An Overview of Whistleblower Protection Claims at the United States Department of Labor

William Dorsey

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An Overview of Whistleblower Protection Claims at the United States Department of Labor

William Dorsey* 

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I. THE DEPARTMENT OF LABOR WHISTLEBLOWER PROTECTION STATUTES AND THEIR REGULATIONS

Employees who expose corporate and governmental malfeasance provide a valuable public service, forcing institutions and managers to correct the transgressions brought to light. In 2002, three of them shared *Time Magazine*'s encomium as People of the Year: Cynthia Cooper of WorldCom and Sherron Watkins of Enron, who both exposed corporate financial scandals, and FBI Special Agent Coleen Rowley, who complained to the FBI Director about the FBI Headquarters' mishandling of field information about terrorism suspects before the September 11, 2001 attacks. But whistleblowers often are fired in retribution for their revelations, and suffer continuing financial hardship as they struggle to acquire new jobs, finding themselves branded as eccentric, if not traitorous, employees. Those who are not terminated may be ostracized, demoted, transferred to dead-end positions, or saddled with false performance evaluations that inexorably culminate in firing.

Most Americans hold their jobs at the will of their employer; they may be terminated at any time, for any reason - or for no reason at all.1 Congress modified this traditional doctrine of at-will employment through a variety of statutes designed to shield whistleblowers from vengeful employment actions. Many offer administrative relief overseen by the U. S. Secretary of Labor, rather than the remedies in Article III trial courts. This article gives an overview of whistleblower protection adjudications at the U.S. Department of Labor's Office of Administrative Law Judges.

Section I introduces the whistleblower protection statutes that give rise to the complaints adjudicated by the Secretary of Labor.2 Section II reviews earlier statutes that have protected employees from job retaliation and identifies several whistleblower statutes the Secretary of Labor does not administer, but refers to for guidance in interpreting and applying her employee protection programs; these statutes may permit

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2. See infra notes 8-56 and accompanying text.
judicial remedies.\(^3\) Section III familiarizes the reader with key concepts in whistleblower protection litigation.\(^4\) Among these are the need to prove intentional retaliation, and the distinction between direct and circumstantial proof of discrimination that affects whether the evidentiary presentation will rely on the *McDonnell Douglas*\(^5\) framework for burdens of proof and production to present a sufficient case. Section IV explores the types of relief that may be ordered to abate a violation, which includes reinstatement before a final decision under some statutes, and the monetary damages available to successful complainants. Section IV explores the remedies and monetary damages available to successful complainants.\(^6\) Section V highlights procedural matters that will interest lawyers representing workers claiming whistleblower protection or defending employers at the Office of Administrative Law Judges.\(^7\)

A tension between looking for commonalities in these employee protection statutes and appreciating subtle differences among the Acts will permeate the discussion.

The Office of Administrative Law Judges (OALJ) adjudicates disputes under eleven of the fourteen whistleblower statutes the Secretary of Labor administers. This jurisdiction encompasses employers in three spheres of the economy: the environment, transportation, and securities.

*A. Environment*

Eight statutes protect employees from retaliation when they report unsafe or unlawful practices by their employers that adversely affect the environment. They are as follows:

1. Energy Reorganization Act of 1974 (ERA);\(^8\)
2. Federal Water Pollution Control Act of 1972;\(^9\)

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3. Some of the statutes discussed in Section II permit direct judicial remedies. *See infra* notes 57-79 and accompanying text.
4. *See infra* notes 80-258 and accompanying text.
6. *See infra* notes 259-342 and accompanying text.
7. *See infra* notes 343-400 and accompanying text.
3. Toxic Substances Control Act of 1976;\textsuperscript{10}  
4. Solid Waste Disposal Act of 1976;\textsuperscript{11}  
5. Clean Air Act of 1977;\textsuperscript{12}  
6. Comprehensive Environmental Response, Compensation & Liability Act of 1980;\textsuperscript{13}  
7. Pipeline Safety Improvement Act of 2002 (Pipeline Safety);\textsuperscript{14}  
8. Safe Drinking Water Act of 1974.\textsuperscript{15}

\textbf{B. Transportation}

Two statutes protect employees in the transportation industry. The first is the 1982 Surface Transportation Assistance Act (STAA).\textsuperscript{16} Employees in the trucking industry are protected from job

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discrimination for actions relating to commercial motor vehicle safety and health.\textsuperscript{17}

The second statute that protects employees in this industry is the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).\textsuperscript{18} Employees of air carriers, their contractors and subcontractors who provide information about air safety violations to their employer or the federal government are protected.

\textbf{C. Securities}

The Sarbanes-Oxley Act (SOX)\textsuperscript{19} was enacted as § 806 of the Corporate and Criminal Fraud Accountability Act of 2002.\textsuperscript{20} Employees who disclose or complain about fraudulent activity that can mislead investors in publicly traded companies are protected.\textsuperscript{21}

\textit{D. Whistleblower Protection Matters Under the Secretary's Jurisdiction Not Heard at the Office of Administrative Law Judges}

Under three acts, the Secretary of Labor may seek relief on a whistleblower's behalf in a United States District Court, rather than through administrative proceedings.

1. Section 11(c) of the Occupational Safety and Health Act (OSH Act)

Employers must keep workplaces free from hazards recognized "as likely to cause their employees serious physical harm or death." The whistleblower protection régime created in § 11(c) of the OSH Act redresses reprisals against workers who complain to Occupational Safety and Health Administration (OSHA), seek or participate in an OSHA inspection, or participate or testify in any proceeding related to an OSHA inspection. OSHA investigates more than 1,000 of these discrimination complaints from workers each year.

Section 11(c) of the OSH Act offers whistleblowers no private right of action. If OSHA determines a complaint is well founded, the Secretary has discretion to file a civil action in a United States district court seeking the employee’s rehiring, reinstatement or other appropriate relief. Workers’ attempts to force the Secretary to sue on their behalf have proven unsuccessful.

2. Statutes like § 11(c) of the OSH Act

The OSH Act served as the model for two other whistleblower protection statutes. First, Congress implemented the International Convention for Safe Containers of December 2, 1972, by forbidding discrimination against employees who report unsafe shipping containers or other violations of the International Safe Container Act of 1977 to the Secretary of Transportation. This whistleblower protection provision, administered by the Secretary of Labor, mirrors § 11(c) of the OSH Act. The Secretary of Labor also adjudicates complaints under the Asbestos Hazard Emergency Response Act of 1986, which prohibits state or local educational agencies from

25. § 660 (c)(2). See also 29 C.F.R. § 1977.3.
26. Wood v. Dep’t of Labor, 275 F.3d 107, 112 n. 9 (D.C. Cir. 2001) (rejecting a worker’s claim for relief against the Secretary when OSHA’s investigation of a § 11(c) complaint found no violation).
discriminating against employees who provide information about potential violations of that act. The statute specifically incorporates the procedures of § 11(c) of the OSH Act as the remedy.\textsuperscript{28}

The Office of Administrative Law Judges has no role in these three statutes; they will not be discussed further.

\textit{E. Practical Groupings of OALJ Whistleblower Statutes}

Whistleblower protection acts share many features, but are emphatically not cookie-cutter copies of one another. Congress has refined its employment protections over time.\textsuperscript{29}

The whistleblower cases at the Office of Administrative Law Judges may be grouped in different ways for different purposes. Consider three examples:

1. Most acts require that the presiding judge review and approve adjudicatory settlements. Three, however, do not: the Federal Water Pollution Control Act,\textsuperscript{30} the Solid Waste Disposal Act,\textsuperscript{31} and the Comprehensive Environmental Response, Compensation and Liability Act.\textsuperscript{32}

2. All acts allow successful employees to recover compensatory damages, but only two permit punitive damage awards: the Safe Drinking Water Act\textsuperscript{33} and the Toxic Substances Control Act.\textsuperscript{34}

3. The Aviation Investment and Reform Act for the 21\textsuperscript{st} Century (AIR 21),\textsuperscript{35} SOX,\textsuperscript{36} and Pipeline Safety Act\textsuperscript{37} provide for interim reinstatement orders before trial, while the ERA permits

\begin{itemize}
  \item \textsuperscript{28} 15 U.S.C. § 2651(b) (1998).
  \item \textsuperscript{29} The development of the law is well chronicled from an employee's viewpoint in two books: STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW (Quorum Books 2001) (on whistleblower law generally), and STEPHEN M. KOHN ET. AL, WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES (Prager 2004) (on the Sarbanes-Oxley law specifically).
  \item \textsuperscript{30} § 1367.
  \item \textsuperscript{31} § 6971.
  \item \textsuperscript{32} § 9610; \textit{see also infra} notes 287-296 and accompanying text.
  \item \textsuperscript{33} § 1367.
  \item \textsuperscript{34} 15 U.S.C. § 2622 (1998); \textit{see also infra} notes 243-260 and accompanying text.
  \item \textsuperscript{35} § 42121.
  \item \textsuperscript{36} § 1514A
  \item \textsuperscript{37} § 60129.
\end{itemize}
reinstatement after trial but before the administrative law judge's decision is reviewed by the Administrative Review Board.\textsuperscript{38}

Despite considerable variations in their fine points, three broad clusters of whistleblower protection acts emerge. The environmental acts of the 1970's comprise the first group, which embody the original Congressional approach to employee protection. Employees who rely on them must prove retaliation without the benefit of any statutory burden shifting provisions.

The second group is comprised of those statutes adjudicated by the OALJ that incorporate burden shifting, first introduced by amendments to the ERA by the Energy Policy Act of 1992.\textsuperscript{39} Using that statute as an example, the burden of persuasion falls first on the employee to demonstrate that retaliation for a protected activity was a "contributing factor" to the unfavorable personnel decision.\textsuperscript{40} The employee obtains relief unless the employer counters with "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.\textsuperscript{41}

Congress introduced this paradigm to ameliorate what had become known as the "Mt. Healthy" defense,\textsuperscript{42} named after the U. S. Supreme Court decision in \textit{Mt. Healthy City Board of Education v. Doyle}.\textsuperscript{43} There a teacher without tenure rights claimed he was not re-hired because he had criticized the school board's teacher dress code in the media, while the board claimed it had other valid reasons not to renew

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38. For more discussion, see infra notes 262-287 and accompanying text.
40. § 5851(3)(d).
41. § 5851(b)(3)(D).
43. \textit{Mt. Healthy}, 429 U.S at 274.
the employment.\textsuperscript{44} The Court held that, in order to obtain relief in a mixed motive case; a public employee must show that constitutionally protected speech was a "motivating factor" in the adverse employment decision.\textsuperscript{45} The public employer may rebut this with proof by a preponderance of evidence that it would have taken the same action had the employee not engaged in constitutionally protected speech.\textsuperscript{46}

Congress intended to hamper the defense of whistleblower claims by employers in the nuclear industry with its "clear and convincing" evidence standard, used whenever an employee established that retaliation contributed in some part to an adverse employment action. "Recent accounts of whistleblower harassment at both NRC licensee . . . and [Department of Energy] nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry."\textsuperscript{47} "These reforms," according to the House Report, "are intended to address those remaining pockets of resistance."\textsuperscript{48} The Eleventh Circuit relied on this legislative history when it affirmed the relief granted by Secretary of Labor to an employee in a close case.\textsuperscript{49} The procedures, burdens of proof, and remedies in AIR 21 closely follow those Congress introduced in 1992 to the ERA.\textsuperscript{50} The SOX Act explicitly incorporates AIR 21's rules and procedures.\textsuperscript{51} The Pipeline Safety act also follows this model.\textsuperscript{52} The ERA and these more recent statutes (the Pipeline Safety, SOX, and AIR 21 acts) form the second useful analytic group.

The STAA represents the third model. Its structure roughly resembles the 1970's environmental whistleblower acts, and lacks any burden shifting provision. It also describes the circumstances where an

\begin{itemize}
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id. at 287.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568 (11th Cir. 1997).
  \item \textsuperscript{50} \textit{Compare} the AIR 21 text in \S 42121(b)(2)(B) \textit{with} the amended ERA procedures at \S 5851(b)(3)(A) through (D).
  \item \textsuperscript{51} \S 1514A (b)(2)(A).
  \item \textsuperscript{52} \textit{See} \S 60129(b)(2)(B)(iii) and (iv).
\end{itemize}
employee may refuse a work assignment, which is permitted under the ERA.\textsuperscript{53} It protects employees in making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;"\textsuperscript{54} "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health,"\textsuperscript{55} or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.\textsuperscript{56}

II. PRECURSOR AND SIMILAR WORKER PROTECTION STATUTES

A. Earlier Employee Protection Statutes

1. Title VII of the Civil Rights Act

Whistleblower protection statutes generally have been patterned on the portion of Title VII of the Civil Rights Act of 1964, as amended, that makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."\textsuperscript{57} \textit{English v. Whitfield} directly analogized "realtiatory harassment" claims under the employee protection provision of the ERA (42 U.S.C. §5851) to claims of gender and race-based discrimination under Title VII.\textsuperscript{58} The Secretary of Labor, and later the Secretary's designee, the Administrative Review Board (Board), have recognized that Title VII uses almost identical language to describe prohibited retaliatory acts, shares a common statutory origin with ERA. Both entities have looked to Title VII decisions to guide their interpretations of the central text of whistleblower statutes that forbid an employer to discharge a

\textsuperscript{54} § 31105(a)(1)(A).
\textsuperscript{55} § 31105(a)(1)(B)(i).
\textsuperscript{56} § 31105(a)(1)(B)(ii). The Secretary's regulations at 29 C.F.R. pt. 1978 are structured very differently than those implementing all the other whistleblower statutes.
\textsuperscript{58} English v. Whitfield, 858 F.2d 957, 963-64 (4th Cir. 1986).
whistleblower or "otherwise discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment."\(^{59}\)

The salient difference between retaliation claims under whistleblower statutes and Title VII is that whistleblower protection does not arise from an enduring characteristic of the plaintiff (race, sex, national origin, faith, etc.), but rather from an activity: reporting safety concerns about some activity that Congress believed merited special protection, or, in the case of SOX, reporting fraud against shareholders.\(^{60}\)

Amendments to Title VII in 1991\(^{61}\) introduced disharmonies in the burdens of proof required and remedies available under Title VII and the Department of Labor's ERA, AIR 21, SOX, and Pipeline Safety statutes. Readers must pay close attention to the statutory text at issue in a Title VII decision to determine whether it may serve as precedent for interpreting or applying the language of a current DOL whistleblower statute.

\(^{59}\) Shelton v. Oak Ridge Nat'l Labs., No. 98-100, slip op. at 7 (ARB Mar. 30, 2001), available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/CAA/98_100C (dismissing the complaint because the imposition of an employer's lowest level of progressive that might culminate in removal (an "Oral Reminder") did not qualify an adverse action that the Secretary could remedy); see also West v. Kasbar, Inc., No. 04-155, slip op. at 4 (ARB Nov. 30, 2005), available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/STA/04_155.STAP.PDF (dismissing a claim for the complainant's failure to allege any tangible job consequence); Martin v. Dept. of the Army, No. 1996-131, slip op. at 7 (ARB July 30, 1999), available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SDW/96_131.SDWP.PDF (finding the complainant failed to prove a constructive discharge, but that the Army was liable for $75,000 as compensatory damages for his emotional distress and attorney's fees).


