

OSHA Must Address Crippling Weaknesses in Whistleblower Protection

Testimony Submitted by
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On behalf of Public Employees for Environmental Responsibility (PEER), today we are submitting the following testimony focusing on one critical but neglected aspect of Occupational Safety & Health Administration (OSHA) operations. Later this month, we will submit more detailed comments and suggestions concerning worker exposure to hazardous substances and the continued inattention to this major portion of OSHA’s mission in both rulemaking and enforcement.

PEER is a service organization for employees working on resource protection and public health issues within public agencies, including OSHA. One service that PEER provides is guidance and legal representation to public servants who become whistleblowers. Through PEER, public servants have exposed and thereby prevented significant dangers to public health and safety, serious environmental degradation, huge losses of public funds and widespread law-breaking and outrageous malfeasance by public agency managers.

Our core message today is that OSHA does not effectively protect workers who report health and safety hazards or other violations and dangers. Moreover, OSHA does not protect its own specialists from retaliation for raising health and safety issues or concerns about the consequences of OSHA’s own actions – or inaction. Unless and until OSHA can redress both its substantial inability to protect whistleblowers and its internal culture of reprisal, the ameliorative effect of many of the reforms it might pursue will be frustrated.

In the spirit of “physician, heal thyself”, our testimony begins with OSHA’s own internal history of reprisal and makes recommendations for positive change. Next, we turn to the limitations of the OSHA 11(c) (Section 11(c) of the Occupational Safety and Health Act [29 U.S.C. § 660(c)]) program and recommend administrative and legislative solutions.

OSHA has a duty to investigate and adjudicate whistleblower cases under the provisions of 17 statutes. As the agency tasked with those duties, OSHA cannot possibly be a credible arbiter of private sector whistleblower cases if it has a poor record with whistleblowers within its own ranks.

One case that epitomizes OSHA's egregious treatment of whistleblowers was that of Dr. Adam Finkel. In 2003, Dr. Finkel was removed from his position as the OSHA Administrator for the six-state Rocky Mountain Region after protesting a decision by Assistant Labor Secretary John Henshaw to deny recommended blood screening tests for OSHA's own employees and to not inform potentially exposed individuals of their exposures and the value of undergoing a blood test for sensitization to beryllium dust.

An agency database indicated that as many as 1,000 current and former compliance officers may have been exposed to beryllium concentrations hundreds or thousands of times greater than safe levels. Beryllium is an extremely toxic metal that carries a high risk of disease following even very low exposure. Hundreds of workers have already died of chronic beryllium disease (CBD); a fast-progressing and potentially fatal lung disease, the only known cause of which is exposure to beryllium.

Beginning in 1999, OSHA scientists developed a protocol for testing active and retired inspectors for beryllium exposure. In April 2002, Assistant Secretary John Henshaw decided that the agency would not establish a testing program or even provide information or counseling to potentially affected agency employees and retirees. A blood test used by industry and the U.S. Department of Energy (which has tested tens of thousands of its employees) can detect whether a person has been sensitized to beryllium, a necessary condition for the onset of CBD. The test costs approximately \$150 per application.

OSHA is supposed to be setting appropriate workplace health standards yet it has failed to take the prudent steps required to protect its own inspectors from a lethal lung disease. To illustrate the profound misplacement of priorities, OSHA spent more money than it would have cost to test all exposed inspectors to hire consultants and focus groups to develop its then-new slogan – "Safety and Health Add Value."

After 18 months of intransigence following Dr. Finkel public exposure of his concerns, OSHA finally began a medical monitoring program in April 2004, but only for its current inspectors. Notwithstanding the decision to test, OSHA's program did not –

- Target those with the highest risks. Instead, testing was offered to nearly all the people who likely had the lowest exposures without providing key information about severity of exposure. This is like telling every DC resident that there is lead in the water when you already know which houses have the highest levels;
- Inform or offer testing to the approximately 1000 retired federal inspectors or to the active and retired inspectors who work for the 23 states that have their own

OSHA programs. The retirees may have had more exposure than their active counterparts; and

- Address the much larger group of private-sector workers in beryllium-containing workplaces (such as foundries and dental laboratories) whose employers will not have to offer testing unless OSHA revises its 60-year-old beryllium regulation.

