



Issue Date: 09 October 2015

CASE NO.: 2013-TSC-00001
2013-CAA-00003

In the Matter of

MICHAEL J. MADRY,
Complainant,

v.

EMLAB P&K, LLC,
Respondent.

**ORDER DENYING MOTION TO COMPEL AND
GRANTING PROTECTIVE ORDER CONCERNING
TESTIMONY OF DR. KOT**

This is a whistleblower action under the Toxic Substances Control Act, 15 U.S.C. § 2622, and its implementing regulations at 29 C.F.R. Part 24.¹ While working for EMLab as a Quality Assurance Manager, Complainant reported to the Quality Assurance Director, Dr. Edward Kot. In March 2010, Dr. Kot filed with the Occupational Safety & Health Administration a whistleblower complaint against EMLab. Complainant Madry filed the present case five or six months later, on October 1, 2010. He alleges that he engaged in the same protected activity as did Dr. Kot and that this activity caused or was a motivating factor in adverse actions taken against him. He alleges that EMLab also retaliated against Dr. Kot, establishing a “pattern and practice” of disregard for its employees’ statutory rights.

Procedural History and Background

Served with a subpoena, Dr. Kot appeared and testified at a deposition in Madry’s case on July 15, 2015. An attorney representing Dr. Kot at the deposition advised that she would instruct Dr. Kot not to answer any questions about any OSHA complaint he might have filed against EMLab. Kot Dep. at 100-01. That would include any issue related to any such complaint. *Id.* at 101. She would also instruct him not to answer any question about any performance appraisal EMLab gave him or any performance improvement plan EMLab might have put him on. She offered no explanation on the record at the deposition.²

¹ On March 22, 2013, Complainant stipulated to Respondent’s motion to dismiss his Clean Air Act claim. I dismissed that claim on March 25, 2013.

² During earlier questioning, Dr. Kot’s counsel objected to a line of questions that EMLab posed concerning the performance improvement plan. Dr. Kot’s counsel stated that EMLab had entered into an agreement not to discuss

On July 27, 2015, Complainant moved to compel Dr. Kot to answer questions falling into the categories to which his counsel had objected. Complainant argues that he “needs the testimony of Dr. Kot to prove that Respondent engaged in a continuing pattern and practice of misconduct, first with Dr. Kot and continuing with Madry, in order to prove his punitive damages claim.” C.Br. at 3.³ He offers no other purpose for the evidence.

A week later, on August 3, 2015, Dr. Kot appeared through counsel and moved for a protective order and sanctions against Complainant. He referred to colloquy at the deposition in which Complainant Madry’s counsel stated that he had a copy of the performance improvement plan, that he obtained this document from his client, and that Complainant got it from OSHA. Kot Br. at 1-2; Dep. Kot at 101-02. According to Dr. Kot, Complainant stated at the deposition that he got the performance improvement plan from OSHA attorney/investigator Darrell Whitman. Kot Br. at 2. Dr. Kot stated that he is informed and believes that Whitman divulged “many documents” from OSHA’s investigative file on Dr. Kot’s complaint. *Id.* He asserts that this was a breach of OSHA’s duties to him. *Id.*

Dr. Kot argues that by obtaining documents from the OSHA investigator, Complainant circumvented the regulatory scheme and should not be permitted to benefit from the documents. Dr. Kot moves for a protective order:

Forbidding the use of the Deposition of Darrell Whitman as well as the use of any information or documents received in any unauthorized manner from Edward Kot’s Withdrawn and Closed OSHA file from Darrell Whitman or any sealed documents concerning Edward Kot not received by a FOIA request.

Motion at 7. He asks for an order sealing the performance improvement plan and similar documents obtained from the OSHA investigative file. He asserts that the order is necessary to protect him from oppression and undue expense. *See* 29 C.F.R. § 18.52 (2015).

Complying with an order to show cause, Complainant filed an opposition on August 10, 2015. Respondent filed a brief on August 17, 2015, supporting Dr. Kot’s views and asserting that the discovery sought is irrelevant. At my direction, on September 1, 2015, Dr. Kot filed a copy of his OSHA-approved settlement agreement with EMLab for *in camera* review, as well as a redacted copy for the record.⁴

any performance improvement plan or performance issues. *Id.* at 41, 66. Following the objection, EMLab did not pursue the questions.

³ “C.Br.” refers to Complainant’s brief in support of his motion to compel. “Kot Br.” refers to Dr. Kot’s brief in support of his motion for a protective order and sanctions. “Sol. Br.” refers to the Solicitor of Labor’s brief. “Whitman Dep.” refers to the deposition of Darrell Whitman, April 15, 2015.

⁴ The only substantive terms not redacted in the copy submitted for the record are the confidentiality provisions that limit disclosures about the litigation and settlement.

Dr. Kot’s motion that I review the unredacted agreement *in camera* is granted. The redacted version is admitted to the record for purposes of the currently pending motions. I exclude the unredacted material as it is not relevant to the present litigation and contains information that the parties to the agreement have agreed should be treated

On September 1, 2015, the Solicitor specially appeared at my request to provide the views of the Department. The Department argues that its former employee, Mr. Whitman, testified at the deposition and revealed investigative materials in violation of the Department's *Touhy* regulations (29 C.F.R. §§ 2.20-2.25), the Privacy Act (5 U.S.C. § 552a), government-wide ethics rules, and the rules governing the OSHA whistleblower program. The Department moves for an order forbidding the use of all current and future testimony and documents that Whitman produced and Complainant obtained without following applicable legal procedures. The Department also moves to exclude "the fruits of such discovery." It argues as well that OSHA's investigation and pre-decisional analyses are irrelevant in the present case, which this Office decides *de novo*. On August 10, 2015, Complainant filed a reply to the motions for protective order.

I conclude that the testimony Complainant seeks from Dr. Kot exceeds the scope of discovery. For that and other reasons, Complainant's motion to compel is denied. While the protective orders sought are overbroad, I grant them in part.

