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Knox v. United States Department of Labor: The Potentially Risky Business of Interpreting Asbestos Statutes

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2007]

KNOX v. UNITED STATES DEPARTMENT OF LABOR:
THE POTENTIALLY RISKY BUSINESS OF
INTERPRETING ASBESTOS STATUTES

I. INTRODUCTION

Before learning of the serious health risks asbestos poses, various industries used asbestos as insulation due to its usefulness as a pliable, flame and acid resistant material.¹ The resulting health risks from exposure to asbestos, including lung cancer and lung disease, are generally referred to as “asbestos disease.”² Unfortunately, the lung cancer form of asbestos disease known as mesothelioma may remain undetected for many years after asbestos exposure, thereby complicating the causation element of a litigation claim.³

Asbestos is found in the most unsuspecting workplaces and has a potentially dangerous ripple effect that can endanger family members of the employees exposed.⁴ To help prevent further exposure to the potentially deadly asbestos disease, the Clean Air Act (CAA) includes a whistleblower provision.⁵ In general, the whistleblower provision protects employees who take part in a “protected activity,” a term that is defined according to the particular danger that is to be prevented.⁶ With respect to asbestos, the whistleblower provision specifically protects employees who report the existence of asbestos in the workplace and whose employers un-

1. See Asbestos Resource Center, What is Asbestos?, <http://www.asbestosresource.com/asbestos/> (last visited Jan. 17, 2007) (providing information on asbestos, asbestos disease, asbestos litigation and products commonly containing asbestos). These products include “thermal insulation, fire proofing, electrical insulation, building materials [and] brake linings.” *Id.*

2. See Asbestos Resource Center, Asbestos Disease, <http://www.asbestosresource.com/disease/> (last visited Jan. 17, 2007) (describing harmful effects of two common forms of asbestos disease, non-cancerous asbestosis and cancerous mesothelioma).

3. See *id.* (stating possibility for mesothelioma to be undetectable for years after exposure). Latency time is “ten to sixty years.” *See id.*

4. See Asbestos Resource Center, Asbestos Exposure: Occupations at Risk, <http://www.asbestosresource.com/asbestos/exposure.html> (last visited Jan. 17, 2007) (listing wide range of trades subject to asbestos exposure).

5. See 42 U.S.C. § 7622(b) (2006) (providing statutory requirements for employees filing whistleblower suits); see also *Knox v. U.S. Dep’t of Labor*, 434 F.3d 721, 724 (4th Cir. 2006) (citing *Sasse v. U.S. Dep’t of Labor*, 409 F.3d 773, 779 (6th Cir. 2005)) (explaining that whistleblower provision provides employees right to sue employers who retaliate against employees engaging “in [] protected activity”).

6. See 42 U.S.C. § 7622(a) (enumerating employee actions considered “protected activity”).

fairly retaliate through wrongful discharge or employment discrimination.⁷

In *Knox v. United States Department of Labor (Knox)*,⁸ the Fourth Circuit carefully considered the appropriate standard that should be applied in determining whether an employee's action is a protected activity in an asbestos lawsuit.⁹ The court concluded that the standard should be one of reasonable belief that asbestos was, or was likely to be, "emitted into the ambient air" due to the existence of work practice standards and not of proper conveyance of the reasonable belief to the employer.¹⁰ In concluding that William T. Knox (Mr. Knox) was engaged in a protected activity, the court explained that the Administrative Review Board's (ARB) determination that the employee's action was not a protected activity was based on an incorrectly applied standard.¹¹

This Note examines the proper standard to apply when determining whether an employee's action is a "protected activity" under the CAA's whistleblower provision.¹² Section II discusses the facts the Fourth Circuit considered in reaching its conclusion in *Knox*.¹³ Section III provides the following: (1) the background information on the CAA and the purpose of the whistleblower provision; (2) the Environmental Protection Agency's (EPA) right to establish work practice standards; (3) the procedural posture in bringing a claim for a violation of the whistleblower provision; and (4) the appropriate standard to apply in finding whether an employee is engaged in a "protected activity."¹⁴ Section IV details the Fourth Circuit's examination of the case.¹⁵ Section V examines the quality of the

7. See *id.* (prohibiting discharge against employees). The whistleblower provision also prohibits discrimination "with respect to [] compensation, terms, conditions, or privileges of employment." *Id.*

8. 434 F.3d 721 (4th Cir. 2006).

9. See *id.* at 723-25 (trying to reach proper standard by considering rationales behind differing conclusions of Administrative Law Judge (ALJ) and Administrative Review Board (ARB)).

10. See *id.* at 725 (concluding that Mr. Knox's observance of asbestos was protected activity).

11. See *id.* at 725 n.4 (finding ARB violated its duty to use reasoned decision-making under APA).

12. See 42 U.S.C. § 7622(a) (2006) (providing statutory requirements for employee's actions to be considered protected activity).

13. For a further discussion of the facts of *Knox*, see *infra* notes 18-33 and accompanying text.

14. For a further discussion of the CAA and the whistleblower provision, see *infra* notes 34-84 and accompanying text.

15. For a further discussion of the Fourth Circuit's examination of *Knox*, see *infra* notes 85-108 and accompanying text.

court's reasoning and analysis leading to its conclusion.¹⁶ Finally, Section VI contemplates the impact the court's decision will have on future CAA whistleblower cases.¹⁷

II. FACTS

The United States Department of the Interior (DOI) employed Mr. Knox as a training instructor, whose duties entailed acting as a "safety officer" at the National Park Service Job Corps Center (the Center).¹⁸ In December 1999, Mr. Knox first became aware of the asbestos in the Center's buildings when a United States Department of Labor Occupational Safety and Health Administration (OSHA) officer performed a safety inspection of the Center.¹⁹ Thereafter, Mr. Knox discovered an asbestos report from 1983 and an OSHA "Notice of Unsafe or Unhealthful Conditions" issued after an inspection earlier that year in January 1999.²⁰ Upon making such findings, Mr. Knox made several reports to his employer's management team about the asbestos problem from January 2000 to March 2000.²¹ After his first report, the management team "threatened to reduce his job duties and pay," and in response to the threats, he filed actions under the CAA's whistleblower provision.²²

