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ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

GREGORY C. SASSE, Complainant	)	ARB Case Nos. 02-077 and 02-078
v.	)	ALJ Case No. 1998-CAA-7
OFFICE OF THE UNITED STATES ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, Respondent	)	

BRIEF FOR THE ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

The Assistant Secretary for Occupational Safety and Health **("Assistant Secretary")** will address the following questions:

1. Whether the whistleblower provisions of the Water Pollution Control Act (WPCA), 33 U.S.C. 1367, Solid Waste Disposal Act (SWDA), 42 U.S.C. 6971, or Clean Air Act (CAA), 42 U.S.C. 7622, allow an Assistant United States Attorney (AUSA) to sue the Department of Justice (DOJ) because his supervisors allegedly disagreed with his handling of government litigation and his involvement on an environmental task force.

2. Whether the Administrative Law Judge (ALJ) erroneously found that DOJ violated these whistleblower provisions by allegedly disciplining the AUSA because he discussed with a congressional office alleged environmental violations he had investigated.

3. Whether the ALJ's recommended award of punitive damages is barred by sovereign immunity and not authorized by statute. STATEMENT

1. Pre-complaint activities. Since 1983, Gregory Sasse has been an Assistant United States Attorney (AUSA) in the Northern District of Ohio. Tr. 32. For two years, he worked on a drug task force. Tr. 34-35, 890-891; RX O-2, p. 984. In **1985, Sasse was** transferred to a unit that prosecuted general crimes. Tr. 35, 891, 898. In 1987, the Chief of the Criminal Division sent Sasse to an environmental seminar, Tr. 899; see Tr. 40-42, and Sasses supervisor and the Division Chief subsequently assigned him an environmental case that involved the dumping of toxic materials at Cleveland's airport. Tr. 47, 903. That case resulted in a guilty plea and a decision by the government to appeal what it believed was too lenient a sentence. See United States v. Bo as, 920 F.2d 363 (6th Cir. 1990); see also United States v. Rutana, 932 F.2d 1155 (6th Cir.) (government appeal of sentencing in another environmental case handled by Sassd), cert. denied, 502 U.S. 907 (1991). Sasse received his first overall ratings of "excellent" in the years he worked on Bogas and Rutana. See RX O-2, p. 984 (ratings for 1989 and 1990); CX 13-C, 13-F, 13-G, pp. 17-77 (documents filed in Bogas); CX 30-B, pp. 182-186 (Rutana notice of appeal).

In 1991, Sasse attended an environmental conference in New Orleans with the United States Attorney, and after the conference she asked him to form an environmental task force of federal, state and local agencies. Tr. 123, 127-129. During the next "file review," Sasse told the Division Chief that he was going to be very busy on the task force and did not know if he would be able to get to his other cases. Tr. 1078.1 The Division Chief, who had opposed taking appeals in Bogas and Rutana, Tr. 1082-1084, checked with the First Assistant United States Attorney, who had also attended the New Orleans conference, to see whether Sasse should make the task force a full time job to the exclusion of his other cases. Tr. 10781079; RX N-3, p. 950. The First Assistant, who had supervisory responsibility over the Division Chiefs, viewed it appropriate to assign other work. Tr. 1136; see Tr. 1079. At the next file review, the Division Chief told Sasse that "[j]ust because he went gallivanting around New Orleans with the United States Attorney, didn't mean he didn't have to finish his other work." Tr. 1079.

In 1992, Sasse received an overall rating of "excellent" for his 1991 appraisal, but believed he was "downgraded" from

[1] The Division Chief, with a supervisor present, held "file reviews" four times a year to discuss pending cases. See Tr. 132, 924-925.

outstanding to excellent on one of the elements because of his work on environmental cases. Tr. 116-123; see RX O-2, p. 985. In March 1992, he purportedly told the United States Attorney that the Division Chief and Deputy Division Chief, who was his immediate supervisor, were retaliating against him for enforcing environmental laws. Tr. 148-151. In Sasses view, this meeting with the United States Attorney temporarily stopped their harassment. Tr. 151-156. The Division Chief and Deputy Chief disputed Sasses perceptions. Compare Tr. 152-156 (Sasse's testimony) with Tr. 1009-1010, 1097-1098 (Division Chief's and Deputy Chief's testimony).

