage, such as jury duty, seeking public office, asserting a right to collective bargaining, or joining a union; and (4) discharge because an employee filed a worker's compensation claim. Lynch v. Blanke Baer and Bowey Krimko, Inc., 901 S.W.2d 147, 150 (Mo. App. 1995).

The courts of this state have limited the public policy exception to apply only to those cases when [**4] the discharge of an employee violates a constitutional provision, a statute, or a regulation based on a statute. See Luethans, 838 S.W.2d at 120.

Plaintiffs' petition asserts a wrongful discharge action under Missouri's public policy exception to the employment at-will doctrine. [*344] Plaintiffs alleged in their petition that their discharge by defendant violated OSHA because that section protects employees reporting to the Department of Labor from retaliatory discharge. 29 U.S.C. § 660(c)(1) (1985). OSHA prohibits employers from discharging or discriminating in any way against an employee because that employee has filed a complaint, instituted an action, or otherwise exercised any right available under OSHA. Id.

Plaintiffs further alleged that because the purpose of OSHA is to assure workers "safe and healthy working conditions" and because OSHA prohibits employers from discharging employees for exercising their rights under OSHA, defendant's discharge of plaintiffs was a violation of public policy. Plaintiffs alleged they were employed by defendant at-will. They alleged that OSHA promotes public policy by ensuring safe working conditions. Finally, they alleged defendant [**5] violated public policy when it fired plaintiffs for reporting to the Department of Labor. We believe plaintiffs have alleged facts sufficient to state a claim for wrongful discharge under Missouri's public policy exception.

Defendant argues that the public policy exception does not apply to cases such as this one where the statute, which is the basis for the public policy exception, provides its own remedy. OSHA permits an employee to file a complaint with the Secretary of Labor within thirty days after the discrimination or discharge has occurred. 29 U.S.C. § 660(c)(2) (1985). The Secretary has sole discretion in deciding whether to bring an action in federal court regarding the employee's rights. Id. Should the Secretary choose to do so, the statute allows for reinstatement of the employee to the employee's former position with back pay. Id. The statute provides no means of appeal for an employee whose complaint is not acted upon by the Secretary. Id. Defendant contends the remedy provided by the statute is the exclusive remedy available to employees in those situations.

Defendant bases its argument on this court's decision in Hendrix v. Wainwright Industries, [**6] 755 S.W.2d 411 (Mo. App. 1988). The employee in Hendrix did not allege the employer's actions violated Missouri's public policy, as plaintiffs have in the instant case. 755 S.W.2d at 412-413. The petition in Hendrix asserted only a conspiracy to violate OSHA. However, defendant points to the general statement of law in Hendrix:

Any remedy for retaliatory discharge must come from within the agency. There is no private cause of action for violation of the Occupational Safety and Health Act.

Id. at 413. This pronouncement of the law was taken from Taylor v. Brighton Corp., 616 F.2d 256, 264 (6th Cir. 1980). Since Taylor, the Eighth Circuit has examined the same issue and determined that OSHA does not bar a state wrongful discharge claim. Schweiss v. Chrysler Motors Corp., 922 F.2d 473, 475 (8th Cir. 1990). In Schweiss, as in the instant case, the plaintiff alleged she was discharged for reporting violations of OSHA at her workplace. Schweiss, 922 F.2d at 474. The Eighth Circuit determined that those allegations were sufficient to state a cognizable claim under Missouri law. Id. The only issue which remained for the court's decision [**7] was whether OSHA pre-empted plaintiff's state law claim. Id.

The Eighth Circuit found no language in the statute expressly pre-empting state law. Schweiss, 922 F.2d at 474. It also found no reason to infer pre-emption from the language of the statute, noting that "[OSHA] expressly allows for state regulation in the occupational safety field of law." Id. The court specifically held that the remedial measures provided for in OSHA did not preempt a state law wrongful discharge claim. Id. at 475.

In reaching its decision in Schweiss, the Eighth Circuit relied on a recently decided U.S. Supreme Court case, English v. General Electric Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65, 74 (1990). In English, the Supreme Court examined whether the Energy Reorganization Act of 1974 pre-empted a state law tort claim. That statute provides remedial measures to retaliatory discharge similar to those provided for in OSHA. 42 U.S.C. § 5851 (1995). Although defendant disagrees, we believe the issue in this case is also whether [*345] OSHA pre-empts plaintiff's wrongful discharge claim. Pre-emption can occur when: (1) federal law expressly pre-empts [**8] state law; (2) federal law occupies the field so completely that pre-emption may be inferred; or (3) there is a conflict between federal and state law. English, 496 U.S. at 78-79. The Supreme Court found no pre-emption of the state tort claim by the federal statute, noting, "ordinarily the mere existence of a federal regulatory or enforcement scheme, even one as detailed as [the Energy Reorganization Act], does not by itself imply pre-emption of state remedies." Id. at 80. The court found no actual conflict between the federal and state remedies, and thus no pre-emption. Id. at 81. The Eighth Circuit applied English to the facts of Schweiss and held that OSHA allows a state wrongful discharge claim under Missouri's public policy exception. Schweiss, 922 F.2d at 475.

We believe Schweiss and English promote the more just policy of allowing plaintiffs remedies in addition to the single narrow remedy provided by OSHA. For these reasons, we follow Schweiss and English.

Defendant further contends that state law simply does not apply where a federal statutory remedy exists, regardless of preemption. Defendant relies on Clark v. Beverly Enterprises-Missouri, [**9] 872 S.W.2d 522, 525 (Mo. App. 1994) for this rule. However, the rule is merely dicta in Clark. The statute in Clark did not provide a remedy and plaintiff was allowed to assert a private cause of action. Defendant also relies on Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560, 565 (W.D. Mo. 1990), which was cited by the Western District in Clark as authority for this rule. Prewitt is distinguishable.

The employee in Prewitt brought suit for wrongful discharge under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 215(a)(3) (1965). In Count I of the employee's complaint, she alleged wrongful discharge under FLSA. Id. at 561. Count II was a claim for wrongful discharge under Missouri's public policy exception to the employment at-will doctrine. Id. The federal district court concluded the employee had not stated a claim upon which relief could be granted as to Count II. 747 F. Supp. at 565. The court reasoned that FLSA provided a complete range of remedies for the employee and thus the public policy exception did not apply in that instance. Id.

The distinction between Prewitt and the instant case lies in the statutory remedies. [**10] FLSA allows an employee to bring a claim in either federal or state court to recover "employment, reinstatement, promotion, and the payment of lost wages and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1995 Supp.). In contrast, OSHA only allows an employee to file a complaint with the Secretary of Labor who then decides whether to bring an action on the employee's behalf. 29 U.S.C. § 660(c)(2) (1985). The employee's right to relief is even further restricted in that the complaint must be filed within thirty days of the discrimination or discharge. Id. The decision to assert a cause of action is in the sole discretion of the Secretary of Labor and the statute affords the employee no appeal if the Secretary declines to file suit. Id. It is obvious from the language of the two statutes that although an employee may obtain any type of relief possible under FLSA through the employee's own actions, the relief available under OSHA is limited to what the Secretary of Labor deems appropriate. It should also be noted that unless

an employee acts immediately and files a complaint with the Secretary of Labor, there is no remedy available without the public [**11] policy exception. We agree that, in instances such as Prewitt, a complete statutory remedy should replace the common law remedy, but such a result should not occur, in cases such as this, where the statutory remedy is incomplete.

A statutory remedy shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelopes the remedies provided by common law.

Prewitt, 747 F. Supp. at 565, citing Detling v. Edelbrock, 671 S.W.2d 265, 271-272 (Mo. banc 1984).

We find OSHA does not provide a complete remedy and therefore we conclude that Missouri's public policy exception is applicable [*346] notwithstanding the existence of the federal statutory remedy under OSHA. Plaintiffs have stated a claim of wrongful discharge under the public policy exception to Missouri's employment at-will doctrine.[1] We reverse and remand for further proceedings.

ROGER WOOD, APPELLANT v. DEPARTMENT OF LABOR AND ELAINE CHAO, SECRETARY OF LABOR, APPELLEES

NO. 00-5297

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
275 F.3d 107; 2001 U.S. App. LEXIS 27258

September 7, 2001, Argued
December 28, 2001, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Columbia. (No. 98cv02364).

Wood v. Herman, 104 F. Supp. 2d 43, 2000 U.S. Dist. LEXIS 9867, 16 I.E.R. Cas. (BNA) 905, 2000 O.S.H. Dec. (CCH) P 32167 (D.D.C. 2000)

DISPOSITION: Affirmed.

COUNSEL: Joanne Royce argued the cause for the appellant. James R. Klimaski was on brief.

Beverly M. Russell, Assistant United States Attorney, argued the cause for the appellees. Kenneth L. Wainstein, Acting United States Attorney at the time the brief was filed, R. Craig Lawrence, Assistant United States Attorney, and Ann Rosenthal and John Shortall, Attorneys, United States Department of Labor, were on brief for the appellees.

JUDGES: Before: HENDERSON, RANDOLPH and ROGERS, Circuit Judges. Opinion for the court filed by Circuit Judge HENDERSON.

OPINION BY: KAREN LECRAFT HENDERSON

OPINION

[*108] KAREN LECRAFT HENDERSON, Circuit Judge: Appellant Roger Wood seeks review of the district court's dismissal of his appeal from the decision of the Department of Labor (DOL) declining to file suit on his behalf for retaliatory discharge under section 11(c) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 660(c). The district court held that the DOL's decision not to sue was committed to the agency's discretion by law and thus not subject to judicial review pursuant to the United [**2] States Supreme Court's decision in Heckler v. Chaney, 470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). In light of the limited issue Wood raises on appeal, we affirm the district court's dismissal of his complaint but on a different ground.

I. Wood was employed as a senior electrician by United Engineers and Constructors (UE&C)[1] at the Johnston Atoll Chemical Agent Disposal System (JACADS).[2] JACADS is a facility consisting of several chemical weapons incinerators located on the Johnston Atoll in the Pacific Ocean. The facility is operated by UE&C pursuant to a U.S. Army contract to dismantle and destroy the lethal chemical weapons stockpile stored on the island. Due to the type of weapon handled at JACADS, the working conditions at the facility are probably as dangerous as any undertaken in the world.

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[1] We express no opinion on the merits of plaintiffs' claims.

[1] UE&C is a subsidiary of Raytheon Industries.

[2] On a motion to dismiss, the facts as alleged in the complaint are taken as true and all reasonable inferences therefrom are drawn in the plaintiff's favor. See Sugar D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 411, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986).

[**3] According to his complaint, before working at JACADS, Wood was employed at the Pine Bluff Arsenal in Arkansas, where he gained extensive experience in the field of chemical weapons destruction, making over 1000 "toxic entries"[3] with various levels of protective clothing and respirators. Upon his arrival at JACADS in 1990, Wood discovered that management and many of his co-employees failed to appreciate the dangers associated with the destruction of chemical weapons. In particular, he found basic safety equipment and training, the norm at Pine Bluff, inadequate at JACADS. As a result, Wood began making a number of safety complaints about conditions at the facility. In November 1990, Wood's concerns were confirmed when an investigation conducted [*109] by the Occupational Safety and Health Administration (OSHA) resulted in the issuance of a "serious"[4] citation for two violations. The violations included the provision of unapproved respirators, 29 C.F.R. § 1910.134(c), and the standby team's use of improper protective equipment, 29 C.F.R. § 1910.134(e)(3)(iii). Coincident with the citation, OSHA mandated that all toxic entries be [**4] discontinued until JACADS complied with a schedule of specific safety precautions.

Subsequently, Wood and his supervisors had a number of clashes regarding safety issues at JACADS. The supervisors saw many of Wood's allegations as scare tactics, intended to frighten his co-workers. The disputes culminated in Wood's refusal to work in a toxic area because UE&C had not provided him with new corrective lenses for the facepiece of his protective mask. Because he had already received a final reprimand for refusal to work,[5] Wood was discharged for insubordination on February 4, 1991.

[**5] On February 15, 1991 Wood filed a complaint with OSHA alleging that his discharge violated section 11(c)(2) of the Act, which prohibits reprisals against employees who raise health and safety concerns. See 29 U.S.C. § 660(c).[6] OSHA regional investigator John Braeutigam was initially assigned to investigate Wood's allegations and, based on his investigation, the San Francisco Regional OSHA Office concluded that UE&C had violated section 11(c)(2) of the Act by terminating Wood for making safety complaints about the conditions at JACADS. When attempts at settlement proved unsuccessful, the Regional Office forwarded the complaint to the DOL Regional Solicitor with the recommendation that "a case be filed on Wood's behalf." After further research, the Regional Solicitor concluded that the case was inappropriate for litigation due to a possible jurisdictional conflict with the Department of the Army (Army), which, he concluded, was responsible for setting the safety standards at JACADS. As a result, DOL's Office of the Solicitor (DOL Solicitor) referred Wood's claim to the Army. The Army conducted its own investigation and, in February 1996, finally returned [**6] the case to DOL without taking any action.

In April 1996 OSHA and the DOL Solicitor reviewed Wood's case again. In a letter dated May 3, 1996 the OSHA Assistant Secretary notified Wood that OSHA would take no further action. Explaining that the right to refuse to work is very limited, the Assistant Secretary concluded that Wood's refusal to participate in toxic entries did not meet the applicable legal test and thus his termination did not violate section 11(c). The Assistant Secretary also [**7] suggested that UE&C's probable jurisdictional defense based on the Army's [*110] authority over JACADS would "further complicate the litigation."

On October 2, 1998 Wood filed the instant action seeking judicial review of the DOL Secretary's decision declining to bring a civil action on his behalf pursuant to section 11(c)(2) of the Act. Count I of his complaint alleged that the Secretary "determined that Raytheon, [Wood's] employer, had violated 29 U.S.C. § 660(c)" and then "unlawfully declined to file suit in an appropriate U.S. district court against Raytheon." Compl. P P 57-58. Counts II and III alternatively charged that the statement of reasons regarding the decision not to sue contained in the Assistant Sec-

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[3] A toxic entry is an entry into an environment where toxic contamination exists. See Compl. P 15.

[4] "Serious" means a "hazard, violation or condition such that there is a substantial probability that death or serious physical harm could result." See 29 C.F.R. § 1960.2(v).

[5] On February 2, 1991 Wood had received and signed a "FINAL REPRIMAND" letter detailing his refusal to work as directed. The reprimand stated that "any further incidents, in which your actions are interpreted as insubordination * * * will result in the immediate termination of your employment at JACADS." JA 123.

