

TESTIMONY OF THOMAS DEVINE,

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before the

SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY
U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND
PENSIONS

on

“WHISTLEBLOWERS AND JOB SAFETY:
ARE EXISTING PROTECTIONS ADEQUATE TO BUILD A SAFER
WORKPLACE?”

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Mr. Chairman:

Thank you for inviting my testimony today on the adequacy of occupational safety whistleblower protection rights. My name is Tom Devine, and I serve as legal director of the Government Accountability Project (“GAP”), a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. Since 1977 we have assisted over 6,000 whistleblowers formally or informally through representation. GAP also has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including corporate rights enacted since 1992, AND the Whistleblower Protection Enhancement Act of 2012.

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 million workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for government contractors, the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as *The Whistleblower's Survival Guide: Courage Without Martyrdom*, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on government Oversight)(2002); and *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights*. (2008).

As part of our mission, I authored *The Corporate Whistleblower Survival Guide: A Handbook for Committing the Truth*,” which won the getAbstract International Business Book of the Year Award at the 2011 Frankfurt Book Fair. *Committing the Truth*’s legal chapter spotlighted weaknesses in legal rights for occupational safety whistleblowers, and enforcement practices for all whistleblowers by the Department of Labor’s (DOL)

Their foundation for occupational safety is section 11(c) of the Occupational Safety and Health Act, which shields those who report safety violations and is America's first federal whistleblower protection statute. Ironically, while section 11(c) is America's oldest and by far most frequently used whistleblower law, it also is America's weakest. At GAP we view credible whistleblower laws as "metal shields," because employees who rely on those rights have a fighting chance to survive. By contrast, no matter how gaudily decorated, lowest common denominator rights are "cardboard shields" that ensure doom for anyone who depends on them. Compared to best practices globally, section 11(c) is a cardboard shield without the paint job.

My testimony also will summarize the gap between rights on the books and rights in reality, based on enforcement practices by OSHA's new Directorate of Whistleblower Protection. (DWPP) It should not take an act of Congress for DOL to far more effectively protect whistleblowers. There is widespread consensus that prior policies administering section 11(c) severely frustrated the law's purpose. Under Assistant Secretary David Michaels, the Occupational Safety and Health Administration (OSHA) which administers section 11(c) has committed to policies that could reverse that track record. But change would disrupt deeply ingrained priorities by OSHA's regional leadership, which has a unique role. How much his policies make a difference will depend on accountability through independent oversight, from audits to hearings such as today's forum.

SECTION 11(c) COMPARED TO GLOBAL BEST PRACTICES

The standards below are based on comparisons with all federal whistleblowers laws, those at Intergovernmental Organizations (IGO) like the United Nations or World Bank, U.S. funding prerequisites for IGO's, and other nations such as Great Britain. While compiled by GAP, they are consistent with those of the Council of Europe and the Organization for Economic Cooperation and Development. By these criteria, section 11(c) only meets 25% of the criteria. This is ironic, because modern U.S. whistleblower statutes such as those in the Sarbanes Oxley law and those for government contractors reflect the gold standard level of whistleblower rights. The previously-introduced Protecting America's Workers Act would upgrade occupational safety rights to those in all modern whistleblower laws enacted since 2002. It is frustrating for whistleblower rights advocates that Congress has not acted on legislation to modernize occupational safety whistleblower rights to the standards that govern nearly all other private sector contexts. The analysis below explains the criteria for effective whistleblower protection, and evaluates section 11(c) with that baseline.

I. SCOPE OF COVERAGE

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free expression

rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.

1. Context for Free Expression Rights with “No Loopholes”. Protected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute or would incur organizational liability for breach of legally enforceable confidentiality commitments. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. It is necessary to specify that disclosures in the course of job duties are protected, because most retaliation is in response to “duty speech” by those whose institutional role is blowing the whistle as part of organizational checks and balances.

