

Congress Strengthens Whistleblower Protections for Federal Employees

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On November 27, 2012, President Obama signed into law the Whistleblower Protection Enhancement Act of 2012 (WPEA),¹ which will substantially strengthen whistleblower protections for federal whistleblowers. The legislation recognizes that whistleblowers are crucial in helping to expose waste, fraud, abuse, mismanagement and threats to public health and safety across the Federal government. Their disclosures save billions of dollars and even human lives. A recent study published by the Merit Systems Protection Board (MSPB) titled, "Blowing the Whistle: Barriers to Federal Employees Making Disclosures," found that, in 2010, approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing perceived either threats or acts of reprisal, or both.² To ensure that federal employees will come forward with vital disclosures that make the government more efficient, transparent and accountable, the WPEA removes judicially-created loopholes that significantly narrowed the scope of protected whistleblowing under the Whistleblower Protection Act;³ enhances the remedies available to government whistleblowers who have suffered retaliation; strengthens the ability of the U.S. Office of Special Counsel (OSC)⁴ to hold managers accountable for retaliating against whistleblowers; affords whistleblower protections to all Transportation Security Administration (TSA) employees; and mandates broader outreach to inform federal employees of their whistleblower rights.⁵

Clarifying the Scope of Protected Disclosures

When Congress enacted the Whistleblower Protection Act of 1989, it specifically protected "any disclosure" of covered forms of wrongdoing, i.e., any information that an individual reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302(b)(8). But several Federal Circuit decisions substantially narrowed the scope of protected conduct by creating loopholes that were contrary to Congressional intent. Those decisions include: (1) *Horton v. Dep't of the Navy*,⁶ holding that disclosures to the alleged wrongdoer are not protected; (2) *Willis v. Dep't of Agriculture*, excluding from WPA protection a disclosure made as part of an employee's normal job duties;⁷ and (3) *Meuwissen v. Dep't of Interior*, holding that disclosures of information already known are not protected.⁸ As pointed out in a Senate report on the WPEA, these decisions were contrary to the plain meaning of the WPA and diverted attention from the real issue in WPA cases--whether the personnel action at issue in the case occurred because of the protected disclosure.

Sections 101 and 102 of the WPEA restore the original intent of the WPA to adequately protect whistleblowers by clarifying that a disclosure does not lose protection because: (1) the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed; (2) the disclosure revealed information that had previously been disclosed; (3) of the employee or applicant's motive for making the disclosure; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time which has passed since the occurrence of the events described in the disclosure. Section 101(b)(2) also clarifies that a disclosure is not excluded from protection because it was made during the employee's normal course of duties, providing the employee is able to show that the personnel action was taken in reprisal for the disclosure.

Protecting Disclosures About Scientific Integrity

Section 110 extends whistleblower protections to government scientists who challenge censorship or make disclosures related to the integrity of the scientific process. In particular, it protects disclosures of information that an employee reasonably believes are evidence of censorship related to research,

analysis, or technical information that cause, or will cause, gross government waste or mismanagement, an abuse of authority, a substantial and specific danger to public health or safety, or any violation of law. "Censorship" is broadly defined to include "any effort to distort, misrepresent, or suppress research, analysis, or technical information." This expansion of WPA protected conduct is consistent with efforts by this Administration to promote scientific integrity, including the March 9, 2009 Presidential memorandum on Scientific Integrity, which requires agencies to adopt policies ensuring scientific integrity.

Enhanced Remedies

Section 107(b) of the WPEA authorizes the MSPB⁹ to award compensatory damages in prohibited personnel practice cases. Until the WPEA, whistleblowers were generally limited to economic damages, out-of-pocket medical costs, attorney fees and equitable relief (e.g., reinstatement, rescinding a suspension, modifying a performance evaluation, etc.). In addition, Section 104(c) adds a remedy for whistleblowers subjected to retaliatory investigations by clarifying that corrective action can include "fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for" protected whistleblowing. The WPEA does not define what constitutes a retaliatory investigation, leaving in place the MSPB's decision in *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323-25 (1997), holding that "[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing." 76 M.S.P.R. at 324. Retaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or extraordinary reviews of time and attendance records.

New Personnel Action Prohibiting Enforcement of Gag Clauses

The WPA prohibits the taking of a broad range of personnel actions in retaliation for whistleblowing, including removals, demotions, reassignments, pay decisions, as well as significant changes in duties, responsibilities, or working conditions. See 5 U.S.C. § 2302(a)(2)(A). Section 104(b) of the WPEA makes it a prohibited personnel practice for an agency to implement or enforce any nondisclosure policy, form, or agreement that fails to notify an employee that the agreement does not supersede, conflict with, or otherwise alter whistleblower rights and protections. In addition, Section 115 imposes a separate government-wide prohibition on the use of non-disclosure agreements that do not contain the required notifications.

Enhancing OSC's Ability to Deter Retaliation Through Disciplinary Action

The OSC can seek corrective action to remedy whistleblower retaliation, and may also petition the MSPB to discipline an employee for retaliating against a whistleblower. See 5 U.S.C. §§ 1214(b)(2)(B), (C), (b)(4)(A). OSC has been hampered in its ability to pursue disciplinary actions because of the Federal Circuit's *Santella*¹⁰ decision requiring OSC to meet an onerous "but for" causation standard in disciplinary action cases. *Santella* further dissuaded OSC from bringing disciplinary action cases at the MSPB by requiring OSC to pay the attorney fees of a manager in a disciplinary action case in which OSC does not prevail.¹¹ Section 106 of the WPEA overturns *Santella* by clarifying that OSC can prevail in disciplinary action case by demonstrating to the MSPB that the whistleblower's protected disclosure was a "significant motivating factor" in an agency's decision to take the adverse action, even if other factors also motivated the decision. Section 107(a) also provides that the employing agency, not OSC, will be liable for attorney's fees in disciplinary action cases.