2. The National Labor Relations Act

An even earlier statute that has protected workers engaged in controversial workplace activities is the National Labor Relations Act of 1947 (NLRA), as amended. The NLRA's anti-retaliation provisions have served as a pattern for many whistleblower protection laws. Case law applying this retaliation provision is particularly relevant to interpretation of the environmental whistleblower acts that were explicitly modeled on it.


The Coal Mine Health and Safety Act of 1969 (CMHSA) is another early act that includes a whistleblower protection provision patterned on the anti-retaliation provisions of the NLRA. The employee protection provisions of the ERA, the Clean Air Act and the Toxic Substances Control Act (TSCA) share a common heritage with the CMHSA's anti-discrimination provisions. The Secretary has relied on CMHSA decisions to substitute the remedy of economic reinstatement for actual pre-trial reinstatement of an employee under the AIR 21, SOX and Pipeline Safety acts when an employer proves the employee presents a likely security risk.

66. See S. Rep. No. 848, 95 at 29, as reprinted in 1978 U.S.C.C.A.N. at 7303; 122 CONG. REC. 8286-88 (1976) (statements of Sens. Tunney and Helms regarding the TSCA bill S.3149); PA v. Catalytic, Inc., No. 1983-ERA-2, slip op. at 4 (Sec'y Jan. 13, 1984) (regarding the Clean Air Act and the Federal Water Pollution Control Act). See also Macowiak v. Univ. Nuclear Sys., Inc., 735 F.2d 1159 (9th Cir. 1984) (recognizing that the CMHSA served as the model for the original ERA statute); Passaic Valley Sewerage Comm'r's v. Dep't of Labor, 992 F.2d 474, 479 (3rd Cir. 1993) (recognizing parallels between the whistleblower provisions of various environmental protection acts, the NLRA and mine safety legislation).
67. See infra notes 262-87 and accompanying text.
B. Whistleblower Acts Outside the Secretary of Labor's Jurisdiction

Congress has not assigned the Secretary of Labor to administer and enforce all federal whistleblower protections. Federal workers and employees in the banking industry are protected separately. When their statutory text is similar, decisions applying those acts offer insights into the proper application of the DOL statutes.

1. Whistleblower Protection for Federal Workers

The Whistleblower Protection Act of 1989 shields a federal employee from a retaliatory personnel action for disclosing what the employee reasonably believes are violations of law or instances of gross mismanagement. In the disciplinary proceedings prosecuted before the Merit Systems Protection Board, the employee need only prove the disclosure was a "contributing factor" to the discipline, not its predominate cause. Congress aids this showing with a statutory knowledge/timing test. When the employee proves that the agency manager taking the adverse action knew of the disclosure, and the discipline's timing is such that a reasonable person could believe that the disclosure contributed to it, the agency must prove by clear and convincing evidence it would have taken the same action in the absence of the protected disclosure.

No whistleblower statute the Secretary of Labor administers includes a similar knowledge/timing presumption. The second analytic group of the Department's whistleblower statutes employ a similar form of burden shifting that requires an employer to prove by clear and convincing evidence that the same adverse action would have been taken in the absence of protected activity. Attorneys practicing in this area should be aware that the Federal Circuit applies that Act in an idiosyncratic way that strips a federal employee of protection if the

69. § 122(e)(1).
70. § 1221(e)(1)(A-B).
71. § 1221(e)(2). See also Kewley v. Dep’t of Health & Human Servs., 153 F.3d 1357 (Fed. Cir. 1998).
72. This is discussed further in the mixed motive section. See infra notes 242-61 and accompanying text.
otherwise protected internal complaint is made to the supervisor or manager responsible for the violation of law. This error has been confined to applications of the federal Whistleblower Protection Act, however.

2. The Banking–Related Acts

Whistleblower provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 protect employees of depository institutions and federal banks from discrimination when they report certain conduct to a regulatory agency, bank, or the Attorney General. These whistleblowers may sue in a United States district court without exhausting any administrative remedies.

The Federal Credit Union Act similarly forbids insured credit unions to discharge or otherwise discriminate against employees who inform a government body about possible violations of law by credit unions or by their directors, officers, or employees. Unlike the banking act and the Department’s whistleblower statutes, wholly internal disclosures or complaints by credit union employees receive no protection. The language of this act assigns no burdens of proof to the parties, but the courts have incorporated the familiar ones that apply in cases under the 1989 banking act. The USA Patriot Act forbids

73. See, e.g., Willis v. Dep’t of Agric., 141 F.3d 1139, 1143 (Fed. Cir. 1998) and Horton v. Dep’t of Navy, 66 F.3d 279, 282 (Fed. Cir. 1995).


77. 12 U.S.C. § 1790b(a)(1) (2001). See also Garrett v. Langley Fed. Credit Union, 121 F. Supp. 2d 887 (E.D. Va. 2000) (denying a credit union’s motion for summary judgment where a jury could infer that the credit union retaliated against the employees after they reported to examiners their concerns about certain business practices).

78. § 1831j; see also Simas v. First Citizens’ Fed. Credit Union, 170 F.3d 37, 44 (1st Cir. 1999).
financial or other institutions to discharge or otherwise discriminate against any employees who provide information to the Secretary of the Treasury, the Attorney General, or any Federal supervisory agency about possible violations of that Act, its regulations, or of specific statutes targeting money laundering and transactions by unlicensed money transmitting businesses.  

III. ESSENTIAL CONCEPTS

A. Intent is Everything

Whistleblower protection matters are disparate treatment claims. They focus on whether the employer intentionally discriminated or retaliated against the employee on the basis of a protected characteristic (for Title VII plaintiffs) or a protected activity (for whistleblowers or union organizers and members).

1. Direct proof of discrimination

   a) Availability

   Direct proof of discriminatory intent is rarely available. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." The Fifth Circuit's remarks in a case under the Age Discrimination in Employment Act of 1967 (ADEA) is equally applicable to DOL whistleblower protection claims:

   Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree . . . Employers are rarely so cooperative as to include a notation in the personnel file, "fired due to age," or to inform a dismissed employee candidly that he is too old for the job.

82. Thornbrough v. Columbus & Greenville RR. Co., 760 F.2d 633, 638 (5th Cir. 1985) (citations omitted).
Sometimes an employer’s statements or actions lay its intentions bare.

1. A trucking company manager might thunder to a driver: “I’m sick and tired of your bellyaching about safety, you are #$%*@$#! fired.”

2. Setting aside applications from women without review because the men who constitute the review committee know their boss would never hire a female investigator is direct proof of sex discrimination in violation of Title VII.\(^8\)

3. Another example is an employer’s declaration to a Hispanic female disc jockey that she would be denied an advantage (a better time slot for her radio show) because she was not “a black male.”\(^8\)

4. A landlord’s comment that she does not want couples with children living in her apartment building because they may disturb other elderly tenants is direct evidence of familial status discrimination forbidden by the Fair Housing Act.\(^8\)

5. A supervisor’s repeated reminders to an employee that he or she can be replaced by someone younger and cheaper are direct evidence of age discrimination.\(^8\)

6. A corporate officer’s remarks during a general meeting with employees of a newly acquired company that older workers “have problems adapting to changes and new policies” is direct evidence of age discrimination.\(^8\)

“Smoking gun” instances of direct evidence collected from the Eleventh Circuit in *Merritt v. Dillard Paper Company*\(^8\) illustrate how unsophisticated employers have gotten themselves into hot water with embarrassingly blunt statements of discriminatory animus.\(^8\) The treatise *Employment Discrimination Law* cites decisions expressing the classic, dictionary view that “direct” evidence is proof that requires the

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83. Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984).
84. Mojica v. Gannett Co., Inc., 7 F.3d 552, 561 (7th Cir. 1993) (en banc).
85. 42 U.S.C. § 3604(a); Kormcizy v. Sec’y of Dep’t of H.U.D., 53 F.3d 821 (7th Cir. 1995).
86. Rose v. N.Y. City Bd. of Educ., 257 F.3d 156 (2d Cir. 2001).
89. See also the discriminatory statements collected at Lindeman and Grossman, *supra* note 60, at 55-56, n.113 for additional examples.
trier of fact to draw no inferences. That widespread view is flawed for the reasons the Second Circuit gave in *Tyler v. Bethlehem Steel* and explained by Judge Tjoflat in *Wright v. Southland Corporation*. These cases will be discussed in the following section.

b) Direct proof: Can you know it when you hear it?

The observation that "the various circuits have about as many definitions of 'direct evidence' as they do employment discrimination cases" remains as apt as when it was first made in *Tyler v. Bethlehem Steel Corporation*. It is essential to review the holdings on what has qualified as "direct" evidence of invidious discrimination in the federal circuit in which a case arises.

A trio of court of appeals decisions reviews the law in this area well: *Wright v. Southland Corporation;* *Fernandes v. Costa Bros. Masonry, Inc.;* and *Costa v. Desert Palace, Incorporated*. *Wright* and *Fernandes* are not binding precedents, but they provide valuable orientations to the case law that deals with direct proof.

In *Wright*, Judge Tjoflat, reversing a summary judgment for an employer in a case alleging both age discrimination and a retaliatory termination for filing an EEOC complaint, painstakingly explained why “direct” evidence must encompass inferences. He concluded, much as the Second Circuit had in *Tyler*, that direct evidence means proof from which a trier of fact could conclude, more probably than not, that

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90. *Id.* at 56 n.116 (Cumulative Supp. 2002).
91. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2nd Cir. 1992) (holding in a Title VII case that “direct” evidence simply means proof sufficient for the fact finder to conclude that an illegitimate characteristic was a motivating factor for the challenged action).
95. *Wright* is the opinion of a single judge. The Supreme Court abrogated the *Fernandes* holding without diminishing the utility of the classification system it presented for the approaches appellate courts use to identify direct evidence of discriminatory animus.
96. *Wright*, 187 F.3d at 1289.
97. *Tyler*, 958 F.2d at 1183.
a protected characteristic (age) or activity (filing a discrimination complaint) contributed to the contested employment decision. Although he failed to persuade the two other members of the panel, who concurred only in the result, the Ninth Circuit accepted his reasoning in its en banc decision in *Costa v. Desert Palace, Incorporated.*

The First Circuit divided the patchwork of decisions that have attempted to describe “direct” evidence of discrimination into three schools of thought or approaches. While the Supreme Court specifically abrogated that court’s holding in *Desert Palace, Inc. v. Costa,* the three categories the First Circuit fashioned aid in making sense of what otherwise seems chaotic. Individual circuits do not follow those categories reliably, however, which limits their utility.

The Ninth Circuit canvassed the law on “direct” evidence in its decision in *Costa v. Desert Palace, Inc.,* but determined that it need not choose any approach. It held that direct proof of discrimination is unnecessary for a plaintiff to obtain a mixed-motive jury instruction under the 1991 amendments to Title VII. The Supreme Court agreed. It similarly sidestepped the issue of what direct evidence is, even though it had granted certiorari in part to consider the distinction between what constituted direct and circumstantial evidence of retaliation. That distinction retains vitality because complainants

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98. *Wright,* 187 F.3d at 1293-1306.
99. *Costa,* 299 F.3d at 853. For additionally discussion on this case, see supra notes 94-95 and accompanying text.
100. These are the “classic” position (the evidence is self-sufficient to show discriminatory animus), the “animus plus” position (the evidence of animus must bear squarely on the adverse employment action the plaintiff complains about), and the “animus” position (the evidence of discrimination needs no tie to the adverse employment action). *Fernandes,* 199 F.3d at 582-83 (finding the plaintiff’s evidence too ambiguous to qualify as direct evidence).
102. The Ninth Circuit later despaired of harmonizing the case law dealing with what qualifies as “direct” evidence of discrimination even within individual circuits, let alone among them. It characterized the state of the law as a hopelessly incoherent “morass” and “quagmire.” *Costa,* 299 F.3d at 853-54.
103. *Id.* at 838. The Ninth Circuit believed the First Circuit had misclassified its approach to direct evidence in the *Fernandes* decision as that of an “animus plus” jurisdiction. *Id.* at 853 n.3.
104. *Desert Palace, Inc.*, 539 U.S. at 101 n.3.
who present direct proof do not depend on the *McDonnell Douglas* burden shifting in the presentation of their evidence.105

Decisions frequently contrast direct evidence to circumstantial proof. For example, in a Title VII retaliatory firing claim, the Seventh Circuit described direct proof as “evidence that establishes without resort to inferences from circumstantial evidence” that the plaintiff engaged in a protected activity (filing a discrimination charge) and, as a result, was terminated.106 As it reversed an employer’s summary judgment in an age discrimination case, the Eleventh Circuit fell back on a similar dictionary definition to say that “[d]irect evidence is ‘[e]vidence, which if believed, proves the existence of the fact in issue without inference or presumption.’”107 These formulations disregard two salient facts. All knowledge is inferential, as the decision in *Visser v. Packer Engineering Associates, Inc.* points out.108 Second, inductive legal reasoning is by its nature inferential.109 It moves from the particular (the facts a party proves) to a legal conclusion (liability or exoneration for intentional discrimination) that is only probable, not mathematically certain. Ultimately, however, it is unhelpful to contrast direct evidence with some other type of proof that requires the fact finder to take no inferential steps before the key fact (discriminatory intent) is considered to be proven. Only an employer’s admission establishes discriminatory intent without resort to inferences of any kind.110 Such evidence is not needed for a plaintiff to successfully prove intentional discrimination.111 Neither should it be required to qualify as direct evidence.112 Following its 2002 *en banc* decision in *Desert Palace*, the Ninth Circuit stated that direct evidence “typically consists of clearly sexist, racist, or similarly discriminatory statements

105. See supra notes 140-146 and accompanying text.
107. Rollins v. Techsouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) (quoting *BLACK’S LAW DICTIONARY* 413 (5th ed. 1979)).
108. Visser v. Packer Eng’g Assocs., Inc., 924 F.2d 655, 659 (7th Cir. 1991) (en banc).
110. *Wright*, 187 F.3d at 1295 n.9.
111. *Desert Palace, Inc.*, 539 U.S. at 90.
112. *Tyler*, 958 F.2d at 1185.
or actions by the employer."  But just how clear must that evidence be? The court went on to say that, when the objectionable comment was not directed to the plaintiff, some inference is needed to connect the discrimination to the plaintiff. When the evidence shows animus to a class the plaintiff belongs to (such as a reference to "dumb Mexicans" when the plaintiff is Mexican) "the inference to the fact of discrimination against the plaintiff is sufficiently small that we have treated the evidence as direct."  

The Eight Circuit may have abandoned the direct/circumstantial dichotomy altogether in employment discrimination cases. Consider its analysis in *Griffith v. City of Des Moines*:

We have long recognized and followed this principle in applying *McDonnell Douglas* by holding that a plaintiff may survive the defendant's motion for summary judgment in one of two ways. The first is by proof of "direct evidence" of discrimination. Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. Thus, "direct" refers to the causal strength of the proof, not whether it is 'circumstantial' evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary

113. Coghlan v. Am. Seafoods Co., LLC, 413 F.3d 1090, 1095 (9th Cir. 2005) (affirming summary judgment against a plaintiff who had alleged job discrimination because he was not Norwegian, without offering direct evidence of discrimination).

114. Id. at 1095 n.6 (relying on Cordova v. State Farm Ins. Cos., 124 F.3d 1145, 1149 (9th Cir. 1997)).
judgment by creating the requisite inference of unlawful discrimination through the \textit{McDonnell Douglas} analysis, including sufficient evidence of pretext.\textsuperscript{115}

In a Title VII sex discrimination claim for refusal to promote and for constructive discharge, the Fourth Circuit stated that direct evidence is proof of conduct or statements that both reflects discriminatory animus and bears directly on the contested employment action.\textsuperscript{116} It also has been characterized as proof that "can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents."\textsuperscript{117}

Treating statements or acts that point toward a discriminatory motive for the adverse employment action as direct evidence is the most practical approach.

