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OSHA Docket Office, Docket No. **OSHA-2010-0004**
U.S. Department of Labor, Room N-2625
200 Constitution Avenue, NW.
Washington, DC 20210

By Facsimile: (202) 693-1648

Re: Docket No. OSHA-2010-0004

Dear Madam or Sir:

A. The big picture.

The new administration has a historic opportunity to improve OSHA's whistleblower program. I am pleased to offer these comments to help us accomplish the public purpose of assuring all employees in America that they will be protected if they raise concerns about health, safety, environmental, nuclear, or other matters of public interest.

The purpose of the employee protections is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. *Devereux v. Wyoming Association of Rural Water*, 93-ERA-18 (Sec'y, October 1, 1993); *Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). Employees can play an important role in protecting the public from environmental and nuclear safety dangers. They can keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. Accordingly, the federal statutes prohibit such discrimination.

In enforcing the employee protection of the Energy Reorganization Act, a prior Secretary of Labor said that "employees must feel secure that any action they may take" furthering "Congressional policy and

purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

The protection of whistleblowers is a necessary component of any program to protect worker and public safety. "If employees are coerced and intimidated into remaining silent when they should speak out, the result can be catastrophic." *Rose v. Secretary of Department of Labor* (6th Cir. 1986), 800 F.2d 563, 565.

A 2008 University of Chicago study determined that whistleblowers are the best tool for fighting corporate fraud. One unfortunate, but not surprising, finding was that of whistleblowers whose identity was revealed, 82% of them were either forced from their position or quit under duress. In 2009, the accounting firm of PriceWaterhouseCoopers issued its Global Economic Crime Survey.[1] It confirmed that the most effective way to detect corporate fraud is though whistleblowers. PWC concluded that fraud detection depends on protecting those whistleblowers and punishing those who commit fraud, "regardless of their position in the company."

B. Introduction

I have been a lawyer for 28 years, and I have practiced before the US Department of Labor (DOL) since 1995. I have handled over 20 environmental, nuclear and other whistleblower cases before the DOL. Since 2002, I have also served as Secretary of the National Whistleblowers Center. In 2008, I moved from Ohio to Washington, DC, to become Legal Director of the National Whistleblowers Center.

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[1] Available at:
www.pwc.com/gx/en/economic-crime-survey/download-economic-crime-people-culture-controls.jhtml

I urge OSHA to think creatively in shaping a Whistleblower Program rooted in the public interest. A successful program assures all employees that their activities in furtherance of legislative objectives will provide them with an effective protection against retaliation.

C. OSHA can best address the GAO's concerns (from Report 09-106) by reorganizing whistleblower investigators into a new national office.

On January 27, 2009, the Government Accountability Office (GAO) issued its Report GAO-09-106, called, "Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency." The report says what many whistleblower practitioners have long known: the Department of Labor's whistleblower program needs more resources and better quality. Investigators do not have the equipment, training, legal counsel or oversight needed to assure quality investigations.

The GAO discovered that OSHA does not have the systems in place to assure the accuracy of case statistics, the agency's processing time, reasons for screening out complaints, and the outcomes of settlements. GAO found that the Office of Administrative Law Judges (OALJ) did have reliable and verifiable case tracking data, and its average processing time for a whistleblower appeal was nine (9) months. The Administrative Review Board (ARB) considers appeals from ALJ decisions, and its processing time can range from thirty (30) days to five (5) years. GAO found that the ARB does not have reliable data of its docket flow and lacks oversight of its data quality.

Overall, the GAO found that whistleblower caseloads are increasing, and the cases themselves are becoming more complex. GAO recommended that each OSHA Regional Office conduct an independent audit of its whistleblower program to identify program deficiencies and the corrective actions needed. As I explain below, I believe that it would be better to remove whistleblower cases from the Regional Offices and to provide instead for a national whistleblower office within the Department of Labor.

For outcomes, GAO found that OSHA's report of a 21 percent success rate for whistleblowers could be misleading. OSHA includes all settled cases in the "successful" category. As a result, "nearly all" of the successful cases were settlements, rather than OSHA decisions on the merits. GAO found that even some of the settled cases were not properly recorded, and the actual success rate is more likely 19 percent. These statistics suggest that OSHA investigators work with employer's lawyers and encourage settlement in cases where OSHA would otherwise find merit. In cases were OSHA is accepting the employer's word about its motives for an adverse action, most investigators simply issue a determination to dismiss the whistleblower's complaint. In appeals to OALJ, whistleblowers win less than a third of the contested cases.

