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Whistleblower Law 101: Facing Food Industry Retaliation

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WHISTLEBLOWER LAW 101: FACING FOOD INDUSTRY RETALIATION

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TOM DEVINE: Good afternoon. I'd like to begin by saying what an honor it is to follow Judge Igasaki's presentation to us today. He does not wear it on his sleeve, but during the last year, under his leadership, whistleblowers have had a greater chance of achieving justice at the Department of Labor than anytime since I started representing corporate whistleblowers in 1979. Just to illustrate what a difference that kind of leadership can make, in 2009, the Administrative Review Board (ARB) had an eight and thirty-three track record against whistleblowers for decisions on the merits. Last year it was eight and fourteen, and that is because a lot more cases are being decided to make sure that people get a genuine day in court when they assert their rights.

I would also like to give credit where it is due. A number of folks have complimented me for a legal research memo as part of our program today because my name is on it. Actually, that memo is the work of a [Government Accountability Project (GAP)] GAP[1] alumnus named Sarah Goldman Warden, who

1. *About*, GOVERNMENT ACCOUNTABILITY PROJECT, http://www.whistleblower.org (last visited Feb..1, 2012).

presented and prepared it for the Consumer Product Safety Improvement Act,[2] Continuing Legal Education course. John Cantu and I polished the memo and updated it a little for today's event.

That leads me into the next point that I wanted to make, which is to comment on the warnings that I have been reading over the last few days issued by some law firms, that I should do my homework in preparation for this event. There are a lot of law firms—and I can't really list them—exercising their freedom of speech to advertise how important they are. But these law firms are kind of crying wolf in saying that we had a momentous, earth-shattering development here. I hope that someday it is, but it's a little premature to draw that conclusion.

For example, one firm said that probably more than any other whistleblower legislation preceding it, the Food Safety Modernization Act[3] (Act) delivers protection affecting a broad range of businesses, and to those business' entire workforces. Well, maybe that firm has not heard of the Sarbanes-Oxley Act.[4] It allows forty million employees at all publicly-traded corporations to challenge any misconduct that could threaten the value of shareholders' investments. Or maybe that firm has not heard of the Consumer Product Safety Improvement Act, which covers twenty million workers throughout our nation's retail sector and some 15,000 products. And then there's the False Claims Act[5] which applies similar rights for employees of any corporation subject to a federal regulation that creates a contractual relationship.

The reality is that this law that we are talking about today is the reflection of a legal revolution in corporate freedom of speech that has occurred during the last decade. Other industries that are adjusting to the same type of rights for their workers are the nuclear power and nuclear weapons industries. And, as Chairman Igasaki pointed out, there is also the railroad industry, the trucking industry, the mass transit industry, the health industry as part of the health reform law,[6] anyone receiving stimulus money, defense contractors, and the whole financial industry.

This is not a unique phenomenon. This is becoming one of the facts of life for corporate accountability in our nation and, frankly, corporations are doing just fine living with it. Some argue that this is law is very vulnerable to abuse by insubordinate employees who do not want to work and therefore use this law as an opportunity to cloak themselves as whistleblowers. Well, not too many employees take that opportunity seriously.

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2. Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314. 3, 122 Stat. 3016, 3017 (2008) (codified at 15 U.S.C. §§ 2051-89)

3. Food Safety Modernization Act, Pub. L. No. 110-353, 124 Stat. 3885 (2011).

4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

5. False Claims Act, 31 U.S.C. §§ 3729-31 (2006).

6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of 20 U.S.C. 2010).

In 2009, under Sarbanes-Oxley, we had over forty-two million workers who are covered; only forty-six employees filed administrative complaints—about one per million over the course of the year. It is understandable why employees do not file administrative complaints. No matter how strong legal rights are now compared to whistleblower rights in the past, whistleblowers are still severe underdogs when they exercise those rights. The highest rate of success for any corporate whistleblower law at the administrative level, the [Aviation and Investment Reform Act (AIR)] AIR21[7] law, is 9.8 percent—less than a one in ten chance. The Sarbanes-Oxley law, which ushered in the modern era of access to federal court, has a 3.2 percent success rate at the administrative level. If you go to court, the rate of success is not that much better. Nuclear power and nuclear weapons workers have had the opportunity to go to court since 2006;[8] since that time, the workers have had a zero and five track record in reported decisions. For Sarbanes-Oxley it is a two in six track record. Obviously, this is not something that companies should be afraid of in terms of liability.

