**STATEMENT OF RICHARD E. FAIRFAX, DIRECTOR**
**DIRECTORATE OF ENFORCEMENT PROGRAMS**
**OCCUPATIONAL SAFETY AND HEALTH ADMINSTRATION**
**U.S. DEPARTMENT OF LABOR**
**BEFORE THE**
**SUBCOMMITTEE ON WORKFORCE PROTECTIONS**
**COMMITTEE ON EDUCATION AND LABOR**
**UNITED STATES HOUSE OF REPRESENTATIVES**

**May 15, 2007**

Good morning Chairwoman Woolsey, Ranking Member Wilson, distinguished Members of the Subcommittee, ladies and gentlemen. My name is Richard Fairfax. I have worked for OSHA for 29 years. Currently I am the Director of Enforcement Programs, for which I coordinate the agency's Federal inspection efforts. I have served in this position since 1998. Thank you for the opportunity to appear before you today to speak to you about OSHA's administration of the whistleblower provisions of fourteen statutes.

## Organization and Responsibilities

When the Occupational Safety and Health Act became law in 1970, Section 11(c) complaints were investigated by Compliance Safety and Health Officers in the field. By 1974, it had become apparent that specialized skills were needed to conduct retaliation investigations, and in 1975, a central whistleblower investigation office was established. This office consisted of two supervisors and ten investigators, all located in the ten regional offices around the country. By 1980, there were over 70 investigators and supervisors. In 1981, the whistleblower program was further decentralized, with responsibility delegated to each of the ten Regional Administrators. Currently, the whistleblower program employs 72 full-time field investigators, nine supervisors, and one program manager in the field.

Under my direction, the Office of Investigative Assistance (OIA) develops policies and procedures for all 14 whistleblower statutes administered by OSHA, administers appeals of cases dismissed under 11(c), the Asbestos Hazard Emergency Response Act of 1986 (AHERA), and the International Safe Container Act (ISCA), develops and presents formal training for Federal and State field staff, and provides technical assistance and legal interpretations to field investigative staff. OIA employs six staff.

Twenty-three of the twenty-six states that operate state plans pursuant to Section 18 of the Occupational Safety and Health Act of 1970 provide whistleblower protection that is as effective as that under Section 11(c) of the Occupational Safety and Health Act of 1970. Section 18 provides that any state that desires to assume responsibility for development and enforcement of occupational safety and health standards may do so. To establish a state plan, a state must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Private-sector employees in state plan states may file occupational safety and health retaliation complaints with either federal OSHA or the state or both. Complaints under any of the other thirteen whistleblower statutes administered by OSHA fall under the jurisdiction of Federal OSHA.

**History of Delegation of Statutes to OSHA**

In the 1980s and 1990s, because of the expertise of the OSHA retaliation investigators, whistleblower investigative and administrative responsibilities under the Surface Transportation Assistance Act of 1982 (STAA), ISCA, and AHERA were delegated to OSHA to administer. For similar reasons, in 1997, under an agreement with the Department's Wage & Hour Division, the enforcement of the whistleblower provisions of six environmental statutes and the nuclear safety statute, the Energy Reorganization Act (ERA), was delegated to OSHA.

In 2001, the enforcement of the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) was added, and in 2002, the enforcement of the whistleblower provisions of the Sarbanes-Oxley Act (SOX) and the Pipeline Safety Improvement Act of 2002 (PSIA) was also added.

**The Fourteen Whistleblower Statutes Administered by OSHA**

OSHA administers the whistleblower provisions of fourteen statutes. The general provisions of these statutes are administered and enforced by the primary agency. For example, OSHA enforcement officers investigate the safety or health complaints which could underlie a whistleblower complaint, the FAA investigates airline safety complaints, the Federal Motor Carrier Safety Administration investigates commercial motor carrier safety complaints, and the SEC investigates allegations of corporate fraud. (A chart containing the statutes and their coverage and filing and appeal deadlines is appended to this document.)