Oblique or ambiguous statements that require context to appreciate have qualified as direct evidence. The following serve as examples of such:

1. An officer-employee of a savings and loan association was ousted after bringing irregularities to the attention of regulators. Before she suffered any adverse actions, the association’s president wrote to criticize her disclosures and to make a record of her actions that would serve as “the basis from which future management

\textsuperscript{115} Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (referring to \textit{McDonnell}, 411 U.S. at 792) (citing Thomas v. First Nat’l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)).


\textsuperscript{117} Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994). In this case, the plaintiff sued to challenge her termination one day before she would have gone on pregnancy leave. On a defense motion for summary judgment, the trial judge treated a statement by the plaintiff’s immediate supervisor that she did not believe the plaintiff would return to work after giving birth as insufficient to qualify as direct evidence of discriminatory intent. The appellate court regarded that statement as circumstantial evidence of motivation, but held that firing plaintiff in the belief she would not return did not violate the Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e(k) (West 1991).
decisions will be made."\textsuperscript{118} This ominous but vague letter was found to be direct evidence of discriminatory animus.\textsuperscript{119}

2. In an age discrimination case the court of appeals considered the statement: "[T]hink of it like this. In a forest you have to cut down the old, big trees so that the little trees underneath can grow."\textsuperscript{120} This was no stray remark. The manager who fired the plaintiff offered it in a conversation not long after the termination to explain the firing. It also qualified as direct evidence of discrimination.\textsuperscript{121}

On the other hand, direct evidence at times has been defined in the negative, that "stray remarks in the workplace," "statements by nondecision makers" or "statements by decision makers unrelated to the decisional process itself" do not constitute direct evidence.\textsuperscript{122} A summary judgment for the employer was affirmed in \textit{Yates v. Douglas}. There, supervisor X had used the "n" word to refer to the African-American employee and made other offensive comments one to two years before discharge.\textsuperscript{123} The allegedly biased supervisor was found not to have played an integral role in the termination.

\begin{quote}
[\textit{E}ven were we to find that [the allegedly bigoted supervisor] was closely involved in the employment decision, we would nevertheless affirm \ldots. Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support an inference of racial discrimination \ldots. Direct evidence of racial discrimination is not established by mere stray
\end{quote}

\begin{itemize}
\item \textsuperscript{118} Frobose v. Am. Sav. & Loan Ass'n of Danville, 152 F.3d 602, 607 (7th Cir. 1998) (reversing a summary judgment for the association in an action under the banking whistleblower statute, § 1831j(a)).
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} Wichmann v. Bd. of Trs. of S. Ill. Univ., 180 F.3d 791, 795 (7th Cir. 1999), vacated and remanded on other grounds, 528 U.S. 1111 (2000).
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} Beshears v. Asbill, 930 F.2d 1348,1354 (8th Cir. 1991) (adopting language from Justice O'Connor's concurring opinion that was part of the badly fractured 4-1-1 majority in Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (plurality opinion)).
\item \textsuperscript{123} \textit{Yates v. Douglas}, 255 F.3d 546 (8th Cir. 2001).
\end{itemize}
remarks in the workplace, statements by non-decision makers, or statements by decision-makers unrelated to the decisional process itself.\textsuperscript{124}

In \textit{Tracanna v. Arctic Slope Inspection Service}, the complainant presented testimony at trial of his immediate supervisor’s boasts that only he had what it took to get rid of the complainant. For this and other reasons the judge found against the employer.\textsuperscript{125} The Board questioned whether there was credible proof that the supervisor made the statement, but ascribed little significance to it if it had been made. The statement came after the layoff, and the supervisor had pressed his own superiors to offer the complainant another position. Moreover, the boastful immediate supervisor was neither responsible for laying the complainant off nor for making decisions about whether to offer him other positions; rather, higher supervisors were. If the remark had been made, “it would not be legally significant in connection with [the complainant’s] layoff and subsequent job offers, which were determined by higher-level [ASIS] personnel.”\textsuperscript{126}

c) Applying the Definitions of Direct Evidence

The First Circuit found that the president of a credit union had made surprisingly direct and express threats of retaliation in a memorandum to the plaintiff in \textit{Simas v. First Citizens’ Federal Credit Union}.\textsuperscript{127} The vice president responsible for delinquent loan collections told the internal auditor that he might have to inform federal regulators of her failure to investigate a troubled, unusually large loan the president had orchestrated for a friend who also served on the credit union’s board of directors. The internal auditor complained to the president about this pressure to investigate. The president wrote a memorandum to the collections’ vice president instructing him that that he would be terminated immediately if he brought up these “unwarranted charges or threats” again.\textsuperscript{128} His concerns were hardly

\textsuperscript{124} Id. at 549 (internal quotations omitted).
\textsuperscript{126} Id. at 11 (citation omitted).
\textsuperscript{127} Simas, 170 F.3d at 37.
\textsuperscript{128} Id. at 42.
unwarranted; when the borrower defaulted, the commercial property securing the loan proved much less valuable than the balance due. After the vice president notified federal authorities of the loss, as the law required, he suffered many reprisals and essentially was forced out of his job within five months. The appellate court found the president’s memorandum was direct evidence of discriminatory animus that precluded summary judgment in the credit union’s favor.  

The court in *Ezell v. Potter* reversed a summary judgment motion granted in favor of the U.S. Postal Service on claims of disparate treatment grounded in both Title VII (for race and sex discrimination) and the ADEA.  

The plaintiff mail carrier offered direct evidence of discrimination through anti-white, anti-male, and anti-older worker remarks his co-supervisors uttered. That appellate panel described direct evidence as “evidence that can be interpreted as an acknowledgment of the defendant’s discriminatory intent. To constitute direct evidence of discrimination, a statement must relate to the motivation of the decision-maker responsible for the contested decision.” One of plaintiff’s two supervisors said they planned “to get rid of older carriers and replace them with younger, faster carriers.” The other frequently made disparaging remarks about older workers, and referred often to plaintiff's “gray hair and beard, commented on his slowness and suggested that because of his speed, he should consider another line of work.” This qualified as direct proof of discriminatory animus aimed at the plaintiff that exposed that supervisor’s age bias. The two supervisors recommended that the postmaster, the ultimate decision-maker, terminate the plaintiff, and provided supporting information. Their discriminatory motives were imputed to the postmaster when he did so.

A supervisor’s disapproval of an employee’s report to a government agency can be important evidence of intentional discrimination. A supervisor’s comment that the complainant used the Nuclear Regulatory Commission as a threat “virtually amounts to direct

129. *Id.* at 48.
130. *Ezell*, 400 F.3d at 1051.
131. *Id.* (internal citation omitted).
132. *Id.*
133. *Id.*
evidence of discrimination.” A manager’s similar testimony that he thought the complainant “is using OSHA” by complaining constituted “very strong evidence of discriminatory intent.”

2. Circumstantial evidence of retaliation

Evidence of invidious retaliation is often circumstantial. Circumstantial evidence is not inferior proof. “[I]n any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.” The law does not distinguish between the weight given to direct or circumstantial evidence. The inference of discriminatory intent is reached inductively, from the evidence as a whole. The difficulty in obtaining evidence that plainly suggests discrimination spawned the ubiquitous McDonnell Douglas burden-shifting framework that “is designed to give the plaintiff a boost when he has no actual evidence of discrimination (or retaliation) but just some suspicious circumstances.”

136. Aikens, 460 U.S. at 714 n. 3.
139. Stone, 281 F.3d at 643. See also Wright, 187 F.3d at 1301 (remarking that the presumption was added to make the plaintiff’s task slightly easier).
There are at least three types of circumstantial evidence of intentional discrimination:

1. Suspicious timing, ambiguous statements (oral or written), behavior or comments directed at other members of the protected group, and other bits and pieces from which the ultimate inference of discriminatory intent might be drawn;

2. Proof that employees who are situated similarly to the plaintiff, but who lack a characteristic on which an employer is forbidden to base a difference in treatment (e.g., race, gender, age, pregnancy, etc.), received systematically better treatment. That proof may or may not be rigorously statistical;

3. Proof that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person who lacked the protected characteristic.

3. Burden of Proof

A complainant may prove retaliation for a protected activity with direct or circumstantial evidence.

a) Direct Proof of Discrimination

A plaintiff who relies on direct proof of discrimination shoulders the ordinary burden to establish the claim by a preponderance of the evidence. The employer has no affirmative burden to prove anything in response, but almost certainly will deny that the discriminatory statements were made or acts occurred.

b) Circumstantial Proof of Discrimination

A plaintiff who relies on circumstantial evidence of invidious discrimination must successfully navigate the course of shifting burdens the U.S. Supreme Court first articulated in *McDonnell Douglas Corp. v. Green*, and was progressively refined in various subsequent cases. The elements of a prima facie case of discrimination serve a

140. *McDonnell*, 411 U.S. at 792. As noted, the holding of *McDonnell* was refined in various subsequent cases, including *Tex. Dep’t of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). *See*
gate-keeping function: they set the minimum proof required for a plaintiff to keep a foot inside the courtroom door. The employer responds by articulating (not proving) one or more legitimate, non-discriminatory reasons for its adverse action. This bursts the bubble of the presumption that arises from plaintiff’s prima facie case. The plaintiff then shows that the reason offered was not the true reason for the adverse action, but rather a pretext to mask invidious discrimination. Concessions by the employer’s witnesses during their cross-examination in depositions or at trial may suffice to prove pretext by exposing that the reasons the employer offers for its adverse actions as so weak, implausible, inconsistent, incoherent or contradictory that they are unworthy of belief. The plaintiff often needs to offer additional evidence to show that this reason is merely pretextual. No universal rule controls this highly fact-sensitive issue. The ultimate burden of proof on the issue of discriminatory intent always remains with the plaintiff, just as it does in a claim based on direct evidence.

4. Allocation of BOP Does not Dictate the Order of Proof

The three-part McDonnell Douglas framework is not applicable when the complainant offers direct proof of discrimination; those are straightforward “she said, he said” cases. Claims predicated on circumstantial evidence of discriminatory intent rarely proceed in three neat phases. The parties’ positions become known through discovery, so the plaintiff will likely cover the elements of discrimination and evidence about pretext during the case-in-chief. The McDonnell Douglas framework, as modified by Burdine, was “never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.”

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Poll v. R.J. Vyhnalek Trucking, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002).


142. *See* Kormoczy v. Sec’y of Dep’t of H.U.D., 53 F.3d 821, 824 (7th Cir. 1995) (recognizing that the direct approach and the McDonnell burden shifting are “distinct evidentiary paths.”). *See also* Griffith, 387 F.3d at 736; Wright, 187 F.3d at 1294, 1297, and 1301; Lowe v. City of Monrovia, 775 F.2d 998, 1006 (9th Cir. 1985) (“[A] plaintiff can establish a prima facie case of disparate treatment without satisfying the McDonnell Douglas test.”).

B. The Complainant's Prima Facie Case

The complainant must adduce some evidence on each element of the whistleblower discrimination claim. The rule is not relaxed for unrepresented complainants. In Smith v. Sysco Foods of Baltimore, a truck driver was fired under his employer's policy of assessing penalty points to those who arrived late to work. He offered no proof that he filed a complaint related to vehicle safety or that he refused to operate a vehicle. The judge's recommended order dismissed the claim for failure to prove that he had engaged in protected activity, an essential element of a prima facie case. The Board affirmed, noting that although the complainant was a pro se litigant, "the burden of first establishing, and ultimately proving, the necessary elements of a whistleblower claim is no less for pro se litigants than it is for litigants represented by counsel." The four essential elements of all whistleblower discrimination claims are not especially onerous. As will be discussed, these elements are: (1) status; (2) engaging in a protected activity; (3) adverse action; and (4) a causal connection.

1. Status

The complainant must be an employee covered by a relevant statute. Complaints must be filed with the Department of Labor within the time the statute prescribes. Strictly speaking, the timeliness of the complaint is not an element of the claim, but an affirmative defense the employer can raise. OSHA often dismisses a complaint when the investigation shows that it was filed too late.

For ERA cases the time to file with the Department is 180 days from the date of the adverse action, as it is for cases under the STAA and the Pipeline Safety Act. For AIR 21 and SOX cases the period is

144. Regan v. Nat'l Welders Supply, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5-6 (ARB Sept. 30, 2004).
146. Id.
147. § 5851(b)(1) (ERA); § 31105(b)(1) (STAA); 60129(b)(1) (Pipeline Safety).
ninety days. Under the environmental statutes the period is much shorter—thirty days. The clock runs from the time the employee becomes aware or reasonably should be aware of the employer’s adverse action. In narrow circumstances, the time limits may be subject to equitable tolling. For example, in Tennessee Valley Authority v. United States Secretary of Labor, the court of appeals affirmed an earlier decision that modified the ERA limitations period equitable grounds when the employer had concealed an operative fact that formed the basis of the claim.

2. Protected Activity

It is not unlawful for an employer to be a jerk. Shabby or even reprehensible treatment of an employee violates no employment discrimination statute. To obtain relief the employee must prove that a protected activity (such as whistle blowing under one of the Department of Labor’s statutes or union activity under the NLRA) or a protected characteristic (such as race or sex under Title VII or age under the ADEA) motivated the abuse. The majority’s reasoning in Visser, an age discrimination matter, illustrates this point particularly well.

Not every disclosure of corporate wrongdoing earns an employee whistleblower protection. The complainant must have disclosed something a Department of Labor statute protects. The following demonstrate the importance of specifically linking the activity with protections afforded under a statute:

148. § 42121(b)(1) (AIR 21); § 1514A(b)(2)(A) (SOX).
149. See, e.g., § 300j-9(i)(2)(A) (Safe Drinking Water Act); § 7622(b)(1) (Clean Air Act).
1. The Secretary of Labor cannot grant relief for discrimination of the types prohibited by Title VII, or the NLRA.\(^{153}\) A whistleblower act may be broadly interpreted, however. Safety complaints that are not obviously related to nuclear safety can be protected under the ERA because employment retaliation "may directly affect the radiological safety of nuclear plant construction and operation."\(^{154}\) For example, in *Stephenson v. NASA*, the court held that emissions of ethylene oxide and freon in an enclosed space within the space shuttle made out a Clean Air Act complaint, even though at first blush it appears to be an occupational hazard under § 11(c) of the OSHA Act rather than an environmental hazard.\(^{155}\)

SOX presupposes that the matter disclosed will include some intentionally deceitful acts by the employer or some fraud against shareholders or investors.

2. A manufacturer’s poor internal quality control does not equate to securities fraud.\(^{156}\) A trial judge rejected as insufficient allegations that the employee had been terminated for his complaints that a significant number of auto and marine batteries the publicly traded corporation manufactured were being returned as defective. He raised no securities fraud. A Senate Report accompanying the SOX Act explained that the statute "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company."\(^{157}\) The law was designed to protect employees "in detecting and stopping actions which they reasonably believe are fraudulent."\(^{158}\) Securities fraud may include "any means of


\(^{155}\) *Stephenson*, 1994-TSC-5 (Sec’y July 3, 1995).