The first results from screenings of several hundred inspectors showed that nearly 4 percent of those examined had become sensitized to beryllium. OSHA inspectors exposed for only a few days had sensitization rates equal or greater than those of workers who have spent years in beryllium-laden environments, suggesting that OSHA inspectors may have been subjected to extremely high exposures.

Under a substantial whistleblower settlement reached with the agency, Dr. Finkel returned to academia, and now, we are proud to say, is a member of the PEER Board of Directors. The fundamental contradictions that his case raised, however, remain with OSHA today.

Lest the Finkel case be dismissed as ancient history, consider another case that is unfolding at this moment. This summer, OSHA's top expert and foremost critic on workplace injury and illness records was pushed out of his job. For nearly 25 years, Robert Whitmore was the top OSHA official overseeing OSHA recordkeeping requirements before he was put on paid administrative leave *for two years*, and then finally terminated on July 13, 2009.

OSHA management placed him on paid administrative leave back in July 2007 and left him there until the *Washington Post* ran a story about his extraordinary bureaucratic exile. Days after that piece ran, OSHA moved to fire Whitmore for "disruptive, intimidating and inappropriate behavior."

Prior to the Bush administration, Whitmore had won commendations during his 37-year Labor Department career but, in recent years, he had become increasingly vocal in criticizing the steady decline in the accuracy of mandated industry reports of on-the-job accidents and illnesses, as well as his agency's growing aversion toward enforcing recordkeeping requirements. For example, in his 2008 congressional testimony, Whitmore stated that agency claims of safer and healthier workplaces could no longer be supported:

"I contend that the current OSHA Injury and Illness information is inaccurate, due in part to wide scale underreporting by employers and OSHA's willingness to accept these falsified numbers. There are many reasons why OSHA would accept these numbers, but one important institutional factor has dramatically affected the Agency since 1992, regardless of the political party in power: steady annual declines in the number of workplace injuries and illnesses make it appear that OSHA is fulfilling its mission."

Following his termination, Mr. Whitmore filed a whistleblower retaliation complaint, claiming that his marathon leave and termination arose from his dissent and not his conduct. PEER is representing him before the U.S. Merit Systems Protection Board seeking to have him restored to his previous position.

In the weeks leading up to his MSPB hearing which is scheduled to begin next week, OSHA has repeatedly taken the stance that there is no outcome that is acceptable to it that would allow Robert Whitmore to return to the agency in any capacity or under any circumstances.

Meanwhile, the Obama administration is now moving to adopt some of the reforms that Mr. Whitmore had long urged. On September 30, 2009, OSHA initiated an “Illness and Injury Recordkeeping National Emphasis Program” that beefs up enforcement of industry reporting rules. It is designed to “test OSHA’s ability to effectively target establishments to identify under-recording of occupational injuries and illnesses.” The need for changes advocated by Mr. Whitmore was reinforced last fall in a Government Accountability Office report entitled *Enhancing OSHA’s Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data* (GAO 10-10).

Unless Mr. Whitmore wins his MSPB appeal, he will not get a chance to implement many of the reforms for which he has fought. Meanwhile, many of the OSHA senior managers and their protégés who, for years, blocked reforms will remain in place.

In discovery leading up to the Whitmore hearing, we have obtained sworn testimony and e-mails that senior OSHA officials regard the act of filing a whistleblower complaint as “a declaration of war” – an ironic stance given that private sector workers are expected to file whistleblower complaints with these same officials. One manager expressed a desire for a “working weapon” in dealing with a perceived OSHA whistleblower. Still another expressed the idea that internal whistleblowers should be intimidated until they “puckered” (that is, until they were ready to submit).

While these cases have played out in public, PEER has received confidential complaints of harassment from other OSHA employees, as well as reports that they fear reprisal for candidly raising professional concerns. Therefore, we were not surprised to see OSHA’s dismal ratings by its employees in the 2009 version of the “Best Places to Work” survey. In addition to being 45th from the bottom of 216 agencies in overall assessment, OSHA did even more poorly on the three measures arguably related to the (un-surveyed) issue of reprisal and intimidation: 6th from the bottom in “effective leadership, supervisors,” 20th from the bottom in “performance-based advancement,” and the lowest sub-score of all (40.0) in “fairness.”

