



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

JOON, LLC, d/b/a AJIN USA,

Respondent.

OSHRC Docket No. 17-0053

BRIEFING NOTICE

Briefs are requested on the following issues. The parties are directed to brief only these specific issues.

- (1) Did the judge err in characterizing Citation 2, Items 5-7 and 10-14, as willful? In addressing this issue, the parties should discuss whether the judge erred in admitting into evidence over Respondent's objection a criminal plea agreement between Respondent and the United States Department of Justice, and relying on that agreement as support for the willful characterization of these violations.
- (2) Did the judge err in recharacterizing Citation 2, Items 16-20, from willful to serious?
- (3) Did the judge err in analyzing Respondent's claim that "OSHA is biased against Korean employers and impermissibly targeted [the company]" pursuant to caselaw addressing vindictive prosecution rather than selective prosecution? *Compare Nat'l Eng'g & Contracting Co.*, 18 BNA OSHC 1075, 1077 (No. 94-2787, 1997) ("Vindictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right."), *aff'd*, 181 F.3d 715 (6th Cir. 1999), *with Altor, Inc.*, 23 BNA OSHC 1458, 1460 n.2 (No. 99-0958, 2011) ("[S]elective enforcement is judged 'by ordinary equal protection standards, under which it must be shown that the alleged selective enforcement had a discriminatory effect and was motivated by a discriminatory purpose.' ") (quoting *DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153 (No. 83-0299, 1987)).
 - a. If not, did the judge properly reject Respondent's claim?
 - b. If so, did Respondent establish a selective prosecution defense? *See Owen v. Wainwright*, 806 F.2d 1519, 1523 (11th Cir. 1986) ("[T]o prevail in a defense of selective prosecution, a defendant must . . . [show] that he has been singled out for prosecution although others similarly situated . . . have not been prosecuted

[and that the] . . . prosecution [has] constitutionally impermissible motives such as racial or religious discrimination.”).

The parties are advised that when a case is directed for review to consider either the merits or characterization of an item, the appropriateness of the penalty is also subject to review. Accordingly, the parties may address the amount of the penalty if they so choose.

All briefs are to be filed in accordance with Commission Rule 93.¹ The first brief is to be filed within 40 days of this notice. A party not intending to file a brief shall notify the Commission in accordance with Commission Rule 93. The time for filing any responsive briefs (or letters filed in lieu of briefs) shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Dated: March 29, 2023

/s/

John X. Cervený
Executive Secretary

¹ The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority, other than statutes, regulations, case law, law journal articles, and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.