The final observation I saw was the recommendation to train their clients in these new rights, and that is a very well-taken recommendation not just to limit liability, but also to prevent the avoidable disasters that occur when corporate leaders do not listen to their workforce. It is bad business to silence or kill the messenger, and that is why the Sarbanes-Oxley law was created—to protect shareholders.

With that introduction out of the way, I'd like to turn your attention to the whistleblower protections in section 402 of the Act. The protections have four basic areas.

The first is free speech rights. Free speech rights bar entities engaged in manufacturing, processing, packing, transporting, distribution, reception, holding, or importation of food from discharging an employee for exercising his or her free speech rights. This sounds like it must cover the entire food industry, but it does not. It does not cover the beginning of the cycle in the farms and it does not cover the area where we have the greatest threat of contamination—meat and poultry slaughter and processing activities. These free speech rights are a bite, not a whole meal, when we look at the entire food industry. Employers broadly interpret these free speech rights to include applicants or alumni of a corporation, who are also protected against any discrimination.

What do we mean by [retaliation]? The Supreme Court defined [retaliation] to mean any activity that would chill or intimidate you from carrying out rights protected by the law; it is a very broad and very flexible definition. Employees are protected from [retaliation] when making disclosures, whether on an

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7. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181 (2000) (codified at 49 U.S.C. § 42121 (2010)).

8. 42 U.S.C. § 5851 (2005) (protecting employees that report violations of the Atomic Energy Act of 1954).

employee's own initiative, or as part of his or her job duties. This protection from [retaliation] cuts off one of the most severe loopholes of the last twenty years to free speech rights—your whistleblower rights apply when you're carrying out your duties, not just as a hobby.

Well, what is the protected activity here? The protected activity is making a disclosure that you reasonably believe is a violation of any provision of the act. And not just making the disclosure itself; it includes assisting the whistleblower in making a disclosure. Thus, those employees who are on the support team for the disclosing employee also have these free speech rights. This helps to prevent preemptive strikes against employees that discredit them before they can make their disclosure, or to deal with gag orders. It covers anything that you reasonably believe is a violation of the law and of this act.

In this context, "reasonably believe" basically means that you believe it yourself, that your belief is sincere and genuine, and that you have a rational basis for your belief, even if, ultimately, you are mistaken in your belief. The scope of the Food Safety Modernization Act—and the whole Food, Drug, and Cosmetic Act[9]—is quite broad, but not broad enough to cover the entire food industry. You are protected for participating in any government proceeding, and the case law says that you are also protected for making disclosures to the public. The policy rationale behind this protection is that those disclosures are the lifeblood for government enforcement actions and proceedings. Finally, if you refuse to participate in a violation of the law, you do not necessarily have to wait until the end of the trial to know if you have free speech rights.

The process for this law is a two-stage process. One is at the administrative level. First, an initial informal investigation is completed by the Occupational Safety and Health Administration (OSHA).[10] As a practice tip, when you file your complaint, be sure that you show your hand—that you allege all of the necessary facts to prove that your rights were violated, or OSHA will throw out your complaint without an investigation. OSHA can then order preliminary reinstatement at the end of their investigation, which will have to stick throughout the appeal process unless the employer seeks to challenge it in a separate hearing. If either side is not satisfied by the OSHA informal investigation, either side can then go to an administrative hearing at the Department of Labor, as Judge Igasaki summarized for us. If either side is not satisfied with the results of the DOL administrative hearing, [they] can appeal to the Court of Appeals, or they can start over. If they haven't received a ruling in 210 days, either side can go to District Court and seek a jury trial with a fresh slate. Even if you lose in court, you can start over within ninety days; if somehow, as an unemployed whistleblower, you can afford to do that.

