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Mr. David E. Ciambruschini
Local Rules and Forms Committee
U.S. District Court for the District of Maryland
101 West Lombard Street
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Re: Proposed Principles for the Discovery of Electronically Stored Information in Civil Cases.

Dear Local Rules and Forms Committee:

As an attorney with experience representing whistleblowers, I want to share my insights about how the newly proposed ESI principles will adversely affect my clientele and the remedial purposes served by whistleblower protection laws.

I am particularly concerned that whistleblowers will be put at a disadvantage by the following proposals:

- In reciting proportionality principles the FRCP places first "the importance of the issues at stake in the action," while the Local Rules place that factor last, after burden and expense and amount in controversy;
- Principle 2.04(e) presumes there will be cost-shifting, whereas the 2015 amendments to the FCRP had rejected explicit cost-shifting, noting that authority for cost-shifting already exists in the rules;
- The Principles encourage parties to appoint an ESI liaison, and contemplate sanctions for failure to do so, which may hurt individual clients and attorneys in small practices.

- The Principles overemphasize the issue of proportionality, repeating the concept over and over when in fact the FRCP's approach to proportionality represented only a modest change in the rules.

A. Whistleblowers often face a disparity of access to relevant information.

The Federal Circuit noted that, "Congress understood that whistleblowers are at an evidentiary disadvantage in proving their cases." *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012). Employers own and control the information that whistleblowers depend on to prove their allegations about violations of law. Indeed, whistleblowers sometimes suffer termination of their employment precisely because the employer wants to deprive them of access to the information. The employer also controls the information that would establish its deviations from normal practices, and disparate application of its standard of discipline.

B. Whistleblower protection serves remedial public purposes.

Congress has used whistleblower protection to serve a wide variety of public purposes. Through the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, et seq. (1970), Congress sought to save the lives of coal miners by protecting disclosures to federal officials. Judge Wilkey held that the public interest at stake was so important that the law must also protect a miner's notification to a foreman. *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975); see also, *Munsey v. Federal Mine Safety and Health Review Comm'n*, 595 F.2d 735, 741 (D.C. Cir. 1978). Judge Wilkey explained as follows:

> Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are . . . in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management. Only if the miners are given a realistically effective channel of communication re [*sic*] health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.

Discovery costs money, too. By enacting whistleblower protections, Congress makes the decision that the cost of protecting whistleblowers is necessary to save the lives at stake every day in our mines.

After the *Phillips* decision made clear that whistleblower protection statutes would be construed broadly to protect employees making disclosures, Congress used similar wording to protect employees engaged in other environmental or safety areas. In 1976, Congress enacted the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and protected employees speak out about improper releases of toxic chemicals in our environment. In 1977, Congress included 42 U.S.C. § 7622 in the Clean Air Act.

When Congress amended the Federal Mine Safety and Health Act in 1978, it explicitly approved

Judge Wilkey's interpretation of the Act. S. Rep. No. 186, 36, 95th Cong. 1st Sess. 1977, U.S. Code Cong. 2nd Ad. News, 3436. In 1978, Congress enacted the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, and protected employees who raise nuclear safety concerns.

Congress used whistleblower protections in the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, to protect truckers who insist on safe equipment and respecting the Hours of Service (HOS) rules. In 2000, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, protected airline employees who risk their careers by raising safety issues. The Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129, also used a whistleblower protection to help make us safer from pipeline accidents. Whistleblower protections now protect the safety of our food, cars and ships at sea. Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; Seaman's Protection Act (SPA), 46 U.S. C. § 2114.

Employees play an important role in protecting the public from environmental and nuclear safety dangers. For example, they can keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. To achieve the ends of eliminating discrimination, and protecting complainants from retaliation, the law mandates that "employees must feel secure that any action they may take" furthering "Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

In the wake of the Enron scandal, Congress enacted the Sarbanes-Oxley Act in 2002, 18 U.S.C. § 1514A. In the last decade, Congress strengthened whistleblower protections through the Energy Policy Act, the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087, the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, and the National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142. These laws added provisions for *de novo* review by a United States District Court in the event that the Secretary of Labor has not issued a final decision within one year after the filing of a complaint, and there is no showing that the delay is due to the bad faith of the complainant. Congress obviously wanted to expand the avenues of relief available to whistleblowers.

