

# OSC Investigation Matrix

By Darrell Whitman  
(November 1, 2017)

## **Notes:**

This matrix is based on the documents provided to the OSC, with the primary document being the Declaration provided with the April 2016 Amended Complaint. This Declaration has been supplemented with additional documents, including a group of affidavits and statements from witnesses, as noted below. This matrix is not intended as an exhaustive framework for the conduct of a fully-qualified and thorough investigation. Rather it represents an initial framework that should be expanded through the addition of depositions and document discovery. All witness and parties cited here should be subsequently deposed to obtain a full account of their testimony.

Additionally, the narrative reflected in this matrix is also only a starting point to uncovering the full story reflected in the events this matrix documents. It should be understood that I could gather and report only those facts discovered by me from the time I first began my duties with the Agency in July 2010 to the time of drafting this matrix. Each event represents a node connecting to other events and actors, and exploring these nodes should construct a more complete understanding of how and why these events occurred.

## **Acronyms**

ALJ – Department of Labor Administrative Law Courts  
CRC – Department of Labor, Civil Rights Center  
DOL – U.S. Department of Labor  
OIG – Department of Labor, Office of Inspector General  
OSHA – Occupational Safety and Health Administration  
OWP – Office of Whistleblower Protection within OSHA  
Reg. V – OSHA, Region V, Chicago, IL.  
Reg. IX – OSHA, Region IX, San Francisco, CA  
Reg. X – OSHA, Region X, Seattle, WA.  
SOL – Department of Labor, Solicitor's Office

CFR (Federal regulations)  
CON. (U.S. Constitution)  
EEOC (Equal Employment Opportunity Commission)  
USC (Federal statutes)  
WIM (Whistleblower Investigations Manual, adopted and effective 9-20-2011)  
WPA (Whistleblower Protection Act)

**Evidence cited as:**

- A. OSC Disclosures, submitted January 2015
- B. OSC Complaint, submitted April 6, 2016
- C. Complainant's Declaration supporting his OSC complaint
- D. Addendum to Affidavit, submitted 5-19-2017
- E. Department of Justice Affidavit, submitted 1-24-2017
  
- H. Affidavit of Maral Boyadjian
- I. Affidavit of Johnny Burris
- J. Affidavit of Dan Forrand
- K. Affidavit of Yesinia Guitron
- L. Affidavit of Benjamin Heckman
- M. Affidavit of Sue Kamlet
- N. Affidavit of Michael Madry
- O. Affidavit of Jason Skolarik
- P. Affidavit of Aaron Stookey
- Q. Affidavit of Blake Wu
- R. Linda Morales interview report, completed 7-22-2016
- S. Holly Thomas interview report, completed 8-29-2016
- T. Matthew Zugsberger DOL submission, 2-27-2017
- U. Affidavit filed with the Grand Jury, January 2017.

**Format**

While the overall investigation proposal adopts the five broad areas of OSC concern, there is overlap between these areas. For example, there is considerable overlap between "violations of law, rules and regulations" and the other four sections because prohibited activities are often, but not always, violations of law, rules and/or regulation. However, the section on "violations of law, rules, and regulations" provides specific cites to violations, leaving the other sections to account for their impacts. In the interests of economy, there will be a reference to earlier citations where appropriate.

## **Violations of Law, Rules, and Regulations**

**A. Violations of 5 USC, §§2301, et seq. (Whistleblower Protection Act)**

**1. 5 USC §2301(b)(2)** - All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

- 1. Discrimination against employees with identified and qualified disabilities. (Exs. A, C—pp.2-4, 7-9, 12-13, 56-76, 84-88, H, M, O and DOL dismissal of EEO Complaint - attached)
- 2. Placing employees under surveillance and attacking their Constitutional rights of free speech, freedom of association, and protection of privacy. (Exs. A, B, C—pp.16-25, 162-193, M, S)

3. Region IX RA fails to take corrective action in the context of a group grievance complaining of a hostile workplace and retaliation for reporting violations of laws, rules and regulations. (Ex. C-pp. 2-4, 12-13, M, Q)

4. Region IX RA manipulated the investigation of an EEO Harassing Conduct Complaint to ensure it would be dismissed. (Exs. A, B, C-p.25, 39-46, M)

**2. 5 USC §2301(b)(4)** - All employees should maintain high standards of integrity, conduct, and concern for the public interest.

1. OSHA conducts a retaliatory investigation in 2014 after receiving reports of corruption. (Exs. A, B, C-pp. 140-144, 162-193, M, U)

2. Region IX conducts multiple hostile and abusive fact-finding Weingarten meetings. (Exs. A, B, C-pp.25-30, 80-83, 154-158, M, Q)

3. Region IX RSI falsifies whistleblower investigation reports. (Exs. A, B, C-pp.8-12. See also investigation reports cited supra.)

4. Region IX RSI engages in surveillance of employees. (Exs. A, B, C-pp.39-49, 80-83, M).

5. Region IX RSI downgrades employee Performance Appraisals based on disabilities, and as retaliation for protected activities. (Exs. C-pp. 3-4, 144-154, H, M)

6. Region IX RA manipulated the investigation of an EEO Harassing Conduct Complaint to ensure it would be dismissed. (Exs. A, B, C-p.25, 39-46, 76-79, M)

7. Region IX ARA refuses to take corrective action regarding wrongdoing of other Region IX administrators. (Ex. C-pp.76-79)

8. Region IX RA refuses to take action to protect whistleblower complainants from abuse by the Region IX RSI. (Exs. A, A-appendix B, C-pp. 36-39, L, N,, P)

9. Region IX REI orders the withdrawal of two SOX complaints in 2010 without the approval of the complainants, and thus failed to investigate what later appeared as wide-spread fraud. (Exs D, E)

**3. 5 USC §2301(b)(5)** – The Federal work force should be used efficiently and effectively.

1. Using OSHA employees to conduct unauthorized surveillance and retaliatory investigations of employees (Exs. A, B, C-pp. 80-83, H, M)

2. Region IX RA fails to take corrective action in the context of a group grievance complaining of a hostile workplace and retaliation for reporting violations of laws, rules and regulations. (Ex. C-pp.2-4, 25)

**4. 5 USC §2301(b)(6)** – Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards: Terminating employees in retaliation for protected activity.

1. Using Performance Appraisals as retaliation for protected activity; (Exs. A, B, C-pp.4-5, H, M)

**5. 5 USC §2301(b)(7)** – Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

1. Failing to provide necessary education and training before making assignments to investigators. (Exs. A, B, C)

2. Failing to provide effective education to managers regarding EEO standard and practices. (Exs. A, A-Appendix B, B, C–pp.2, 13-14, 56-76, H, M)

**6. 5 USC §2301(b)(9)** – Employees should be protected against reprisal for the lawful disclosure of - information which the employees reasonably believe evidences— (A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

1. Retaliating against employees in the context of their protected activity. (Exs. A, B, C–pp.4-5, 25-30, 39-48, 80-83, 100-105, 106-122, 162-193, H, M, U)

**7. 5 USC §2302(b)(1)(D)** – Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— **(1)** discriminate for or against any employee or applicant for employment—. . . **(D)** on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791):

1. Repeated denial of reasonable accommodation to complainant with a recognized disability where required by law. (Ex. C–pp. 3-4, 12-14, 26, 56-76, M)

2. Senior Region IX managers organizing retaliation against employees in the context of their protected activity (Exs. A, B, C–pp.26, H, M, O, U).