Best Practices: United Nations Secretariat whistleblower policy (ST/SGB/2005/21), section 4; World Bank Staff Rule 8.02, section 4.02; Public Interest Disclosure Act of 1998 (“PIDA”), c. 23 (U.K.), amending the Employment Rights Act of 1996, c.18), section 43(G); Protected Disclosures Act of 2000 (“PDA”); Act No. 26, GG21453 of 7 Aug. 2000 (S. Afr.), section 7-8; Anti-Corruption Act of 2001 (“ACA”) (Korea – statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 (“Ghana WPA), section 4; Japan Whistleblower Protection Act, Article 3; Romanian Whistleblower’s Law (“Romania WPA”), Article 6; Whistleblower Protection Act of 1989 (“WPA”) (U.S. federal government), 5 USC 2302(b)(8); Consumer Products Safety Improvement Act (“CPSIA”) (U.S. corporate retail products), 15 USC 2087(a); Federal Rail Safety Act (“FRSA”) (U.S. rail workers) 49 USC 20109(a); National Transportation Security Systems Act (“NTSSA”) (U.S. public transportation) 6 USC 1142(a); Sarbanes Oxley Reform Act (“SOX”) (U.S. publicly-traded corporations) 18 USC 1514(a); Surface Transportation Assistance Act (“STAA”) (U.S. corporate trucking industry) 49 USC 31105(a); American Recovery and Reinvestment Act of 2009 (“ARRA”), (U.S. Stimulus Law), P.L.111-5, Section 1553(a)(2)-(4); Patient Protection and Affordable Care Act (“ACA”), (U.S. health care), sec. 1558, in provision creating section 18C of Fair Labor Standards Act, sec. 18B(a)(2)(4); Food Safety Modernization Act (“FSMA”) (U.S. food industry), 21 USC 1012(a)(1)-(3); Dodd Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”)(U.S. financial services industry), sec. 1057(a)(1)-(3).

Section 11(c): PASS. Section 11(c) does not contain any context loopholes.

2. Subject Matter for Free Speech Rights with “No Loopholes”. Whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

Best Practices: UN ST/SGB/2005/21, section 2.1(a); World Food Programme (WFP) Executive Circular ED2008/003, section 5; World Bank Staff Rule 8.02, section 1.03; African Development Bank (AfDB) “Whistleblowing and Complaints Handling Policy, section 4; The Whistleblowers Protection Act, 2010 (“Uganda WPA”), section II.2; PIDA, (U.K.); PDA, section 1(i)(S. Afr.); New Zealand Protected Disclosures Act (“NZ PDA”), 2000, section 3(1), 6(1); ACA (Korea), Article 2; Public Service Act (“PSA”), Antigua and Barbuda Freedom of Information Act, section 47; R.S.O., ch. 47, section 28.13 (1990) (Can.); Ghana WPA, section 1; WPA(U.S. federal government), 5 USC 2302(b)(8); FRSA (U.S. rail workers) 49 USC 20109(a)(1); NTSSA (U.S. public transportation) 6 USC 1142(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1); ACCR (U.S. Stimulus Law) P.L.111-5, Section 1553(A)(1)-(5); ACA(U.S. health care) *id.*; FMSA (U.S. food industry) *id.*; Dodd Frank (U.S. financial services industry) *id.*.

Section 11(c): PASS. In addition to protection for specific disclosures, protected activity in section 11(c)(1) includes exercise of “any right afforded by this Act.”

3. Right to Refuse Violating the Law. This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

Best Practices: Asian Development Bank (ADB) Administrative Order No. 2.10, section 3.5 (see AO 2.04, section 2.1 (f) for corresponding definition of misconduct); World Bank Staff Rule 8.02, section 2.07(see Staff Rule 8.01, section 2.01 for definition of misconduct); WPA (U.S. federal government) 5 USC 2302(b)(9); FRSA (U.S. rail workers) 49 USC 20109(a)(2); NTSSA (U.S. public transportation) 6 USC 1142(a)(2); CPSIA (U.S. corporate retail products) 15 USC 2087(a)(4); STAA (U.S. corporate trucking industry) 49 USC 31105(a)(1)(B); ACA (U.S. health care) sec.18C(a)(5); FSMA (U.S. food industry) 21 USC 1012(a)(4); Dodd Frank (U.S. financial services industry) sec. 1057(a)(4).