If OSHA is to fulfill its mission, its culture of whistleblower harassment must end. If the Obama administration is serious about meaningful change at the agency (and about giving employees “a voice in the workplace”) it needs the help of inside reformers. Rather than penalizing them and retaliating against them, it needs to rely on their

expertise to identify and redress issues – and begin the much overdue process of OSHA reform.

Five simple steps can start this transformation:

1. An agency announcement of a Zero Tolerance policy for whistleblower harassment;
2. Integrating tolerance and respect for staff views as a major element in all manager evaluations;
3. Institute independent reviews of all pending retaliation and discrimination complaints and litigation, looking to resolve as many as possible;
4. Open a safe channel of communications so that employees can communicate concerns to the top echelons of the agency without fear of reprisal. As part of this safe channel, employee surveys should be used to evaluate operations and rate managers; and
5. Lift restraints on candor by removing restrictions on employees' ability to submit material for publication without the need for prior management review or approval (similar to the new U.S. Fish & Wildlife Service policy embodied in Director's Order 117). Further, OSHA should adopt clear policies that allow employees to provide factual information in response to inquiries from reporters, congressional investigators or members of the public. In other words, honesty should not constitute disciplinary offense inside OSHA.

If, however, OSHA really wanted to change the culture and send a strong signal through its ranks, it should bring back some former “dissidents” to positions with authority to pursue the reforms for which they sacrificed their careers.

The connection between protecting internal whistleblowers to the OSHA mission of protecting workers who disclose hazards is immediate and direct. No matter how good the agency is, it has to depend somewhat on the eyes and ears of the workforce to help it police the more than 7 million establishments in American commerce – and this will not happen if reprisals go undeterred.

For example, OSHA recordkeeping of worker injuries and illnesses is the main measure the agency uses to measure the success of its programs. The records form the basis for targeting firms and industries for future inspections. In the above-referenced report, GAO found that widespread underreporting by workers of on-the-job injuries was linked to patterns of pressure by employers against both workers and health care professionals. GAO recommended that OSHA “inspectors interview workers during the records audits to obtain information on injuries and illnesses.” OSHA has pledged to follow this recommendation.

Yet, OSHA cannot expect courageous candor from private sector employees if it does not encourage or even tolerate it from its own. Unfortunately as with its own specialists, OSHA has failed to protect private sector workers that it interviews from retaliation.

As a consequence, workers who contradict their employers' official reports can be targeted for removal or other reprisal. The only recourse for these workers would be to file complaints with OSHA, which has a notoriously poor record of protecting whistleblowers – both in and outside the agency.

Just how poor is somewhat unclear. In a December 2008 report (*Whistleblower Protection Program: Better Data and Improved Oversight Would Help to Ensure Program Quality and Consistency*; GAO 09-106) GAO concluded that the Department of Labor and OSHA lack “reliable information” about whistleblower case processing and that case statistics were not being “accurately recorded.” Moreover, OSHA investigators lack the resources, training and legal assistance to properly conduct reprisal investigations. Finally, OSHA does not audit or perform other reviews of the program to facilitate either consistency or quality of outcomes.

The fragmentary agency statistics that are displayed indicate that a small, and declining, number of workers – approximately one in five – who file 11(c) retaliation claims win any relief, principally in the form of an OSHA-brokered settlement, however paltry. These dauntingly low success rates have stayed relatively constant over the past fifteen years but the number of complaints filed has significantly declined – perhaps due to the low likelihood of success: In the early 1990's, OSHA received more than 3,500 11(c) complaints; by 1999 the number of complaints had fallen to 2,465 and to only 1330 by 2002.

We are not aware of anyone who suggests that the drop-off in the number of complaints is because actual reprisals are declining or that the OSHA whistleblower program is deterring violations. Congressional testimony over the past twenty years is full of horror stories from workers who lost employment for acting to protect themselves, co-workers and the public. And in low-wage industries, such as slaughterhouses, canneries and processing plants, tales of retaliation from reports of horrendously dangerous or unhealthful conditions are the stuff of documentaries and media exposés.

