No. 05-9739

In The
Supreme Court of the United States

DIANA R. WILLIAMS,

Petitioner,

v.

**UNITED STATES DEPARTMENT OF LABOR,
BALTIMORE CITY PUBLIC SCHOOLS SYSTEM,**

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE FOURTH CIRCUIT ERRED IN REQUIRING A WHISTLE-BLOWER'S CONCERNS TO BE DEMONSTRABLY TRUE BEFORE THEY MAY BE CONSIDERED SUFFICIENTLY REASONABLE TO BE PROTECTED

WHETHER A MIXED-MOTIVE ANALYSIS APPLIES IN WHISTLE BLOWER CASES WHERE THE EMPLOYEE HAS ESTABLISHED EVIDENCE OF THE EMPLOYER'S RELIANCE ON PROTECTED ACTIVITY IN TAKING ADVERSE EMPLOYMENT ACTION

PARTIES TO THE PROCEEDING

All of the parties to this matter are identified in the caption of the Petition.

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OPINIONS BELOW

The decision of the Department of Labor's Administrative Law Judge is unreported and is included in the Appendix to this Petition at pages 58-129. The decision of the Department of Labor's Administrative Review Board is unreported, and is included in the Appendix to this Petition at pages 53-57. The decision of the United States Court of Appeals for the Fourth Circuit is unreported, and is contained in the Appendix to this Petition at pages 22-52.

STATEMENT OF JURISDICTION

The opinion and judgment of the Fourth Circuit were entered on November 18, 2005. No petition for rehearing was filed. The present Petition was filed on February 16, 2006, within the ninety-day period provided for in Rule 13(1) of the Rules of the Supreme Court of the United States. Consequently, this Court has jurisdiction to review the decision of the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Facts. In the present case the Petitioner pursued claims that she had been dismissed from her employment with the Baltimore Maryland public schools in retaliation for having brought attention to lead contamination in drinking water in the schools.

In 1992 and 1993, all Baltimore City public schools were tested for potential lead hazards. (JA 67-68).[1] As part of this project, thirty-six schools, including Southeast Middle School, were identified as having dangerously high levels of lead in the water. (JA 67-68, 302). All of these schools would have to comply with Environmental Protection Agency ("EPA") requirements, either by flushing drinking fountains each morning to clear unacceptable levels of lead from the pipes or, if necessary, turning off fountains completely. (JA 67-68). For those schools that turned off fountains, the long-term temporary solution was to provide bottled water at accessible stations until renovation. (JA 69). An extended, phased-in, renovation project began the summer of 1996 at Fairmount-Harford, where Petitioner Diana Williams was then teaching. (JA 75-79, 116). The building, however, remained in use during the renovation. (JA 75-79, 116).

Ms. Williams began teaching mathematics at Fairmount-Harford in 1981, where, during the course of her career, she received consistently superior performance evaluations. (JA 183-236). In fall, 1996, however, her school had seemed to become a hazard area, one she believed to be detrimental to her and the students' health. (JA 75-76). Worried the renovations created a number of unsafe conditions, Williams and other teachers voiced their concerns to the administration. (JA 31, 75-76, 116). These teachers were reassured by the principal, Elaine White, and by Baltimore City Public Schools System's ("BCPSS") Building Safety and Education Officer, Jack Elam, that all was safe. (JA 31, 116). Fumes later emanating through hallways, signs indicating ongoing asbestos abatement, and Ms. Williams' visual

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[1]References are retained to the pages of the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit for ease of reference in the event that the Court obtains the record from the Fourth Circuit.

impressions, convinced her otherwise. (JA 75). She therefore contacted the Maryland Occupational Safety and Health Administration ("MOSH"), seeking independent verification that the renovations had created no current health hazards and, specifically, that students of the Head Start program housed in the building were not at risk. (JA 31). In response to Ms. Williams' contact, an Occupational Safety and Health Administration ("OSHA") inspector inspected Fairmount-Harford beginning on September 26, 1996 (JA 300). Though the inspector noted no violations pertaining to asbestos or lead hazards, he did confirm Ms. Williams' fears insomuch as he found the presence of potential hazards in lead-dense paint (JA 98-107). Importantly, MOSH's report of the investigation confirmed that, though no violations were found, some dust samples taken at the school did contain lead (JA 94, 112, 289). Ms. Williams' fears seemed justified; the results indicated to her that she indeed worked in an environment with potential lead hazards (JA 31).

