

Comments of National Employment Law Project

On Whistleblower Protection Issues in the Finance Industry Docket No. OSHA-2018-0015

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Docket No. OSHA -2018-0005

Loren Sweatt
Deputy Assistant Secretary
OSHA
OSHA Docket Office
Room 3653
200 Constitution Avenue, NW
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Dear Deputy Assistant Secretary Sweatt,

The National Employment Law Project (NELP) submits the following comments in response to the Federal Register Notice issued by the Occupational Safety and Health Administration (OSHA) on September 5th announcing a public meeting to solicit comments and suggestions from stakeholders in the financial industry on issues facing the agency in its administration of the whistleblower protection provisions of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Sarbanes Oxley Act. We will address both questions asked in the Scope of Meeting Section:

- 1) How can OSHA deliver better Whistleblower customer service?
- 2) What kind of assistance can OSHA provide to help explain the whistleblower laws it enforces?

NELP is a non-profit research and policy organization that for more than 45 years has sought to ensure that America upholds the promise of opportunity and economic security for all workers.

In June 2016, NELP issued a report entitled “Banking on the Hard Sell.”¹ In compiling this report, we used qualitative interviews with bank workers from a variety of banks in numerous cities and 18 different states to understand their relationship to predatory sales goals. Many of these workers acknowledged that they were asked to perform their jobs in ways that made them uncomfortable, and which they at times felt directly contradicted the

¹ <https://www.nelp.org/wp-content/uploads/NELP-Report-Banking-on-the-Hard-Sell.pdf>.

mandatory legal compliance trainings they had received. Yet most many felt that their institutions did not have a process by which to report those concerns, and even when they did, workers feared retaliation in the form of diminished compensation, public humiliation in front of their colleagues, harassment, and even termination.

When we went back to bank workers roughly 18 months later, we did a broad survey of hundreds of workers and the data found little room for optimism. The results, which were disappointing yet not entirely surprising, were published in the report entitled “Cashing Out: How Bank Workers are Fairing Almost Two Years After the 2016 Fraudulent Sales Scandals.”² We learned that while bank executives assured regulators that they were addressing the practices that led to so many abuses of workers and consumers, workers said that those new policies were unevenly communicated and often unclear. Most distressingly, they said that they continued to fear sharing concerns about those goals because of the potential for retaliation or termination.

In theory, workers should be able to turn to the Occupational Safety and Health Administration (OSHA) to raise these types of concerns, as the Sarbanes-Oxley Act and the Consumer Financial Protection Act of 2010 vests it with the authority and responsibility to protect whistleblowers from employer retaliation. To be sure, a few whistleblowers sought and received remedies through OSHA for their terminations.³ Yet, it is clear from OSHA’s own press releases that OSHA took too many years to process these cases. In fact, in one case that OSHA found for the whistleblower in 2017, the worker had not been able to work in the banking industry since he complained in 2010. That is seven years! That is an unconscionable amount of time for an agency to process a whistleblower case. Clearly, though OSHA did find for a handful of the complainants, the overall story of OSHA’s responsiveness to banking workers is not so rosy.⁴ And given OSHA’s scarce resources and diminishing staff, its ongoing ability to effectively protect financial industry workers who try to uncover abuses in the industry is precarious at best.

Going back to the initial passage of the OSH Act, Congress understood that workers play a crucial role in ensuring that their workplaces are safe. Equally important, if workers were going to report hazardous conditions to their employer or to OSHA, they needed protection against retaliation for such activities. For that reason, section 11(c) of the OSH Act prohibits discrimination against employees for exercising their rights under the law.

² <https://www.nelp.org/blog/cashing-big-banks-lobbying-dollars-mean-weaker-protections-consumers-workers/>.

³ See, e.g., <https://www.osha.gov/news/newsreleases/region9/07212017>; <https://www.zuckermanlaw.com/osha-orders-wells-fargo-pay-5-4m-whistleblower/>.

⁴ See, e.g., <https://www.reuters.com/article/us-wells-fargo-accounts-whistleblower-idUSKCN12D2M0>; <https://www.americanbanker.com/news/unprotected-how-the-feds-failed-two-wells-fargo-whistleblowers>.