[6] Section 660(c) has three subsections. Defining "protected activity" under the Act, section 660(c)(1) provides: "No person shall discharge or in any manner discriminate against any employee because * * * of the exercise by such employee * * * of any right afforded by this chapter." 29 U.S.C. § 660(c)(1). Section 660(c)(2) provides the complaint procedure and describes the prohibited action, see infra p. 6, and section 660(c)(3) sets forth the Secretary's notice deadline once a complaint is filed.

retary's May 3, 1996 letter violated the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(a).[7] Defendants DOL and the DOL Secretary moved to dismiss.

[**8] On June 23, 2000 the district court dismissed Wood's complaint, concluding that the Secretary's decision declining to bring a section 11(c) suit was not judicially reviewable. Wood v. Herman, 104 F. Supp. 2d 43, 48 (D.D.C. 2000). The district court relied on the holding in Heckler v. Chaney, 470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985), in which the Supreme Court declared that an agency decision declining to initiate an enforcement action is generally "presumed immune from judicial review" unless the statute "has provided guidelines for the agency to follow in exercising enforcement powers." Wood v. Herman, 104 F. Supp. 2d at 45-46 (D.D.C. 2000) (quoting Chaney, 470 U.S. at 832-33).[8] "Unable to discern any meaningful guidelines for the Secretary to follow in deciding whether to bring an enforcement action," the district court held that "the Chaney presumption of nonreviewability must govern." 104 F. Supp. 2d at 46. Without separately discussing the APA claims, the district court dismissed the entire action. This appeal followed.

[**9] II.

On appeal, as he did in the district court, Wood frames the issue as "whether the Secretary of Labor's decision not to bring an enforcement action, despite having found a violation under 29 U.S.C. § 660(c), is reviewable." Appellant's Br. at 2. We review the dismissal of Wood's complaint de novo. Gilvin v. Fire, 259 F.3d 749, 756 (D.C. Cir. 2001). In deciding a purely legal question, we need not adopt the reasoning relied upon below. See Eldred v. Reno, 345 U.S. App. D.C. 89, 239 F.3d 372, 374-75 (D.C. Cir. 2001). While we affirm the district court's dismissal of Count I, we do so on a different basis from the one used below. We conclude that Count I fails to state a claim on which relief can be granted, Fed. R. Civ. P. 12(b)(6), because the Secretary did not determine that Wood's discharge violated section 11(c) of the Act.

In challenging the Secretary's non-enforcement decision, Wood relies principally upon the language of section 11(c)(2). We allow Wood to fall on his statutory "sword." The pertinent language of section 11(c)(2) of the Act provides:

[*111]

Any employee who believes that he has been discharged or otherwise discriminated [**10] against by any person in violation of this subsection may * * * file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such 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 * * *

29 U.S.C. § 660(c)(2) (emphasis added). Count I mirrors the statutory language, alleging that the Secretary determined that Wood's employer had violated section 11(c)(2) and then "unlawfully failed to bring an action." In light of the congressional mandate reflected by the "shall" language, Wood argues, the Chaney presumption of non-reviewability is inapplicable.

Wood's contention is based on the premise that the Secretary's statutory duty to bring suit under section 11(c)(2) arises only if the Secretary first finds a violation. As discussed below, the Secretary made no such determination here and concluded instead that Wood's refusal to work was not protected activity under the Act. Wood appears to view [**11] the Secretary's determination that the subsection was not violated and the Secretary's decision not to bring suit as two sides of the same coin so that he may challenge the latter without regard to the former. As the complaint itself appears to recognize, however, the Secretary's determination that section 11(c)(2) has been violated at all is a requisite precondition to her enforcement decision. Count I alleges "the Secretary conducted an investigation into plaintiff's claim of retaliation; confirmed its merits; and determined that Raytheon, plaintiff's employer, had violated 29 U.S.C. § 660(c) by terminating plaintiff in retaliation for protected activity." Compl. P 57 (emphasis added). In his Reply Brief, Wood further argues that because the "Secretary of Labor unquestionably found a violation of § 11(c)," the DOL "was obligated to file suit on his behalf." Reply Br. at 1 (emphasis added). Although Count I (paragraph 57) of the complaint alleges that the first step

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[7] Count II also challenged the Assistant Secretary's additional rationale included in his May 3, 1996 letter that the jurisdictional issue would likely complicate the litigation of Wood's claim. Counts IV, V and VI laid out additional grounds for relief which are not before us on appeal.

[8] Chaney noted that an agency's decision to decline enforcement is "generally committed to an agency's absolute discretion" and "involves a complicated balancing of a number of factors which are peculiarly within [agency] expertise." 470 U.S. at 831 (citations omitted). In addition, "the agency is far better equipped than the courts to deal with the many variables involved in the proper order of its priorities." Id. at 831-32.

of the statutory directive detailed above was met, Wood's complaint also recites the contents of the Assistant Secretary's May 3rd letter, which states in part that "we conclude [**12] that your refusal to work does not meet the test set forth in [section 11(c)]." Compl. P 50 (emphasis added). See generally 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 319-20 (2d ed. 1990). On its face, then, the complaint foretells its own demise. Wood's challenge to the Secretary's decision not to bring suit on his behalf, which forms the basis of Count I, cannot be heard if the Secretary did not first determine that UE&C violated section 11(c)(2).

Section 11(c)(2) designates the Secretary as the official who decides whether and to what extent an investigation is "appropriate" and, based on that investigation, whether the complainant has made out a claim that his employer discriminated against him, by discharge or otherwise, for his protected activity. 29 U.S.C. § 660(c). To demonstrate that the Secretary "unquestionably" found a violation, Wood sweepingly contends that "every single Department of Labor official and attorney who investigated the facts found a strong merit case." Reply Br. at 1. His contention, even if true, is irrelevant. Only the Secretary of Labor is authorized to "determine" whether [**13] the "subsection has been violated." The Secretary has delegated to the Assistant Secretary for Occupational Safety and Health "the authority and assigned [*112] responsibility for administering the safety and health programs and activities of the Department of Labor * * * under * * * the Occupational Safety and Health Act of 1970." See Secretary's Order 3-2000, 65 Fed. Reg. 50017 (August 16, 2000). Using this authority, the Assistant Secretary for Occupational Safety and Health John Deer determined on May 3, 1996 that Wood's refusal to work was not protected activity under section 11(c)(2) and therefore UE&C did not violate the Act by discharging him. The first step of section 11(c)(2) not having been taken, then, Wood cannot as a matter of law make out a retaliatory discharge claim as set forth in Count I.[9]

[**14] For the foregoing reasons, the district court's dismissal of Count I of Wood's complaint is

Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee sought review of the United States District Court for the District of Columbia's dismissal of his appeal from the decision of defendant Department of Labor, which declined to file suit on his behalf for retaliatory discharge under § 11(c) of the Occupational Safety and Health Act, 29 U.S.C.S. § 660(c).

OVERVIEW: The employee had filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that he had been discharged for raising health and safety concerns. The employee alleged that the Secretary of the Department of Labor (DOL) had determined that the employer had violated 29 U.S.C.S. § 660(c) and then unlawfully declined to file suit against the employer. The district court held that the DOL's decision not to sue was committed to the agency's discretion by law and was not subject to judicial review. The court affirmed the district court's decision, but on a different basis. The court found that as a matter of law, the employee could not make out the retaliatory discharge claim because the Assistant Secretary for Occupational Safety and Health, who had been delegated the authority to decide whether a complainant had made out a claim that his employer discriminated against him, had determined that the employee's refusal to work was not protected activity under 29 U.S.C.S. § 660(c) and that, therefore, the employer did not violate the Occupational Safety and Health Act by discharging him.

OUTCOME: The court affirmed the dismissal of the count alleging that the secretary had unlawfully declined to file suit against the employer.

CORE TERMS: protected activity, regional, judicial review, chemical weapons, declining, file suit, bring suit, enforcement action, jurisdictional, protective, reprimand, retaliatory discharge, agency decision, unquestionably, discriminated, destruction, terminating, retaliation, respirators, discharged, unlawfully, reviewable, confirmed, guidelines, assigned, insubordination, termination, supervisors, complicate

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[9] In holding that the Secretary's decision not to sue was unreviewable, the district court did not reach Counts II and III, Wood v. Herman, 104 F. Supp. 2d at 45; on appeal Wood did not raise, in the alternative, an issue on either, and accordingly, Wood has waived any objection to their dismissal. Moreover, the court does not reach the questions whether either the Secretary's determination of a violation vel non or her determination upon finding a violation not to file a complaint are subject to judicial review.

Appendix 6

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*1 FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

Eugene R. **Fidell** [FNa]

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INTRODUCTION

Few areas of federal labor law are currently the subject of such wide public interest as "whistleblowing," a now familiar term for employee dissemination of information critical of or reflecting adversely on an employer, typically for the purpose of correcting or preventing some violation of law or other harm. [FN1] A recent widely publicized episode involved two engineers employed at Morton Thiokol, Inc., a major National Aeronautics and Space Administration contractor for the ill-fated Challenger space shuttle. The engineers alleged that they were retaliated against for whistleblowing in matters affecting safety.

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I. TAXONOMY AND TERMINOLOGY

Although much of the business of ensuring that laws are observed has become the responsibility of the government, rather than of private citizens, the Supreme Court has rejected the notion that private citizens have no role to play. [FN12] Whistleblower protection provisions are among the tools available to government for the achievement of public objectives. Some of these tools are used directly by the government itself, while others are used by private individuals. Imprisonment, fines, penalties, and forfeitures are, for example, familiar sanctions used by government as direct disincentives to violations of the law. [FN13] Rewards [FN14] or qui tam provisions might, by contrast, be thought of as indirect incentives to obey the law because they encourage private interests to assist in the achievement of public ends. In some circumstances, the law may create an indirect negative incentive to encourage private citizens to assist in suppressing crime. The Tariff Act, for example, provides that refusing to assist a Customs officer is a misdemeanor. [FN15] Federal whistleblowing anti-retaliation provisions remove disincentives for private assistance in achieving public ends. Such provisions hold harmless***6** those employees whose information must reach the government in order to help achieve public goals. [FN16]

There are certain terminological pitfalls in the whistleblowing area. The phrase "employee protection" is, for example, occasionally used to describe whistleblowing anti-retaliation measures. [FN17] This term, however, has been used in contexts other than whistleblowing. Another recent enactment [FN18] uses the vague and essentially meaningless term "public protection."

The terms "discrimination" and "affirmative action" respectively describe protected whistleblowing and the fashioning of remedies. Obviously, these terms have particular meanings in society; their use in this context can inappropriately imply a legal or doctrinal kinship with the race relations area, thereby bringing into play very different concerns and values from those that underly public policy in the whistleblowing area.

II. THE COMMON LAW CONTEXT

The background against which the federal legislation addressed in this Article arose may be briefly sketched. [FN19] At common law (American, incidentally, rather than English), the rule evolved that an employee could be dismissed at the will of the employer unless his contract provided otherwise. [FN20] This doctrine is said to have originated in a treatise published a little more than a century ago, [FN21] and was embraced promptly and uncritically. Eventually, however, some courts began to ***7** carve exceptions from the rule. Doctrines have arisen in a number of jurisdictions which hold that there is a "public policy exception" to the employment-at-will rule. In summary, such exceptions hold that an employer cannot discharge an employee for conduct that advances a recognized public policy. The law on this point is essentially state law, [FN22] and the extent to which it applies to any particular set of facts is likely to vary dramatically from one jurisdiction to another.

III. THE FEDERAL LEGISLATIVE RESPONSE

In addition to judicial recognition of a public policy exception to the employment-at-will doctrine, Congress and a number of state legislatures have enacted specific provisions ensuring protection against retaliation for employees who assert various rights. The federal legislation includes a variety of statutes, only some of which deal with public health and safety programs. [FN23] This Article is confined to the measures protecting health and safety whistleblowers, although a broader study may be desirable at a later date to explore the need for rationalizing the entire federal legislative scheme.

A. Public Sector Employees

Table 2 [FN24] lists the various federal statutes that seek to protect from retaliation those public employees who engage in whistleblowing. These statutes are beyond the scope of this Article, but a few words may still be in order. The key statute is the Civil Service Reform Act of 1978 (CSRA), [FN25] which created broad protection for disclosures by civilian federal

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found to have merit. [FN50] In 1985 58 merit findings were issued. [FN51] In fiscal year 1985, the Labor Department's Office of Administrative Law Judges (OALJ) docketed 20 STAA cases following OSHA investigation, and conducted six administrative hearings.

Third in frequency are retaliation complaints under the Federal Mine Safety and Health Act. [FN52] MSHA investigated 205 complaints of safety- or health-related discrimination that were filed during fiscal ***11** year 1985. [FN53] The Labor Department's Office of Administrative Law Judges adjudicates cases under a broad range of statutory programs, most of which have nothing to do with whistleblowing. The Office is, however, also responsible for a substantial part of the overall whistleblower caseload. The OALJ received 77 such cases during fiscal year 1985 under the various whistleblowing statutes it administers (including the 20 STAA cases referred to above). Of these, the vast majority were nuclear cases brought under the Energy Reorganization Act (ERA). [FN54] The OALJ received 264 whistleblowing cases between 1980 and late 1986. [FN55] However, there have been very few discrimination complaints under the Surface Mining Control and Reclamation Act (SMCRA). [FN56] The number of whistleblower complaints received by the Department of Labor was not available at the time of publication of this Article, but it appears that in fiscal year 1985 the Wage and Hour Division conducted approximately 50 investigations under the statutes for which it is responsible, of which about one-half were found to be meritorious.