In the months that followed, Ms. Williams took it upon herself to ensure that Fairmount-Harford was safe for her, her colleagues, and students, that the School administration took necessary precautions during the renovation, and that BCPSS remained forthright regarding the presence of any hazards. To accomplish this, she contacted media, school officials, and outside public authorities. (JA 169). Ms. Williams' principal motivation remained the safety of the schools. As Ms. Williams testified, her efforts to raise consciousness about potential hazards in the school took their emotional and physical toll, and responses from school administration already seemed, to her, disapproving or uncaring.

On April 17, 1997, Principal White advised Ms. Williams she would be transferred to a new school because of her health and safety concerns. (JA 172). In August, 1997, her transfer was confirmed and she was assigned to teach eighth grade mathematics at Southeast Middle School. Ms. Williams' objected to her transfer for numerous reasons, including that teaching at Southeast meant teaching in a large open-plan classroom with other ongoing classes. (JA 181).

These events were the prelude to and precipitant of Ms. Williams' state of mind and her belief that BCPSS administration would continue to be less than responsive to her environmental concerns. As a result, in August, 1997, before her transfer to Southeast, she obtained certification in lead-abatement and lead-paint inspection. (JA 278-88).

Three notable communications with the public followed. First, in September, 1997, Ms. Williams distributed a copy of a letter, voicing her concerns to Baltimore Mayor Kurt Schmoke, at both Fairmount-Harford and Southeast Middle schools and to media. (JA 174-76). On April 8, 1998, Ms. Williams distributed a handwritten flier identifying herself as a lead expert and asserting that several schools, James Mosher Elementary, Highlandtown Middle, and Fairmount-Harford High School, contained potentially hazardous environments. (JA 180; JA 62). Ms. Williams also voiced the same concerns contained in her flier to MOSH. In July, 1998, MOSH inspected James Mosher Elementary and found lead in the paint. (JA 72-73). (BCPSS also conducted an investigation at James Mosher and found levels of lead above HUD guidelines. (JA 71-74).) BCPSS recommended performing more extensive sampling to determine the extent of lead bearing dust; it also recommended abating both exterior and interior lead paint. (JA 73-74). MOSH also inspected Highlandtown and, though it issued no citations for violations, found severely damaged walls with peeling paint, confirming Ms. Williams' visual impressions. (JA 237).

Finally, on February 24, 1999, having obtained a list of addresses from a clerical staff person (JA 55-56), Ms. Williams mailed a letter to parents of Southeast schoolchildren publicizing what she believed to be the presence of lead-contaminated drinking water in Southeast Middle School. (JA 240). Her assertions were based upon visual inspections of her workplace and a sample of water from a school water fountain tested at her own cost the previous month (JA 45, 239, 269-70).

In January of 1999 the Petitioner had tests performed by an EPA-certified laboratory on water drawn from a drinking fountain outside of the principal's office. This drinking fountain was supposed to have been turned off years earlier because of high lead levels. The results of these tests, reported to the Petitioner on January 29, showed an unacceptable level of lead in the water.

The City Health Department inspected Southeast Middle School on February 11, 1999, in response to Ms. Williams' complaints. (JA 292-93). Drinking fountains at Southeast were to have been turned off, in response to lead problems detected in the 1992-93 school testings. (JA 303; JA 67). The Health Department nonetheless noted low water pressure in several fountains and found one fountain outside the school's main office (the one tested by Petitioner), designated to have been off because of lead problems, on. (JA 67). The record contains no evidence that Ms. Williams was ever informed of the results, such as they were, of the February 11 visit. In a later report the Health Department indicated that it did not take water samples until March 10, 1999 (JA 305).