For 1993, Sasse again received an overall rating of excellent, but the Deputy Chief noted concerns that Sasse was taking too much leave, was not returning phone calls, and was not moving his cases. Tr. 934-945; see RX O-4, pp. 1004-1012; RX O-6, pp. 1030-1033. Sasse believed that, after the United States Attorney left with the change in administration in 1993, the Division Chief and Deputy Chief had started to harass him again for his work on environmental cases. Tr. 157-158. He believed that he had been assigned more cases than other attorneys in the office, was not getting requested training, had been denied awards, and had been given a secretary who had problems typing and misplaced or misfiled documents. Tr. 288-

310, 339-341, 397-403. His superiors disputed his perceptions. Tr. 830, 964-966, 984-985, 989-991, 997-1000, 1020-1024.

For 1994, Sasse again received an overall rating of excellent. Tr. 355; RX G-2a, pp. 765-780. He filed a grievance because he had been downgraded on two elements. Tr. 357; RX G2b, pp. 781-784. In February 1996, the Executive Office for United States Attorneys denied the grievance. Tr. 390; RX G-3, pp. 859-861.

While Sasse was grieving his 1994 "downgrades," a major environmental case against Safety Kleen, a company that collects and disposes of hazardous waste throughout the United States, was transferred from Sassd to DOJ's Environmental and Natural Resources Division in Washington. See Tr. 275-276, 560-565, 580-582; CX 31-P, pp. 318-319. That division later decided to close the case without prosecuting anyone. Tr. 591-621. Sassd disagreed with that decision and believed that the Division Chief was retaliating against him by taking away environmental cases that the Chief believed were too old and by downgrading him for having such cases. Tr. 271-286. He also argued to the ALJ that DOJ was attempting to shield a former EPA employee who worked for Safety Kleen. See ALJ Recommended Dec. & Order (ALJ RD&O) 9.

In April 1996, Sasse agreed that the secretary he had complained about should be rated excellent in all elements of

her job and that restrictions which had resulted in other secretaries being assigned to do her work should be lifted. Tr. 965; RX D-4, pp. 756-758. In November 1996, the Deputy Chief reassigned Sasse's work to this secretary. Tr. 310. Sasse, who had been giving work to other secretaries, viewed the reassignment as a re-initiation of discrimination. On November 25, 1996, within thirty days of the reassignment, he filed the complaint at issue here.

2. Post-complaint activities. In 1997, Sasse, while still working as an AUSA, proposed to officials of the National Aeronautics and Space Administration (NASA) that he work for them in a private capacity to help ensure that NASA contractors were adhering to environmental laws. See 1/14/00 Letter from DeFalaise to Sasse (attached to 6/6/02 Letter from DOJ attorney Johnson to ALJ Tierney); Tr. 505-507. At that time, NASA owned property next to the Cleveland airport that Sasse had discovered, from his work on Bo as and the environmental task force, to be severely contaminated. Tr. 256-259; see also Tr. 206-221 (testimony of former chief of NASA's environmental compliance office). The NASA officials reportedly referred Sasses business proposal to NASA's Office of Inspector General (OIG), who in turn referred the matter to DOJ's OIG. DeFalaise Letter, supra, at 2. In October 1998, DOJ officials informed

Sasse that he was under a criminal investigation in connection with his proposal to NASA. Tr. 502, 507.

On January 14, 2000, the Executive Office of United States Attorneys proposed to suspend Sasse for five days because his business proposal to NASA violated ethical standards of the DOJ and Office of Government Ethics. DeFalaise Letter, supra, at 12. Those standards require, among other things, that DOJ employees obtain prior approval before engaging in outside employment that involves a subject matter in the component's area of responsibility, 5 C.F.R. 3801.106(c), and prohibit a government employee from using public office for his own private gain, 5 C.F.R. 2635.702. See 18 U.S.C. 208 (a) (criminal conflict of interest provision).

In late January or early February 2000, Sasse received a request from a staff person in Congressman Kucinich's office to assist that office in evaluating environmental issues at the Cleveland airport, which was in the Congressman's district, and on February 2, 2000, he informed the First Assistant United States Attorney of this contact. ALJ RD&O 15; Tr. 254-256; RX Z-4, p. 1427. The First Assistant obtained more details from Sasse on the environmental problems and then asked him to write a memo detailing his concerns. Tr. 831-832, 839; RX Z-5, p. 1428. Sassd did so, and DOJ, the EPA, the FBI, and NASA's OIG investigated. Tr. 258, 721-723, 840; CX 17-E, pp. 163-165. In

June or July 2000, those agencies and the First Assistant unanimously concluded that there was no current evidence of criminal wrongdoing. Tr. 727-728, 842-845.