Statistics concerning the incidence of whistleblowing cases brought before the NLRB were also unavailable, although case summaries furnished by the Board's Office of General Counsel indicate that health and safety issues are not uncommon in Board proceedings. [FN57] For comparative purposes, during fiscal year 1985, the Office of Special Counsel of the Merit Systems Protection Board received 135 whistleblowing disclosures from federal employees. [FN58]

IV. SHORTCOMINGS OF THE CURRENT ARRANGEMENTS

A. Jurisdictional Lacunae

The most obvious shortcoming of the current federal legislation protecting***12** health and safety whistleblowers is the omission of coverage for major sectors of the economy where health and safety are unquestionably at stake. For example, Congress has yet to extend whistleblowing protection to aviation, aerospace, vessel construction and operation, food and drugs, medical devices, and consumer products generally. Also, while the major environmental laws administered by EPA include whistleblower provisions, one-the Noise Control Act of 1972 [FN59]-does not. Even where the industry itself is covered, the statute may be written to exclude persons whose jobs have safety implications. [FN60]

Government contractors constitute a major omission to the extent that their activities are not covered by any of the subject-matter-specific anti-retaliation statutes. For example, in 1974 the Department of Labor and the Atomic Energy Commission acknowledged that the whistleblower provisions of the OSH Act are inapplicable to the working conditions of Atomic Energy Commission (AEC) contractor employees who work in facilities which are owned or leased by the government, but operated by the contractor, so long as the AEC prescribes and enforces radiological and nonradiological occupational safety and health standards. [FN61] This kind of gap has been addressed in a variety of ways, including internal agency regulations or contractual provisions. [FN62]

Congress has also begun to recognize the need for coverage of government contractors in general. For example, in the aftermath of the Challenger disaster, Representative Markey observed: "If the Morton Thiokol engineers were Federal employees, they would have recourse through the Civil Service Reform Act and the Office of Special Counsel. But as employees of a Government contractor, they have no ***13** protection." [FN63]

Protection of whistleblowers such as the Morton Thiokol engineers may well raise difficult drafting problems, since it appears that the engineers' expressions of concern were not couched in terms of violations of federal regulations, but rather spoke to the degradation of safety standards peculiar to the shuttle effort. The protection of safety concerns voiced within a company is, not surprisingly, a matter of considerable controversy. Congress should, in framing generic whistleblower

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Retaliation against concerted activity in response to safety concerns has been held to be an unfair labor practice by the National Labor Relations Board, but the Board has recently emphasized that it "was not intended to be a forum in which to rectify all the injustices of the workplace." [FN75] Given the requirement for concerted activity, and the Board's emphasis on the fact that the employee in Meyers Industries [FN76] might have an action under state law or (had it been in effect at the time) under the STAA, it seems improbable that the NLRA [FN77] will prove to be of substantial benefit to whistleblowers who act alone-***16** particularly if their conduct might also be protected under other legislation. [FN78] Indeed, the current Board has expressly disclaimed an interest in "taking it upon ourselves to assist in the enforcement of other statutes." [FN79] This narrow perspective appears to be at odds with the philosophy underlying whistleblower provisions, the basic purpose of which is to assist in the achievement of substantive federal health and safety objectives. Because the statute of limitations for unfair labor practice complaints is longer than most of the whistleblowing statutes, contraction of the NLRB's role effectively reduces the protection available to employees. Meyers Industries suggests that Congress should not look to the broad coverage of the NLRA as a reason to refrain from enacting generic private sector whistleblower legislation. [FN80]

2. Refusals to Work

Employee refusals to work are protected under the Energy Reorganization Act, [FN81] the Federal Mine Safety and Health Act, [FN82] the Federal Railroad Safety Authorization Act, [FN83] the Labor Management Relations Act, [FN84] the National Labor Relations Act, [FN85] and the Surface Transportation Assistance Act. [FN86] The NLRA protects only "concerted activity" under section 7, [FN87] rather than individual conduct. [FN88] Unless the refusal to work is part of a group effort or is an individual effort intended to enlist the support of others, or involves the assertion of a right grounded in a collective bargaining agreement, [FN89] it will not be protected. [FN90] ***17** Section 502 of the LMRA applies to employees who stop work "in good faith because of abnormally dangerous conditions," [FN91] but it is unclear whether the provision protects only those workers actually at risk, or others who join with them. In addition to these statutory provisions, safety-based refusals to work are protected by a regulation [FN92] issued under the OSH Act, and upheld by the Supreme Court in Whirlpool Corp. v. Marshall. [FN93]

The refusal to work provisions typically require that the employee have an actual reasonable belief that he is in danger. [FN94] For example, the STAA provides:

> No person shall discharge, discipline, or in any manner discriminate against an employee . . . for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial vehicle safety and health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition . . . . [FN95]

C. Limitation of Actions

The range of statutes of limitations applicable to health and safety whistleblowing complaints is considerable and, given the plain kinship among these statutes, intellectually indefensible. [FN96] Absent some showing that would justify differences from one setting to another-and this author has been unable to discern the basis for such a showing-a single statute should govern.

What should the limitation period be? This is necessarily a matter of ***18** legislative judgment and should reflect the fact that employers are unlikely to inform the employee that he or she is being dismissed as a reprisal for whistleblowing. Because of this, the employee may not be aware at the time of discharge that a statutory right has been tolled. If an employee must file more than a "notice of appeal" to trigger the whistleblowing hearing process, [FN97] a 30-day statute of limitations is unreasonable, even if a notice is required to be posted at the workplace advertising the complaint process. Moreover, an

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the Secretary of Labor. In any event, there is no need to create a new agency or additional staff for this purpose; the non-OSHA caseload data suggest that interagency transfers would suffice to meet any shift in agency responsibilities. If, on the other hand, substantial new categories of employees are brought under whistleblower provisions, some net increase in staff would probably be necessary.

The program ageecies should play an active role in support of the investigative agencies, even if they do not themselves have investigative responsibility. In technical cases, the program agencies can (and already do, on occasion) furnish technical advice to the investigative agencies. They can also provide expert witnesses or technical interrogators for hearings. At times, they might wish to appear as amici in the whistleblower hearings. [FN107] And they should receive reports on the outcome of each hearing so that they may take whatever follow-up actions may be appropriate in light of the facts developed in the adjudicatory process. These reports should include the adjudicatory decisions as well as the investigative agency's comments and analysis, where appropriate. The program agencies should take affirmative steps to aid whistleblowers, including the issuance of employee protection regulations***21** that could be enforced in the licensing context, where appropriate, such as the NRC has done. [FN108] Agency regulations could also impose useful notice-posting requirements that would adviseemmployees in advance of their rights under the employee protection statutes. [FN109] This is particularly appropriate if Congress continues to insist on unrealistically short statutes of limitations.

Concern has been expressed over the short time typically allotted to the investigative agencies for processing employee complaints. Rather than simply eliminating the investigative phase (e.g., permitting the employee to institute an APA [FN110] hearing without prior agency screening), [FN111] attention might be given to allowing an APA hearing upon request, if the investigative agency has not completed its investigation within a fixed period. [FN112] The disadvantage of such an arrangement would be that the employee and employer would be deprived of the potentially useful initial reaction of the agency. At present, a favorable initial ruling by the agency may be critical to the employee's ability to obtain counsel on a contingent fee basis. [FN113]

Another issue concerns the desirability of requiring or encouraging an employee to exhaust employer-provided remedies as a precondition to an agency hearing. [FN114] Many firms today have internal mechanisms ***22** for the receipt of employee safety complaints; a few have contracted with outside companies to provide external private dispute-ventilation machinery. [FN115] Before a broad requirement for such programs is imposed, however, serious thought should be given to the fact that an exhaustion requirement may only retard employee access to the public adjudicatory process. Arguably, the exhaustion requirement could also provide the employer with an unfair opportunity for early discovery, possibly even before the employee has legal representation.

If such programs are required, the concerned agencies will have to address the discoverability of documents generated during the process [FN116] and the need to toll the statute of limitations during the exhaustion period. One attorney representing employers has indicated that documents and statements generated by both sides in the course of exhaustive internal channels would be discoverable. [FN117] On the basis of the information currently available, the public interest in prompt disposition of employee protection complaints outweighs the competing interest in potentially reducing the need for recourse to formal governmental processes. Certainly public policy "should not aim at driving every internal dispute toward litigation," [FN118] but the system should also not create excessive hurdles.

E. Adjudicatory Procedures

Nowhere is the lack of consistency in federal protection of whistleblowers more apparent than in the arrangements Congress has set for the adjudication of complaints. In eight instances [FN119] (involving ***23** cases arising under the environmental laws and the STAA), on-the-record APA hearings [FN120] and recommended decisions [FN121] are the task of the DOL Office of Administrative Law Judges, [FN122] subject to final action by the Secretary of Labor, [FN123] with the assistance of the DOL Office of Administrative Appeals. One source of concern has been the lack of detailed regulatory guidance concerning the procedures to be followed in connection with review by the Secretary of Labor. [FN124] The Department of Labor has shown its concern over the case backlog in the Office of Administrative Appeals. [FN125] The DOL should streamline the final layer of agency review by promulgating formal rules of appellate procedure. It has also been

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The failure of the current arrangements to provide for judicial enforcement of DOL subpoenas should be remedied as soon as possible by providing for enforcement of DOL subpoenas in the manner provided for other agency subpoenas. [FN142] Until Congress takes such action, the main protection against stonewalling in discovery is the availability of adverse inferences [FN143] or sanctions akin to those provided under Rule 37(b)(2) of the Federal Rules of Civil Procedure. Sanctions alone, however, do not provide a sufficient response to a willful failure to cooperate with discovery in a health or safety whistleblowing case; more is at stake in a whistleblowing case than merely the outcome of the individual action. The public interest may require that the facts be developed in such a case, not simply that the individual employee obtain relief, whether through sanctions or a settlement. Moreover, even with judicial enforcement of subpoenas, ALJ's should still be at liberty to draw adverse inferences or impose sanctions in the event of failure to allow discovery, because the requirement of applying to a federal court for subpoena enforcement may be too time consuming and costly for the party seeking enforcement [FN144]-even though enforcement proceedings are supposed to be summary in nature. [FN145] A party's failure to press ***27** for judicial enforcement of an agency subpoena should, for this reason, not preclude either adverse inferences or appropriate agency sanctions.

Misconduct by counsel-another of the charges levelled by the complainants' bar-is a serious matter that can thwart the achievement of congressional objectives and thereby endanger public health and safety. The arrangements currently in place give agency decisionmakers ample authority to penalize such misconduct, and this authority should be invoked upon a showing of good cause. [FN146] In the unlikely event that ALJ's prove to be indifferent on this score, the Secretary of Labor can be expected to take a firm stand on review. In addition, the usual forums for the consideration of ethical violations remain available. If the misconduct deprives a party of a fair hearing, the decision should be set aside on judicial review.

F. Remedies

The basic remedies available under the employee protection statutes consist of backpay, reinstatement, and attorneys' fees. In some instances, additional relief may be ordered. For example, a number of statutes authorize actual damages, and a variety of kinds of injury have been compensated under those provisions. [FN147] These include medical expenses, front pay, and job search expenses. In one ERA case, an employee was awarded $10,000 for mental pain and suffering and injury to reputation. [FN148] Another employee received $70,000 "to cover past and future medical expenses . . . and as recompense for . . . humiliation and mental suffering." [FN149]

Only two of the environmental employee protection provisions (SDWA and Toxic Substances Control Act (TSCA)) specifically authorize punitive damages. The Department of Labor has held such damages to be unavailable in other contexts. [FN150] The reason for this disparity is unclear, although TSCA [FN151] and SDWA [FN152] were developed ***28** from a common model. With no conceivable explanation for the differences available, a single rule should apply.

Agencies are also authorized to order the abatement of the employer's conduct as well as "affirmative action," although little, if any, use has been made of the latter power. Future cases will probably see increasing use of the affirmative action power.

Under the FMSHA [FN153] and STAA, [FN154] Congress authorized interim relief in the form of temporary reinstatement while the employee's complaint is pending. Significantly, the STAA provision has been sustained against constitutional challenge. [FN155]

Other remedies may be available through the program agency if, for example, the agency licensed the employer in some fashion. Under the Atomic Energy Act, [FN156] the NRC has taken administrative action against licensees because of retaliation against whistleblowing. [FN157] However, as the NRC has indicated, "the action taken by NRC focuses on the licensee to change the conduct of the discriminator. It is not a direct remedy to the employee." [FN158]

G. Judicial Review

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before the OALJ had a more difficult time ascertaining the law. This caused proceedings to be less focused, as well as made it more difficult for employers and employees to know their basic rights. In addition, it thwarted the desirable goal of cross-fertilization between the OALJ and other whistleblower adjudicatory agencies. This insulation makes little sense and, building on the statutory patchwork, tends to retard the development of a coherent body of law in this area.

The sufficiency of the publication of the OALJ decisions remains an open question. At present, research that steps from one anti-retaliation program to another is needlessly cumbersome because of the variety of reporting services. Publication of the OALJ cases will only partially alleviate that problem. If digesting and indexing of whistleblowing cases continue to follow separate systems within each agency, the present network will have been only slightly improved.

This does not suggest that the bar currently confronts a "Tower of Babel" in the whistleblowing area, but the present arrangements necessarily leave the door open to doctrinal variations where they may be unwarranted. If Congress decides to bring all private sector health and safety whistleblowing jurisdiction under one "roof," with a single set of statutory provisions administered by a single agency, this concern will disappear. If Congress does not, serious attention should be given to integrating the reporting arrangements.

*32 V. RECOMMENDATIONS

Clearly, Congress must address important questions regarding the current arrangements for the protection of private sector health and safety whistleblowers. Based on the findings outlined above, Congress and involved agencies should take the following steps.

Congress should enact omnibus whistleblowing legislation to replace all extant federal private sector health and safety whistleblowing provisions. This legislation should include: (1) protection for all private sector employees (including government contractor employees) and state and local government employees against retaliation for whistleblowing with respect to violations of federal safety and health requirements; (2) assignment of investigative responsibility to the Secretary of Labor for all private sector health and safety whistleblowing retaliation cases; (3) provision for on-the-record Department of Labor APA hearings [FN177] in all private sector health and safety whistleblowing cases, with discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts; (4) provision for a single definition of "protected conduct"; (5) provision for a single statute of limitations of not less than 180 days; (6) provision for a single set of remedies (including debarment and suspension of government contractors); (7) provision for a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and (8) provision for a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements, and mandatory coordination with program agencies.

Subject to the actions taken by Congress as recommended above, the Secretary of Labor should: (1) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of decisions of the Office of Administrative Law Judges; (2) transfer all private sector health and safety whistleblowing investigative responsibility to the Occupational Safety and Health Administration, since (under section 11(c) of Occupational Safety and Health Act [FN178] and section 405 of the Surface Transportation Assistance Act [FN179]) OSHA currently receives by far the largest number of private sector health and safety whistleblowing complaints; (3) develop, in consultation with the agencies responsible for the substantive regulatory program, detailed written procedures, as nearly uniform as the Secretary *33 deems practicable, for coordinating investigation, adjudication, and follow-up in whistleblowing cases; and (4) cause all ALJ and Secretarial decisions in whistleblowing cases to be indexed and published, including those rendered prior to January 1, 1987.