On February 25, 1999, Southeast began to receive numerous calls from concerned parents in response to Ms. Williams' letter of the day earlier. (JA 264-65). On February 26, Principal Fields sent a letter to parents, denouncing Ms. Williams' assertions. (JA 241). On March 1, 1999, Robert Booker, Chief Executive Officer of BCPSS, approved recommendation for Ms. Williams' suspension, pending further disciplinary action. (JA 242). Asserting that Ms. Williams' actions unnecessarily caused concern among parents and disrupted BCPSS's functioning, CEO Booker subsequently recommended Ms. Williams' dismissal for "misconduct in office." (JA 245-46).

On August 26, 1999, a hearing was held before a hearing examiner for the Baltimore City Board of School Commissioners. The hearing examiner determined that the allegations in Ms. Williams' February 1999 letter had merit, that her use of addresses to mail the February 24 letter did not rise to the level of "misconduct in office," and that the CEO's recommendation for dismissal should be denied. The Board of School Commissioners, however, rejected the hearing officer's recommendation and approved the dismissal. On December 14, 1999, Ms. Williams filed a claim against BCPSS for unlawful discharge and discrimination with the United States Department of Labor. (JA 31-33). On June 9, 2000, an investigator for the Department of Labor Occupational Safety and Health Administration informed BCPSS that he had found Ms. Williams to be a protected employee engaging in statutorily protected activity, and recommended that Ms. Williams be restored to her position and that damages be assessed against BCPSS. (JA 34-37). The ALJ subsequently rejected this recommendation and found unlawful discrimination had not played part in Ms. Williams' dismissal. (JA 44).

Procedural history. On December 14, 1999, Ms. Williams filed what was treated as a complaint with the Department of Labor alleging that she had been terminated from her employment with BCPSS because of her complaints about lead in the school drinking water supply. On June 9, 2000, after investigation of Williams' allegations, the Department of Labor's Occupational Safety and Health Administration found that Williams was a protected employee and that prohibited discrimination was a factor in her termination.[2] BCPSS appealed this decision to the administrative agency on June 16, 2000.

A hearing was conducted before an administrative law judge on August 17, 18, and 23, 2000. Ms. Williams appeared pro se; BCPSS was represented by counsel. Following the hearing, the ALJ allowed the parties to submit post-hearing briefs. On November 30, 2000, the ALJ entered a Recommended Decision and Order disagreeing with the prior investigation and determining that Williams had not been discriminated against.

Williams filed a timely petition for review with the ARB. See 29 C.F.R. § 24.8(a) (requiring any party aggrieved by an ALJ's recommended disposition to file a petition for review with the ARB within ten business days of the ALJ's recommendation). Though the Department of Labor's regulations require the ARB to issue its final decision within ninety days of the filing of the petition for review, 29 C.F.R. § 24.8(c), the ARB did not issue a decision in Williams' case until May 30, 2003, some two and one-half years later. In this decision, the ARB acknowledged that the ALJ had employed improper analysis in the proceeding, imposing an initial burden on Williams to prove "a prima facie case by a preponderance of the evidence" even though a full hearing on the merits had taken place, but nonetheless affirmed and finalized the ALJ's decision. Williams thereafter filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit.

On appeal, the Fourth Circuit Court granted a petition for review and assigned counsel to represent the Petitioner.

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[2]In the later issued Recommended Decision and the ALJ described BCPSS's approach to these proceedings as "cavalier," noting that BCPSS did not participate in the Occupational Safety and Health Administration's investigation and had without explanation refused, prior to the formal hearing, to respond to Ms. Williams' timely served interrogatories.

After briefing and argument a divided panel of the Fourth Circuit affirmed the decision of the ARB, with one judge dissenting.

Basis of jurisdiction in the agency and the court of appeals. The Secretary of Labor had jurisdiction over the complaint filed by Petitioner pursuant to the employee protection provisions of various federal statutes, including the Clean Air Act ("CAA"), 42 U.S.C. § 7622(b)(1), and the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9(i)(2). The Petitioner timely appealed the decision of the ALJ to the ARB.