- Section 11(c) of the Occupational Safety & Health Act of 1970 (OSH Act), 29 USC §660(c), provides protection for employees who exercise a variety of rights guaranteed under the Act, such as filing a safety or health complaint with OSHA, participating in an inspection, etc. Covered employees have 30 days to file complaints.
- Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 USC §2651, provides protection for individuals who report violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or non-profit private. Covered employees have 90 days to file complaints.
- Section 322 of the Clean Air Act, Amendments of 1977 (CAA), 42 USC §7622, provides protection for employees who report potential violations regarding air emissions from area, stationary, and mobile sources. Covered employees have 30 days to file complaints.
- Section 10 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC §9610, also known as the "Superfund" Act, provides protection for employees who report potential violations regarding clean up of uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Covered employees have 30 days to file complaints.
- Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 USC §5851, provides protection for employees who report potential violations of the ERA or of the Atomic Energy Act of 1954. Covered employees have 180 days to file complaints.
- Section 507 of the Federal Water Pollution Control Act, Amendments of 1972 (FWPCA), 33 USC §1367, also called the Clean Water Act, provides protection for employees who report potential violations regarding discharges of pollutants into the waters of the United States. Covered employees have 30 days to file complaints.
- Section 7 of the International Safe Container Act of 1977 (ISCA), 46 USC §80507, provides protection for employees who report an unsafe intermodal cargo container. Covered employees

have 60 days to file complaints.

- Section 6 of the Pipeline Safety Improvement Act of 2002 (PSIA), 49 USC §60129, provides protection for employees who report violations of federal law regarding pipeline safety and security or who refuse to violate such provisions. Covered employees have 180 days to file complaints.
- Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 USC §31105, provides protections for drivers and other employees relating to the safety of commercial motor vehicles. Commercial motor vehicles are all vehicles designed to carry more than 10 passengers, including the driver; vehicles placarded for hazardous material; and freight trucks with a gross vehicle weight or gross vehicle weight rating of 10,001 or more pounds. Covered employees have 180 days to file complaints.
- Section 1450 of the Safe Drinking Water Act of 1974 (SDWA), 42 USC §300j-9(i), provides protection for employees who report potential violations regarding all waters actually or potentially designed for drinking use, whether from above ground or underground sources. Covered employees have 30 days to file complaints.
- Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA), 42 USC §6971, also called the Resource Conservation and Recovery Act (RCRA), provides protection for employees who report potential violations regarding the disposal of solid and hazardous waste at active and future facilities, see CERCLA for abandoned or historical sites. Covered employees have 30 days to file complaints.
- Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 USC §1514A, provides protection for employees who report potential violations of mail, wire, bank, or securities fraud, any Securities and Exchange Commission regulation, or any other federal law relating to fraud against shareholders. Covered employees have 90 days to file complaints.
- Section 23(a)(1-3) of the Toxic Substances Control Act (TSCA), 15 USC 2622, provides protection for employees who report potential violations regarding 75,000 industrial chemicals currently produced or imported into the United States. Covered employees have 30 days to file complaints.
- Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 USC §42121, provides protection for employees who report potential violations of air carrier safety. Covered employees have 90 days to file complaints.

**Jurisdiction**

Investigators must confirm that complaints fall under a whistleblower statute administered by OSHA. Investigators review every new case upon assignment to ensure the complaint was timely filed, that a *prima facie* allegation is present under one of the statutes, and that the case has been properly docketed and all parties notified. The investigator also checks on prior or current retaliation, safety and health, or other regulatory cases related to either the complainant or the employer. This enables the investigator to coordinate related investigations and obtain additional background information pertinent to the case at hand. If the complaint fails to meet any of the

elements of a *prima facie* allegation, or if coverage issues preclude the continuation of the investigation, the complaint must be dismissed, unless it is withdrawn.

**The Elements of a Violation**

Under the whistleblower statutes, employers are not permitted to retaliate against an employee for engaging in activities protected by statute. To prove a violation, each of the four elements of a *prima facie* allegation must be established. The elements are:

Protected Activity

It must be established that the complainant engaged in activity protected by the specific statute(s) under which the complaint was filed. Protected activity generally falls into four broad categories: providing information or reporting an alleged violation of the law to a government agency (e.g., OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, DOT), a supervisor (the employer), a union, health department, fire department, Congress, or the President; filing a complaint or instituting a proceeding provided for by law, for example, a formal occupational safety and health complaint to OSHA under Section 8(f); testifying in proceedings; and, under some of the statutes, refusing to perform an assigned task on the basis of a reasonable apprehension of death or serious injury or refusing to perform a task that is deemed illegal under the substantive statute.

Employer Knowledge

The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity. For example, a respondent manager need not have specific knowledge that the complainant contacted a regulatory agency if the complainant's previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant.