Shortly after filing the whistleblower actions, the director of the Center fired Mr. Knox; however, he promptly rescinded the discharge upon finding that the discharge was based on improper information on the status of Mr. Knox's employment.²³ Within one month of his reinstatement, Mr. Knox filed an action with an Administrative Law Judge (ALJ) who found that his employer violated the CAA's whistleblower provision.²⁴ The employer appealed the

16. For a further discussion of the court's analysis in *Knox*, see *infra* notes 109-31 and accompanying text.

17. For a further discussion of the impact of the *Knox* decision, see *infra* notes 132-44 and accompanying text.

18. See *Knox v. U.S. Dep't of Labor*, 434 F.3d 721, 722-23 (4th Cir. 2006) (providing specific information on plaintiff's employment situation).

19. See *id.* (showing plaintiff's awareness of asbestos in workplace).

20. See *id.* (evidencing notice given to employer of asbestos in buildings).

21. See *id.* at 723 (explaining first step taken by employee to report asbestos problem).

22. See *id.* (showing that Mr. Knox specifically filed actions with Merit Systems Board, DOI Office of Special Counsel and DOI Secretary).

23. See *Knox*, 434 F.3d at 723 (explaining that employer mistakenly believed Mr. Knox was probationary employee and not permanent employee when firing Mr. Knox). After learning that Mr. Knox was a permanent employee, his employer reinstated Mr. Knox and removed references to discharge from his records. See *id.*

24. See 42 U.S.C. § 7622 (2006) (enumerating situations in which employees are protected against unlawful discharge or discrimination and explaining procedure for filing suit against employer). The present claim reached the ALJ, who

ALJ's judgment and brought the case to the Administrative Review Board (ARB), which rejected the ALJ's decision.²⁵

Although the ARB heard and acknowledged Mr. Knox's testimony that he observed asbestos near an exhaust fan, which he reasonably believed released asbestos into the "ambient air," it nonetheless dismissed Mr. Knox's claim after finding that he was not involved in a protected activity.²⁶ The ARB based its rejection of the claim after considering the following issues: (1) applying a heightened standard of properly conveying the release of asbestos into the ambient air, or "air external to buildings," and not the regularly accepted standard requiring "reasonable belief" of asbestos release and (2) strictly interpreting the CAA's use of the phrase "release into ambient air" as air necessarily having to be emitted "external to buildings" and not in the workplace.²⁷ Therefore, because Mr. Knox believed the ARB incorrectly found his actions to fall outside the scope of protected activity, he objected to the ARB's decision to dismiss.²⁸

In accordance with the Administrative Procedure Act (APA), Mr. Knox filed a petition for review with the Fourth Circuit to examine the ARB's unfavorable decision.²⁹ The APA specifically requires an administrative agency to apply the "clearly understood legal standard that [the administrative agency] enunciates in principle," thereby exercising "reasoned decisionmaking."³⁰ Accordingly, the Fourth Circuit accepted Mr. Knox's petition to determine

decided that the employer violated the CAA whistleblower provision when its agents retaliated against an employee engaged in a "protected activity." *See id.*

25. *See Knox*, 434 F.3d at 724 (providing procedural history of case to show differences in opinion regarding whistleblower claims and definition of "protected activity").

26. *See id.* at 723 (providing ARB's reason for refusing Mr. Knox's claim).

27. *See United States v. Grace*, 455 F. Supp. 2d 1172, 1175 (D. Mont. 2006) (citing *United States v. Pearson*, 274 F.3d 1225, 1234 n.11 (9th Cir. 2001)) (noting that "ambient air" excludes indoor air); *see also id.* (citing *Train v. NRDC*, 421 U.S. 60, 65 (1975)) (analyzing states' responsibility in complying with CAA standards and defining "ambient air" as "the statute's term for the outdoor air used by the general public"); *Knox*, 434 F.3d at 724 (explaining why ARB did not consider Mr. Knox's actions "protected activity" under CAA).

28. *See Knox*, 434 F.3d at 724 (providing Mr. Knox's argument that ARB's standard was incorrect).

29. *See id.* at 723-24 (citing 5 U.S.C. § 706(2)(A)-(E) (2006)) (stating procedural steps, beginning with administrative proceedings and then proceeding to federal court proceedings, if necessary). "Federal courts can overturn an administrative agency's decision only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' or 'unsupported by substantial evidence.'" *Id.* (citing 5 U.S.C. § 706(2)(A)).

30. *See id.* (discussing standard that administrative agencies should apply in exercising reasoned decisionmaking).

whether the ARB applied the appropriate standard and reached a proper decision.³¹ After careful review, the Fourth Circuit held that the ARB applied a different standard than commonly applied in determining whether a protected activity existed and thus breached the APA's reasoned decisionmaking standard, which resulted in an inconsistency.³² As such, the court remanded the case with instructions that it be decided consistent with the court's opinion.³³

III. BACKGROUND

A. The Clean Air Act

The CAA's goal is to reduce air pollutants that cause health and environmental risks by setting limits on the amount of pollutants reaching the air.³⁴ The statute also establishes a step-by-step approach for the EPA to follow in obtaining this goal, which entails: (1) identifying and listing the harmful air pollutants; (2) identifying and listing the sources of the pollutants and (3) creating regulations to deal with the pollutants.³⁵ A recent 1990 amendment created a stricter enforcement policy, whereby companies violating a regulation are fined regardless of the reason underlying their violation.³⁶

In *1000 Friends of Maryland v. Browner (1000 Friends)*,³⁷ a case providing a detailed discussion of the importance of compliance with the CAA, the court described the CAA as a "comprehensive

31. *See id.* (citing *Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Relations Bd.*, 522 U.S. 359, 376 (1998)) (stating that if "clearly understood legal standards" are not applied, such as "good-faith reasonable doubt and preponderance of the evidence," judicial rule will be impeded). *See also* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984) (explaining deferential standard to be applied in cases where ARB's decision is to be reviewed).