The final order of the ARB was entered on May 30, 2003. Petitioner filed her petition for review with the Fourth Circuit on June 10, 2003. Because this petition was filed within sixty days of the ARB's final decision, it was timely. 42 U.S.C. § 300j-9-(c)(1) (fixing 60-day period for appealing decisions of ARB); see Fed. R. App. P. 15(a)(1) ("review of an agency order is commenced by filing, within the time prescribed by law, a petition for review . . ."). The Court of Appeals had jurisdiction to review the final order of the ARB pursuant to, among other statutes, 42 U.S.C. § 7622(c)(1) and 42 U.S.C. § 300j-9-(c)(1).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IN THIS CASE SETS A STANDARD OF "REASONABLENESS" SO HIGH THAT IT WILL CHILL LEGITIMATE WHISTLE-BLOWING ACTIVITY WHICH CONGRESS SOUGHT TO PROTECT

Lead contaminated drinking water remains a public health crisis in the United States. Research suggests no "safe" level of exposure to lead. Studies have found that lead levels of 5 micrograms in a tenth of a liter of blood can cause cognitive problems. Yet the Centers for Disease Control and Prevention draws the line for "acceptable" lead levels at twice that amount. Further, in 2003 the New England Journal of Medicine reported on a study that found that lead appears to deliver its biggest blow to a child's brain upon first exposure, maybe even before the lead reaches the "acceptable" level of contamination. Benjamin Gitterman and Muriel Wolf, Editorial, *Getting the Lead Out; no "safe" level of exposure*, Washington Post, April 14, 2004.[3] Reasonableness is an inherently flexible standard, and when the risk of harm is substantial a far greater level of caution or concern is warranted then when adverse consequences are unlikely. Given the long-recognized, well-documented, damaging effects of lead on young children's cognitive functions and, consequently, their ability to lead happy, productive lives, it is hard to imagine a situation in which more caution would be warranted. In the present case, however, the ARB and the Court of Appeals concluded that a dedicated public school teacher was

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[3]Mister Gitterman and Ms. Wolf are associate professors of pediatrics at the Children's National Medical Center at George Washington University.

unreasonable in her concerns about lead in school drinking water. These decisions, if permitted to stand, will result in a substantial restriction of the rights of whistle blowers in an arena where such attention drawing is desperately needed and for this reason the Court should grant the Petition and reverse the decision below.

A reviewing court shall hold unlawful and set aside agency decisions where they are "unsupported by substantial evidence" or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(E) and 5 U.S.C. § 706(2)(A). Ms. Williams must prevail if she shows "such relevant evidence as a reasonable mind might accept as adequate to support [her] conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). In conducting this review, a court considers the entire record before it, including any evidence contrary to the Secretary of Labor's decision. "The Secretary's decision should be set aside when a fair estimate of the witnesses' testimony does not justify the decision." *Universal Camera v. N.L.R.B.*, 340 U.S. 474, 490 (1951); *see King v. Califano*, 615 F.2d 1018, 1019-20 (4th Cir. 1980) (applying substantial evidence standard and setting aside decision "because the Secretary failed to give proper consideration to certain evidence . . . . The Secretary must consider all the evidence and explain . . . the reason for rejecting relevant evidence in support of the claim"). It is not enough that evidence can be found in the record which, when viewed in isolation, substantiates the Secretary's decision, but rather "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera*, 340 U.S. at 487-88.

A. The standard adopted by the Fourth Circuit to determine the reasonableness of an employee's concerns requires that an employee's concerns be ultimately borne out by undisputed evidence; a standard which is high than that adopted by other

courts and which conflicts with the intent of Congress.

The present action is brought under the "whistle blower protection" provisions of the Clean Air Act ("CAA"), the Safe Drinking Water Act ("SDWA"), the Solid Waste Disposal Act ("SWDA") and the Toxic Substances Control Act ("TSCA").[4] The relevant provisions of the CAA, SDWA, and TSCA are materially identical and provide that:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act . . . ;
> (2) testified or is about to testify in any such proceeding; or
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C. § 7622(a); 15 U.S.C. § 2622(a); 42 U.S.C. § 300j-9(i)(1).