Facts

At Complainant's request, this Office issued a subpoena directing Darrell Whitman to appear at a deposition on March 19, 2015. The deposition subpoena did not require Whitman to bring with him any documents.⁵ The deposition went forward on a later date, April 16, 2015. During two sessions, Whitman testified for more than five hours.

According to the Solicitor of Labor, neither Complainant nor Whitman supplied a copy of the deposition subpoena to Whitman's supervisors or anyone else at DOL. Sol. Br. at 3. Neither Whitman nor Complainant's counsel has directly disputed this for the record. But Whitman did testify that he advised his supervisor before the deposition that he would be testifying. Whitman Dep. at 198. An Associate Regional Solicitor knew of the subpoena no later than April 21, 2015 (*i.e.*, five days *after* Whitman testified), but the Solicitor of Labor does not say how or precisely when her office learned that Whitman had been subpoenaed to testify.⁶ In all, I am not entirely certain what Whitman communicated to whom and what information arrived at an appropriate desk or when. But there is no question on this record that Whitman went the deposition,

confidentially. *See* 29 C.F.R. § 18.85(a). The unredacted version of the settlement agreement between EMLab and Dr. Kot will be returned under separate cover to Dr. Kot's counsel.

⁵ At Respondent's request, this Office also issued a subpoena for the production of documents to the Custodian of Records at OSHA. The subpoena demanded OSHA's investigative file on Complainant's complaint and also its investigative file on Dr. Kot's complaint. The subpoena was not directed to Darrell Whitman.

⁶ On April 21, 2015, Associate Regional Solicitor Brown wrote to Complainant's counsel that employees and former employees of the Department may not disclose information from or about the Department's files without approval of the appropriate Deputy Solicitor of Labor, citing 29 C.F.R. §§ 2.20, 2.22 (*Touhy* regulations). The person seeking the information must give the Solicitor's office a written summary of the information sought and its relevance to the pending case. Apparently not knowing that the deposition already had occurred, Mr. Brown advised Complainant's counsel to supply the required information if Complainant wanted to go forward with the deposition. Sol. Br. Exh. B. It thus is apparent that the Department learned no later than April 21, 2015, of the plan for a deposition of Whitman.

testified, and volunteered government documents without complying with the Department's *Touhy* regulations in that he did not have the approval of the appropriate (or any) Deputy Solicitor. *See* 29 C.F.R. §§ 2.20-2.25.

At the deposition Whitman explained that, "It is part of our duty as a whistleblower investigator to provide witness testimony at appeals in cases." *Id.* But he also said that, though he had worked as an OSHA investigator for five years, this was his first deposition in that capacity, and he didn't know of any other investigator in his office who had previously testified. *Id.* at 4, 198. As he said, "It's not a common procedure." *Id.* This is difficult to square with his comment that giving testimony is part of his job.

Turning to his background, Whitman testified that he has a bachelors and a graduate degree in sociology. He completed a law degree from Santa Clara University School of Law in 1989, and was admitted to the State Bar of California four years later, in 1993. After working for a legal publishing company, he took a job with the Small Business Administration in 1994. It appears that the SBA took some kind of disciplinary action against Whitman; Whitman filed a whistleblower complaint against the SBA in or around June 1997; and the Merit Systems Protection Board decided in his favor and awarded him reinstatement with backpay. Whitman Dep. at 103. Whitman left the SBA in 1998 and opened a law firm focused mostly on representing whistleblowers in claims against federal agencies. *Id.* at 102-03, 106-07. He found the practice of law stressful, closed the firm in 2000, and returned to graduate school. *Id.* at 105. He completed a master's degree in government in 2003. He moved to England and completed a Ph.D. in politics and public policy five years later, in 2008. OSHA hired him as a Regional Investigator in 2010.

Whitman's first assignment as an OSHA investigator was Dr. Kot's case. He contacted Madry as a likely witness. After talking with Madry, Whitman concluded that Madry too had a whistleblower complaint. As Whitman testified: "I became aware that there were a lot of issues that [Madry] shared with Dr. Kot . . . so I began to talk to him at that point about whether or not he wished to . . . file his own complaint." *Id.* at 129-30. Whitman "advised him of his right to file a complaint, and [Madry] did."⁷ Whitman Dep. at 13. These discussions between Whitman and Madry began in early September 2010, and Madry filed a complaint on October 1, 2010. *Id.* at 16, 128. OSHA assigned Whitman to investigate Madry's complaint.

At his deposition, Whitman identified and testified about fourteen exhibits. The record is silent about how the parties to Madry's case obtained the documents, but the Solicitor asserts that Whitman supplied them, and that appears to be correct. *See* Whitman Dep. at 182 (Whitman admits that, after he was removed from investigating Madry's complaint, he supplied documents

⁷ As Whitman testified: "It's not unusual that we have several people in a workplace [under investigation] that are engaged in similar behavior and experiencing similar kinds of a workplace atmosphere context. And when we experience that, this is part of what the [OSHA whistleblower] program is supposed to do. It's supposed to encourage improved workplace health and safety. And one way you do that is to encourage people to step forward and tell their story. So it is part of our mandate to reach out to people in the workplace, particularly when we get this sense that, oh, there are other people that might be similarly positioned to advise them about what's required to be a whistleblower, what the implications are, what the process is. I would say probably about 20, 25 percent of our cases come that way." Whitman Dep. at 130-31.

to Madry); Sol. Br. at 3. In his testimony, Whitman identified witnesses he'd interviewed, at least two or three of whom were Madry's peers or lower ranking employees. *See* Whitman Dep. at 21, 46-47, 68. Whitman also testified about the substance of what these co-workers told him. *Id.* at 29-30, 40-41, 53-63, 68-70, 161-64.⁸

Some of Whitman's interview memos are included as exhibits to his deposition. *Id.*, Exh. 2, 3, 6, 7, 10, 13. These include from the Madry case file Dr. Kot's statement and Whitman's notes of his interview of Kot. *Id.*, Exh. 5, 9. They include a letter of resignation from one of Madry's peer co-workers. *Id.*, Exh. 11. For one of the lower ranking employees, the name of the person interviewed is redacted on Whitman's interview notes (Exh. 6), but he divulged the person's name when testifying. *Id.* at 68. Whitman testified about his analysis and conclusions on both cases, as well as the views of his OSHA supervisor. *Id.* at 76-77, 80-86.