On May 2, 2000, acting on the January 14, 2000 proposed disciplinary action, the Director of the Executive Office for United States Attorneys suspended Sasse for five days for his October 1997 attempt to obtain private employment with NASA. 5/2/00 Letter from Santelle to Sasse (attached to 6/6/02 Letter from DOJ attorney Johnson to ALJ Tierney). The Director concluded that Sasse had violated the Doi ethical regulation requiring prior approval before an employee engages in outside employment and the Office of Government Ethics regulation prohibiting an employee from using his public office for private gain. Santelle Letter, supra, at 2. Sasse did not appeal the suspension, and he was suspended from July 17, 2000 through July 21, 2000. See RX X-1, p. 1235.2

[2] On July 10, 2000, Representative Burton, as Chairman of the House Government Reform Committee, and Representative Kucinich wrote a letter to Attorney General Reno requesting her to detail Sasse to that Committee to assist in assessing the nature of the toxic contamination on the NASA site at the Cleveland airport. CX 17-F, p. 166. The Justice Department officials in Washington responsible for responding to this request decided to deny the request because DOJ was at or near the "ceiling" it had established for detailees. RX Z-6, p. 1430. Accordingly, the Justice officials denied the request without discussing it with the Executive Office of United States Attorneys or with the United States Attorney's Office in the Northern District of Ohio. Ibid.; see also Tr. 833-834 (First Assistant did not see

(continued . . .)

3. ALJ decision. The ALJ concluded that DOJ did not retaliate against Sassd for his work on environmental cases and the task force largely because, in the ALJ's view, the CAA, SWDA, and WPCA whistleblower provisions do not protect activities that are part of an employee's assigned duties. ALJ RD&O 6-13. The ALJ also concluded, however, the DOJ had retaliated against Sasse for his efforts to expose contamination at the Cleveland airport because his dealings with Congressman Kucinich were protected. Id. at 14-23. The ALJ recommended compensatory damages, $200,000 in punitive damages, attorney's fees, and a cease and desist order. Both parties seek review of the ALJ's decision and present numerous arguments in support of their positions.

(. . . continued) the request until a week and a half before the June 2001 ALJ hearing).

Under generally accepted principles of administrative finality, the ALJ's decision was not final until the damages issue was resolved. See, e.g., Washington Metro. Area Transit Auth. v. Director, OWCP, 824 F.2d 94 (D.C. Cir. 1987). The present notices of appeal to the ARB, filed before the ALJ resolved the damages issue, nevertheless ripened when the ALJ issued the damages decision. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 311 n.3 (3d Cir. 2001) (although notice of appeal is premature when filed before damages are calculated, it ripens without the need for a second filing when damages are calculated while the appeal is pending). The pending attorney's fee request to the ALJ does not affect finality. See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198 (1988) .

ARGUMENT We urge the Administrative Review Board (ARB) to resolve the case by holding that (A) although the CAA, SWDA, and WPCA provisions may protect employees carrying out assigned duties, principles of sovereign immunity and prosecutorial discretion require that they do not allow Sasse to sue DOJ because his supervisors allegedly disagreed with his handling of government environmental litigation and his service as a DOJ representative on an environmental task force; (B) Sasses congressional contacts were neither the cause of his suspension nor protected activities; and (C) in any event, the ALJ's award of punitive damages is barred by precedent and principles of sovereign immunity

A. The whistleblower provisions do not permit an AUSA to sue DOJ because of workplace disagreements over his handling of government litigation and his involvement on an environmental task force

It is a well-established principle of statutory construction "that any waiver of the National Government's

[4] In June 1998, the Wage and Hour Division, which investigated complaints before transfer of that responsibility to the Assistant Secretary for Occupational Safety and Health, concluded that DOJ had violated the CAA, WPCA, and SWDA. Because Wage & Hour's findings were based exclusively on Sasses evidence (DOJ having refused to permit an investigation), they do not represent a definitive view on the issues addressed in this brief. See also Sasse v. USDOJ, ARB Case No. 99-053, at 4 (Aug. 31, 2000) (not deciding whether Sasses duties as an AUSA are protected).