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9. Federal Food, Drug and Cosmetic Act of 1906, 21 U.S.C. § 301 (2006) .

10. U.S. DEPARTMENT OF LABOR, *About OSHA*, http://www.osha.gov/dte/sharwood/successes.html (last visited Jan. 14, 2012) ("Congress created the Occupational Safety and Health Administration ("OSHA") to ensure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.").

Your rights are under very favorable standards. Basically, if your protected activity was relevant to the action taken against you, you can establish a *prima facie* case based on the "continuing factor" standard.[11] The employer will then have to rebut the prima facie case by clear and convincing evidence, which is about seventy-five to eighty percent of the record, in order to defeat your case. If you win, you cannot make a profit, but you can be made whole through compensatory damages, whether at the administrative or the district court level.

Finally, there are some insurance policies for these rights. For example, these rights cannot be canceled by employment agreements wherein you waive your statutory free speech rights as a pre-requisite to being hired. Even if you enter into such an agreement, the agreement will not be worth the paper that it is written on. Gag orders cannot overcome or supersede your free speech rights.

There is no doubt that this is an impressive law. It is a best practices law for what we have right now. Though I would like [it] to come full circle. Even with a best practice law, you have, at best, the status of an underdog fighting Rocky Balboa. It is going to take a real miracle to win your case. If not a miracle, it is going to take a very, very effective process. As a rule, if you want to commit to the truth and survive, you are going to have to win a legal campaign, not just a lawsuit. It is going to have to be a campaign that is grounded in solidarity with all the people who should be benefiting from your dissent. So my bottom line is an advertisement for the book that GAP's putting out in March, called *Committing the Truth: A Corporate Whistleblower's Survival Guide*.[12] And thank you for hearing this preview.

ROBERT VAUGHN: Thank you, Tom. That was a very light tap. Mr. Guyer?

THAD GUYER: Hello. My name is Thad Guyer from the law firm of T.M. Guyer and Ayers and Friends, PC.[13] We only litigate whistleblower cases. We litigate about half of our caseload on behalf of the Government Accountability Project [(GAP)]. The way that it normally works is GAP spends years and years up on Capitol Hill. They work tirelessly and fearlessly. Tom leads the movement on the Hill. What GAP does is take three or four pages of whistleblower protection and they try to tack it on every single law that Congress passes. It is roughly the same language in every law [in which] they tack in whistleblower protections, with some minor, appropriate changes. So, I am a whistleblower specialist, and over the years, I have learned about the

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11. *See* 5 C.F.R. § 1209.7 (2011) (explaining that "the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure [of protected activity] was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant").

12. Tom Devine & Tarek F. Maassarani, COMMITTING THE TRUTH: A CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE (Government Accountability Project 2011).

13. *See* T.M. Guyer and Ayers and Friends, PC, http://www.guyerayers. com (last visited Feb. 1, 2012).

Atomic Energy Act,[14] the Sarbanes-Oxley Act, and the Surface Transportation Assistance Act.[15] When you are a whistleblower lawyer you have to learn about these kinds of substantive laws that are thousands of pages long—that these three or four pages are tacked into. Now they have added another one for me to learn—the Food Safety Modernization Act.

I agree with Tom that as a litigator, your chances of winning are statistically only about three percent. However, if you are a whistleblower specialist and know what you are doing because you focus all your energy on it, the success rate is much higher than three percent. Also, if you add to [all of your] good settlements—at least for our law firm and I am sure for Jason Zuckerman and the Employment Law Group[16]—then our batting averages are certainly better than fifty-fifty.

In my view, whistleblower laws, including this one, like all reform laws, suffer from illusion. And it is the illusion that Congress saw as a problem requiring a legislative fix. Whistleblower laws can all too often result in a lot of disillusionment and a lot of heartbreak unless whistleblowers, whistleblower lawyers, and the various [non-governmental organizations (NGOs)] that work with whistleblowers and disclosures work very hard and very fast right from the outset to tighten up the loose language that is in these laws. The Act will not be an exception; there is definitely loose language in this law. Otherwise, the big celebrations we have when Congress passes a new one of these whistleblower laws can quickly turn sour. Then, the new lawyers, workers, and NGOs who get involved in whistleblower litigation, who haven't been through the cycle before, can become very disillusioned. I hate to see that happen.