In addition to these changes, Congress and the Executive Branch may wish to address a number of related issues, such as the question of preemption. As was persuasively explained at a public hearing conducted by the Administrative Conference of the United States, [FN180] there is a considerable amount of whistleblowing litigation in the state and federal courts, resting not on federal whistleblowing protections, but on state law doctrines such as the public policy exception to the employment-at-will doctrine. [FN181] State law doctrines are evolving rapidly in this area, and it would be premature to

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CONCLUSION

The protection of private sector health and safety whistleblowers is an issue of fundamental workplace fairness and an issue affecting a large portion of the federal regulatory scheme. The current panoply of federal whistleblower statutes is complex and confusing, even to the experienced labor law practitioner. Although the increasing congressional interest in protecting health and safety whistleblowers is to be commended, the present conglomeration of statutes and regulations inhibits, rather than furthers, the rational development of law in this area.

The time is right for reform of the federal whistleblower protection scheme. The recommendations contained herein represent a substantial step forward toward a more rational and even-handed form of regulation. Indeed, the Administrative Conference of the United States has recently formally recommended many of the principal conclusions of this Article. [FN189] Moreover, legislation has been introduced that would achieve many of the same goals. [FN190] Without such action, we run the ***36** risk that the present arrangements, which were conceived as means of remedying real-life problems, will collapse under the crushing burden of complexity, inconsistency, and irrationality.

***37** TABLE 1

PRIVATE SECTOR EMPLOYEE PROTECTION STATUTES

(Health & Safety)

Statute	Program Agency	Investigative Agency	Adjudicatory Agency	Statute of Limitations[FN] [FN1]	Judicial Review
AHERA[FN] [FN191]	EPA	DOL	Dist Cts	90 days	N/A
CAA[FN] [FN192]	EPA	WHD	OALJ	30 days	Ct Apps
CERCLA[FN] [FN193]	EPA	WHD	OALJ	30 days	Dist Cts
DOD87[FN] [FN194]	DOD	DOD	None in Act	None in Act	N/A
ERA[FN] [FN195]	NRC	WHD	OALJ	30 days	Ct Apps

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FWPCA[FN] [FN208]	EPA	WHD	OALJ	30 days	Ct Apps

TABLE 2

PUBLIC SECTOR EMPLOYEE PROTECTION STATUTES

(Health & Safety)

Statute	Program Agency	Investigative Agency	Adjudicatory Agency	Statute of Limitations	Judicial Review
ASHDCA[FN] [FN209]	EDUC	None in Act	None in Act	None in Act	N/A
AHERA[FN] [FN210]	EPA	DOL	Dist Cts	90 days	N/A
CSRA[FN] [FN211]	OPM	OSC	MSPB	20 days	Fed Cir
DOD84[FN] [FN212]	DOD	DODIG + Components	OASD(A)	None in Act or Regs	Dist Cts
EO12196[FN] [FN213]	All (less military)	DOL	Program Agencies	None	N/A

FN1. The limitation periods refer to the time for filing a complaint with the investigative agency, rather than for seeking judicial review.

[FNa] Klores, Feldesman & Tucker, Washington, D.C. B.A., Queens College (1965); LL.B., Harvard University (1968).

This Article was originally prepared as a consultant report for the Administrative Conference of the United States. The views expressed are the author's alone and do not necessarily reflect those of the Conference, its committees, or its staff.

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[FN12]. See United States v. New York Tel. Co., 434 U.S. 159, 175 n. 24 (1977).

[FN13]. Congress could, for example, criminalize acts that interfere with or discourage whistleblowing in areas under federal regulation. Although the literal terms of the Ku Klux Klan Act, 18 U.S.C. § 241 (1982), might cover such misconduct, the Act has been accorded a narrow interpretation, and there is no evidence of it having been used in this fashion.

[FN14]. 18 U.S.C. § 3059 (1982).

[FN15]. See 19 U.S.C. § 507 (1982) (providing that customs officer, after making known his identity, may demand and must receive assistance of citizens in performance of his duties); see also Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, § 3152, 100 Stat. 3207 (to be codified at 18 U.S.C. § 981) (providing immunity from civil prosecution for persons who render help at request of Customs officer).

[FN16]. Another disincentive to removal would be to debar government contractors who retaliate against whistleblowers. This was proposed in response to the case of the Morton Thiokol engineers referred to above, H.R.J. Res. 634, 99th Cong., 2d Sess., 132 CONG.REC. 2758 (1986), but the matter died in committee. One of the engineers has sued the company and also asserted a FTCA claim, 28 U.S.C. § 1346(b) (1982), against NASA. Boisjoly v. Morton Thiokol, No. 87-194 (D.D.C. filed Jan. 28, 1987), noted in N.Y. Times, Jan. 29, 1987, at A16, col. 1.

[FN17]. For example, 29 C.F.R. §§ 24.1-24.9 (1987) implements various federal "employee protection" provisions for which Secretary of Labor has been given responsibility. E.g., Safe Drinking Water Act, 42 U.S.C. § 300(j)- 9(i) (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982); Toxic Substances Control Act, 42 U.S.C. § 2622 (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982).

[FN18]. Asbestos Hazard Emergency Response Act of 1986, Pub.L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

[FN19]. The growth of interest in the whistleblowing area is evidenced by the fact that scholarly writers now no longer feel a need to set out the history of the area. Jenkins, supra note 11, at 467 & n. 11 (1983); Comment, Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine, 38 ME.L.REV. 67, 70 n. 6 (1986).

[FN20]. L. LARSON & P. BOROWSKI, supra note 5, § 2.04.

[FN21]. See Feinman, The Development of the Employment at Will Rule, 20 AM.J. LEGAL HIST. 118, 126-27 (1976).

[FN22]. L. LARSON & P. BOROWSKI, supra note 5, § 11.04 (summarizing federal common law developments in area of wrongful discharge).

[FN23]. The best single catalogue of the federal statute appears in L. LARSON & P. BOROWSKI, supra note 5, § 11.02-.03. Thoughtful articles have been written by William R. Jenkins, supra note 11, and Kohn & Kohn, An Overview of Federal and State Whistleblower Protections, 4 ANTIOCH L.J. 99 (1986). Federal regulations also require state OSHA plans to include employee protection provisions. 29 C.F.R. § 1902.4(c)(2)(v) (1986).

[FN24]. See infra p. 38 (Table 2).

[FN25]. 5 U.S.C. § 2101 (1982).

[FN26]. Pub.L. No. 99-661, § 942(a)(1), 100 Stat. 3816 (whistleblowing provision to be codified at 10 U.S.C. § 2409).

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employer's retaliatory discharge of employee who files OSHA complaint); Holmes v. Schneider Power Corp., 628 F.Supp. 937 (W.D.Pa.1986) (holding no private right of action for employee); see also L. LARSON & P. BOROWSKI, supra note 5, § 11.03[20]. This doctrine applies only to conventional whistleblowing actions; in refusal-to-work situations, the employee can seek mandamus requiring the Secretary to enforce the statute. 29 U.S.C. § 662(d) (1982).

[FN43]. See Note, The Employment-at Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety, 16 U.MICH.J.L. REFORM 435, 439-40 (1983) (noting deficiencies in DOL personnel and resources); B. MINTZ, OSHA HISTORY, LAW AND POLICY 342 (1984) (lamenting 429 "meritorious" cases languishing in Solicitor's Office at DOL).

[FN44]. But see 73 DEP'T LAB ANN.REP. FY85 121 (1986) (refering to "substantial increase" in section 11(c) caseload, among others).

[FN45]. Solomon & Garcia, Protecting the Corporate WhistleBlower Under Federal Anti-Retaliation Statutes, 5 J.CORP.L. 275, 283 (1980).

[FN46]. 1984 OSHA ANN.REP. 56.

[FN47]. 49 U.S.C. § 2305 (1982).

[FN48]. 48. 1984 OSHA ANN.REP. 56.

[FN49]. Labor Dept's Enforcement of "Whistleblower" Law Found Weak, CONVOY DISPATCH, Feb. 1986, No. 59, at 3, col. 3.

[FN50]. Id.

[FN51]. Id.

[FN52]. 30 U.S.C. § 801 (1982).

[FN53]. In fiscal years 1985 and 1986, the full MSHRC decided 11 cases involving safety complaints or refusals to work. Three cases involved both kinds of discrimination, five involved only safety or health complaints, and three involved only a refusal to work. 73 DEP'T LAB.ANN.REP. FY85 63 (1986); see Letter from L. Joseph Ferrara, General Counsel, MSHRC, to Eugene R. Fidell (Oct. 31, 1986) (discussing MSHRC litigation).

[FN54]. 42 U.S.C. § 5851 (1982).

[FN55]. Private Sector Whistleblower Protection Statutes, 1986: Public Hearings Before the Administrative Conference of the United States 45-46 [[[hereinafter ACUS Whistleblower Hearings Transcript] (testimony of Nahum Litt, Chief Judge, OALJ).

[FN56]. 30 U.S.C. § 1293 (1982).

[FN57]. Letter from James Y. Callear, Freedom of Information Officer, NLRB, to Eugene R. Fidell (Sept. 4, 1986).

[FN58]. OFFICE OF SPECIAL COUNSEL OF MERIT SYSTEMS PROTECTION BD.ANN.REP. FY85 15 (1985).

[FN59]. 42 U.S.C. § 4901 (1982 & Supp. III 1985).

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[FN73]. Compare Brown and Root v. Donovan, 747 F.2d 1029, 1032 (5th Cir.1984) (holding internal whistleblowing is not protected unless employee has contact with government) with Kansas Gas & Elec. Co. v. Brock, 180 F.2d 1505 (10th Cir.1985), cert. denied, 106 S.Ct. 3311 (1986) (holding whistleblower protection extends to internal complaint) and Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir.1984) (holding internal complaints protected) and Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502, 485 N.E.2d 372 (1985) (holding complaint need not be made to regulatory authority), cert. denied, 106 S.Ct. 1641 (1986).

[FN74]. S. KOHN, supra note 5, at 28-29.

[FN75]. Meyers Industries, 1986 NLRB Dec. (CCH) ¶ 18,184, 281 NLRB No. 118, at 19 (Sept. 30, 1986), aff'd sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C.Cir.1987).

[FN76]. Meyers Industries involved a truck driver who was retaliated against for refusing to work and reporting a safety violation to state authorities. 281 NLRB No. 118.

[FN77]. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

[FN78]. The Supreme Court has recognized that "parties may have a choice of federal remedies," Cornell Constr. Co. v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616, 635 n. 17 (1975), but one wonders whether dual federal remedies are necessary in the whistleblowing area. If federal whistleblowing legislation were reorganized as recommended herein, there would be less need to be concerned about limitations on the gloss applied to the NLRA, and no need for two federal agencies to address a single issue.

[FN79]. Meyers Industries, 281 NLRB No. 118, at 19.

[FN80]. Indeed, on appeal the District of Columbia Circuit affirmed the NLRB's decision in Meyers Industries, holding that the Board's interpretation of "concerted activity" was reasonable. Prill v. NLRB, 835 F.2d 1481, 1485 (D.C.Cir.1987).

[FN81]. 42 U.S.C. § 5851 (1982). While the statute is silent, the Secretary of Labor has construed the ERA to protect good faith, reasonable refusals to work on the theory that the ERA and FMSHA are in pari materia. Pensyl v. Catalitic Inc., No. 83-ERA-2, slip op. at 5 (SOL Jan. 13, 1984).

[FN82]. 30 U.S.C. § 815 (1982).

[FN83]. 45 U.S.C. § 441 (1982).

[FN84]. 29 U.S.C. § 143 (1982).

[FN85]. 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

[FN86]. 49 U.S.C. § 2305 (1982).

[FN87]. 29 U.S.C. § 157 (1982).

[FN88]. See generally Nothstein, Employee Refusals to Work, LABOR (Fall 1982).

[FN89]. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984).

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[FN106]. Pub.L. No. 99-661, § 942, 100 Stat. 3942 (to be codified at 10 U.S.C. § 2409).

[FN107]. See 29 C.F.R. § 18.12 (1986) (amici restricted to filing briefs).

[FN108]. 10 C.F.R. § 50.7(c) (1987).

[FN109]. The Nuclear Regulatory Commission (NRC) has already taken this step. 10 C.F.R. § 50.7(e) (1987). Wage and Hour Division regulations impose other notice-posting requirements. 29 C.F.R. § 500.76(d)(1) (1986); see id. § 516.4 (providing notice posting requirements for minimum wage and overtime provisions).

[FN110]. Administrative Procedure Act, 5 U.S.C. § 551-559 (1982).

[FN111]. ACUS Whistleblower Hearings Transcript, supra note 55, at 57-60 (testimony of Kennedy P. Richardson); see Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986) (suggesting, in alternative, that 30-day limit for Wage and Hour Division investigations be precatory).

[FN112]. See 42 U.S.C. § 2000e-5(f)(1) (1982) (providing aggrieved persons may institute civil action if EEOC dismisses complaint or fails to sue within 180 days of filing of charges).

[FN113]. ACUS Whistleblower Hearings Transcript, supra note 55, at 84 (testimony of Stephen M. Kohn). But it has been argued that:

> The hypothesis that the Wage and Hour Division investigation is necessary to induce private attorneys to prosecute section 210 cases is refuted by the fact that no such inducement has ever been necessary for common law wrongful discharge claims and the fact that section 210 authorizes the administrative law judge to award attorney's fees which may well exceed what the attorney would otherwise receive under a typical contingent fee agreement. Nor is the Wage and Hour Division investigation necessary to 'screen out' frivolous claims since most private attorneys will decline to undertake cases with no plausible merit.

Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986).

[FN114]. See ACUS Whistleblower Hearings Transcript, supra note 55, at 14 (testimony of Sen. Charles E. Grassley) (suggesting agencies could be required to bring in outside counsel to identify and investigate employee concerns). Another approach might be to encourage or require professionals such as engineers to avail themselves of professional societies' safety committees when ethical issues arise. Unfortunately, however, these mechanisms are not well known. D. Lindorff, Engineers' Duty to Speak Out, THE NATION, June 28, 1986, at 881. In addition, employees often do not have the luxury of being able to formulate a request for an opinion, and such committees lack the tools to find needed facts on issues which are often hotly contested.

[FN115]. See generally Wargo, Tracking Employee Concerns, 32 NUCLEAR INDUSTRY No. 1, at 3 (Jan. 1985).