Section 11(c): FAIL. Although the Act has a general right to refuse unsafe working conditions, section 11(c) does not codify protected activity that includes the right not to violate the law.

4. Protection Against Spillover Retaliation. The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as “assisting whistleblowers,” (to guard against guilt by association), and individuals who are

“about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a “reasonable belief” and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

Best Practices: World Bank Staff Rule 8.02, section 2.04; AfDB Whistleblowing and Complaints Handling Policy, section 6; Organization of American States, “Draft Model Law to Encourage and Facilitate the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses” (“OAS Model Law”), Article 28; ACA (Korea), Art. 31; NZ PDA, section 4(3); WPA (U.S.), 5 USC sections 2302(b)(8) (case law) and 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regular Commission, Department of Energy and regulated corporations), 42 USC 5851(a); FRSA (U.S. rail workers) 49 USC 20109(a); NTSSA (U.S. public transportation) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); STAA (U.S. corporate trucking industry) 49 USC 31105(a); ACA (U.S. health care) sec. 18C(a); FSMA (U.S. food industry) 21 USC 1012(a); Dodd Frank (U.S. financial services industry) Sec. 1057(a).

Section 11(c): PASS. Section 11(c)(1) protects those “about to” engage in protected activity,

5. “No Loopholes” Protection for All Citizens With Disclosures Relevant to the Public Service Mission. Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization’s mission. It should not matter whether they are full time, part-time, temporary, permanent, expert consultants, contractors, employees seconded from another organization, or even volunteers. What matters is the contribution they can make by bearing witness. If harassment could create a chilling effect that undermines an organization’s mission, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization’s activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings.

Best Practices: AfDB Whistleblowing and Complaints Handling policy, sections 5.1 & 6.2; ADB Administrative Order No. 2.10, section 8; IDB Staff Rule No. PE-328, section 2.1 & 2.2; Anti-

Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]), Pillar 3; NZPDA, section 19A; PIDA (U.K.), sections 43 (K)(1)(b-d); ACA (Korea), Art. 25; Whistleblower Protection Act of 2004 (Japan WPA), section 2; Ghana WPA, sec. 2; Slovenia Integrity and Prevention of Corruption Act (Slovenia Anti-Corruption Act), Article 26; Uganda WPA, section II.3; Foreign Operations Appropriations Act of 2005 (“Foreign Operations Act”)(U.S. MDB policy) section 1505(a)(11)(signed November 14, 2005); False Claims Act (U.S. government contractors), 31 USC 3730(h); sections 8-9.; STAA (U.S. corporate trucking industry) 49 USC 31105(j); ACCR of 2009 (U.S. Stimulus Law) P.L.111-5, Section 1553(g)(2)-(4); Dodd Frank, Sec. 922(h)(1).

Section 11(c): FAIL. The law is silent on these relevant contexts.

6. Reliable Confidentiality Protection. To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect.

Best Practices: ADB Administrative Order No. 2.10, sections 3.2, 5.1 & 5.4 and Administrative Order No. 2.04, section 4.2; AFDB Whistleblowing and Complaints Handling Policy, sections 6.1 & 6.9.4; WFP ED2008/003, section 10; UN ST/SGB/2005/21, section 5.2; OAS Model Law, Articles 10 and 11, 49; PSA (Can.), sections 28.17(1-3), 28.20(4), 28.24(2), 28.24(4); NZ PDA section 19; ACA (Korea), Articles 15 and 33(1); Slovenia Anti-Corruption Act, Article 23 (4), (6) and (7); Uganda WPA, sections VI.14 and 15; WPA (U.S.) 5 USC sections 1212(g), 1213(h); FRSA (U.S. rail workers) 49 USC 20109(i); NTSSA (U.S. public transportation) 6 USC 1142(h); STAA (U.S. corporate trucking industry) 49 USC 31105(h); Dodd Frank (U.S. financial services) sec. 748(h)(2) and 922(h)(2); Jam PDA, section 24.