sovereign immunity must be unequivocal," and that "'[w]aivers of immunity must be construed strictly in favor of the sovereign."' USDOE v. Ohio, 503 U.S. 607, 615 (1992) (citation and internal quotation omitted). Some administrative decisions have broadly construed the CAA, SWDA, and WPCA to waive the federal government's immunity from suit under those statutes' whistleblower provisions. See Berkman v. United States Coast Guard Acad., ARB Case No. 98-056, at 13 (Feb. 29, 2000); Jenkins v. USEPA, No. 92-CAA-6, at 4 (Sec'y Dec. May 18, 1994); Marcus v. USEPA, No. 92-TSC-5, at 2 (Sec'y Dec. Feb. 7, 1994); Conley v. McClellan Air Force Base, No. 84-WPC-1, at 4 (Sec'y Dec. Sept. 7, 1993). In an appropriate case, the ARB may wish to reexamine the waiver issue with respect to the CAA and WPCA.5 It is not necessary to do so here, however, because, whatever the

The WPCA prohibits retaliation by any "person," 33 U.S.C. 1367(a), but its "pointed" omission of the United States from the definition of "person" in 33 U.S.C. 1362(5) indicates that the United States is not included in the definition. USDOE, 503 U.S. at 617-618. The CAA defines "person" to include federal agencies, 42 U.S.C. 7602(e), but its substantive prohibitions apply to the undefined term "employer[s]," a term that does not necessarily include federal agencies. 42 U.S.C. 7622(a). The SWDA, on the other hand, is enforceable against any "person," and defines that term to include agencies of the "United States." 42 U.S.C. 6903(15), 6971(a). The texts of the CAA, WPCA, and SWDA whistleblower provisions, and the "federal facilities" provisions of those statutes, 33 U.S.C. 1323, 42 U.S.C. 6961(a), 42 U.S.C. 7418(a), discussed in Conley, Marcus, Jenkins, and Berkman, are reprinted in Attachment A to this brief.

scope of the waiver, the CAA, SWDA, and WPCA do not permit an AUSA to sue Doi because his supervisors allegedly disagreed with his handling of environmental cases and work on the task force.

1. We agree with Doi that its prosecutorial decisions are not subject to review. See Resp. to First Appeal Br. of Complainant 16-22. To avoid interference with DOJ's prosecutorial decision making, however, the ARB should do more than merely strike portions of the ALJ's decision, as Doi argues. Id. at 21-22. The ARB should hold that the WPCA, CAA, and SWDA whistleblower provisions do not enable Sasse to sue over his activities or complaints relating to his work as a prosecutor and member of the task force for two interrelated reasons.

First, the CAA, SWDA, and WPCA provisions are reasonably construed to provide Doi a defense to such suits. The Supreme Court has recognized that, even though a statute "on its face" may admit of no defense to suit, certain defenses are so wellestablished that "we presume that Congress would have specifically so provided had it wished to abolish' them." Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (citation omitted). Thus, the Court has construed 42 U.S.C. 1983, which on its face provides no defense of official liability, to preserve an individual prosecutor's defense of absolute immunity from suits that challenge prosecutorial acts. Ibid.; see also,

e.g., Kalina v. Fletcher, 522 U.S. 118, 123 (1997).[6] The Court reasoned that such immunity is necessary primarily to enable the prosecutor to exercise independent judgment when deciding which suits to bring and how to conduct them, and secondarily to protect the prosecutor from harassing litigation that would divert his time and attention from his official duties. Kalina, 522 U.S. at 125.

The same reasoning applies to the WPCA, CAA, and SWDA provisions. The Justice Department's prosecutorial authority arises from its designation by statute as the agency responsible for helping the President "discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (citation omitted); see also 28 U.S.C. 516, 519. It is well established that DOJ retains broad discretion on how to exercise that authority. Armstrong, 517 U.S. at 464. Absent certain alleged constitutional violations not present here, courts will not review DOJ's prosecutorial decision making, in part because courts are not competent to undertake such a review

[6] Under 42 U.S.C. 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

and in part because such review -delays the criminal proceeding, threatens to chill law enforcement by subjecting a prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."' Armstrong, 517 U.S. at 465 (citing Wayte v. United States, 470 U.S. 598, 608 (1985)); see also Confiscation Cases, 74 U.S. 454, 457 (1868); United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992). Accordingly, just as courts "'presume that Congress would have specifically so provided had it wished to abolish'" a prosecutor's absolute immunity from suit for acts taken in a prosecutorial capacity, Buckley, 509 U.S. at 268, so the ARB should presume that Congress would have specifically provided if it intended the environmental whistleblower provisions to abolish the rule against review of DOJ's prosecutorial decision making.