Federal whistle blower provisions are "intended to promote a working environment in which employees are

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[4]As the ARB noted, there has been some confusion throughout the history of this case as to which statutes Ms. Williams' complaint falls under. (JA 164). For simplicity and because it does not affect Ms. Williams' available remedies, this Brief adopts the identification of applicable statutes suggested by the ARB in its Final Decision and Order. (JA 164).

relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment . . . ." *Passaic Valley Sewerage Commissioners v. United States Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993). Federal safety legislation, including whistle blower statutes, should be "broadly construed" to effectuate their congressional purpose. *Rayner v. Smirl*, 873 F.2d 60, 63 (4th Cir. 1989) (interpreting Federal Railroad Safety Authorization Act to protect whistle blowers in making intra-corporate complaints even though the act itself did not explicitly provide such protection).

An employee's actions can be based only upon a reasonable belief—not certainty, and still qualify as protected activities under whistle blower protection statutes. "[E]mployees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute." *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478. A wide variety of actions are to be considered such "good faith assertions" and, thus, within the broad definition of whistle blower statutes. *Id.*; *see Consolidated Edison Co. v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984).

The ultimate merit of a reasonable concern is irrelevant to whether the expression of that concern is protected or not. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (holding that "protection [under § 405(a)] is not dependent upon whether [the complainant] was *actually* successful in proving a violation of a federal safety provision") (emphasis in original). If it were otherwise, and the law only protected the reporting of complaints that were later proven to be well-founded, there would be a substantial chilling effect on employee whistle blowing because the employee could never be sure, when reporting a concern, that the concern would later withstand intense scrutiny. "An employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of in-house or external review in order to merit protection under [the CWA] for the obvious reason that such a standard would chill employee initiatives in bringing to light perceived discrepancies in the workings of their agency." *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 479; *see Munsey v. Fed. Mine Safety & Health Review Comm'n*, 595 F.2d 735, 742 (D.C. Cir. 1978) (declaring that "Congress would not want to place additional procedural and substantive burdens on miners who seek the protection of [the statute] by requiring that the miners demonstrate their state of mind and the merit of their complaints"); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (ruling that opposition activity is protected even when it is "based on a mistaken good faith belief that Title VII has been violated," citing cases from the First, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits); *Johnson v. Old Dominion Sec.*, 86-CAA-3, slip op. at *6 (Sec'y of Labor May 29, 1991) (holding that activity is protected as long as it is "grounded in conditions constituting reasonably perceived violations of the TSCA and its regulations").

The Court of Appeals and the Agency in the instant case based their decisions upon a finding that, after a certain point, the Petitioner's concerns were unreasonable because they were no longer supported in fact, and therefore her actions were not protected. These decisions are wrong as a matter of fact–there was substantial evidence in the record supporting the Petitioner's concerns at the relevant time and contrary evidence had not been made available to her–and wrong as a matter of law because they tip the balance of reasonableness away from the goal Congress had in adopting the whistle blower protection provisions.

The Petitioner was suspended on March 1, 1999, for a letter that she wrote on February 24, 1999. The Agency and the Fourth Circuit concluded that the concerns Ms. Williams expressed in the February 24 letter were no longer reasonable because the Health Department had inspected and tested the drinking fountains on February 11, 1999, and determined that there were no unacceptable amounts of lead in the water and, moreover, that water from the fountain was no longer available when she wrote the letter because it had been turned off. These conclusions are incorrect as a matter of fact as demonstrated by the record.