Since the passage of the OSH Act, Congress gave OSHA the additional responsibility of enforcing the whistleblower provisions of 21 other laws, including the Consumer Financial Protection Act of 2010 and the Sarbanes-Oxley Act. This is a unequivocal acknowledgement that workers are “this Nation's eyes and ears, identifying and helping to control not only hazards facing workers at jobsites, but also practices that endanger the public's health, safety, or well-being and the fair and effective functioning of our government.”⁵

NELP has previously documented how OSHA enforcement staff and enforcement in general is falling under the current Administration. Most particularly, as of January 2018, OSHA had only 764 inspectors as opposed to the 814 it had just one year earlier. This, of course, impacts OSHA's ability to investigate claims of violations of the OSH Act. We don't know the staffing levels of those investigating whistleblower claims, but we hope that this Administration will assure that there is no reduction in staff from the previous Administration.

In all fairness, we must also note that the failure to adequately protect whistleblowers is a problem that transcends particular administrations and is due, in large part, to the severe under-funding the Agency faces, especially in light of the enormous responsibility of enforcing the Whistleblower provisions of 22 laws.

As the articles cited above detail, there were already serious shortcomings in OSHA's response to financial industry whistleblowers. Most glaringly, there were extraordinary delays. For example, former Wells Fargo general manager Claudia Ponce de Leon filed a whistleblower claim in December of 2011, and as of the writing of an article published on October 13, 2016, OSHA still had not interviewed her.⁶ Her complaint was one of several dozen filed against Wells Fargo over the prior 14 years.

Similarly, Yesenia Guitron and Judi Klosek, two Wells Fargo workers in St. Helena, California, were fired after they spoke up against fraudulent practices. They filed complaints with OSHA in May of 2010, but as late as 2017, neither were ever contacted by the Agency for so much as an interview.⁷

These are but a few examples of the finance industry workers who should have been able to turn to OSHA for protection and relief, but instead, found themselves lost in an administrative process that was unresponsive to their complaints. Had their complaints been more promptly investigated, other workers may have been identified or come forward and OSHA may have uncovered what was going on at Wells Fargo far earlier and saved countless consumers and workers from violations of their rights.

⁵ Testimony of David Michaels, Oct. 7, 2015, <https://www.osha.gov/news/testimonies/10072015>.

⁶ <https://www.reuters.com/article/us-wells-fargo-accounts-whistleblower-idUSKCN12D2M0>.

⁷ <https://www.americanbanker.com/news/unprotected-how-the-feds-failed-two-wells-fargo-whistleblowers>.

But in order for OSHA to properly handle these kinds of claims and all of the other whistleblower and safety claims it receives, it needs adequate resources and adequate staff. OSHA must continually request additional staffing for the Whistleblower Protection Program. OSHA should also explore providing the Whistleblower Protection Program with the authority to transfer a case under these laws at the whistleblower's request if the regional office has not completed its investigation within a certain time frame. For instance, if the case is still open after 6 months, at the complainant's request, OSHA could automatically transfer the complaint to the Office of Administrative Law Judges for a de novo proceeding. This would enable the whistleblower to begin a more timely administrative hearing, rather than wait possibly years for what more often than not is an adverse decision. A similar process exists at the Office of Special Counsel.

OSHA must also increase its training of all its whistleblower investigators so they understand the type and kind of violations that workers may report under the whistleblower provisions of laws regulating the financial sector – and the impact not just on the worker, but on consumers. (As a first step, we are happy to provide copies of our report cited at the beginning of our testimony.) Clearly, the OSHA investigative staff did not understand the gravity of the complaints in the financial sector filed with the agency in 2010 and 2011 – otherwise why would they have taken so long to process these claims.

NELP fully appreciate the dedication of OSHA's whistleblower staff and the challenges they face in protecting workers who file claims of retaliation. We know that more staff and more training are critical to providing the timely adjudication of claims that American workers deserve. But, most importantly, when OSHA receives a complaint they must reach out to the worker as soon as possible to take their statement, and explain the process and alternatives. Many of these financial statutes have a private right of action, but many workers may not have the funds or resources to file a lawsuit. And OSHA needs to keep better track of complaints and the length of its decision making process so that every case where a worker is fired is given priority, and no case should take as long as the previous cases cited here.

We urge the agency to complete a thorough investigation of how it handles whistleblower cases from the financial sector, request additional resources, and implement new policies that will assure these complaints are heard and processed in a fair and timely manner.

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