

**Testimony of Lynn Rhinehart,
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**Before the Subcommittee on Workforce Protections
Committee on Education and Labor
U.S. House of Representatives**

On

**The Whistleblower and Victim's Rights Provisions
of H.R. 2067, the Protecting America's Workers Act**

April 28, 2010

Chairman Woolsey, Ranking Member Rodgers, and Members of the
Subcommittee:

My name is Lynn Rhinehart, and I am the General Counsel of the
AFL-CIO, a federation of 56 national unions representing more than 11.5
million working men and women across the United States. Thank you for
the opportunity to testify today about the urgent need to strengthen the anti-
retaliation provisions in the Occupational Safety and Health Act (OSH Act),
and about how H.R. 2067, the Protecting America's Workers Act, addresses
this need.

Today is Workers Memorial Day, a day unions and others here and
around the globe remember those who have been killed, injured and made ill
on the job. The recent tragedies at the Massey coal mine in West Virginia,
the Tesoro refinery in Washington State, and the Kleen Energy Systems

facility in Connecticut, are vivid and painful reminders of the need to continue and redouble our efforts to assure safe and healthful working conditions for all workers. In 2008, the last year for which comprehensive data are available, 5,214 workers were killed on the job – an average of 14 workers each day, and millions of workers were injured. Clearly, more needs to be done to bring about the OSH Act’s promise of safe and healthful jobs for all workers. We greatly appreciate your holding this hearing today, on Workers Memorial Day, to focus attention on workplace safety and health, on shortcomings in the existing law, and on proposals to strengthen it.

Today marks the 39th anniversary of the day the Occupational Safety and Health Act took effect. In the nearly 40 years since the OSH Act’s enactment, it has never been significantly amended or strengthened.¹ As a result, many provisions in the law, including its penalty provisions and its anti-retaliation provisions, have fallen far behind other worker protection, public health, and environmental laws. It is past time for these provisions to be updated and strengthened.

There is universal agreement about the importance of workers being involved in addressing safety and health hazards at the workplace. Workers

¹ The OSH Act’s civil penalties were last increased in 1990 as part of the omnibus budget reconciliation bill. P.L. No. 101-508.

see first-hand the hazards posed by their jobs and their workplaces, and they are an important source of ideas for addressing these hazards. But in order for workers to feel secure in bringing hazards to their employer's attention, they must have confidence that they will not lose their jobs or face other types of retaliation for doing so. All too often, fear of retaliation for "rocking the boat" leads workers to stay quiet about job hazards, sometimes with tragic results, as we saw with the Massey mine explosion earlier this month.²

The importance of workers being able to raise concerns about workplace hazards with their employers without risking their jobs is especially acute under the OSH Act, because, given limited resources and the vast number of workplaces under OSHA's jurisdiction, actual inspection and oversight of workplaces by OSHA inspectors is quite rare. In its most recent annual report on the state of workplace safety and health, released today in conjunction with Workers Memorial Day, the AFL-CIO found that, according to the most recent statistics, it would take 91 years for federal and state OSHA inspectors to conduct a single inspection of each of the 8 million

² Dan Barry, et al., "2 Mines Show How Safety Practices Vary Widely", N.Y. Times (April 22, 2010). *See also* Peter Kilborn, "In Aftermath of Deadly Fire, a Poor Town Struggles Back," N.Y. Times (Nov. 25, 1991) (workers at the Imperial Food chicken processing plant, where 25 workers died in a fire, did not raise safety complaints because they feared losing their jobs).

workplaces in the United States.³ Given the paucity of inspectors and inspections, OSHA needs workers to be the eyes and ears on the ground, bringing problems and hazards to the attention of their employers to bring about prompt, corrective action *before* injuries, illnesses, and fatalities occur.

Unfortunately, the anti-retaliation provisions in the OSH Act are exceedingly weak. Ironically, they are far weaker than the other 16 anti-retaliation laws that are also enforced by OSHA, and they are weaker than the anti-retaliation provisions in the Mine Safety and Health Act. As a consequence, workers who are fired or face other retaliatory action for filing an OSHA complaint or raising concerns about workplace hazards are left with very little recourse, unless they are fortunate enough to be covered by a union contract, which provides far stronger protections and quicker remedies.

The U.S. Government Accountability Office (GAO) surveyed seventeen whistleblower statutes enforced by OSHA and found that the OSH Act contains much weaker whistleblower provisions than these other federal laws.⁴ Four weaknesses are particularly problematic: (1) the Act's short statute of limitations for filing whistleblower complaints; (2) the absence of

³ AFL-CIO, **Death on the Job: The Toll of Neglect** (April 2010).

⁴ Government Accountability Office, **Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency** 50-65 (Jan. 2009).

preliminary reinstatement while cases are proceeding through the system; (3) the lack of an administrative process for hearing cases; and (4) the absence of a private right of action for workers to pursue their own cases before the agency or in federal court in situations where the Secretary of Labor fails or chooses not to act.