In January of 1999 the Petitioner had tests performed by an EPA-certified laboratory on water drawn from a drinking fountain outside of the principal's office.[5] The results of these tests, reported to the Petitioner on January 29, showed an unacceptable level of lead in the water. The Health Department visited the school on February 11, 1999, but did not conduct any water quality tests and specifically indicated that it would return two weeks later to conduct the testing. (JA 137, 291-93, 305). The record contains no evidence that Ms. Williams was ever informed of the results, such as they were, of the February 11 visit. In a later report the Health Department indicated that it had taken water samples from the fountain on March 10, 1999 (JA 305) at which point Ms. Williams had already been suspended. These tests confirmed dangerously high levels of lead in the water. Thus, at the time Ms. Williams circulated her February 24 letter, she had no reason to question the results of the January laboratory report and thus had a good faith basis for believing her concerns were reasonable, and her concerns were subsequently vindicated.

The ALJ also found that the Petitioner's concerns were unreasonable because the drinking fountain had been turned off before the February 24 letter was written. Though the drinking fountain had been turned off before the Petitioner circulated the February 24 letter, it was also supposed to have been turned off in January when she was able to obtain water from it, so it could not be said as a matter of law that her concerns were

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[5]The fountain was supposed to have been turned off but was inexplicably still operating.

unreasonable. Moreover, as Judge Gregory pointed out in his dissenting opinion. Because the effects of lead are long-term and cumulative, the Petitioner's concerns would remain reasonable even if no access to contaminated water remained because the effects of prior lead exposure were equally dangerous.

While this Court does not traditionally grant certiorari review simply to correct errors of fact in an individual case, the errors in the present case contribute to a legal error of greater national importance, namely the level of evidentiary support which a plaintiff must show in a retaliation case in order to establish the reasonableness of her concerns. This is an issue which this Court should address.

It would seem to be clearly established law that an employee's concerns do not have to be true as a matter of fact in order to be reasonable as a matter of law. Were this not so, little would remain of Congress's intent to bring sunshine to the workplace as employee's would have to engage in full-scale scientific or technical investigation before voicing concerns or else voice the concerns at the peril of their jobs. As the dissenting judge stated, the decision in this case "discourages employees from disclosing information reasonably intended to protect the vulnerable when their employers are unwilling to do so." That the Petitioner's concerns were indeed reasonable would seem to be indisputably established by the fact that a hearing officer for the Baltimore City Schools, an investigator for the United States Occupational Safety and Health Administration and the dissenting judge below have all found the Petitioner's concerns to be reasonable and her activities protected; this is not a case where the Petitioner finds herself alone in the dark, with all of the facts and the opinions of reasonable people aligned against her. This is, instead, precisely the type of reasonable disagreement where Congress intended employee whistle blowing to be protected.

Whistle blower statutes are designed precisely to encourage employees to come forward with concerns that their employers would rather be kept under wraps. By setting the standard of reasonableness so high–in essence requiring the employee to prove that his claims are in fact borne out by scientific evidence, rather than simply being reasonable based upon the information known or knowable by the employee at the time–the Fourth Circuit's decision conflicts with the decisions of other courts of appeals and inhibits Congressional intent.

THE MIXED-MOTIVE ANALYSIS SHOULD APPLY IN WHISTLE BLOWER CASES AND THE FAILURE OF THE FOURTH CIRCUIT TO APPLY SUCH ANALYSIS IN THIS CASE WAS ERROR

The court below as well as the ARB concluded that even if the Petitioner had engaged in protected activity, BCPSS had legitimate non-prohibited reasons for dismissing her. The Fourth Circuit and the ARB erred, however, in failing to apply the mixed-motive analysis set forth by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). This analysis has been adopted by the NLRB and applied to whistle blower protection cases under the National Labor Relations Act. *In re Wright Line*, 251 N.L.R.B. 1083 (1980). The reach of the analysis has been further extended to cases arising under the Energy Reorganization Act ("ERA") and "analogous situations." *Donovan*, 673 F.2d at 62.

The mixed-motive proof scheme is triggered when the employee has presented "direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion." *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)); *see also Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 (4th Cir. 1999). Whether such analysis applies in whistle blower cases does not appear to have been clearly resolved and the instant case presents an opportunity to clarify this issue.