Section 11(c): FAIL. The law is silent on confidential complaints, which are protected in other statutes due to the chilling effect on preliminary efforts to exercise rights.

7. Protection Against Unconventional Harassment. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from discipline to litigation.

Best Practices: ADB Administrative Order No. 2.10, section 2.11; IDB Staff Rule No. PE-328, sections 2.41-2.44; UN ST/SGB/2005/21, section 1.4; WFP ED2008/003, section 4; World Bank

Staff Rule 8.02, section 2.04; OAS Model Law, Article 28; ACA (Korea), Article 33; Uganda WPA, section V.9(2), V.10, and V.11; WPA (U.S. federal government), 5 USC 2302(b)(8) and associated case law precedents; FRSA (U.S. rail workers 49 USC 20109(a); NTSSA (U.S. public transportation workers) 6 USC 1142(a); CPSIA (U.S. corporate retail products) 15 USC 2087(a); SOX (U.S. publicly traded corporations) 18 USC 1514(a); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(a); ACA (U.S. health care) Sec. 18C; FSMA (21 USC 1012(a); Dodd Frank (U.S. financial services industry) sec. 1057(a); Jamaican Public Disclosure Act, 2011, (“Jam PDA”), section 2.

Section 11(c): PASS. Section 11(c)(1) bans an employer from discriminating in any manner.

8. Shielding Whistleblower Rights From Gag Orders. Any whistleblower law or policy must include a ban on “gag orders” through an organization’s rules, policies, job prerequisites, or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech, or even waiving access to statutory rights.

Best Practices: WFP ED/2008/003, sections 8 and 11; World Bank Staff Rule 8.02, para. 4.03; NZ PDA section 18; PIDA (U.K.), section 43(J); PDA (South Africa), section 2(3)(a, b); Ghana WPA, sec. 31; Uganda WPA, section V.12 and V.13; WPA (U.S.), 5 USC 2302(b)(8); Transportation, Treasury, Omnibus Appropriations Act of 2009 (U.S.), section 716 (anti-gag statute)(passed annually since 1988); FRSA (U.S. rail workers) 49 USC 20109(h); NTSSA (U.S. public transportation) 6 USC 1142(g); STAA (U.S. corporate trucking industry) 49 USC 31105(g); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(d)(1); ACA (U.S. health care) Sec 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(c)(2); Dodd Frank (U.S. financial services industry) sections 748(h)(3) and (n)(1), 922(h)(3) and 1057(c)(2); Jam PDA, Sections 15, 20, third schedule, section 4.

Section 11(c): FAIL. Unlike nearly all modern whistleblower laws, section 11(c) does not have an “anti-gag” provision.

9. Providing Essential Support Services for Paper Rights. Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower’s rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. The U.S. Whistleblower Protection Act includes an Office of Special Counsel, which investigates retaliation complaints and may seek relief on their behalf. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

Best Practices: United Nations Office of Staff Legal Assistance (for access to legal services); NZ PDA, sections 6B, 6C; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; WPA (U.S.), 5 USC 1212; Inspector General Act (U.S.) 5 USC app.; ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b); U.S. WPA, 5 USC 1212-1219; Jam PDA, section 21.

Section 11(c): FAIL. Section 11(c) does not impose any support or remedial responsibilities in connection with process complaints.

II. FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

10. Right to Genuine Day in Court. This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

Best Practices: UN ST/SGB/2005/21, section 6.3; OAS Model Law, Articles 39, 40; Foreign Operations Act (U.S. policy for MDB's), section 1505(11); NZ PDA, section 17; PIDA (U.K.) Articles 3, 5; PDA (S. Afr.), section 4(1); ACA (Kor.), Article 33; Romania WPA, Article 9; Uganda WPA, sections V.9(3) and (4); WPA (U.S.), 5 USC 1221, 7701-02; Defense Authorization Act (U.S.) (defense contractors) 10 USC 2409(c)(2); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(4) and (c)-(f); FRSA (U.S. rail workers) 49 USC 20109(c)(2)-(4); NTSSA (U.S. public transportation) 6 USC 1142(c)(4)-(7); CPSIA (U.S. retail products) 15 USC 2087(b)(4)-(7); SOX (U.S. publicly traded corporations) 18 USC 1514(b); STAA (U.S. corporate trucking industry) 49 USC 31105 (c)-(e); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(3)-(5); ACA (U.S. health care) sec. 18C(b)(1); FMSA (U.S. food industry) 21 USC 1012(b)(4); Dodd Frank (U.S. financial services) sections 748(h)(1)(B)(i), 922(h)(1)(b)(1) and 1057(c)(4)(D).