The ARB should therefore reject Sasse's interpretation of the CAA, SWDA, and WPCA provisions, under which a senior prosecutor's supervision of subordinate attorneys' cases and work load constitutes "interference" with "protected activities" and provides a basis for suit. Such a suit requires DOJ to explain, and administrative adjudicators to review, the prosecutorial decision making of its supervisory attorneys. See ALJ RD&O 6-13 (discussing the "give and take" between Sasse and his supervisors concerning prosecutorial decisions and the

Safety Kleen case). Permitting such a suit would raise the same concerns that led the Court to recognize immunity defenses for individual prosecutors and to prohibit judicial review of discretionary prosecutorial decision making: interference in the ability of Sassp's superiors, see 28 U.S.C. 542(b); 28 C.F.R. 0.15, to exercise independent judgment on which suits to bring and how to defend them; and harassing litigation that would divert DOJ personnel from their official duties.

Second, a related reason the CAA, SWDA, and WPCA provisions should not be construed to protect Sasse's activities in this case is to avoid serious separation of powers questions. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (statute should be construed, if possible, to avoid serious constitutional questions). A serious question may arise because an AUSA has no right to work on a particular class of cases (here, environmental ones) as he sees fit, free from supervision. That supervision is grounded in the President's responsibility to take care that laws are faithfully executed because, as discussed above, the President discharges that responsibility through supervisory attorneys who act on his behalf. To interfere with those attorneys' supervision of law enforcement -- and to vest an individual AUSA with a right to enforce laws without direction from his supervisors -- would seriously erode

the ability of **the President and his appointees to supervise government litigation, including the setting of** prosecutorial priorities and allocation of limited prosecutorial resources. See p. 3, supra (discussing differing views between Sasse and the Chief of the Criminal Division on how much time Sassg should spend on non-environmental cases, which Sasse views as discrimination). Protecting Sasse's activities in this case would also allow a court, on review of a DOL decision on a discrimination complaint, to decide (as Sass) argues) that supervisory hostility to environmental cases (or to the way a particular AUSA wants to litigate them) violates the statute. And it could open the door to intrusive remedies, possibly including an injunction requiring an AUSA's superiors not to assign non-environmental cases that "interfere" with an AUSA's chosen method of prosecuting environmental ones, and court oversight of DOJ's prosecutorial priorities to ensure that DOJ complied with such a remedy. Such results would plainly interfere with DOJ's constitutional and statutorily based authority to enforce federal law, including the environmental statutes whose purposes are supposed to be furthered by the whistleblower provisions. See, e.g., Armstrong, 517 U.S. at 465 (deference to prosecutorial decision making "stems from a

concern not to unnecessarily impair the performance of a core executive constitutional function").'

Finally, holding that the CAA, SWDA, and WPCA provisions do not enable an AUSA to sue over prosecutorial disagreements is not inconsistent with Conley, Marcus, Jenkins, and Berkman. None of the acts considered to be protected in those cases were prosecutorial acts, or raised the separation of powers concerns at issue here. As discussed above, a holding that Sasses actions were not protected will also make it unnecessary for the ARB to decide whether the CAA and WPCA provisions waive the federal government's immunity from suit.

2. The ARB should use the above analysis, rather than the ALJ's reliance on Huffman v. OPM, 263 F.3d 1341 (Fed. Cir. 2001). See ALJ RD&O 6-8. Huffman's holding, that an employee's normal work activities are not protected under the Whistleblower

In contrast, an AUSA would be protected from such things as race or sex discrimination. See, e.g., Primes v. Reno, 190 F.3d 765 (6th Cir. 1999); Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998). In those cases, statutes do not purport to protect a particular kind of job function, but rather codify the constitutional principle that race and sex classifications are not a valid basis for making employment decisions. Accordingly, while both types of discrimination cases have the potential for subjecting DOJ's reasons for an alleged adverse employment action to scrutiny by an outside administrative body (the ARB or EEOC) and the courts, a court's intrusion into DOJ's prosecutorial decision making is less severe when the court is examining whether supervisory discipline was based on race or sex than when a court decides whether a supervisor exhibits hostility to an AUSA's prosecution of environmental cases.

Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16, does not easily transfer to the whistleblower provisions at issue here. The WPA protects only one kind of activity -- a "disclosure" -- while the provisions at issue here use different language to protect other kinds of activities, as well as employees who are "about to" engage in those activities. Compare 5 U.S.C. 2302(b)(8)(A), with 29 C.F.R. 24.2(b). Huffman is also difficult to reconcile with court and agency recognition that an employee's normal job activities may be protected under DOL whistleblower provisions. See, e.g., 61 Fed. Reg. 24336, 24338 (1996) (NRC statement of policy); Osage Tribal Council ex rel. Osage Tribe of Indians v. USDOL, 187 F.3d 1174, 1178 (10th Cir. 1999), cert. denied, 530 U.S. 1229 (2000); Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); Tyndall v. USEPA, No. 93-CAA-6, at 3-4 (ARB June 1, 1996).