\(^{158}\) Id.
disseminating false information into the market on which a reasonable investor would rely."\textsuperscript{159}

3. An allegation that an employer illegally released sludge into groundwater, when the release neither constituted nor led to a fraud on shareholders, failed to state a claim under that act.\textsuperscript{160} The same was true when a medical transcriber could not identify how her complaints that she had been underpaid "provided information about conduct she reasonably believed constituted a violation of the federal fraud statutes, or an SEC rule or regulation, or any other federal law relating to shareholder fraud."\textsuperscript{161} A complaint about indoor air quality that may have been adequate under § 11(c) of the OSHA Act failed to state a claim for protection under the SOX statute when it implicated no shareholder fraud.\textsuperscript{162} \textit{Minkina v. Affiliated Physicians Group}, 2005-SOX-19 (ALJ Feb. 22, 2005) (also holding the employer was not a publicly traded company covered by the SOX statute).

4. In \textit{Fader v. Transportation Security Administration}, a complaint under the AIR 21 alleged only that the complainant had reported violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud.\textsuperscript{163} The trial judge granted the employer’s motion to dismiss for failure to state claim upon which relief could be granted, holding that a protected activity under AIR 21 must specifically implicate safety.

a) Intra-corporate Disclosures are Protected

Protection now extends to an employee’s intra-corporate safety, quality control or other complaints or disclosures.\textsuperscript{164} The Fifth Circuit

\textsuperscript{159} \textit{Ames Dep’t. Store, Inc.}, 991 F.2d at 953, \textit{Tuttle}, 2004-SOX-76 slip op. at 3-4.

\textsuperscript{160} Hopkins \textit{v. ATK Tactical Sys.}, 2004-SOX-19 (ALJ May 27, 2004).


\textsuperscript{162} \textit{Minkina v. Affiliated Physicians Group}, 2005-SOX-19 (ALJ Feb. 22, 2005) (also holding the employer was not a publicly traded company covered by the SOX statute).


\textsuperscript{164} § 5851(a)(1(A) (part of the amendments to the ERA made in the Energy Policy Act of 1992); H.R. No. 102-474 (VIII) at 78, \textit{as reprinted} in 1992 U.S.C.C.A.N. 1953, 2282, 2296 (demonstrating that Congress had always intended
now recognizes that its contrary holding in the early cases of Brown & Root, Inc. v. Donovan,165 and Willy v. Coastal Corporation,166 were overturned by Congress in the 1992 ERA amendments.167 This protection of internal complaints is a crucial aspect of the statutes. All three whistleblowers selected as Time’s 2002 People of the Year made their complaints internally. Accountant Sherron Watkins wrote her complaint to the top executive of her company, Enron CEO Ken Lay. Internal auditor Cynthia Cooper went to WorldCom’s controller and to the chief financial officer; when they were unresponsive, she went over their heads to the chairman of the board’s audit committee and the outside auditor KPMG.168 FBI Special Agent Coleen Rowley wrote to FBI Director Robert Mueller.

b) Employer Cannot Require Internal Report Before Employee Reports to Government.

An employee cannot be required to complain internally before blowing the whistle to outside regulators, or disciplined for failing to follow an established chain of command when making internal complaints.169

165. Brown & Root, Inc. v. Donovan 747 F.2d 1029 (5th Cir. 1984)
166. Willy v. Coastal Corp. 855 F.2d 1160, 1169 n.13 (5th Cir. 1988).
167. Willy v. Admin. Review Bd., 423 F.3d 483 (5th Cir. 2005), aff’g Willy v. Admin. Review Bd., ARB No. 97-107, ALJ Case No. 1985-CAA-1 (“Congress clarified by statute [i.e., the 1992 amendments to the ERA] that Brown & Root was incorrect in holding that complaints to employers were not protected under § 5851). Id. at 489 n. 9.
169. Williams v. Mason & Hanger Corp, ARB No. 98-030, ALJ No. 1997-ERA-14, slip op. at 10 (ARB Nov. 13, 2002); Fabricius, 1997-CAA-14, slip op. at 4 (ARB Feb. 9, 1999). See also Pogue v. U.S. Dep’t of Labor, 940 F.2d 1287, 1290 (9th Cir. 1991) (upholding a finding that a “chain of command” defense was
c) Employee’s Motive for Reporting to Government is Irrelevant to Protection.

Congress demands no altruistic motivation from whistleblowers. Even an employee with smoldering hostility toward the employer, who gleefully reports something that causes the employer grief with a regulator, is protected. Departmental decisions put it this way:

The Secretary has held that where the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant . . . . The purpose of the whistleblower statutes is to encourage employees to come forward with complaints of health hazards so that remedial action may be taken, and if such a course of action furthers the employee's own selfish agenda, so be it. This approach is consistent with case law under other federal statutes. For example, the Merit Systems Protection Board has held that regardless of a whistleblower's alleged personal motivations, the law's protections extend to employees who reasonably believe in their charges.170

d) No Actual Violation is Required for Protection

pretextual when the employer retaliated because the employee bypassed her superior to complain).

The complainant need not prove at trial that the employer actually violated a statute, regulation or other applicable standard. The complainant must only show a reasonable basis to think there was improper activity. The significance of the employee's background can be seen in *Kalkunte v. DVI Financial Services, Inc.* In *Kalkunte*, the employer fell into such financial trouble that it eventually filed for bankruptcy. There, the trial judge found a report that senior managers had altered delinquency reports and incorporated them into public disclosure statements was a protected disclosure of a blatant fraud on investors. The complainant also alleged that, following default, the employer improperly commingled funds with a subsidiary, which violated SEC regulations. As in-house counsel, the complainant had a reasonable basis to believe these acts violated the law, in part because documentary evidence supported the allegations.

An employee's refusal to follow employer instructions believed to be illegal is also protected under the ERA and the STAA. The ERA regulations also require the worker to identify the illegal conduct to the employer.

3. Adverse Action

a) The Nuclear/Environmental Acts and AIR 21

For the Secretary of Labor to grant relief, an employer must have taken an adverse employment action. Under AIR 21, for example, no

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171. *Halloun v. Intel Corp.*, ARB No. 04-068, 2003-SOX-7, slip op. at 6 (ARB Jan. 31, 2006) (holding a reasonable but mistaken belief that the employer had violated securities laws is protected); Melendez v. Exxon Chem. Ams., ARB No. 1996-051, ALJ No. 1993-ERA-6, slip op. at 20 (ARB July 14, 2000), *available at* http://www.oalj.dol.gov/public/wblower/decsn/93era06e.htm (affirming and applying prior holdings such as that in Minard v. Nerco Delamar Co., Case No. 92-SWD-1, slip op. at 7-16 (Sec'y Jan. 25, 1994) (holding that the complainant must actually believe the employer is violating a statute or regulation, and the belief must be objectively reasonable for a person with the employee's training and experience).


174. § 5851(a)(1)(B); § 31105(a)(1)(A).

175. 29 C.F.R. § 24.2(c)(2).
employer may "discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment" in retaliation for a protected activity. The operative language is similar to that of the environmental whistleblower acts and Title VII.

Except under the STAA, implementing regulations under all of the discussed statutes offer redress for retaliation that does not immediately pinch an employee's pocket through a termination, suspension or demotion. The Secretary maintains an employer "otherwise discriminate[s]" and incurs liability when it "intimidates, threatens, restrains, coerces, [or] blacklists" a protected employee. The regulations for the recent Pipeline Safety Act are essentially identical. The Secretary turned aside objections to this regulatory augmentation of the statutory text, declaring "the language [of the regulation] is simply a fuller statement of the scope of prohibited conduct, which encompasses discrimination of any kind with respect to the terms, conditions or privileges of employment." The Secretary's considered interpretation of how broadly whistleblower protection extends, an interpretation made through the rulemaking process, is entitled to respect in the federal courts. The statutory authority to adjudicate whistleblower protection matters, coupled with the Secretary's repeated use of notice-and-comment rulemaking to define forbidden discrimination broadly under the nuclear, environmental and other whistleblower acts that Congress has not objected to over many years, should insulate the definitions from attack.

176. § 42121(a) (emphasis added).
177. 29 C.F.R. § 24.2(b) and (c) (for the nuclear and environmental acts) and 29 C.F.R. § 1979.102(b) (for the AIR 21 act).
178. 29 C.F.R. § 1981.102(b).
181. See United States v. Mead Corp., 533 U.S. 218 at 230, n.12 (2001) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)). Mead stated that the high level of judicial deference described in Chevron is due to an agency's application or interpretation of a statute where Congress gave the agency
b) The SOX Act

The SOX statute states its prohibitions more thoroughly than the text of the environmental acts, the AIR 21 statute and Title VII, but not quite as expansively as the Secretary's AIR 21 and nuclear/environmental regulations. Congress forbids a SOX employer to "discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee" with respect to the employee's compensation, terms, conditions, or privileges of employment. The SOX regulation at 29 C.F.R. § 1980.102(b) repeats these statutory proscriptions without embellishment because the Secretary believes that the statute "specifically describes the types of adverse actions prohibited under the Act." If forbidden threats and harassment also encompass acts that intimidate, restrain, coerce and (or) blacklist employees, the SOX statute and the Secretary's other whistleblower regulations afford identical safeguards.

c) The STAA Act

The Administrative Review Board treats claims about adverse actions under the STAA statute uniquely. The text of that act forbids an employer to discharge or "to discipline or discriminate against an employee regarding pay, terms, or privileges of employment . . . ." While the language of the STAA Act is similar to the other whistleblower protections statutes, the language of the SOX statute remains broader. The Secretary's STAA regulations do not describe the obligations of the STAA with characteristic expansiveness, to take in conduct that "intimidates, threatens, restrains, coerces, [or] blacklists" a protected employee.

the authority to engage in notice-and-comment rulemaking or the formal adjudication of statutory rights.

182. § 1514A(a) (emphasis added).
184. § 31105(a)(1)(A).
185. Compare the STAA regulations at 29 C.F.R Part 1978, that lack any subsection on "obligations and prohibited acts" with 29 C.F.R. § 24.2(b) and (c) for the nuclear and environmental acts; 29 C.F.R. § 1979.102(b) for the AIR 21 act; and 29 C.F.R. § 181.102(b) for the Pipeline Safety Act.
d) Tangible job consequences

The terms "adverse employment action" and "tangible job consequence" have been used almost interchangeably in Title VII decisions. The Supreme Court has defined a tangible job consequence as one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The EEOC and some courts of appeals disagree over which types of employment actions Title VII reaches. In turn, the Secretary's Administrative Review Board and administrative law judges have struggled to determine which adverse personnel actions whistleblowers may contest in the Department's administrative proceedings.

Terminations and suspensions are not the only actions that employees have challenged successfully. The EEOC broadly interprets "adverse employment action" under Title VII to include "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." A job transfer that does not result in a loss of pay nonetheless may be remediable. The Ninth Circuit embraces this broad interpretation of Title VII's anti-retaliation provision. Likewise, the Tenth Circuit holds that any act that causes more than de minimis impact on a plaintiff's future employment opportunities may be actionable retaliation.

188. Stone, 115 F.3d at 1571 (demotion and transfer to a less favorable job with less prestigious, less essential tasks amounted to a tangible employment action by the employer).
189. See Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) ("This provision does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination").
190. Hillig v. Rumsfeld, 381 F.3d 1028, 1033-1035 (10th Cir. 2004).
Other courts specifically reject the EEOC's broad notion of what constitutes an "adverse employment action" under Title VII. The Seventh Circuit held that oral or written reprimands under a progressive discipline system were not "tangible job consequences" Title VII would remedy. A reprimand is not adverse because it may bring the employee closer to termination. "Such a course [is] not an inevitable consequence of every reprimand, however; job-related criticism can prompt an employee to improve her performance and thus lead to a new and more constructive employment relationship."

The Board followed the Seventh Circuit Oest decision in an STAA case where a truck driver received a second warning letter for refusing to comply with management's policy that he log his breaks as off duty time, rather than as "on duty, not driving" when he took rest stops inside the cab of his truck. He claimed that the employer's policy violated U. S. Department of Transportation regulations, and that its written warning discriminated against him. The Board found he engaged in protected activity, but held he failed to state a claim because the new warning, which moved him closer to serious discipline, imposed no "tangible job consequences" for the Secretary to remedy. "[A]lthough we agree that the STAA is aimed at preventing [employer] intimidation of employees for exercising their rights, intimidation does not equate with adverse action." The Board similarly found no adverse employment action was involved where the driver received a written warning for excessive absenteeism.

192. Oest v. Ill. Dep't of Corr., 240 F.3d 605, 613 (7th Cir. 2001).
193. Id.
195. Id.
196. Id. slip op. at 5.
197. Agee v. ABF Freight Sys., Inc., ARB No. 04-182, ALJ No. 2004-STA-40 (ARB Dec. 29, 2005). Agee's claim also became moot because the applicable collective bargaining agreement permitted discipline for absenteeism only within nine months of a written warning, which expired while the matter was being litigated. He failed to argue that the nine-month limit on the warning's effectiveness allowed too little time to fully litigate the issue while the controversy
In *Hendrix v. American Airlines, Inc.*, the trial judge thoroughly analyzed discordant administrative decisions on the meaning of "adverse action" under whistleblower protection statutes, especially the concept of "tangible job consequences." She also discussed the different views the courts of appeals have expressed about how this concept applies in Title VII cases. The judge utilized the definition developed under Title VII in the Tenth Circuit, where the facts arose.

was live, so that argument was waived. Neither did his request for attorney fees or for injunctive relief overcome the mootness problem.

198. Some decisions hold that a complainant must show the employer's action had some "tangible job consequence." See *Shelton v. Oak Ridge Nat'l Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001) (holding that in the absence of a tangible job consequence, a verbal reprimand and accompanying disciplinary memo were not adverse actions); *Ilgenfritz v. U.S. Coast Guard*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001) (holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action); *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002) (holding that a supervisor's criticism does not qualify as an adverse action); *Jenkins v. U.S. Environmental Protection Agency*, ARB No. 1998-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003) (citing to *Ellerth*, 524 U.S. at 761, for the proposition that an adverse action must have a tangible job consequence). See also *Dolan v. EMC Corp.*, 2004-SOX-1 (ALJ Mar. 24, 2004) and Robichaux v. American Airlines, 2002-AIR-27 (ALJ May 2, 2003). This is not a consistent view, however. Other Board decisions define "adverse action" more broadly. See *Bassett v. Niagara Mohawk Power Corp.*, No. 85-ERA-34 (Sec'y Sept. 28, 1993) (holding that negative comments in a performance evaluation can constitute adverse action, without a showing of adverse economic impact); *Guitierrez v. Regents of the Univ. of Cal.*, ARB No. 1999-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002) (holding that the narrative portion of a performance appraisal constituted an adverse action, even if the ultimate rating did not because the performance assessment was a factor in determining the complainant's salary). See also *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, 5, 93-CAA-1, 94-CAA-2, 3 (ARB June 14, 1996); *Boytin v. Pa. Power and Light Co.*, No. 94-ERA-32 (Sec'y Oct. 20, 1995).


200. According to the trial judge's analysis in *Hendrix*, the Second and Third Circuits limit an "adverse action" under Title VII to something that "materially affects" the terms and conditions of employment, relying on *Torres v. Pisano*, 116 F.3d 625, 640 (2nd Cir. 1997) and *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997). The Fifth and Eight circuits hold that only an "ultimate employment action" constitutes an adverse action. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Lederberger v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).
She pointed out in a footnote that the text of the SOX Act differs from other whistleblower statutes in explicitly prohibiting threats and harassment – acts that are not necessarily tangible and certainly not ultimate employment actions. This led to a finding that placing the complainant on a lay-off list qualified as an adverse action, even though he suffered no tangible consequence because his name was removed before the lay-offs took effect. Later in the decision, however, the judge found that there was no connection between protected activity and the placement on the lay-off list.