Section 11(c): FAIL. The Secretary has full access to court, but the complainant has access neither to any judicial nor guaranteed administrative due process, even at the informal level. Section 11(c)(2) only provides for a discretionary investigation, without any administrative or judicial due process fact finding. OSHA investigations have no teeth, because they only can be enforced by the Solicitor of Labor, which declines to prosecute up to 70% of favorable OSHA merit determinations in any given year. There is no appellate judicial review of agency discretion. *See Wood v. Department of Labor*, 275 F.3d 107, 110 (D.C. Cir. 2001) In other words, the whistleblowers have no control of their rights.

11. Option for Alternative Dispute Resolution with an Independent Party of Mutual

Consent. Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a “strike” process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether Intergovernmental Organizations waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the U.S. Whistleblower Protection Act.

Best Practices: Foreign Operations Act (U.S. MDB policy) section 1505(a)(11); WPA (U.S. federal government labor management provisions), 5 USC 7121.

Section 11(c): FAIL. There is no such provision.

III. RULES TO PREVAIL

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win.

12. Realistic Standards to Prove Violation of Rights. The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards for intergovernmental organizations such as the United Nations.

This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a “contributing factor” in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur “because of” the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests the whistleblower must pass to win a ruling that their rights were violated.

Best Practices: UN ST/SGB/2005/21, sections 5.2 & 2.2; WFP ED 2008/003, sections 6 and 13; World Bank Staff Rule 8.02, sec. 3.01; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.7; Foreign Operations Act, Section 1505(11); Whistleblower Protection Act (U.S. federal government) 5 USC 1214(b)(2)(4) and 1221(e); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(3); FRSA (U.S. rail workers) 49 USC 20109(c)(2)(A)(i); NTSSA (U.S. public transportation) 6 USC 1142(c)(2)(B); CPSIA (U.S. corporate retail products) 15 USC 2087 (b)(2)(B), (b)(4); SOX (U.S. publicly-traded corporations), 18 USC 1514(b)(2)(c); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(1); ACA, sec. 1558(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(2)(C) and (b)(4)(A); Dodd Frank (U.S. financial services industry) sec. 1057(b)(3).

Section 11(c): FAIL. Unlike every corporate whistleblower law since 1992, section 11(c) has no legal burdens of proof.

13. Realistic Time Frame to Act on Rights. Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Six months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common law rights and are preferable.

Best Practices: ADB Administrative Order No. 2.10, section 6.5; WFP ED2008/003, section 7; UN ST/SGB/2005/21, section 2.1(a) & 5.1 (no statute of limitations); PIDA (U.K.), section 48.3; PDA (S. Afr.), section 4(1); NZ PDA, section 17; ACA (Kor.) (no statute of limitations); WPA (U.S. federal employment) 5 USC 1212 (no statute of limitations); False Claims Act (U.S. government contractors), 42 USC 3730(h) and associated case law precedents;); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(1); FRSA (U.S. railroad workers) 49 USC 20109(d)(2)(A)(ii); NTSSA (U.S. public transportation) 6 USC 1142(c)(1); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(1); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b)(1); ACA (U.S. health care industry) sec. 18C(b)(1); FSMA (U.S. food industry) 21 USC 1012O(b)(1); Dodd Frank (U.S. financial services industry) sec. 748(h)(1)(B)(iii), 922(h)(1)(B)(iii) and sec. 1057(c)(1)(A).

Section 11(c): FAIL. The provision's 30 day statute of limitations ties for a global worst practice.

IV. RELIEF FOR WHISTLEBLOWERS WHO WIN

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by holding the wrongdoer accountable.