Whitman also testified about OSHA's internal processes. The exhibits include unsigned copies of the OSHA "Final Investigative Reports" that Whitman drafted in both Madry's and Dr. Kot's cases. Whitman Dep. at 114, Exh. 1, 12. Whitman acknowledged that the "Final Investigative Reports" are internal steps leading to OSHA's decision; they are not the final OSHA determination on the merits. The OSHA determination is issued as "Secretary's Findings." *Id.* at 114-17; OSHA "Whistleblower Investigations Manual," IV.B [the investigative report is an internal summary of the investigation (written to the supervisor and not the parties), some of which might be adopted in the Secretary's Findings]. When the investigator submits a Final Investigative Report, a supervisor might require additional work and redrafting, and additional changes can occur after that at the Regional Administrator level. *Id.* at 171-73.

Whitman commented that OSHA's funding restrictions and lack of subpoena power limit OSHA's access to witnesses.⁹ *Id.* at 146. As a result, OSHA might decide the merits of complaints without all of the relevant documents. *Id.* at 147, 194. Similarly, damage calculations as of the time of the "Final Investigative Report" might be "very speculative under the best circumstances . . . extremely speculative." *Id.* at 170, 188 ("I always treat damages as very speculative in my reports"). With respect to the investigation of Complainant's claim, Whitman testified that the record contains a falsified report. *Id.* at 200-02.

Whitman stated that OSHA removed him from Madry's case while it was ongoing. Whitman Dep. at 175-76. But Whitman continued to have contacts with Madry a couple times per month. *Id.* at 181, 204. Whitman acknowledged that he understood that the proper channel for third parties to access documents in Dr. Kot's closed case file is through the Freedom of Information Act. *Id.* at 90-91. But according to Whitman, when Madry "had some difficulty with the agency obtaining exhibits," he asked for Whitman's help. *Id.* at 182. In Whitman's opinion, Madry was entitled to the documents, so Whitman gave them to him. *Id.* He and Madry also discussed "trying to get the agency to produce the documents." *Id.* Whitman testified that when OSHA releases documents, it engages in "overzealous redaction." *Id.* at 203. Madry also supported Whitman on Whitman's legal pursuits: He gave Whitman permission to use details from his case in support of claims Whitman is pursuing against OSHA. *Id.* at 203.

⁸ In addition, Whitman testified about his interviews of some higher level EMLab managers.

⁹ Whitman also cited as another limiting factor that OSHA does not interview witnesses under oath. *Id.* at 27-28.

Discussion

Complainant's motion to compel must be denied and a protective order issued concerning the additional questioning Complainant proposes of Dr. Kot at a resumption of his deposition. The discovery sought is neither relevant nor reasonably calculated to lead to admissible evidence. Even if it were, the expense and intrusion into Dr. Kot's privacy is disproportionate to any likelihood of evidence that would be admissible. But the protective orders that Dr. Kot and the Solicitor seek go too far.

I. Complainant May Not Resume the Deposition of Dr. Kot.

Complainant asserts that the questions he would pose to Dr. Kot are necessary to show a "continuing pattern and practice of misconduct" necessary to support his demand for punitive damages. The Toxic Substances Control Act's whistleblower protection provision allows the award of punitive damages in appropriate cases.¹⁰ The implementing regulations are to the same effect.¹¹

There has been little development of the case law on punitive damages under this Act. Recent punitive damages decisions in the Administrative Review Board have concerned the Surface Transportation Assistance Act, *see Youngermann v. United Parcel Services, Inc.*, ARB No. 11-056 (Feb. 27, 2013), or the Federal Rail Safety Act, *see Griebel v. Union Pacific RR Co.*, ARB No. 13-038 (Mar. 18, 2014). Unlike the Toxic Substances Control Act, both of those statutes place a cap on punitive damages. The Board's discussion of punitive damages often considers the case law under Title VII (which also has caps). That statute differs from the Toxic Substances Control Act and the other two whistleblower statutes because it includes an express statement of the circumstances that give rise to punitive damages.¹² But the express language in Title VII differs little from the common law standard¹³ and is of considerable value in

¹⁰ As the Act provides: "If in response to a complaint filed under paragraph (1) the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, (iii) compensatory damages, and (iv) where appropriate, exemplary damages." 15 U.S.C. § 2622(b)(2)(B).

¹¹ The regulation provides: "If the ALJ concludes that the respondent has violated the law, the order shall direct the respondent to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate." 29 C.F.R. § 24.109(d)(1).

¹² Punitive damages are allowed under Title VII for intentional discrimination (not disparate impact) undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

¹³ *See Smith v. Wade*, 461 U.S. 30, 56 (1983) (common law-based standard applied to civil rights claim under 42 U.S.C. § 1983 held to require a showing that the defendant's conduct was "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Id.* This is substantially the same as the express standard in Title VII.

establishing a punitive damages standard for OSHA whistleblower statutes. Thus, when establishing a standard for Surface Transportation Assistance Act cases in *Youngermann*, the Board relied on the Supreme Court's statement of how punitive damages should be analyzed in a Title VII case as set out in *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

In *Kolstad*, the Supreme Court "rejected the notion that eligibility for punitive damages requires a showing of actual malice or egregious misconduct." *Youngermann*, slip op. at 6. Rather, a showing of egregious misconduct might show that the employer acted with reckless indifference or callous disregard of the federally protected right. *Id.* The relevant disregard is shown if the employer "discriminate[s] in the face of a perceived risk that its actions will violate federal law." *Id.* (citing *Kolstad* at 536, which cited *Smith v. Wade*, 461 U.S. 30, 50 (1983)). The focus is on "the actor's state of mind." *Youngermann*, slip op. at 6. An employer may avoid liability "where it has made a 'good faith effort' to comply with the anti-discrimination provisions" of the statute. *Id.* at 7 (citing *Kolstad*).

