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How Well Does OSHA Protect
Workers From Reprisal:
Inspector Opinions

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Before the
Subcommittee on Labor-Management Relations
Committee on Education and Labor
House of Representatives



SUMMARY OF GAO TESTIMONY BY WILLIAM J. GAINER
ON INSPECTORS' OPINIONS ABOUT HOW WELL
OSHA PROTECTS WORKERS FROM REPRISAL

The Occupational Safety and Health Act and regulations developed by the Occupational Safety and Health Administration (OSHA) give workers certain rights and responsibilities. These include the right to report safety and health hazards and to refuse to work when faced with an imminent danger of death or serious injury. Because the free exercise of these rights is considered instrumental to ensuring a safe and healthful workplaces, the act also guarantees workers protection from employer reprisal when they exercise their rights. In fiscal year 1989, OSHA resolved about 3,600 complaints from workers about employer reprisals, and it found that evidence supported 16 percent of the complaints. A GAO survey of OSHA inspectors found, however, that many inspectors believe workers' participation is limited by their lack of knowledge about their rights and lack of protection from employer reprisal.

Many Workers Are Unaware of Their Rights. Almost 80 percent of the inspectors said fewer than half of all workers are knowledgeable about their rights, and about one-third said that few if any workers are knowledgeable about their rights.

Workers Cannot Safely Exercise Their Rights. About 22 percent of the inspectors said that workers were not free to exercise their rights, such as the right to talk confidentially with an inspector. A similar percentage (26 percent) said that workers have little or no protection when they report violations to OSHA. Inspectors also said workers have even less confidence than they do in their protection: Almost half of the inspectors thought that workers themselves believe they would have little or no protection if they reported violations.

Legislative and Other Factors Reduce Workers' Protection. The legislative factors that inspectors believe make it difficult for the agency to protect workers include (1) the 30-day period for filing a complaint, (2) requirements to litigate cases in district court rather than through an administrative law judge, (3) the lack of interim remedies while a case is being litigated or settled, and (4) ambiguities in the statute. Other factors they cited included (1) the length of case processing time, (2) the nature of the investigations, and (3) the difficulty in proving that employer reprisal has occurred.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss workers' protection from reprisal when they exercise their rights to protect themselves and their co-workers from health and safety workplace hazards. These rights are guaranteed by legislation and by regulations established by the Occupational Safety and Health Administration (OSHA). What I will be providing is the perspective of OSHA inspectors on how effectively the legislative provisions of section 11(c) of the Occupational Safety and Health Act, as administered by OSHA, operate to protect workers from reprisal because of their actions. As requested, we will also give you some specific examples of problems reported to us by inspectors.

In summary, inspectors believe that many workers are uninformed about their rights and unprotected against reprisal by employers when they exercise them. Some also identified factors that they believe reduce workers' protection against reprisal. Before elaborating on these points, I would like to provide some background on OSHA and the provisions of section 11(c) and a description of our survey methodology.

BACKGROUND

The Occupational Safety and Health Act is the nation's primary law governing workplace health and safety, covering about 5.8 million businesses employing 83.4 million workers. The Secretary of Labor administers the act through OSHA. OSHA sets mandatory safety and health standards, inspects workplaces, assesses penalties for violations, and establishes time periods for employers to abate identified hazards. In addition, the agency provides education and consultation programs and oversees the 21 states and 2 territories that operate their own health and safety programs for public and private sector employees.

Workers' Rights and Responsibilities

The Occupational Safety and Health Act and Department of Labor implementing regulations provide employees with a number of workplace rights. These include the right to be informed about the law, workplace hazards, and OSHA standards and actions in response to worker complaints. Workers also have a right to report violations and request a workplace inspection, to accompany and talk with inspectors, and to contest the period of time OSHA allows for an employer to abate a hazard. OSHA regulations also give workers the right to refuse work when faced with an imminent danger of death or serious injury.