Whistleblower protection has been held to cover poor performance appraisals that are meant to dissuade others from whistle blowing, which stifles the employee disclosures Congress sought to encourage. Decisions at the Office of Administrative Law Judges are not unanimous on the point, however. *Dolan v. EMC Corp.* held that an unfavorable performance evaluation that did not reduce the complainant’s salary, directly jeopardized his job security, or cause any tangible job detriment was not a remediable adverse employment action. The court in *Dolan* also dismissed the complaint as untimely; however, the decision did not discuss whether the text of the SOX statute that proscribes threats and harassment, together with actions such as discharge, demotion and suspension, reaches an evaluation.

Actions that just leave an employee unhappy trigger no protections. When more senior managers immediately recognize that a line supervisor has bungled a matter, and thoroughly abort any adverse consequences, no cause of action arises.

4. Causal Connection

The protected activity must have irked the employer in a way that contributed to the adverse action. It need not be the action’s sole or

203. McNeill v. Crane Nuclear Inc., ARB No. 2002-002, ALJ No. 2001-ERA-3 (ARB July 29, 2005). *See also* Ciofani v. Roadway Express, Inc., 2004-STA-46 (ALJ Nov. 18, 2004) (trial judge granted summary judgment in the employer’s favor because it had rescinded all three suspension letters that were involved in the complaint, the employee had not served any of the suspensions, and all references to the suspension letters were removed from his personnel file. The complainant lost no time, wages or benefits due to the suspension letters.).
even its dominant cause. As will be discussed, this requires a clear chronology and knowledge on the part of the employer. The inquiry into the employer's motives is "highly context-specific."204

a) Chronology

The protected activity must precede the adverse action. *Slattery v. Swiss Reinsurance American Corp.* affirmed a summary judgment for the employer despite the temporal proximity of an EEOC charge to a subsequent probation and discharge.205 Temporal proximity may permit the fact finder to infer a causal nexus. In *Slattery*, no causal nexus was found because "the adverse employment actions were both part, and the ultimate product, of 'an extensive period of progressive discipline' which began when [the employer] diminished Slattery's job responsibilities a full *five months prior* to his filing of the EEOC charges."206 "Where . . . gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise."207

Decisions such as *Couty v. Dole*208 teach that, for procedural, burden-shifting purposes, "temporal proximity is sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge." In *Couty*, nearly thirty days had elapsed between the protected activity and the termination. A complainant generally satisfies this element with a showing that the protected activity preceded the adverse action, and that the employer knew of it.209

205. Slatterly v. Swiss Reinsurance America, Corp., 248 F.3d 87 (2d Cir. 2001).
206. *Id.* at 95.
207. *Id.; see also Halloum*, ARB No. 04-068, slip op. at 7 (holding a performance improvement plan imposed on a poorly performing employee before he brought any allegations of securities fraud to the SEC could not have a retaliatory purpose, but onerous modifications made to it after his SEC complaint could).
208. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (nearly thirty days elapsed between the protected activity and the termination).
209. Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (the adverse action must come "so closely in time as to justify an inference of retaliatory motive"); Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926 (11th Cir. 1995).
An extensive gap between animus and the adverse employment action may defeat the causation element of the prima facie case.\footnote{See Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223 (11th Cir. 2002).} For example, in \textit{Scott v. Suncoast Beverage Sales, Ltd.}, two and one-half years earlier a co-worker, who later became the black employee’s supervisor, said that, "we will burn his black ass."\footnote{Id. at 1227. This statement was not regarded as direct evidence of racial motivation for termination. Had it been, there would have been no need to analyze the adequacy of the prima facie case, which applies to cases made with circumstantial evidence.} The plaintiff contended that racial attitudes are slow to change and comment should be treated as direct evidence. The court regarded it as too far removed in time and too indirectly connected to the termination decision.\footnote{See also Lewis v. Holsum of Fort Wayne, Inc., 278 F.3d 706 (7th Cir. 2002) (four-month interval between protected activity and discharge was regarded as too long to support an inference of retaliation).}

Temporal proximity used to establish the causation element of the \textit{McDonnell-Douglas} framework when the claimant’s evidence is circumstantial may not carry the day when the judge ultimately weighs all the proof to decide whether the protected activity caused or contributed to the adverse action. Close timing alone is rather weak evidence. When paired with additional proof, such as inconsistencies in an employer’s statements about the reasons for the adverse action, there is sounder basis to find causation. Strong countervailing evidence may lead the judge to conclude that retaliation had nothing to do with the adverse action.

Bear in mind that the element of the claim is causation, not its proxy, temporal proximity.\footnote{Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir.1997).} Hard and fast rules setting a maximum acceptable time interval between the protected activity and the adverse action that take no account of the facts can reward guile. The complainant may be one of a small group of skilled or professional employees who cannot easily be replaced, or engaged in significant on-going projects that would deter a sophisticated employer from precipitous retribution. It may bide its time before retaliating.\footnote{Id. at 178.}
evidence viewed as a whole may merit the inference that a remote protected event sparked retaliation.

Where "temporal proximity . . . is missing, courts may look to the intervening period for other evidence of retaliatory animus."\(^{215}\) Ongoing antagonism following the protected activity is that kind of proof.\(^{216}\) The claimant should be permitted to offer a broad range of evidence to shed light on the elusive issue of the employer's motivation.

b) Knowledge

At a minimum, someone in a position to affect the complainant's employment must have known of the protected activity before the adverse action was taken; the employer must act at least partially from a retaliatory motive.\(^{217}\)

The person who signs a complainant's poor performance appraisal, reprimand, suspension or dismissal letter may be too far removed from the situation to know much, if anything, about the matter. If someone in the chain of command engineered the adverse action, the complainant is protected.\(^{218}\) Layers of "bureaucratic ignorance" do not

\(^{215}\) Jensen v. Potter, 435 F.3d 444 (3rd Cir. 2006).
\(^{218}\) See Ezell, 400 F.3d at 1051; Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77 (1st Cir. 2004) (discharge decision came from unbiased decision makers who acted on inaccurate, misleading or incomplete facts compiled by a biased employee. Judgment for employer reversed with directions to make findings about whether the information source withheld exculpatory information out of bias); Henrich v. Ecolab, Inc., 2004-SOX-51 (ALJ Nov. 23, 2004) (credible evidence that complainant's immediate supervisors knew of his protected activity may be imputed to outside executives who had ultimate authority over the complainant's employment). See also the analysis of the law of agency as it relates to corporate responsibility for the acts of middle managers in Ellerth, 524 U.S. at 762-63 and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998) (involving sexual harassment claims).
shield an employer from liability. Different types of circumstantial proof may be used in different types of cases. For example, a refusal to hire/blacklisting, claim may require a complainant to show that job openings existed. Consider this example from a Seventh Circuit case: an engineer applies to employers serially. When he isn’t hired, he claims he was blackballed for past whistle blowing, arguing that large corporations must have openings for engineers. The claim fails. He must prove either during his case in chief or in his opposition to the potential employer’s summary judgment motion that he was qualified for identifiable open positions. According to the Seventh Circuit:

His burden is to show that after filing the charge that he claims provoked the retaliation, only he, and not any similarly situated job applicant who did not file a charge, was not hired even though he was qualified for the job for which he was applying . . . . It is doubtful whether Hasan was qualified for the job for which he was turned down . . . .

5. A Prima Facie Case made with Circumstantial Evidence Raises a Rebuttable Presumption of Discrimination

If the employer is wholly silent after the complainant presents an adequate prima facie case, the complainant prevails. It is unlikely an employer will fumble so badly at trial.

Once an employer articulates a legitimate non-discriminatory reason for its action, the presumption disappears. Then the complainant must show by the preponderance of the evidence that discrimination motivated the adverse action.

Some administrative law judges find it helpful to go through the prime facie case analysis explicitly when direct evidence of discriminatory animus is not offered to ensure all the necessary elements are covered. The Board frequently chides judges for doing

220. Hasan v. Dept. of Labor, 400 F.3d 1001, 1004 (7th Cir. 2005).
221. See Reeves, 530 U. S. at 143; St. Mary's Honor Ctr., 509 U.S. at 510 (1993); Aikens, 460 U. S. at 714.
so. After recognizing the utility of the *McDonnell Douglas* framework, it said:

The amended ERA certainly does not preclude a complainant from presenting a circumstantial case of retaliation at a hearing before a Department of Labor ALJ. Nor do the 1992 amendments dictate or suggest that an ALJ, or this Board, not rely, when appropriate, upon the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof. Indeed, when the Board recently applied the Title VII pretext framework in an ERA case brought under the amended Act, we explained that because most ERA complaints are grounded on circumstantial evidence of retaliatory intent, "this Board and reviewing courts routinely apply the framework of burdens developed for pretext analysis under Title VII." However, we continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried.

The preference for not setting the structure of the decision based on burden shifting comports with the conclusion the U. S. Supreme Court reached in *U.S. Postal Service Board of Governors v. Aikens*. The prima facie case analysis of *McDonnell Douglas* and its progeny is rooted in the federal rules of civil procedure as applied in course of jury trials. If either the plaintiff or the employer fails to provide sufficient proof for their argument by the close of their case, judgment as a matter


224. *Kester*, ARB No. 02-007, slip op. at 3.

225. *Aikens*, 460 U.S. at 711 (claiming racial discrimination under the Civil Rights Act for a failure to promote) and Reeves, 530 U.S. at 133 (claiming age discrimination under the ADEA).
of law is entered against the party that failed in its proof and the court takes the matter from the jury. Motions of that type are generally inappropriate under the federal APA, where the administrative law judge considers all the evidence the parties present.

An administrative law judge reaches a decision on the basis of the record as a whole. The issue comes down to whether there was invidious discrimination, as Aikens points out. It makes no difference whether the judge’s conclusion is drawn from direct or circumstantial evidence of discriminatory animus, or a blend of both. Moreover, the recommended decision and order the judge enters in whistleblower cases is not the equivalent of a district court’s final judgment. It is a decision that may be subject to action by the Administrative Review Board before it becomes final.

C. The Employer’s Burden of Going Forward

The employer must state its legitimate, non-discriminatory reason for the adverse employment action with enough specificity that the complainant has a full and fair opportunity to demonstrate that the reason given is pretextual. The employer’s burden is only one of going forward; this “involve[s] no credibility assessment.” The ultimate burden of persuasion on the issue of invidious discrimination remains with the employee.

The employer need not prove the reason(s) it articulates motivated its adverse action, but must show enough to raise an issue of fact. The

226. FED. R. CIV. P. 50.
227. The trial judge in Sysco Foods of Baltimore did more than enter an oral order of dismissal at the close of the complaint’s inadequate prima facie case, when the employer moved for a “non-suit.” Sysco Foods of Baltimore, ARB No. 03 134 at 3. The judge wrote a detailed recommended order of dismissal after reviewing the trial transcript. In contrast, pre-trial motions for summary decision are permitted under 29 C.F.R. § 18.40 and 18.41. They are practically indistinguishable from motions for summary judgment under FED. R. CIV. P. 56.
228. See also Blum v. Witco Chem. Corp., 829 F.2d 367, 372, n. 2 (3d Cir.1987) (“Once a case has been fully litigated, however, it is unnecessary for the appellate court to decide whether a prima facie case had, in fact, been established”).
230. See infra notes 288-296 and accompanying text.
231. St. Mary's Honor Ctr., 509 U. S. at 509.
employer is likely to offer actual, though perhaps not all, reasons for what it did. Typical reasons include:

1. The complainant is not as qualified for a job as other candidates;
2. Inability to get along with co-workers or supervisors;
3. Misconduct or insubordination;
4. Business exigencies (e.g., the need to lay workers off); or
5. Poor performance or absenteeism.

D. Complainant’s Proof of Pretext

The complainant must convince the judge that the reason or reasons the employer proffered for the adverse action are merely pretexts for discrimination. When the matter reaches trial, the complainant’s burden of proving pretext merges with the ultimate burden to persuade the judge that he or she has suffered intentional discrimination. Inferences drawn from the prima facie case may be considered in determining whether to accept or reject the reasons the employer articulated for its adverse employment action.232

A pair of AIR 21 cases illustrate how employers may prevail on the issue of pretext. When an employer proved that a pilot had a history of complaints about unprofessional behavior and poor interpersonal skills with co-workers, and a disrespectful attitude towards his supervisor, it persuaded the trial judge that the pilot’s report of a safety concern did not contribute even partially to the decision to terminate him for the belligerent and unprofessional manner in which the concern was communicated.233 Similarly, another employer successfully demonstrated that it placed a pilot on long term sick leave for acts that indicated emotional instability; its decision was unrelated to the pilot’s earlier complaint about the airline’s failure to remove the checked luggage of two passengers who had been prevented from taking a flight due for currency violations. His protected activity and the employer’s adverse action were separated by intervening events that defeated an

232. Reeves, 530 U.S. at 143 (once the employer provides a legitimate, non-discriminatory reason for the personnel decision, the burden shifts to the plaintiff to show by a preponderance of the evidence that the employer’s benign explanation was contrived to obscure a discriminatory motive).

inference of causation, and adequately explained the employer’s decision to require the fitness evaluation.\textsuperscript{234}

A case based on circumstantial evidence does not end because the employee proves the employer’s reason for its adverse action is untrue or a pretext. The employee still must convince the fact finder that the adverse action was motivated by invidious discrimination.\textsuperscript{235} Summary judgment was affirmed for the governmental employer in \textit{Neal v. Roche}, where the plaintiff conceded in motion papers that the true reason she was not promoted was not prohibited by statute, despite the fact that the government had concealed this reason with a pretextual explanation.\textsuperscript{236} The civilian promoted to the job the plaintiff wanted had been selected to protect her from an impending lay-off because her job slot was slated to become a military one. It made no difference that the government offered a false reason for the promotion. A plaintiff prevails \textit{only} by showing that an invidious motive contributed to the adverse action, although it may not be the only reason.\textsuperscript{237}

Pretext can be shown by various means, including:

1. \textit{Direct} evidence: These are rare actions or statements of an employer that betoken discriminatory intent. With direct proof of retaliatory motivation, pretext analysis should not even apply.

2. \textit{Comparative} evidence: This refers to proof that someone else similarly situated with respect to performance, qualifications and conduct did not receive the same adverse treatment, or to proof that the employer departed from its established policies and practices.

3. \textit{Inherent} implausibility: The factual underpinnings for the reason the employer puts forward may beggar belief. For example, the employee’s personnel file includes good recent performance evaluations, the adverse action is temporally proximate to the protected activity, and no credible evidence of intervening poor performance explains the employer’s action.

\textsuperscript{235} \textit{St. Mary’s Honor Ctr.}, 509 U.S. at 502.
\textsuperscript{236} Neal v. Roche, 349 F.3d 1246 (10th Cir. 2003).
\textsuperscript{237} There can be various reasons for a lay-off, as will be discussed in the mixed motive analysis below. \textit{See infra} notes 243-260 and accompanying text.
4. **Inconsistent** explanations for the adverse action: These lead the fact finder to infer that the employer fabricated reasons to disguise discriminatory animus and cannot keep its story straight.\(^\text{238}\)

5. **Statistics:** This is rarely seen in Department of Labor adjudications, perhaps because data is too expensive.