32. *See Knox*, 434 F.3d at 725 n.4 (explaining how court found in favor of Mr. Knox). When granting petition for review, the court cited *Allentown*, where the Court held that the ARB's application of a different standard of review was a breach of APA requirements. *See Allentown*, 522 U.S. at 374.

33. *See Knox*, 434 F.3d at 725 (providing court's decision to review Mr. Knox's claim).

34. *See* EPA, Plain English Guide to the Clean Air Act, http://www.epa.gov/oar/oaqps/peg_caa/pegcaain.html (last visited Jan. 17, 2007) (explaining EPA's objectives in removing harmful air pollutants).

35. *See* EPA, Plain English Guide to the Clean Air Act: Features of the 1990 Clean Air Act, http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html (last visited January 17, 2007) (discussing process in which EPA regulates and controls harmful air pollutants).

36. *See id.* (providing enforcement policy for violators).

37. 265 F.3d 216 (4th Cir. 2001).

program for controlling and improving the nation's air quality."³⁸ Overall, the CAA seeks to protect public health and welfare.³⁹ It allows the EPA to identify harmful substances in the air and set national ambient air quality standards (NAAQS) for state compliance.⁴⁰ As such, the states must establish a state implementation plan that meets the NAAQS in order to avoid a CAA violation.⁴¹

B. The CAA Whistleblower Provision: Section 7622⁴²

The whistleblower provision protects employees who abide by and enforce the CAA's goals.⁴³ The goals are to protect the public from harmful air pollutants and employees from an employer's retaliatory measures, which may include wrongful discharge and discrimination in "compensation, terms, conditions, or privileges of employment."⁴⁴ As evidenced in *Varnadore v. Secretary of Labor* (*Varnadore*),⁴⁵ the CAA is one of many federal statutes containing a whistleblower provision to protect employee whistleblower activities.⁴⁶ The statute specifically aims to deter wrongful discharge or discrimination of an employee for reporting harmful substances released or likely to be released into the "ambient air."⁴⁷

38. See *id.* at 220 (explaining purpose of CAA).

39. See *id.* (explaining goals of CAA).

40. See *id.* (explaining function of CAA).

41. See *id.* (citing 42 U.S.C. § 7407(a) (2006)) (providing state implementation plans should identify way in which "national primary and secondary ambient air quality standards will be achieved and maintained" within "air quality control" territory in that state).

42. 42 U.S.C. § 7622 (2006).

43. See *id.* § 7622(a) (describing actions that CAA whistleblower provision protects).

44. See *Knox v. U.S. Dep't of Labor*, 434 F.3d 721, 724 (4th Cir. 2006) (citing whistleblower provision to provide function and purpose thereof). See also *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 220 (4th Cir. 2001) (explaining that CAA was created to keep public safe from harmful air pollutants); *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 627 (6th Cir. 1998) (listing various actions that surmount to retaliation).

45. 141 F.3d 625 (6th Cir. 1998).

46. See *id.* at 626 (deciding whistleblower claims for violation of seven environmental statutes). See also Daniel Riesel & Dan Chorost, *When Regulatory Universes Collide: Environmental Regulation in the Workplace*, 13 N.Y.U. ENVTL. L.J. 613, 617 n.21 (2005) (providing that CERCLA applies to situations where "there is a release or substantial threat of release" of harmful substances). See generally Lucian T. Pera, *Lawyers as Whistleblowers: A Quick Tour of the Emerging Law of Retaliatory Discharge of In-House Counsel*, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, 735 PLI/Lit 619, 627 (2006) (listing various federal statutes implementing whistleblower provisions, thereby showing effort made to protect whistleblower activities in various forms).

47. See 42 U.S.C. § 7622(a) (describing actions that CAA whistleblower provision protects).

Federal regulations define “ambient air” as “that portion of the atmosphere, external to the buildings, to which the general public has access.”⁴⁸ *United States v. Grace (Grace)*,⁴⁹ holding that evidence of indoor releases was not admissible, cited existing case law and EPA regulations that maintain “ambient air” is “air exterior to buildings and accessible by the public.”⁵⁰

C. The Proper Standard for Reviewing Asbestos Whistleblower Cases

As stated in *Wilkins v. Saint Louis Housing Authority (Wilkins)*,⁵¹ the general standard applied in whistleblower cases is reasonable belief, a standard that comes from the specific wording in the provisions and the anti-retaliation principle behind such provisions.⁵²

1. *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc. (Chevron)*⁵³ and the “Deferential Standard”

The *Chevron* deferential standard, which is a generally applied standard in statutory interpretation, entails a two-step analysis.⁵⁴ The first step involves a court deciding “whether Congress has directly spoken to the precise question at issue,” and the second step depends on whether Congress has spoken to the question at issue.⁵⁵ If Congress has spoken to the question, the court should adhere to Congress’s intent; if not, the court should answer “whether the agency’s answer is based on a permissible construction of the statute.”⁵⁶

48. See 40 C.F.R. pt. 50.1(e) (2006) (defining ambient air); *Varnadore*, 141 F.3d at 626 (involving whistleblower claims for violation of seven environmental statutes). See generally Pera, *supra* note 46, at 627 (listing various federal statutes that feature whistleblower provisions and discussing federal efforts to protect whistleblower activities in various contexts).

49. 455 F. Supp. 2d 1172 (D. Mont. 2006).

50. See *id.* at 1174-75 (referring to various cases and existing EPA regulations that address definition of “ambient air”).

51. 314 F.3d 927 (8th Cir. 2002).

