# CERCLA

Ashley Gjovik | Apple Inc | Department of Labor

## Prima Facie

**1) Did the actions for which Complainant seeks whistleblower protection touch on concerns for the environment or public health and safety that are the focus of the environmental acts?**

- Filing a whistleblower complaint is quintessential protected activity. Talking about such a complaint with the news media and a federal agency is also protected activity. *(Erickson v. U.S. EPA)*
- An employee who makes a complaint to the employer that is "grounded in conditions constituting reasonably perceived violations" of the environmental acts, engages in protected activity. Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity under the environmental whistleblower protections. The employee need not prove that the hazards he or she perceived actually violated the environmental acts. Nor must an employee prove that his assessment of the hazard was correct. And we have also held that an employee need not prove that the condition he or she is concerned about has already resulted in a safety breakdown. *(Erickson v. U.S. EPA)*
- An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer's actions violate a particular environmental statute. *Oliver v. Hydro-Vac Services, Inc.*

Gjovik: Yes – EPA Superfund site, TRW Microwave, 825 Stewart Drive Sunnyvale CA

**2) Complainant must have had a reasonable good faith belief that his conduct was in furtherance of the purposes of the act under which he seeks protection when he made the complaint.**

- Complainant "does not need to express his reasonable belief when he engaged in protected activity so long as he reasonably believed, at the time he voiced his complaint or raised his concerns, that a threat to the environment or to the public existed."

Gjovik: EPA Superfund goals are:

- **Yes**!!!
  - Protect human health and the environment by cleaning up contaminated sites;
  - Involve communities in the Superfund process; and
- **Sure**:
  - Return Superfund sites to productive use.
  - Make responsible parties pay for cleanup work;

**3) There is a potential for overlap between the environmental whistleblower acts and the Occupational Safety and Health Act. The case law makes clear that while the environmental statutes "generally do not protect complaints restricted solely to occupational safety and health [covered by Section 11(c)]," they do if "the complaints also encompass public safety and health or the environment."**

- In Devers v. Kaiser-Hill Co. , ARB No. 03-113, ALJ No. 2001-SWD-3 (ARB Mar. 31, 2005), the ALJ had held that the Complainants had not engaged in protected activity under the whistleblower provisions of the ERA, TSCA, SWDA and CERCLA because the complaints related only to safety in the workplace failing under the OSH Act. The ARB affirmed the ALJ in regard to the three environmental statutes, but reversed in regard to the ERA. The ARB found

that the OSH Act is preempted by the ERA where the matter involves non-federal employees whose working conditions are governed by a federal agency having statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. See 29 U.S.C.A. § 653(b)(1). In the instant cases, the Complainants were employees of a company that had contracted with the DOE to decontaminate and decommission a nuclear weapons parts plant. DOE has exercised statutory authority to regulate occupational safety or health at government-owned, contractor-operated facilities. In addition, the Board found that it had already ruled in Williams v. Mason & Hanger Corp. , ARB No. 98-030, ALJ No. 1997-ERA-14, slip op. at 18-22 (ARB Nov. 13, 2003) -- a case involving workers who were decommissioning nuclear weapons -- that "employee concerns about exposure to radioactive sources are covered by the ERA, regardless of whether exposure to public at large is implicated." Id ., slip op. at 24. See also Mosley v. Carolina Power & Light Co. , 1994-ERA-23, slip op. at 4 (Sec'y Aug. 23, 1996) (involving the ALARA standards). In contrast, the ARB agreed with the ALJ that the environmental statutes "'generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment.'" Devers , slip op. at 10, quoting Post v. Hensel Phelps Constr. Co. , 1994-CAA-13, slip op. at 2 (Sec'y Aug. 9, 1995).