Procedural Enhancements

The WPEA includes three significant procedural enhancements:

- *Expansion of Individual Right of Action Appeal.* In 1989, Congress gave whistleblowers the option to pursue an individual right of action (IRA) appeal, *i.e.*, an independent right to seek review of a Section 2302(b)(8) whistleblower retaliation claim at the MSPB, after exhausting administrative remedies at OSC. The IRA appeal option is available after 120 days have passed since the whistleblower filed a complaint with OSC, and an IRA appeal must be filed within 65 days of receiving an IRA rights letter from OSC (similar to an EEOC right-to-sue letter). Section 101(b) of the WPEA expands the IRA right to include most 2302(b)(9) reprisal claims, including:
 - A. retaliation for filing a whistleblower appeal;¹²
 - B. retaliation for assisting an individual in the exercise of an appeal, complaint or grievance right;
 - C. retaliation for cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel; or
 - D. retaliation for refusing to obey an order that would require the individual to violate a law.
- *Authorizing All-Circuit Review of MSPB Decisions in Whistleblower Appeals.* Section 108(a) of the WPEA suspends the Federal Circuit's exclusive jurisdiction over whistleblower appeals from the MSPB for a period of two years, allowing petitions for review to be filed either in the Federal Circuit or in a regional federal circuit court of appeals.
- *Ensuring Due Process Rights at MSPB Hearings.* Section 114 of the WPEA clarifies that in whistleblower appeals at the MSPB, an agency should not be permitted to present its affirmative defense (*i.e.*, the agency would have taken the same personnel action for lawful reasons, independent of any retaliation against the employee for protected whistleblowing), until the whistleblower has had an opportunity to show that a protected disclosure was a contributing factor in the personnel action. This codifies recent precedent requiring a full and fair hearing in whistleblower retaliation cases and that an initial decision examine all the pertinent record evidence, rather than focusing on only the evidence supporting the ultimate conclusion reached. See *Whitmore v. Dep't of Labor*, 680 F.3d 1353 (Fed. Cir. 2012).

Additional Enhancements

- *Extending whistleblower protections to all TSA employees.* Section 109 of the WPEA affords the 50,000+ passenger and baggage screeners working for the TSA full WPA rights as well as protections against certain other prohibited personnel practices, including discrimination under the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.
- *OSC Amicus Authority.* Section 113 of the WPEA strengthens OSC's ability to protect whistleblowers by authorizing OSC to appear as *amicus curiae* in any WPA action brought in any federal court. Prior to this amendment, OSC was unable to participate as an *amicus curiae* in significant, precedent-setting cases at the Federal Circuit.

Educating Employees About Their Rights

In addition to strengthening the rights of whistleblowers in the federal sector, the WPEA requires a broad outreach effort to educate employees about these rights. Under the amended 5 U.S.C. § 2302(c), agency heads must continue to ensure that agency employees are informed of their whistleblower rights and about other prohibited personnel practices, and now must also inform employees how to lawfully make a protected disclosure of classified information to the Special Counsel, an Inspector General, Congress, or any other designated agency official authorized to receive classified information.

In addition, Section 117 requires each agency to designate a Whistleblower Protection Ombudsman to educate agency employees about prohibitions on retaliation, and rights and remedies against retaliation, for protected disclosures. The Ombudsman, however, would not act as a legal representative, agent, or advocate of the whistleblower.

Conclusion

Collectively, these important reforms will make the WPA stronger than at any point in its history and go a long way in promoting government accountability.

¹Pub. L. No. 112-199.

²Blowing the Whistle: Barriers to Federal Employees Making Disclosures is a publication of the Office of Policy and Evaluation, U.S. Merit Systems Protection Board. MSPB studies are available online at www.mspb.gov/studies.

³Pub. L. No. 101-12.

⁴OSC is an independent federal agency that plays an important role in helping whistleblowers. Its role is to protect federal employees from "prohibited personnel practices," including whistleblower retaliation and unlawful hiring practices, such as nepotism. OSC also provides an independent, secure channel for disclosing and resolving wrongdoing.

⁵The final version of the WPEA does not include provisions that would have provided whistleblower protections to intelligence and national security employees. On October 10, 2012, President Obama issued a Presidential Policy Directive (PPD) that prohibits retaliation against whistleblowers in the intelligence community (IC) and requires intelligence agencies to establish a review process for claims of retaliation consistent with the procedures in the WPA. See PPD-19 (Oct. 10, 2012). The review procedures must be adopted within 270 days of issuance of the PPD.

⁶66 F.3d 279, 282 (Fed. Cir. 1995).

⁷141 F.3d 1139, 1144 (Fed. Cir. 1998).

⁸234 F.3d 9, 12–13 (Fed. Cir. 2000).

⁹The MSPB is an independent, quasi-judicial agency in the Executive Branch tasked with protecting the Federal merit system.

¹⁰*Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994).

¹¹*Santella v. Special Counsel*, 86 M.S.P.R. 48, ¶ 10 (2000), *aff'd on recons.*, 90 M.S.P.R. 172 (2001), *aff'd*, 328 F.3d 1374 (Fed. Cir. 2003).

¹²The IRA right is not afforded to individuals who suffer retaliation for exercising an appeal, complaint or grievance right, other than the exercise of such right in connection with an alleged violation of 2302(b)(8).