GAO found that OSHA has not even established a minimum equipment list saying what investigators should have. Some, but not all, have laptop computers and portable printers to take written statements

in the field. This equipment is necessary for investigators to make an accurate written record of a witness' first statement about a complaint.

The GAO report arrives at an opportune moment. The new administration has an opportunity to give the whistleblower program new leadership that reflects a commitment to protecting whistleblowers. This can be done most effectively by reorganizing existing personnel into a national whistleblower office.

Having a single national office to review investigators' reports is the only way to assure a consistent standard for evaluating investigations and outcomes. Too often, when investigator are overworked, and lacking in training, equipment and professional counsel, they will rely on an employer's claims about the true motives for an adverse action against a whistleblower. Whistleblower cases, like other discrimination cases, requires an evaluation of all the surrounding circumstances to assess whether they point to a legitimate employer action or to a pretext for unlawful retaliation. A national office will also provide an added layer of separation between adjudicators and local employers. It would add prominence to the Department's whistleblower program and create a single national office that could speak for the needs of whistleblowers. This added independence and attention would further encourage whistleblowers to come forward.

Whether or not OSHA determines to consolidate whistleblower investigators into a single national office, OSHA can improve the policies by which investigators conduct their work. I urge the adoption of policies that call on investigators to get recorded statements from the employer's decision makers as early as possible during the investigation. It is an embarrassment for OSHA when a case progresses to the ALJ hearing and the record shows that the key decision maker was never interviewed by the investigator. Recording the decision maker's stated reasons for an adverse action is the best way to focus the investigation on the true reasons for the adverse action. The recorded statement of the decision maker is also necessary for subsequent review and evaluation of the employer's decision and the OSHA investigation.

That said, OSHA needs to respect the role of attorneys during an investigation. I would hope that we have heard the last of OSHA investigators attempting to contact represented parties without the knowledge or participation of legal counsel. However, the OSHA investigations manual still does not require investigators to communicate strictly through legal counsel for represented parties. This requirement is necessary to raise the level of professionalism in OSHA's whistleblower program.

OSHA can also improve the quality of its final reports if it would submit proposed findings to the parties for comment and rebuttal. The iterative process would deepen the analysis of the final report. To the extent that disclosure of proposed findings might encourage the parties to enter into a settlement of the claim, that can only be helpful.

The depth of investigation and analysis must become deeper as employers become more sophisticated. One federal judge explained, "Today's employers, even those with only a scintilla of sophistication, will

neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. ... It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action ranging from failure to hire to discharge." *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), Justice Thomas said that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" If investigators are not provided sufficient training, equipment and direction, then their determinations will fail in the primary public purpose of assuring employees that they will be protected when they blow the whistle.

D. OSHA needs to review its interim rules, address public comments and make its rules final.

On August 10, 2007, OSHA published interim rules amending 29 CFR Part 24, 72 Fed. Reg. 44956. Mr. Jason Zuckerman and myself submitted comments to the amended regulations on October 9, 2007. Mr. Zuckerman is an attorney with The Employment Law Group here in Washington, DC. At the time, Mr. Zuckerman and I co-chaired the Whistleblower Committee of the National Employment Lawyers Association. OSHA still has not published final rules, or responses to the public comments.

E. Limiting federal court jurisdiction in ERA cases.

One error in the interim rules adds a hurdle to a whistleblower's decision to remove a case from DOL and file it in U.S. District Court. The Energy Policy Act of 2005, Public Law 109-58, was enacted on August 8, 2005. Among other provisions, this new law amended the employee protection provisions for nuclear whistleblowers under Section 211 of the ERA, 42 U.S.C. 5851. The 2005 amendment added a provision for *de novo* review by a United States District Court in the event that the Secretary has not issued a final decision within one year after the filing of a complaint, and there is no showing that the delay is due to the bad faith of the complainant. Congress obviously wanted to expand the avenues of relief available to nuclear whistleblowers. The *de novo* process in district courts is available as an option for complainants, but is not required. As such, rules intended to accomplish the congressional purpose should respect the complainant's options, and work in their favor, not to their detriment.