For example, let us look at the Sarbanes-Oxley Act of 2002. It was supposed to be a great law. We had great celebrations when it passed. So I'm going to call on my good friend and colleague, who we e-mail late, late into the night, into the early morning hours on these things, Jason Zuckerman, and I want to ask Jason just to come to the microphone very quickly and just very briefly list off for us two or three of the disillusionments that you saw with Sarbanes-Oxley.

JASON ZUCKERMAN: You said at the beginning, what's going to be really, really easy is for the employee to show that they had engaged in what is known as protected conduct because you just have to show you had a reasonable belief. Well, I'll give you one example.

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14. Atomic Energy Act of 1954, 42 U.S.C. § 2011 (2006).

15. Surface Transportation Assistance Act of 1982, 49 U.S.C. § 5323 (2006).

16. *See* The Employment Law Group LLC, http://www.employment lawgroup.net/ (last visited Feb. 1, 2012).

An employee blew the whistle. She said "We cannot give this to the SEC. It's not accurate." So she blew the whistle on a violation of an SEC rule. The court held she didn't [qualify under the Act]. Why? Because she is a CPA and she should have known that the SEC rule would only apply when you actually give the information to the SEC. The whole point of the law . . . is to prevent people from being harmed. If you were to apply that to the law here, an employee should not blow the whistle to prevent people from being exposed to an unsafe product but instead should hold back, wait until people have been harmed because then they can show that they were absolutely right, that there was a violation. So hopefully that won't happen here.

Also, the law itself would require only that you provide information to your employer. Well, what the ARB did—not the current ARB, this was the prior ARB. This came right out of the thin air, not from the words of the statute. The ARB said, "You have to show that your concerns specifically implicate a violation SEC rule." So if you're not an expert, you have to clearly show that you had an e-mail, for example, that would show that you were absolutely right that there's a violation SEC rule. If I have a client hire me who is employed, I can help him create that e-mail, which is very helpful, but obviously all my clients hire me after they've lost their job. That can happen.

One other thing: the goal of the law was to apply to a lot of people. So it applied if you were an employee of a publicly traded company or you were an agent or all of these other entities. Well, what the courts did is they said well actually, the way a lot of corporations work is that the corporation that has its name on what they actually give to the SEC has no actual employees. The employees are employed through other entities that are a part of the parent corporation. I would have to fight for years before I get into the merits of whether that law would even apply to my client and then, as you know, the whole point of the law was that 180 days after you bring the claim, you could go into court. So you could try your claim before the jury and, of course, as you learned the hard way, somehow there were a lot of courts that would hold, "Well, there is no clear right to have a jury trial." And I have to say it was because of the work of the Government Accountability Project that we were able to close out that huge loophole as part of the Dodd-Frank Act.[17]

THAD GUYER: Thanks a lot, Jason. The questions with the new law are: who is going to decide what Congress said in this law, what Congress didn't say, what Congress intended, and what Congress did not intend? Somebody is going to make those decisions and there are going to be lawyers involved and NGOs involved and the real question, unfortunately, is who gets to those decisions first. Because when the first one of these cases comes out, the same as Sarbanes-Oxley or any of the other whistleblower laws, and that first judge

17. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (to be codified at 12 U.S.C. § 5301).

decides that case—although it may not be controlling on all the other judges and all the other courts—it becomes precedent and they're hardwired to follow the precedent. So it's really important for us to work hard and get the upper hand on this.