Adverse Action

The evidence must demonstrate that the complainant suffered some form of *adverse employment action* initiated by the employer. Although the language of the statutes may differ, they frequently use the terms "discharge or otherwise discriminate." The phrase *adverse employment action* has been defined in the decisions of many courts, including the Supreme Court. This is an area of the law that is currently in flux, and investigators and supervisors regularly review decisions to keep up-to-date on case law. Examples of retaliatory employment actions include, but are not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire or recall, failure to promote, blacklisting, transfer to a different job, change in duties or responsibilities, denial of overtime, reduction in pay, denial of benefits, and constructive discharge, wherein the employer *deliberately* creates working conditions that are so difficult or unpleasant that a reasonable person in the employee's situation would feel compelled to resign.

Nexus

A causal link—nexus—between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence, such as animus (exhibited animosity)

toward the protected activity. It may also be shown by indirect or circumstantial evidence, such as the proximity in time between the protected activity and the adverse action or the disparate treatment of the complainant in comparison to other similarly situated employees.

Under ten of the statutes administered by OSHA, a complainant must establish by a preponderance of the evidence that the alleged adverse action was motivated by the alleged protected activity in order to establish that the law was violated. Under four of the statutes, a complainant must establish by a preponderance of the evidence that the alleged protected activity was a contributing factor to the alleged adverse action. Once a complainant establishes a prima facie case that his or her protected activity was either a motivating or contributing factor in the adverse action, the burden of production shifts to the respondent to articulate a non-retaliatory reason for the adverse action. If this is done, the burden then shifts back to the complainant to establish that the respondent's articulated reason was a pretext for discrimination or that the respondent's reason, while true, is only one of the reasons for its conduct, and that another reason was complainant's protected activity. To avoid liability in a "mixed motive" case, the respondent must demonstrate, depending on the statute, either by a preponderance of the evidence or by clear and convincing evidence, that it would have taken the same adverse action notwithstanding the complainant's protected activity.

**Investigating Complaints**

DOL investigators are not advocates for either the complainant or the respondent; rather, as neutral fact-finders, they must assess both the complainant's allegation and the respondent's non-retaliatory reason for the alleged adverse action. It is on this basis that relevant and sufficient evidence is identified and collected in order to reach the appropriate disposition of the case. If the complainant is unable to demonstrate by preponderance of the evidence the elements of a *prima facie* allegation, the case is dismissed.

Early Resolution

OSHA makes every effort to accommodate situations in which both parties seek resolution prior to the completion of the investigation. An early resolution is often beneficial to both parties, since potential losses are at their minimum when the complaint is first filed. Consequently, the investigator is encouraged to contact the respondent immediately after completing the evaluation interview if he or she believes an early resolution may be possible. Thereafter, at any point the investigator can explore how an appropriate settlement may be negotiated and the case concluded.

On-site Investigation

Personal interviews and collection of documentary evidence are conducted on-site whenever practicable. Generally, investigators personally interview all appropriate witnesses during a single site visit. The respondent's designated representative has the right to be present for all management interviews, but interviews of employees are to be conducted in private. In limited circumstances, testimony and evidence may be obtained by telephone, mail, or electronically.

Interviewing the Complainant

The investigator generally arranges to interview the complainant as soon as possible to obtain a statement detailing the complainant's allegations. In some circumstances, and at the request of the complainant, the investigator may meet with the complainant at the latter's home.

The complainant is asked to provide a list of witnesses and all documentation in his or her possession relevant to the case. The investigator also ascertains the restitution sought by the complainant and advises the complainant of his or her obligation to seek interim employment in order to mitigate any possible damages, and to maintain records of interim earnings.

Contact with the Respondent

Following receipt of OSHA's letter notifying the respondent of the complaint, the respondent may submit a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. However, in most cases, the investigator needs to visit the respondent's worksite to interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense.

The investigator generally interviews all company officials who had direct involvement in the alleged protected activity or retaliation, and attempts to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. While at the respondent's establishment, the investigator makes every effort to obtain copies of, or at least review and document in a memorandum to file, all pertinent data and documentary evidence that the respondent offers and that the investigator determines is relevant to the case.