The Fourth Circuit recently reaffirmed that the statutory language means just what it says. In *Stone v. Instrumentation Laboratory Co*., (No. 08-2196, Dec. 2009), the Court stated, "Starting, as we must, with the text of the statute, we find the above quoted language to be plain and unambiguous." The Court added, "The text of the statute is clear — if the DOL has not reached a final decision within the time period established by Congress, a complainant has the *statutory right* not merely to undefined relief in another forum, but to "*de novo* review" in federal district court. 18 U.S.C. § 1514A(b)(1)(B). A plaintiff's right to pursue such relief is not circumscribed in any manner by the statute." [Emphasis in original.]

The interim final rule has altered Part 24 to deter complainants from seeking relief in district courts in a way that hampers all complainants in the preparation of their cases. I suggest that the Department would better serve the statutory goals by demonstrating that it is a superior forum for these specialized cases. The Department should compete on the quality of its determinations rather than sacrifice quality for the sake of speed. DOL simply lacks authority to rewrite the 2005 amendments to the ERA by striking the phrase *de novo* and restricting a complainant's ability to remove a complaint to federal court.

F. ERA burdens should be described correctly.

The Department's Summary and Discussion of Regulatory Provisions overgeneralizes when it states, "The burdens of proving a retaliation claim are the same as those of a standard discrimination claim." In *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (June 22, 2006), the Supreme Court noted how the purpose of anti-retaliation laws goes beyond the purpose of anti-discrimination laws. Accordingly, the Court held that a broader range of adverse actions can be remedied with the anti-retaliation provision of Title VII than is addressed through its anti-discrimination provisions (which are limited to adverse employment actions).

Congress improved the burdens for whistleblowers in the 1992 amendments to the Energy Reorganization Act. Once the employee shows that the protected activity was a "contributing factor" in the adverse action, the burden is on the employer to prove by "clear and convincing" evidence that it would have taken the same personnel action absent the employee's complaint. 42 U.S.C. § 5851(b)(3)(D). A contributing factor includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Halloum v. Intel Corp*., 2003-SOX-7, at 18 (ALJ Mar. 4, 2004) (emphasis added) (citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)) (noting that under the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the "contributing factor" test is "specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action."). For further background on the origin and significance of the "contributing factor" burden of proof, I recommend Judge Dorsey's article, "An Overview of Whistleblower Protection Claims at the United States Department of Labor," 26 J. Nat'l Ass'n Admin. L. Judges 43, 66 (2006), and also R. Vaughn, "America's First Comprehensive Statute Protecting Corporate Whistleblowers", 57 Admin. L. Rev. 1 (Winter 2005).

The Energy Reorganization Act (ERA), 42 U.S.C. § 5851(b)(3), now provides:

> (3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through

> (F) of subsection (a)(1) of this section was a **contributing factor** in the unfavorable personnel action alleged in the complaint.
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> (B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, **by clear and convincing evidence**, that it would have taken the same unfavorable personnel action in the absence of such behavior.
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> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a **contributing factor** in the unfavorable personnel action alleged in the complaint.
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> (D) Relief may not be ordered under paragraph (2) if the employer demonstrates **by clear and convincing evidence** that it would have taken the same unfavorable personnel action in the absence of such behavior. [Emphasis added.]

The *McDonnell Douglas* framework no longer applies to ERA nuclear whistleblower claims because Congress provided an independent evidentiary framework for that statute in 1992. *See Doyle v. U.S. Sec. Labor*, 285 F.3d 243, 249-50 & n. 9 (3rd Cir. 2002), *Williams v. Administrative Review Bd.*, 376 F.3d 471, 476 and n.3 (5th Cir. 2004), *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999), and *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

In *Doyle*, 285 F.3d at 249-50, the Court of Appeals for the Third Circuit reviewed the new evidentiary framework, noting: "[t]he Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776, effective October 24, 1992, amended section 210 to incorporate a burden-shifting paradigm whereby the burden of persuasion falls first upon the complainant to demonstrate that retaliation for his protected activity was a 'contributing factor' in the unfavorable personnel decision." "Clear and convincing" is an evidentiary standard that "requires a burden higher than 'preponderance of the evidence' but lower than 'beyond a reasonable doubt.'" *Getman v. Southwest Securities, Inc*., 2003-SOX-8, at 10 (ALJ Feb. 2, 2004) (*citing Yule v. Burns Int'l. Security Service*, 1993-ERA-12 (Sec'y May 24, 1995)); *see also Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002). The ARB has relied on the Black's Law Dictionary definition: "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB 02-028, 2001-AIR-3 (Jan. 30, 2004).