52. See *id.* at 933 (citing *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002)) (discussing its interpretation of Title VII and policy against retaliation).

53. 467 U.S. 837 (1984).

54. See *id.* at 842-43 (explaining two-step analysis involved in application of “deferential standard”).

55. See *id.* at 842 (quoting court’s discussion of first step).

56. See *id.* at 843 (providing details of step two in application of deferential standard).

2. Allentown Mack Sales & Services, Inc. v. NLRB
(Allentown)⁵⁷ and the Reasoned Decisionmaking
Requirement

Following the *Chevron* standard, *Allentown* provided that the APA required administrative agencies to exercise reasoned decisionmaking.⁵⁸ As found in *Allentown*, the ARB would be committing a notable breach by violating the reasoned decisionmaking requirement under the APA.⁵⁹ The court noted “[t]he evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ’s), and effective review of the law by the courts.”⁶⁰ APA section 5851 allows the court to overturn the ARB’s decision if it is either “unsupported by substantial evidence” or “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁶¹

3. United States v. Ho (Ho)⁶² and Work Practice Standards

Ho discussed the EPA’s right to establish “work practice standards” to control harmful pollutants, such as asbestos, under CAA section 112 and other relative regulations.⁶³ In *Ho*, when the building owner in question did not follow the work practice standards, he violated a federal statute and federal regulations on asbestos removal, which resulted in his criminal conviction.⁶⁴ Similarly in *United States v. Shaw (Shaw)*,⁶⁵ Shaw violated several work practice standards for improper asbestos removal during the demolition of a

57. 522 U.S. 359 (1998).

58. See *Knox v. U.S. Dep’t of Labor*, 434 F.3d 721, 724 (4th Cir. 2006) (citing *Allentown Mack Sales & Serv., Inc. v. Nat’l Labor Relations Bd.*, 522 U.S. 359, 376 (1998)) (providing standard of review).

59. See *Allentown*, 522 U.S. at 374 (emphasizing severity of ARB’s application of different standard deviating from required reasoned decisionmaking standard).

60. See *id.* at 375 (discussing application of correct standard).

61. See 42 U.S.C. § 5851(c)(1) (2006) (providing appropriate standard of review to be applied); see also *Shirani v. U.S. Dep’t of Labor*, 187 F. App’x 631, 633 (7th Cir. 2006) (providing proper standard to apply in whistleblower actions where court is reviewing administrative agency’s decision).

62. 311 F.3d 589 (5th Cir. 2002).

63. See 42 U.S.C. § 7412(h)(1) (2006) (allowing EPA to create “work practice standards” instead of creating emission standards, thus providing leniency for finding asbestos violations); see also *Knox*, 434 F.3d at 724 n.3 (citing *Ho*, 311 F.3d at 601-02) (demonstrating that asbestos does not have to be in ambient air for employer to violate CAA).

64. See *Ho*, 311 F.3d at 595 (relaying consequences of violating work practice standards).

65. 150 F. App’x 863 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 2039 (2006).

building, which resulted in the company's criminal conviction.⁶⁶ When the *Shaw* court found violations regardless of whether there was proof of asbestos in the ambient air, the court reinforced the flexibility of finding an asbestos violation.⁶⁷

4. *Passaic Valley Sewerage Commission v. United States Department of Labor (Passaic Valley)*⁶⁸ and *Broad, Good Faith Statutory Interpretation*

In *Passaic Valley*, where an employee made "intracorporate complaints," the court interpreted the statute broadly so as to be consistent with the statute's purpose and legislative history.⁶⁹ "The whistle-blower provision was enacted for the *broad* remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards."⁷⁰ In addition, the Supreme Court has allowed such protection because it "prevent[s] the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses."⁷¹ As such, even ill-formed complaints are found acceptable, so long as they are made in good faith.⁷²

5. *Shirani v. United States Department of Labor (Shirani)*⁷³ and *the Sufficient Connection Requirement*

In the *Shirani* case, however, the Seventh Circuit set a limit on the extent to which a protected activity can be found by rejecting a plaintiff's whistleblower action for being "too amorphous" and lacking a sufficient connection between the protected activity and the

66. *See id.* at 869 (evidencing violation of work practice standards constituting violation of federal regulations).

67. *See id.* at 883 (finding asbestos violation after testing samples of insulation found in building that contained asbestos); *see also Ho*, 311 F.3d at 592 (finding asbestos violation when noting that building was unsealed and fireproofing was not wetted as required by regulation when asbestos was removed).

68. 992 F.2d 474 (3d Cir. 1993).

69. *See id.* at 478 (finding more than one possible interpretation of statute).

70. *See id.* (emphasis added) (discussing importance of broad interpretation of whistleblower provision in environmental statutes).

71. *See id.* at 479 (citing *National Labor Relations Board v. Scrivener*, 405 U.S. 117, 122-23 (1972)) (providing Supreme Court's view on statutory interpretation of whistleblower statute).

72. *See id.* at 478 (discussing acceptability of interpreting whistleblower statutes broadly).