Comparisons raise the difficult issue of whether the other employee or employees the complainant proposes to use as comparators were “similarly situated.” In *Hasan v. Department of Labor*, for example, when an instructor at a training center was first reprimanded for theft of food meant for students, and later fired for doing so again, she faced a difficult proof problem when she claimed that she really had been fired in retaliation for a sexual harassment claim she made four months earlier.\(^\text{239}\) The court of appeals affirmed a summary judgment against her because “she failed at the threshold by presenting no evidence that similarly situated employees (repetitive food thieves) were treated more leniently than she was.”\(^\text{240}\) The employer often successfully shows dissimilarities between the complainant and other employees. The situations need not be *identical*; it would be very difficult for any employee to prevail if that were the standard.\(^\text{241}\) The language about “repetitive food thieves” in the 7th Circuit’s *Hasan* decision may not accurately represent the state of the law, even within the 7th Circuit. Showing that an employee of another race or gender received treatment that is more favorable after a second infraction as serious as removing student’s food from the center could set up a valid comparison under *Ezell’s* approach to comparators.\(^\text{242}\) Reading between the lines in *Hasan*, the instructor’s recidivism may have been the nub of her problem.

Theoretically the employer also may show that the challenged business practice was random or did not follow a predictable pattern, but this likely would be difficult to prove.

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\(^{238}\) See, e.g., Vieques Air Link, Inc. v. U.S. Dep’t of Labor, 437 F.3d. 102 (1st Cir Feb. 2, 2006); *Bechtel*, 50 F.3d at 935.

\(^{239}\) *Hasan*, 400 F.3d at 1001.

\(^{240}\) *Id*. at 1005.

\(^{241}\) *Ezell*, 400 F.3d at 1051.

\(^{242}\) *Id*. at 1050.
E. Mixed Motive Cases

People act from more than a single motivation. An employer harboring permissible and impermissible reasons for an adverse action may never have considered their relative weight. After the fact, it can be difficult or impossible to portray any one as the "primary" consideration, the "but-for" factor, or the "necessary and sufficient" cause. The analytic starting points for this issue are the U.S. Supreme Court decisions in *Mt. Healthy City Board of Education v. Doyle* and *Price Waterhouse v. Hopkins*.

*Mt. Healthy* involved an annual-contract schoolteacher whose employment was not renewed at the end of the year he was up for tenure. He sued for reinstatement under 42 U.S.C. § 1983, claiming that his termination was retribution for exercising his First Amendment right to free speech. The trial judge had found that political speech played a substantial role in the school board's decision not to renew his employment. The lower court ordered reinstatement, which had the incidental effect of granting tenure. The Court vacated the judgment when it ruled the teacher could obtain re-employment only by showing that the Board terminated him in retribution for his political speech. If the Board had adequate independent reasons not to renew his teaching contract, it would prevail. The matter was remanded for the necessary additional fact finding. This "mixed-motive" or "dual motive" test for liability shifts the burden of persuasion, not just production, to the employer when the employee has made out a prima facie case. The employer must persuade the fact finder by a preponderance of evidence that it would have taken the same action even in the absence of the protected activity or of any discriminatory motive.

*Price Waterhouse v. Hopkins*, a Title VII case, holds the employer's burden in a mixed motive discrimination case is tantamount

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244. *Price Waterhouse*, 490 U.S. at 228 (plurality opinion).
245. *Mt. Healthy City Bd. of Ed.*, 492 U.S. at 274.
246. *Id.* (citing 42 U.S.C. § 1983 (1996)).
247. *Id.* at 284.
248. *Id.* at 286.
249. *Id.* at 287.
to proving an affirmative defense.\textsuperscript{250} Here, a woman was denied partnership.\textsuperscript{251} Because Title VII does not require clear and convincing evidence to prove a claim, if an employer permitted sex stereotyping to play a part in an employment decision, it must prove by a preponderance of evidence that it would have made the same decision in the absence of discrimination.\textsuperscript{252}

Importing this Title VII analysis to whistleblower claims, an employer who carried its burden by a preponderance of evidence bore no liability to the whistleblower. The Administrative Review Board explained:

There are situations, however, in which there is no one "true" reason for the employer's actions, in the sense that there was one motivation, either legitimate or illegitimate . . . . The employer's burden in such a "dual motive" case is handled much like an "affirmative defense; the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another."\textsuperscript{253}

The Supreme Court's recent unanimous decision in Desert Palace, Inc. v. Costa\textsuperscript{254} made clear that direct evidence of discrimination is not required to prove a mixed-motive bias case. This issue had been in doubt since 1989 because of the Supreme Court's badly fractured rationale in Price Waterhouse, where the concurring opinion of Justice O'Connor would have shifted the burden to the employer only where there was "strong" or "direct" evidence of discrimination.\textsuperscript{255} This was one reason the federal courts of appeals had struggled so much to identify what qualified as direct evidence of discrimination.

This is no longer the way ERA, AIR 21, SOX and Pipeline Safety whistleblower matters are handled. Congress amended both the Civil

\textsuperscript{250} Price Waterhouse, 490 U.S. at 246, 250.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at 253-54.
\textsuperscript{254} Desert Palace, Inc., 539 U.S. at 90.
\textsuperscript{255} Price Waterhouse, 490 U.S. at 274-75.
Rights Act and the ERA in the early 1990s to overrule the Supreme Court's *Price Waterhouse* decision in part. The amendments to Title VII and to the ERA were not identical, and those differences matter.

1. Civil Rights Amendments of 1991

Congress determined that "[t]he effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex or national origin has been severely undercut by the recent Supreme Court decision in *Price Waterhouse v. Hopkins*."\(^{256}\) The Civil Rights Amendments of 1991 amended Title VII to say that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."\(^{257}\) With this amendment, an employee who suffered an adverse action partially motivated by invidious discrimination received the right to declaratory and injunctive relief, and to recover attorney's fees from the employer with mixed motives; however, they were still not entitled to hiring, reinstatement, promotion, or back pay. It can be dangerous to read current Title VII cases without bearing this change in mind, and assume the same result would be reached and relief ordered under whistleblower statutes. No similar amendment was made to the Age Discrimination in Employment Act. The *Price Waterhouse* approach, which requires the employer to prove beyond a preponderance of the evidence that it would have taken the same action even in the absence of discrimination still applies in mixed motive age discrimination claims.\(^{258}\) Bear this in mind when reading current ADEA decisions.

The effect the Civil Rights Amendments of 1991 may be seen in *Rowland v. American General Finance*.\(^{259}\) The employer maintained

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258. Lewis v. YMCA, 208 F.3d 1303, 1305 (11th Cir. 2000). *See also* Smith v. City of Jackson, 544 U.S. 228 (2005) (narrowly construing an employer's ADEA liability under a disparate-impact theory because Congress has never amended the ADEA as it amended Title VII of the Civil Rights Act).

that it did not promote a female branch manager because of complaints from employees and customers, and a jury accepted its argument. The Court of Appeals for the Fourth Circuit reversed, finding that the district court erred when it refused to give a mixed-motive jury instruction. There was substantial evidence of bias, and a real possibility that, had a mixed-motive instruction had been given, the jury could have found that sex discrimination was a motivating factor even though the employer would have made the same decision anyway.

2. ERA Amendments

The 1992 amendments to the ERA\(^{260}\) state that if a protected activity \textit{contributed} to the adverse employment action at all, the employer must demonstrate "by clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.\(^{261}\) If the employer meets the enhanced level of proof, it escapes liability. The Civil Rights Act Amendments of 1991 do not exonerate an employer; rather, they preclude reinstatement, back pay and some other damages. Congress adopted these enhanced burdens of proof for employers in the AIR 21, SOX and Pipeline Safety statutes.

Clear and convincing evidence is a more onerous burden than preponderance of the evidence, but less than "beyond reasonable doubt."\(^{262}\)

IV. WHISTLEBLOWER DAMAGES AND REMEDIES

When an employer has violated an environmental whistleblower act, the Secretary is authorized to order five remedies: (1) affirmative action to abate the violation; (2) reinstatement; (3) compensatory damages; (4) costs; and (5) expenses, which include attorney’s fees. Under only two statutes, the Safe Drinking Water Act and the Toxic Substances Control Act, may exemplary damages be awarded.

\(^{261}\) § 5851(b)(3)(D); \textit{Kester}, ARB No. 02-007, slip op. at n. 15.
A. Reinstatement

The regulations relating to nuclear and environmental safety, the STAA, SOX and Pipeline Safety all require reinstatement when an employee seeks it.\(^{263}\) It need not be ordered in three situations:

1. When the employee does not ask for it;\(^ {264}\)
2. When the employee has rejected a legitimate and unconditional reinstatement offer; or \(^ {265}\)
3. When reinstatement is not feasible.\(^ {266}\)

The mere fact that the employer fired a whistleblower does not establish the third factor: the impossibility of a normal working relationship between the parties. Reinstatement is normally the remedy granted to whistleblowers.\(^ {267}\) An employer is in a tight spot when it seeks to demonstrate that the employee’s return to work is not feasible; it requires proof that a normal working relationship is impossible or proof of actual medical risk to the employee. In Creekmore v. ABB Power Systems Energy Services, Inc.,\(^ {268}\) the judge had found in an

\(^{263}\) Nuclear and environmental safety regulations are located at 29 C.F.R. §24.8(c)(1). The STAA and SOX are located at 29 C.F.R. §1979.109(a-b), respectively. AIR 21 can be found at 29 C.F.R. 1980.109(b), while Pipeline Safety is located at 29 C.F.R. 1981.109(b).

\(^ {264}\) Nix v. Nehi-RC Bottling Co., 84-STA-1 (Sec’y July 13, 1984). See also Moravec v. HC & M Transp., Inc., 90-STA-44 (Sec’y Jan. 6, 1992), slip op. at 22 & n.14; Nidy v. Benton Enters., 90-STA-11, slip op. at 17 n.15 (Sec’y Nov. 19, 1991); Dale v. Step 1 Stairworks, Inc., ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005)(stating reinstatement is mandatory, although the Board may have been influenced by the employee’s pro se status).


\(^ {266}\) Doyle v. Hydro Nuclear Servs., Inc., ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 7-8 (ARB Sept. 6, 1996), rev’d on other grounds; Doyle v. United States Sec’y of Labor, 285 F.3d 243, 251 (3d Cir. 2002) (reinstatement under the ERA was impractical because the company no longer employed comparable workers, and had no positions for which he qualified); Kalkunte v. DVI Fin. Servs., Inc., 2004-SOX-56 (ALJ July 18, 2005) (reinstatement not an available remedy because the employer had gone bankrupt and was no longer in business; front pay was awarded instead).

\(^ {267}\) See Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ALJ Feb. 15, 2005) (rejecting four grounds the employer offered for not reinstating its former chief financial officer, and holding that reinstatement is part of the "make whole" goal of the SOX statute and the presumptive remedy for wrongful termination).

earlier decision that reinstatement was not inappropriate and recommended front pay instead. The Deputy Secretary found the front pay award inappropriate because "the observed tension between the parties at the hearing is not sufficient to demonstrate the impossibility of a productive and amicable working relationship in this case."  

The higher the position the whistleblower held, the more likely it is the former employer will claim that it is impossible to reintegrate the whistleblower as a trusted member of management. The argument fails on two grounds: it denies the complainant the preferred make-whole remedy and it undercuts the deterrent value of reinstatement.  

Reinstatement is not ordered when the job had always been meant to be a short-term project, or when the employer shows the employee would have been laid off in a general reduction of the workforce, regardless of discrimination.  

1. Preliminary Orders in ERA Cases  

In a meritorious ERA whistleblower cases, the statute and regulation require the judge to issue a preliminary order granting interim relief such as reinstatement, back pay, and other actions necessary to abate the violation, but not compensatory damages. In Trueblood v. Von Roll America, Inc., the Board remanded the case where the judge had not issued the preliminary order required under § 24.7(c)(2) until after the employer had petitioned for review of the Recommended Decision and Order. The judge's preliminary order of reinstatement must be issued separately from the recommended decision in order to be immediately effective.  

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269. Id. The Deputy Secretary made the final decision because the Secretary had recused himself.  
273. See McNeill, ARB No. 02-002; Welch, No. 7:05CV00546.
Overview of Whistleblower Protection Claims

2. Stays of Preliminary Reinstatement Ordered by OSHA in AIR 21 SOX and Pipeline Safety Matters

Reinstatement can be an issue at the outset of an AIR 21, SOX or Pipeline Safety case if OSHA’s initial investigation ordered it. These three statutes authorize the Secretary, acting through OSHA, to exercise an extraordinary power to order reinstatement before there has been any evidentiary hearing. Under the ERA, a judge orders reinstatement and back pay only after a formal on-the-record hearing.

Employees, joined by the Secretary of Labor, have enforced the Secretary's preliminary reinstatement order in SOX matters. For instance, in *Bechtel v. Competitive Technology, Inc.*, after the employer requested a hearing, the administrative law judge denied its motion to stay OSHA’s preliminary reinstatement order. The district court found it had subject matter jurisdiction although a final order had not been issued because the statute authorizes enforcement of preliminary orders. The district court also rejected the employer's argument that the employees were not entitled to a preliminary injunction because they had not demonstrated the material elements for that relief, holding that the SOX statute "makes clear that the Secretary of Labor and not the court makes the determination of whether an order of reinstatement is appropriate." The employer was required to reinstate the workers immediately and to pay them salary, benefits, and other compensation they would have earned if the employer had complied with the Department’s reinstatement order when it was originally issued. The reinstatement issue ultimately became moot when the judge dismissed the SOX complaint after trial.

In *Windhauser v. Trane*, the underlying case terminated by settlement. The judge nonetheless fined the employer for obstinate failure to reinstate the employee as OSHA had ordered, even after the

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274. § 42121(b)(2)(A); § 1514A(b)(2)(A); and § 60129(b)(2)(A).
275. See § 5851(b)(2)(A).
277. Id.; see the ALJ's Mar. 29, 2005 order.
278. Id.; see the District Court’s May 13, 2005 order at 8.
280. *Windhauser v. Trane*, 2005-SOX-17 (ALJ June 1, 2005),
judge denied its motion for a stay. 281 Unless an administrative sanction for such intransigence is available, the employer enjoys a passive stay, at least until the employee can obtain district court enforcement of the preliminary reinstatement order. 282 The judge set the fine at double the amount the employee would have earned in salary and bonuses from the date of the OSHA order until the date of settlement of the case, analogizing to the Department’s enforcement authority under the ADEA and the Fair Labor Standards Act. 283

An exception to interim reinstatement is included in the AIR 21, SOX, and Pipeline Safety regulations when the employer “establishes that the complainant is a security risk.” 284 This exception is narrowly construed. The Federal Register publication of the final SOX regulation addressed public comments that were submitted on this aspect of the proposed regulation. The security risk exception substitutes front pay for preliminary reinstatement when an employer “clearly establishes” that reinstatement “might result” in physical violence against persons (employees or customers) or property. 285 That gloss on the regulation’s text is contradictory and illogical, calling for the employer to “clearly establish” that something “might” happen. 286 The Secretary also rejected a comment from the U.S. Chamber of Commerce that sought to broaden the exception to encompass risks to an employer’s trade secrets. 287 “Economic reinstatement” in the form of continued pay and benefits is the interim remedy when the employer proves the employee is a security risk. 288 This substitute remedy was

281. Id.
282. Id.
283. Id. (citing 29 U.S.C. § 626(b) (the ADEA) and 29 U.S.C. § 216(b) (Fair Labor Standards Act)).
286. Id.
287. Id. at 52,108-109.
borrowed from cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977.\textsuperscript{289}

The security risk exception is not found in regulations for other whistleblower acts because they afford no pretrial relief. If an employer succeeded at trial in proving that a whistleblower who otherwise qualified for reinstatement presented an undue security risk if replaced in the work site, common sense dictates that reinstatement would not be “feasible” and the equivalent of economic reinstatement in the form of front pay should be ordered.