14. Compensation with “No Loopholes”. If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, sections 6.5 & 6.6 and Statute of the Administrative Tribunal of the African Development Bank Art. XIII (1); OAS Model Law, Articles 17 and 18; Foreign Operations Act (U.S. policy for MDB's), Section 1505(11); NZ PDA, section 17; ACA (Korea), Article 33; PIDA (U.K.), section 4; WPA (U.S. federal government employment), 5 USC 1221(g)(1); False Claims Act (U.S. government contractors), 31 USC 3730(h); Defense Authorization Act (U.S.) (defense contractors), 10 USC 2409(c)(2); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(c)(3)(B) and (d); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4);) STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(B); ACCR of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(b)(2)(A), (B), and (b)(3); ACA (U.S. health care) sec. 18C(b)(2); FSMA (U.S. food industry) 21 USC 1012(b)(3)(B) and (b)(4)(B); Dodd Frank (U.S. financial industry) sec. 1057(c)(4)(B)(i) and 4(D)(ii).

Section 11(c): FAIL. Although section 11(c)(2) permits the Secretary to seek “all appropriate relief,” courts do not always consider that language sufficient to permit consequential, special or compensatory damages that must be awarded for an employee to be made whole.

15. Interim Relief. Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years.

Best Practices: UN ST/SGB/2005/21, Section 5.6 and Statute of the United Nations Dispute Tribunal, Article 10(2); ADB Administrative Order No. 2.10, section 7.1; AfDB Whistleblowing and Complaints Handling Policy, sections 6.6.1, 6.6.5 & 9.6; World Bank Staff Rule 8.02, sec. 2.05; OAS Model Law, Articles 17, 32; PIDA (“U.K.”), section 9; NZ PDA, section 17; WPA

(U.S. federal government), 5 USC sections 1214(b)(1), 1221(c); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(1); SOX (U.S. publicly-traded corporations), 5 USC 1214(b)(1); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012 (b)(2)(B); Dodd Frank, sec. 748(h)(1)(B)(i), 922 (h)(1)(B)(i) and sec. 1057(b)(2)(B).

Section (11)(c): FAIL. While the Secretary may litigate for a restraining order, the complainant has no right to seek interim relief during the OSHA proceeding.

16. Coverage for Attorney Fees. Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, section 6.5.4; Statute of the Administrative Tribunal of the International Monetary Fund, Art. XIV (4); Statute of the Administrative Tribunal of the Asian Development Bank, Art. X (2); OAS Model Law, Art. 17; NZ PDA section 17; WPA (U.S. federal government), 5 USC 1221(g)(2-3); False Claims Act (U.S. government contractors), 31 USC 3730(h); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B)(ii);); FRSA (U.S. railroad workers) 49 USC 20109(e); NTSSA (U.S. public transportation) 6 USC 1142(d)(2)(C); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly-traded corporations), 18 USC 1514(c)(2)(C);); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(A)(iii) and (B); ACCR of 2009 (U.S. Stimulus Law), P.L. 111-5, Section 1553(b)(2)(C) and (b)(3); ACA (U.S. health care) sec. 1558(b)(1); FSMA (U.S. food industry) 21 USC 1012(b)(3)(C) and (4)(D)(iii); Dodd Frank (U.S. financial services) sec. 748(h)(1)(C), 922(h)(1)(C) and sections 1057(C)(4)(B)(ii) and (D)(ii)(III).

Section 11(c): FAIL. There is no relevant provision, even for costs.

17. Transfer Option. It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

Best Practices: AfDB Whistleblowing and Complaints Handling Policy, section 6.5.5; UN SGB/2005/21, Section 6.1; United Nations Population Fund (UNFPA) "Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding

Activity,” para. 26; WFP Executive Circular ED2008/003, para. 22; The United Nations Children's Fund (UNICEF) Whistleblower Protection Policy, para. 23; OAS Model Law, Article 18; PDA (S. Afr.), section 4(3); ACA (Korea), Article 33; WPA (U.S. federal government), 5 USC 3352.