73. 187 F. App'x 631 (7th Cir. 2006).

retaliatory measure.⁷⁴ The Seventh Circuit distinguished job transfer rejections, terminations and demotions from sexual harassment.⁷⁵ The court further noted that the former acts are single acts that may not constitute a valid claim in court while sexual harassment is considered a continuing act that is “so covert that its discriminatory character is not immediately apparent,” yet ultimately deserves adjudication.⁷⁶ In conclusion, the Seventh Circuit found that the whistleblower claim was tenuous and ruled against the plaintiff.⁷⁷

D. Asbestos: A Deadly and Dangerous Pollutant

CAA section 112(b)(1) lists asbestos as a “hazardous air pollutant.”⁷⁸ Asbestos has been reported to cause serious health problems, such as mesothelioma, which is a “brutal cancer whose only known cause is asbestos” and is not the only destructive disease caused.⁷⁹ Mesothelioma alarmingly kills two to three thousand people every year.⁸⁰ Further, asbestos causes non-cancerous conditions that can debilitate an individual or lead to death.⁸¹

Not realizing the extent of harm that asbestos causes, certain industries or businesses have conducted fraudulent asbestos removal; in other words, they have taken illegal shortcuts leaving asbestos for possible future exposure.⁸² For this reason, section 112(b)(1) lists asbestos as a hazardous air pollutant.⁸³ Further, the CAA allows regulations providing flexibility in finding an asbestos

74. See *id.* at 633-34 (explaining that claims need to be supported by concrete evidence of discriminatory actions).

75. See *id.* at 634 (citing *Place v. Abbott Labs.*, 215 F.3d 803, 808 (7th Cir. 2000)) (differentiating single acts from continuing acts in context of finding valid whistleblower claim).

76. See *id.* (citing *Abbott Labs.*, 215 F.3d at 808) (describing difference between single acts and continuing acts for purposes of finding valid whistleblower claim).

77. See *id.* (explaining Shirani’s claim was too tenuous to be protected activity under whistleblower provision).

78. See *United States v. USA Remediation Servs., Inc.*, No. 02-CR-171E, 2005 WL 906490, at *2 (W.D.N.Y. Apr. 18, 2005) (citing 42 U.S.C. § 7412(b)(1) (2006)) (listing asbestos as hazardous air pollutant).

79. See Patrick M. Hanlon, *Developments in Premises Liability Law 2005*, 2005 SL041 ALI-ABA 665, 667-68 (describing serious health risks created by asbestos exposure).

80. See *id.* at 667 (providing statistical data showing large number of people dying from asbestos exposure).

81. See *id.* at 668 (listing other serious health risks resulting from asbestos exposure).

82. See Craig A. Benedict, *Ripping and Running: The Large Scale Defrauding of the Public by the Asbestos Abatement and Related Industries: A Prosecutor’s Prospective*, 2004 SK019 ALI-ABA 85, 89 (stating illegal shortcuts were common).

83. See 42 U.S.C. § 7412(b)(1) (2006) (listing hazardous air pollutants).

violation; specifically, CAA section 114(a) allows the EPA to create a reporting requirement that, when violated, evokes CAA section 113 “impos[ing] criminal penalties” on violators.⁸⁴

IV. NARRATIVE ANALYSIS

The Fourth Circuit considered two issues in its decision to grant the petition for review: (1) whether the ARB applied the appropriate standard and (2) whether the statute and relevant federal regulations were properly interpreted when applied to Mr. Knox’s situation.⁸⁵ Specifically, the first issue dealt with whether the ARB applied the appropriate standard when determining that Mr. Knox’s knowledge of the existence of asbestos and subsequent reporting did not constitute a protected activity under the CAA.⁸⁶ The second issue considered whether the ARB correctly found Mr. Knox’s activities unprotected under the CAA because his observation of the asbestos in the building was not necessarily proven to be “released in the ambient air” with respect to existing work practice standards.⁸⁷

A. The Proper Standard: Reasonable Belief

Under the APA, the ARB is expected to use reasoned decision-making by applying the “clearly understood legal standards” as stated in *Allentown*.⁸⁸ In *Knox*, the ARB contended that it used reasoned decisionmaking when applying the regularly accepted “deferential standard” provided in *Chevron* and, as such, expected Mr. Knox to have properly conveyed the release of asbestos into the ambient air to be protected under the CAA.⁸⁹ The Fourth Circuit rejected the ARB’s contention and found that the standard the

84. See 40 C.F.R. pt. 61.150 (2007) (stating standards for asbestos removal does not necessarily require asbestos in ambient air); see also *United States v. Ho*, 311 F.3d 589, 594-95 (5th Cir. 2002) (citing 42 U.S.C. §§ 7413, 7414(a) (2006)) (explaining reporting requirement of section 114(a)). The EPA created a work practice standard requiring individuals to report asbestos findings and stated criminal penalties for reporting requirement violators. See *id.* at 595.

85. See *Knox v. U.S. Dep’t of Labor*, 434 F.3d 721, 723-25 (4th Cir. 2006) (discussing importance of applying proper standard and construing statute with reference to relevant regulations to be consistent with APA requirements).

86. See *id.* at 724-25 (discussing APA’s requirement for reasoned decision-making and applying proper standard to reach fair decision).

87. See *id.* at 724 (showing overly strict interpretation of statute when considering existing asbestos regulations).

88. See *id.* (citing *Allentown Mack Sales & Serv., Inc. v. Nat’l Labor Relations Bd.*, 522 U.S. 359, 376 (1998)) (providing that administrative agencies should apply regularly accepted legal standard when reviewing cases).

89. See *id.* at 724 (discussing applicable standard).

ARB applied was improper with respect to an asbestos case.⁹⁰ The court reasoned that because federal statutes and regulations allow the creation of “work practice standards” for handling hazardous substances such as asbestos, violations of the CAA’s whistleblower provision could result in more than one fashion.⁹¹

The court observed that the ARB initially announced that the standard being applied *was* the reasonable belief standard, yet the ARB actually applied a different, heightened standard that was inconsistent with the trend of the statutes and regulations.⁹² Specifically, the ARB failed to apply the well-accepted “reasonable belief” standard and inappropriately sought a stricter standard, which required Mr. Knox to prove that he “actually conveyed his reasonable beliefs to management.”⁹³ Therefore, the court concluded that the ARB failed to use reasoned decisionmaking when failing to apply the well-accepted reasonable belief standard that it had initially acknowledged as the applicable standard.⁹⁴

B. Appropriate Application of the CAA

In *Knox*, the Fourth Circuit found a flaw in the ARB’s rigid requirements concerning Mr. Knox’s conduct when determining whether the CAA protected his activities of reporting asbestos in the workplace.⁹⁵ Specifically, the ARB provided the definition of the term “ambient air” as “air external to buildings” and discounted air in the workplace, and it found that Mr. Knox’s activity was not protected under the CAA.⁹⁶ As such, the ARB rejected Mr. Knox’s claim.⁹⁷

Regarding the “reasonable belief” standard applied in asbestos cases, the court found the ARB’s interpretation of “release into ambient air” too restrictive when the ARB found “the presence of as-

90. See *Knox*, 434 F.3d at 724 n.3 (noting standard applied in these circumstances inappropriate).

91. See *id.* at 724 (citing 42 U.S.C. § 7412(h)(1) (2006)) (allowing work practice standards to help control hazardous substances such as asbestos).