Short Statute of Limitations. Under the OSH Act, workers must file a retaliation complaint within 30 days or their claims are barred by the statute of limitations. This is an exceedingly short statute of limitations when compared to other laws, which provide a minimum of 60 days and more typically 180 days for workers to file a complaint.

Indeed, many of the whistleblower statutes enforced by the Department of Labor—ranging from the Surface Transportation Assistance Act (which protects whistleblowers who complain about violations of federal truck safety regulations) to the Energy Reorganization Act (which protects whistleblowers who work at nuclear facilities) to the Sarbanes-Oxley Act (which protects whistleblowers who report corporate fraud) to the whistleblower provisions contained in the newly-passed Patient Protection and Affordable Care Act (which protects whistleblowers who complain about violations of the health care law) allow employees between 60 and

180 days to file a complaint.⁵ And, of course, the many anti-discrimination statutes enforced by the Equal Employment Opportunity Commission (EEOC), such as Title VII and the Americans with Disabilities Act, allow employees either 180 or 300 days (depending on the state) to file a charge based on retaliation for complaining about discrimination.

The OSH Act's exceedingly short statute of limitations makes it far more likely that workers who face discharge or other retaliation will miss the deadline for filing a complaint, meaning that they will have no real recourse under the OSH Act.

No Preliminary Reinstatement. The second major shortcoming in the OSH Act's anti-retaliation provisions is the absence of language authorizing preliminary reinstatement of a worker while his or her case is pending and working its way through the process. Here again, almost all of the other anti-retaliation laws enforced by OSHA authorize the Secretary to order preliminary reinstatement where she finds reasonable cause, after an initial investigation, to believe that a violation has occurred. The preliminary reinstatement provisions in the Federal Mine Safety and Health Act are even stronger. They call for the Federal Mine Safety and Health Review Commission to order immediate preliminary reinstatement in all cases unless

⁵ See *id.* at 51; see also P.L. 111-148, 124 Stat. 119 (2010).

the Secretary determines that the complaint was frivolously brought. 30 U.S.C. § 815(c).

Preliminary reinstatement is an important component to a meaningful anti-retaliation process, because it means that a worker will not be out of work losing pay and benefits while the case is pending. It is a common feature of other anti-retaliation statutes, including statutes enforced by OSHA, and it has proven workable. It should be added to the OSH Act.

No Administrative Process. Unlike most other whistleblower laws enforced by OSHA, there is no administrative process for pursuing anti-retaliation claims under the OSH Act. Instead of conducting an investigation and issuing a preliminary order, with review before an administrative law judge within the agency, as is the case with most other whistleblower laws, the Secretary must file suit on the worker's behalf in federal district court – a costly, resource intensive, and time-consuming process that the Secretary rarely pursues.

According to data provided by OSHA, in FY 2009, OSHA received 1,280 complaints alleging violations of the 11(c) anti-retaliation provisions in the OSH Act, 29 U.S.C. § 659(c). The majority were dismissed. Nearly 20 percent of the cases (246 cases) settled. OSHA recommended that the Secretary pursue litigation in 15 cases; 4 cases were actually brought. Since

1996, the Secretary of Labor has filed only 32 cases in federal district court under Section 11(c). And, because the OSH Act does not authorize workers to pursue their cases on their own, workers in the thousands of cases the Secretary did not pursue were left without meaningful recourse.

The absence of an administrative process greatly weakens the effectiveness and utility of the anti-retaliation provisions in the OSH Act.

No Right of Appeal or Private Action. The fourth major shortcoming in the OSH Act's anti-retaliation provisions is the absence of a right for workers to get a hearing or pursue their own case before an administrative law judge or the court. Under the OSH Act, workers are entirely dependent on the Secretary of Labor to pursue their cases, because there is no administrative process for them to access and no right to bring their case in federal district court if the Secretary elects not to proceed. As the statistics outlined above reveal, the Secretary pursues only a handful of cases each year, leaving the rest of workers without a forum to pursue their own cases.

The absence of a private right of action for workers to pursue their own cases before an administrative agency or the court makes the OSH Act's anti-retaliation provisions far weaker and far outside the mainstream of other anti-retaliation laws. As the chart attached to this testimony shows, other whistleblower provisions enacted by Congress provide workers with

the ability to seek a hearing before an administrative law judge, or a de novo hearing before a federal district court, or both. In contrast, an employee who brings a whistleblower complaint under the OSH Act is wholly dependent on the Secretary of Labor to vindicate his or her rights; if the Secretary delays or declines to pursue the employee's case – which, as explained above, is what happens in the vast majority of cases – the whistleblower has no recourse under the law. This is a serious shortcoming that greatly undermines the effectiveness of the OSH Act and its anti-retaliation provisions.

