

MEETING  
OF  
WHISTLEBLOWER PROTECTION PROGRAM ADVISORY COMMITTEE

Chaired by Emily Spieler

Tuesday, January 29, 2013

10:30 a.m.

Occupational Safety and Health Administration

Department of Labor

Frances Perkins Building

200 Constitution Avenue NW

Washington, D.C. 20210

Reported by: Andrew Knous, RPR/CSR,  
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1 SPEAKERS

2 David Michaels, Assistant Secretary  
3 of Labor, OSHA

4

5 Rob Swain, Counsel for Legal Advice, OSHA  
6 Division, Solicitor's Office

7

8 Patricia Smith, Solicitor of Labor

9

10 PUBLIC COMMENTS SPEAKERS

11 Richard Renner, Attorney, Private Practice

12

13 Bill Kojola, AFL-CIO

14

15 Rick Inclima, Director of Safety,  
16 Brotherhood of Maintenance of Way  
17 Employees Division in the Teamsters  
18 Rail Conference

19

20 Vince Verna, Director of Regulatory Affairs  
21 for the Brotherhood of Locomotive Engineers  
22 and Trainmen

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1 DISCUSSION OF STATUTE 11(c) SPEAKERS

2 Michael Mabee, Supervisory Investigator

3 Region 1, New England States

4

5 David Baskin, Regional Solicitor's Office

6

7 IDEAS DISCUSSION

8 Patricia Smith, Solicitor

9

10 OBSERVERS

11 Bruce Rolfsen

12 Christopher Cole

13 Cassandra Lewis

14 Susan Lindhorst

15 Kathleen Hughes

16 Ron Johnson

17 John Risch

18 Mark Lerner

19 Debbie Berkowitz

20 Richard Miller

21 Ed Watt

22 Jeff Kurtz

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1 Gary Visscher  
2 Paul Tanner  
3 George Chartier  
4 Roy Maurer  
5 Charlie Lord  
6 Sherrill Benjamin  
7 Brian Broker  
8 Carla Marcellus  
9 Sabina Khadka  
10 Katelyn Wendell  
11 Anna Laura Bennett  
12 Sarah Marcus  
13 Megan Guenther  
14 Jacquelyn  
15 Cori Hutcheson  
16 Josie Gross  
17 Nicole Vitale  
18 Paul James  
19 Katie Weatherford  
20 Randy (illegible)  
21  
22

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1 different people have asked for five minutes or so, to  
2 address the Committee. I'm going to call upon you,  
3 each in turn. If you could just come up to the table,  
4 when I call you. Introduce yourself, and then give us  
5 the comments you would like.

6 I would just like to caution you about one  
7 thing, which is, obviously, this Committee does not  
8 consider and make any determinations at all, about  
9 individual complaints. Although, obviously, individual  
10 stories can be quite illustrative of systemic problems.  
11 To the extent, that's the purpose of your story, that's  
12 fine. But please do be aware, that we are not in a  
13 position to do, other than refer you to the  
14 Whistleblower Program, if you have an individual  
15 concern.

16 A number of the people, who posted issues on  
17 the website, in fact, do have individual concerns, and  
18 the Department will be following up with those people.  
19 Is Bill Kojola here? No. Okay. Richard Renner?

20 RICHARD RENNER

21 ATTORNEY, PRIVATE PRACTICE

22 Thank you. Richard Renner here. I'm an attorney in

1 private practice, in Silver Spring, Maryland. I  
2 submitted written comments, but the discussion today  
3 has generated a few more thoughts I wanted to share.  
4 It was pretty clear that, this morning, concern was  
5 raised about problems with OSHA 11(c), one of the  
6 oldest, and at this point, most antiquated  
7 Whistleblower Protections. One of the key problems of  
8 OSHA 11(c) is that workers do not own their own  
9 whistleblower claim. They make a complaint to OSHA,  
10 but OSHA makes the decision about whether or not it  
11 will exercise its rights to bring the claim to court  
12 and to enforce those rights. So that's meant that very  
13 few of the many thousands of 11(c) complaints that come  
14 in actually get to court and get adjudicated. That  
15 would change, if Congress would pass the Protecting  
16 American Workers Act (PAWA). This has been introduced  
17 many times, and it's introduced again now.

18 Under this law, you would give whistleblowers  
19 their own claim. If OSHA decided not to pursue it,  
20 they would have a right to a hearing before an  
21 Administrative Law Judge. If the whistleblower  
22 prevailed, the whistleblower's attorney would recover



1 attorney's fees. With that provision then, private  
2 attorneys could take on the role of enforcing OSHA  
3 11(c). This is a provision that's made a significant  
4 difference in the environmental area, where I got my  
5 start. It's been used effectively in Sarbanes-Oxley,  
6 and of course, in the other more modern Whistleblower  
7 Protections.