Workers are not surveyed as to what they think of the OSHA 11(c) process. However, a 1992 survey of OSHA inspectors conducted by GAO found that fewer than 10 percent of OSHA inspectors believed that the current system protects employees who exercise the rights afforded them by workplace safety and health laws from retaliation by their employers (House Education and Labor Committee report H.R. Rep. No. 102-663, pt. 1. at 59 (1992)).

In order for OSHA to strengthen its whistleblower protection program, it needs to conduct a thorough program audit. The last such audit we could find was conducted back in 1997 U.S. by the Labor Department (DOL) Office of Inspector General (*Nationwide*

Audit of OSHA's 11(c) Discrimination Investigations: Final Report No. 05-97-107-10-105). Its three main findings were –

- “Workers in general, but particularly those in small companies, are vulnerable to reprisals by their employers for complaining about unsafe/unhealthy working conditions...The severity of the discrimination is highlighted by the fact that for 653 cases included in our sample, nearly 67 percent of the workers who filed complaints were terminated from their jobs;
- OSHA operating practices and SOL [Labor Office of Solicitor] coordination present obstacles to gaining ‘all appropriate relief’ as provided by the OSH Act for complainants with merit cases. Without SOL input, many cases may be settled too early because of legislated time constraints for conducting an investigation. In addition, many case files contained incomplete documentation of worker losses in back wages, and cases referred for litigation were too often rejected. We also found that 81 percent of the cases referred to SOL were not promptly acted upon; and
- OSHA’s automated case management system is ineffective for reporting and managing 11(c) cases.”

No evident follow-up work on these issues has been done in the more than a dozen years since this audit. Thus, it is not publicly known whether any of deficiencies identified in the 1997 audit was ever addressed.

It should be noted that one of the singular features of the 11(c) program is that whistleblowers have no avenues for pursuing their own claims following the initial complaint. These safety and health whistleblowers are completely dependent on the willingness of the Labor Office of Solicitor to prosecute their cases.

Whether it is due to a lack of resources or will, SOL prosecutes only a tiny percentage of the cases that have merit. The 81 percent rejection rate of cases referred to it by the investigatory branch documented by the DOL Inspector General would be a scandal if emulated at the U.S. Department of Justice or a state or local prosecutor’s office. Yet, at DOL that stunningly high level of non-performance apparently is acceptable.

A related problem is that the pool of OSHA investigators who perform the lion’s share of the work on 11(c) complaints is relatively static, even as their jurisdiction grows. OSHA now conducts investigations under 17 different whistleblower statutes, including two added as recently as 2008. Despite this growth in jurisdiction, ranging from commercial nuclear power-plants to the corporate offices of publicly-traded companies, there has been no concomitant growth in investigative resources.

It is time for OSHA and DOL to consider creating a separate organization for handling discrimination complaints, with sufficient staff to do justice to those whistleblowers who must rely upon their offices. While it would be administratively easier to house this new

organization within DOL, Congress should evaluate the merits of placing it away from the entire DOL machinery and thereby give it a fresh start.

Perhaps most importantly, OSHA and DOL should support modernizing its whistleblower statute. The 11(c) whistleblower provision is unchanged from its enactment back in 1970. Many of the bottlenecks and deficiencies could be cured by a legislative revision, including provisions to –

- Allow whistleblowers a private right of action so that they are not dependent upon SOL to prosecute their claims. This would help bypass the SOL bottleneck. Several of the state OSHA plans have had this feature for years;
- Lengthen the statute of limitations for filing claims from 30 days to at least 160 days so that workers who require time to find legal assistance do not find the 11(c) door already closed; and
- Eliminate the array of jurisdictional obstacles to 11(c) coverage, including extending coverage to public sector workers and to workers who refuse orders that endanger others besides the worker him or herself.

The Obama administration's support of such reform legislation would make a meaningful contribution to worker protection that would endure well beyond its tenure.

In conclusion, it is critical that OSHA look at protection of whistleblowers – both in the workplace and within its own halls – as a central concern crucial to the accomplishment of its mission rather than as a side issue that can remain on the back burner.

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