- In *Tucker v. Morrison & Knudson* , 94-CER-1 (ARB Feb. 28, 1997), the ALJ had concluded that Complainant's reporting of the violation of internal safety procedures was protected environmental whistleblower activity. The ALJ based this determination on the theory that "[s]afety regulations to protect personnel charged with effectuating the purposes of environmental legislation such as that involved in this incident should be deemed an integral component of the law and its implementation process." The Board disagreed because "[t]he safety violations which [an operations manager] committed did not relate to *environmental* safety, but rather to *occupational* safety." The Board wrote that: "[t]he distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one. Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in United States Federal District Courts, not within the Department of Labor's administrative adjudicatory process."
- Complainant's communications to OSHA and repeated requests to DISD for environmental assessments pertaining to the service center clearly touched on the environmental and public health and safety concerns that are CERCLA's focus. Williams, in seeking from DISD the environmental assessment for the Service Center II facility, was seeking information about a potentially serious environmental hazard. Consistent with the environmental statutes and regulations, prior ARB law, and other case law, Williams's request for information touched on the environmental concerns CERCLA covers. Williams presented evidence that DISD resisted producing the environmental assessments Williams sought, an assertion DISD did not refute. Williams's pursuit of information about such an environmental concern in this particular case is exactly what CERCLA attempts to ensure is not silenced, regardless of whether the employee pursues the interest solely for himself and his co-workers. The ALJ's insistence that, to be protected by CERCLA, Williams express concern for protecting non-DISD employees, the public, or the environment, was too narrow in this case. The environmental hazard, about which Williams sought information, appears to be a potentially large and potentially serious public concern notwithstanding its obvious occupational health and safety implications. The fact

question nevertheless remains as to whether Williams subjectively believed he was raising environmental concerns" (*Williams v. Dallas Independent School District ,)*

- In *Post v. Hensel Phelps Construction* Co., 94-CAA- 13 (Sec'y Aug. 9, 1995), A provision in CERCLA protects an employee who "has provided information to a State or to the Federal Government. . . ." 42 U.S.C. § 9610(a). . . . Accordingly, it was correct to find in this case that Post's contact with OSHA was protected activity even if it concerned solely occupational safety and health.

Gjovik: The TRW Microwave Superfund site is part of the Triple Site of three Superfund sites in Sunnyvale, CA. Groundwater plume stretches over a mile. Offices, schools, homes, stores, and restaurants impacted by the vapor intrusion.

- https://www.kqed.org/futureofyou/388730/silicon-valleys-toxic-past-haunts-sunnyvale-neighborhood
- https://regionalassociations.org/u-s-epa-reaches-settlements-to-study-and-mitigate-indoor-air-and-groundwater-contamination-in-sunnyvale-california/
    - https://semspub.epa.gov/work/09/100023247.pdf
    - https://semspub.epa.gov/work/09/100018488.pdf

## Audience for Report/Complaint

Reporting violations of environmental statutes, and safety and quality issues, are protected activity under whistleblower provisions when reported:

✅ * Where the Complainant informs a manager that he had contacted EPA officials during a spills conference and confirmed that the Respondent should be reporting certain emissions under CERCLA, the Complainant has engaged in protected activity. ***Dodd v. Polysar Latex,*** 88-SWD-4 (Sec'y Sept. 22, 1994).*

✅ **Internally to mgmt**

- (*Nichols v Bechtel, Helmstetter v. Pacific Gas & Electric Co, Basset)*
- On October 24, 1992, the ERA was amended to provide express coverage for internal complaints, in effect overruling *Brown & Root v. Donovan* . *See* Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992).
- The Board observed that an informal and internal safety complaint may constitute protected activity. Slip op. at 5, citing, *Nichols v. Bechtel Construction, Inc.* , 87-ERA-44
- An informal complaint to a supervisor may constitute protected activity. *See, e.g., Nichols v. Bechtel Construction, Inc.* , 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), *appeal dismissed,* No. 92-5176 (11th Cir. Dec. 18, 1992); *Dysert v. Westinghouse Electric Corp.,* 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected).
- *Crosier v. Portland General Electric Co.,* 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity).
- *CERCLA: Filing internal complaints is protected activity under CERCLA. Pogue v. United States Dept. of the Navy, 87-ERA-21 (Sec'y May 10, 1990),*

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Ashley's evidence: EH&S, Dan West, David Powers, Employee Relations, Human Resources, Ethics, I&D, Business Conduct, Legal

✅ **Internally to coworkers:**

- A foreman who had been demoted after making safety complaints on behalf of the crews, engaged in further protected activity when he communicated the situation to the crews, which resulted in their refusal to work unless their safety concerns were addressed. The Secretary characterized this communication as "an early version of [the Complainant's] section 211(b) discrimination complaint, which is protected under section 211(a)(1)(D) as a proceeding commenced or about to be commenced under the ERA. 42 U.S.C. § 5851(a)(1)(D)." *Harrison v. Stone & Webster Engineering Group,* 93-ERA-44 (Sec'y Aug. 22, 1995).