So who are the people who need to decide? First of all is the Obama administration's Department of Labor in rulemaking. We recently went through the Dodd-Frank Wall Street Reform Act that everybody's probably heard a lot about. And these defense firms and the very well-funded industries of Wall Street, do you think they just sat back and waited for the SEC to promulgate their rules? They didn't. And the SEC took very, very free reign with deciding what the law meant because they're aware that the court gives substantial deference to the administrative agencies. Unfortunately, the Department of Labor does not really take that kind of free reign. If the NGOs and the whistleblowers and the advocates push the Department, I hope that the Department will get in there and give some broad, protective interpretations of flushing out some of this language, rather than just doing one of these copy and paste of the language of the statute and a bunch of procedures they have from the past whistleblower laws.

Who else is going to define it? It's going to be the Obama administration ARB.[18] So what they're going to rely on is whistleblowers and whistleblower practitioners to preserve the right arguments in the record before the administrative law judges, before [OSHA], [who] makes . . . initial determinations. You've got to take this law and push very broad interpretations in these places where the language is loose so that when it gets to the ARB, the ARB can rule in your favor because you've preserved that in the record.

Lastly, who is going to make the decisions as to what Congress meant? That's going to be the federal courts. The federal courts are the worst possible place for any whistleblower to be. The ALJs [Administrative Law Judges (ALJs)][19] are bad and it's going to take a while before the ALJs have better guidance from the ARB. But once you are into the federal courts, you are in the land of ultra-conservative control and rampant summary justice practices. And so I would advocate to practitioners to take your claims up through the ALJs,

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18. *See* U.S. DEP'T OF LABOR *The Administrative Review Board*, http://www.dol.gov/arb/ (last visited Jan. 14, 2012) (The Administrative Review Board issues final agency decisions for the Secretary of Labor in cases arising under a wide range of worker protection laws, primarily involving environmental, transportation, and securities whistleblower protection; H-1B immigration provisions; child labor; employment discrimination; job training; seasonal and migrant workers; and federal construction and service contracts.).

19. *See* U.S. DEP'T OF LABOR, *Mission Statement*, http://www.oalj.dol.gov/ALJMISSN.HTM (last visited Jan. 14, 2012) (Administrative law judges from the United States Department of Labor's Office of Administrative Law Judges ("OALJ") preside over formal hearings concerning many labor-related matters. The OALJ's mission is to render fair and equitable decisions under the governing law and the facts of each case.).

protect the record, be ready to lose, and get something good up before the ARB. Do not fall for this, "Oh, I'll go to federal court because federal courts are big and muscular and they really care." They do not. The federal courts are just absolute slaughterhouses for whistleblowers.

The issues that the battleground is going to be over are going to start with what constitutes protected activity. And so here are my questions to you. Which of the following are actually prohibited by the food safety statutes, regulations, and standards? Keep in mind, all this whistleblower law says is it is protected activity if you blow the whistle on a violation of law, rule, regulation, or standard. Those laws, rules, regulations, and standards are thousands and thousands of pages elsewhere; they are not there in this little statute. So my question is: is it a violation for Jack-in-the-Box to serve rare meat?

Is it a violation of the statute to chlorinate chicken?

Is it a violation of federal law to sneeze on the produce in the Safeway?

No. And is it a violation of a federal food safety act to sell food beyond the date stamp on it?

It could be easily defended as a no.

So the point is how do these employees that work in the Jack-in-the-Box, that work in the Safeway, that work in the food distribution, how do they know what the statutes say? They go on the basis, "gosh, that seems unsafe . . . . [T] hat seems unsanitary." And under current law, as Jason Zuckerman pointed out, you have the ARB precedent saying that the whistleblower has to come forward with substantial and specific information implicating a particular violation of the underlying law and they cannot just come in there and say, "[G]osh, this is really unsafe" or "[T]hat just seems very dangerous in view of everything that's happening." They are going to blow the whistle and they are going to have very well-funded defense firms coming forward and they are going to fight them off, and we saw the same thing happen under the Sarbanes-Oxley Act. It is really hard to find protected activity under Sarbanes-Oxley if you are not involved with the whistleblower very early on. So a huge amount of education has to be done out there within the food industry.