3. DOL/Administrative Law Court dismissing EEO Complaints without a valid investigation (Ex. C–pp. 56-76, and attached dismissal of EEO complaint)

**8. 5 USC §2302(b)(8)** – . . . **(8)** take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of— **(A)** any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences— **(i)** any violation of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences - **(i)** any violation (other than a violation of this section) of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

1. Retaliating against employees in the context of their protected activity. (Exs. A, A-Appendix B, B, C–pp.2-7, 25-30, 48-52, 80-83, 140-142, H, M)

**9. 5 USC §2302(b)(9)** – **(9)** take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of— **(A)** the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation— **(i)** with regard to remedying a violation of paragraph (8); or **(ii)** other than with regard to remedying a violation of paragraph (8); **(B)** testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii); **(C)** cooperating with or disclosing information to the Inspector General of an

agency, or the Special Counsel, in accordance with applicable provisions of law; or **(D)** refusing to obey an order that would require the individual to violate a law, rule, or regulation:

1. Involuntary reassignment of an employee in the context of protected activity. (Exs. C-pp.16-25, F)
2. Retaliation against employees in the context of testimony regarding corruption during the 2014 OSHA management review. (Exs. A, A-Appendix B, B, C-pp.140-142 , M, S)
3. Region IX management fails to refer me to the OSC with regard to the violations of law I reported in June 2012. (Ex. C-p.105)

**10. 5 USC §2302(c) – ... (c)** The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

1. OSHA Director fails to ensure the proper administration of the Whistleblower Protection Program, or take corrective action in the context of retaliation against employees engaging in protected activity. (Exs. A, A-Appendix B, B, C-p. 12, H, M, S)
2. DOL Secretary of Labor fails to ensure the protection of employees engaged in protected activity. (Exs. A, B, C-pp. 130-140, 141-142, M, S)
3. DOL Director of the Office of Solicitor fails to ensure subordinates know and respect whistleblower law and practice. (Exs. A, A-Appendix B, B, C-pp. 16-25, 39-46, L, N)
4. DOL Director of the Administrative Law Courts fails to ensure subordinates know and respect whistleblower law and practice. (Exs. C-pp.56-76, D, N)
5. DOL Director of the Office of Inspector General fails to ensure subordinates know and respect whistleblower law and practice. (Exs. A, B, C-pp.3-5, 39-46, 132-140, 154-155)
6. DOL Civil Rights Center fails to conduct proper investigation of EEO complaint. (Ex. C-pp. 56-76.)
7. Director of the Environmental Protection Administration fails ensure the integrity of laboratory accreditation. (Exs. A, B, C-p.140-141, L)
8. Director of the Federal Aviation Administration fails to ensure integrity of aircraft maintenance, and the protection of whistleblowers. (Exs. A, B. See also, *FedEx Corporation/Forrand/9-3290-09-057*, and *Gruzalski v. FedEx*, Los Angeles Superior Court, Case No. BC512638.)
9. Director of the Nuclear Regulatory Agency fails to ensure proper investigations of safety and security reports. (Exs. A, B, C-pp.16-25. See also, *PG& E Corp./Easley, et al./9-3290-10-041*)
10. Director of the Federal Railroad Administration fails to conduct proper investigations and protect whistleblowers. (See, *Union Pacific/Peterson/9-3290-11-069*, *Union Pacific Railroad/Tsosie/9-0370-09-022*)
11. Director of the National Park Service fails to ensure the proper performance of contracts, and protect public health and safety. (Ex. T)

## **B. Violations of 18 U.S.C. §1001 (Obstructing Justice)**

*Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--*

*falsifies, conceals, or covers up by any trick, scheme, or device a material fact;  
makes any materially false, fictitious, or fraudulent statement or representation; or  
makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;*

1. Region IX and the DOL/CRC obstruct a 2012 EEO Harassing Conduct investigation, including giving false testimony regarding the conduct of the investigation (Exs. A, A-Appendix B, C-pp. 25, 39-48, K)
2. Region IX, the DOL/CRC, and the DOL Office of Solicitor obstruct a 2014 EEO investigation: (Exs. A, B, C-pp. 56-76, 140-142, S, P)
3. The Secretary of Labor, OSHA Directorate, and Region IX obstruct a 2014 investigation into corrupt practices: (Exs. A, B, C-pp.140-142, 162-193, Q, P);
4. Region IX and the DOL Office of Solicitor obstructs multiple whistleblower investigations (2011 to 2017): (Exs. A, B, C-pp. 5-7, 36-37, 140-142, L)
5. Region IX RA refuses/fails to advise employees of right to report wrongdoing to the OSC. (Ex. A, A-Appendix B, C-pp.138-140, L, S)
6. Region IX RSI obstructs whistleblower investigations by ordering extended investigations beyond protocols and in violation of statutory limits. (Ex. A, A-Appendix B, B, C, m, O, P)
7. Region IX obstructs the investigation of two SOX complaints against Wells Fargo Bank in 2010, and delays a third in 2012. (Ex. D, E, U)

## **C. Violations of 5 U.S.C. §552 (Freedom of Information Act)**

1. **5 U.S.C. §552a(2)** – Requests for “all records” – only partial response, or no response to requests. (Exs. A, C-pp.142-143, 162-163, N, O, T)
2. **5 U.S.C. §552a(3)** – Prompt production in “reasonable” forms: documents heavily redacted and unreadable. (Exs. C-pp.142-143, N, O, T)
3. **5 U.S.C. §552a(6)(A)** – 20 day response to a request: No response to requests within the time limit. (Exs. C-pp.142-143, N, O, T)

## **D. Violations of 5 U.S.C. §552a (Privacy Act)**

**1. 5 U.S.C. §552a(b)** – *CONDITIONS OF DISCLOSURE.*—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, the employment of nonemployee student interns to receive, evaluate, and record personal information from potential whistleblower complainants. . .

1. Employment of non-government student interns to conduct intake of whistleblower complaints involving the collection and disclosure of personal information. (Exs. A, B)

**2. 5 U.S.C. §552a(e)(2)** – *Agency Requirements.* Each agency that maintains a system of records shall-  
(2) collect information to the greatest extent practicable directly from the subject individual when the

information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

1. Placing complainant under surveillance and collecting of personal and protected information without complainant's knowledge, and distributing this information to other DOL employees. (Exs. A, B, C-pp. 25-30, 192, M, U)

## **E. Violations of U.S. Constitution**

**First Amendment** - *.Freedom of speech or of the press.*

*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press . . .*

1. Retaliation with regard to speaking with the media/gag order. (Exs. A, B, C-pp.156-158, 193, 195)

**Fourth Amendment** - *Protection from Unreasonable Searches and Seizures*

*The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.*

1. Conducting unwarranted surveillance of employees. (Exs. A, A-appendix B, B, C-pp.16-25, 80-83, 192-193, 195)

## **F. Violations of 42 U.S.C. §§12111 et seq. and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201-12204 and 12210), pursuant to 29 U.S.C. §794d (Section 501, The Rehabilitation Act)**

### **1. 42 U.S.C § 12112 - General rule**

*No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.*

#### **Construction**

*As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—*

*limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;*

*participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);*

*utilizing standards, criteria, or methods of administration--*

*that have the effect of discrimination on the basis of disability; or*

*that perpetuate the discrimination of others who are subject to common administrative control;*

*excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association; not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; Exs.*

...

#### ***Examination and inquiry***

##### ***Prohibited examinations and inquiries***

*A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.*

1. Requiring an unnecessary, invasive, and potentially life-threatening, medical examination regarding a disability: (Ex. H)
2. Denying reasonable accommodation for a medically documented recognized disability: (Exs. C – pp.2, 13-14, 26, H)
3. Denying reasonable accommodation for training to employees with recognized disabilities: (Exs. C- pp.12-13, 80-90, M)
4. Denying reasonable time to participate in the hearing of my EEO complaint. (Ex. C-pp. 100-105)

## **F. Violations of the Whistleblower Investigations Manual**

**1. Ch. 1, X, Functional Responsibilities, A. Responsibilities, 1 – Regional Administrator (RA)** - The RA has overall responsibility for all whistleblower investigation and outreach activities, as well as for ensuring that all OSHA personnel, especially compliance safety and health officers (CSHOs), have a basic understanding of the rights afforded to employees under all of the whistleblower statutes enforced by OSHA and are trained to take whistleblower complaints . . .