Thus, the analysis must focus on the employer's state of mind and whether those acting on its behalf perceived a risk that their actions would violate the Act's whistleblower protections. Egregious conduct is not required but might show the relevant reckless indifference or callous disregard of the complainant's right to engage in protected activity without retaliation.

Complainant offers little to explain how the testimony he seeks from Dr. Kot is relevant under the applicable legal framework. He argues that he needs the testimony to establish an entitlement to punitive damages through a showing of a "continuing pattern and practice of misconduct." Complainant offers no authority for or explanation how a "pattern and practice" is relevant to punitive damages under the Toxic Substances Control Act.¹⁴ Even were "pattern and practice relevant," Complainant offers nothing to show that EMLab's taking adverse actions against two employees would amount to a pattern and practice. On the contrary, they would appear to be an isolated incident affecting two workers, not a thoroughgoing practice infecting the employer's business systemically.

Yet I do see how evidence arising out of OSHA's investigation of Dr. Kot's case could be relevant to punitive damages in Madry's case under certain circumstances. That could occur, for example, if OSHA issued Secretary's Findings against EMLab on the Kot complaint *before* EMLab took any action adverse to Madry. Having received the OSHA determination on the Kot case, EMLab likely would perceive a risk that similar actions against Madry would violate Madry's rights. EMLab might dispute OSHA's findings in the Kot case and request a hearing before an administrative law judge. But EMLab could not reasonably dismiss the possibility that the administrative law judge's decision would be the same as OSHA's. In this scenario, if EMLab took adverse actions against Madry, it could be seen as perceiving the risk that it was violating Madry's rights yet proceeding with the adverse actions anyway. That is the kind of

¹⁴ "Pattern and practice" refers to an area of employment litigation that the federal government may initiate to address systemic discrimination in violation of Title VII. See 42 U.S.C. §2000e-6. The EEOC initiates pattern and practice cases. 42 U.S.C. § 2000e-6(a), (d), (e). At the EEOC's request, the district court will assign the case to a three-judge panel. 42 U.S.C. § 2000e-6(b), (d), (e). Where a three-judge panel is assigned, appeals are directly to the Supreme Court. 42 U.S.C. § 2000e-6(b). Nothing in this is relevant to the presently pending case.

callous disregard that could call for punitive damages under the analysis that both the Supreme Court and the Administrative Review Board have adopted.

But this scenario cannot have happened here because OSHA never issued Secretary's Findings in Dr. Kot's case. The closest OSHA came to completing its investigation was an unsigned, draft report that Whitman gave to his supervisor for review and approval. The draft might have needed further work before being approved. Even if approved, the draft could differ substantively from the ultimate OSHA determination (Secretary's Findings). This will never be known because OSHA's processing of Dr. Kot's complaint ceased when EMLab and Dr. Kot settled and OSHA approved the settlement.¹⁵

Complainant is correct that the scope of discovery is broad. As our rules provide,

Unless otherwise limited by a judge's order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . For good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding. Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

29 C.F.R. § 18.51(a). On the other hand, some limitations on discovery are mandatory:

¹⁵ Complainant argues that OSHA "ultimately found merit in both cases," but this assertion is both unfounded and irrelevant. Whitman drafted his internal investigative report in Kot's case, but OSHA made no findings; the parties settled before that happened. And as discussed above, Secretary's Findings on the Kot case – even if they existed, which they do not – would be relevant only if EMLab received them before it took adverse actions against Complainant

More generally, OSHA's final determinations ("Secretary's Findings") are usually irrelevant because hearings at this Office are *de novo*. 29 C.F.R. § 24.107(b). Even were the Secretary's Findings on Madry's complaint relevant, those Findings in Madry's case were mixed: OSHA found that EMLab took some adverse actions in violation of the Act, but that Madry's proof was insufficient on his central allegation that his termination from employment was unlawful.

Finally, the settlement between EMLab and Kot implies nothing about punitive damages. Complainant does not contend that the settlement is relevant and does not seek further information about it. In any event, EMLab does not admit liability in the settlement agreement; on the contrary, the agreement contains an express non-admissions clause. Moreover, Dr. Kot and EMLab did not settle until nine months after EMLab terminated Complainant's employment. To the extent anything about the settlement suggests that EMLab perceived a risk that its conduct toward Dr. Kot violated the Act, nothing about the settlement would suggest that EMLab came to that perception *before* it terminated Madry's employer months nine earlier (or took other adverse actions before then).

(Even if Whitman's draft internal report on his investigation were admissible, Whitman's testimony demonstrates how little weight could be placed on it. Whitman acknowledged that limited resources and the unavailability of subpoenas compromise OSHA investigations. He commented that witness statements are not under oath. He explained how he had to wheedle information out of employers because he could not take depositions or compel the production of documents. He described OSHA's damages calculations in the Final Investigative Report as "extremely speculative." Though I believe Mr. Whitman underestimates OSHA's expertise, resources, and authority, his opinion emphasizes the propriety of the regulatory scheme, which requires *de novo* consideration of whistleblower claims at this Office. Here, the parties may engage in thoroughgoing discovery (with subpoena power and means to compel responses) under OALJ rules and then may present evidence at a full adversarial hearing under formal rules of evidence.)

On motion or on his or her own, the judge *must* limit the frequency or extent of discovery otherwise allowed by these rules when:

(i) The discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive . . .; or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

29 C.F.R. § 18.51(b)(4) (emphasis added).

The questions that Dr. Kot declined to answer were limited to those concerning any OSHA complaint that he might have filed against EMLab (or any issue arising in any such complaint), any performance appraisal EMLab gave him, or any performance improvement plan EMLab might have put him on.