Section 11(c): FAIL. There is no relevant provision.

18. Personal Accountability for Reprisals. To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. The OAS Model Law even extends liability to those who fail in bad faith to provide whistleblower protection. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the U.S. in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

Best Practices: UN SGB/2005/21, section 7; UNFPA “Protection against Retaliation...” para. 29; UNICEF Whistleblower Protection Policy, para. 26; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.4, 6.9.2; World Bank Staff Rule 8.01, sec. 2.01(a); OAS Model Law, Articles 12,13 41-46; NZ PDA, section 17; ACA (Korea), Article 32(8); Article 32(8); Hungary, Criminal code Article 257, “Persecution of a conveyor of an Announcement of Public Concern”; Public Interest Disclosure Act, No. 108, section 32; Uganda WPA, sections VI.16 and 18; WPA (U.S. federal government) 5 USC 1215;); FRSA (U.S. railroad workers) 49 USC 20109(e)(3); NTSSA (U.S. public transportation) 6 USC 1142(d)(3); CPSIA (U.S. corporate retail products) 15 USC 2087(b)(3)(B) and (b)(4)(C); SOX (U.S. publicly-traded corporations), 18 USC 1513(e); STAA (U.S. corporate trucking industry) 49 USC 31105(b)(3)(C); Jam PDA, section 23;

Some Multilateral Development Banks have created hybrid systems of accountability that indirectly protect whistleblowers from harassment by bank contractors. The banks' policies are to apply sanctions or even stop doing business with contractors who engage in whistleblower retaliation. AfDB Whistleblowing and Complaints Handling Policy, sections 6.2 and 6.3; ADB Administrative Order No. 2.10, section 8.5; Inter-American Development Bank Staff Rule No. PE-328, section 10.3 & 11.1.

Section 11(c): FAIL. There is no relevant provision.

V. MAKING A DIFFERENCE

Whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public – positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

19. Credible Corrective Action Process. Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the charges that merited an investigation and report, to assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organization's website.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for Intergovernmental Organizations is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

Best Practices: ACA, (Korea), Articles 30, 36; NZ PDA section 15; PSA (Can.), section 28.14(1) (1990); Japan WPA, Section 9 (2004); Slovenia Anti-Corruption Act, Articles 23 and 24; WPA (U.S. federal government), 5 USC 1213; Inspector General Act of 1978 (U.S. federal government), 5 USC app.; False Claims Act, 31 USC 3729 (government contractors); FRSA (U.S. railroad workers) 49 USC 20109(j); NTSSA (U.S. public transportation) 6 USC 1142(i); STAA (U.S. corporate trucking industry) 49 USC 31105(i); Jam PDA, section 18. Third Schedule.

Section 11(c): PASS. The underlying Act has well-established, actively enforced provisions for underlying safety. While they have been the subject of justified criticism, they are far superior to practices for enforcement of section 11(c)'s anti-retaliation rights.

20. Private attorney general option: Citizens Enforcement Act

Even more significant is enfranchising whistleblowers and citizens to file suit in court against illegality exposed by their disclosures. These types of suits are known as private attorney general, or "qui tam" actions in a reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good," a rare marriage of the public interest and self interest. In the U.S., this approach has been tested in the False Claims Act for whistleblower suits challenging fraud in government contracts. It is the nation's most effective whistleblower law in history for making a difference, increasing civil fraud recoveries in government contracts from \$27 million annually in 1985, to over \$30 billion since, including more than one billion dollars annually since 2000. Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions.

Best Practices: False Claims Act, 31 USC 3730 (U.S. government contractors) Dodd Frank Act, sections 748 and 922 (Commodities Future Trading Commission and Securities and Exchange Commission violations)

Section 11(c): FAIL: There is no provision for independent enforcement.

On balance, a 25% pass rate is unacceptable when the baseline is best practice standards for an effective whistleblower law. Putting the criteria in perspective, the five core principles for credible protection are loophole free protection, realistic time frames to act on rights, fair legal burdens of proof on the evidence necessary to prevail, meaningful due process to enforce the rights, and remedies that make victims whole if they prevail. While a pioneer statute in achieving the first principle of clear rights, section 11(c) fails the remaining four that are essential for the rights to be meaningful. It is a primitive statute long overdue to modernize so that it matches the rest of corporate whistleblower law.