[FN116]. Durham v. Butler Service Group, No. 86-ERA-9 (OALJ 1986), discussed in Safety Concerns Programs Challenged by Intervenors, NUCLEAR INDUSTRY, No. 6, at 16-17 (June 1986). Access to documents obtained under the SAFETEAM program marketed by a subsidiary of the Detroit Edison Co. was permitted subject to a protective order in Texas Utilities Electric Co., Nos. 50-445 to 446 (ASLB Dec. 23, 1985) (Comanche Peak Units 1 and 2). See generally Heffner, Limiting Risk: Improving Public Perception of Nuclear Plant Safety Through SAFETEAM (remarks at American Nuclear Society Annual Meeting, Nov. 12 1985).

[FN117]. See Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986).

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Appendix 7

Provisions that Vary by Statute					
Statute	Preliminary Reinstatement	Punitive Damages	Attorney's Fees	"Kick-out" Provision	Private Right of Action (to enforce orders)
11(c)	no	yes	no	no	no
AHERA					
ISCA					
STAA	yes	yes	yes	210 days	no
CAA	no	no		no	yes
CERCLA					n/a
FWPCA					n/a
SDWA		yes			no
SWDA		no			n/a
TSCA		yes			no
ERA		no		1 year	yes
AIR21	yes			no	
SOX				180 days	
PSIA				no	
NTSSA		yes		210 days	
FRSA					
CPSIA		no			

Berstler v. Hirsch, No. 83-6122 (E.D.Pa. July 10, 1983); Atchison v. Brown & Root, Inc., No. 83-29889 (Harris Co., Tex.Dist.Ct.), on removal, No. H85-3568 (S.D.Tex.)). Stokes and Parks were remanded to the California courts. Stokes v. Bechtel N.Am. Corp., 614 F.Supp. 732, 735 n. 1 (N.D.Cal.1985).

[FN182]. 285 U.S. 262 (1932).

[FN183]. Id. at 311 (Brandeis, J., dissenting).

[FN184]. Anaya v. Hansen, 781 F.2d 1, 7 & n. 8 (1st Cir.1986).

[FN185]. Administrative Conference Recommendation No. 84-5, Preemption of State Regulation by Federal Agencies, 1 C.F.R. § 305.84-5 (1987).

[FN186]. With respect to any recommendations regarding the allocation of responsibility for judicial review, the views of the Judicial Conference of the United States and the Federal Judicial Center should first be secured.

[FN187]. 29 U.S.C. § 660(c) (1982).

[FN188]. Asbestos Hazard Emergency Response Act of 1986, Pub.L. No. 99-519, § 211, 100 Stat. 2970, 2987 (1986) (to be codified at 15 U.S.C. § 2641).

[FN189]. 52 Fed.Reg. 23,629, 23,631 (1987) (to be codified at 1 C.F.R. § 305.87-2).

[FN190]. Uniform Health and Safety Whistleblower Protection Act, S. 2095, 100th Cong., 2d Sess., 134 CONG.REC. S1447 (daily ed. Feb. 23, 1988).

[FN191]. Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub.L. No. 99-519, § 211, 100 Stat. 2970 (to be codified at 15 U.S.C. § 2641).

[FN192]. Clean Air Act (CAA), 42 U.S.C. § 7622 (1982).

[FN193]. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (1982).

[FN194]. Department of Defense Authorization Act of 1987 (DOD87), Pub.L. No. 99-661, § 942, 100 Stat. 3816 (to be codified at 10 U.S.C. § 2409).

[FN195]. Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982).

[FN196]. Federal Mine Safety and Health Act of 1977 (FMSHA), 30 U.S.C. § 815 (1982).

[FN197]. Federal Railroad Safety Authorization Act of 1980 (FRSAA), 45 U.S.C. § 421 (1982).

[FN198]. International Safe Containers Act (ISCA), 46 U.S.C. § 1501 (1982).

[FN199]. Labor Management Relations Act (LMRA), 29 U.S.C. § 141 (1982).

[FN200]. Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. § 1855 (1982).

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F.2d 281 (6th Cir.1982)).

[FN149]. English v. General Elec. Co., No. 85-ERA-00002, slip op. at 18 (ALJ Aug. 1, 1985), noted in Franklin, Dismissed Nuclear Worker Awarded $10,000, N.Y. Times, Aug. 4, 1985, at 23, col. 1.

[FN150]. Landers v. Commonwealth-Lord Joint Venture, No. 83-ERA-5, slip op. at 17 (1983), noted in S. KOHN, supra note 5, at 64 & n. 18. Under several statutes, exemplary damages may be awarded if a civil action is brought to secure compliance with the Secretary's order. TSCA, 15 U.S.C. § 2622(d) (1982); SDWA, 42 U.S.C. § 300-9(ii)(4) (1982); ERA, 42 U.S.C. § 5851(d) (1982); CAA, 42 U.S.C. § 7622(d) (1982).

[FN151]. 15 U.S.C. § 2622 (1982).

[FN152]. 42 U.S.C. § 300f (1982).

[FN153]. 30 U.S.C. § 815(c) (1982).

[FN154]. 49 U.S.C. § 2305 (Supp. III 1985).

[FN155]. Brock v. Roadway Express Inc., 107 S.Ct. 1740 (1987). But see Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir.1985) (holding unconstitutional certain procedures of Federal Mine Safety and Health Review Commission).

[FN156]. Pub.L. No. 79-585, 60 Stat. 755 (codified as amended at 42 U.S.C. § 2011 (1982)).

[FN157]. 10 C.F.R. § 50.7(c) (1987).

[FN158]. Letter from A.B. Beach, Deputy Director, Enforcement Staff, Office of Inspection and Enforcement, NRC, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 10, 1986).

[FN159]. See sources cited infra p. 37 (Table 1).

[FN160]. See Leber v. Pennsylvania Dep't of Envtl. Resources, 780 F.2d 372 (6th Cir.1986) (state agencies not subject to employee protection proceedings), cert. denied, 106 S.Ct. 3294 (1986).

[FN161]. 29 U.S.C. § 660(c) (1982).

[FN162]. Pub.L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

[FN163]. The fact that a section 11(c) case must be brought by the government harms employers by rendering inapplicable any statute of limitations. Marshall v. Intermountain Elec. Co., 614 F.2d 260 (10th Cir.1980).

[FN164]. The belief that no action will be taken to correct a problem which a whistleblower discloses tends to discourage whistleblowing. MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING AND THE FEDERAL EMPLOYEE 27-31 (1981), cited in Martin, The Whistleblower Revisited, 8 GEO. MASON L.REV. 123 (1985).

[FN165]. 47 Fed.Reg. 54,585 (1982), discussed in Kansas City Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1509-10 (10th Cir.1985), cert. denied, 106 S.Ct. 3311 (1986); see also 29 C.F.R. § 244(a) (1986) (program agency to receive copy of all complaints).

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[The article, "A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing," by Jarod S. Gonzalez, may be accessed at the following Internet address:]

http://papers.ssrn.com/sol3/papers.cfm?abstract—id=1538336

[The GAO report, "Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency," January 2009, may be accessed at the following Internet address:]

http://www.gao.gov/new.items/d09106.pdf

COMPARISON OF ANTI–RETALIATION PROVISIONS IN OTHER LAWS

Statute	Statute of limitations	Preliminary reinstatement	Right to get hearing before ALJ or court
Federal Railroad Safety Act (amended 2007)	180 days	Yes	Yes
Consumer Product Safety Improvement Act (2008)	180 days	Yes	Yes
Surface Transportation Assistance Act (1982, amended 2007)	180 days	Yes	Yes
Aviation Investment And Reform Act (2000)	90 days	Yes	Yes
Sarbanes-Oxley (2002)	90 days	Yes	Yes
Patient Protection and Affordable Care Act (2010)	180 days	Yes	Yes
Clean Air Act (1977)	30 days	Yes	Yes
Mine Safety and Health Act (1977)	60 days	Yes	Yes
OSH Act (1970)	30 days	No	No

The AFL–CIO urges prompt action on the Protecting America's Workers Act. It is past time to update and strengthen the Occupational Safety and Health Act so that workers in this country will be better protected from job hazards and better protected when they speak out about them.

Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.

[Additional submissions of Mr. Miller follow:]

JASON M. ZUCKERMAN,
THE EMPLOYMENT LAW GROUP,
May 11, 2010.

Hon. GEORGE MILLER, *Chairman,*
Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC 20515.

RE: *Statute of Limitations in Whistleblowers Provisions of PAWA.*

DEAR REPRESENTATIVE MILLER: I am a principle at the Employment Law Group and my practice focuses on representing employees in whistleblower retaliation actions. I commend the leadership of the Workforce Protections Subcommittee of the House Education and Labor Committee for focusing on the critical need to amend the whistleblower protection provision of the Occupational Safety and Health Act. The lack of a private right of action and the 30-day statute of limitations render the whistleblower provision wholly ineffective. Workers should not be forced to jeopardize their safety and health in order to keep their jobs. I have represented individuals who made the difficult choice to complain to management about the unsafe work conditions and as a result thereof, suffered swift and severe retaliation. As written, the whistleblower provision in the Protecting America's Workers Act (H.R. 2067) takes a balanced approach to providing long overdue whistleblower protections to workers. In light of the recent oil rig explosion off the coast of Louisiana, the tragic deaths of 29 miners at the Upper Big Branch mine, and other workplace fatalities, ensuring the right of workers to report unsafe work conditions should be a no-brainer.

During the hearing held on April 28, 2010 a witness criticized the statue of limitations provision in Section 203, asserting that the "'discovery rule' is a foreign concept in employment law" and that a discovery rule is "not expressly adopted in any other federal employment statute including the staples of employment discrimination law: Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act." In fact, the "discovery rule" has been applied to employment discrimination statutes. See, e.g., Eber v. Harris County Hosp. Dist., 130 F. Supp. 2d 847, 864 (S.D. Tex. 2001) ("The Fifth Circuit has adopted a discovery rule for determining when a party's claim under the ADA accrues. An ADA cause of action accrues when the employee receives unequivocal notice of facts giving rise to his claim or a reasonable person would know of the facts giving rise to the claim." [internal cites and quotes omitted]); Deily v. Waste Management of Allentown, 118 F. Supp. 2d 539, 542-543 (E.D. Pa. 2000) (fact issue on when Plaintiff discovered his termination); Brickings v. Bethlehem Lukens Plate, 82 F. Supp. 2d 402, 409 (E.D. Pa. 2000; Conners v. Maine Medical Center, 42 F. Supp.

2d 34, 51-52 (D. Me 1999), on reconsideration, 70 F. Supp. 2d 40 (D. Me. 1999); Silk v. City of Chicago, 1996 WL 312074, at *7 (N.D. Ill. 1996); Washburn v. Sauer-Sundstrand, Inc., 909 F. Supp. 554, 558 (N.D. Ill. 1995). For example, the Seventh Circuit held Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990) that "the rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery rule" of federal common law, which is read into statutes od limitations in federal-question cases (even when those statutes of limitations are barrowed from state law) in the absence of a contrary directive from Congress." Id. At 450.

Significantly, the Supreme Court held in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) that the discovery rule may apply to claims under the Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Ledbetter, 550 U.S. 618, 642 n. 10 ("We have previously declined to address whether Title VII suits are amenable to a discovery rule. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 114, n. 7, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002). Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.").

Other recent decisions acknowledge that the statute of limitations should begin to run when the plaintiff has actual knowledge of a discriminatory injury. See, e.g., Foster v. Gonzales, 516 F. Supp. 2d 17, 23 n.5 (D.D.C. 2007) citing Del. State Coll. v. Ricks, 449 U.S. 250, 261 (1980)) (180-day period begins running on date on which "plaintiff had notice of final (as opposed to a tentative) termination decision"); see also James v. England, 332 F. Supp. 2d 239, 245 (D.D.C. 2004) (holding that Ricks controls start of limitations period for Title VII claims by private sector employees).

The Third Circuit discussed Ricks in Colgan v. Fisher Scientific Co. 935 F. 2d 1407 (3d Cir. 1991). By noting that Prof. Ricks has received "explicit notice that his employment would end" upon expiration of his terminal contract after his denial of tenure, the Court implicitly provided a notice requirement to trigger the limitations period; i.e., when the employer has established its official position and made that position apparent to the employee by explicit notice. See Colgan, 935 F. 2d at 1416-17. In Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F. 3d 1380 (3d Cir. 1994), the Third Circuit said that the discovery rule (so famous in tort cases) is implicit in the Ricks holding that the limitations period begins to run at the time the allegedly discriminatory decision is made and communicated to the employee. See id. At 1386 n.5 (citing Ricks, 449 U.S. at 258); see also Merrill v. Southern Methodist Univ., 806 F.2d 600.604-05 (5th Cir. 1986) (stating that limitations period in Title VII cases starts to run on date when plaintiff knows or reasonably should know that discriminatory act has occurred, not on date victim first perceived that discriminatory motive caused act).

In sum, there is substantial precedent in employment law for applying a discovery rule to the statute of limitations. Please feel free to contact me at 202-261-2810 if you would like additional information.

Very truly yours,

JASON M. ZUCKERMAN,
The Employment Law Group, PC.

OFFICE OF THE SOLICITOR

Strategic Goals and Performance Measures

1. Maintain an Effective Litigation Strategy That Advances Departmental Goals.

1.1 Percent of favorable outcomes in cases submitted for litigation. [Repeat annual targets of 95%].

1.2 Close an increasing percentage of all cases annually. [Ascending Target.]

1.3 The ratio of total resources expended for litigation to program recoveries demonstrates that the cost of litigation is a decreasing percentage of the total amount of restitution, recoveries and penalties awarded. [Descending Target.]

1.4 Percent of favorable outcomes, in whole or in part, in appellate matters. [Repeat annual target of 98%.]

1.5 Successfully establish/defend and important legal principle in 75% of all cases submitted for litigation and 75% of appellate matters.

2. DOL Regulations Achieve Agency Policy Objectives and Comply with All Legal Requirements.

2.1 The major provisions of final DOL rules and regulations are not successfully challenged an increasing percentage of the time. [Ascending Target.]

2.2 Increase the rate of completion of major task regarding legal review and drafting by the SOL Divisions of regulation within deadlines established in advance with the responsible DOL agency. [Ascending Target.]

3. DOL Actions Are Based on Sound Legal Advice.

3.1 Increase in average legal opinions/advice per FTE devoted to that function. [Ascending Target.]

4/21/10

[Questions submitted to witnesses and their responses follow:]

[VIA EMAIL],
U.S. CONGRESS,
Washington, DC, May 3, 2010.

Hon. JORDAN BARAB, *Deputy Assistant Secretary,*
U.S. Department of Labor, Occupational Safety & Health Administration, 200 Constitution Avenue, Washington, DC 20210.

DEAR MR. BARAB: Thank you for testifying at the Workforce Protections Subcommittee's hearing on "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," held on Wednesday, April 28, 2010.