There appears to be some confusion about the key elements of a whistleblower retaliation claim, which confusion results in investigators incorrectly assuming that a complainant must have "smoking gun" evidence of retaliation, that any reasonable explanation for an adverse action meets the "clear and convincing evidence" standard, and that an act of retaliation is actionable only where it has a tangible economic consequence. Accordingly, I suggest that the Department define the following terms:

> An "unfavorable personnel action" includes any recommended, threatened, or actual discrimination, including, but not limited to, termination, demotion, suspension, or reprimand; involuntary transfer, reassignment, or detail; referral for psychiatric or psychological counseling; investigation, provision of benefits; taking or failing to take any personnel action, including failure to promote or hire or take other favorable personnel action; engaging in any conduct that would dissuade a reasonable employee from engaging in activities protected by this statute; or retaliating in any other manner against an employee because that employee makes a protected disclosure or refuses to comply with an illegal order.
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> "Clear and convincing evidence" is evidence indicating that the thing to be proved is highly probable or reasonably certain and is a higher burden than preponderance of the evidence.
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> A "contributing factor" is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.

The Department can assist all parties, and its own staff, by making clear that the burdens of proof for ERA cases are those set out in 42 U.S.C. § 5851(b)(3) and not the burdens of traditional discrimination claims. The Department should be mindful that Congress used the same improved burdens in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B), the Sarbanes-Oxley Act ("SOX"), and the recent Consumer Product Safety Improvement Act ("CPSIA"). It is time to get it right.

It would be a mistake to follow the Supreme Court's 5-4 decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009). In *Gross*, the Supreme Court held that since Congress did not modify the burdens of proving causation in age discrimination cases in the 1991 Civil Rights Amendments, the previous burdens still apply. In other words, the development of "mixed motive" methods of providing causation do not apply to claims under the Age Discrimination in Employment Act (ADEA). Justice Thomas made clear in his majority opinion that he was focused on the "text of the ADEA." This holding should have no effect on proving causation in whistleblower cases which have traditionally followed the federal case law developed under Title VII. Moreover, the *Gross* decision is controversial and has been widely criticized. There is legislation pending in Congress to correct it.

Since *Dartey v. Zack Company of Chicago***,** 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 6-9, the Secretary has followed federal Title VII case law in determining causation in retaliatory adverse action cases arising under 29 C.F.R. Part 24 and the statutes enumerated there, and therefore applying *Gross* would be a departure from well-established DOL precedent. The two leading cases used by the Secretary to establish the framework for Part 24 whistleblower cases were *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981) (Title VII case) and *Mt. Healthy School Dist. Bd. of Education v. Doyle,* 429 U.S. 274 (1977) (Constitutional adverse action case). He noted that *Mt. Healthy* had been applied to section 5851 cases by the Second Circuit. *Consolidated Edison Co.*

of New York v. Donovan, 673 F.2d 61 (2d Cir. 1982); *Jaenisch v. United States Dep't of Labor*, 697 F.2d 291 (2d Cir. 1982); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, D&O of Remand by SOL, at 10, (Feb. 15, 1995), affirmed *Carroll v. USDOL*, 78 F.3d 352 (8th Cir. 1996).

The Eleventh Circuit recently made clear that the Supreme Court's holding in *Gross v. FBL Financial Services, Inc.*, has no effect on Title VII and laws following its burdens of proof. In construing the Florida Civil Rights Act (FCRA), the Court explained:

> The Florida courts have held that decisions construing Title VII are applicable when considering claims of discrimination under the Florida Civil Rights Act, because the FCRA was patterned after Title VII. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (citing Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989)); Fla. Stat. § 760.10(1)(a). n2 Therefore, we analyze cases under the FCRA in the same manner as those brought under Title VII. See Harper, 139 F.3d at 1387. *Jiles v. UPS*, 2010 U.S. App. LEXIS 435 (11th Cir. Fla. Jan. 7, 2010)

In the previous decade, the ARB, still following Title VII standards, made it increasingly difficult for whistleblowers to prevail. Even under the "contributing factor" test, the prior administration's ARB required complainants to do more than show that the protected activity was a "motivating factor" in the adverse action. *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-5 (ARB Nov. 29, 2006). There, the Board observed that a complainant "must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing factor.'" This decade of ARB caselaw was a departure from the trend of improvements developed during the previous two decades. It was also in stark contrast to the lessening burdens Congress was creating in new whistleblower statutes, including AIR 21, SOX, PSIA, STAA, FRSA, NTSSA, CPSIA, and the ARRA.