1. Region IX RA failed to ensure employees had a basic understanding of whistleblower rights and statutes: (Exs. A, A-Appendix B, C)
2. Region IX RA failed to take corrective action with regard to known violations of whistleblower policy and practice by subordinate managers. (Exs. A, Appendix B, C-pp.25-30, M, S)

**2. Ch. 1, X, Functional Responsibilities, A. Responsibilities, 2 – Supervisors** - . . . the Supervisor is responsible for implementation of policies and procedures and for the effective supervision of field whistleblower investigations, including the following functions:

...

e. Providing guidance, assistance, supervision, and direction to investigators during the conduct of investigations and settlement negotiations.

...

k. Providing training (formal and field) to investigators.



1. The Region IX RSI intervened in the conduct of investigations without notice and without working with the investigator (see, Ch.1, X, 3c – investigators are responsible for “Interviewing complainants and witnesses, obtaining statements, and obtaining supporting documentary evidence.”). Exs. A, A-Appendix B, C-pp. 5-7)
2. The Region IX RSI collaborated with respondents to dismiss cases without notice and without working with the investigator (see, Ch. 1, X, 3e – investigators are responsible for “Interviewing and obtaining statements from respondents’ officials, reviewing pertinent records, and obtaining relevant supporting documentary evidence.”): (Exs. A, A-Appendix B, B, C-pp. 5-7)
3. The Region IX RSI drafted Secretary’s Findings without notice or consultation with investigators (See, Ch. 1, X, 3g – investigators tasked with drafting Secretary’s Findings; Exs. A, B, C-pp. 5-7)
4. The Region IX RSI took over settlement negotiations without notice and without working with the investigator (see, Ch. 1, X, 3h – investigators tasked with conducting settlement negotiations; Exs. A, B, C-pp. 5-7)
5. The Region IX RSI failed to provide training (formal and field) to investigators before assigning complex investigations. (Exs. A, B)

### **3. Ch. 1, X, Functional Responsibilities, A. Responsibilities, 6 – Regional Solicitor of Labor (RSOL)–**

Each RSOL reviews cases submitted by RAs for their legal merit, makes decisions regarding case merit, and litigates, as necessary, those cases deemed meritorious. Regional attorneys provide legal advice to the RA and represent the Secretary in federal district court proceedings under the various statutes and the Assistant Secretary for Occupational Safety and Health in proceedings before DOL administrative law judges.

1. The RSOL assigned to Region IX commonly delayed action for months on requests, refused to support merit recommendations, and refused to perform function essential to the Whistleblower Protection Program. (Exs. A, A-appendix B, B, C-pp.5-7, 17-19)

**4. Ch. 1, XI, Investigative records - ...** Under no circumstances are investigation notes and work papers to be destroyed or retained, or used by an employee of the Government for any private purpose.

1. OSHA Region IX RSI repeatedly manipulated case files, deleted evidence, and falsified analyses to conceal evidence of mismanagement. (Exs. A, B, C-pp. 5-7, 17-25)

**5. Ch. 1, XI, A. – Non-Public Disclosure -** While a case is under investigation or appeal, information contained in the case file will be disclosed to the parties in order to resolve the complaint . . . This non-public disclosure may also occur at any level after the investigative stage, through the course of any administrative or judicial proceedings, until the final disposition of the case, either through the administrative or judicial process:

1. OSHA consistently refused the disclosure as mandated, and retaliated against Complainant when he did so. (Exs. A, A-Appendix B, B, C-pp.5-7, 17-30)

**6. Ch. 2, III, A(1) – In-take of Complaints - ...** When practical and possible, the investigator will conduct face-to-face interviews with complainants. ...:

1. Investigators rarely conducted face-to-face complainant interviews. (Exs. D, E. See, also Reports of Investigation, supra, file notes regarding complainant interviews)

**7. Ch. 2, V, Scheduling the Investigation** – A. The Supervisor must assign the case for investigation. Ordinarily, the case will be assigned to an investigator, taking into consideration such factors as the investigator’s current caseload, work schedule, geographic location, and statutory time frames . . . :

1. Cases were consistently assigned without regard to the knowledge or capacity of an investigator to investigate a complaint. (Exs. A, B, D, E, H, M, Q)

**8. Ch. 2. (p. 2-13) Respondent Notification Letter.** . . . Within 20 days of your receipt of this complaint you may submit to this agency a written statement and any affidavits or documents explaining or defending your position; (p. 2-21) Sample Non-cooperation Letter to Respondent. No response: More than 20 days have passed since your receipt of our letter requesting a position statement; however, I have received no response from you to the complaint allegations. ... If we do not receive your response within the ten days, OSHA’s preliminary findings will become undisputed, which will cause us to issue Secretary’s Findings based on the evidence gathered to date.

1. OSHA Region IX rarely, if ever, enforced these deadlines, causing cases to be delayed months, and sometimes years. (Exs. D, U. See also, date on Statements of Position in Reports of Investigation.)

**9. Ch. 3, II – General Principals** - ... relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination of the case.

The investigator must bear in mind during all phases of the investigation that he or she, not the complainant or respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by OSHA . . .

1. The Region IX RSI commonly dictated relevant evidence as determined by Respondents, not the investigator: (Exs. A, A-Appendix B, B, C-pp. 5-7, 17-25. See also, changes in Reports of Investigation by the Region IX RSI.)

**10. Ch. 3, IV, B – Preliminary Investigation/Early resolution** - OSHA must make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation. ...

1. OSHA commonly “pushes” early resolution, whether or not both parties seek it: (Exs. A, B, C-pp. 5-7, 17-25, H, N. See also changes in Reports of Investigation effected by Region IX RSI, including: *EM Lab P&K, LLC et al./Kot/9-3290-10-034*; *EMLab P&K, LLC/Madry/9-3070-11-001*)

**11. Ch. 3, V, Weighing the Evidence** - The whistleblower statutes administered by OSHA fall into two groups, with distinct standards of causation and burdens of proof—the “motivating factor” and the “contributing factor” statutes.

A. “Motivating Factor” Statutes.

1. Under this standard, the investigation must disclose facts sufficient to raise the inference that the protected activity was a motivating factor in the adverse action.

... B. “Contributing Factor” Statutes.

1. Under these standards, a preponderance of the evidence must indicate that the protected activity was a contributing factor in the adverse action. A contributing factor is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.”

1. OSHA commonly misapplied “motivating standards”, a higher test, rather than a “contributing factor” test, regardless of the statute involved in the complaint: (Exs. C-pp. 17-25, See also changes in Reports of Investigation made by Region IX RSI, including: *EM Lab P&K, LLC et al./Kot/9-3290-10-034*; *EMLab P&K, LLC/Madry/9-3070-11-001*.)

**12. Ch. 3, VI, Field Investigation** – A. Elements of a violation - ... An effective investigation focuses on the elements of a violation and the burden of proof required. ...

1. Protected Activity –

a. Providing information to a government agency (including, but not limited to OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, TSA, FRA, FTA, CPSC, HHS), a supervisor (the employer), a union, health department, fire department, Congress, or the President.

2. Employer knowledge –

The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity. For example, one of the respondent’s managers need not have specific knowledge that the complainant contacted a regulatory agency if his or her previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant. Also, the investigation need not show that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity.