SECTION 11(C) ENFORCEMENT

It is beyond credible debate that there is an unacceptable gap between section 11(c)'s broad mandate for protection, and reality. According to the DWPP website, from FY 2005-20013 there were 10,380 complaints, some 60% of the total volume for whistleblower cases. But there were only 138 decisions that a whistleblower's rights were violated, or a 1.45% success rate. While annual settlements ranged from 15-25%, even that voluntary relief generally is minimal when the chances of losing are so low. Employee rights and union colleagues credit OSHA

inspectors with using section 11(c) to prevent retaliation against witnesses, and even getting minimal help in up to 25% of cases is better than nothing. But the track record indicates little or no realistic chance for justice when a decision is rendered. In practice, the law rubber stamps almost any retaliation that is challenged if the case results in a final ruling. .

But it also is beyond credible debate that a breakdown in enforcement, not weak statutory rights, is the primary reason the track record has been so weak. This duty has never had priority in an overextended agency specializing in worker safety, not employment rights. Resources and training have been meager. Further, unusual regional authority and lack of independent oversight have frustrated consistent implementation of national standards for what the law means in practice. Reviews ranging from the Government Accountability Office, to the DOL Office of Inspector General, to GAP's own survey of whistleblowers and practitioners consistently found that OSHA's whistleblower program due to – excessive, even multi-year delays processing complaints; lack of training; inadequate resources for staff; inadequate staffing levels that sustained unrealistic workloads; failure to interview or functionally communicate with complainants; lack of fiscal control over appropriated funds; failure to use alternative disputes resolution mediations to resolve cases; lack of data to support decisions; widely varying interpretations of law between regions; widely varying success rates between regions; lack of authority by the national OWPP to reverse regional decisions; and most fundamentally – lack of accountability through an independent national audit of regional compliance with consistent national standards. In short, Dr. Michaels faced an imposing challenge to reach the law's available potential.

He is to be commended for establishing policies and taking actions that are first steps in a long road to legitimacy for the new Directorate of Whistleblower Programs. The reforms that he has initiated include –

- * creation of the DWPP, with direct reporting authority to him, moving whistleblower rights up from OWPP's subsidiary status in the Office of Enforcement;
- * a separate line item budget for the DWPP, so that it can control its own resources;
- * significantly increased staff for DWPP;
- * initiation of national training programs in whistleblower rights, to promote consistent interpretations of legal rights;
- * more user-friendly procedures, such as accepting oral complaints;
- * a modernized website that is an effective resource for those seeking to learn their rights;
- * institution of a policy to conduct interviews of complainants in all cases; and
- * institution of tougher standard against indirect discrimination, such as workplace bonuses for not reporting safety violations, and discipline for getting injured.

While OSHA is imposing increased auditing oversight, however, this function still will be under the functional control of the regions. The lack of independent accountability raises concerns about the strength and consistency of these reforms in practice. Similarly, while the national office now may reverse regional rulings, it has not yet exercised this authority.

It also is difficult not to be concerned that OSHA reassigned the DWPP Director, Elizabeth Slavet, shortly after she began implementing plans for a more independent audit. Ms. Slavet is a nationally-recognized whistleblower expert, previously having served as the highly-respected Chair of the U.S. Merit Systems Protection Board adjudicating the Whistleblower Protection Act for federal workers. Many of the reforms credited above occurred under her leadership at DWPP. After her abrupt removal, it is essential that OSHA takes steps to – 1) assure there is no violation of Ms. Slavet’s own whistleblower rights; 2) select a successor whose credibility and expertise also are beyond dispute; and 3) add independent audit enforcement teeth to his announced reforms.

While Dr. Michaels has created a credible blueprint for an effective enforcement program of whistleblower rights, it will take ongoing, independent oversight for that blueprint to make a significant difference in practice. Toward that goal, GAP is available as a resource both to this committee, and for the DWPP.