92. See *id.* at 725 n.4 (disapproving ARB’s shift in standards); see also *Passaic Valley Sewerage Comm’r v. U.S. Dep’t of Labor*, 992 F.2d 474, 478-79 (3d Cir. 1993) (discussing proper statutory interpretation).

93. See *Knox*, 434 F.3d at 725 (discussing ARB’s inappropriate application of heightened standard).

94. See *id.* at 725 n.4 (finding that ARB did not apply correct standard).

95. See *id.* at 725 (discussing ARB’s reasoning upon rejecting Mr. Knox’s claim, which was ultimately found inappropriate).

96. See *id.* (providing ARB’s interpretation of ambient air used in its analysis). See also 40 C.F.R. pt. 50.1 (2007) (defining ambient air).

97. See *Knox*, 434 F.3d at 724-25 (demonstrating ARB’s overly strict requirement for Knox to convey asbestos being emitted into air).

bestos in the workplace generally” was not sufficient evidence of a protected activity.⁹⁸ Further, the ARB acknowledged, but rejected Mr. Knox’s testimony concerning the proximity of the exhaust fan to the asbestos as further proof of the likelihood of harmful pollutants being emitted into the air.⁹⁹ Mr. Knox’s reasonable belief that the asbestos was being emitted into the ambient air was found to be proper evidence of a protected activity under the CAA, but nonetheless was rejected.¹⁰⁰ In sum, the Fourth Circuit found the strict interpretation of the phrase “release into ambient air” defeated the purpose of the CAA to protect the public from harmful air pollutants.¹⁰¹

In further support of the court’s holding were CAA regulations allowing “work practice standards” to be established such that, when broken, they created a CAA violation.¹⁰² The court referred to CAA section 112, which allowed the EPA to create work practice standards to protect against asbestos, and to *Ho*, which examined work practice standards applicable to asbestos situations and explained how actual release into the ambient air may not be necessary for a CAA violation to exist.¹⁰³ The allowance of work practice standards removed the necessity for asbestos to be in the ambient air for a CAA violation to exist.¹⁰⁴ Federal regulations specifically reflect instances in which a violation could result without asbestos being released into the ambient air.¹⁰⁵ As such, the court was “not convinced that a reasonable belief of a release into the ambient air [was] even the correct standard in all cases under the whistleblower provision of the CAA.”¹⁰⁶

98. *See id.* at 725 (stating that Mr. Knox’s evidence and testimony showed reasonable belief of release into ambient air, yet ARB still rejected Mr. Knox’s claim).

99. *See id.* at 723 (providing account of Mr. Knox’s testimony that ARB observed and rejected).

100. *See id.* at 723-25 (discussing flexibility in interpreting “ambient air”).

101. *See id.* at 724-25 (discussing ARB’s inappropriate construction of CAA whereby “release into ambient air” was construed as actual release that Mr. Knox witnessed and reported).

102. *See Knox*, 434 F.3d at 724 n.3 (noting additional ways to violate CAA when work practice standards are in place and thus showing flexibility in finding protected activity).

103. *See id.* (noting flexibility in finding CAA violation).

104. *See id.* at 724 n.3 (showing release of asbestos into ambient air is not necessary for violation to occur because of serious harm such release causes).

105. *See id.* (citing 40 C.F.R. pt. 61.150 (2007)) (stating violation can occur without asbestos released into ambient air).

106. *See id.* at 724 n.3 (evidencing ability to interpret asbestos violations broadly such that it is not necessary to find asbestos in ambient air for violation to occur).

After the Fourth Circuit considered the CAA's guiding principle, regulations created to broaden the finding of a violation and history providing flexibility in finding protected activities, the court found the ARB's conclusion that Knox's activities were unprotected improper.¹⁰⁷ Specifically, the ARB was overly technical when it found Mr. Knox's complaint to be unprotected activity for solely stating that asbestos was present, but not "being emitted into the ambient air," because protected activity also includes the potential for asbestos to be emitted into the ambient air in view of work practice standards.¹⁰⁸

V. CRITICAL ANALYSIS

In view of the serious harm asbestos causes and the CAA's goal to protect the public from dangerous air pollutants, the Fourth Circuit's decision to allow review of Mr. Knox's whistleblower action is proper.¹⁰⁹ The following portions of the court's analysis were sound: (1) its basis for finding that in asbestos cases courts should apply a "reasonable belief" standard and not the ARB's more particular and stricter standard requiring a conveyance of reasonable belief and (2) its decision that flexibility exists when finding a violation of the CAA, thereby broadening the scope of protected activity and furthering the guiding principle of the CAA.¹¹⁰

First, the APA provides that administrative agencies should apply the "clearly understood legal standard enunciate[d] in principle" to reasonably decide a case.¹¹¹ Upon review of (1) the CAA's goal to protect the public by monitoring the nation's air quality and providing requirements to maintain a healthy environment; (2) the general principle behind whistleblower provisions in favor of employees who are victims of retaliation; (3) the ARB's initial acceptance of the well-accepted "reasonable belief" standard and (4) the

107. See *Knox*, 434 F.3d at 725 (concluding that Mr. Knox's activities were protected and granting petition for review).

