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Whistleblower Protection Advisory Committee
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Public comment and request to speak, Docket No. OSHA-2012-0020

Dear Madams and Sirs:

I request permission to speak at your January 29, 2013, meeting. I do not plan to use any electronic presentation. I request five (5) minutes.

I am an attorney with some experience in handling whistleblower matters at the U.S. Department of Labor. My web page is at: www.taterenner.com

I would like to make three suggestions. First, I suggest that the WPAC recommend to the Department of Labor that it move the authority to make initial determinations in whistleblower cases from the Regional Directors to the Whistleblower Protection Program (WPP). The current system has not worked well for whistleblowers, who still win a small fraction of cases at the OSHA stage. A centralized program for making determinations would provide better uniformity and place final decision-making authority in the hands of an official for whom whistleblower protection is the primary duty.

Although OSHA has made a significant increase in issuing merit determinations, the odds are still not as good for whistleblowers as would be necessary to truly encourage employees to come forward with their compliance concerns. The latest OSHA WPP statistics are available from: http://www.whistleblowers.gov/wb_data_FY05-12.pdf
They show that from 2005 to 2008, OSHA issued 7,754 determinations, of which 103 were merit findings. From 2009 to 2012, OSHA issued 8,769 determinations, of which 202 were merit findings.[1] Thus, the last four years saw merit findings issue at a rate of 2.3%, up from 1.3% in the previous four years. Both of these numbers are too small to encourage employees to come forward. I am particularly distressed that the rate of merit determinations in SOX cases remained

1 I appreciate that these rates do not reflect settlements and other withdrawals, but the available statistics do not provide a meaningful way to assess the extent to which any such settlements were of a type that would be encouraging to whistleblowers. My personal experience is that settlements at the OSHA stage are usually less favorable to employees than those at the ALJ or subsequent stages.

in this 1 to 2 percent range while our economy tanked due to massive frauds in the financial sector. See Richard Moberly's article, "Sarbanes-Oxley's Whistleblower Provisions - Ten Years Later," 64 S.C. L. Rev., Book 1. Perhaps if whistleblower determinations were more centralized, the WPP could assign investigators based on specialized knowledge in the subject matters of each law.

Regional Directors have many other duties besides assessing whistleblower complaints. If determinations were centralized with the WPP, then there would be one OSHA officer responsible for the policy and implementation of the whistleblower protection program. The national program would have more accountability as to both the speed and content of the determinations. The WPP would have more prominence, and that would be good for developing a public image that encourages employees to raise their concerns.

The very purpose of the employee protections is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993); *Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). Employees can play an important role in protecting the public from environmental, nuclear and transportation dangers. Now with SOX, CPSIA, FSMA and Dodd-Frank, they also protect investors, consumers and our economy. 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.

Second, OSHA will soon be considering the public comments on the proposed revisions to 29 CFR Part 18, the procedural rules for the Office of Administrative Law Judges (OALJ). See http://www.gpo.gov/fdsys/pkg/FR-2012-12-04/pdf/2012-28516.pdf
A regular motif of the proposed changes is to make the process more "efficient" by finding ways to "limit or avoid abusive, frivolous, or unnecessary discovery." I certainly agree that discovery should not be used to abuse an adversary or to waste resources. For example, I find the use of mental health examinations, rationalized through the complainant's request for garden variety emotional distress damages, to be particularly offensive. Still, I am mindful that discovery issues are often decisive in the adjudication of liability. I have had several cases in which resolution of a discovery dispute became the catalyst for settlement. I also recall with frustration whistleblower cases my clients have lost after being denied crucial discovery. The Department's preface at 77 FR 72145 notes that, "The amendments were not meant to block needed discovery, but to provide judicial supervision to curtail excessive discovery." I am concerned that this and similar wording in the Department's explanations will lead ALJs to believe that limiting discovery is more important than giving whistleblowers the evidence they need to win their cases.

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.) This type of "totality of the circumstances" analysis recently led the ARB to reverse a post-hearing dismissal. *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 09-057, ALJ No. 2008-ERA-3, Order of Remand (ARB June 24, 2011). Discovery is often the key to find the patterns that point to unlawful motive.

The Secretary of Labor has stated that parties to DOL whistleblower proceedings have "all the discovery mechanisms of the Rule of Practice" available to them to assist in preparing for a hearing. *Malpass v. General Electric Co.,* 85-ERA-38/39, D&O of SOL, slip op. at 12 (March 1, 1994). It would be helpful if the Department's preamble to its final rules said the same. In *Holub v. H. Nash Babcock, Babcock & King, Inc.*, 96-ERA-25, Discovery Order of ALJ (March 2, 1994), the ALJ ruled that "the law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. Further, the courts have held that liberal discovery in these cases is warranted." *Id*., slip op. at 6. Also see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1073) (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); *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 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.

The WPAC can be helpful in expressing the importance of discovery in building the circumstantial case.

Third, I ask the WPAC to join with the Office of Special Counsel (OSC) in calling on Congress to make a substantial increase in funding for both the WPP and the OSC. The spate of new whistleblower laws has significantly increased the whistleblower caseload of OSHA and the OALJ. The ARB remains so overwhelmed that adjudications can take years. Especially in cases where whistleblowers win a remand, the total pendency at the Department of Labor can span the better part of a decade.

With the recent passage of the Whistleblower Protection Enhancement Act (WPEA), and the appointment of a Special Counsel, the OSC has also experienced a marked increase in its caseload.

On January 27, 2009, the Government Accountability Office (GAO) issued its Report GAO-09-106, called, "Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency." The report says what many whistleblower practitioners had long known: the Department of Labor's whistleblower program needs more resources and better quality. Investigators did not have the equipment, training, legal counsel or oversight needed to assure quality investigations.

The public benefits from routing out corruption in both the public and private sectors. Congress passes whistleblower protections precisely because the cost of corruption is high. Whistleblower protection leverages our tax dollars by returning good value through environmental enforcement, safer transportation, and integrity in our financial markets. Please join together in calling on Congress to double the funding for both the WPP and the OSC within the next four years. We need a prompt and effective remedy for all whistleblowers to encourage employees to pursue the public interest.

Thank you for your attention to my concerns.

Very Truly Yours,

Richard R. Renner
Attorney at Law