Committee Members have additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

1. Under Section 18 of the OSH Act, OSHA and "state-plan" states share joint jurisdiction over section 11(c) anti-retaliation cases, and workers are free to file in either venue. However, in practice OSHA has a policy, which sends claims from workers employed in state-plan states back to the states to investigate. PAWA makes clear that it is the option of workers in state-plan states to file with federal OSHA or the state, and OSHA cannot remove a case back to the state once a worker makes a selection. Your testimony questions whether this provision is necessary, implying that since state plans are presumed to be "at least as effective as" federal OSHA, there is no need to give workers in state-plan states the right to select a venue.

A) Has OSHA completed its audit of all 22 state plans under the enhanced review launched by the Administration?

B) Do you have evidence based on case file reviews that all 22 state plans are currently "at least as effective as" federal OSHA in implementing anti-retaliation provisions? If not, when will you have this information?

C) If PAWA is enacted, it will take at least two years before all states enact changes to their whistleblower laws under Section 11(c). Does the Administration believe workers who lose their jobs during this transition period should be required to file 11(c) complaints in states with state plans that provide inadequate whistleblower relief, while workers in federal OSHA states enjoy better protections?

D) Your testimony raised a concern about giving workers the freedom to choose the venue in which they want to bring a whistleblower claim, based on a concern about agency resource demands. Could you please explain why Congress should enact legislation which deprives workers of their current statutory right to select what they believe is the best venue for their anti-retaliation claims?

2. If PAWA's whistleblower provisions are enacted, the Office of Whistleblower Programs at OSHA would be responsible for administering these claims. Will it be relatively easy to get this reformed 11(c) process up and running?

3. Since PAWA provides 11(c) whistleblowers with access to an administrative hearing process plus a private right of action if DOL fails to act on a timely basis, isn't it the case that the Solicitor's office would be relieved of having to use its scarce resources to evaluate and prosecute a large percentage of these 11(c) anti-retaliation cases?

4. Mr. Chinn's testimony contends that none of the 17 whistleblower statutes administered by OSHA use the "discovery rule" for determining whether the statute of limitation should be extended in cases where workers did not know they were the subject of retaliatory action until later on.

A) Isn't it the case that OSHA regulations at 29 CFR 1977.15(d)(3) extend statutes of limitations in ways that are similar to the discovery rule?

B) Are there other whistleblower statutes administered by OSHA, which also allow for extending the statute of limitations in instances where the complainant learned of the discriminatory conduct outside the time period set forth in the statute of limitations?

5. The U.S. Chamber of Commerce testified at a recent hearing that small businesses should have the right to recover attorney's fees from employees who file whistleblower claims and fail to prevail at a hearing.

A) Does the Administration support a loser pay provision where workers would have to pay an employer's legal costs in a retaliation case?

6. Tonya Ford testified about the January 29, 2009 incident at an Archer Daniels Midland plant in Lincoln, Nebraska that killed her uncle, Robert Fitch and questioned the sufficiency of the citations for which the Company was cited.

(A) Does OSHA have any policy directives relating to use of the OSHAct's general duty clause in cases where portions of that standard deal with the design requirements of grandfathered man lifts installed prior to 1971?

(B) In addition to the specific standards for which ADM was cited in regard to the man lift, was OSHA prohibited from using the OSHAct's general duty clause to cite ADM for failure to maintain a workplace free from recognized hazards that led to the death of Mr. Fitch? If there was no prohibition, why wasn't ADM also cited under the general duty clause?

(C) As part of its informal settlement agreement with ADM, why didn't OSHA require the Company to replace all 5 of the man lifts at this plant instead of just one manlift?

(D) Does OSHA plan to issue a new directive with regard to the man lift standard (Part 1910.68) and the applicability of the general duty clause?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis at lynn.dondis@mail.house.gov and Richard Miller at richard.miller@mail.house.gov by close of business Wednesday, May 12, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis or Mr. Miller at 202-226-1881.

Sincerely,

GEORGE MILLER,
Chairman.

OSHA Responses to Additional Questions for the Hearing Record

REPRESENTATIVE LYNN WOOLSEY (D-CA)

Question 1: Under Section 18 of the OSH Act, OSHA and "state-plan" states share joint jurisdiction over section 11(c) anti-retaliation cases, and workers are free to file in either venue. However, in practice OSHA has a policy, which sends claims from workers employed in state-plan states back to the states to investigate. PAWA makes clear that it is the option of workers in state-plan states to file with federal OSHA or the state, and OSHA cannot remove a case back to the state once a worker makes a selection. Your testimony questions whether this provision is necessary, implying that since state plans are presumed to be "at least as effective as" federal OSHA, there is no need to give workers in state-plan states the right to select a venue.

A. Has OSHA completed its audit of all 22 state plans under the enhanced review launched by the Administration?

B. Do you have evidence based on case file reviews that all 22 state plans are currently "at least as effective as" federal OSHA in implementing anti-retaliation provisions? If not, when will you have the information?

C. If PAWA is enacted, it will take at least two years before all states enact changes to their whistleblower laws under Section 11(c). Does the Administration believe workers who lose their jobs during this transition period should be required to file 11(c) complaints in states with state plans that provide inadequate whistleblower relief, while workers in federal OSHA states enjoy better protections?

D. Your testimony raised a concern about giving workers the freedom to choose the venue in which they want to bring a whistleblower claim, based on a concern about agency resource demands. Could you please explain why Congress should enact legislation which deprives workers of their current statutory right to select what they believe is the best venue for the anti-retaliation claims?

Answer:

A. OSHA's Regional Offices are in the process of completing their baseline enhanced evaluations of 21 of the 22 comprehensive State Plans, covering both the private and public sectors, and 4 of the 5 Public Employee Only State Plans. (Evaluation of the Nevada Plan was completed previously in 2009, and the Illinois public employee plan was only recently approved and is not yet operational.) The reports will be submitted to the Assistant Secretary for review prior to public issuance. We anticipate that the reports should all be issued by the end of August.

B. The evaluations will be focused primarily on enforcement, but if deficiencies are identified in a State Plan's anti-retaliation program, the report will include recommendations for improvement. As indicated above, OSHA anticipates that the reports should all be issued by the end of August. At that time OSHA will be better able to assess the overall effectiveness of State Plan discrimination programs.

It should be noted that the State Plans operate under authority of State law and have statutory nondiscrimination provisions parallel to those of Section 11(c) of the OSH Act. The States also extend these protections to State and local government employees. Should a State's occupational safety and health anti-retaliation program be found to be seriously flawed, OSHA would temporarily discontinue its referral of complaints to the State for investigation and would concurrently accept complaints filed directly with the State for dual Federal filing, thus assuring the protection of the workers' rights.

C. No. If PAWA is enacted, the States will be expected to enact parallel amendments to their State laws within 12 months, as specified in the current bill. Until such time as State law is amended, OSHA would expect most complainants to take advantage of their right to file their complaints with Federal OSHA under PAWA. Federal OSHA would investigate those complaints. Until such time as each State's statutory authority is upgraded, OSHA would require the States to advise complainants of the expanded rights available to them under the Federal program and of their right to file their complaint with Federal OSHA instead of the State.

D. Under current law, Federal OSHA retains authority to accept and investigate complaints of discrimination filed by private sector workers in State Plan States even when the State has achieved final approval status and the authority for concurrent Federal enforcement jurisdiction has been relinquished under Section 18(e). Complainants may file either with Federal or State OSHA or they may timely file with both in order to retain their rights. Dual investigation by both authorities is an inappropriate use of scarce resources. Thus OSHA routinely defers its investigation of such dually filed complaints to the State, but retains the authority to act later on the complaint should the State investigation be found lacking. OSHA similarly refers Federally filed complaints from workers in State Plan States to the State for investigation. When a complainant files his/her discrimination complaint only with the State Plan, Federal OSHA's authority is limited to monitoring the State's performance through investigation of Complaints About State Program Administration (CASPAs). OSHA is providing Federal funding to allow the States to run effective State Plans, including a required anti-retaliation program. Where the State anti-retaliation program, after any revisions mandated by PAWA have been accomplished, is determined to be at least as effective as the Federal, resources can be most effectively utilized by allowing the State to conduct the investigation.

Once the states have made the statutory changes needed to comply with PAWA, their whistleblower programs will be as effective as OSHA's. Providing workers a choice between equivalent protections would not necessarily strengthen whistleblower protection. States with approved plans contribute valuable expertise, staffing and funding to the nation's overall safety and health effort, and their assistance is also much needed in enforcing workplace anti-retaliation laws. We feel that, from a resource allocation standpoint, it is better to leave the choice of state or federal remedies to OSHA rather than individual complainants. One alternative might be a provision that filing a complaint with either OSHA or a state constitutes a valid filing with the other authority; OSHA would have the discretion to proceed in a case where OSHA believes its involvement would add value.

Question 2: If PAWA's whistleblower provisions are enacted, the Office of the Whistleblower Protection Programs at OSHA would be responsible for administering these claims. Will it be relatively easy to get this reformed 11(c) up and running?

Answer:

The reforms entailed by the enactment of PAWA would necessitate revision of 29 CFR Part 1977. OSHA's whistleblower investigation procedure regulations are not subject to the notice and comment procedures of the APA; nevertheless, we initially promulgate such regulations as interim final rules and provide the public with the opportunity to submit comments. A final rule will be published after the agency receives and reviews the public's comments.

Changes to the law enacted by PAWA would, of course, become effective on the date specified by Congress. Therefore, until Part 1977 is revised, OSHA would have to take several immediate steps to make the regulated community aware of the changes. We would reach out to employers and employees through our Web site, updated fact sheets and OSHA posters, and possibly other means. In addition, when a section 11(c) complaint is filed, we would explain in the notification letters to the employee and employer that recent amendments to the Occupational Safety and Health Act resulted in new procedures and we would enclose a copy of the revised

statute. Finally, OSHA would quickly revise the chapter on section 11(c) in the Whistleblower Investigations Manual.

Question 3: Since PAWA provides 11(c) whistleblowers with access to an administrative hearing process plus a private right of action if DOL fails to act on a timely basis, isn't it the case that the Solicitor's office would be relieved of having to use its scarce resources to evaluate and prosecute a large percentage of these 11(c) anti-retaliation cases?

Answer:

Under the existing Section 11(c), complainants have no private right of action, a key element of whistleblower protections that is available under all but two other whistleblower statutes enforced by OSHA. The private rights of action under PAWA would ensure a hearing for complainants, and could also reduce the demand on SOL's litigation resources.

Question 4: Mr. Chinn's testimony contends that none of the 17 whistleblower statutes administered by OSHA use the "discovery rule" for determining whether the statute of limitation should be extended in cases where workers did not know they were the subject of retaliatory action until later on.

A. Isn't it the case that OSHA's regulation at 29 CFR 1977.15(d)(3) extends the statutes of limitations in ways that are similar to the discovery rule?

B. Are there other whistleblower statutes administered by OSHA, which also allow for extending the statute of limitations in instances where the complainant learned of the discriminatory conduct outside of the time period set forth in the statute of limitations?

Answer:

A. 29 CFR 1977.15(d)(3) narrowly addresses one application of the principle of equitable tolling, by which a filing deadline may be delayed or suspended if the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action. PAWA addresses a somewhat different principle, which comes into play when a complainant only discovers he has been retaliated against after the normal filing period has elapsed. This "discovery rule" would come into play in situations where, even though an employer has not affirmatively misled the complainant, the complainant only discovers after the end of the filing period that he did not receive a pay increase afforded to others, or discovers that instead of being temporarily laid off, his employer had decided not to call him back. PAWA would clarify that in such cases the filing period does not begin to run until the complainant knows or should reasonably have known that he has been retaliated against.

B. The Supreme Court held in Delaware State College v. Ricks, 449 U.S. 250, that the date of an adverse action is when the decision is made and communicated to the employee. Therefore, if an employer has not yet communicated the adverse decision to the employee until much later, then for purposed of evaluating timeliness, the adverse action has not occurred until the date on which it was communicated. In addition, OSHA accepts untimely complaints in certain circumstances under the doctrine of equitable tolling. The principle of equitable tolling, which applies in some situations, including where an employer has concealed or misled an employee about the grounds for adverse action, is well established in case law under the various anti-retaliation statutes, although it is not expressly set forth in the statutes themselves. OSHA's Whistleblower Investigation Manual has adopted that principle for all anti-retaliation laws administered by OSHA. I am not aware that such a discovery rule exists under any of these statutes.

Question 5: The U.S. Chamber of Commerce testified at a recent hearing that small businesses should have the right to recover attorney's fees from employees who file whistleblower claims and fail to prevail at a hearing.

A. Does the administration support a loser pay provision where workers would have to pay employer's legal costs in a retaliation case?

Answer:

The possibility that an employee—in many cases, an out-of-work former employee—might become responsible for paying an employer's attorney fees would be a powerful disincentive to any worker who considers filing a retaliation complaint, and would have a chilling effect on the exercise of employee rights in the workplace. Moreover, the Chamber assumes that any complaint that isn't found to have merit was brought frivolously. OSHA does not believe that a complainant's motive for bringing reasonably believed occupational safety or health concerns to the attention of their employers or the government should be called into question. We strongly oppose such a provision.

Question 6: Tonya Ford testified about the January 29, 2009 incident at Archer Daniels Midland plant in Lincoln, Nebraska that killed her uncle, Robert Fitch and questioned the sufficiency of the citations for which the Company was cited.

A. Does OSHA have any policy directives relating to the use of the OSH Act's general duty clause in cases where portions of that standard deal with the design requirements of grandfathered man lifts installed prior to 1971?

B. In addition to the specific standards for which ADM was cited in regard to the man lift, was OSHA prohibited from using the OSH Act's general duty clause to cite ADM for failure to maintain a workplace free from recognized hazards that led to the death of Mr. Fitch? If there was no prohibition, why wasn't ADM also cited under the general duty clause?

C. As part of its informal settlement agreement with ADM, why didn't OSHA require the company to replace all 5 of the manlifts in the in the plant instead of just one manlift?

D. Does OSHA plan to issue a new directive with regard to the manlift standard (Part 1910.68) and the applicability of the general duty clause?

Answer:

A. Yes. OSHA issued a directive on October 30, 1978 regarding inspections of man lifts. That directive is still in effect, however, OSHA will be updating the directive to clarify the intent.

B. OSHA is not prohibited from using the general duty clause to cite design requirements of manlifts. OSHA did not identify "design" deficiencies on the manlift in question at ADM. Rather, the citations addressed maintenance and inspection. Where existing standards apply to particular hazards, citing the general duty clause is not permitted under Occupational Safety and Health Review Commission case law.