If the respondent does not have actual knowledge, but could reasonably deduce that the complainant filed a complaint, it is referred to as *inferred knowledge*. **In several cases, I was directed to adopt a higher standard of direct knowledge, rather than this lower standard of indirect knowledge.**

3. Adverse Action –

The evidence must demonstrate that the complainant suffered some form of adverse action initiated by the employer. An adverse action may occur at work; or, in certain circumstances, outside of work. Some examples of adverse actions may include, but are not limited to:

...

Harassment - unwelcome conduct that can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. This type of conduct becomes unlawful when it is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Hostile work environment - separate adverse actions that occur over a period of time, may together constitute a hostile work environment, even though each act, taken alone, may not constitute a materially adverse action. Courts have defined a hostile work environment as an ongoing practice, which, as a whole, creates a work environment that would be intimidating, hostile, or offensive to a reasonable person. A complaint need only be filed within the statutory timeframe of any act that is part of the hostile work environment, which may be ongoing.

...

Blacklisting

...

Intimidation

Constructive discharge - the employer *deliberately* created working conditions that were so difficult or unpleasant that a reasonable person in similar circumstances would have felt compelled to resign.

It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as “adverse,” in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action “materially adverse.” Specifically, the evidence must show that the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation.<sup>1</sup> The investigator can test for material adversity by interviewing co-workers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

#### 4. Nexus -

*A causal link between the protected activity and the adverse action must be established by a preponderance of the evidence.* [emphasis added] Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited ill will) toward the protected activity, timing (proximity in time between the protected activity and the adverse action), disparate treatment of the complainant in comparison to other similarly situated employees (or in comparison to how the complainant was treated prior to engaging in protected activity), false testimony or manufactured evidence.

Questions that will assist the investigator in testing the respondent’s position include:

- Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- Did the complainant’s productivity, attitude, or actions change after the protected activity?
- Did the respondent discipline other employees for the same infraction and to the same degree?

1. Rather than following the WIM’s standards for the purpose of linking adverse action to protected activity, the Region IX supervisor would use nexus to elaborate reasons to dismiss cases, based on a standard far above “preponderance of evidence”: (Exs. C-pp. 16-25, 130-132, J, N, P)

2. Rather than follow the WIM’s directives regarding the conduct of a whistleblower investigation, the Region IX RSI would commonly demand investigations go far beyond the WIM’s standards, rendering them investigations into legal issues beyond those of a whistleblower investigation. For example, in re *EMLabs P&K v. Kot*, I was directed to dismiss a complaint as not meeting protected activity, even though the complainant’s reports to Respondent were prompted by a federal auditor’s requests. (Exs C-pp. 5-7, 12-13, 17-25, N)

3. Region IX management commonly refused to accept harassment, a hostile work environment,

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<sup>11</sup> *Burlington Northern & Santa Fe R. R. Co. v. White*, 548 U.S. 53, 68 (2006).

blacklisting, intimidation, and/or constructive discharge as adverse actions, and the WIM's standards of analyses. (Exs. C-pp. 5-7, See also *EMLabs. V. Madry*, citation supra).

**13. Ch. 3, VI, B – Contact with the Complainant** - The investigator's initial contact with the complainant should be made during the complaint intake and evaluation process. The assigned investigator must contact the complainant as soon as possible after receipt of the case assignment. Contact must be made even if the investigator's caseload is such that the actual field investigation may be delayed.

1. Investigators rarely, if ever, contacted a Complainant during intake and evaluation, but only after the case was later assigned to them, and there was rarely any pressure to make early contact: (Evidence can be found in the files of most any case cited in my complaint. (Exs. D, E, U)

**14. Ch. 3, VI, B, 1 - Activity/Telephone Log** - All telephone calls made, messages received, and exchange of written or electronic correspondence during the course of an investigation must be accurately documented in the activity/telephone log.

1. This was rarely the case. (Exs. D, E, U. See also, case files cited below.)

**15. Ch. 3, VI D. – Complainant Interview** - The investigator must attempt to interview the complainant in all cases. The investigator must arrange to meet with the complainant as soon as possible to conduct an interview regarding the complainant's allegations.

1. Complainants were not always interviewed, particularly if it was thought their cases might "kick out". (See, e.g., Exs. B, D, E, U)

**16. Ch. 3, VI, E. – Contact with Respondent** - Often, after receiving the notification letter that a complaint has been filed, the respondent or respondent's attorney calls the investigator to discuss the allegation or inquire about the investigative procedure. The call should be noted in the activity/telephone log, and, if pertinent information is conveyed during this conversation, the investigator must document it in the activity/telephone log or in a Memo to File.

1. When Region IX managers "took over investigations", they would not regularly document calls from Respondents: (Exs. C-pp.5-7, D, E, U)

**17. Ch. 3, VI, F, 1. – Uncooperative Respondents** - When conducting an investigation under § 11(c) of the OSH Act, AHERA or ACA, subpoenas may be obtained for witness interviews or records. Subpoenas should be obtained following procedures established by the Regional Administrator.

1. Region IX managers rarely, if ever, approved issuing subpoenas, often delaying resolution of cases for months and sometimes years. (See, e.g., *USPS, et al./John/9-3290-11-027*)

**18. Ch. 3, VI, J – Analysis** - After having gathered all available relevant evidence, the investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above and according to the requirements of the statute(s) under which the complaint was filed.

1. In practice, if Region IX managers disagreed with the investigator's analysis, they would rewrite it without consulting the investigator: (Exs. C-pp. 16-25, J, N, P)

**19. Ch. 3, VI, K – Conclusions of Investigations of Non-Merit Complaints** - Upon completion of the field investigation and after discussion of the case with the Supervisor, the investigator must contact the complainant in order to provide him or her with the opportunity to present any additional evidence deemed relevant. This closing conference may be conducted with the complainant in person or by telephone.

1. In some cases, the Region IX supervisor would appoint himself to this role without notice or working with the investigator, commonly discouraging Complainants from offering new evidence: (Exs. C-pp.5-7, 12, 16-25, J, N, P)

2. In one case, the Region IX supervisor ordered the investigator not only to not conduct a closing conference with the complainant, but not to talk to the complainant at all. (Ex. C-pp. 16, 52. See, *EMLab P&K, LLC/Madry/9-3070-11-001*, and *Lockheed Martin/Stookey/9-0370-11-005*)

**20. Ch. 3 VI, L, 2 – Documenting the Investigation.** – The ROI must be signed by the investigator and reviewed and approved in writing by the supervisor.

1. To the best of my knowledge, Region IX investigators were not asked/allowed to sign their Reports of Investigation: (Ex. C-pp.5-7, See, e.g. *Copper Basin Railroad/Lawson/9-0370-10-030* and *USPS, et al./John/9-3290-11-027*)

**21. Ch. 4, II, B - Investigator and Supervisor Discuss the Case.** The Supervisor and the investigator will discuss the facts and merits of the case throughout the investigation. The Supervisor will advise the investigator regarding any unresolved issues and assist in making a determination or deciding if additional investigation is necessary.

1. In practice, there was little cooperative engagement between investigators and the supervisor, with the supervisor often taking arbitrary actions without consultation with the investigator: (Exs. C-pp. 5-7, 16-25, J, N, P)

**22. Ch. 4, III - Report of Investigation** - The investigator must report the results of the investigation by means of a Report of Investigation (ROI), following the policies and format described in detail in Chapter 5 of this Manual. Once the ROI is approved, the investigator will write draft Secretary's Findings for review and signature by the RA or his or her designee.

1. Investigators only occasionally drafted Secretary's Findings, with the supervisor commonly either drafting them or rewriting them: (Exs. B, C-pp.5-7, 16-25)

**23. Ch. 4, VI, A – Review** - The investigator will provide the completed case file and draft determination letters to the Supervisor. Upon receipt of the completed case file, the Supervisor will review the file to ensure technical accuracy, thoroughness of the investigation, correct application of law to the facts, completeness of the Secretary's Findings, and merits of the case. If legal action is being considered, the Supervisor will review the recommendation for consistency with legal precedents and policy impact. Such review will be completed as soon as practicable after receipt of the file.