108. See *id.* at 724 (holding ARB reviewed evidence with inappropriate standard).

109. See *id.* at 725 (finding ARB's decision improper due to improper analysis and granting petition for review).

110. See *id.* at 723-25 (discussing applicable standard in asbestos cases and properly finding protected activity).

111. See *id.* at 724 (citing *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 376 (1998)) (discussing appropriate application of legal standard involves reasoned decisionmaking).

dangerous health risks created by asbestos exposure, the reasonable belief standard should have been applied.¹¹²

Applying a reasonable belief standard allows a plaintiff to obtain judicial review where unfair retaliation has occurred.¹¹³ The court properly noted the inappropriate shift in standards, placing a heavier burden on Mr. Knox to prove his actions were protected under the CAA, thus contradicting the whistleblower provision's purpose.¹¹⁴ As shown in *Passaic Valley*, the purpose behind the whistleblower provision is to provide broad support against unfair retaliatory measures.¹¹⁵ Moderation, however, is essential, and *Shirani* correctly limits how broadly a statute can be interpreted by rejecting claims that are "too amorphous."¹¹⁶

Furthermore, according to *Allentown*, the ARB has the freedom to use its deference when deciding this case.¹¹⁷ The ARB in *Knox*, however, overstepped the boundaries.¹¹⁸ Specifically, when the ARB shifted away from the regularly accepted "reasonable belief" standard to a stricter standard, it reached a result different than one it likely would have reached had it not violated the APA's reasoned decisionmaking requirement.¹¹⁹ While the Fourth Circuit also applied *Chevron's* deferential standard, it did not go against the clearly established legal standard in whistleblower cases, one of the

112. See *Knox*, 434 F.3d at 724 (discussing CAA's guiding principle of protecting against air pollutants that cause harm to public). See also *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir. 2002) (citing *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002)) (referring to Title VII's anti-retaliation provision); Hanlon, *supra* note 79, at 667-68 (describing serious health risks created by asbestos exposure).

113. See *Wilkins*, 314 F.3d at 933 (discussing why reasonable belief standard is appropriate in whistleblower cases).

114. See *Knox*, 433 F.3d at 725 n.4 (stating that ARB's shift in standard was inappropriate in asbestos whistleblower case). See also *Passaic Valley Sewerage Comm'r v. U.S. Dep't of Labor*, 992 F.2d 447, 478 (3d Cir. 1993) (providing that consistency with statute's purpose and legislative history is important in determining whistleblower action).

115. See *Passaic Valley*, 992 F.2d at 478 (emphasizing importance of broadly interpreting whistleblower provision).

116. See *Shirani v. U.S. Dep't of Labor*, 187 F. App'x 631, 634 (7th Cir. 2006) (limiting broad interpretation of whistleblower provision to exclude frivolous and tenuous claims).

117. See *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 377 (1998) (providing that while ARB should be given deference when interpreting regulations, APA standard should limit ARB's discretion).

118. See *Knox*, 434 F.3d at 724-25 (explaining that under deferential standard ARB had power to narrowly construe statute, but found ARB's conclusions improper).

119. See *id.* (discussing reasoned decisionmaking requirement and ARB's breach of such requirement).

employee's reasonable belief.¹²⁰ The court appropriately looked at the various regulations pertaining to asbestos, the CAA itself and to cases on asbestos, whistleblower provisions and the appropriate standard of review of administrative agency decisions.¹²¹ Thus, in asbestos cases, employees falling prey to retaliation for reporting workplace asbestos problems need only prove they reasonably believed that asbestos was being or would most likely be emitted into the air.¹²²

In allowing a claim for the likelihood of asbestos admission into the air, the court referred to specific regulations pertaining to asbestos.¹²³ Specifically, the court turned to CAA section 112(h)(1), which provides additional avenues of CAA violations, and *Ho*, which addressed the asbestos issue with regard to the violation of work practice standards, allowing flexibility in statutory interpretation in asbestos situations.¹²⁴ The ARB inappropriately strayed from its responsibility of reasoned decisionmaking by applying a different standard and placing a heavier burden on the plaintiff employee.¹²⁵

Notable, however, is *Grace*, a case decided subsequent to *Knox*, which reiterated a strict interpretation of the term "ambient air" that disallowed indoor air or air in a workplace to be considered "ambient air" and found inadmissible evidence of indoor releases based on case law and existing federal regulations.¹²⁶ This case, however, did not include whistleblower provisions in its analysis, thereby missing an entire public policy dimension of protecting employees from unfair employer retaliation, which was considered in the *Knox* decision.¹²⁷ In view of the imbalance of power between the employer and the employee, the court's opinion was reasonable

120. See *id.* at 724 (discussing applicable standard). See also *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir. 2002) (finding reasonable belief to be appropriate standard).

121. See *Knox*, 434 F.3d at 723-25 (relaying court's thorough analysis of case).

122. See *Wilkins*, 314 F.3d at 933 (applying reasonable belief standard).

123. See *Knox*, 434 F.3d at 724 n.3 (stating that court did not believe that asbestos must be emitted into air for violation in view of existing regulations).

124. See *id.* at 724 n.3 (discussing work practice standards protecting against asbestos).

125. See *id.* at 724 n.3, 725 n.4 (stating ARB failed to follow its reasoned decisionmaking responsibility).

126. See *United States v. Grace*, 455 F. Supp. 2d 1172, 1174-75 (D. Mont. 2006) (stating no ambiguity exists in definition of ambient air). See also 40 C.F.R. pt. 50.1(e) (2007) (defining ambient air).