\textit{B. After-Acquired Evidence of Misconduct}

After a discriminatory termination, the employer may learn of facts that would have lead it to terminate the whistleblower earlier for a legitimate reason. These typically are uncovered in discovery (e.g., learning that the employee had surreptitiously copied confidential financial documents or taped conversations with other employees despite the employer’s well established policy against doing so). The U.S. Supreme Court acknowledged that aggressive discovery to fish for this type of evidence can harass or punish the whistleblower, but relied on trial judges to rectify any abuses.\textsuperscript{290} The employer must show that the conduct was so significant or severe that the newly discovered fact would, by itself, certainly have led to the employee’s termination.\textsuperscript{291} Mixed motive analysis does not apply; by definition, the lawful motive for termination was unknown when the employer took its adverse action.\textsuperscript{292} In a jury trial, that evidence would be admissible only in the damages portion of the case; an administrative law judge may admit the evidence, but consider it as relevant only to the remedy.


\textsuperscript{291} \textit{Id}.  

\textsuperscript{292} \textit{Id.} at 360.
If a firing offense is proven, that evidence precludes reinstatement and front pay. It would make no sense to reinstate someone who could, and indeed would, be promptly terminated on reinstatement. The employee still can recover back pay for the period from the unlawful discharge until the new information about earlier misconduct was uncovered. That amount may be adjusted up or down whenever there are “extraordinary equitable circumstances” on either side. The same principles apply to fraud in an employment application. But post-termination events (e.g., evidence of the employee’s drunken driving after a discriminatory termination) are not the primary focus of this doctrine. To determine whether the offense uncovered would merit termination, "the inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not."

C. Back Pay and Other Terms, Conditions, and Privileges of Employment

Back pay is a make-whole remedy, meant to restore the employee to the position he or she would have been in had no discrimination

293. Id. at 361-62.
294. Id.
295. Id.
296. McKennon, 513 U.S. at 362.
298. McKennon, 513 U.S. at 356-63; See Sellers v. Mineta, 358 F.3d 1058, 1064 (8th Cir. 2004) (post-termination conduct can become relevant in unusual situations, for example where post-termination misconduct would make the employee ineligible for reinstatement, such as termination from a later job for serious dishonesty); Medlock v. Ortho Biotech, Inc., 164 F.3d 555 (10th Cir. 1999) (rejecting employer’s claim that back pay should be reduced because it would have fired the plaintiff for post-termination cursing at its lawyer at the unemployment benefits hearing its discriminatory firing brought about).
occurred. The amount due is what the employee would have earned but for the discrimination. The following five elements are considered when calculating a back pay award.

1. Burdens of Proof on Items Granted as Relief

Although the burden is on the employee to establish what the employer owes, uncertainties in computing the amount are resolved against the employer. A hypothetical employment history may be used to determine the appropriate scope of the remedy.

2. Interim Earnings and Mitigation of Damages

Interim earnings are deducted from a back pay award. Unemployment compensation the employee may have received is not, however.

The employer bears the burden to prove that the employee did not properly mitigate damages. It must show that: (1) there were substantially equivalent positions available; and (2) the employee failed to seek them with reasonable diligence. A terminated employee may be "expected to check want ads, register with employment agencies, etc."
and discuss potential opportunities with friends and acquaintances."^{305}  
The employee must make a reasonable effort to mitigate income loss, but is not held to the highest standards of diligence.\textsuperscript{306}  The benefit of a doubt ordinarily goes to the wronged employee.\textsuperscript{307}

3. Tax Consequences

The adverse tax consequences of a lump sum damage payment that represents many years of back pay may lead the ALJ to increase the damages to compensate for any incremental tax bite.\textsuperscript{308}  The employee must accurately and credibly document the additional tax liability.\textsuperscript{309}

4. Prejudgment Interest

Prejudgment interest is included on back pay, at the rate due for underpayment of federal taxes.  Section 26 U.S.C. 6621(a)(2) sets forth the rate as short-term federal rate plus three percentage points.\textsuperscript{310}

5. Other Terms, Conditions and Privileges of Employment

The value of other terms or conditions or privileges of the lost job are recoverable, such as:

1. Actual and direct expenses resulting from his loss of a health plan, including any additional weekly out-of-pocket expense the

\textsuperscript{305}  Id.  (quoting Helbing v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 964 (E.D. Pa. 1989) (relying on Sprogis v. United Airlines, 517 F.2d 387, 392 (7th Cir. 1975)).
\textsuperscript{306}  Id.
\textsuperscript{307}  Id.
\textsuperscript{308}  Sievers v. Alaska Airlines Inc., 2004-AIR-28 (ALJ May 23, 2005) (including a $144,000 tax equalization adjustment on $390,000 in lost earnings reduced to present value because the whistleblower would receive a lump sum that would otherwise have been paid over his 12 year work life expectancy); Doyle v. Hydro Nuclear Servs., ARB Nos. 1999-41 to -42, 2000-12, No. 1989-ERA-22, slip op. at 10-11 (Final Decision and Order on Damages ARB May 17, 2000) (finding the whistleblower's proof failed to justify any award enhancement).
\textsuperscript{309}  Id.
\textsuperscript{310}  Id.
worker pays for health insurance at a new employer until the discriminating (i.e., old) employer offers reinstatement;\textsuperscript{311} 

2. Indirect losses consisting of out-of-pocket medical care expenses for the worker or dependents that had been covered by the policy in effect at the discriminating employer, should medical benefits the employee obtains at a replacement job be less generous. These may include prescription drugs, or chiropractic care;\textsuperscript{312} 

3. Reimbursement for lost medical benefits or lost disability insurance;\textsuperscript{313} 

4. Reimbursement for reimbursement for 401(k) retirement plan contributions the employee would have received, up to the time he began participating in a similar plan from a subsequent employer;\textsuperscript{314} 

5. Restoration of sick leave where employer’s discrimination caused the employee’s illness.\textsuperscript{315} 

\textit{D. Compensatory Damages} 

Compensatory damages make a wronged party whole and are not awarded to punish the employer.\textsuperscript{316} 

1. Elements Included 

Compensatory damages are available for a whistleblower’s pain and suffering, mental anguish, embarrassment, and humiliation.\textsuperscript{317} Emotional stress and mental anguish must be the “proximate result” of

\textsuperscript{311} Jackson v. Butler & Co., ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26, slip op. at 8 (ARB Aug. 31, 2004). 
\textsuperscript{312} \textit{Id.}, slip op. at 9 
\textsuperscript{313} Williams v. T.I.W. Fabrication & Machining, Inc., 1998-SWD-3 (Sec’y June 24, 1992). 
\textsuperscript{314} Jackson, ARB Nos. 03-116, slip op. at 7. 
\textsuperscript{315} DeFord v. Tennessee Valley Auth., 1981-ERA-1 (Sec’y Aug. 16, 1984). 
\textsuperscript{316} Hedden v. Connnan Inspection Co., 1982-ERA-3 (ALJ Jan. 22, 1982). 
\textsuperscript{317} See, e.g., DeFord, 1981-ERA-1; Simas, 170 F.3d at 47 (finding a statute granting “compensatory damages” authorized non-economic damages for the publicly humiliating way management fired the plaintiff); Waechter v. J.W. Roach & Sons Logging And Hauling, ARB Case No. 04-183, OALJ Case No. 2004-STA-00043 (awarding $20,000 for emotional distress when the employer falsely accused a truck driver of stealing the truck he was driving when the employer fired him, resulting in the driver being jailed for five hours).
the unlawful discrimination, and the employee has the burden to prove the magnitude of those injuries.\textsuperscript{318} Though testimony from medical experts (such as psychiatrists, psychologists, or counselors) is not required, it strengthens the damage claim.\textsuperscript{319}

Compensatory damages may also be awarded for loss of professional reputation, medical expenses, and adverse physical health consequences, such as high blood pressure or depression. District courts to which SOX cases have been removed have split on this issue. For example, in \textit{Hanna v. WCI Communities, Inc.}, the district court found that damages for loss to reputation may be awarded under the "make whole" remedy of the Sarbanes-Oxley Act.\textsuperscript{320} In \textit{Murray v. TXU Corporation}, another district court held that the remedies portion of the SOX whistleblower provision at 18 U.S.C. § 1514 does not provide for reputational injury.\textsuperscript{321}

This split illustrates the potential for discord Congress introduced when it gave both the Secretary and the federal district courts jurisdiction to hear SOX, and now ERA, cases. The Secretary of Labor has the advantage of building a body of internally consistent case law. In contrast, federal district courts rarely see SOX or ERA whistleblower cases. They are less likely to be guided by precedent from the Department, and rely instead on their greater familiarity with Title VII cases that are similar but not identical.\textsuperscript{322} When applying the SOX and ERA statutes, it will also be difficult for administrative law judges to keep abreast of both Administrative Review Board decisions, which they are required to follow, and district court cases, which carry no precedential weight.

\begin{itemize}
\item \textsuperscript{318} Blackburn, 1986-ERA-4.
\item \textsuperscript{319} Blackburn, 982 F.2d at 132 n.6 (4th Cir. 1992), \textit{aff’d} regarding back pay award, \textit{rev’d} on other grounds (finding testimony about the employee’s emotional distress due to the termination given by his wife and father were adequate to support an award). The Secretary ultimately awarded $5,000 for emotional distress in Blackburn. See Blackburn v. Reich, 79 F.3d 1375, 1376 (4th Cir. 1996); \textit{see also} Lederhaus, 1991-ERA-13.
\item \textsuperscript{322} Recall the differences in the burden of proof and statutory remedies in mixed motive cases under Title VII as compared to ERA, AIR 21, SOX and Pipeline Safety cases. \textit{See supra} notes 243-260 and accompanying text.
\end{itemize}
2. Setting a Compensatory Award

The Secretary requires that compensatory damages be compared with awards in similar cases to ensure consistency.\textsuperscript{323} For many years, these awards were modest. The Board has recently looked more closely at the amounts, signaling that those historical awards were low. The Board determined that damage awards by courts or juries for violations of state or federal anti-discrimination rights statutes or in analogous tort actions (e.g., violation of privacy rights) are instructive when setting damage awards in environmental whistleblower statutes:

We emphasize that there is no arbitrary upper limit on the amount of compensatory damages that may be awarded under the whistleblower protection provisions enforced by the Department; indeed, as a practical matter, exclusive reliance on damage awards in prior whistleblower cases easily could result in the level of compensatory damages becoming frozen in time, ignoring even such basic factors as inflation a result that would be inconsistent with the statutory mandate that the victims of unlawful discrimination be compensated for the fair value of their loss.\textsuperscript{324}

Unfortunately, this says nothing about how to make such awards part of the record; presumably the employee proves those verdicts or awards at trial.

\textit{E. Exemplary Damages}

The remedies under the ERA are comprehensive, but "do not include punitive damages."\textsuperscript{325} They have been denied as unauthorized

\begin{footnotes}
\item[323]\textit{Blackburn}, 1986-ERA-4; McCuistion v. Tenn. Valley Auth., 1989-ERA-6 (Sec'y Nov. 13, 1991).
\end{footnotes}
Similarly, two district courts have held that the SOX statute does not include punitive damages.  

Only the Safe Drinking Water Act and the Toxic Substances Control Act permit punitive damages. The Board applies the standard found in the Restatement 2nd of Torts § 908: punitive damages are appropriate when the employer has shown callous indifference to the legal rights of others. They "serve in punishment for wanton or reckless conduct to deter such conduct in the future." Violation of either Act in itself is not enough. "If the purposes of the statute can be served without resort to punitive measures, the Board does not award exemplary damages."

F. Equitable-type Relief

The Secretary’s remedies may also include orders requiring posting, located prominently at the workplace, of an order finding a violation of the employee protection statute(s) and the steps the employer is undertaking to follow the law in the future. This type of remedy is often an aspect of the relief granted in NLRA cases. The Secretary may order further actions to eradicate discrimination, including training of managers in their duties under the whistleblower acts to avoid future violations, or changes to the employer's written policies (e.g., rescission of a policy that required employees to notify the company of all contacts with state and federal officials). These

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329. Jones v. EG&G Defense Materials, Inc., ARB No. 97-129, No. 1995-CAA-3, slip op. at 24-25 n. 20 (Sec. Final Dec. and Order Sept. 29, 1998) (citing White v. Osage Tribal Council, No. 95 SDW-1, ARB, Decision and Order of Remand, slip op. at 10 (ARB Aug. 8, 1997) (rejecting exemplary damage award where the Board “fully expects future compliance” with the Safe Drinking Water Act)). See also Leveille v. N.Y Air Nat’l Guard, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4, slip op. at 6 (Decision and Order on Damages ARB Oct. 25, 1999) (affirming the judge's finding that the colonel in the Air National Guard who gave two negative employment references about the complainant harbored no intent to harm her and did not act with reckless disregard for her rights).
330. When the OSHA investigation finds in favor of an employee, the proposed order granting relief often includes an example of the notice to be posted.
orders do not usurp the equity powers of Article III courts, they implement the Secretary’s statutory obligation to abate the discrimination.

G. Litigation Expenses

All the Department’s whistleblower statutes provide that prevailing employees will recover their costs, expenses, expert witness fees and attorney’s fees. The availability of fee reimbursement leads some employees to choose the Department of Labor’s administrative forum over the whistleblower remedies available in some state courts. The liabilities for litigation expenses are not reciprocal. Employers are not awarded fees automatically when a whistleblower claim fails.

A fee petition must detail the work performed, the time spent on the work, and the hourly rate sought for the lawyers and other professionals (e.g., paralegals, experts, etc.). The presumptive fee is the appropriate hourly rate times the hours reasonably devoted to the litigation, known as the lodestar amount.

No enhancement of the lodestar amount for contingency arrangements is permitted. City of Burlington v. Dague was a case brought before the United States Supreme Court. Though Dague was not a whistleblower case, it involved a fee award under federal environmental protection statutes. As outlined in Dague, the principle of not enhancing fees for contingency applies to all federal fee-shifting statutes.

Under some whistleblower acts, unsuccessful complainants may be required to pay small fee awards to the employer if the complaint is

331. See, e.g., 29 C.F.R. § 24.1-.9 (2004), referring to fees “reasonably incurred.”
332. Id.
333. Id.
334. Id.
335. For detailed coverage of attorneys’ fee issues, see generally ALBA CONTE, ATTORNEY FEE AWARDS (3d ed. West 2004).
336. See id.
338. Dague, 505 U.S. at 557.
339. See id.
“frivolous or has been brought in bad faith.” Generally, these fees are no more than $1,000. Under the Senate version of the AIR 21, bill fee awards of up to $5,000 might have been made against employees who brought “frivolous complaints,” evaluated under the standard used in Rule 11 of the Federal Rules of Civil Procedure. The Conference Report did not accept the Senate position; rather, it reduced the maximum fee amount to $1,000 and referred only to frivolous complaints without incorporating the Rule 11 standard.