Ashley's evidence: [redacted]

✅ **Internally threatening to report complaints to gov agencies** (*Macktal)*

Ashley's evidence: Employee Relations, EH&S

✅ **Internally threaten to sue:**

- Complainant's statement to a person that he was considering filing an environmental citizen suit is a protected activity, since the environmental acts protect from discrimination employees who threaten to enforce the acts. [citations omitted] It was disputed whether this person was in Respondent's employ, although it was undisputed that this person informed Respondent's security officers of Complainant's activities. ***Crosby v. Hughes Aircraft Co.,*** 85-TSC-2 (Sec'y Aug. 1, 1993).

Ashley's evidence: Employee Relations

✅ **Internally threatening go to the press**

- In *Diaz-Robainas v. Florida Power & Light Co.,* 92-ERA-10 (Sec'y Jan. 10, 1996), the Complainant's threat to go the press with his safety concerns was protected activity. His threat was protected even if he also intended to expose matters other than his protected concerns. The ALJ found that the Complainant misused the ERA by raising safety issues only to intimidate management into increasing his performance rating. The Secretary noted, however, that he has held that where the complainant has a reasonable belief that the respondent is violating the law, other motives he or she may have had for engaging in protected activity are irrelevant.

Ashley's evidence: Employee Relations, EH&S

✅ **Externally to the government**

- In *Conley v. McClellan Air Force Base,* 84-WPC-1 (Sec'y Sept. 7, 1993), Complainant, an industrial waste water treatment plant operator, engaged in protected activity when he

complained or "appealed" to the California State Water Resources Control Board about the classification of Respondent's McClellan Air Force Base Waste Water Treatment Plant
- Complaints to and cooperation with local authorities are protected under the whistleblower provisions; thus Complainant's report to a local fire department of a possible environmental hazard was found to be protected activity in *Masek v. The Cadle Co.* , ARB No.97-069, ALJ No. 1995-WPC-1 @ 7 (ARB Apr. 25, 2000).
- Complaints to, and cooperation with, local authorities are protected under DOL whistleblower provisions. *See, e.g., Ivory v. Evans Cooperage, Inc.,* 88-WPC-2 (Sec'y Feb. 22, 1991), slip op. at 2, 5.
- In *Lassin v. Michigan State University,* 93-ERA-31 (ALJ Sept. 29, 1993), the ALJ held that a telephone contact with the NRC was protected activity even though Complainant was only seeking basic information and was not making a formal complaint at the time, where Complainant did convey his concern that a radioactive spill was not being adequately addressed. The ALJ stated that the public policy of facilitating the information to the government is served irrespective of the reporter's specifically defined intent in making the communication.
- Section 210(a)(1) of the ERA, 42 U.S.C. § 5851(a)(1), explicitly protects an employee who is "about" to go to the Nuclear Regulatory Commission with safety concerns. *Francis v. Bogan, Inc.,* 86-ERA-8 (Sec'y Apr. 1, 1988) (the employer, however, must know about the protected activity for the complaint to be actionable).
- The whistleblower provisions protect preliminary steps to commencing or participating in a proceeding when those steps "could result in exposure of employer wrongdoing." *Poulos v. Ambassador Fuel Oil Co.,* 86-CAA-1 (Sec'y Apr. 27, 1987), slip op. at 6. Since a complainant's threat to report a chemical spill to local authorities, if proven, could result in the exposure of wrongdoing, it may be protected. *See Couty v. Arkansas Power & Light Co.,* 87-ERA-10 (Sec'y June 20, 1988), *adopting,* (ALJ Nov. 16, 1987), *reversed on other grounds,* 886 F.2d 147 (8th Cir. 1989); *Cram v. Pullman- Higgins Co.,* 84-ERA-17 (Sec'y Jan. 14, 1985), slip op. at 1 (in both cases, threat to make report to government agency constituted protected activity).

Ashley's Evidence: Federal EPA, CA DPH

✅ **Externally to press**
- Contact with the press is protected activity under the whistleblower statutes. *Carter v. Electrical District No. 2 of Pinal County,* 92-TSC-11 (Sec'y July 26, 1995).
- In ***Floyd v. Arizona Public Service Co.,*** 90-ERA-39 (Sec'y Sept. 23, 1994), the Secretary held that the Complainant engaged in a protected activity when he met with a newspaper reporter and provided him documents concerning safety at the Respondent's nuclear facility.
- Participating in a television report on alleged leakage of radioactive waste is protected activity under the ERA's whistleblower provision. *Dobreuenaski v. Associated Universities, Inc.* , 96-ERA-44 @ 9 (ARB June 18, 1998).
- Complainant spoke to a neighbor whom he knew to a be an environmental activist about unsafe practices by employer, neighbor notifies government, government officer reaches out to employer. The ALJ, based on the Secretary of Labor's decisions in Scott v. *Alyeska Pipeline Service Co. , 1992-TSC-2 (Sec'y July 25, 1995),* and *Wedderspoon v. City of Cedar Rapids, Iowa* , 1980-WPC-1 (Sec'y July 28, 1980), concluded that Complainant had engaged in protected activity: even though Complainant did not contact state or federal authorities directly, the causal

nexus was supplied by the activist's contact and subsequent investigation by a government official.

- In *Diaz-Robainas v. Florida Power & Light Co.,* 92-ERA-10 (Sec'y Jan. 10, 1996), the Complainant's threat to go the press with his safety concerns was protected activity. His threat was protected even if he also intended to expose matters other than his protected concerns. The ALJ found that the Complainant misused the ERA by raising safety issues only to intimidate management into increasing his performance rating. The Secretary noted, however, that he has held that where the complainant has a reasonable belief that the respondent is violating the law, other motives he or she may have had for engaging in protected activity are irrelevant.

Ashley's Evidence: (pre-suspension) Verge, NYT, Washington Post; (post-suspension, pre-termination) Reuters, NPR, Financial Times, Bloomberg, ….

**Externally to private person**

- Providing information to a private person for transmission to responsible government agencies, or for use in environmental lawsuits against one's employer, is protected activity under the CAA, SWDA, TSCA, and FWPCA. *Scott v. Alyeska Pipeline Service Co.,* 92-TSC-2 (Sec'y July 25, 1995), citing *Simon v. Simmons Indus.,* 87-TSC-2 (Sec'y Apr. 4, 1994).

**Not protected:**

- The Court noted that the Secretary had concluded that the statements were not protected activity because making health and safety complaints to a member of the general public (as opposed to a co- worker, employer/supervisor, union officer, or newspaper reporter), without demonstrating that the employee is about to file a complaint or participate or assist in a proceeding, is too remote from the remedial purposes of the relied upon whistleblower provisions to be a protected activity. *Simon v. Simmons Foods, Inc.,* 1995 U.S. App. LEXIS 3715 (8th Cir. 1995)
- In *Stone & Webster Engineering Corp. v. Herman* , 1997 U.S. App. LEXIS 16225, No. 95-6850 (11th Cir. July 2, 1997)(case below 93-ERA-44), the Eleventh Circuit upheld an interpretation of 42 U.S.C. § 5851(a) "as shielding the expression of safety-related concerns to fellow workers, when . . . that expression has a public dimension and fits closely into an extended pattern of otherwise protected activity." The court did not reach the question of whether such an expression made in an isolated or private communication was sufficient to constitute protected activity, but emphasized that the expression of concern must be viewed in context. The court indicated that section 5851 does not protect every act that an employee commits under the auspices of safety, but concluded that section 5851(a)(1)(F) was purposely drafted by Congress is broad terms. The court indicated recognition that this approach may cause "some difficulty in distinguishing between offering a shield behind which some employees may incite trouble about a host of non-safety issues, including labor disputes, and one behind which well-intentioned employees may raise an alarm against safety hazards." The court, however, concluded that "this is a balance for the Secretary of Labor to attempt to strike in the first instance. The only question is whether the Secretary's balance here, as we have cast it, is a permissible reading of the whistleblower provision. We think it is."
- The whistleblower provisions of the environmental statutes protect employees who make safety and health complaints to their own employers as well as to government agencies. Making health and safety complaints to the general public, however, without a demonstration that the employee is about to file a complaint or participate or assist in a proceeding is too remote from the

purposes of the environmental acts to be a protected activity. Simon v. Simmons Industries, Inc., 87-TSC-2 (Sec'y Apr. 4, 1994).
- On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment is not protected. Nor is a complaint that is based on numerous assumptions and speculation. Erickson v. U.S. Environmental Protection Agency , ARB Nos. 04-024, 04-025, ALJ Nos. 2003-CAA-11 and 19, 2004-CAA-1 (ARB Oct. 31, 2006),

# Underlying Violation

**Topic of Report / Underlying Violation**
- Where the Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. See Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995)
- The Respondent's status as a non-hazardous waste facility and the Complainant's inability to specify the controlling EPA regulations were not determinative of whether the Complainant engaged in protected activity in Oliver v. Hydro-Vac Services, Inc. , 91-SWD-1 (Sec'y Nov. 1, 1995). Rather, the question was whether the Complainant's concerns were based on a reasonable belief that the Respondent was violating the SWDA and FWPCA. The Secretary noted that the Complainant believed that certain soil received by the Respondent resulting from the removal of an underground gasoline tank was hazardous to the environment because it contained high levels of benzene. The Secretary concluded that the Complainant's belief that the soil posed a danger and that the Respondent was mishandling it in violation of the SWDA and the FWPCA was reasonable, both legally and factually, noting that Federal case law reveals that confusion exists in delineating hazardous waste, and particularly in regard to contaminated soil from underground storage tanks.

**Photographs**
- In *Richard Adams v. Coastal Production Operations, Inc.,* 89-ERA-3, the Complainant worked for Respondent as a boat operator on an as needed basis. Upon witnessing an oil spill while on duty, Complainant objected to a foreman. When the pump causing the spill continued to discharge oil, the Complainant borrowed a camera and photographed the pumping operation. The Complainant's supervisor later asked for the camera and ordered the Complainant to leave the job site. The Complainant notified the president of the Respondent business as well as the coast guard. The following day, the president phoned the Complainant and chastised him for taking the photographs of the oil spill and using the boat's radio to call the Coast Guard. The Secretary held that the Complainant's photographing of the oil spill was protected activity since "Complainant objected orally and openly took photographs, further demonstrating to supervisors on the scene his objection to the spill. In the context of this case, taking the pictures was an aspect of Complainant's objection and thus was protected." (Sec'y Aug. 5, 1992).
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**Not Protected**
- Kesterson v. Y-12 Nuclear Weapons Plant , 95-CAA-12 (ARB Apr. 8, 1997 The Board observed that the Secretary had held that internal complaints about a technical issue which could only

threaten the environment if many speculative events all occurred was not protected." 92-CAA-12 @ 3 (citations omitted). Thus, the following matters were not protected activity:

- Complainant's mere friendship with another employee who is a whistleblower
- Complainant's truthful answers given in an internal investigation into who ordered the purchase of allegedly illegal surveillance equipment (Complainant's theory was that the allegedly illegal surveillance equipment could be used to spy on whistleblowers)
- Complainant's objections to allegedly illegal orders to remove computer files from a computer held in evidence in a state criminal case (although such actions may be protected by other laws
- Complainant's complaint about abusive treatment by a manager that was not based on the manager's fitness for duty, but the manager's military style of supervision
- Complainant's refusal to assist in an alleged scheme to fabricate reasons to fire a female employee (although such actions may be protected by other laws)

- Where the Complainant did no more than ask State and Federal agencies and Congress to investigate his allegation that there are unusual health problems at Oak Ridge, Tennessee, and did not attribute these health problems to any particular business nor did he contend that any illegal activity was occurring, the ALJ in *Reid v. Methodist Medical Center,* 93-CAA-4 (ALJ Mar. 29, 1993), found that the Complainant had not engaged in protected activity. The ALJ recognized that a generic complaint actually leading to an investigation under an environmental statute of a particular employer may result in whistleblower protection for a complainant, but found no such nexus here.

# Motives & Responses

**Motive of Report**

- In Smith v. Western Sales & Testing , ARB No. 02 080, 2001 CAA 17 (ARB Mar. 31, 2004), the Complainant's primary motive for lodging complaints about the Respondent's painting operation was that paint overspray was damaging his vehicle. Nonetheless, the Complainant's complaint included concerns about paint fumes released into the ambient air, which the ARB concluded was an action to carry out the purposes of the CAA. The Board noted that it was well established that a whistleblower's motives need not be concern for the environment; rather, the relevant issue is whether the complainant's belief that the respondent is violating the environmental laws was reasonable. The ARB disagreed with the ALJ that the Complainant was required to establish that the release of pollution was adequate to trigger a violation of the CAA. The ARB also noted that pro se pleading should be construed liberally.
- In Hasan v. Sargent & Lundy , 2000 ERA 7 (ALJ Dec. 5, 2002), Employer argued that Complainant raised safety concerns with the expectation that he would be assigned to complete additional review work and thereby extend his employment. Thus, Respondent argued, although Complainant's activity would typically be considered protected activity, it should not in the instant case because Complainant was not a good faith whistleblower. The NRC, however, had validated some of the problems raised by Complainant. Thus, the ALJ concluded that although the record supported questions about Complainant's motives, Complainant had nonetheless engaged in protected activity.
- Respondent contended that the distribution of the leaflet should not be considered protected activity because Complainant allegedly was merely making the distribution in an attempt to