1. In practice, the supervisor would delay reviewing completed case files for months, and sometimes more than a year. (Exs. B, C-pp. 5-7, N, P. See, also, *Core-Mark International/McPherson/9-0370-12-005*, *Hawaii Air Ambulance/Stone/9-2400-10-0004*, and *Core-Mark International/Nelson/9-0370-11-014*)

**24. Ch. 4, VI, B, 1 – Approval/Withdrawal** - A complainant may withdraw his or her complaint at any time during OSHA’s processing of the complaint. However, it should be made clear to the complainant that by entering a withdrawal on a case, he or she is forfeiting all rights to appeal or object, and the case will not be reopened. Withdrawals may be requested either orally or in writing. It is advisable, however, to obtain a signed withdrawal whenever possible. (See sample complaint withdrawal request form at the end of this chapter.) In cases where the withdrawal request is made orally, the investigator must send the complainant a letter outlining the above information and confirming the oral request to withdraw the complaint. Once the Supervisor reviews and approves the request to withdraw the complaint, a second letter must be sent to the complainant, clearly indicating that the case is being closed based on the complainant’s oral request for withdrawal. Both letters must be sent via certified U.S. mail, return receipt requested (or via a third-party commercial carrier that provides delivery confirmation), or via any third-party commercial carrier that provides delivery confirmation. Proof of delivery of both letters must be preserved in the file with copies of the letters to maintain accountability.

1. In several important SOX cases, withdrawals were ordered without prior notice to or approval of the Complaint: (Exs. D, E, U)

**25. Ch. 4, VI, B, 3 – Approval/Settlement** - Voluntary resolution of disputes is desirable in many whistleblower cases ... Once an employee has filed a complaint and if the case is currently open, any settlement of the underlying claims reached between the parties must be reviewed by OSHA to ensure that the settlement is just, reasonable, and in the public interest. ...

1. In practice, OSHA pushed for settlements with little regard to “just, reasonable, and in the public interest”. (Exs. B, C-pp. 5-7, L, N, P. See also, *Copper Basin Railroad/Lawson/9-0370-10-030*)

**26. Ch. 4, VI, B, 6, a – Merit Finding** - In STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, CFPA, FSMA, and SPA cases involving discharge, where a bona fide offer of reinstatement has not been made, the Assistant Secretary must order immediate, preliminary reinstatement upon finding reasonable cause to believe that a violation occurred.

1. In practice, Region IX rarely, if ever, ordered “immediate, preliminary reinstatement upon finding reasonable cause to believe that a violation occurred”: (Exs. B, C-pp. 5-7, L, N, P)

**27. Ch. 4, VI, B, 7 – Further Investigation Warranted** - If, for any reason, the Supervisor does not concur with the investigator’s analysis and recommendation or finds that additional investigation is warranted, the file must be returned for follow-up work.

1. In practice, if the supervisor didn’t agree with the investigator, he commonly would appropriate the investigation without further discussion. (Exs. C-pp. 5-7, 16-25, L, N, P.)

**28. Ch. 5, V, F, 2 – Secretary’s Findings** - On the same date that the complainant and respondent are sent the findings, the original complaint and a copy of the Secretary’s Findings will be sent to the Chief Administrative Law Judge under a cover letter, where they will be held pending any request for hearing. The primary enforcement agency must also be provided a copy of the Secretary’s Findings.

1. In some merit cases, primary enforcement agencies were not provided Secretary’s Findings. (Exs. C-pp. 5-7, N)

**29. Ch. 5, V, F, 7 – Documenting key dates In IMIS** -The timely and accurate entry of information in IMIS, as detailed in OSHA Directive IRT 01-00-016, is critically important. In particular, key dates must be accurately recorded in order to measure program performance.

1. This did not occur in at least some cases, and there were no clear lines of authority for doing it.

**30. Ch. 6, II – Remedies** - In cases where OSHA is ordering monetary and other relief or recommending litigation, the investigator must carefully consider all appropriate relief needed to make the complainant whole after the retaliation.

1. As noted below, this rarely, if ever, occurred, and Region IX management as well as the DOL/ALJ often approved remedies on the basis of what was preferred by Respondents:

A. **Reinstatement:** Rarely ordered, rarely enforced when ordered. (Exs. B, L, N, P). See also: *Copper Basin Railroad/Lawson/9-0370-10-030*; *EMLabs P&K v. Madry/9-3070-11-001*, *Hawaii Air Ambulance/Stone/9-2400-10-0004*; *JPMorgan Securities/Burris/9-0370-13-017*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*.)

B. **Backpay:** Commonly ordered, but limited: (Exs. I, L, N, P. See also: *EMLabs P&K v. Madry/9-3070-11-001*, *JPMorgan Securities/Burris/9-0370-13-017*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*.)

C. **Compensatory damages:** Commonly ordered, but also limited: (Exs. I, L, N, P. See also: *EMLabs P&K v. Madry/9-3070-11-001*, *JPMorgan Securities/Burris/9-0370-13-017*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*.)

D. **Punitive damages:** Almost never ordered, even in cases of egregious retaliation: (Exxs. I, N. See also: *EMLabs P&K v. Madry/9-3070-11-001*, *JPMorgan Securities/Burris/9-0370-13-017*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*.)

E. **Attorney's fees:** Commonly ordered where allowed.

F. **Interest:** Commonly ordered on damages allowed.

G. **Expungement of records:** Commonly ordered, but with little enforcement.

H. **Neutral reference:** Commonly ordered, but with little enforcement.

**31. Ch. 6, III – Settlement Policy** - ... OSHA should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

1. OSHA settlements rarely considered whether settlements were “fair and equitable” (Ex. C-p.29, See also, No. 32 above).

**32. Ch. 6, IV, B – Adequacy of Settlements - Full Restitution.** Exactly what constitutes “full” restitution will vary from case to case. The appropriate remedy in each individual case must be carefully explored and documented by the investigator. *One hundred percent relief should be sought during settlement negotiations wherever possible*, but investigators are not required to obtain all possible relief if the complainant accepts less than full restitution in order to more quickly resolve the case. As noted above, concessions may be inevitable to *accomplish a mutually acceptable and voluntary resolution of the matter*. [emphasis added]



1. In practice, OSHA generally disregards this WIM directive (Ex. C-p.29. See also, No. 32 above).

**33. Ch. 6, IV, B, f – Adequacy of Settlements-** Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief. Where the employer uses e-mail or a company intranet to communicate with employees, such means shall be used for posting.

1. Region IX will sometimes ask for this, but never enforce it, even when they have clear notice the Respondent is not in compliance: (Exs. B, N)

**34. Ch. 6, IV, B, j – Adequacy of Settlements/punitive damages** - Punitive damages may be considered under certain statutes. They may be awarded when a management official involved in the adverse action knew that the adverse action violated the relevant whistleblower statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages may also be considered when the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of the statutes OSHA enforces. See Ch. 6 II D above for more guidance, including other examples. However, coordination with the supervisor and RSOL as soon as possible is imperative when considering such action. If RSOL agrees that such damages may be appropriate, further development of evidence should be coordinated with the RSOL.

1. Region IX rarely, if ever orders punitive damages, even where they clearly meet this WIM test (see above). In part that appears to come from a reluctance to ask the RSOL to support them, which the RSOL historically refuses to do. (Exs. B, C-p.29. See also, No. 32 above.)

**35. Ch. 6, IV, C. - The Standard OSHA Settlement Agreement** - In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action may have on co-workers. Yet, posting of a settlement agreement, standard poster and/or notice to employees, while an important remedy, may also be an impediment to a settlement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.