In December 2012, Congress passed the Whistleblower Protection Enhancement Act (WPEA) to clarify how restrictive judicial interpretations were contrary to the congressional intent of protecting federal employee whistleblowers. See S. REP. NO. 112-155 at 4-5 (2012) ("The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred 'because of' the protected disclosure."). The Whistleblower Protection Act has always recognized that whistleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation. *Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed.Cir. 1995) ("The purpose of the Whistleblower Protection Act is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press."). "In a high-performing workplace, federal employees must be able to pursue the missions of their organizations free from discrimination and should not fear or experience retaliation or reprisal for reporting—blowing the whistle on—waste, fraud, and abuse." GAO Report, "The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing", GAO Report No. GAO-01-715T (May 9, 2001), *available at* http://www.gao.gov/assets/110/108818.pdf.

Disclosures of fraud and waste increase transparency and prompt official investigations. Empirical analyses of whistleblower cases note the importance of employee disclosures in prosecuting fraud. A study conducted at the Booth School at the University of Chicago noted that 19.2% of corporate fraud is detected by the employees, compared to 14.1% detected by auditors. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, *The Journal of Finance*, Vol. 65, Issue 6 (December 20, 2010), Table 2 at p. 54.[1] The Association of Certified Fraud Examiners ("ACFE") has conducted biennial reports on occupational fraud since 2002. ACFE's *2010 Report to the Nations* finds that employee tips detected 40.2% of reported frauds, compared to 1.8% detected by law enforcement.[2] By forcing potential whistleblowers to choose between their careers and the truth, denying protection to whistleblowers risks losing the 40% of fraud cases disclosed by employees.

I urge the Committee to reject principles that would further constrict discovery. Without broad discovery, some whistleblowers would be unable to prove their claims. When whistleblowers suffer reprisals and cannot obtain effective redress, other potential whistleblowers will be discouraged and the public interest will suffer.

C. Discovery is a necessary component of effective whistleblower protection.

Speed of adjudication is not a substitute for true justice. In *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239 (4th Cir. 2009), the Court stated:

> Both a complainant that has suffered adverse job consequences and the public therefore have a strong interest in Congress aiding whistleblower plaintiffs, even if in so doing Congress's scheme may be less efficient than the scheme contemplated by the Secretary.

1 *Available at* http://www.nber.org/papers/w12882.pdf

2 *Available at* http://www.acfe.com/rttn/2010-highlights.asp.

Most cases of discrimination or retaliation lack a smoking gun. *See*, *Lockhart v. Westinghouse Credit Corp*., 879 F.2d 43, 48 (3d Cir. 1989). One federal judge explained, "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. ... It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action ranging from failure to hire to discharge." *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006).

Employee protection cases are often based on circumstantial evidence of discriminatory intent. *See*, *Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)). In assessing a dispute about intent, courts must consider the totality of circumstances. *United States v. Arzivu*, 534 U.S. 266 (2002) (Justice Rehnquist admonishes the lower courts for examining the facts surrounding the investigatory stop in isolation. Only by viewing the totality of the circumstances could the court give due weight to the factual inferences drawn by the border patrol agent in deciding to conduct the stop.); *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 82 (1998) (Justice Scalia wrote the opinion of the Court and explained that: [t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.). Discovery is often the key to find the patterns that point to unlawful motive. In particular, the very best evidence of a decision-maker's true motives is often in an email, perhaps an email that was deleted, but still survives in a backup file, an archive or on the image of a harddrive. Indeed, such an email would not have to be made by the final decison-maker. Accord, *Staub v. Proctor Hospital*, 562 U.S. ____, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011) (unanimously reinstating a service member's USERRA claims based on the employer's liability for the anti-military animus of one mid-level supervisor.).

In the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1073), the Supreme Court recognized that extensive discovery in employment discrimination cases is necessary and the refusal to adhere to the "liberal spirit" of discovery would be an abuse of discretion. See also, *Duke v. University of Texas at El Paso*, 729 F.2d 994, 997 (5th Cr. 1984) ("procedural technicalities" to impede liberal discovery are improper). One member of the Department of Labor's Administrative Review Board (ARB) explained:

> In employment discrimination cases, the courts have held that discovery should be permitted "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 295 (D.Del. 1975) (citations omitted). "In such cases, the plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination." *Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 65 (E.D. Mo. 1995) (citations omitted). *Accord Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983) (vacating protective order which limited discovery in part because, "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); *Flanagan v. Travelers Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986) (same). Consistent with this body of case law, the Secretary of Labor and the ALJs

have recognized the broad scope of discovery to be afforded parties in whistleblower cases. *See, e.g., Malpass v. General Electric Co.*, Case Nos. 85-ERA-38/39, Sec'y Dec., Mar. 1, 1994, slip op. at 12; *Holub v. Nash, Babcock, et al.*, Case No. 93-ERA-25, ALJ Disc. Ord., Mar. 2, 1994, slip op. at 6. *See generally Timmons v. Mattingly Testing Services, Inc.*, ALJ Case No. 95-ERA-40, ARB Dec. & Ord. of Rem., June 21, 1996, slip op. at 4-6 (discussing the "full and fair presentation" of a whistleblower case by the parties).

Khandelwal v. Southern California Edison, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), concurring opinion of E. Cooper Brown.

In *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), the U.S. Court of Appeals for the Federal Circuit explained how determination of a retaliation claim must be made with consideration of all the pertinent record evidence. It explained that whether evidence is sufficiently clear and convincing to meet the employer burden of proof is not determined by examining only the evidence that supports the ultimate conclusion reached. 680 F.3d. at 1368. Instead, evidence satisfies this burden of proof only when it is considered with all the pertinent record evidence and despite the evidence that fairly detracts from that conclusion. *Id*. The court further specifically stated that it is error to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been adequately proven. *Id*.

Many discovery disputes arise in the context of whether other employees are fair comparators to the whistleblower. For example, evidence that a "comparable, non-protected" person was treated better serves to establish both the fourth prong of the *prima facie* case and pretext. *See*, *e.g.*, *Ercegovich v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 350 (6th Cir. 1998). In examining retaliatory motive, the *Whitmore* court cautioned against taking an unduly dismissive and restrictive view, noting that, where the whistleblowing disclosure reflects on managers, or is highly critical of the employer's conduct, officials may be motivated to retaliate even when they are not directly implicated by the disclosures, do not know the whistleblower personally, are outside the whistleblower's chain of command, were not directly involved in the alleged retaliatory actions, or were not personally named in the disclosure. 680 F.3d at 1370-72. As judges increasingly seek specificity in discovery requests, whistleblower advocates will need the flexibility to make a greater number of requests to reveal the patterns that can reveal pretexts and establish liability. The proposed limits based on proportionality or cost-shifting are severe and will prevent some whistleblowers from prevailing.

I urge the Committee to consider the *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action* currently being implemented in federal district courts around the country. *See*, *generally*, *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action*, Federal Judicial Center (November 2011), available at: http://www.fjc.gov/ public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf. At the 2010 Conference on Civil Litigation at Duke University, attendees supported case-type-specific "pattern discovery" as a way to stem unnecessary cost and delay in the litigation process and agreed that employment cases would be a good place to start. The Protocols may further simplify the discovery process.

D. The rules can give more specific and helpful guidance on ESI discovery.

The prevalence of electronically stored information (ESI) makes the search and production of information cheaper. That is why American business has embraced paperless records.

I specifically suggest that the rules require parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms. I continue to see parties printing out emails, for example, and producing the hard copies or graphical images to frustrate an opponent's ability to save and search the responsive documents for key names or phrases. Hard copy or graphical production also deprives the recipient of metadata that may contain highly relevant and non-privileged information about when and how documents were created or modified. The companies go to extra effort to make their electronic records harder for complainants to use. The searchable electronic form is necessary to properly search and manage the documents. It is not fair that an employer can search the relevant emails, policy files, and other documents electronically while the employee and his or her counsel would have to read through all the of pages of paper to get even less information.

Courts that have considered the issue have held that production of electronic documents in their electronic form is proper. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), reversed on other grounds, 90 F.3d 553 (D.C.Cir. 1996). *See also Anti-Monopoly, Inc. v. Hasbro, Inc.,* 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y.) "Production of materials in hard copy form does not preclude a party from receiving the same information in electronic form."; *see also Cobell v. Norton,* 2002 U.S. Dist. LEXIS 5291 (D.D.C.) (request for permission to produce emails on paper draws sanctions). Production electronically is easier for the producing party and more useful to the receiving party. It is the right thing to do.

Thank you for your attention to my concerns.

Very Truly Yours,

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