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EPA Case Drives Calls To Strengthen Whistleblower Rules For Private Firms

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Citizen and other government watchdog groups are pressing Congress to consolidate and strengthen OSHA's authorities governing private sector whistleblowers, citing in part a recent case where a Labor Department (DOL) board found that EPA officials wrongfully fired an agency whistleblower who was entitled to protections.

Watchdog advocates say the case -- brought by EPA scientists Cate Jenkins over her termination after she blew the whistle on the agency's response to the 9/11 attacks -- is an example of beneficial statutory changes that Congress made to federal whistleblower protections in 2012 and are now seeking to extend similar changes to OSHA's programs governing employees in private firms.

They add that the patchwork of statutes that OSHA oversees for different sectors creates “confusion” that impedes employee's disclosure protections.

The EPA case “shows that whistleblowers play an important check on illegal, unethical business practices,” said Debbie Berkowitz, a former senior policy adviser at OSHA, who is now at the National Employment Law Project. “Which is why it is important that these cases are heard and funds are administered to process these cases."

The seven-year “case moved forward, but look how long it took,” she added.

To address such concerns, Public Citizen and the Government Accountability Project are urging lawmakers to take up legislation to consolidate DOL's anti-retaliation statutes into “one coherent law” and argue that many of the current statutes that were enacted before 2000 are “obsolete and are virtually unenforceable."

“Whistleblower laws have the power to prevent tragedies by providing employees safe channels to sound the alarm before a disaster occurs. This ultimately benefits employers, workers, shareholders, and the public. However, antiquated and inconsistent laws (compounded by resource restraints) have hampered DOL’s ability to implement its Whistleblower Protection Program for too long,” the groups argue in a background memo on the issue.

The memo notes that between fiscal year 2005 and FY13, whistleblowers won in only 3 percent of cases.

“Most federal employees enjoy whistleblower protections under one primary law, the Whistleblower Protection Act, which Congress unanimously strengthened in 2012. . .Congress can provide similar

clarity for the private sector through one whistleblower protection law that is a consolidated of all 22 DOL-administered statutes and reflects the most current rights," it adds.

Among other things, the groups are seeking to extend some statutes of limitation, require a stronger burden of proof and temporarily reinstate whistleblowers while their cases are being adjudicated.

In addition to statutory concerns, labor advocates are also concerned about the administration's signals to roll back whistleblower protections, pointing to President Donald Trump's FY19 budget request for DOL, which has proposed to eliminate DOL's Whistleblower Protection Advisory Committee (WPAC).

WPAC was created to submit recommendations to the Labor Secretary and the head of OSHA "on ways to improve the fairness, efficiency, effectiveness, and transparency of OSHA's administration of whistleblower protections." But the FY19 Budget request would eliminate the committee and replace it with "more targeted stakeholder meetings allowing more focused engagement with specific stakeholders" and will create an estimated cost savings of $140,000.

Supreme Court Ruling

In addition, a Supreme Court ruling last month in *Digital Realty Trust v. Somers* found a financial sector whistleblower was not protected from retaliation under Securities and Exchange Commission (SEC) rules, raising significant concerns from whistleblower advocates.

"By strictly construing the scope of protected activity, the Supreme Court has upended over 50 years of decisions interpreting numerous whistleblower statutes that have for years protected employees who report concerns to compliance officials and managers, Stephen Kohn, executive director of the National Whistleblower Center (NWC), said in a statement.

He said the decision could set a precedent that undermines protections for employees who fail to report alleged violations to OSHA, including provisions in the Occupational Safety and Health (OSH) Act, surface mining laws, and a host of other environmental, transportation, financial and other laws' whistleblower protections that the agency oversees.

In the EPA case, *Cate Jenkins v. United States Environmental Protection Agency*, DOL's Administrative Review Board (ARB) March 1 ruled to uphold an ALJ's finding that EPA wrongfully terminated the scientist for disclosing concerns about the agency downplaying post 9/11 toxic dust exposures and engaged in "egregious conduct" during litigation. This included falsely accusing the scientist of making death threats.

Jenkins, who had worked at the agency since 1979, filed a complaint with OSHA, in January 2011 alleging that the EPA "unlawfully terminated her employment in retaliation for disclosures, complaints, and communications" that are protected under the environmental whistleblower statutes enforced by OSHA.

Jenkins alleged that EPA had engaged in "improper laboratory testing, falsified a regulation governing exposure safety standards, and knowingly covered up the toxic properties of the dust" which she claimed contributed to first responders' "excessive" exposures to harmful levels of toxic dust.

The ALJ found in an April 2015 that EPA “willfully and deliberately engaged in discovery misconduct” and that a supervisor's claims that Jenkins had made a death threat against him as justification for her termination, were unfounded.

The ALJ issued a default judgment against the agency and sanctions for failure to respond to discovery requests; EPA subsequently appealed the decision to the ARB, which upheld the ALJ's decision.

“Default judgment as a deterrent is clearly warranted in this case. . . . Moreover, the matter is now before the Administrative Review Board, whose affirmation of the ALJ's ruling will surely send a signal to government and private-sector parties alike who appear before Department of Labor administrative law judges that the level of discovery misconduct engaged in by the EPA and its legal counsel in this case will simply not be tolerated,” the March 1 decision says.

'Woefully Inadequate'

In a March 12 statement, Jenkins reiterated advocates' concerns that the current laws are “woefully inadequate to protect whistleblowers” and “discourage people from whistleblowing in the first place."

“Very few win out of those who file cases. Most do not even file cases, because there is a strict 30-day limit from the time retaliation took place, which is unreasonable,” Jenkins said according to the statement.

“The decision really speaks to the voracity of this case and really underscored the need for an overhaul of the whistleblower statutes,” said Shanna Devine, a worker health and safety advocate at Public Citizen.

She explained that protected disclosures of violations of rules, such as the Occupational Safety and Health Act or the Clean Air Act, have differing and small windows to report employer retaliation for whistleblowing.

Paula Dinerstein of **Public Employees for Environmental Responsibility**, who served as lead attorney on the case, said the proceedings also demonstrate the “extremes a federal agency will pursue to remove a whistleblower” and the “enormous amount of persistence it can take for whistleblowers to obtain justice,” noting that the litigation spanned nearly eight years.

“It should not require the stamina of a marathoner for civil servants to obtain justice -- but unfortunately it often does” said Dinerstein in an email. -- *Rebecca Rainey* (rrainey@iwpnews.com)