Essentially, Complainant's theory misses the mark because it is not based on EMLab's perception that it might be violating federal law or any other relevant factor. Instead, his theory is that punitive damages are appropriate because EMLab violated the Act twice: first with Kot and then with Madry. Complainant has failed to show how this is relevant under the correct standard for punitive damages.

Even were there some relevance, Complainant could not rely on the mere fact that Dr. Kot raised allegations against EMLab. *See Griebel v. Union Pacific RR Co.*, ARB No. 13-038 (Mar. 18, 2014). In *Griebel*, an employer challenged an award of punitive damages because the administrative law judge admitted a compilation of whistleblower complaints previously filed against it. *Id.*, slip op. at 2. The Board was able to uphold the punitive damages award because "the ALJ made clear that little to no weight was placed on the evidence," thus making any error harmless. *Id.* If a compilation of many previously alleged violations proves little or nothing, a showing of just one prior alleged violation shows less.

In particular, to establish an adequate foundation for his current motion, Complainant would need to show, not just that Dr. Kot raised *allegations*, but that Dr. Kot's complaint was *actually meritorious*. The deposition testimony Complainant demands of Dr. Kot could be relevant only if I were to allow a full trial of Dr. Kot's claim within Madry's trial. Only then could I make even the limited finding that Complainant seeks: that the Company violated one other employee's rights as well as Madry's.

I would not allow such a trial within a trial. For the reasons I have explained, I find such evidence irrelevant to punitive damages under the analysis that the Supreme Court and the Board have adopted. *See* 29 C.F.R. § 18.402. It does not go to EMLab's state of mind when it took adverse action toward Madry. It comes too late to show that EMLab perceived a risk that it was

violating Madry's rights when it took those actions. It is not so egregious as to imply a perceived risk of a violation.

In the alternative, I would exclude such evidence because its probative value is substantially outweighed by considerations of undue delay and waste of time. *See* 29 C.F.R. § 18.403. Allowing a full-bore trial of Dr. Kot's allegations within the Madry trial would massively enlarge the scope of discovery that the parties would need and would likely double the length of the hearing. Yet it would have little probative value under the Supreme Court's and Administrative Review Board's holdings that set out the correct analysis for punitive damages. As the evidence sought is neither relevant nor reasonably calculated to lead to evidence that I would admit, it falls outside the scope of discovery.

That, however, is not the end. Even were the deposition questions within the scope of discovery, I am required to disallow them under 29 C.F.R. § 18.51(b)(4).¹⁶ Complainant may obtain the relevant information from EMLab, which is already a party, or from OSHA. He may ask either whether OSHA issued Secretary's Findings in Dr. Kot's case. Complainant may also take discovery from EMLab aimed at unprivileged internal communications that show the Company perceived a risk that it would violate the Act if it took action against Complainant. Complainant may file a Freedom of Information Act request with OSHA or ask the Deputy Solicitor to allow a deposition of the person most knowledgeable about OSHA's investigative file on either Dr. Kot's or Madry's complaint. Indeed, Complainant took the deposition of the OSHA investigator on both cases: Darrell Whitman, who was a forthcoming witness.

Dr. Kot settled his case and is entitled to a degree of finality and repose. Moreover, asking Dr. Kot for the discovery places a considerable burden on him: He risks breaching the confidentiality provision in his settlement agreement with EMLab and triggering the liquidated damages provision related to it, and he needs the advice and assistance of counsel to avoid that result.¹⁷ This substantially outweighs the likely benefit of the discovery sought. The contents of any performance reviews about Dr. Kot (or performance improvement plans) would prove little on the merits of Madry's case, including the merits on punitive damages.

¹⁶ The Secretary recently introduced these proportionality concepts into our discovery regime with the 2015 amendments to this Office's general procedural rules at 29 C.F.R. Part 18, subpart A.

¹⁷ That Complainant's attorney happens to be his wife still requires an investment of counsel's time and is no less burdensome than if Complainant had to hire counsel. If Complainant's wife were not working on this case, she would have additional time to work on the cases of paying clients or an employer.

The confidentiality provision in the settlement agreement between EMLab and Kot does not extend to disclosures "compelled by a court, agency or tribunal of competent jurisdiction by mandatory legal process such as a subpoena." But I understand that EMLab told Dr. Kot that Complainant's serving him with the deposition subpoena does not bring him within the exclusion.

It is not for me to construe the confidentiality provision or its exclusions. I will only comment that the very fact that EMLab asserts that Dr. Kot's making disclosures about his complaint and the settlement would breach the settlement agreement means that Dr. Kot must beware the risk of potential litigation with EMLab. The liquidated damages provision would require him to return to EMLab all that EMLab paid in settlement of his whistleblower complaint. It is difficult to understand how OSHA could have approved a provision with such a Draconian *in terrorem* effect, especially when the liquidated damages provision for EMLab violations of confidentiality is a paltry \$5,000. It could well be that these provisions violate public policy. But, again, that is not for me to determine. It simply is a reason that Complainant does better to seek the discovery from EMLab or OSHA.

Accordingly, Complainant's motion to compel is denied. Dr. Kot's deposition is concluded and may not be reopened. No party may serve Dr. Kot with a subpoena (for personal appearance or for production of documents) without the express approval of the administrative law judge. Any subpoena without a separate authorizing order is void *ab initio*. The sole exception is a subpoena for Dr. Kot to testify at the hearing: as Complainant's supervisor, Dr. Kot could well have evidence directly relevant to Complainant's claim.

II. Dr. Kot Is Entitled to a Protective Order.

Dr. Kot argues that the applicable regulatory regime required Complainant to file a Freedom of Information Act request for Dr. Kot's investigative file. He argues that Complainant circumvented the regulatory scheme, obtained the documents "illegally," and should not be permitted to benefit from them. He believes that Complainant came into possession of the documents and information at the Whitman deposition. He essentially seeks orders (1) sealing the transcript of Whitman's deposition, and (2) forbidding any party from using documents obtained from the OSHA investigative file on his complaint unless the documents are separately obtained through a FOIA request.