The act also charges workers with certain responsibilities. For example, they are to comply with all applicable OSHA standards, report any hazardous conditions to their supervisors, cooperate

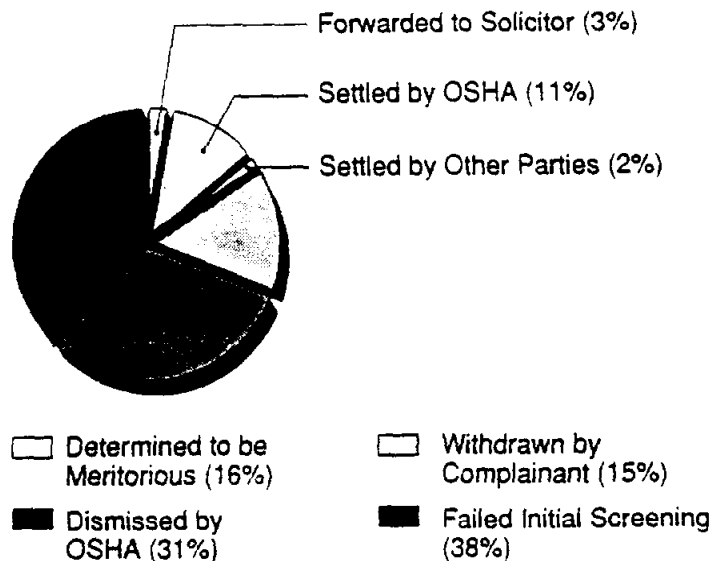
with OSHA compliance officers, and report work-related injuries or illnesses to their employers.

Protecting Workers Against Reprisal

In addition to their other rights, section 11(c) of the act gives workers the right to take actions to ensure their health and safety on the job without fear of punishment, such as being fired. To ensure that workers can exercise their rights, OSHA operates a complaint investigation program. OSHA investigators examine complaints of employer reprisals and determine whether the evidence supports the complaints.

Workers (or their representatives) who believe they have been punished for exercising their safety and health rights must contact the nearest OSHA office to file an "11(c) complaint" within 30 days of the time they learn of the alleged reprisal (discrimination). In response to a complaint, an investigator conducts an in-depth interview with the complainant initially to screen out inappropriate complaints, such as those which fail to meet the 30-day filing requirement or for which OSHA lacks jurisdiction. As shown in the figure below, of the approximately 3,600 complaints resolved in fiscal year 1989, about 38 percent failed this initial screening.

GAO Agency Disposition of 11(c) Complaints, FY 1989



The agency investigates the remaining cases to determine whether they are meritorious--the evidence supports the conclusion that there is a section 11(c) violation--or whether the complaint should be dismissed. By law, the complainant must receive this determination within 90 days of the date the agency receives the complaint. The agency has an internal administrative appeals process through which complainants who disagree with the determination can appeal to the national office.

Meritorious cases are a relatively small proportion of all complaints received. In fiscal year 1989, about 16 percent of all cases were determined to be meritorious; the others were either screened out without a full investigation, withdrawn by the complainant, or dismissed by OSHA. During the 1980s, the percentage of meritorious cases each year has ranged from 10 to over 16 percent.

Most meritorious cases are settled without resort to litigation. In fiscal year 1989, the agency forwarded fewer than 3 percent of all complaints to the Labor Solicitor for legal action. The remaining meritorious cases were settled either by OSHA (11 percent) or by agreements reached between other parties (2 percent). There is no provision for judicial review of OSHA's decision to dismiss a section 11(c) case, and employees have no private right to pursue legal action when they are dissatisfied with the agency's decision to dismiss a case.

OBJECTIVES, SCOPE, AND METHODOLOGY

In April 1989, we sent a mail questionnaire to a representative sample of one-third of OSHA's safety and health compliance officers and all of their immediate supervisors. We asked for their opinions and experiences with respect to several aspects of OSHA's activities, including workers' knowledge of their health and safety rights and their protection from reprisal.¹ Our survey results come from 336 inspectors: 219 safety and health compliance officers and 117 supervisors. This represents about 33 percent of all compliance officers we identified as conducting inspections and 75 percent of the supervisors. The results can be projected to the universe of all those conducting or directly supervising inspections with a sampling error no greater than plus or minus 4.6 percent for any estimate. In addition to answering multiple-choice questions, 38 inspectors wrote narrative comments about the 11(c) program. We discussed these

¹ This survey was part of a study requested by the Chairman, Joseph Gaydos, and Ranking Minority Member, Paul Henry, of the Subcommittee on Health and Safety, House Committee on Education and Labor, who have agreed that we could report the results related to section 11(c) in these hearings.

comments in interviews with ten inspectors and one 11(c) investigator.