If necessary, subpoenas may be obtained for testimony or records when conducting an investigation under §11(c) or AHERA. The other whistleblower provisions do not authorize subpoenas. If the respondent fails to cooperate or refuses to respond, the investigator makes a determination based on the available evidence.

Analysis

After having gathered all relevant evidence available and resolved any discrepancies in testimony, the investigator evaluates the evidence and draws conclusions based on the evidence and the law, according to the requirements of the statute(s) under which the complaint was filed.

Upon completion of the field investigation and after discussion of a non-meritorious case with his or her supervisor, the investigator again contacts the complainant in order to provide him or her the opportunity to present any rebuttal or additional evidence the complainant deems to be relevant. If the complainant offers any new evidence or witnesses, the investigator then ascertains whether such information is relevant, and if so, what further investigation might be necessary prior to final closing of the case.

Documenting the Investigation

Investigators document any and all activities associated with the investigation of a case, developing a substantial case file that contains the original complaint; the respondent's response(s); all of the documentary evidence; memoranda to the file about every contact with any party or witness that is otherwise not documented, such as in a witness statement; all correspondence to or from the parties, other government agencies, or others; results of any research conducted; the Final Investigative Report; and a copy of the Secretary's Findings or other correspondence closing the case.

Issuance of Secretary's Findings and Orders, if Appropriate

Once the Final Investigative Report is written, the investigator forwards it, together with the case file, to the supervisor for review and concurrence, so that Secretary's Findings can be issued. This allows either dismissal of the case or a finding of a violation of the relevant statute. If there is a violation, the investigator, where appropriate, broaches the subject of settlement with the respondent. If the respondent is amenable, settlement negotiations may be initiated. The appropriate remedy in each individual case will already have been carefully explored and documented by the investigator.

Remedies

The remedies available and permitted vary according to statute, and are subject to legal interpretations and decisions. Remedies not only involve corrective actions for the individual who filed the complaint, but also address the impact of the violation on the entire work force. Thus, to prevent a chilling effect or to ensure that a similar violation does not recur, orders may include requirements for posting a notice of the whistleblower statute violation, management training, and informational speeches to workers and their representatives.

Full relief of the complainant's loss is generally sought during settlement negotiations, but compromises may be considered in appropriate cases to accomplish a mutually acceptable resolution of the matter. If settlement is reached, an agreement is signed and the case is closed. If it is not possible to reach an equitable settlement, OSHA issues to the respondent, in cases heard by DOL ALJs, Secretary's Findings and an Order, by way of which the complainant is made whole. In OSHA section 11(c), AHERA, and ISCA cases, OSHA notifies respondent of its determination of a violation. Relief in those cases is requested by a complaint filed by the Secretary in federal district court. Relief may encompass any or all of the following, and it is not necessarily limited to these:

- Reinstatement or preliminary reinstatement—depending on the statute under which the complaint was filed—to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation.
- Wages lost due to the adverse action, offset by interim earnings.
- "Front pay," which encompasses future wage losses, calculated from the end-date of back-wages, and projected to an agreed-upon future date in cases where reinstatement is not feasible.
- Expungement of all warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in the complainant's personnel file or other records.
- Respondent's agreement to provide a neutral reference to potential employers of the complainant.
- Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief.
- Compensatory damages, including out-of-pocket expenses such as medical costs, expenses stemming from cancellation of a company insurance policy, expenses incurred in searching for another job, vested pension fund or profit-sharing losses, or property loss resulting from missed payments, and non-pecuniary losses including mental anguish, loss of reputation, etc.
- Punitive damages, under certain statutes.

The Surface Transportation Assistance Act of 1982, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), the Sarbanes-Oxley Act of 2002 (SOX), and the Pipeline

Safety Improvement Act of 2002 (PSIA) authorize the Secretary to order preliminary reinstatement based on her investigative findings. However, in the last few years, the Secretary and complainants have experienced some difficulty in compelling recalcitrant employers to comply with preliminary reinstatement orders issued by either OSHA or the Office of Administrative Law Judges under AIR21 and SOX. Although AIR21 (as well as SOX, by incorporating AIR21) expressly provides that the filing of objections does not stay the Secretary's preliminary order reinstating the employee, the jurisdictional provisions of the statute reference only a section entitled "final orders." Accordingly, a number of judges have held that they lack authority under the statute to enforce preliminary reinstatement orders even though the statute explicitly states that those orders are not to be stayed during the administrative adjudication. Those judges have interpreted the statute as providing the Secretary and whistleblowers with a cause of action to enforce only *final* orders of the Secretary, i.e. decisions of the DOL Administrative Review Board.