G. Service of complaint and respondent's response.

In Section 24.104(b), I suggest that it would be helpful if the final regulation provided that OSHA serve the respondent's response on the complainant's representative. The practice among OSHA field offices is uneven on this point. Respondents are entitled to a copy of the complaint once it is filed. Complainants will have a right to the response once OSHA closes its investigation and the complainant submits a FOIA request. However, the complainant could assist OSHA in its investigation if the complainant has a copy of the respondent's response. Providing the employer's responses to the complainant is consistent with the OSHA policy for non-public disclosure. Still, respondents should know that their response will not be confidential so they are not caught by surprise when their response is used as an exhibit in the ALJ hearing.

In an effort to promptly complete investigations, some investigators are inclined to accept whatever justifications for an adverse action that are offered by the employer without probing whether such justifications are in fact credible. This approach cannot be considered an "investigation." To serve the critical objectives of these whistleblower protection statutes, OSHA investigators should provide a complainant with the respondent's submissions and should not close the investigation until the complainant has had an opportunity to respond.

H. Permitting Witnesses to Meet Privately with OSHA Investigators.

Employees of respondents are often reluctant to speak candidly, if at all, to investigators for fear of reprisal. Accordingly, the presence of a respondent's representative (typically an attorney) at an OSHA interview can have a chilling effect that prevents the investigator from discovering important evidence. Unless the witness is in a level of management such that communications must be made through the corporation's attorney pursuant to Rule 4.2 of the Model Rules of Professional Responsibility, investigators should specifically inform witnesses of the opportunity to meet privately with an OSHA investigator or to speak with an OSHA investigator by phone.

I. Service of OSHA determinations on counsel of record.

In Section 24.105(b), I suggest that the rule should specifically require service on the attorney of record for each party (if the party has counsel). Mr. Renner has one case where OSHA sent the determination directly to a complainant with limited English proficiency, even though he signed and filed the original complaint. He did not learn about the determination until OSHA sent him a copy — more than a month later. Even though he filed the objection and request for hearing immediately upon his receipt of the determination, the ALJ dismissed the objection and request for hearing on grounds that it was not made within thirty days, counting from the original issuance directly to the complainant. This case is currently pending at the Sixth Circuit in *Smith v. Solis*, Case No. 08-4058 (ARB Case No. 06-146). We could avoid these types of problems if the rule specifically required service on the attorney of record, or alternatively, if the rule allowed objections within thirty days of the last service when the party and his or her attorney are served at different times.

J. Imposing Undue Limitations on Discovery.

I particularly object to the last sentence of Section 24.107(b) ("Administrative law judges have broad discretion to limit discovery in order to expedite the hearing."). It had been well established that the time limits for adjudication can be extended or waived to allow for the completion of discovery. *Timmons v. Mattingly Testing Services*, 95-ERA-40, D&O of Remand by ARB, pp. 5-6 (June 21, 1996). An initial request to extend the time limits is routinely granted. *Tracanna v. Arctic Slope Inspection Service*, 97-WPC-1, ARB No. 97-123, D&O of Remand by ARB, at 5 (Nov. 6, 1997). Adequate time is absolutely necessary to accomplish proper discovery in a manner consistent with the Federal

Rules of Civil Procedure. Accord, *Malpass v. General Electric Co.*, 85-ERA-38/39, D&O of SOL, slip op. at 12 (March 1, 1994). The Secretary of Labor has stated that parties to DOL whistleblower proceedings have "all the discovery mechanisms of the Rule of Practice" available to them to assist in preparing for a hearing. *Malpass v. General Electric Co.*, 85-ERA-38/39, D&O of SOL, slip op. at 12 (March 1, 1994). In *Holub v. H. Nash Babcock, Babcock & King, Inc.*, 96-ERA-25, Discovery Order of ALJ (March 2, 1994), the ALJ ruled that "the law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. Further, the courts have held that liberal discovery in these cases is warranted." *Id.*, slip op. at 6. Also see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1073) (extensive discovery in employment discrimination cases is necessary and the refusal to adhere to the "liberal spirit" of discovery would be an abuse of discretion); *Duke v. University of Texas at El Paso*, 729 F.2d 994, 997 (5th Cr. 1984) ("procedural technicalities" to impede liberal discovery are improper). One member of the ARB explained:

> In employment discrimination cases, the courts have held that discovery should be permitted "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 295 (D.Del. 1975) (citations omitted). "In such cases, the plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination." *Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 65 (E.D. Mo. 1995) (citations omitted). *Accord Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983) (vacating protective order which limited discovery in part because, "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); *Flanagan v. Travelers Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986) (same). Consistent with this body of case law, the Secretary of Labor and the ALJs have recognized the broad scope of discovery to be afforded parties in whistleblower cases. *See, e.g., Malpass v. General Electric Co.*, Case Nos. 85-ERA-38/39, Sec'y Dec., Mar. 1, 1994, slip op. at 12; *Holub v. Nash, Babcock, et al.*, Case No. 93-ERA-25, ALJ Disc. Ord., Mar. 2, 1994, slip op. at 6. *See generally Timmons v. Mattingly Testing Services, Inc.*, ALJ Case No. 95-ERA-40, ARB Dec. & Ord. of Rem., June 21, 1996, slip op. at 4-6 (discussing the "full and fair presentation" of a whistleblower case by the parties).
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> *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), concurring opinion of E. Cooper Brown.

It is ironic that Congress created the judicial bypass for ERA cases out of a perception that the DOL process was not adequate to protect whistleblower interests, and now the DOL is using the bypass provision as a basis to make its process even less suitable. I urge the Department to make its process better so that complainants are encouraged to bring their claims to the Department and allow the Department to complete its process.

The 2005 amendment affects only ERA whistleblower complaints. However, the new Part 24 affects all the environmental whistleblower cases, even though the complainants there have no right of *de novo* review in district court. The current legislation provides no logical basis to restrict their rights of discovery in any way.

If the Department was intent on limited discovery for the sake of speed, it could make clear that ALJs can make an adverse inference of unlawful discrimination based on a respondent's failure to make full and complete discovery responses. Accord, *Malpass v. General Electric Co.*, 85-ERA-38/39, D&O of SOL, slip op. at 12 (March 1, 1994). The Department could add a requirement for initial disclosures (reference FRCP 26(a)(1)). The Department could expedite discovery by shortening the time to respond to interrogatories, requests for documents or admissions.

K. Encouraging E-Discovery.

I specifically suggest that the Department require parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms. I have noticed numerous parties printing out emails, for example, and producing the hard copies to frustrate an opponent's ability to save and search the responsive documents for key names or phrases. The companies go to extra effort to make their electronic records harder for complainants to use. The searchable electronic form is necessary to properly search and manage the documents. It is not fair that respondent can search the relevant emails, policy files, and other documents electronically while complainant and his counsel would have to read through all the of pages of paper to get the same information. I mention a searchable electronic form because some respondents' counsels have been converting documents to PDF forms by scanning the hardcopy or otherwise making the PDF file non-searchable. That frustrates the purpose of electronic discovery. Courts that have considered the issue have held that production of electronic documents in their electronic form is proper. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), reversed on other grounds, 90 F.3d 553 (D.C.Cir. 1996). *See also Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y.) "Production of materials in hard copy form does not preclude a party from receiving the same information in electronic form."; *see also Cobell v. Norton*, 2002 U.S. Dist. LEXIS 5291 (D.D.C.) (request for permission to produce emails on paper draws sanctions). Production electronically is easier for the producing party and more useful to the receiving party. It is the right thing to do. The ALJ erred in failing to compel respondent to produce its electronic versions of its documents.

The modern practice of maintaining electronic records means that businesses typically have more records than they did in times past. They will need the time to identify the location of all electronic data, to retrieve such data, and to prepare the data for production. Limiting the period for discovery prejudices complainants in that it will effectively deny them the opportunity to obtain the documents necessary to prove their claims. ALJs are generally reluctant to impose discovery sanctions. Limiting the period for discovery gives respondents a tremendous advantage in that they can spend months

withholding documents and by the time the discovery motions are before an ALJ, the case will be going to trial and the complainant will not have had access to documents and information that can prove the claim. DOL precedent establishes that the reason for encouraging expeditious hearings is to benefit the complainant. *Johnson v. Transco Prods., Inc.*, 85-ERA-7, slip. op. of ALJ at 2 (Mar. 5, 1985). The employee is likely to be out of a job or otherwise economically disadvantaged by the employer's alleged retaliation. The time limits are not designed to provide the employer with a means of pressuring or harassing an employee who has "blown the whistle." *Bullock v. Rochester Gas & Electric Corp.,* 84-ERA-22 (ALJ June 8, 1984) (interim order) (Respondent had opposed continuance for Complainant to obtain an attorney). DOL appears to have lost sight of this precedent and appears to be more concerned with protecting respondents from the burden of discovery than in assuring a fair adjudication of a complaint. I urge the Department to remove the sentence that encourages ALJs to limit discovery, and instead specify that discovery should include initial disclosures, searchable electronic production of electronic records, and adverse inferences upon a showing of failure to make timely and complete responses.