And then the other issue is the protected audience. What this statute says is: that you are protected if the whistleblower blows the whistle on a violation of a law, rule, or regulation, to the employer, to the federal government, or to the attorney general of the state. Well, at all the Jack-in-the-Boxes where people get sick and die or McDonald's or Burger King's or Safeways all across the country, who are the primary inspectors that "Joe Blow employee" is going to see if he's working in these retail places? It's the state and local restaurant inspectors. It's the state and local inspector who goes into the food store. It's not federal inspectors running in there. And so if an employee calls that inspector aside at the Jack-in-the-Box and says, "it's just terrible here, there was food contaminated with salmonella and the management even knew it was in there and they went ahead and sold it and then I read that a family got sick and their kid died," under the current law, there is no protection whatsoever because that local inspector is not the federal government, and it is not the attorney general. And so what needs to be done at an early stage, in the rulemaking by the Department of Labor, and in arguments that advocates are going to make, is that we need to have a rule. The rule should say that if the employer, federal

government or state attorney general is a likely recipient of that information in the normal course, then it should be protected so that if we know that the local food inspector for the county or the state is going to make a report back to the federal government about this, then the report to the local inspector needs to be covered.

These are going to be two of the big battlegrounds that are going to be fought out in these cases and what we really need to do is get the upper hand on the rulemaking and getting into the ALJs and putting these arguments on the record and staying out of federal court as long as we can.

HON. LUIS CORCHADO: Good afternoon. Thank you for having us here. I have picked three areas that I would like to focus on in the act that have what I would call loaded words. And I think I've generated a lot of debate below, meaning the ALJs in the district courts and even within the ARB, but I will not name names or spill the beans on anybody. But the first area is the word "related." You didn't really mention the word "related" but kind of hinted at it that you reasonably believe that it's related.

When I was a litigator, I would always sit there and think, "okay, what question can I ask this stupid defendant or plaintiff that makes them give me the information that I want? I don't know what they have, what it says, but what's the one word that I can use—'regarding,' 'referring to?'" I always landed on the word "related" as being the broadest word that I can think of that says, "I don't know what you've got but if it's in any way related to this question, you've got to give it to me." And so that's kind of how I see that word. And you know, it may be wrong; I have my own personal experience as a litigator. But that word to me is about as broad as you can get. And so I think it's an important word to key on as a practitioner, as a defendant, or as an employee, to be aware of that word because I think it's a loaded word.

And then somebody mentioned the words "definitively" and "specifically" and "most assuredly," "most certainly," "undoubtedly be related to the violation." "Definitively" and "specifically," you know, those are words that have been debated across the board in all of these different statutes; [the Sarbanes-Oxley Act], the atomic world, all these statutes. And there are going to be a couple of words that are still debated. But keep in mind that you're always going to deal with the same ALJs who have to deal with all these laws and they may forget that this law doesn't have that word or it's written differently. Therefore, as a practitioner, you have to be aware of the nuances that exist in the different laws.

And so there are words such as "definitively" and "specifically," but I urge you to revisit or reeducate the ALJs to make sure they pay attention to the law that is in front of them and not prior cases or prior bodies of law that are written differently. That's the trickiest part about being a practitioner. And so under the word "related," the land mines are figuring what that word itself means, how broad it is, and how definitively and specifically does the information have to relate.

And the last thing I will say about that point is—because there is so much more to say—when do you have to be as specific as you should be? And is it when you make the complaint, back in the day, or when you file a complaint

with the ALJ or federal court? There is a difference. You have to ask your client, if they're the employee, "well, what did you say?" And if they're the employer, you have to say, "what did they tell you?" We have to know specifically what was said because that's going to be a battleground. So moving away from those words, that is the first area that I would point out to you that causes a lot of problems in the cases that we see.

A second area is adverse action. What is adverse action? Well, a lot of the ARB cases in other courts take Title VII law[20] and try to utilize it as a pattern to figure out what is adverse action in the whistleblower world. And you know, sometimes it is helpful and, honestly, sometimes it is not. I think that too often Title VII law is too quickly adopted into the whistleblower law when it does not quite fit. And so when you go back to 1998, and you look at *Burlington Industries v. Ellerth*,[21] that is a sexual harassment case where the Supreme Court talked about tangible job consequences. And if you look at ARB cases, you'll see that that phrase really started to be utilized after 1998 in the ARB cases. And I do not know if it was an exact fit. And then you have the *Burlington Northern* case[ ][22] in 2006 that talked about adverse actions.