Hearings and Appeals

Many of OSHA's findings are not challenged. Complainants or respondents who object to OSHA's findings under the Energy Reorganization Act of 1974, as amended, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the Sarbanes-Oxley Act of 2002, the Pipeline Safety Improvement Act of 2002, the Surface Transportation Assistance Act of 1982, and the environmental statutes may request a *de novo* hearing before a Department of Labor Administrative Law Judge (ALJ). After a decision is issued by an ALJ, review may be sought from the Administrative Review Board (ARB), which is authorized to issue final orders of the Secretary of Labor. Depending on the whistleblower law involved, the ARB either reviews the entire ALJ decision under a *de novo* standard of review, or *de novo* on matters of law and a "substantial evidence" standard of review on the ALJ's findings of fact. Judicial review of final agency decisions is in the U.S. Courts of Appeals.

Actions under OSHA, AHERA, and ISCA are enforced by the Secretary in district court. There is no statutory right to appeal OSHA, AHERA, and ISCA determinations by OSHA. The agency-level decision is the final decision of the Secretary of Labor. However, if a complaint is dismissed by the OSHA Regional Office, the complainant may request from the Director of the Directorate of Enforcement Programs (DEP) a review of the case file. This review is not *de novo*. Rather, a committee consisting of staff of the Office of Investigative Assistance and the Office of the Solicitor's Occupational Safety and Health Division (the Appeals Committee) reviews the case file and the field's findings. If the committee agrees with the field's dismissal, the dismissal is upheld. If the investigation is found to be deficient, the case is remanded to the field to be reopened for further investigation. If the committee believes that suit should be filed, it recommends this course of action to the Regional Solicitor's Office.

**Program Performance**

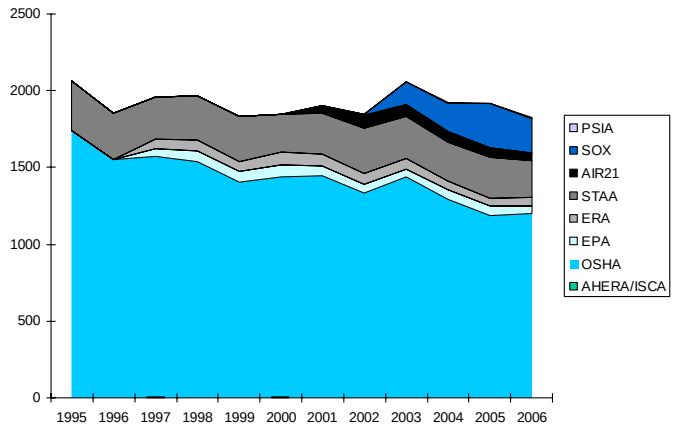
The complexity of complaints filed under the more recently enacted statutes, such as Air 21 or SOX, has resulted in lengthier OSHA investigations that can exceed the statutory timeframes.

| Statute | Statutory Timeframe | Total Cases Completed | Average Days to Complete | Percent Completed within Statutory Timeframe |
|---|---|---|---|---|
| OSHA | 90 | 1233 | 89 | 70% |
| AHERA | | 1 | 211 | 0 |
| ISCA | | n/a | n/a | n/a |
| STAA | 60 | 245 | 84 | 47% |
| AIR21 | | 54 | 121 | 20% |
| SOX | | 249 | 150 | 27% |
| PSIA | | 7 | 84 | 29% |
| ERA | 30 | 53 | 143 | 6% |
| CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA | | 57 | 102 | 18% |

**Average Days to Complete Investigations, Compared to Statutory Timeframes**

This discrepancy between the timeframes prescribed in the statutes and agency practice is not limited to the investigative stage. The Office of Administrative Law Judges and the Administrative Review Board face the same challenges. Indeed, two years ago, when Congress amended the Energy Reorganization Act of 1974 (ERA), it added, among other things, a "kick-out" provision allowing complainants to remove a case to U.S. District Court if the Department of Labor failed to issue a final decision within a year, so long as the delay is not due to the bad faith of the complainant. Although the ERA amendments in 2005 did not change the statutory 90-day timeframe for issuing final decisions, we believe that in setting a one-year timeframe for removal to district court, Congress recognized that it is often necessary for the Department to take up to one year to complete the investigatory and adjudicative processing of a whistleblower complaint under the ERA.