Complainant opposes. He states that he "is not seeking any information concerning Dr. Kot's settlement agreement," and that "there is nothing in the motion to compel requesting any such information." He argues that, because discovery depositions are not public, Dr. Kot's privacy interests are not at stake, citing *Seattle Time Co. v. Rinehart*, 467 U.S. 20 (1984).¹⁸ Finally, he argues that the protective order sought is overbroad in that it would extend to the entire 211-page transcript of Whitman's deposition plus its 15 exhibits.

I will reserve (until my discussion of the Solicitor's contentions) Dr. Kot's arguments about the manner in which Complainant obtained the materials in question. As to the remaining arguments, Dr. Kot has shown a basis for a protective order but not one as broad as he requests.

An ALJ "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." 29 C.F.R. § 18.52. Personnel documents such as performance evaluations and performance improvement plans are private. Their disclosure could well embarrass the employee whose records they are; the disclosure could also be oppressive in impairing the person's efforts to obtain future employment.

In this case, burden and expense also are relevant. Unlike Complainant, who waived his privacy interests related to his employment when he filed his complaint, Dr. Kot made no such waiver in Madry's case. By settling his own case, Dr. Kot achieved a modicum of privacy for the records divulged to OSHA in that case. The protection of these documents is all the more appropriate in that, as I discussed above, they are neither directly relevant nor reasonably calculated to lead to

¹⁸ Complainant misplaces his reliance on *Rinehart*. That case holds no more than that protective orders limiting disclosure of information gained through civil discovery do not run afoul of the First Amendment. 467 U.S. at 36-37.

admissible evidence. *See* 29 C.F.R. §§ 18.402, 18.403. Even if discovery is not public disclosure, Dr. Kot has a privacy interest in not disclosing his personnel records to Madry or his counsel, not to mention the possibility that they will show the documents to others or offer them into the public record at the hearing.

Regardless of how Complainant obtained these documents, he holds them and may disclose them only subject to the following protective order:

1. Complainant's counsel must keep in his personal possession any EMLab personnel record about or concerning the employment of Dr. Kot. Complainant must give any copy he has of any such document to his counsel, retaining none. Complainant and his counsel may review the documents together and discuss them privately, but only counsel may retain the documents after discussion. Absent an order of the ALJ, Complainant's counsel may otherwise show the documents or question persons about the documents only if the persons are directors, officers, or managerial employees of EMLab who rank higher than Dr. Kot did in EMLab's corporate organization, in-house attorneys of EMLab, human resources managers of EMLab, the custodian of records of EMLab, or attorneys representing EMLab in this case. No such person may be permitted to retain a copy of any such document. Within 14 days after this case is finally concluded, Complainant and his counsel each will convey to Dr. Kot's counsel each and every copy either has of any of the records described in this paragraph, retaining none. Complainant states that he has no interest in Dr. Kot's settlement agreement with EMLab. Therefore, if he or his counsel has an unredacted copy of the agreement, he and his counsel must send all such copies to Dr. Kot's counsel within 7 days of the date of this Order. Neither Complainant nor his counsel may retain any unredacted copy of the settlement agreement unless either is able to obtain the document through the Freedom of Information Act, by subpoena addressed to the Solicitor of Labor (who has appeared in this action), or voluntarily from EMLab or Dr. Kot. Though EMLab properly has copies of these same documents, it may not disclose them for purposes of this litigation beyond the persons listed above, except with prior approval of the ALJ. Any party must file a motion *in limine* if he or it plans to offer any of these documents at the hearing. A copy of the document being offered must be submitted for *in camera* review with the motion. The party must explain the relevance of the testimony. The motion must be served on Dr. Kot's counsel.
2. Every statement that Darrell Whitman made in his deposition testimony in this case is sealed if it concerns: (1) Dr. Kot's employment with EMLab, (2) Dr. Kot's whistleblower complaint against EMLab, (3) OSHA's investigation of that complaint, (4) Mr. Whitman's findings based on the investigation, or (5) the settlement of that complaint. Any such testimony may be disclosed only if authorized in an order from the ALJ based on a showing that it is directly relevant to an issue pending in the current matter. Any party must file a motion *in limine* if he or it plans to offer any of this testimony at the hearing. An excerpt of the transcript being offered must be submitted for *in camera* review with the motion.

The party seeking admission must explain the relevance of the testimony. The motion must be served on Dr. Kot's counsel.

3. In all other respects, Dr. Kot's motion is denied.

III. The Department of Labor Is Entitled to Relief.

The Solicitor requests an order aimed at cabining any further disclosures of the materials Mr. Whitman divulged and of his deposition testimony. She asserts that Whitman's testimony and disclosure of government records violated the Secretary's so-called *Touhy* regulations, 20 C.F.R. §§ 2.20-2.25, the Privacy Act, 29 U.S.C. § 552a, government-wide ethics rules, and OSHA practices and procedures on the handling of investigations. She requests that the protective order extend to the OSHA investigation files on Dr. Kot's and Mr. Madry's complaints, Whitman's deposition testimony in this case, any future attempt by any party to call Whitman as a witness without following required procedures, and the fruit of any disclosure that has occurred. Complainant opposes any further limiting orders.

Touhy regulations. Congress has empowered the Secretary (and heads of other executive departments) to regulate the conduct of employees concerning the "custody, use, and preservation of [the Department's] records, papers, and property." 5 U.S.C. § 301. Based on this authority, the Secretary adopted regulations to direct how employees respond to subpoenas, orders, or demands from courts in cases in which the Department is not a party, when the demand would require the production or disclosure of materials in Department files, information related to such materials, or any information the employee acquired while performing official duties. 29 C.F.R. § 2.20(a). The regulations require the employee receiving the subpoena or similar demand to notify the appropriate Deputy Solicitor of Labor. 29 C.F.R. § 2.21. The person who caused the subpoena to be issued must supply the Deputy Solicitor with a written summary of the materials or information sought and its relevance. *Id.* No Department employee may respond to a subpoena for Department files, information in the files, or other information acquired in her or his work without the approval of the Deputy Solicitor. 29 C.F.R. § 2.22.¹⁹