1. Region IX has no interest in curing the chilling effect of retaliating against whistleblowers, and rarely orders or enforces posting of settlements.

**36. Ch. 6, VI – Enforcement of Settlements** - In any case under statutes other than OSHA 11(c), AHERA, and ISCA that has settled, if the employer fails to comply with the settlement, the RA or designee shall refer the case to RSOL to file for enforcement of the order in federal district court. A letter shall be sent to the complainant informing the complainant about this referral and in cases under statutes allowing the complainant to seek enforcement of the order in federal district court the complainant shall be so advised. If an employer fails to comply with a settlement in an OSHA 11(c), AHERA, or ISCA, case, the RA or designee shall refer the case to RSOL for litigation and the complainant shall be so informed.

1. OSHA Region IX will not act to enforce settlement agreements, even where the breach involves subsequently terminating the complainant: (Ex. C-pp. 17-18)

### **37. Ch. 14, V. – Sarbanes-Oxley - “Kick-out” Provision –**

Complainants have the right to bring an action in district court for de novo review if there has been no final decision of the Secretary within 180 days of the filing of the complaint, provided that there has been no delay due to the complainant’s bad faith. See 18 U.S.C. § 1514A(b)(1)(B).

Special Procedures for SOX Cases.

In order to ensure consistency among the Regions and to alert the National Office of any significant or unusual issues, Secretary’s Findings in all merit SOX cases and all “significant” dismissals must be reviewed by OWPP. “Significant” dismissals are those involving complex coverage issues; extraterritoriality; or significant media attention. Proposed merit SOX Findings and “significant” dismissals must be emailed to the Director of OSHA’s Directorate of Enforcement Programs, with a copy to the Director of OWPP, for review prior to issuance. OWPP will ordinarily review the proposed letter within 5 working days. If the Regional Office has not received this review within 15 working days, then the Regional Office is authorized to proceed with its determination letter, unless the National Office has advised that it needs additional time in which to complete its review.

1. In practice, Region IX commonly assumed SOX cases will “kick-out”, and actively encouraged investigators to not investigate them. Instead, Region IX either encouraged complainants to withdraw their complaints, or acted to do so without the complainant’s voluntary agreement. This avoided providing notice of these cases to either the OWPP, which could review the action, or the SEC or now the CFPB, which was tasked with taking corrective action. (Ex. U)

## **Gross Mismanagement**

Many of the above-cited violations of law, rule, or regulation also reflect gross mismanagement. These will be summarized here, but without citations. Other instances of gross mismanagement do not rise to violations of law, rule, or regulation, and this will be summarized with citations to exhibits.

### Previously discussed:

1. Mismanagement of multiple whistleblower investigations as reported above, including: *EM Lab P&K, LLC et al./Kot/9-3290-10-034*; *EMLab P&K, LLC/Madry/9-3070-11-001*; *FedEx Corporation/Forrand/Case No. 9-3290-09-057*; *Galindo Construction Inc./Zugsberger/9-3290-L7-075*; *Hawaii Air Ambulance/Stone/9-2400-10-0004*; *JPMorgan Securities/Burris/9-0370-13-017*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*; *PG& E Corp./Easley, et al./9-3290-10-041*; *Wells Fargo Bank, N.A./Klosek/9-3290-10-036*; *Wells Fargo Bank, N.A./Guitron/9-3290-10-035*; *Wells Fargo/Ponce de Leon/9-3290-12-017*.
2. Retaliation against employees in the context of protected activity, as noted above.
3. Denial of employee accommodation for recognized disabilities, as noted above.
4. Failing to take corrective action with regard to known violations of law and policy by management, as noted above. (See, also, Exs. C-pp. 2-4, H, U)
5. Failing provide essential training, as noted above.
6. Appointing supervisors to perform essential functions without appropriate training and experience, as noted above.
7. Abusing fact-finding Weingarten hearings, as noted above.
8. Assigning non-employees to conduct core and legally sensitive duties, as noted above.

9. Purging the Whistleblower Protection Program of qualified investigators and replacing them with less qualified and/or unqualified investigators, as noted above.
10. Conducting a retaliatory 2014 investigation in response to my report of corruption, as noted above.

Additional:

1. Mismanagement of multiple whistleblower investigations, not previously reported, including: *Calpine Corporation/Bryan/9-3290-12-019; Copper Basin Railroad/Lawson/9-0370-10-030; Core-Mark International/McPherson/9-0370-12-005; Core-Mark International/Nelson/9-0370-11-014; FedEx Express/Rodriguez/9-3290-13-025; Hualapai Enterprises/Slominski/9-0370-10-003; Morango Casino Resort & Spa/Reyna/9-3290-12-088; ; PPG Aerospace/Makijew/9-3290-10-37; Sage Memorial Hospital/ Rodela/Case No. 9-0370-10-027; Union Pacific/Peterson/9-3290-11-069; Veolia Transportation/Armstrong/9-0050-10-011; Worldwide Energy & Manufacturing USA, Inc./Cheng/9-3290-10-042.*
- 2 Inexcusable delays in processing cases, sometimes for years. (Exs. B, I, J, K, L, N, P)
3. Obstructing investigations by ordering investigators to rewrite reports up to three to four times after initial merit recommendations; arbitrarily reversing merit findings without explanation or analysis; rewriting investigative reports without having engaged in fact-finding; submitting merit recommendations for authoritative review to managers who were not only unqualified, but did not participate in fact-finding; without knowledge of the investigator, re-interviewed witnesses seeking to change their testimony by diluting support for the whistleblower ; and again without knowledge of investigators intervening to communicate with parties. (Exs. B, J. See also: *Core-Mark International/McPherson/9-0370-12-005; Core-Mark International/Nelson/9-0370-11-014; Sage Memorial Hospital/ Rodela/Case No. 9-0370-10-027; Union Pacific/Peterson/9-3290-11-069; EM Lab P&K, LLC et al./Kot/9-3290-10-034; EMLab P&K, LLC/Madry/9-3070-11-001; FedEx Corporation/Forrand/Case No. 9-3290-09-057; Hawaii Air Ambulance/Stone/9-2400-10-0004; JPMorgan Securities/Burris/9-0370-13-017; Lockheed Martin/Stookey/9-0370-11-005; M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029; PG& E Corp./Easley, et al./9-3290-10-041; Wells Fargo/Ponce de Leon/9-3290-12-017)*
4. Violating whistleblower rights by: ordering cases closed without interviewing complainants; ordering investigators not to communicate with complainants about their rights, remedies or relevant evidence; reversing merit findings after the whistleblower complained about delays; breaching whistleblower confidentiality when they complained about delays and mismanagement. (Exs. B, I, K, L, N, O, P, U. See also: *Core-Mark International/McPherson/9-0370-12-005; Core-Mark International/Nelson/9-0370-11-014; Sage Memorial Hospital/ Rodela/Case No. 9-0370-10-027; Union Pacific/Peterson/9-3290-11-069; EM Lab P&K, LLC et al./Kot/9-3290-10-034; EMLab P&K, LLC/Madry/9-3070-11-001; FedEx Corporation/Forrand/Case No. 9-3290-09-057; Hawaii Air Ambulance/Stone/9-2400-10-0004; JPMorgan Securities/Burris/9-0370-13-017; Lockheed Martin/Stookey/9-0370-11-005; M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029; PG& E Corp./Easley, et al./9-3290-10-041; Wells Fargo/Ponce de Leon/9-3290-12-017)*
5. Protecting and/or limiting companies from accountability for violations of whistleblower law, including: giving corporate defendants permission to delay responses up to a year while whistleblowers were without relief; without investigators' knowledge actively communicating with corporate counsel to influence the outcome of an investigation; without the investigators' knowledge arranging meetings between corporate counsel and regional OSHA management, then reversing merit findings without consulting the investigators. (Exs. B, C-pp.16-25, L, N, P.)
6. Falsifying and censoring final investigative Reports by: removing evidence that supported a merit finding, ordering investigators to include text which contradicted facts documented in the Report; and

rewriting Reports when the investigator protested that would be violating the law. (Exs. B, C-pp. 16-25. See also, investigative reports cited below.)