Despite the increased numbers of statutes and increasing numbers of complaints filed under the newer statutes, the total number of complaints filed annually remains relatively steady at 1,800 to 2,100 complaints per year. However, the proportion of the more complex cases has grown in relation to the simpler cases under the other statutes (see graph below).



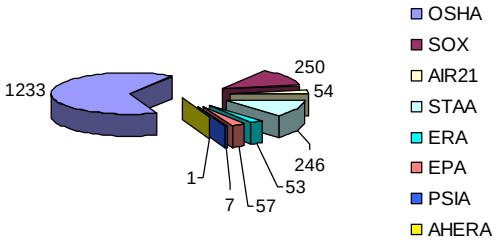

**Cases Received from Fiscal Year 1995 through 2006**

The outcomes of complaints received under all of the statutes for the past ten years are summarized in the table below.

| Calendar Year | Cases | | Outcomes | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Cases Received | Complaints Completed | Withdrawn | Dismissed | Merit Findings Issued | Settled by OSHA | Settlement approved by OSHA | Average Days to Complete |
| **1998** | 1928 | 2072 | 375 | 1165 | 66 | 413 | 53 | 84 |
| **1999** | 1845 | 1782 | 255 | 1032 | 78 | 367 | 50 | 100 |
| **2000** | 1853 | 1951 | 231 | 1184 | 69 | 415 | 52 | 108 |
| **2001** | 1869 | 2076 | 316 | 1277 | 107 | 325 | 51 | 110 |
| **2002** | 1913 | 1886 | 246 | 1204 | 78 | 293 | 65 | 95 |
| **2003** | 2059 | 2164 | 280 | 1391 | 86 | 260 | 147 | 106 |
| **2004** | 1869 | 2028 | 228 | 1385 | 52 | 253 | 110 | 103 |
| **2005** | 1936 | 1911 | 245 | 1276 | 37 | 262 | 91 | 107 |
| **2006** | 1865 | 1936 | 261 | 1240 | 29 | 294 | 112 | 102 |
| **Jan-March 2007** | 464 | 417 | 54 | 289 | 7 | 64 | 19 | 101 |

## Fiscal Year 2006 Performance

OSHA received 1,825 cases in fiscal year 2006. The chart below represents cases completed in fiscal year 2006, broken out by statute.




**Complaints Completed in Fiscal Year 2006**

The outcomes of OSHA's investigations for fiscal year 2006 are consistent with those of the past five or more years. The results do not vary more than five percentage points from year to year. Twenty-two percent of the investigations resulted in a disposition favorable to the complainant ("merit" cases). Of these, 66% were settled by OSHA, 28% were settled by the parties themselves, and in the remainder—7%—OSHA issued findings or preliminary orders in favor of complainants. In addition, 65% were dismissed, and 14% were withdrawn. Generally, investigations leading to dismissal of claims entail as much work and last as long as those leading to findings of violations. OSHA does not track the length of investigations broken out by findings of merit or non-merit.

The State Plan States had similar results with their 11(c)-type complaints in fiscal year 2006—60% were dismissed; 20% withdrawn; and 20% were meritorious, of which 75% were settled.

**Fiscal Year 2007 Performance**

In the first half of fiscal year 2007, we have received 916 cases and completed 856 investigations, with an average of 107 days in length per investigation. Sixty-six percent of those complaints were dismissed, 12% were withdrawn, 2% were found to be meritorious (that is, merit findings were issued), 15% were settled by OSHA, and 5% were settled by the parties and approved by OSHA.

**Conclusion**

I hope that my testimony has shed some light on the complex process by which whistleblower complaints are resolved. Not only do our investigators juggle the competing demands of numerous open cases at any one time, they must have knowledge and expertise in applying numerous related statutes and implementing regulations (beyond the 14 whistleblower statutes and their particular implementing regulations). Investigators must know the parlance of, for example, federal criminal fraud statutes, federal securities laws and regulations, Federal Aviation Administration regulations, other Department of Transportation regulations, Nuclear Regulatory Commission regulations and many others.

I look forward to answering any questions you might have.