We limited our questions to the reprisal protections provided to workers under the Occupational Safety and Health Act. We did not ask them about protection for workers covered by other laws, such as those in the trucking industry covered by the Surface Transportation Assistance Act, for which OSHA also enforces reprisal protections.

In discussing our findings with OSHA headquarters officials, they noted that with the exception of two regions in which pilot projects are underway, inspections and 11(c) investigations are carried out by different individuals, who may have different opinions about the 11(c) program. They questioned whether inspectors have enough information to assess workers' knowledge of their rights and their protection by the 11(c) program.

Some of the inspectors we surveyed, however, were doing investigations along with inspections. In addition, most inspectors, while not directly involved in such investigations, have sources of information about the adequacy of the program. For example, they talk with workers who have requested inspections or exercised their rights in other ways, and they hear from them about instances of reprisal from employers.

We obtained information on the complaint process under section 11(c) and some overall program statistics from OSHA, and we discussed with OSHA officials the inspectors' responses. However, we did no further audit work at the agency that would allow us to confirm or disprove these respondents' observations about the protection being provided.

OVERVIEW OF SURVEY RESULTS

Under the Occupational Safety and Health Act, the free exercise of employees' workplace rights is described as instrumental to ensuring a safer and more healthful work environment. But many OSHA inspectors believe that workers' participation is limited by their lack of protection from employer reprisal. The figure below summarizes inspectors' beliefs about worker protection from reprisal under 11(c).

GAO Overview of Survey Results

Inspectors Believe

- Many workers are unaware of their rights
- Workers are correct in thinking they cannot exercise their rights without reprisal
- Legislative and other factors combine to reduce their protection

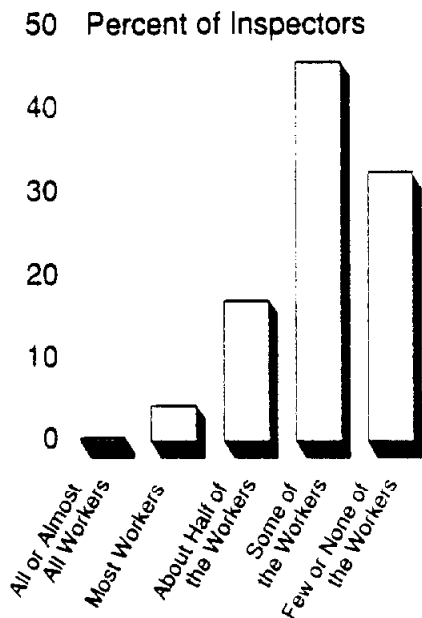
Inspectors Believe Many Workers Are Unaware of Their Rights

The next figure shows that most inspectors (almost 80 percent) believe that fewer than half of all workers are knowledgeable about their 11(c) rights, and almost one third (33 percent) think that few if any workers are knowledgeable about their 11(c) rights.

If workers have limited knowledge, it may be because what they know about their rights is primarily dependent on their actions

actions to inform themselves. For example, workers can get pamphlets and other information from OSHA, and they can read the notice employers are required to post informing them about the act, including their rights. But the poster itself explains only those rights guaranteed under the law, not those granted under agency regulation. For example, their right to refuse work in situations where they face imminent danger of death or serious injury is not mentioned on the official poster.