In a 1951 case involving a Department of Justice employee who refused to comply with a subpoena based on similar departmental rules, the Supreme Court held that a predecessor statute to 5 U.S.C. § 301 authorized such regulations, that the DOJ rule was proper, and that the district court improperly held the DOJ employee in contempt. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951). As the Court stated: "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of *centralizing determination* as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious." *Id.* (emphasis added). The result is the same whether the subpoena demands documents or testimony. *In re Recalcitrant Witness Boeh*, 25 F.3d 761, 766-67 (9th Cir. 1994). The Court's language suggests that the statute's purpose is to centralize agencies' handling of

¹⁹ If the return date on the subpoena occurs before the Deputy Solicitor has decided whether to permit the disclosure, a Department attorney will appear with the employee and request a stay on the subpoena. 29 C.F.R. § 2.23. If a court denies a stay, the employee must respectfully decline to comply with the subpoena or other order and cite *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951). 29 C.F.R. § 2.24.

disclosure demands, not to insulate agencies from requirements to make legally mandated disclosures.

Consistent with this, in 1958, Congress amended the authorizing statute to clarify that it is merely for “housekeeping,” to centralize the government’s responses to subpoenas and other demands for disclosure, not to limit its obligation to make otherwise required disclosures. *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 777 (9th Cir. 1994). As the amendment provides: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” 5 U.S.C. § 301. Thus, “section 301 [as amended] does not, by its own force, authorize federal agency heads to withhold evidence sought under a valid federal court subpoena.” *Id.* As the Supreme Court observed: “The antecedents of § 301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern *internal departmental affairs*.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979) (emphasis added).

I conclude that 5 U.S.C. § 301 and the *Touhy* regulations permit the Department to direct its employees not to comply personally with subpoenas and orders requiring disclosures of federal records and information but rather to forward the demands to the appropriate Deputy Solicitor. This housekeeping regime allows for centralized decision-making about what records or information must be produced and what demands to oppose. The statute and regulations do not exempt the government from making any disclosure, and they impose no restrictions on parties to litigation seeking records or information. While the *Touhy* regulations insulate a government employee from contempt sanctions, they do not impose requirements on private litigants who seek government information. Nor do they provide any sanction against private litigants who subpoena government employees directly and not through a Deputy Solicitor. Complainant did not violate the *Touhy* regulations or 5 U.S.C. § 301 because he has no obligations under either.

The Solicitor misplaces her reliance on *dicta* in an isolated, aging district court decision for the proposition that “litigants . . . are bound to follow the procedure contemplated by section 2.22 in seeking DOL documents.” *Smith v. C.R.C. Builders Co.*, 626 F. Supp. 12, 15 (D. Colo. 1983). Nothing about the duties of the private litigant who sought the government information was at issue in *Smith*, and the district judge offered no explanation or discussion for the single sentence on which the Solicitor relies. His decision is not controlling, and I find it unpersuasive in the light of the discussion above.

Similarly, I find unavailing the Solicitor’s argument based on the *Touhy* regulations’ requirement that the party seeking information furnish the Deputy Solicitor with a written summary of what he seeks and how it is relevant. *See* 29 C.F.R. § 2.21. The Solicitor argues that this shows that the entirety of the *Touhy* regulations apply to private litigants who seek Department records.

But, as the enabling statute is a housekeeping provision and not more, I find that a party’s failure to supply the Deputy Solicitor with the written summary might result in the Deputy Solicitor’s rejection of the subpoena. But it imposes no greater burden or sanction on the private litigant and does not extend every other requirement in the *Touhy* regulations to private parties seeking government records or information.

Privacy Act. The Solicitor also relies on the Privacy Act, 29 U.S.C. § 552a, to limit Complainant’s use of the records and information Whitman disclosed. The Privacy Act controls how government agencies maintain records about individuals and when and to whom government agencies may or must disclose those records.²⁰ *Id.* The Act provides civil remedies for private individuals whose records are improperly maintained, withheld, or disclosed. 29 U.S.C. § 552a(g). The remedies may include an award of damages when the agency violation is intentional or willful. 29 U.S.C. § 552a(g)(4).

But the Solicitor points to nothing in the statute or the case law to show that the Privacy Act imposes any requirement on private persons who seek access to government records or information; the statutory requirements thus are on the government, not the public. Legislative bodies can and do draft into confidentiality statutes provisions that exclude from use in litigation documents or other information that was improperly created, disclosed, or obtained.²¹ Congress simply included no such provision in the Privacy Act.²²

Government ethics rules. The federal government’s ethics rules include provisions limiting the use of government property, including government records, other than for authorized purposes. See 5 C.F.R. §§ 2635.101, 2635.704. The Solicitor also argues that, if Mr. Whitman makes future disclosures, he could be exposed to criminal sanctions, citing 18 U.S.C. § 207. But, again, if these rules or sanctions apply, they apply to Mr. Whitman, not Complainant. The Solicitor offers no authority for the proposition that these ethical rules or this criminal provision imposes an obligation on a private person who seeks access to government records or information.

Protective order. Despite these limitations, however, the Ninth Circuit (controlling here) has instructed that the government’s interests might be a basis for a protective order under any procedural rule even if the *Touhy* regulations are not. See *Exxon Shipping Co.*, 34 F.3d at 779. In *Exxon Shipping*, the court viewed as a serious concern that requiring the government to produce eight additional employees for deposition would allow private litigants to commandeer into their service government employees, all to the detriment of the “smooth functioning of government operations.” 34 F.3d at 779. Though the court held that this had no implications under 5 U.S.C. § 301 or the *Touhy* regulations, it observed that under applicable procedural rules, district courts may quash or modify subpoenas that cause “undue burden,” may limit the use of

²⁰ Under the statute, “the term ‘record’ means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.” 29 U.S.C. § 552a(a)(4). It therefore extends to employment records with the person’s name or with certain personally identifiable information.