8           But another concern I have is that State  
9 Courts often provide employees a tort remedy for  
10 wrongful discharge. But many States have an exception  
11 to that tort claim, where State or Federal law provides  
12 an adequate remedy. Several States have reached a  
13 conclusion, that I think is incorrect, that the OSHA  
14 11(c) remedy is adequate. Because there is some  
15 possibility of relief.

16           But if OSHA, itself, were to declare that it  
17 believes the 11(c) remedy is not adequate, then those  
18 of us who practice in this area could cite the State  
19 Courts to that declaration and ask that they reconsider  
20 their decisions on the adequacy of 11(c), so that the  
21 employees would at least have the same remedies as  
22 other whistleblowers under State law, and would not be

1 denied relief, because of the existence of the  
2 ineffective 11(c) remedy.

3           Now, I want to get to some of the comments  
4 that I submitted in my written comments. I noticed  
5 that Director Slavet made a couple of points this  
6 morning, that I think are interrelated: (1) is that  
7 she wants to address the corporate culture; (2) she  
8 would like to see earlier resolution of whistleblower  
9 claims; (3) she would like the statistics to be  
10 understandable; and (4) she would like the program to  
11 have effective deterrents. To me, effective deterrents  
12 would be look into the mind of a manager, who's making  
13 a decision about whether or not to impose an adverse  
14 action. If that manager has the belief that he or she  
15 can get away with it; can suppress the violations that  
16 suppress the reporting, well then there's no deterrent  
17 effect. So key to that deterrent effect then are the  
18 statistics, and seeing that whistleblower remedies are  
19 effective.

20           In my review of the statistics that were  
21 published, and are available here in the back, I  
22 noticed there's a significant chunk for settlements.

1 And, unfortunately, it's difficult to assess the  
2 effectiveness of those settlements. If it's an  
3 employee saying, "I give up. I'll take whatever I can  
4 get," then that settlement does not reflect  
5 accomplishment of the enforcement purpose of  
6 encouraging whistleblowers to come forward.

7           So I think it would be more effective if  
8 those settlements were broken out into those that  
9 included reinstatement, or the employee staying on the  
10 job, and those that did not. That would be a measure  
11 of whether or not we are accomplishing the legislative  
12 purpose of seeing that whistleblowers who have the  
13 spine to speak truth to the power, whether or not we  
14 are keeping them on the job. That's what I think we  
15 can look at. The one statistic, that there can be no  
16 doubt about, is the comparison between the merit  
17 determinations and the dismissals. I noticed, that in  
18 the last four years, we picked up that rate from where  
19 it used to be, at 1.3 percent. Now, it's about 2.3  
20 percent. But even at 2 percent, I don't think that's  
21 much of a deterrence. I'd like to see some type of  
22 program that would make that a better number. Indeed,

1 when whistleblowers have a full due process remedy, in  
2 front of the Administrative Law Judges, we do see a  
3 better rate, with that type of process.

4 My suggestion, that I made in my written  
5 comment, is this. Let's transfer the final  
6 determination of whistleblower complaints from the  
7 Regional Directors to the National Directorate, here in  
8 Washington. That way, there'd be one office, with one  
9 Director, who was accountable; that put a public face  
10 on the program. The decisions would be made by a staff  
11 that was dedicated solely to enforcement of the  
12 Whistleblower Program. I would hope that that type of  
13 organization and accountability within the Department  
14 of Labor would see an improvement in that number, and  
15 an improvement in the deterrent effect of the  
16 Whistleblower Protection Program.

17 One other point I want make, here on the  
18 Fairfax Memo. I notice that in Point 2, he raises a  
19 concern about those employers that discipline employees  
20 for violating a company rule about the time or manner  
21 of reporting injuries. Of course, there's some  
22 notorious examples of whistleblowers, who came forward

1 and reported within hours after an incident, and then  
2 were disciplined for reporting too late, even on the  
3 same day as the incident.

4 I think, as Martin Luther King said, "The  
5 time is always right, to do what is right." And the  
6 Fairfax Memo indicates that those rules should be  
7 reasonable. I suggest that there is no reasonable time  
8 limit on reporting injuries. That even if an injury  
9 happened a long time ago, if the rule means that the  
10 employee's going to be disciplined for coming forward,  
11 because they're coming forward too late, then that rule  
12 is unlawful and it still deters reporting. Reporting  
13 should be protected at all times. Thank you very much.

14 MS. SPIELER: Thank you, Mr. Renner. I think  
15 Bill Kojola may have come into the room. Is that  
16 right? Come join us at the....

17 BILL KOJOLA

18 SAFETY AND HEALTH DEPARTMENT OF AFL-CIO  
19 Yeah. I apologize for not being here, when my name was  
20 called. I never want to be late for lunch, but in this  
21 case, I was at lunch. So at any rate, let me introduce  
22 myself. My name is Bill Kojola. I'm with the Safety