GAO Inspector Opinions of Worker Knowledge of Section 11(c) Rights



Number of Workers Knowledgeable About 11(c) Rights

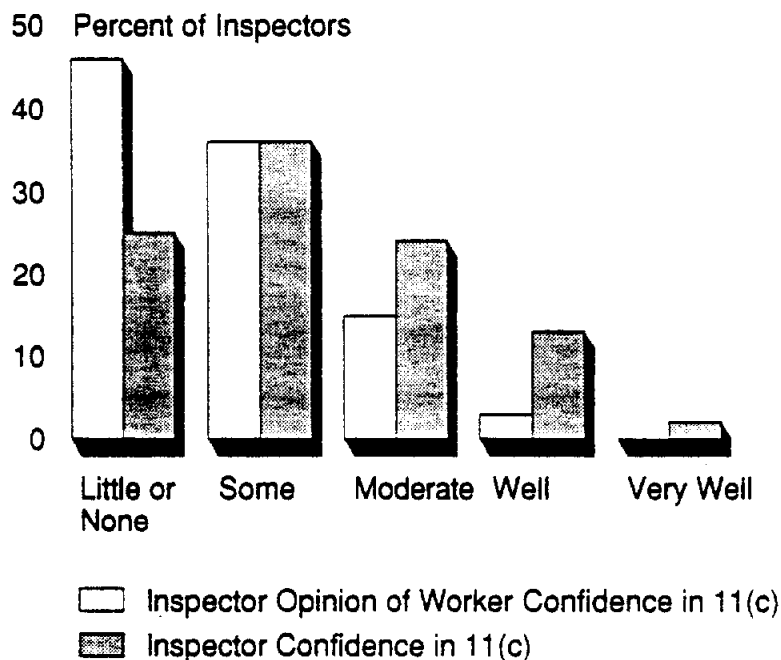
Inspectors Believe Workers Are Correct in Thinking They Cannot Safely Exercise Their Rights

Inspectors generally do not believe that workers are free to exercise their 11(c) rights, such as to talk confidentially with an inspector. Fewer than 10 percent said that workers definitely could exercise these rights without reprisal, while 22 percent said they definitely could not.

As shown in the figure below, a similar percentage of the inspectors (26 percent) expressed the belief that 11(c)

procedures provide workers little protection from reprisal when they report violations to OSHA. And inspectors said workers have even less confidence than they do in their protection: almost half of the inspectors (46 percent) said that workers themselves generally believe they would have little protection if they reported violations.

GAO Inspector Opinions of Protection When Violations Are Reported



Several inspectors also cited specific instances of reprisals against workers and the impact reprisals had on OSHA activities. For example, one inspector described a situation where a worker was "blackballed" by an employer who found out he had reported hazards to OSHA and, as a result, had to move out of town. Inspectors in several regions said that OSHA is aware that it cannot protect workers who report violations. As a result, they said, on occasion OSHA has been forced to drop citations when the employers contested them because the agency was unwilling to reveal in subsequent hearings the name of the worker who made the complaint.

Inspectors Identified Legislative
Factors That They Believe Reduce
the Protection Under 11(c)

About two-thirds of the inspectors who made narrative comments identified specific factors that they believe reduce the protection provided by the 11(c) program. Some of these were legislative factors, while others were more administrative or resource problems. These factors warrant further investigation, which we plan to perform in the coming months. The legislative factors are shown below.

GAO Legislative Factors Inspectors Believe Limit Protection

- 30-day filing period
- Taking employer to court rather than an administrative law judge hearing
- Lack of interim remedies while case is pursued
- Ambiguities in the statute, such as refusal to work because of serious health hazards

Short filing period

Giving workers only 30 days in which to file a complaint sets a more stringent requirement than workers have under some other federal statutes, such as section 405 of the Surface Transportation Assistance Act. That law gives certain workers in the trucking industry 6 months to file complaints of reprisal. Three inspectors reported that they knew of instances where employees otherwise had good or strong cases but failed to meet

the 30-day deadline and thus had their complaints dropped. One supervisor believed that, in his region, more than half the cases rejected would have been appropriate cases if the filing period had been longer than 30 days.

According to one inspector, workers who are fired for reporting a safety and health violation often are unaware of their rights and are in a "state of shock" from the incident. By the time workers become aware of their rights, the 30-day filing deadline has passed.

Requirement to take employer to court rather than to an administrative law judge hearing

According to two inspectors, another problem is the requirement that the agency must litigate cases at the district court level, rather than with an administrative law judge, as under section 405. One inspector believes the courts place low priority on these cases. The inspector also said that, in two 11(c) cases, the judge chastised the workers for lack of loyalty to their companies. He also contended that no cases in his area have gone to court in the last two years because OSHA believes that it cannot win the cases.

Lack of interim remedies

Unlike some other federal legislation, such as the Federal Mine Safety and Health Act, the Occupational Safety and Health Act has no provision for interim remedies such as the temporary reinstatement of the employee once the agency finds that a complaint has merit. Instead, workers may continue to face reprisals, such as loss of their jobs while the case is being litigated or settlements are being negotiated.

Five inspectors mentioned that the lack of an interim remedy is a problem, causing financial hardship for many workers. The lack of such remedies may deter or inhibit workers' exercise of their rights under the law.

Ambiguities in the statute

Inspectors described several ambiguities in the OSHA statute, including specifically what activities are protected. One problem of this kind mentioned by inspectors involves workers' right to refuse work that poses an imminent danger of death or serious injury. Ambiguity exists, in part, because the Act is silent on whether workers have a right to refuse work in cases of imminent danger. OSHA regulations grant that right, when certain stringent conditions are met. Although the Supreme Court affirmed the right to refuse work in the context of a safety

hazard, the court did not clearly answer questions concerning the applicability of that right to health violations.

Four inspectors reported that right-to-refuse cases, especially those involving health hazards, present them with a dilemma. Many health hazards, such as exposure to asbestos, have serious long-term effects, but their existence is hard to detect at a given point in time. Four inspectors said that in such ambiguous situations it is hard to advise workers about what protection they would have if they refused to work.

Inspectors Also Identified Other
Factors That They Believe
Reduce the Protection Under 11(c)

Inspectors also cited other factors, shown below, that they believe limit workers' protection against reprisal.

GAO Other Factors Inspectors Believe Limit Protection

- Case processing time
- Nature of the investigation
- Inherent difficulty in proving discrimination

Case processing time

Although the agency is required by law to resolve a complaint within 90 days, 10 inspectors mentioned that many complaints are

outstanding at least that long and often longer. One inspector said that in his office 11(c) cases taking one year to resolve are "not uncommon." Such delays could discourage workers from filing complaints.

In this review, we did not analyze case processing times. OSHA told us that, as of September 1989, about one-quarter of all complaints were over 90 days old.

Nature of the investigations

Several respondents, including some with direct experience in conducting investigations, expressed concern about the adequacy of investigations. One reason for this concern was the perceived pressure to get investigations completed even if it meant reducing their thoroughness. They think this is especially true where inspectors are required to perform both inspections and investigations. One interviewed supervisor was concerned that investigators are not adequately trained to recognize that 11(c) complaints represent not just an occupational health and safety problem but also a personnel or labor relations problem. Knowledge of health and safety violations and the law alone may be insufficient to investigate cases adequately.

Difficulty in showing discrimination

Five inspectors commented on the difficulty of proving employer reprisal (discriminatory action) against workers exercising their rights. Some inspectors said that this may be due to the typically greater sophistication of employers compared to workers. An employer told one inspector that if a worker complains to OSHA, the firm will fire that worker. When the inspector told the employer that such firing was illegal, he said that they simply would find other, legal ways to discharge the employee. Other inspectors went so far as to say that unless the employer actually admits an act of reprisal, OSHA rarely wins.

Cases involving work refusals present other problems. Some inspectors reported how difficult it is to determine what the working conditions were at the time the worker was punished for refusing to work. Conditions may be totally different even a few days after an incident, making it difficult to determine whether or not an imminent danger had existed.

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Many of these comments raise serious issues which we believe should be investigated further, and we plan to do so during the coming months. This concludes my prepared statement. My colleagues and I will be pleased to answer any questions you may have.