The case of whistleblower Roger Wood illustrates the problem. Wood was an experienced electrician who worked at a chemical weapons disposal facility, a facility where the working conditions were described by a federal court as “probably as dangerous as any undertaken in the world.”⁶ Wood repeatedly complained about unsafe working conditions, including inadequate safety equipment, resulting in an OSHA investigation and the employer being cited for two serious safety violations. Subsequently, Wood was fired after he refused to work in a toxic area without adequate safety equipment.⁷ Wood filed a whistleblower complaint with the Department of Labor, and a regional Department of Labor official recommended that the

⁶ *Wood v. Department of Labor*, 275 F.3d 107, 108 (D.C. Cir. 2001).

⁷ *Id.*

agency file suit on Wood's behalf. But after over *five years* of internal review, the Department ultimately declined to pursue Wood's case. Wood sued in federal court seeking to force the Department of Labor to file suit on his behalf. A full ten years after he was fired, the U.S. Court of Appeals for the D.C. Circuit denied Wood's claim, finding that the Occupational Safety and Health Act's whistleblower provision left all determinations as to whether to bring suit solely in the hands of the Department of Labor.⁸

⁸ *Id.* at 111-12.

The Anti-Retaliation Provisions in the Protecting America's Workers Act Will Help Bring the OSH Act's Protections into the Mainstream

The Protecting America's Workers Act (PAWA) will update and improve the OSH Act's anti-retaliation provisions and bring them up to par with other anti-retaliation laws enforced by OSHA. By providing more meaningful anti-retaliation protections to workers, PAWA will help encourage employees to speak out when they become aware of hazardous workplace conditions, which will help bring about corrective action and prevent injuries, illnesses, and deaths on the job.

PAWA accomplishes these goals by making the following common-sense changes, as reflected in the March 9, 2010 Discussion Draft of Modifications to H.R. 2067:

- It extends the statute of limitations for filing complaints from the current 30 days to 180 days;
- It establishes clear and reasonable timeframes for the Secretary of Labor to complete her investigation and for administrative law judges to hear and decide cases, and authorizes workers to pursue their cases before an ALJ or federal court when these deadlines are missed;
- It provides for preliminary reinstatement of workers after an investigation and determination by the Secretary of Labor. The

Secretary is given 90 days to investigate cases and issue a preliminary order. In cases where the Secretary of Labor finds reasonable cause to believe that a violation of the anti-retaliation provisions has occurred, the bill allows the Secretary to issue a preliminary order reinstating the employee to his or her position, along with other relief;

- In the event that the Secretary dismisses a complaint, or does not issue a timely preliminary order, i.e., within 120 days, PAWA permits an employee to request a hearing before an administrative law judge;
- If an administrative law judge does not timely issue a decision (i.e., within 90 days), or there is no timely decision on an internal appeal of an ALJ decision, PAWA authorizes workers to bring their case to federal district court;
- PAWA codifies the longstanding rule that workers are protected against retaliation when they refuse in good faith to perform work they reasonably believe poses an imminent danger to their health or safety. OSHA's regulations to this effect have been upheld by the U.S. Supreme Court, *see*

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); PAWA codifies these rules;

- PAWA also codifies OSHA’s existing regulations providing that the OSH Act’s anti-retaliation protections extend to workers who report injuries and illnesses, 29 CFR § 1904.36. The General Accountability Office has found that fear of discharge or other retaliation is a significant factor in workers being reluctant to come forward to report workplace injuries and illnesses.⁹ Explicitly stating that workers are protected against retaliation for reporting injuries will help ensure that workers are not discouraged from coming forward when they are injured on the job;
- PAWA clarifies the remedies that are available to workers who are victims of unlawful retaliation. These remedies are well-established, even in the few cases that have been brought under the OSH Act, but including them in the statute removes any doubt about their availability.

In sum, there is nothing novel about any of these improvements to the OSH Act’s anti-retaliation protections. Rather, all of PAWA’s proposed

⁹ GAO, *Workplace Safety and Health: Enhancing OSHA’s Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data* (Oct. 2009).

improvements are well-established means to protecting whistleblowers that Congress has routinely included in other federal statutes in the four decades since the Occupational Safety and Health Act was passed. It is essential that Congress incorporate these sound and proven protections into the Occupational Safety and Health Act, so that workers who raise concerns about hazardous working conditions receive the same basic protections against retaliation as those who complain about corporate malfeasance, environmental or transportation hazards, or health care fraud.

As the Subcommittee considers legislative change to improve worker protections, including the ability to speak out about job hazards without retaliation, we suggest that the Subcommittee also look at additional measures for protecting these rights, such as the civil penalty provisions for violations of the anti-retaliation provisions of the Mine Safety and Health Act that were adopted by Congress in 2008 as part of the S-MINER Act, H.R. 2768. The S-MINER Act authorized civil penalties of not less than \$10,000 and not more than \$100,000 for each violation of the Mine Act's anti-retaliation provisions. Adopting a civil penalty for violations, in addition to the individual remedies provided for in the Protecting America's Workers Act, would strengthen the tools for enforcing these rights and help deter violations of them.

The AFL-CIO urges prompt action on the Protecting America's Workers Act. It is past time to update and strengthen the Occupational Safety and Health Act so that workers in this country will be better protected from job hazards and better protected when they speak out about them.

Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.