B. The ALJ erroneously concluded that DOJ discriminated against Sasse because of his congressional contacts

The ALJ concluded that Sasse engaged in protected activity through his contacts with Congressman Kucinich regarding the Cleveland airport. ALJ RD&0 20. DOJ argues that the contacts were not protected because, although the CAA could be construed to protect Congressional contacts, Sasse's airport concerns implicated only the WPCA and SWDA, which do not provide such

protection. Resp't's Br. Supp. Pet. Review 16-17. The ARB should hold that the ALJ erred because Sasse has not established that DOJ retaliated against him because of his contacts or that the contacts were protected.

1. In response to the ALJ's post-decision request for information on Sasses damages, DOJ submitted evidence establishing that DOJ suspended Sasse because of his serious ethical violations in submitting a personal work proposal to NASA, not for the "petty" prohibition against using office supplies relied on by the ALJ. Santelle Letter, supra, at 2; ALJ RD&O at 22-23. The evidence also shows that DOJ did not and could not know of Sasses later congressional contacts when it proposed the suspension. See DeFalaise Letter, supra, at 1 (proposing suspension on January 14, 2000); Tr. 254; RX Z-4, p. 1427 (Sasse informed DOJ of his contact by Congressman Kucinich's office on February 2, 2000). The proposed suspension therefore could not have been motivated by the congressional contacts. See Kesterson v. Y-12 Nuclear Weapons Plant, ARB Case No. 96-173, at 5 (Apr. 8, 1997).

The ARB should consider this evidence because it is in the record submitted by the ALJ to the ARB and Sasse has had opportunities to respond to it. See also note 3, supra (ALJ decision not final until damages calculated). In its de novo review, see Berkman, ARB Case No. 98-056, at 15, the ARB should

conclude that the May 2000 final decision was not motivated by Sasses congressional contacts because that decision simply adopts the proposal and notes that Sasse failed to contest it, and there is no evidence in the record to show that the DOJ official who made the final decision knew of Sasses congressional contacts. Deciding that DOJ had legitimate reasons for the suspension will avoid difficult separation of powers questions discussed below.

2. If the ARB reaches the question, it should reject the ALJ's conclusion that Sasses congressional contacts were protected. That conclusion conflicts with important DOJ rules, fails to consider President Bush's statement concerning the scope of protection under the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, and raises serious separation of powers concerns.

a. Sasse has failed to establish that his congressional contacts were protected because he has failed to show that he complied with the United States Attorney's Manual. That manual, in effect now and when Sasse was contacted by Representative Kucinich's office (Attachment B to this brief), requires AUSAs to report promptly "[a]11 Congressional staff or member contacts . . . prior to making any response." U.S. Att'y Man. 1-8.010; see also Tr. 254. Except for certain routine matters, Congressional requests for information or assistance are to be

"immediately referred" to a designated official in DOJ's Office of Legislative Affairs. U.S. Att'y Man. 1-8.030. Such requests

> include but are not limited to requests for non-public documents or information, discussion of or briefings on case status [other than certain public information], attendance at settlement conferences, specific suggestions on case disposition or other treatment, discussion of or requests for information on problems under existing law or suggestions for changes in existing law, requests for interviews, statements or appearances to or before Congressional, members, staff and committees. Ibid. AUSAs must
>
> never provide information on pending investigations, closed investigations that did not become public, that involves Grand Jury, tax or other restricted information, that would reveal the identity of confidential informants, sensitive investigative techniques, deliberative process or the exercise of prosecutorial discretion, or the identity of individuals who may have been investigated but not indicted, without consulting [the Office of Legislative Affairs].

Ibid. (emphasis in original). Thus, under DOJ rules, Sasse was required to report any Congressional contacts and forbidden from providing certain kinds of information. If he did not comply fully with those rules, he would not be protected in discussing with Congressman Kucinich's staff the information about NASA's land that he had gained through his work on Bogas and the task force. Instead, he would be prohibited from providing such information. Cf. United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) (upholding DOJ rule prohibiting subordinates from disclosing DOJ documents without authorization from the Attorney

General); 28 C.F.R. 16.21-16.29 (additional DOJ restrictions on disclosure of information in litigation).