127. See 42 U.S.C. § 7622 (2006) (protecting employees against employer retaliation); *Grace*, 455 F. Supp. 2d at 1172 (deciding that indoor air is not "ambient air", thereby rendering evidence of indoor release inadmissible).

with respect to the CAA's goal to protect the public from air pollutants through its whistleblower provision.¹²⁸ Specifically with respect to asbestos, which is known to cause serious health risks and death, the court necessarily maintained the more flexible, well-accepted "reasonable belief" legal standard to protect the disadvantaged employee under the CAA.¹²⁹

Overall, the court's holding was consistent with (1) the CAA's purpose of preventing harmful air pollutants and its whistleblower provision, which aids in preventing air pollution; (2) the existing regulations protecting against other means by which asbestos can pollute the air and (3) cases analyzing the danger of asbestos and the importance of maintaining a reasonable belief standard in whistleblower cases.¹³⁰ In sum, the court's holding with regard to a harmful substance like asbestos was reasonable and proper.¹³¹

VI. IMPACT

The Fourth Circuit's analysis and decision are consistent with the trend in whistleblower cases.¹³² In addition to helping promote anti-retaliatory measures in a relationship with unbalanced power, the analysis and decision stay in the realm of asbestos-related matters and are thus not over-reaching.¹³³

Although a concern may exist that a protected activity was found too easily and that employers may face an undue burden, the scope of *Knox* will likely only affect similar situations, as the analysis specifically applies to asbestos issues.¹³⁴ Additionally, because the court's decision granted a petition for review consistent with existing regulations and the CAA's goals related to asbestos, as long as

128. See *Knox*, 434 F.3d at 725 (discussing court's granting of petition for review); see also *Passaic Valley Sewerage Comm'r v. U.S. Dep't of Labor*, 992 F.2d 447, 478-79 (3d Cir. 1993) (discussing importance of broad interpretation of statute consistent with statute's purpose and legislative history to protect whistleblowers).

129. See *Knox*, 434 F.3d at 725 (discussing court's reasons for remanding case and applicable standard of review).

130. See 42 U.S.C. § 7412(h)(1) (2006) (allowing EPA to create work practice standards). See also 42 U.S.C. § 7622 (providing employees protection against employer retaliation); *Knox*, 434 F.3d at 724 n.3 (citing *United States v. Ho*, 311 F.3d 589, 594-95 (5th Cir. 2002)) (discussing work practice standards in asbestos situations); *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir. 2002) (discussing protection from employer retaliation against employees).

131. See *Knox*, 434 F.3d at 725 (rejecting ARB's reasoning and decision and granting petition for review).

132. See *id.* (rejecting ARB's decision to deny plaintiff's whistleblower claim with respect to asbestos).

133. See *id.* (providing decision specifically with respect to asbestos violations).

134. See *id.* (rejecting ARB's denial of plaintiff's claim).

the regulations and CAA guiding principles do not change dramatically, the application of the court's decision in future asbestos whistleblower cases will most likely be proper.¹³⁵ As such, the ARB will be responsible for using more caution when specifically handling asbestos whistleblower cases.¹³⁶

Following the Fourth Circuit's reasoning, future asbestos whistleblower cases will have more flexibility in finding instances of protected activity under the CAA.¹³⁷ The court has established that focusing solely on the statutory language and failing to refer to the relevant regulations and cases will not properly accomplish the CAA's goals in protecting the public from harmful air pollutants, thereby leading to an improper decision.¹³⁸ As a result, the importance of referring to all necessary resources is confirmed.¹³⁹ The flexibility, however, will be kept in bounds as stated in the subsequent *Shirani* case, which held that finding protected activities should be limited to situations that are not "too amorphous," thus reiterating the importance of proper review that is not overly broad or narrow.¹⁴⁰ The application of the *Knox* ruling will also be limited, or even potentially barred by *Grace*, which disallowed evidence of indoor releases based on a literal interpretation of "ambient air."¹⁴¹

Most importantly, however, the Fourth Circuit strongly disagreed with the misapplication of the legal standard.¹⁴² It quoted *Allentown* which stated, "[i]t is hard to imagine a more violent breach of that requirement of [reasoned decisionmaking] than applying . . . a standard of proof which is in fact different from the

135. See *id.* at 723-25 (providing court's analysis of case to reach decision to grant petition for review).

136. See *Knox*, 434 F.3d at 725 n.4 (citing *Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Relations Bd.*, 522 U.S. 359, 374 (1998)) (discussing result of applying wrong standard). The *Allentown* Court ruled that applying the wrong standard is a "violent breach" of the APA's reasoned decisionmaking requirement. See *id.*

137. See *id.* at 725 (noting appropriate standard). The court found that the reasonable belief standard, and not "actual convey[ance of] his reasonable beliefs," was appropriate in determining whether the CAA protects the actions. See *id.*

138. See *id.* at 724 (providing that reference to regulations and other relevant cases is necessary to achieve proper results).

139. See *id.* (discussing importance of referring to various sources to reach proper conclusion).

140. See *Shirani v. U.S. Dep't of Labor*, 187 F. App'x 631, 634 (7th Cir. 2006) (providing limit to finding protected activity).

141. See *United States v. Grace*, 455 F. Supp. 2d 1172, 1175-77 (D. Mont. 2006) (discussing inadmissibility of evidence of indoor releases).

142. See *Knox*, 434 F.3d at 725 (discussing standard ARB should have applied but did not apply).

rule or standard formally announced.”¹⁴³ Thus, whether a case deals with an asbestos whistleblower issue or another whistleblower issue, the importance of applying the correct legal standard is reiterated, thereby reinforcing the idea that decisionmakers must be sure to apply the proper standard to reach a fair and efficient decision.¹⁴⁴ In sum, the *Knox* decision will provide further considerations with respect to asbestos whistleblower actions involving various statutes, regulations and policy concerns, which aim to protect employee rights, health and welfare.

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143. See *id.* at 725 n.4 (citing *Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Relations Bd.*, 522 U.S. 359, 374 (1998)) (emphasizing importance of applying correct legal standard).

144. See *id.* at 725 (discussing reasons for remanding case to be reviewed and decided consistent with well-accepted legal standard of reasoned decisionmaking).

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