# Occupational Safety and Health Administration
# Office of Investigative Assistance
# Whistleblower Statutes

| Acts | Days to file | Form of filing | Employees covered | Days to appeal |
|---|---|---|---|---|
| **Section 11(c) of the Occupational Safety & Health Act of 1970 (OSHA).** [29 USC §660(c)] Section 11(c) protection for employees who exercise a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA, participating in an inspection, etc. | 30 | Any | Private sector<br>U.S. Postal Service | 15 |
| **Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA).** [15 USC §2651] protection for individuals who report violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or private. | 90 | Any | Public and private sector | 30 |
| **Section 7 of the International Safe Container Act of 1977 (ISCA).** [46 App USC §1506] protection for employees who report an unsafe intermodal cargo container. | 60 | Any | Private sector | 30 |
| **Section 405 of the Surface Transportation Assistance Act of 1982 (STAA).** [49 USC §31105] protections for drivers and other employee relating to the safety of commercial motor vehicles. Coverage includes all buses (for hire), hazardous material vehicle placarded, and freight trucks with a gross vehicle weight of 10,001 pounds. | 180 | Any | Private sector performing duties related to transporting hazardous material, freight, or people over the road | 30 |
| **Section 1450 of the Safe Drinking Water Act of 1974 (SDWA).** [42 USC §300j-9(i)] protection for employees who report potential violations regarding all waters actually or potentially designed for drinking use, whether from above ground or underground sources. | 30 | Written | Private sector<br>City, county, state, municipal and federal | 30 |
| **Section 507 of the Federal Water Pollution Control Act, Amendments of 1972 (FWPCA).** [33 USC §1367] Also called the Clean Water Act, protection for employees who report potential violations regarding discharges of pollutants into the waters of the United States. | 30 | Written | Private sector<br>City, county, state, municipal and federal | 30 |
| **Section 23(a)(1-3) of the Toxic Substances Control Act (TSCA),** [15 USC 2622] protection for employees who report potential violations regarding 75,000 industrial chemicals currently produced or imported into the United States. | 30 | Written | Private sector<br>City, county, state, municipal and federal | 30 |
| **Section 23 of the Toxic Substances Control Act of 1976 (TSCA).** [15 USC §2622] protection for employees who report potential violations regarding industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA). | 30 | Written | Private sector, city, county, state, municipal and federal | 5 |

| Acts | Days to file | Form of filing | Employees covered | Days to appeal |
|---|---|---|---|---|
| **Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA).** [42 USC §6971] Also called the Resource Conservation and Recovery Act (RCRA). protection for employees who report potential violations regarding the disposal of solid and hazardous waste at active and future facilities, see CERCLA for abandoned or historical sites. | 30 | Written | Private sector<br>City, county, state, municipal and federal | 30 |
| **Section 322 of the Clean Air Act, Amendments of 1977 (CAA).** [42 USC §7622] protection for employees who report potential violations regarding air emissions from area, stationary, and mobile sources. | 30 | Written | Private sector<br>City, county, state, municipal and federal | 30 |
| **Section 10 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).** [42 USC §9610] a.k.a. "Superfund," protection for employees who report potential violations regarding clean up of uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. | 30 | Written | Private sector<br>City, county, state, municipal and federal | 30 |
| **Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended,** [42 USC §5851] protection for employees who report potential violations of the ERA or the Atomic Energy Act of 1954. | 180 | Written | Employees of nuclear licensees, Nuclear Regulatory Commission, Department of Energy and their contractors and subcontractors | 30 |
| **Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).** [49 USC §42121] protection for employees who report potential violations of air carrier safety. | 90 | Written | Private sector employees of a commercial air carriers and its contractors and subcontractors | 30 |
| **Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX).** [18 USC §1514A] protection for employees who report potential violations of mail, wire, or bank fraud, or the Securities Exchange Act or any other federal law relating to fraud against shareholders. | 90 days | Written | Private sector employees of companies registered under §12 or required to report under §15(d) of the SEA and their contractors and subcontractors | 30 |
| **Section 6 of the Pipeline Safety Improvement Act of 2002 (PSIA)**. [49 USC §60129] protection for employees who report violations of federal law regarding pipeline safety and security or who refuse to violate such provisions. It includes a provision for levying up to $1,000 civil penalties against the employer. | 180 days | Written | Private sector employees of a pipeline facility, their contractors and subcontractors, and city, county, state, and municipal employees | 60 |