7. Abusing the settlement process by took settlement negotiations away from investigators without their knowledge, conducting *ex parte* communications with corporate counsel regarding settlement; threatening to reverse merit findings if the complainant did not accept a nuisance settlement or other relief significantly lower than proposed by the investigator; pressuring for settlements instead of merit findings, which also prevented referrals to regulatory agencies to address issues raised by the whistleblowers. (Exs. B, C-pp.5-7, 16-25, L, N, P)

8. Region XI RA failing to take corrective action with regard to violations of law, and the creation and maintenance of a hostile workplace. (Exs. C-p.2, H,)

9. Region IX RSI attempts to impose quotas on investigators in violation of OSHA policy. (Ex. C-pp.124-125, M, Q.)

### **Abuse of Authority**

Many of the above-cited violations of law, rule, or regulation also reflect gross mismanagement. These will be summarized here, but without citations. Other instances of gross mismanagement that don't rise to violations of law, rule, or regulation, will be summarized here with citations to exhibits.

#### Previously discussed:

1. Delaying, and dismissing multiple whistleblower investigations as reported above, including: *EM Lab P&K, LLC et al./Kot/9-3290-10-034*; *EMLab P&K, LLC/Madry/9-3070-11-001*; *FedEx Corporation/Forrand/Case No. 9-3290-09-057*; *Galindo Construction Inc./Zugsberger/9-3290-L7-075*; *Hawaii Air Ambulance/Stone/9-2400-10-0004*; *JPMorgan Securities/Burris/9-0370-13-017*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*; *PG& E Corp./Easley, et al./9-3290-10-041*; *Wells Fargo Bank, N.A./Klosek/9-3290-10-036*; *Wells Fargo Bank, N.A./Guitron/9-3290-10-035*; *Wells Fargo/Ponce de Leon/9-3290-12-017*.

2. Rewriting statutory burdens of proof in violation of the applicable whistleblower statutes, including: failing to use the "contributing factor" test for a *prima facie* case, and substituting a more difficult "primary motivating factor" test, rather than using the statutorily required "preponderance of evidence" in evaluating a Respondent's retaliatory motive. These appeared in *Forrand*, *Lockheed-Martin v. Stookey* and *Hawaii Air Ambulance v. Stone*. which were critically rejected in other judicial forums, but when applied by OSHA precluded the reinstatement of the whistleblower as a statutory remedy. As reported above.

3. Retaliating against employees in the context of protected activity, as noted above.

4. Denying employees accommodation for recognized disabilities, as noted above.

5. Failing to take corrective action with regard to known violations of law and policy, as noted above.

6. Appointing supervisors without appropriate training and experience, as noted above.

7. Abusing fact-finding Weingarten hearings, as noted above.

8. Assigning non-employees to conduct core and legally sensitive duties, as noted above.

9. Purging the Whistleblower Protection Program of qualified investigators and replacing them with less qualified and/or unqualified investigators, as noted above.

10. Cultivating and maintaining a hostile workplace for employees with disabilities, as noted above.

11. Allowing managers to conduct unauthorized surveillance of employees, as noted above.

12. Region IX Solicitor refuses to defend merit award. (Ex. C-pp.36-37)

Additional:

1. OSHA appoints self-interested investigators to 2014 OSHA management review, who then turn it into a retaliatory investigation. (Exs. A, C-pp.140-144.)
2. Region IX administrators allow a supervisor to organize a hostile Weingarten hearing in response to the employee's report of wrongdoing by the supervisor (Exs. A-Appendix B, C-pp.25-30.)
3. Region IX RA fails to take corrective action when he receives reports: the RSI has organized unauthorized mediation training, improperly managed whistleblower investigations, and used coercive tactics to achieve settlements; RSI is creating and maintaining a hostile workplace; junior administrators misrepresent important facts during his investigation. (Exs. A, A-Appendix B, C-p.2-4, 25-30, H.)
4. Region IX Administrators facilitate retaliation against an employee in the context of the employee's protected activity. (Exs. A.-Appendix B, C-pp.25-30, H.)
5. Region IX Administrators organize an obstruction of a 2012 EEO Harassing Conduct complaint. (Exs. A.-Appendix B, C-pp.34-35, M.)
6. Region IX Administrators falsify testimony grievance hearing testimony to conceal wrongdoing. (Exs. A.-Appendix B, C-pp.16-25)
7. Region IX Administrators conceal information from an employee to use it to attack the employee. (Ex. A.-Appendix B)
8. Region IX Administrators knowingly violate EEO employee protections. (Exs. A.-Appendix B, H, M, Q)
9. Region IX Administrators collaborate with the Region IX RSI to dismiss merit complaints (Exs. A, A-appendix B, C-pp.25-30)
10. Region IX Administrators create and maintain a hostile workplace in retaliation for employee protected activity. (Exs. A.-Appendix B, B, C-pp.25-30, H)
11. Region IX RSI refuses to enforce an OSHA settlement agreement, instead designating the violation a new complaint. (Exs. A.-Appendix B, C-pp.17-18. See and compare: *Copper Basin Railroad/Lawson/9-0370-10-030*, *Copper Basin Railroad/Lawson/9-0370-11-007*)
12. Region IX RSI revised investigative reports to conceal facts supporting merit recommendations. (Exs. A-Appendix B, C-pp.2-5)
13. Region IX RSI refuses to engage in an interactive process, as ordered by the FOH, and denies reasonable accommodation in the context of an employee's protected activity. (Exs. A-Appendix B, C-pp.3-5, 7-8)
14. Region IX RSI order the investigator not talk to the complaint in a case he dismissed. (Exs. A, A-appendix B, C-pp.14-16)
15. Region IX RSI colludes with Respondents to dismiss otherwise merit complaints. (Exs. A.-Appendix B, C-pp.14-16)
16. Region IX RSI denies "make whole remedies" to whistleblowers with merit findings. (Ex. A-Appendix B. See also, above.)
17. Region IX RSI fails to issue reports to appropriate regulatory agencies, based on merit complaints. (Ex. A-Appendix B. See also above.)
18. Region IX RSI conceals from other investigators he has discontinued assigning cases to an investigator who has engaged in protected activity. (Exs. A-Appendix B, M)
19. Region IX RSI conducts unauthorized surveillance of employees. (Ex. A-Appendix B, C-pp.16-30, )
20. The Region VIII ARA conducting the 2014 investigation in Region IX fails to report relevant testimony of wrongdoing. (Ex. A-Appendix B )