In light of the DOJ rules, the ALJ erred in finding that Sasses congressional contacts were protected. There is record evidence that Sasse may have discussed the findings of his airport investigation with Congressman Kucinich's staff before reporting the matter to his superiors and obtaining clearance from DOJ's Office of Legislative Affairs, see Tr. 504; insofar as he did so, he behaved inappropriately and could be disciplined. Courts have recognized that an employer may terminate an employee who behaves inappropriately, even if that behavior relates to activity that would otherwise be protected. See American Nuclear Res., Inc. v. USDOL, 134 F.3d 1292, 12951296 (6th Cir. 1998) (citing, with approval, Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986), which held that an employer does not violate the ERA's whistleblower provision by discharging an employee for the insubordinate manner in which he raised safety concerns); Lockert v. USDOL, 867 F.2d 513, 518 (9th Cir. 1989) (employer has a right to discipline an employee who leaves his job without his supervisor's permission to research safety issues) . $

Because DOJ's rule protects the Executive Branch's constitutional authority to enforce laws, see Argument B.2.c, infra, this case is fundamentally different from cases where

(continued . . .)

b. After the ALJ rendered his decision, Congress enacted the Sarbanes-Oxley Act of 2002, supra, which, among other things, prohibits retaliation against employees of publicly traded companies who expose certain kinds of fraud. Like some other statutes, but unlike the CAA, SWDA, and WPCA whistleblower provisions at issue here, the Sarbanes-Oxley Act expressly addresses disclosures of information to Congress. Id. § 806(a), 116 Stat. at 803; see 5 U.S.C. 2302 (b) (WPA); 10 U.S.C. 2409(a) (protection for employees of defense contractors); 41 U.S.C. 265 (a) (same for employees of executive agency contractors); 42

(. . . continued) employers have been prohibited from disciplining employees for failing to complain through employer-established channels. See, e.g., Pogue v. USDOL, 940 F.2d 1287, 1290 n.2 (9th Cir. 1991); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 565 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981); Talbert v. Washington Pub. Power Supply Sys., ARB Case No. 923 (Sept. 27, 1996), and cases cited; see also 61 Fed. Reg. at 24338 (NRC's statement of policy). Those cases involved employer rules requiring employees either to report complaints to the employer before going to an agency with enforcement responsibility, see, e.g., Ellis Fischel, 629 F.2d at 565, or to report to a designated official within the employer's organization rather than to someone else in that organization. See, e.g., Pogue, 940 F.2d at 1290 n.2. An employer generally has little, if any, legitimate interest in disciplining an employee for raising a safety concern to one person rather than to another person in the employer's organization, so long as the employer is able to address that concern in a timely manner. Similarly, an employer has little or no legitimate interest in restricting employees from reporting safety violations directly to the government. See 135 Cong. Rec. 27832-27842 (1989) (materials explaining why settlements restricting employees' ability to report violations of the ERA to the NRC are illegal).

U.S.C. 5851(a)(1)(C) (Energy Reorganization Act (ERA)'s whistleblower provision).

In signing the Sarbanes-Oxley Act, President Bush has directed executive agencies to construe its whistleblower provision "as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose." 38 Weekly Comp. Pres. Doc. 1286 (July 30, 2002). The President explained that the whistleblower provision "is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority." Ibid. (emphasis added).

In this case, the CAA, SWDA, and WPCA provisions do not purport to define the scope of congressional investigative authority or grant new authority. Sassd has also not shown that Congressman Kucinich's office was conducting a duly authorized investigation when it contacted him. The ARB should consider these facts in addressing the scope of the CAA, SWDA, and WPCA provisions.

c. Separation of powers concerns provide further support for the United State Attorney's Manual's restrictions on congressional contacts and also lead, by themselves, to the conclusion that Sasses congressional contacts were not protected. Separation of powers "prohibits one branch [of

government] from encroaching on the central prerogatives of another." Miller v. French, 530 U.S. 327, 341 (2000). Because a central prerogative of the Executive Branch is to implement the constitutional directive for the President to "'take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints," Congress cannot transfer the authority to enforce federal law without meaningful Presidential control. Printz v. United States, 521 U.S. 898, 922 (1997); see also Morrison v. Olson, 487 U.S. 654, 685-691 (1988). Similarly, Congress may not interfere with the Executive Branch's ability to enforce the laws by obtaining information on such enforcement that is not sufficiently justified by a legitimate legislative purpose. See United States v. AT&T Co., 567 F.2d 121, 129-130 (D.C. Cir. 1977); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-731 (D.C. Cir. 1974) (en banc).