C. The accident involved only one manlift, therefore the investigation was limited in scope and did not include the other manlifts. The investigation was not expanded to the other manlifts, primarily for two reasons: 1) OSHA did not observe numerous significant deficiencies with the manlift associated with the accident, and 2) during employee interviews, no concerns were identified with other manlifts. When a violation is found on one manlift the employer is then put on notice to review others and make appropriate corrections where needed. Manlifts are permitted under 29 CFR 1910, therefore OSHA cannot require employers to replace manlifts with other forms of personnel transport. During the informal conference the employer proposed removing the manlift completely and installing an elevator. The proposed abatement was more extensive and more costly than compliance with the OSHA manlift standard. Other manlifts were not discussed, as they were not a point of concern during the informal conference, and the employer had already volunteered to abate beyond what OSHA could require.

During a follow-up inspection, OSHA found that two manlifts, the Feed Mill and Elevator "A" manlifts, had not been in service for over 5 years. One had been de-energized, with all electrical connection removed completely, and the other had the belt removed completely.

Two other manlifts, Elevator "D" and the Mill Area manlift, were operational and used by employees. OSHA inspected both manlifts. The follow-up inspection is still open.

D. Yes.

[VIA EMAIL],
U.S. CONGRESS,
Washington, DC, May 3, 2010.

MS. TONYA FORD,
333 W. Chadderton Drive, Lincoln, NE 68521.

DEAR MS. FORD: Thank you for testifying at the Workforce Protections Subcommittee's hearing on "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," held on Wednesday, April 28, 2010.

Committee Members have additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

1. If you had been permitted to participate in the OSHA settlement discussions with ADM, would you have raised the fact that abatement should have required replacement of the other four man lifts at the plant and not just the one that was replaced under the settlement agreement?

2. I understand that you had been trying for quite a while to make meaningful contact with OSHA, and at this point, you have had conversations with the local and the national office. Have they told you everything you need to know, and if not, why not? How would you recommend Congress remedy this problem?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis of the Subcommittee staff at lynn.dondis@mail.house.gov by close of business Wednesday, May 12, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis at 202-226-1881.

Sincerely,

GEORGE MILLER,
Chairman.

Ms. Ford's Response to Written Follow-up Questions

DEAR CHAIRWOMAN WOOLSEY, RANKING MEMBER MCMORRIS-RODGERS AND MEMBERS OF THE COMMITTEE: I want to thank you again for the opportunity to testify to you about my family, and how we want to make sure no families go through what we have in the last 18 months. I hope we can work together to make a difference and my Uncles life will not be in vein.

1. If you had been permitted to participate in the OSHA settlement discussion with ADM, would you have raised the fact that abatement should have required replacement of the other four man lifts at the plant and not just the one that was replaced under the settlement agreement?

I want to start off by saying many families that I have met in the last 18 months have the same feelings, we are here to make sure that other families do not go through what we are going through today. There is no price on my Uncle's life, nothing can bring him back and the completion of our family will never return. We stand up and speak in honor of our loved ones that we have lost. I promised my Uncle that his death would not be in vein. I stand by those words today and will until I can honestly say to my Uncle; I tried with all my heart and soul for your horrible, preventable death to save a life and to protect a family from the hurt we feel.

I truly believe that if my family would have had the chance to participate in the OSHA informal settlement discussion with ADM, we would have raised the fact that the abatement should definitely have required that all 5 of the belt operated man lifts in the Archer Daniel Midland plant be replaced. As stated in my testimony, I have done so much research on these devices and they are inherently unsafe. It is a device that causes many injuries and even deaths. My Uncle, Father and even my Grandfather worked for ADM. My Uncle worked 32 years at this plant, going up down these devices. He knew the rules, the regulations and he followed them. So do all the other men and women that work at this and many other grain milling plants in Nebraska and in the United States. No matter how safe a worker is, these device are a hazardous device and should not have been in this plant. The average age of the employees at the Archer Daniel Midland plant, located in Lincoln, NE, are employees that have been employed with ADM for 30+ years putting them at an average age of 50-55 years old. The chance of a man or women having heart attack increases each year after age of 45. Could you image having a heart attack on a device with no walls near you, nothing to hold to, nothing to jump too, the nearest landing 40 ft below?

If we would have had the chance to participate in the settlement discussion with ADM, we would have made sure that OSHA knew that this was not the only belt-operated man lift in the plant. OSHA's decision to allow ADM to replace just one of the five man lifts was not sufficient to protect the lives of the other workers at that plant. Again, nothing is going to bring my Uncle back, however the men and women that work not only at this Grain Milling plant, but others around the Nation deserve to be safe. Going to work should not be a grave mistake, and my Uncle, Father and Grandpa were just three of the men that helped make Archer Daniel Midland Plant what it is today and that is a company that has the stock market value of $18.31 billion dollars.

2. I understand that you had been trying for quite a while to make meaningful contact with OSHA, and at this point you have had conversations with the local and the national office. Have they told you everything you need to know, and if not, why not? How would you recommend Congress remedy this problem?

I have to admit the past 18 months have been frustrating. Hearing from the local news the fines and penalties against ADM were deleted by OSHA was really disrespectful to both my Uncle and our entire family. I've heard from OSHA that they wants to receive our family's input on how they can communicate better with us and other families that have lost loved ones. I have openly given them suggestions and honestly can say that the local OSHA representative has tried to be responsive to us. We still don't have all our questions answered and it seems as though the

answers need to come from OSHA headquarters in Washington, DC, but I feel they have not been eager to speak with us. I will be honest many families will listen and respect what OSHA has concluded in their loved ones investigation. Many families do not understand all of OSHA rules and regulations, I chose to listen and learn and educate myself on the investigation process. Maybe that was my fault but, today I need closure, I believe my family deserves the right to know why ADM, a company that makes so much money was not ordered to remove all of those belt operated man lifts. Why a company found all around the world was able to delete the citations from their records. We can't delete my Uncle from our memory and yet they deleted an accident that took a man's life that worked for them for 32 years.

Family members want open lines of communication throughout the investigation process. We deserve that. We realize that through this communication we may find out things that are painful, such as what our loved ones went through in their last moments. We may find out the horrible way our loved ones died. We need to know each detail of their last breath. The fact is we want to know this. We need to know this to get some measure of closure. We want to know someone cares. We need to know what went wrong that day and how OSHA is working to ensure it does not happen again to another family.We know that OSHA will not necessarily know all facts, but we want to know what they know.

I truly believe that it is very beneficial for Congress to pass PAWA (Protecting America's Workers Act). It is time for families to honor their loved ones and for all of us to work as a team, to make a difference and make work a safer place to be.

I have one question to all employers, why don't you want to protect and honor the men and women that make your company what it is today and what it will become tomorrow?

[VIA EMAIL],
U.S. CONGRESS,
Washington, DC, May 3, 2010.

Dr. CELESTE MONFORTON, *Assistant Research Professor,*
U.S. Department of Labor, Occupational Safety & Health Administration, 200 Constitution Avenue, Washington, DC 20210.Dept. of Environ & Occup Health, School of Public Health & Health Services, George Washington University, 2100 M Street NW, Ste 203, Washington, DC 20037.

DEAR DR. MONFORTON: Thank you for testifying at the Workforce Protections Subcommittee's hearing on "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," held on Wednesday, April 28, 2010.

Committee Members have additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

1. Your testimony raised a question about the views of the U.S. Chamber of Commerce regarding victims' rights. In particular, their witness, Mr. Snare testified on March 16 that:

"Given the legal nature of these proceedings, there does not appear to be much value to this presentation [by families of victims] other than to sensationalize, presumably, already emotional and sensitive matters."

A) Is it not the case that the OSHA's regulations and procedures already allow workers or their representatives to meet with OSHA Area Directors prior to settlements?

B) What value could family members provide to OSHA's process of informal or formal settlements?

C) Some employer representatives have suggested that having families in the room at the same time as employers could inappropriately influence the settlement process, and urged that meetings with families take place separately from meetings with employers. Is it imperative that meetings with the Area Directors and families include the employers or their attorneys at the same time?

2. Mr. Morikawa, who was testifying on behalf of the US Chamber of Commerce at the April 28 hearing, noted that PAWA does not define the term "representative" in Section 306 of the discussion draft pertaining to victim's families.

A) How would you recommend that the term "representative" in the PAWA Section 306 be defined? Or should it be left undefined?

B) Should the law prohibit any attorney from representing victim's families in these meetings between families and OSHA?

3. How does inclusion of family members in an investigation improve the investigation?

4. Your testimony supports the idea of requiring abatement of serious hazards pending employer contest of citations. Do you think that this provision in PAWA, if enacted, would have had an impact of the outcome of OSHA's informal settlement involving ADM?

5. Should the right of families to be involved with the modification of or settlement of citations include formal settlements or informal settlements, or both? Is the text of Section 306 of the March 9 discussion draft sufficiently clear on the types of settlement proceedings which should include families?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis of the Subcommittee staff at lynn.dondis@mail.house.gov by close of business Wednesday, May 12, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis at 202-226-1881.

Sincerely,

GEORGE MILLER,
Chairman.

Dr. Monforton's Written Responses to Questions for the Record

1. Your testimony raised a question about the views of the U.S. Chamber of Commerce regarding victims' rights. In particular, their witness, Mr. Snare testified on March 16 that:

"Given the legal nature of these proceedings, there does not appear to be much value to this presentation [by families of victims] other than to sensationalize, presumably, already emotional and sensitive matters."

A) Is it not the case that the OSHA's regulations and procedures already allow workers or their representatives to meet with OSHA Area Directors prior to settlements?

RESPONSE: In OSHA's current Field Operations Manual (FOM), the agency provides guidance to its field offices on allowing workers or their representatives to participate in its settlement processes. For an informal conference, which must be held within 15 working days of the date the citations were issued, the FOM states:

"If an informal conference is requested by the employer, an affected employee or his representative shall be afforded the opportunity to participate." (FOM 7-3)

To the extent that an affected worker or an employee representative is aware of the employer's request for an informal conference, h/she may request to participate. I understand, however, that some employee representatives do not learn of the employer's request for an informal conference with OSHA until after the fact, making null this "opportunity to participate." Setting aside this deficiency in OSHA's application of this policy, the OSH Act explicitly states that affected workers or their representative have a right to participate in these proceedings.

B) What value could family members provide to OSHA's process of informal or formal settlements?

RESPONSE: I disagree strongly with the U.S. Chamber of Commerce's assertion that family member participation in OSHA's informal or formal settlement process adds no value "other than to sensationalize" matters. I believe that the victim's rights provisions in the Protecting America's Workers Act (H.R. 2067), which are quite modest, have the potential to advance worker health and safety in a positive way. First, family members often have information or physical evidence that can be useful to the OSHA investigators. Allowing family members to participate in the informal contest discussions would be a final opportunity for OSHA to receive this potentially vital information. Second, allowing a family member representative to participate in discussions between OSHA and the company will make the settlement process more transparent and accountable to the public. Currently, these negotiations are held behind closed doors, and family members are not privy to the evidence and arguments offered by each side. Family members should have the right to know more than just the final terms of the settlement. The why and who benefits from the terms of the settlement will help the families and the public at large understand how our worker health and safety enforcement system operates (or fails to operate as intended.) Finally, many family member victims of workplace fatalities want steps to be taken by employers and OSHA so that other families are spared from suffering a similar loss. Family members may turn out to be our nation's best allies for securing improvements in worker health and safety.

C) Some employer representatives have suggested that having families in the room at the same time as employers could inappropriately influence the settlement process, and urged that meetings with families take place separately from meetings with em-

ployers. Is it imperative that meetings with the Area Directors and families include the employers or their attorneys at the same time?

RESPONSE: I expect that having family members in the room at the same time as employers and OSHA will influence the settlement process. That's the point and why I strongly support these provisions of H.R. 2067.

I believe that family members should have the opportunity to witness the negotiations between OSHA and the employer during an informal or formal settlement process. It is imperative that if the family requests to participate that the employer or his attorney be present to face the victim's family.

2. Mr. Morikawa, who was testifying on behalf of the US Chamber of Commerce at the April 28 hearing, noted that PAWA does not define the term "representative" in Section 306 of the discussion draft pertaining to victim's families.

A) How would you recommend that the term "representative" in the PAWA Section 306 be defined? Or should it be left undefined?

RESPONSE: The term "representative" should be defined as any individual designated by the victim's next of kin, including herself or himself, as well as a substitute representative when necessary. (E.g., if a victim's mother wants to represent herself, but on a particular occasion wants her sister to participate on her behalf, the designation process should be flexible to accommodate this mother's wishes.)

B) Should the law prohibit any attorney from representing victim's families in these meetings between families and OSHA?

RESPONSE: No. The law should not prohibit any class, occupation, or personal or professional distinction of an individual from representing the victim's family in the meetings between the company and OSHA. The family of a worker killed on the job should have the right to select whomever they wish to serve as their representative. Some may want to represent themselves, others may want their pastor, their counselor, or an attorney.

There are some who suggest that family members should be barred from designating a private attorney as their representative because somehow it will "lawyer-up" the process. This argument is unconvincing. Federal OSHA relies on the Solicitor's Office for legal advice, and many employers retain attorneys, especially in fatality cases. Lawyers are already part of the informal and formal settlement process. A family member victim of a workplace fatality should have the option of choosing an attorney as their family representative. One witness at the Subcommittee's April 28, 2010 hearing suggested:

"involving a private attorney in settlement meetings at any level could have a "chilling effect" * * * by discouraging the parties from engaging in candid discussions which are necessary in order to accomplish the settlement of OSHA cases." (Dennis J. Morikawa, April 28, 2010)

I disagree. There are some employers who are eager to blame a deceased worker for his/her own death. I believe these employers will be less likely to do so with the victim's family present and may be forced to examine their firm's own practices and violations of health and safety standards. Moreover, some employers may be compelled to abate the identified hazards and improve their safety performance if they know that the victim's family will be present in the settlement negotiations. Finally, the objective of the negotiation should not be to merely "accomplish the settlement of OSHA cases." Rather, the objective should be to compel a change in the employer's and the respective industry's behavior about eliminating hazards and preventing injuries, disease and deaths among the workforce. I don't foresee a "chilling effect," but rather, sunshine on a process that demands more openness.