Under this analysis, once the employee has made a prima facie showing that protected conduct was a "motivating factor" in the employer's decision, the burden shifts to the employer to show by a preponderance of the evidence that it would have taken the same action "even in the absence of the protected conduct." *Doyle*, 429 U.S. at 274. Ms. Williams' testimony and the record offer direct evidence that BCPSS relied on Ms. Williams' activities publicizing her reasonable belief a lead hazard existed at Southeast; the memoranda issued by school officials in response to Ms. Williams' letter, and the official dismissal letter to Ms. Williams, unavoidably lead to this conclusion. *See Fuller*, 67 F.3d at 1142 ("[w]hat is required . . . is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision"). The ALJ thus erred as a matter of law by failing to consider mixed-motive analysis in her opinion, particularly in the light of BCPSS's official letter of suspension, which was based solely upon the content of Ms. Williams' February 1999 letter. (JA 43, 242).

"It is not for [Ms. Williams] to prove anew the presence of retaliatory motive in a dual motive analysis, but for [BCPSS] to separate the influence of both motives and to show that Complainant would have been discharged even if protected activity had not occurred." *Guttman v. Passaic Valley Sewerage Comm'rs*, 85-WPC-2 slip op. at *8 (Sec'y March 13, 1992), *aff'd sub nom. Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474 (3rd Cir. 1993). The Third Circuit applied this logic with express approval, stating that "the [defendant's] evidence fails to separate its legitimate rationale from its prohibited rationale in its termination of [complainant], and thus does not prove its decision would have been the same absent [complainant's] history of complaints."*Passaic Valley Sewerage Comm'rs*992 F.2d at 482. The shift in burdens was justified by the Supreme Court, which explained that "[t]he employer is a wrongdoer: he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity, but by his own wrongdoing." *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983).

BCPSS suspended Ms. Williams without pay for her protected activities. (JA 242). This direct negative reliance upon an illegitimate criterion, while proffering other purported, legitimate reasons for the adverse action, triggers the mixed-motive analysis. Later justifications notwithstanding, BCPSS's official letter calling for Ms. Williams' termination and its subsequent action reflected a "retaliatory attitude" towards Ms. Williams' actions; this likely reliance upon an illegitimate criterion "bears directly" on BCPSS's decision to terminate her and calls for mixed-motive analysis. *See Kubicko*, 181 F.3d at 553.

The Fourth Circuit's decision is silent on this issue, nowhere mentioning the applicability of the doctrine. Clear statements in the record by BCPSS officials demonstrate that had if they felt that the Petitioner's position was supported the by the facts, the discipline imposed on her could have been different.[6] Because this testimony demonstrated that protected

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[6]The Petitioner's immediate supervisor stated that "if she had determined that there was some validity to the Respondent's allegations, she may have recommended a different disciplinary action. Similarly, the Assistant Superintended for the Petitioner's region stated that "if there were merit to [Williams's] claims, she still would have recommended some form

conduct did, in fact, play a role in the discipline that the Petitioner received, this was a case where application of the mixed-motive analysis was required.

The failure of the Fourth Circuit to apply mixed-motive analysis in this case conflicts with the decisions of other circuits which have applied such analysis, and the applicability of this doctrine in whistle blower cases is a question which would benefit from guidance from this Court.

CONCLUSION

A flexible standard of reasonableness, taking into consideration the risks at issue, as well as a standard which does not require an employee to establish truth in fact, but simply reasonableness, are essential to the proper functioning of the various federal whistle blower statutes. The decision in this case, by setting the standard so high that an employee risks dismissal unless her concerns turn out to be supported by scientific analysis, undercuts Congressional intent and significantly reduces the effectiveness of the whistle blower statutes. Review should be granted to address the important question of the nature of the reasonableness inquiry in this category of cases.

In addition, review should be granted to determine the applicability of the mixed-motive analysis in whistle blower cases and to correct the error of the court of appeals in failing to apply the doctrine in this case.

Respectfully submitted,

DIANA R. WILLIAMS,

by counsel.

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of discipline, although the form of discipline may have been different."

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