Applying the Conference Report language, a judge denied an employer’s fee request after he dismissed all the substantive claims in a SOX case. He found that the complaint and the employee’s conduct during the litigation failed to show the employee had been “motivated by animus, bad faith, or a desire to vex [the employer].” Though this is not the precise verbal formulation the SOX regulations prescribe, it is substantially the same.

V. A FEW PROCEDURAL MATTERS

A. Whistleblower Complaints

Written complaints are required and must be filed at the local Wage and Hour Division or with OSHA. The employee need not prepare the complaint personally; the investigator’s memorandum of an interview with the claimant is enough of a writing to qualify. As informal pleadings, complaints need not set out every element of a claim, and

341. § 42121(b)(2)(C).
344. Id.
345. Id.; see also Reddy v. Medquist, Inc., ARB No. 04-123, No. 2004-SOX-35 (ALJ Sept. 30, 2005) (awarding no fees against the complainant who made an arguable but unsuccessful showing that the SOX Act applied to a claim of insider trading).
may be amended liberally during the course of a proceeding. The OSHA Regional Administrator issues a determination upholding or dismissing the complaint when the investigation is completed.

B. The Administrative Review Board

For many years, the Secretary directly reviewed whistleblower decisions by administrative law judges. The Administrative Review Board was created in May of 1996 to issue final decisions on the Secretary’s behalf. Those review decisions, whether by the Secretary before 1996 or by the Board thereafter, bind ALJs.

The administrative law judge prepares what the federal APA refers to as a “recommended decision” in whistleblower cases. The Board reviews the recommended decisions in nuclear and environmental, AIR 21, SOX and Pipeline Safety matters only if a party files a timely petition for review. The judge’s decision in those cases actually functions as an “initial decision,” and becomes final on its own unless the Board affirmatively accepts it for review. This is analogous to a Decision and Order in a Longshore and Harbor Workers’ Compensation Act case. This is also an “initial” decision that has legal effect unless modified or reversed by the Department’s other appellate body: the Benefits Review Board.

351. See AIR 21 Act, § 42121(b)(3)(C); SOX Regulations, 29 C.F.R. § 1980.109(b) (2004); Pipeline Safety Act, § 60129(b)(3)(C).
352. See 5 U.S.C. § 557(b) (2001); see also 29 C.F.R. § 24.7(d) (2004) (nuclear and environmental); 1979.109(c)-.110(b) (AIR 21), 1980.109(c)-.110(b) (SOX), 1981.109(c)-.110(b) (Pipeline Safety) (2004).
whistleblower matters, the Board automatically reviews recommended decisions under the STAA.\textsuperscript{355}

1. The Board’s Standards of Review

a) ERA Cases

An administrative law judge’s fact finding in the nuclear and environmental whistleblower cases does not receive deferential review. In \textit{Griffith v. Wackenhut Corp.}, the Board held that "[n]either §5851 of the Energy Reorganization Act nor applicable regulations specify our standard of review. Accordingly, our review is de novo."\textsuperscript{356} The Board treats the findings of fact and conclusions of law as advisory, yet defers to a judge’s credibility determinations that are based on witness demeanor.\textsuperscript{357} The Board nonetheless must consider the judge’s findings in light of "the consistency and inherent probability of testimony."\textsuperscript{358}

Credibility findings are entitled to “special deference” because the judge "sees the witnesses and hears them testify . . . ."\textsuperscript{359} The \textit{Pogue} court reversed the Secretary’s decision in the employer’s favor when the administrative judge had found for the worker.\textsuperscript{360} The Secretary thought that the Navy (the employer) had successfully proved that it would have taken the same adverse action even in the absence of the employee’s whistle blowing under the \textit{Mt. Healthy} standard.\textsuperscript{361} The


\textsuperscript{357} Devers v. Kaiser-Hill, ARB No. 03-113, No. 01-SWD-3, slip op. at 4 (ARB Mar. 31, 2005); Shirani v. Comed/Exelon Corp., ARB No. 03-100, No. 2002-ERA-28, slip op. at 2-3 (ARB Sept. 30, 2005); Melendez v. Exxon Chems. Ams., ARB No. 96-051, No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000).

\textsuperscript{358} Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

\textsuperscript{359} Pogue v. U.S. Dept. of Labor, 940 F.2d 1287, 1289, 1291 (9th Cir. 1991) (quoting NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962)).

\textsuperscript{360} \textit{Id}. at 1289.

\textsuperscript{361} The decision involved a claim under four of the environmental whistleblower statutes (the \textit{Comprehensive Environmental Response,
appellate court remanded the claim for an assessment of the employee's damages, attorney’s fees, and entitlement to other make-whole remedies.

b) All Other Cases

Regulations prescribe that the Board review factual determinations in cases brought under STAA, AIR 21, SOX and Pipeline Safety Improvement Acts under the much more deferential “substantial evidence” standard.\textsuperscript{362}

2. Approvals of Adjudicatory Settlements by the Board or the Presiding ALJ

The presiding judge approves settlements in cases pending at the Office of Administrative Law Judges when a whistleblower acts require the Secretary’s approval.\textsuperscript{363} The environmental acts vary in their approval requirements. The Toxic Substances Control Act,\textsuperscript{364} Safe Drinking Water Act,\textsuperscript{365} and Clean Air Act\textsuperscript{366} require Secretarial review and approval of settlements, while the Federal Water Pollution Control Act, Solid Waste Disposal Act and Comprehensive Environmental Response, Compensation and Liability Act do not.\textsuperscript{367}

Where the Assistant Secretary is the prosecuting party in an STAA case, the Assistant Secretary must consent to any settlement agreements

\textsuperscript{362} See §§ 1978.109(b)(3) (STAA); 1979.110(b) (AIR 21); 1980.110(b) (SOX); 1981.110(b) (Pipeline Safety).

\textsuperscript{363} See §§ 1979.111(d)(2) (AIR 21); 1980.11(d)(2) (SOX); 1981.111(d)(2) (Pipeline Safety).


\textsuperscript{366} § 7622(b)(2)(A).

between the complainant and the employer before the Board or the
presiding judge can approve it. In the much more common situation
where the Assistant Secretary enters no appearance in the STAA
adjudication, the proper procedure for settlement approvals remains
unclear.

In *Tankersly v. Triple Crown Services, Inc.*, the judge granted an
employer's motion for approval of an adjudicatory settlement that had
been reached orally with the complainant's counsel. The
complainant attempted to renounce the agreement, but the judge found
the agreement binding even though it had not been reduced to
writing. The Secretary declined to adopt the approval order because
the record contained no written settlement agreement signed by all
parties or other memorialization of an entire agreement the parties had
consented to. The Secretary reasoned that STAA settlements are not
effective until their terms have been reviewed and found to be "fair,
adequate, and reasonable, and in the public interest." Regulations
mandate that "[a] copy of the settlement shall be filed with the ALJ or
the Administrative Review Board, U.S. Department of Labor as the
case may be." As is true for other classes of cases that require
review, settlements will not be approved unless a writing signed by all
parties is submitted, or the record clearly states the settlement terms and
contains an unequivocal declaration by the parties that they have agreed
to all of the terms.

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368. See Ass't Sec'y & Filer v. Arch Aluminum & Glass, Inc., ARB No. 2001-
370. See id.
371. Tankersly v. Triple Crown Servs., Inc , 1992-STA-8 (Sec'y Feb. 18,
1993),
372. Id.
slip op. at 2 (Order to Show Cause; Final Decision & Order June 26, 1991, petition
for review denied, No. 91-4642 (5th Cir. May 7, 1992)).
C. Hearings at the Office of Administrative Law Judges

1. Expedited Proceedings

Either party may request a de novo hearing by a judge on the complaint. Those trials are expedited proceedings. The nuclear and environmental statutes give the Secretary of Labor ninety days to conduct the hearing and issue an order after a complaint is filed.

The STAA, AIR 21 and Pipeline Safety Acts use more general language: that the hearing "shall be conducted expeditiously." The Secretary has 120 days to issue a final order after the hearing ends. The Rules of Practice and Procedure of the Office of Administrative Law Judges states that trials under those types of statutory mandates should be begin within sixty days of the request for hearing.

If the Secretary does not enter a final order within 180 days after a SOX complaint is filed, and the delay is not due to the bad faith on the complainant's part, he or she may remove it from the Secretary's jurisdiction by filing an action for de novo review in the U. S. District Court. Employers, on the other hand, have no removal rights. The SOX regulations require the complainant to file a notice with the presiding judge fifteen days before removing a case to the district court. A generally similar removal provision was included in § 629 of the Energy Policy Act of 2005; it permits ERA claimants to litigate in district court if the Secretary has not issued a final decision within one year after the complaint is filed, which is double the SOX removal period of 180 days.

The presiding judge has wide discretion to limit discovery. The judge may not impose time constraints so tight that they interfere with the parties' opportunity to have discovery or to obtain evidence to

375. § 31105(b)(2)(C) (STAA), § 42121(b)(2)(A), (AIR 21), § 60129(b)(2)(A) (Pipeline Safety).
376. Id.
378. § 1514A(b)(1)(B).
support their positions. The Board treats statutory time periods that are not backed up with a removal provision as goals, not mandates.

Despite these tight statutory time frames, lawyers who represent employees rarely want a trial so quickly. All parties commonly agree to additional time for discovery, and perhaps an attempt to settle with the aid of a settlement judge. The OALJ does accommodate parties who are ready for a prompt trial.

2. Subpoenas

None of the whistleblower statutes confer subpoena power explicitly on the Secretary of Labor or the presiding administrative law judge. The Solicitor of Labor has stated that he does not believe the Department's judges have subpoena authority. The Administrative Review Board has gone back and forth on the issue.

One law review article argues that access to subpoenas is a due process right vested in litigants rather than a power of the forum; therefore, express Congressional authorization to issue subpoenas is unnecessary.

The Board recently finessed the issue, holding that judges have the authority to require a party opponent to produce materials, saying:

In regard to a complaint filed under the employee protection provisions of a number of the environmental protection statutes that are also administered by the Department of Labor, a Federal District Court recently held that an administrative law


judge does not have authority to issue a subpoena without a specific statutory grant of such authority. [citation omitted]. Regardless of whether the ALJ is authorized to issue subpoenas pursuant to the STAA, he clearly does have the authority to take measures to compel production pursuant to [29 C.F.R.] sections 18.6(d) and 18.21 [of the Office of Administrative Law Judges’ rules of procedure].

As a practical matter, the Board’s decision in Childers v. Carolina Power & Light Co. gives administrative law judges adequate authority to issue a subpoena to third parties at a litigant’s request. Typically, it is honored without questioning the subpoena authority. The regular exceptions, however, are other federal agencies.

In Bobreski v. EPA, a worker who had been fired after he complained to the EPA about a water treatment facility brought whistleblower protection claims to OSHA under six environmental acts. At the Office of Administrative Law Judges, the presiding judge issued a subpoena for the testimony of the EPA investigator at the complainant’s request. The EPA prohibits investigators from testifying as a matter of policy, as it may under the U. S. Supreme Court decision in Touhy v. Ragen. The agency offered to provide its investigator’s affidavit. The complainant went to district court to compel the EPA to honor the subpoena issued by the Office of Administrative Law Judges. The District Judge found that Congress had not vested administrative law judges with subpoena power in any of the environmental whistleblower acts. Because five of those six acts gave some type of subpoena authority elsewhere in those acts, the court regarded the absence of subpoena power in whistleblower

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387. Id.
390. See id.
adjudication portions of the laws as an intentional Congressional choice and denied enforcement of the subpoena.\textsuperscript{391}

3. Trial Evidence

The regulations at 29 C.F.R. § 24.5(e)(1) provide that the general rules of evidence published in OALJ’s Rules of Practice and Procedure\textsuperscript{392} do not govern claims under the nuclear and environmental whistleblower acts.\textsuperscript{393} The OALJ Rules of Evidence follow the Federal Rules of Evidence closely, and broadly authorizing judges to exclude relevant evidence for "undue delay, waste of time, or needless presentation of cumulative evidence."\textsuperscript{394} In contrast, 29 C.F.R. § 24.5(e)(1) excludes relevant matter only when it is "unduly repetitious."\textsuperscript{395} The Board found this narrower rule "accord[s] with Section 7(c) of the APA, 5 U.S.C. § 556(d)" and is "consistent with the nature of the evidence presented in a circumstantial evidence case of retaliatory intent, some of which may appear to be of little probative value until the evidence is considered as a whole . . . ."\textsuperscript{396}

More than a year later, in the comments to the amended final regulations implementing the Energy Policy Act of 1992, the Secretary stated that the facts are best evaluated when employees, who may appear \textit{pro se}, are not required to present their proof according to strict evidentiary rules.\textsuperscript{397} Hearsay evidence often is appropriate proof when there may be no relevant documents or witnesses to prove discriminatory intent.\textsuperscript{398} Administrative law judges must determine the appropriate weight of that evidence.

\textsuperscript{391} \textit{Id.; see also} Immanuel v. Dep't of Labor, 139 F.3d 889 (4th Cir. 1998) (per curiam) (concluding that in enacting the Water Pollution Control Act Congress did not intend to authorize judges to issue subpoenas, but the judge may require the employer to produce witnesses under its control).

\textsuperscript{392} 29 C.F.R. § 18, subpart B.


\textsuperscript{394} 29 C.F.R. § 18.403 (2004).

\textsuperscript{395} 29 C.F.R. § 24(e)(1) (2004).

\textsuperscript{396} \textit{Seater}, 1995-ERA-13, slip op. at 5 n.8.

\textsuperscript{397} \textit{See} 63 Fed. Reg. 6614, 6619 (Feb. 9, 1998).

\textsuperscript{398} \textit{Id.}
Like the nuclear and environmental whistleblower regulations, the AIR 21, SOX and Pipeline Safety Act regulations adopt only subpart A of OALJ's Rules of Practice and Procedure. The formal rules of evidence published in subpart B of OALJ's Rules of Practice and Procedure were not adopted.\(^{399}\) Judges may exclude "immaterial, irrelevant and unduly repetitious" evidence, and are to apply "rules or principles designed to assure the production of the most probative evidence."\(^{400}\)

The SOX regulations follow the AIR 21 regulations because the text of the SOX statute incorporates by reference AIR 21's "rules and procedures."\(^{401}\)

The STAA evidence regulations, unlike those for all other whistleblower acts, adopt OALJ's Rules of Practice and Procedure at 29 C.F.R. Part 18 in their entirety, incorporating with them the Rules of Evidence in subpart B.\(^{402}\) This means that the cases in which the employee is least likely to be represented by a lawyer, the most formal evidence rules apply.

VI. CONCLUSION

The substantive and procedural law that applies to whistleblower protection claims the Secretary of Labor adjudicates bear many similarities to retaliation claims under Title VII, and to several other employee protection statutes that share a common heritage with the whistleblower acts. There are important differences in the text of the many statutes the Secretary of Labor administers, especially with regard to burden shifting and the remedies available to successful complainants. Adjudicators and practitioners must ascertain their circuit's view about what constitutes direct evidence of discrimination that obviates the use of the *McDonnell Douglas* burden-shifting framework for the presentation and analysis of evidence. In addition, language in the Secretary's regulations that implement the whistleblower act at issue demands careful attention. Familiarity with


the OALJ Rules of Practice and Procedure and the controversy over availability of subpoenas in these adjudications will be important points to consider in preparing these claims for trial.