L. Role of DOL in enforcing whistleblower protection statutes.

The summary of changes to Section 24.108 states that "in most whistleblower cases, parties have been ably represented and the public interest has not required the Department's participation." This statement is an unfortunate reflection of DOL's stance on whistleblower protection laws. This orientation has grave consequences for public health and safety. Just last week, a hearing held by the House Committee on Education and Labor revealed that the six miners who died in a mine cave-in on August 6, 2007, had concerns about mine safety issues but were reluctant to raise them for fear of losing their jobs. Also in 2007, the Nuclear Regulatory Commission (NRC) concluded that personnel at the Peach Bottom Atomic Power Station in Pennsylvania did not report concerns about the sleep inducing conditions for guards because of fear of retaliation. "If employees are coerced and intimidated into remaining silent when they should speak out, the result can be catastrophic." *Rose v. Secretary of Department of Labor* (6th Cir. 1986), 800 F.2d 563, 565. Instead of focusing on limiting discovery in these cases, the Department should be focused on enforcing whistleblower protection laws that enable employees to raise concerns without fear of reprisal. Accordingly, the Department should consider intervening on behalf of complainants in these cases, especially where a complainant is *pro se*.

Ironically, it appears that under the prior Administration, the Solicitor intervened in whistleblower cases almost exclusively when there is an opportunity to narrow or undermine whistleblower protection laws. For example, *Ambrose v. U.S. Foodservice, Inc.*, ARB Case No. 06-096, the Assistant Secretary submitted a brief proposing that the ARB construe coverage under the whistleblower provision of the Sarbanes-Oxley Act very narrowly. The brief proposed a standard that conflicts with the Department's regulations implementing Section 806 of SOX and it disregarded the remedial purpose of Section 806 and Congressional intent. Similarly, in *Sasse v. Department of Labor*, the Department submitted a brief to the Sixth Circuit arguing for a narrow construction of the range of adverse actions that are

actionable under the environmental whistleblower laws. And in *Ede v. Swatch Group,* ARB No. 05-053, the Assistant Secretary again argued for a narrow construction of SOX. Hopefully, the Department will reverse this trend.

M. Deciding cases on the merits.

Finally, I suggest modifications to Section 24.110 that would further the goal of deciding cases on their merits. Specifically, the Department can allow a party to set out sufficient grounds for the ARB review, but then add additional grounds in the brief. The previous rule had allowed parties to make a simple request for review, and then set out the grounds in the brief. In appeals to the federal circuit courts, the process of writing the brief is when counsel is obligated to review the entire record to set out the assignments of error. To require that a party review the entire record to identify all the errors in less than ten business days (since the ten days run from the date of the decision, not the date counsel receives it) is unrealistic and unfair. I notice that in Section 24.105(c), the Department has expanded the time to file a simple objection and request for *de novo* review from five (5) days to thirty (30) days. I support this change in Section 24.105(c). However, it is uneven that parties are allowed thirty (30) days to file a simple request for hearing, but less than ten (10) days to review the entire record to identify all the assignments of error. From time to time, each of us might be in a hearing or take a vacation that is longer than ten (10) days. I suggest that thirty (30) days would be a better time limit for Section 24.110(a). To the extent that the ARB needs to determine that there are good issues present for briefing, this goal can be achieved without limiting a party to assign only those issues identified in the petition for review. The Department can require that a party file a petition that identifies good grounds for the review, and then permit the party to raise additional assignments of error in their brief. This later alternative would still allow the ARB to screen the petitions for meritorious issues for briefing, and preserve the fundamental goal of deciding cases on their merits instead of adding more technical grounds to defeat claims.

If Department personnel or other interested parties have any questions about my comments, they are welcome to call on me.

Very truly yours,

Richard R. Renner
Legal Director
National Whistleblowers Center