Construing the CAA, SWDA, and WPCA provisions to authorize an AUSA's disclosure of information to Congress, in these circumstances, could seriously interfere with DOJ's ability to enforce federal laws.9 For these reasons, the Executive Branch

9 See Randall K. Miller, Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege, 81 Minn. L. Rev. 631, 645-646 (1997) (Expansive congressional access to law enforcement materials "threatens to compromise ongoing criminal investigations and would advantage criminal defendants

(continued . . .)

has long resisted Congressional attempts to obtain DOJ investigative files. See, e.g., Congressional Subpoenas of Dep't of Justice Investigative Files, 8 Op. Off. Legal Counsel 252 (1984); Position of the Executive Dep't Regarding Investigative Reports, 40 Op. Att'y Gen. 45 (1941).

If the CAA, SWDA, and WPCA provisions entitle an AUSA to share investigative information with Congress without regard to DOJ rules regarding Congressional contacts, or to whether the Congressional investigation was duly authorized, they could allow legislators to obtain and use confidential information without any showing that the information will be used for an authorized, proper purpose or that legitimate Congressional interests in obtaining the information outweigh the Executive Branch's interests in not disclosing it. See Watkins v. United States, 354 U.S. 178, 200-201 (1957) (congressional committees and members can compel testimony only if authorized by Congress); Nixon, 498 F.2d at 731 (committee cannot obtain Watergate tapes because it failed to show a sufficient need for

(. . . continued) by revealing the prosecution's strategies, legal analysis, potential witnesses, and settlement considerations. [It] would chill the government's sources of information . . . . [It] threatens to reveal sensitive law enforcement techniques, compromise the privacy rights of innocent parties whom law enforcement materials may reference, and bias a subsequent prosecution with pre-prosecution publicity.") (citations and footnotes omitted).

them). Such results could raise serious separation of powers concerns. Upholding DOJ's authority to prevent Sasse from bypassing its procedures for review and clearance is therefore critical, to avoid the concerns that would otherwise arise if the CAA, SWDA, and WPCA were construed to give an AUSA a protected, unilateral right to disclose information to Congress or any of its members. Such concerns are present in all cases where an AUSA decides to disclose information but heightened in a case, such as this one, where a congressional staffer attempts to recruit an AUSA to assist an individual congressman's investigation.

C. Punitive damages are not available

In awarding punitive damages, the ALJ correctly recognized that the CAA, which expressly allows compensatory damages, does not implicitly allow punitive damages. ALJ RD&O 25. The ALJ erred, however, in awarding punitive damages under the SWDA and WPCA, which authorize the Secretary to require a violator "to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee." 33 U.S.C. 1367(b); 42 U.S.C. 6971(b). The Secretary held that the SWDA does not authorize an award of punitive damages against any defendant in Dodd v. Polysar Latex, No. 88-SWD-4, at 10-11 (Sec'y Dec. Sept. 22, 1994). As the Secretary explained, the

SWDA, like other statutes that have been construed not to allow for punitive damages, is essentially remedial. Ibid. Accordingly, the Secretary refused to construe the SWDA implicitly to allow non-remedial punitive damages. Ibid. That reasoning applies here, both to the SWDA and to the identical wording in the WPCA. See also 29 C.F.R. 24.8(d)(1) (listing only two statutes, neither of which is at issue here, as authorizing the ARB to award punitive damages).

Moreover, the ALJ's construction of the SWDA and WPCA provisions is barred by sovereign immunity. Courts presume that punitive damages are not available against the government because they do not have their traditional deterrent effect; instead of penalizing the wrongdoer, they penalize the taxpayers. See Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784-785 (2000) (private plaintiff cannot obtain punitive damages against state under False Claims Act). Thus, absent express language, a statute is not construed to require a governmental entity to pay punitive damages. See, e.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258268 (1981) (municipality's liability as a "person" under 42 U.S.C. 1983 does not include liability for punitive damages); Commerce Fed. Sav. Bank v. FDIC, 872 F.2d 1240, 1247-1248 (6th Cir. 1989). The SWDA and WPCA whistleblower provisions do not

expressly authorize punitive damages against the government and therefore should not be construed to do so. CONCLUSION

The complaint should be dismissed because Sasse failed to establish that he engaged in protected activity.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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