3. How does inclusion of family members in an investigation improve the investigation?

RESPONSE: Family members potentially have information or physical evidence that can be useful to the OSHA investigators. The information may relate to hazards or worksite practices the deceased worker communicated to his family, may lead investigators to former or current employees with whom OSHA investigators should speak, or examples of hazardous conditions that exist at other worksites under the control of the same employer.

4. Your testimony supports the idea of requiring abatement of serious hazards pending employer contest of citations. Do you think that this provision in PAWA, if enacted, would have had an impact of the outcome of OSHA's informal settlement involving ADM?

RESPONSE: Yes, I support PAWA's provision requiring abatement of serious hazards pending employer contest. My experience working at the Mine Safety and Health Administration informs my view and makes me a firm proponent of this provision. Employers should not be allowed to disregard known serious hazards and

hold hostage the correction of hazards in order to strike a deal with OSHA to reduce a monetary penalty or the severity classification of the violation.

In the case that resulted following the fatal fall in January 2009 of Mr. Robert Fitch at the Archer Daniels Midland plant, OSHA made several errors. The outcome of the case might have been quite different in several respects, including had the PAWA provision requiring abatement of serious hazards been adopted. We can't make advances in preventing harm to workers when our system forces local OSHA staff to bargain with employers for worker protections that they are already required to implement. The informal settlement process should not only expedite abatement of the hazard, but also give OSHA leverage to require employers to implement measures that go above and beyond simply compliance with OSHA's minimum standards.

5. Should the right of families to be involved with the modification of or settlement of citations include formal settlements or informal settlements, or both? Is the text of Section 306 of the March 9 discussion draft sufficiently clear on the types of settlement proceedings which should include families?

RESPONSE: Yes, family members should have the right to participate in the modification of or settlement of citations whether in the formal or informal setting. The text contained in Section 9A and Section 306 make it clear that family members will be granted the following rights:

1. Meet with the Secretary's representative (e.g., OSHA official) before a decision is made to issue a citation or take no action.
2. Receive any citations or other documents at the same time as the employer receives them.
3. Be granted the opportunity to appear and make a statement before OSHA and the employer during informal and formal settlement negotiations.
4. Be afforded the right to appear and make a victim's impact statement before the Occupational Safety and Health Review Commission (OSHRC) in those instances when a case proceeds to it for adjudication.

[VIA EMAIL],
U.S. CONGRESS,
Washington, DC, May 3, 2010.

DENNIS J. MORIKAWA, *Partner,*
Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, PA 19103-2921.

DEAR MR. MORIKAWA: Thank you for testifying at the Workforce Protections Subcommittee's hearing on "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," held on Wednesday, April 28, 2010.

Committee Members have additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

1. Dr. Montforton has testified that Congress should strengthen the Act by assigning designated family liaisons in each area office. Do you agree with that approach?
2. Your testimony suggests that PAWA should define at what point in time and how often families should have an opportunity to make a statement before the OSHA Review Commission on cases which are contested. The discussion draft of PAWA leaves it up to the OSHA Review Commission to determine the proper role of a family member in its proceedings. Isn't the Commission is in the best position to spell out that process in its regulations?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis of the Subcommittee staff at lynn.dondis@mail.house.gov by close of business Wednesday, May 12, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis at 202-226-1881.

Sincerely,

GEORGE MILLER,
Chairman.

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May 13, 2010

VIA FEDERAL EXPRESS

The Honorable George Miller, Chairman
Committee on Education and Labor
United States House of Representatives
2181 Rayburn House Office
Washington, DC 20515-6100

Re: Your letter of May 3, 2010 – "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Worker's Act."

Dear Chairman Miller:

Many thanks for your letter of May 3, 2010 regarding my testimony at the Workforce Protections Subcommittee's Hearing on "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Worker's Act," which was held on Wednesday, April 28, 2010. I was honored to have the opportunity to testify before this Subcommittee on these important issues, and I am happy to respond to the supplemental Questions for the Record from Chairwoman Woolsey (D-CA) as a result of my testimony. As I testified on behalf of the U.S. Chamber of Commerce, my responses below should be considered a continuation of that statement:

1. **Dr. Montforton has testified that Congress should strengthen the Act by assigning designated family liaisons in each area office. Do you agree with that approach?**

As I pointed out during my testimony before the Subcommittee on March 28, 2010, OSHA has for many years included in its Field Operations Manual ("FOM") procedures related to Area Office outreach to victims and the families of victims who have been involved in fatal or catastrophic occupational accidents or illnesses. Indeed, it is my understanding that the information which OSHA has historically provided is very similar to that which is called for in Section 306 of the PAWA discussion draft. We are mindful of the concerns expressed by witnesses such as Tonya Ford at the April 28 hearing concerning past inconsistencies in the amount of information and involvement which OSHA has granted to victims and their families

following workplace fatalities. Thus, we were gratified by Deputy Assistant Secretary, Jordan Barab's comments at the April 28, 2010 hearing in which he acknowledged that existing policies with respect to OSHA's outreach and interactions with victims and the families of victims had not always been implemented consistently and in a timely manner. As a result, Mr. Barab pledged to create new victim's rights policies and to add these policies to OSHA's FOM. Mr. Barab also promised the Subcommittee that OSHA would provide comprehensive training for Compliance Officers, Team Leaders and Area Directors on how to interact with victims and their families. (Barab Statement at pp. 9-10).

In light of the above commitments by OSHA to develop improved FOM policies and procedures for dealing with interactions with victims and/or their families, it is our view that providing in PAWA for the creation of the formal appointment of family liaisons in each Area Office would be unnecessary and indeed redundant. There are potentially significant costs with implementing such a directed formal designation of family liaisons which would be better spent on existing programs. In our view, OSHA should be given the opportunity to address these important issues as it deems appropriate through the FOM, better training, and other means, given its available resources.

2. **Your testimony suggests that PAWA should define at what point in time and how often families should have an opportunity to make a statement before the OSHA Review Commission on cases which are contested. The discussion draft of PAWA leaves it up to the OSHA Review Commission to determine the proper role of a family member in its proceedings. Isn't the Commission in the best position to spell out that process in its regulations?**

Chairwoman Woolsey's question suggests that my position before the Subcommittee on that issue focused only on when and how often families should have an opportunity to make a statement before the Review Commission in contested cases. Let me first clarify that my comments should not be read as supporting the need for such statements to be made before the OSHA Review Commission (the "Commission"). Rather, in both my written and verbal testimony before the Subcommittee on April 28, 2010, I emphasized that I agreed with both Assistant Secretary, David Michaels, as well as Deputy Assistant Secretary, Barab, that further clarification and/or justification needed to be made with respect to the necessity of face-to-face meetings with OSHA and the necessity of providing for public statements at Commission proceedings in that they had the potential of slowing down the inspection, enforcement and adjudication process. As Mr. Barab pointed out very candidly during his testimony, such delays, ". . . only hurt victims and their families in the long run." (Barab Statement at p. 10).

Based on my many years of experience in the OSHA practice area, I share Mr. Barab's concerns regarding the "significant delays" which could occur with respect to the enforcement and adjudication process should PAWA formalize victim or family involvement in that process. I firmly believe that OSHA's proposed victim's rights policies to be included in its FOM will

Morgan Lewis
COUNSELORS AT LAW

George Miller, Chairman
May 13, 2010
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adequately address concerns which were identified at the April 28 hearing while taking into account the need by OSHA as well as the Solicitor's Office to make reasoned and independent prosecutorial decisions with respect to the handling of OSHA cases.

In addition to the above, I remain concerned regarding the lack of clarification of what is intended by the use of the term, "representative of the victim" as that phrase is used in Section 306 of the PAWA discussion draft. As I pointed out during my testimony, it is one thing for the family member of a deceased or unavailable employee to testify regarding the impact which that employee's death or injury has had on that person's family and quite another to have a third-party, such as a private attorney, to be consulted by OSHA and/or to have the opportunity to make a statement to the parties engaged in settlement discussions related to the case. We believe that the involvement of such outside parties has a high likelihood of creating further substantial delays in the OSHA enforcement process as predicted by Dr. Michaels and Mr. Barab in their respective statements to the Subcommittee. Again, let me emphasize that because OSHA is committed to enforcing OSHA standards on behalf of employees, the Agency is in the best position to make critical and necessary determinations with respect to inspections, citations, and the litigation of OSHA cases. The proposed new FOM procedures spelled out by Mr. Barab in his April 28, 2010 testimony will, in my view, provide meaningful opportunity for appropriate outreach and involvement of injured employees and/or their families, or the families of deceased employees in the OSHA inspection, enforcement and adjudication process, while still allowing OSHA the necessary flexibility it needs to effectively carry out its statutory duties.

Finally, while we have the highest confidence in the ability of the Commission to logistically determine the timing and manner of the involvement of injured employees and/or their families, or the families of deceased employees in Commission proceedings, it is our view that the more basic question which needs to be clarified in the first instance is whether, in light of the reasons discussed during the April 28, 2010 hearing, Section 306 of the PAWA discussion draft is truly necessary to facilitate these specific parties the opportunity to participate in OSHA's enforcement efforts.

Thank you very much for the opportunity to respond to Chairwoman Woolsey's supplemental Questions for the Record. I appreciated the opportunity to participate in the Subcommittee hearing on April 28, 2010 and would welcome the opportunity to further respond to questions and/or to offer further testimony if requested by the Subcommittee.

Sincerely,

Dennis J. Morikawa

DJM/ltm

[VIA EMAIL],
U.S. CONGRESS,
Washington, DC, May 3, 2010.

MS. LYNN RHINEHART, *General Counsel,*
AFL–CIO, 815 16th Street, NW, Washington, DC 20006.

DEAR MS. RHINEHART: Thank you for testifying at the Workforce Protections Subcommittee's hearing on "Whistleblower and Victim's Rights Provisions of H.R. 2067, the Protecting America's Workers Act," held on Wednesday, April 28, 2010.

Committee Members have additional questions for which they would like written responses from you for the hearing record.

Representative Lynn Woolsey (D-CA) asks the following questions:

1. PAWA extends the statute of limitations for filing a complaint to 180 days after the date the alleged violation occurred, or the date the employee knew or should have known that it occurred. This construct is known as the discovery rule. Mr Chinn's testimony contends that PAWA's use of the discovery rule is "unprecedented" and that the discovery rule is a "foreign concept" in employment law, and is not used "expressly" in any employment laws. Isn't it the case that the discovery rule is widely applied by courts in employment law, and a similar construct is used by OSHA in determining whether the statute of limitations should be tolled? Could you please provide specific examples?

A) Mr. Chinn's testimony states that PAWA will lead to "excessive litigation and false claims," if Congress adopts a provision which prohibits discrimination against workers who refuse unsafe work where they have "a reasonable apprehension that performing such duties would result in serious injury?" Is there any evidence to support his statement?

Please send an electronic version of your written response to the questions in Microsoft Word format to Lynn Dondis of the Subcommittee staff at lynn.dondis@mail.house.gov by close of business Wednesday, May 12, 2010, the date on which the hearing record will close. If you have any questions, please do not hesitate to contact Ms. Dondis at 202-226-1881.

Sincerely,

GEORGE MILLER,
Chairman.

Ms. Rhinehart's Responses to Questions for the Record From Chairwoman Woolsey

1. PAWA extends the statute of limitations for filing a complaint to 180 days after the date the alleged violation occurred, or the date the employee knew or should have known that it occurred. This construct is known as the discovery rule. Mr. Chinn's testimony contends that PAWA's use of the discovery rule is "unprecedented" and that the discovery rule is a "foreign concept" in employment law, and is not used "expressly" in any employment laws. Isn't it the case that the discovery rule is widely applied by courts in employment law, and a similar construct is used by OSHA in determining whether the statute of limitations should be tolled? Could you please provide specific examples?

Use of the discovery rule and/or the related concept of equitable tolling are commonplace under various employment laws.

OSHA currently tolls (i.e. extends) the 30 day statute of limitations for equitable reasons or where the employer has misled the employee as to the reasons for the adverse action taken against him/her. See 29 CFR 1977.15(d)(3). Similarly, courts reviewing OSHA 11(c) cases have applied equitable tolling principles to allow consideration of complaints filed outside the 30 day statute of limitations. See, e.g., Donovan v. Hahner, 736 F.2d 1421 (10th Cir. 1984) (employer lied to employee about the reason for which he was fired, which justified tolling the statute of limitations); Donovan v. Peter Zimmer America, Inc., 557 F. Supp. 642 (DSC 1982) (applying equitable tolling).

Relatedly, courts have applied the discovery rule in cases brought under other employment statutes. For example, in Cada v. Baxter Healthcare Corp., 920 F.2d 446, 448 (7th Cir. 1990), the Seventh Circuit, in a case brought under the Age Discrimination in Employment Act, held that the discovery rule applies in discrimination cases. In his opinion, Judge Posner explained that "the 'discovery rule' of federal common law * * * is read into statutes of limitations in federal-question cases * * * in the absence of a contrary directive from Congress." Several other circuits have followed Cada in applying the discovery rule in employment-related cases. See, e.g., Podobnik v. United States Postal Serv., 409 F.3d 584, 590 (3rd Cir. 2005) (ADEA case); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3rd Cir. 1994) (Title VII case); Union Pac. R.R. v. Beckham, 138 F.3d 325, 330 (8th Cir. 1998) (ERISA case); Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 343 (D.C. Cir. 1991) (ERISA case). See also J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1253 (1st Cir. 1996) (noting that Section 1113 of ERISA explicitly incorporates the federal common law 'discovery rule.')

2. Mr. Chinn's testimony states that PAWA will lead to "excessive litigation and false claims," if Congress adopts a provision which prohibits discrimination against workers who refuse unsafe work where they have "a reasonable apprehension that performing such duties would result in serious injury?" Is there any evidence to support his statement?

No. In fact, the provision Mr. Chinn criticizes is simply a codification of OSHA regulations that have existed for decades. Under longstanding OSHA regulations that have been upheld by the U.S. Supreme Court, see Whirlpool v. Marshall, 445 U.S. 1 (1980), employees are protected against discrimination when they refuse in good faith to perform work that exposes the employee to a hazardous condition that a reasonable person would conclude presents a real danger of death or serious injury. See 29 CFR 1977.12(b)(2). I am not aware of any evidence suggesting that employees have excessively utilized this right or filed false claims concerning the exercise of this right. To the contrary, the evidence strongly suggests that many employees are reluctant to exercise their rights under the OSH Act because of fear of retaliation by their employers and the absence of meaningful recourse under the OSH Act—a problem that the Protecting America's Workers Act seeks to correct.

Chairwoman WOOLSEY. With that, this hearing is adjourned. Thank you very much again.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned.]