Again, you have to start fresh with these ALJs and say, "What should adverse action mean in the food safety industry and these cases specifically?" You have to educate the ALJ. You have to bring that record forward to the ARB about what is an adverse action. If you look at the various [Code of Federal Regulations], they have different definitions of what it could mean. The AIR 21[23] cases talk about threatening and intimidating as adverse actions whereas other statutes and regulations do not. And so you really have to start with the language of the CFRs and the statute and say, "How far does it go?" The confusion comes from words like "discriminate." Somebody talked about that earlier. I thought I knew what that word meant. I thought it meant simply to treat somebody differently and potentially for the wrong reason. But that word is not so clear in the Supreme Court. And so "adverse action" is another loaded term, not clearly defined and defined differently across the board.

The third area that I wanted to get into is causation. My goodness, what a mess Title VII has wrought in causation. One of the most difficult concepts across the board is the *McDonnell Douglas*,[24] *Burdine*,[25] *St. Mary's*,[26] all those cases put together in front of an ALJ who does not have background in employment law trying to catch up with the rest of the world or whomever in one year after twenty or thirty years of confusion in this area. It is a confusing area. *McDonnell Douglas*/*Burdine* shifting is confusing. I do not think it belongs in most of the hearings that happen in front of an ALJ. I think it confuses the

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20. 42 U.S.C. § 2000e (2006).

21. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

22. Burlington N. & Santa Fe R.R. Co. v. White, 548 U.S. 53 (2006).

23. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (2006).

24. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

25. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981).

26. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

hearing because somebody is trying to say, "OK, first you get your witnesses on the stand and talk about the *prima facie* case. Nothing else." That's not the way it happens but you almost always see it happen this way. "Once you're done talking about that, I'm going to get the employer on the stand and talk about their reasons for why they did what they did, legitimate reasons. Then they're going to get off the stand, then I'm going to have the employee bring back your witnesses and talk about why is that pretext. And then when you've done all that, if we've got to get to a mixed motive case, well, I'll figure that out later."

Really what the ALJ needs to know, and what we need to know on the record, is who did what, when and why. Just talk to me straight up. Tell me the story. What is missing a lot from these cases is a continuous story. The ALJs do a great job a lot of the times. I don't want to criticize them. But a lot of times we get cases that say, "Witness A testified, testified, testified, testified. Witness B testified, testified, testified, testified. Witness C . . . " so on down the line. There are two problems with that. Number one is "testified" is not a finding, so I don't know what the ALJ found as a fact. And practitioners really should be aware of that and help the ALJ. I do not know how often they ask for proposed findings of fact, but you might want to think about giving proposed findings of fact anyway to the ALJ and tell a story.

So the second problem is it is a fragmented story. First I have got to know what A said, then I have got to see what B said and C, and then I have to put it all together to figure out what the story was. That is a dangerous thing, I think, for anyone in a case because it creates gaps that really are not there, it creates misperceptions, and it is just a difficult thing to sort through. And so what I would encourage folks to do is to think about telling the story to the ALJ; making sure the story gets put down on paper; and if it is appealed, that that story gets all the way up to the ARB so that everybody kind of knows, well, "Employer, what's your story?" and "Employee, what's your story?" and then we'll go from there. But I think that is the third area that causes—I probably got myself in trouble on this recording but that's the third area that I think causes a lot of problems. So I will wrap it up by saying, there are a lot more areas in this law that create ambiguous words, ambiguous—just creates ambiguity. And so I encourage you to start with the words in the statute. When the CFRs come out, start with [the statute]—then go to the words in the CFR. Use those words, define those words, and then play it out into a story in the trial and in the appeal, if one follows. So I will stop there. Thank you.

END TRANSCRIPT