21. In 2012, the National Director of the Whistleblower Protection Program, receives reports of mismanagement and violations of law and policy in Region IX, but fails to investigate and take corrective action. (Exs. A-Appendix B, C-pp.16-25)
22. In 2014, the Secretary of Labor fails to order an investigation, or direct the employee to the OSC, when he receives a detail report of corruption in OSHA Region IX. Instead, he allows a retaliatory investigation to occur and presides over the removal of both the employee making the report, the purging of OSHA Region IX attorney-investigators, and the removal of the National Director of the Whistleblower Protection Program, who was preparing an outside audit of the Program. (Exs. A-appendix B, M, Q. See also, MSPB complaint of Elizabeth Slavet.)
23. Between 2010 and 2015, the National Director of OSHA received multiple reports of wrongdoing regarding OSHA management of the Whistleblower Protection Program but failed to take any corrective action. (Exs. A-appendix B, C-pp.16-25, M, Q)
24. Between 2010 and 2015, senior members of the OSHA Directorate received multiple reports of wrongdoing regarding OSHA management of the Whistleblower Protection Program but failed to take any corrective action. (Exs. A-Appendix B, C-pp.16-25)
25. From 2015 to present, the OSHA Directorate and senior OSHA bureaucrats have refused multiple FOIA requests for a copy of the 2014 OSHA investigation, which became the basis for purging OSHA region IX of attorney-investigators. (Ex. A-Appendix B)
26. From 2011 to 2015, senior administrators in the DOL Office of Solicitor repeatedly failed to ensure Regional Solicitors were performing their duties related to the Whistleblower Protection Program. (Ex. A-appendix B)
27. Director of the DOL/Civil Rights Center fails to ensure the proper review and management of EEO complaints. (Exs. A-appendix B, C)
28. In 2014, senior administrators in the DOL/Office of Inspector General failed to investigate reports of serious violations of law and policy in OSHA Region IX. (Ex. A-appendix B)
29. In 2016, the Director of the DOL Administrative Law Courts in Region IX failed to prevent an ALJ from collaborating with a Respondent Company to conceal serious violations of law. (Ex. A-appendix B, C, N)
30. In 2014, Warren Merkel, a senior bureaucrat in the National Voluntary Laboratory Program, contacted and complained to OSHA management when I questioned NvLAP's practice of withholding prior laboratory audit reports from subsequent auditors. (Ex. C-pp. 190-203)
31. Failure to issue final orders. Although the whistleblower statutes require final orders for relief after a merits finding, OSHA has substituted preliminary "due process" letters that did not constitute final resolution. Rather they announce findings of illegality but postpone action. This violation of plain statutory language enabled misconduct summarized above, such as delays and pressure to accept inadequate relief, and vetoes of merit findings by solicitor staff who did not work on the investigations, and the dismissal of cases negotiated with corporate defendants without the knowledge or participation of the investigator. (Ex. B. See also: *Lockheed Martin/Stookey/9-0370-11-005*)
32. Verbal assault and insults against Whistleblower Protection Program Director, Niglen Tolek, by OSHA Assistant Regional Administrator, Mr. Sherrill Benjamin, during an OSHA training session at the OSHA Illinois training center in January 2011. (Ex. C, p. 1).
33. Region IX, ARA Barbara Goto, regularly verbally abused employees in public, causing disruptions and setting a very bad tone for management.(Ex. C, p. 1)

34. DOL Administrative Law Judge improperly dismisses EEO Complaint where substantial evidence of qualified disabilities, retaliation based on disabilities, and failure of DOL/CRC to conduct proper investigation. (Ex. C-pp. 56-76, and attached dismissal of EEO complaint.)

### **A Substantial Waste of Government Funds**

Many of the above-cited violations of law, rule, or regulation also reflect a substantial waste of government funds. These will be summarized here, but without citations. Other instances of a substantial waste of government funds that don't rise to violations of law, rule, or regulation will be summarized with citations to exhibits.

#### Previously discussed:

1. Delaying, and dismissing multiple whistleblower investigations as reported above, including: *EM Lab P&K, LLC et al./Kot/9-3290-10-034*; *EMLab P&K, LLC/Madry/9-3070-11-001*; *FedEx Corporation/Forrand/Case No. 9-3290-09-057*; *Galindo Construction Inc./Zugsberger/9-3290-L7-075*; *Hawaii Air Ambulance/Stone/9-2400-10-0004*; *JPMorgan Securities/Burris/9-0370-13-017*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*; *PG& E Corp./Easley, et al./9-3290-10-041*; *Wells Fargo Bank, N.A./Klosek/9-3290-10-036*; *Wells Fargo Bank, N.A./Guitron/9-3290-10-035*; *Wells Fargo/Ponce de Leon/9-3290-12-017*.
2. Retaliating against employees in the context of protected activity, as noted above.
3. Denying employees accommodation for recognized disabilities, as noted above.
4. Appointing supervisors without appropriate training and experience, as noted above.
5. Abusing fact-finding Weingarten hearings, as noted above.
6. Purging the Whistleblower Protection Program of qualified investigators and replacing them with less qualified and/or unqualified investigators, as noted above.
7. Conducting unauthorized surveillance of employees, as noted above.
8. Conducting improper EEO investigations, as noted above.

#### Additional:

1. Region IX RA conducting three extended meetings over a period of 8 months with Region IX investigators concerning abusive behavior, and violations of law by the RSI, but failing to take any corrective action to address the issues. (Ex. C-pp.2-4)
2. Conducting an October 2014 employee training involving more than 40 employees at a remote site in Salt Lake City, Utah, rather than conducting the training at the federal building in San Francisco.
3. Conducting an August 2014 whistleblower training at a remote site in Phoenix, Arizona, rather than conducting the training at the federal building in San Francisco.
4. Organizing three days of unauthorized mediation training for whistleblower investigators in 2011. (Ex. C-pp.16-25)
5. Sending whistleblower investigators to an unauthorized week-long mediation training program in June 2012. (Exs. C-p.13, M)
6. Hiring an outside consultant to "counsel" whistleblower investigators on multiple occasions, rather than taking corrective action to end a hostile working environment.

## **Substantial and specific danger to public health or safety**

Many of the above-cited violations of law, rule, or regulation also reflect a substantial and specific danger to public health or safety. These will be summarized here, but without citations. Other instances of a substantial and specific danger to public health or safety which don't rise to violations of law, rule, or regulation, and this will be summarized with citations to exhibits.

### Previously discussed:

1. The following complaints noted above and reported to the OSC reflect substantial and specific danger to public health or safety that were not reported to the appropriate regulatory agency for corrective action: *EM Lab P&K, LLC et al./Kot/9-3290-10-034*; *EMLab P&K, LLC/Madry/9-3070-11-001*; *FedEx Corporation/Forrand/Case No. 9-3290-09-057*; *Galindo Construction Inc./Zugsberger/9-3290-L7-075*; *Hawaii Air Ambulance/Stone/9-2400-10-0004*; *Lockheed Martin/Stookey/9-0370-11-005*; *M3 Transport LLC-SLT Expressway, Inc./Heckman/9-0370-10-029*; *PG& E Corp./Easley, et al./9-3290-10-041*.

### Additional:

1. Causing extended delays, dismissing, or settling rather than investigating merit complaints which had reported substantial and specific dangers to the public health and safety. These action exempted OSHA from reporting the potential threats to the proper regulatory agencies. The complaints are reflected in my OSC disclosures and my complaint affidavit (Ex. B, C), and in statements by whistleblowers submitted to the OSC (Exs. B, I, J, K, L, M, N, O, P, T, U)

2. A substantial and specific danger to public health or safety were also reflected in several other complaints, which were either dismissed, settled, or otherwise not investigated and reported to the appropriate regulatory agency, which then resulted in no corrective action taken. These include: *Calpine Corporation/Bryan/9-3290-12-019*; *Copper Basin Railroad/Lawson/9-0370-10-030*; *Core-Mark International/McPherson/9-0370-12-005*; *Core-Mark International/Nelson/9-0370-11-014*; *FedEx Express/Rodriguez/9-3290-13-025*; *Hualapai Enterprises/Slominski/9-0370-10-003*; *Morango Casino Resort & Spa/Reyna/9-3290-12-088*; *PPG Aerospace/Makijew/9-3290-10-37*; *Sage Memorial Hospital/Rodella/Case No. 9-0370-10-027*; *Union Pacific/Peterson/9-3290-11-069*; *Veolia Transportation/Armstrong/9-0050-10-011*; and *Worldwide Energy & Manufacturing USA, Inc./Cheng/9-3290-10-042*.