fabricate a claim for retaliatory discharge already knowing that he was about to be terminated from employment for poor work performance and customer complaints. The Board held, however, that whistleblower protection is not removed merely because a complainant may have other motives for engaging in the protected activity. *Immanuel v. Wyoming Concrete Industries, Inc.* , 95-WPC-3 (ARB May 28, 1997),

- In Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995), the Secretary indicated that merely because a complainant is motivated in part by a desire to retaliate against a co-worker, the expression of a safety or health concern is not removed from categorization as a protected activity. Specifically, the Secretary stated that animosity toward a co-worker does not foreclose independent concerns about a safety issue, and should not diminish protection. Slip op. at 12-13 and n.12.
- Complaints to government officials need not be focused on the subject matter of the environmental act affording whistleblower protection as long as they were brought to the government's attention. Williams v. TIW Fabrication & Machining, Inc., 88-SWD-3 (Sec'y June 24, 1992) (by implication; Complainant went to OSHA which was primarily concerned with ventilation, sanitation and work hazard, but also told OSHA about improper storage or disposition of chemicals and something wrong with the well water).

**Presentation of Report**

- The Secretary found that the Respondent's purpose for firing the Complainant was to silence the Complainant's persistent and increasingly adamant concerns about the contaminated soil. The Secretary noted that an employer may take action against an employee for improper conduct in raising otherwise protected complaints, but noting that the Respondent did not specify intemperate language or defiant conduct as a reason for the termination, found that the Complainant's conduct was not indefensible under the circumstances. The Secretary indicated that the Respondent's complaints about the Complainant's attitude were not a defense because the attitude resulted from the Complainant's outspoken approach and insistence that the soil was not being handled properly. The Secretary found that the Respondent's owner's consultation with authorities and release of the letter to those authorities of his own volition did not absolve it from wrongdoing in firing the Complainant. *Oliver v. Hydro-Vac Services, Inc.* , 91-SWD-1 (Sec'y Nov. 1, 1995),
- When a complainant uses intemperate language or engages in impulsive behavior associated with the exercise of whistleblower rights, there should be a balancing between the right of the employer to maintain shop discipline and the "heavily protected" rights of employees -- to fall outside statutory protection, an employee's conduct actually must be indefensible under the circumstances. While employees are protected when presenting safety related complaints, they do not have carte blanche to choose the time, place and/or method of making those complaints. An otherwise protected employee is not automatically absolved from abusing his or her status and overstepping the defensible bounds of conduct, even when provoked. *Carter v. Electrical District No. 2 of Pinal County,* 92-TSC-11 (Sec'y July 26, 1995) (finding that Complainant's behavior may have caused some workplace disruption, but was not indefensible under the circumstances).

**Respondent Response**

- In Timmons v. Franklin Electric Coop. , 1997 -SWD-2 (ARB Dec. 1, 1998), Complainant had verbally objected to the burial of four oil barrels because he believed that the oil was

contaminated and the barrels were leaking. The ARB found that Complainant's belief was reasonable, and therefore protected activity. The ARB rejected Respondent's contentions that in order to constitute protected activity, it was necessary for it to have proceeded with the original plan to bury the oil barrels (in fact, after Complainant's objection, the barrels were transferred to a disposal company) or to file a more formal complaint.

**Retaliation**

- In Diaz-Robainas v. Florida Power & Light Co., 92-ERA-10 (Sec'y Jan. 10, 1996), the Secretary held that a complaint to management alleging retaliation for his safety concerns was protected activity. In Diaz- Robainas the Complainant alleged in a letter complaining about a negative performance appraisal that the appraisal was in retaliation for his "commitment to projects that [he] considered critical for the nuclear safety of [the facility] and which [certain supervisors] for budgetary or other reasons, clearly opposed." The Secretary found that the Complainant's perception of retaliation for raising protected concerns was reasonable, and that his raising of the fairness of the rating was not disingenuous.