

Analysis of a Decade of Environmental Whistleblower Protection: 1996-2006

Methodology: PEER reviewed administrative cases falling under the whistleblower provisions of the major environmental and nuclear statutes –

Toxic Substances Control Act;
Solid Waste Disposal Act;
Clean Water Act (Water Pollution Control);
Safe Drinking Water Act;
Clean Air Act;
Comprehensive Environmental Response, Compensation, and Liability Act (Superfund); and
Energy Reorganization Act.

Data was gathered from the labor Secretary's Administrative Review Board (ARB) decisions posted on the Office of Administrative Law Judges' website, <http://www.oalj.dol.gov/LIBWHIST.HTM>. The below numbers do not include settlements agreed to at any point before the ARB decision.

Comparison Summary:

- ❖ From 1996 through 2000, the ARB affirmed 70% (14 of 20) of pro-whistleblower ALJ decisions. From 2001 through 2006, the ARB affirmed *less than 30%* (6 of 21) of pro-whistleblower ALJ decisions.
- ❖ Of the ARB decisions reversing the ALJ from 1996 through 2000, nearly 60% (8 of 14) favored the employee. Of the decisions reversing the ALJ from 2001 through 2006, less than 35% (8 of 23) favored the complainant.
- ❖ From 1996 through 1999, the ARB reversed only 2 pro-employee ALJ decisions compared to the 12 reversals from 2003 to 2006. The ARB reversed 6 pro-employee ALJ decisions in 2004 alone.
- ❖ From 2004 through 2006, the ARB affirmed only 1 of 11 pro-employee ALJ decisions – *less than 10%*. It did reverse 3 anti-employee decisions during this same timeframe.

ARB Decision Breakdown:

1996 through 2000

There were 20 pro-employee administrative law judge (ALJ) recommended decisions and orders during this time period that the ARB reviewed (i.e. did not settle before ARB issued a decision):

- 14 were affirmed by the ARB.

- In 3 of these 14, the ARB lowered damages and/or attorney fees/costs;
- In 3 of these 14, the ARB increased damages and/or attorney fees/costs.
- 6 were reversed by the ARB.
 - 1 where the ALJ only partially found for employee and awarded \$168.00 in damages for unlawful demotion; ARB said demotion not unlawful;
 - 1 where the ALJ said no constructive discharge.

There were 8 pro-employer ALJ decisions during this time period that the ARB reversed. Thus, of the 14 ALJ decisions the ARB reversed, 8 were favorable to the employee.

2001 through 2006

There were 21 pro-employee ALJ recommended decisions and orders during this time period that the ARB reviewed (i.e. did not settle before ARB issued a decision):

- 6 were affirmed by the ARB.
 - In 3 of these 6, the ARB decreased damages and/or attorney fees/costs;
 - In none of these 6 did the ARB increase damages and/or attorney fees/costs.
- 15 were reversed by the ARB.

There were 8 pro-employer ALJ decisions during this time period that the ARB reversed. Thus, of the 23 ALJ decisions the ARB reversed, 15 were anti-employee.

General Points

- ❖ Overall, the majority (70+%) of environmental whistleblower cases that did not settle (both pre-2001 and since) resulted in the ALJ entering a recommended decision and order for the employer and the ARB then affirming that decision for the employer.
- ❖ In most cases where the employee received a favorable outcome, there was a settlement before the ALJ decision, or after a favorable ALJ decision but before review by the ARB. The ARB is required to review all proposed settlements, but rarely did the ARB disapprove a settlement agreement (even then it was typically for purely procedural reasons).