²¹ For example, California enacted a statute to prohibit eavesdropping on or recording certain confidential communications. Cal. Civil Code § 632. It provides in part: “Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.” Cal. Civil Code § 632(d).

²² The fact that OSHA has provided its employees with a manual on how to investigate whistleblower cases and the manual establishes rules for disclosure consistent with the Privacy Act again is something aimed at Department employees. It does not establish a legally enforceable obligation on private persons who request or receive documents that the OSHA employee should not have disclosed.

non-retained experts, may issue orders that “recognize and protect privileged information,” and should limit discovery based on considerations such as burden, cost, and proportionality. 34 F.3d at 779, 779 n.10.

Here, in its efforts to comply with legislation such as the Privacy Act and consistent with the government informant privilege, the Department seeks to block any further use or disclosure of records and information that I conclude – for purposes of this litigation – Darrell Whitman improperly disclosed.²³ The Department’s central concerns are personally identifiable information, the names of non-management and confidential witnesses, OSHA’s pre-decisional deliberations, and other materials that OSHA permissibly redacts under FOIA. Consistent with the Ninth Circuit’s teaching in *Exxon Shipping*, I consider the Solicitor’s motion in the context of our routine discovery rules.

The question of personally identifiable information is readily determined based on this Office’s rules. *See* 29 C.F.R. § 18.31. If any party obtained any documents that show for any person the social security number, taxpayer identification number, year of the individual’s birth, any minor’s initials, or the last four digits of any financial account number, all such information must be redacted before the document is shown to any person or offered into evidence. 29 C.F.R. § 18.52.

Statements of the co-workers of Dr. Kot or of Complainant Madry are subject to the government informant privilege. *See generally Roviario v. United States*, 353 U.S. 53 (1957). “The privilege of a witness, person, [or] government [entity] . . . shall be governed by the principles of the common law . . .” 29 C.F.R. § 18.501. In recent years, federal common law has developed a more active role for the courts in protecting inadvertently disclosed privileged material. *See, e.g.,* FED. R. EVID. 502. A disclosure is not a waiver if it is inadvertent, the holder of the privilege took reasonable steps to prevent disclosure, and the holder took prompt, reasonable steps to rectify the disclosure. *Id.* After being notified that information produced in discovery is subject to a claim of privilege,

A party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge for an *in camera* determination of the claim [of privilege]. The producing party must preserve the information until the claim [of privilege] is resolved.

29 C.F.R. § 18.51(e)(2).

²³ Darrell Whitman is not a party. There is no reason that he would appear on these motions, and he has not. As Mr. Whitman has had no notice of these motions or opportunity to be heard, I make no findings binding on him. Rather, I consider his deposition testimony and the other materials on this record to make determinations only for purposes of this case and those persons who appeared on this motion.

Here, the Department has published a series of regulations (*Touhy*) and, in this motion, is taking further steps to rectify the disclosure of privileged information. Accordingly, it is entitled to the benefit reflected in FED. R. EVID. 502.²⁴

Accordingly, no party may use or disclose the following exhibits from the deposition of Mr. Whitman: Exhibits 1, 6, 12, and 13.²⁵ These exhibits contain the names of confidential witnesses or the statements of government informants who are not managerial employees of Respondent. If the case has not settled, 14 days before the hearing, any party may use these documents.²⁶ Any party who contends that portions of any of these documents should not be subject to this Order may file a motion to be relieved of the Order's restrictions. The motion should include a redacted copy of the deposition exhibit, designed to remove anything privileged. The motion must be served on the Solicitor.

Similarly, any testimony that Mr. Whitman gave about any confidential witness or government informant is sealed. That includes any EMLab employee who was not above Mr. Madry in EMLab's organization. No party may show the testimony to anyone or use it for any purpose. If the case has not settled, 14 days before the hearing, any party may use this testimony. As with the exhibits, any party who contends that portions of any of this testimony should not be subject to this Order may file a motion to be relieved of the Order's restrictions. The motion should include a redacted copy of the testimony, designed to remove anything privileged. The motion must be served on the Solicitor.

Any party may file a Freedom of Information Request with the Department of Labor, seeking access to the OSHA investigative files in either the Kot or Madry case. Anything that the Department produces in response to the FOIA request is not subject to any portion of this Order.

Any person wishing to obtain the testimony of Darrell Whitman in this case, whether by additional deposition or at trial and whether the testimony is compelled or voluntary, must give no less than 14 days' notice to David J. Rutenberg, Esq., who has appeared for the Solicitor of Labor (or to any other person whom the Solicitor or Mr. Rutenberg designates). Any testimony taken inconsistent with this requirement will be stricken on motion of the Solicitor.

The parties are advised that, as the Solicitor argues, it appears that much of Mr. Whitman's deposition testimony is neither relevant nor reasonably calculated to lead to anything admissible. It likely is subject to exclusion at the hearing. This matter is decided *de novo*. 29 C.F.R. § 24.107. OSHA's process is generally irrelevant. The parties must prove up their cases with evidence at the hearing, not through reliance on any views of OSHA officials. But I make no

²⁴ The Federal Rules of Evidence are not controlling in this forum. Rather, I look to those rules as a reflection of the developing common law of privilege.

²⁵ Though the informant's name on Exhibit 6 is redacted, at his deposition Whitman identified the informant by name.

²⁶ The government informant privilege is limited. If a party needs the information to prepare for a hearing, ultimately it must be made available.

rulings in this regard now. So long as the motion is filed consistent with 29 C.F.R. § 18.35, any party may file a motion *in limine* concerning this evidence.

In all other respects, the Solicitor's motion is denied.

Order

The parties will comply with all aspects of this Order. Failure to comply, after an opportunity to be heard, could result in sanctions. *See* 29 C.F.R. § 18.57(b), (f). Possible sanctions include striking claims or defenses “in whole or in part,” “dismissing the proceeding in whole or in part,” and “rendering a default decision and order against the disobedient party.” *Id.* The Solicitor or others might have other remedies available elsewhere; nothing in this Order is intended to affect those remedies.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge