Chapter 11.

The United States of America: Federal Whistleblower Protection

by

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There is a growing body of statutory laws in the United States that provide protection to whistleblowers. This chapter will focus on the development of the modern federal whistleblower protection statutes, their origin in good government initiatives, the elements needed to prove whistleblower retaliation under the law, and the role of the US Office of Special Counsel.

Government employees are critical in uncovering corruption, the waste of public funds, dangers to health and safety, and abuse. They are on the inside and so are well positioned to learn of wrongdoing. Understandably, however, few insiders will come forward unless they are protected against reprisal when disclosing information about wrongdoing (MSPB, 2013).

In the United States, the First Amendment to the Constitution provides that Congress may not abridge freedom of speech. However, government employees do not enjoy full free speech rights; the Supreme Court has ruled that the First Amendment only protects an employee when commenting on matters of public concern.[1] A government employee's speech rights must be balanced against their agency's interest in promoting the efficiency of government operations.[2] This balance is often struck against employee rights. For example, the Supreme Court ruled the First Amendment did not protect a prosecutor who reported police misconduct.[3]

There is, however, a growing body of statutory laws in the United States that provide additional protection to whistleblowers, that is, employees who speak out about wrongdoing in the workplace. This case study will focus on the development of the modern federal whistleblower protection statutes,[4] their origin in good government initiatives, the elements needed to prove whistleblower retaliation under the law, and the role of the US Office of Special Counsel (OSC).[5]

Modern history of federal whistleblower protection law

In 1880, James A. Garfield was elected President of the United States. Charles Guiteau believed a pamphlet he wrote resulted in Garfield's victory. Guiteau was incensed that Garfield did not appoint him to an ambassadorship, and he assassinated the President in 1881. Largely in response to President Garfield's assassination, the United States Congress passed the Civil Service Act of 1883, commonly known as the "Pendleton Act", aimed at moving the federal government from a "spoils system" - wherein elected politicians placed their cronies in government jobs - to a professional civil service. The law required that applicants for federal employment be chosen on their own merit, determined by a competitive civil service examination, rather than on the basis of political affiliation or personal connections. The Pendleton Act also made it illegal to solicit co-workers and subordinates for campaign contributions or to fire them for political reasons.

In the 1970s, the US government again faced significant credibility, transparency, and accountability challenges. The Watergate scandal and high profile instances of whistleblower reprisal were on the minds of Congress as it moved to modernise the civil service system. A US senator's investigation found that "[a]lthough statutes do exist which might be interpreted as applicable to whistleblower cases," the "Courts have been reluctant to play an active role in the whistleblower problem" (Leahy, 1978). Congress concluded that protecting whistleblowers would help detect wrongdoing in government, and ultimately prevent it from occurring in the first place. The Senate wrote in its report:

> *In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of*

dollars in cost overruns, the [General Services Administration] employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation (S. Rep. No. 95-969, at 8 [1978]).

In 1978, Congress passed the Civil Service Reform Act (CSRA) in order to make sure that "[e]mployees are…protected against arbitrary action, personal favouritism, and from partisan political coercion" (*id* at 19; 1978 U.S.C.C.A.N. 2723, 2741). The CSRA enumerated merit system principles[6] and prohibited personnel practices, including retaliation for whistleblowing, to protect applicants for employment with the federal government and current civil servants. The new law disbanded the Civil Service Commission, the agency that had been charged with ensuring federal employees were chosen based on merit, due to "a built-in conflict of interest in the agency because of its dual role as personnel manager and protector of employee rights" (Tolchin, 1978). In its place, Congress created the Office of Personnel Management (OPM), which provides guidance and regulations on human resources; and the Merit Systems Protection Board (MSPB or Board), a quasi-judicial body that hears appeals from federal employees who have suffered adverse personnel actions, such as suspension or termination. Initially, the Office of Special Counsel was created as the prosecutorial arm of the MSPB.

In 1989, Congress revisited the CSRA and added the Whistleblower Protection Act (WPA) to:

strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by: 1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and 2) establishing…that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration. (5 U.S.C. § 1201 nt.)

The WPA "provides protections for many federal employees who make disclosures evidencing illegal or improper government activities" (Shimabukuro et al., 2013; 53). The WPA also made the Office of Special Counsel an independent law enforcement agency with broad jurisdiction over the federal government.[7] OSC protects federal government employees, former employees, and applicants for employment (hereafter referred to as "federal employees" or "employees") from prohibited personnel practices, including reprisal for whistleblowing. It also provides a safe channel for government employees to disclose wrongdoing.[8] OSC accomplishes its mission through investigating and prosecuting allegations of prohibited personnel practices, obtaining corrective actions for employees subjected to prohibited personnel practices, and initiating disciplinary actions against government officials who commit prohibited personnel practices. If a personnel action is serious (e.g. removal and long-term suspension), an employee may either appeal the action directly to the Board or seek OSC's assistance. If the personnel action is not otherwise appealable directly by an individual employee, they may still ask OSC to bring the matter before the Board. If OSC declines to do so or does not act on the complaint within 120 days, under the WPA, the employee may then file a retaliation claim to the Board, known as an "individual right of action" (IRA).

In 1994, Congress again reinforced federal whistleblower protections with the Office of Special Counsel Reauthorization Act of 1994. More recently, Congress further

strengthened the law with the Whistleblower Protection Enhancement Act of 2012 (WPEA).[9]

The whistleblower protection enhancement act of 2012

The US Court of Appeals for the Federal Circuit was the sole federal appeals court with jurisdiction to hear appeals arising under the Whistleblower Protection Act. Generally speaking, the Federal Circuit took a narrow view of whistleblower protections. For example, it held that a disclosure of wrongdoing to a co-worker or supervisor may not be protected if made as part of an employee's normal job duties. (For example, an auditor who reported unlawful financial practices was not protected because it was their professional duty to report such illegalities.) These restrictive decisions spurred Congress, with OSC's support, to pass the WPEA, which President Barack Obama signed into law on 27 November 2012.[10] As a pilot project for two years (since renewed for another five years), the WPEA enables appeals to the other eleven courts of appeals that are not bound by Federal Circuit precedent.

The WPEA reversed the effects of restrictive, precedential Federal Circuit court decisions. Sections 101 and 102 of the WPEA restore the original intent of the WPA by clarifying that a disclosure does not lose protection because it: 1) was made to a person, including a supervisor, who had participated in the wrongdoing disclosed; 2) revealed information that previously had been disclosed; or 3) was made while the employee was off duty. In addition, the WPEA makes it clear that an employee or applicant's motive for making the disclosure is irrelevant to its validity, as is the amount of time that has passed since the occurrence 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, provided the employee is able to show that the personnel action was taken in reprisal for making the disclosure.

Section 102 of the WPEA defines protected disclosure of wrongdoing as above "a formal or informal communication" that a whistleblower "reasonably believes" evidences "*any* violation of law, rule, or regulation; or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety" (Library of Congress, 2012). This was intended to clarify that an employee's disclosure is protected if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger." (WPEA, 2012)

The WPEA also adds a thirteenth prohibited personnel practice requiring that a nondisclosure agreement specifically states that its "provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or executive order" concerning classified information, communications to Congress, disclosures to an Inspector General, or any other whistleblower protection (Library of Congress, 2012).

The WPEA extends whistleblower protection to employees and applicants for employment of the Transportation Security Administration of the Department of Homeland Security, who had previously been excluded from statutory protections. It also "requires agency heads to advise their employees on how to make a lawful disclosure of information that is required to be kept classified in the interest of national defence or the conduct of foreign affairs." (Library of Congress, 2012)[11]

In addition, section 113 authorises the Special Counsel to file, as a non-party, *amicus curiae* briefs in whistleblower cases before federal courts to help clarify the broader implications of a specific legal dispute. OSC first used this authority before the Federal Circuit in 2013 in Berry v. Conyers & Northover[12] and before the United States Supreme Court in Department of Homeland Security v. MacLean,[13] which recently ruled that the prohibition on disclosures that are "specifically prohibited by law" under 5 U.S.C. § 2302(b)(8) do not prohibit disclosures that are prohibited by agency regulation rather than statute.[14]

Finally, the WPEA is continually reviewed and evaluated. Congressional oversight committees, for example especially US Senate Committee on Homeland Security and Governmental Affairs and the US House Committee on Oversight and Government Reform, frequently hold hearings relating to whistleblower protection. Additionally, the Office of Special Counsel and Merit Systems Protection Board annually report to Congress on enforcement of the WPEA. Section 116 of the law directs the Government Accountability Office and the Merit Systems Protection Board to report to Congress on the broader implementation of the law by no later than 2016.

The elements of a federal whistleblower retaliation case

How to prove whistleblower retaliation under 5 U.S.C. § 2302(b)(8)

The eighth prohibited personnel practice, found in section 2302(b)(8) of title 5 of the United States Code, makes it illegal to retaliate against a whistleblower.[15,16] To prove whistleblower retaliation, a covered employee must show their protected disclosure was a contributing factor in a personnel action; it need not be the principle reason for the personnel action (Shimabukuro et al., 2013; 54).[17] A covered employee must also show that the responsible official had knowledge that the employee made a disclosure and that the employee was reprised against. If an employee meets these burdens, then to prevail, an agency must establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure.

What is a "personnel action"? (Element 1)

According to 5 U.S.C. § 2302, a "personnel action" means "an appointment; a promotion . . . a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation . . . a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; a decision to order psychiatric testing or examination; the implementation or enforcement of any nondisclosure policy, form, or agreement; and any other significant change in duties, responsibilities, or working conditions."

What counts as a "protected disclosure"? (Element 2)

In order to claim retaliation for whistleblowing, an employee must have made a "protected disclosure." A protected disclosure is a disclosure of information that an employee "reasonably believes evidences a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" (5 U.S.C. § 1213). The Board has held that even if the employee was mistaken in believing wrongdoing occurred, their disclosure is

still protected if their belief was reasonable. Reasonable belief is determined by whether, given the information available to the whistleblower, a person standing in their shoes could reasonably believe that the disclosed information evidences a violation of the statute. Generally under the WPEA, a whistleblower may make their disclosure to anyone,[18] including the news media or Congress; it need not be made through the employee's chain of command. However, if the disclosure is specifically prohibited by law or must be kept secret in the interest of national defence or the conduct of foreign affairs, or its release is prohibited by a Presidential order, the disclosures may only be made through the agency's Office of Inspector General or to OSC (5 U.S.C. § 2302(b)(8)(A)). In some cases, the specific law prohibiting disclosure allows the employee the additional option of making a disclosure of restricted information to a member of Congress or a congressional committee with the necessary clearance to receive the information.

Did the deciding official have knowledge of the disclosure? (Element 3)

The official who took the personnel action in retaliation for the whistleblower's protected disclosure must have had either actual or constructive knowledge that the whistleblower made the disclosure. Constructive knowledge is present where the agency has been informed of the alleged violation and that knowledge can be imputed to the deciding official, or where an official with actual knowledge influenced the deciding official.

Was the protected disclosure a contributing factor in the personnel action? (Element 4)

In order to prove that a whistleblower has suffered reprisal as a result of making a protected disclosure, it must merely be shown that the disclosure contributed to the official's decision to take the retaliatory personnel action. The disclosure need not be the principal reason for the personnel action. The employee may prove this through direct evidence. However, an employee may also present circumstantial evidence that: 1) the official taking the personnel action knew of the disclosure; and 2) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. This is called the "knowledge-timing" test.

The Board has held that knowledge and timing are, by themselves, enough to establish a *prima facie* case of retaliation. However, if the knowledge-timing test is not met, the Board will consider any other circumstantial evidence to determine whether the contributing factor test has been met (for example, Jones v. Department of the Interior [failure to find contributing factor]; Powers v. Department of the Navy).

The impact of the federal whistleblower protections

Solid metrics that evaluate the impact and success of federal whistleblower protection laws in the United States do not exist. It is fair to say, nevertheless, that 37 years after the passage of the Civil Service Reform Act of 1978, federal whistleblowers have strong protections in law against reprisal. However, the effectiveness of these protections is circumscribed by the adequacy of resources dedicated to ensuring the vitality of whistleblower rights.

Despite Congress's clear intent to foster an environment where employees feel comfortable blowing the whistle, as recently as five years ago, roughly one-third of federal employees who said they had been identified as blowing the whistle reported they experienced retaliation or were threatened with retaliation (MSPB, 2011; i). In 1992, a government-wide survey found the same result (MSPB, 2010; 13).

This information helped the non-profit groups, members of Congress, and the Office of Special Counsel advocate for improvements to the federal whistleblower protection law, which resulted in the passage of the WPEA of 2012. There has not, however, been another formal survey on whistleblower retaliation since the passage of the WPEA.

What OSC can determine is that federal employees are availing themselves of whistleblower protections more frequently. The Office of Special Counsel received twice the number of whistleblower reprisal complaints in the first full year after the passage of the Whistleblower Protection Act (1990) than it did the year before (OSC Annual Report to Congress, 1990). In fiscal year 2013, the Office received 12% more complaints of whistleblower retaliation than in 2010, before the passage of the Whistleblower Protection Enhancement Act (OSC Annual Report to Congress, 2014).[19]

The dramatic increase in allegations of whistleblower reprisal result, in part, from an increasingly potent protection statute: the WPEA. In addition, OSC has become an increasingly trusted and valued means for federal employees to disclose wrongdoing and seek protection for whistleblower retaliation. OSC has achieved record numbers of corrective actions for federal employees and disciplinary actions against retaliators since Carolyn Lerner was appointed Special Counsel by President Obama in 2011. As a result, federal employees' awareness of the Office of Special Counsel has increased, as have the number of outreach and training events.

The ongoing mission to better protect federal whistleblowers

Creating a work culture in which employees feel secure raising issues with their supervisors and co-workers, or making disclosures to the Office of Special Counsel, is an ongoing process. The White House Second National Action Plan mandated federal agencies to educate their workforce about rights and responsibilities under whistleblower protection laws through the Office of Special Counsel's 5 U.S.C. § 2302(c) Certification Program.[20] Section 2302(c) requires agency heads to ensure, in consultation with OSC, that employees are informed of the rights and remedies available to them under the Whistleblower Protection Act and related laws. Last year, the White House directed agencies to take affirmative steps to complete OSC's program. Agencies were required to establish a plan for completing the Certification Program and post them on their websites. Currently, 41 agencies have been certified, and another 23 are in the process.

The WPEA also mandates that inspectors general at federal agencies and departments designate a whistleblower protection ombudsman, charged with educating employees about rights, responsibilities, and remedies under whistleblower protection laws. The ombudsman is not, however, an employee's or agency's legal representative or advocate. OSC assists agencies in facilitating their whistleblower protection ombudsman programs and in educating their workforces.

Notes

1 *Connick v. Myers*, 461 U.S. 138 (1983).

2 *Pickering v. Board of Education*, 391 U.S. 563 (1968).

3 In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court noted, however, that the "dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing."

4 While the statutory protection for federal whistleblowers was first contained within the Civil Service Reform Act of 1978, it is commonly referred to as part of the Whistleblower Protection Act of 1989. This paper largely adopts this practice, except when discussing changes to the law.

5 OSC also enforces the Hatch Act, which prohibits partisan politics in the federal workforce, including soliciting political contributions from co-workers and subordinates; and the public-sector employment rights of returning and reserve members of the Armed Forces (the Uniformed Services Employment & Reemployment Rights Act (USERRA)). This paper will not focus on the Hatch Act or USERRA, as neither law is specifically relevant to whistleblower protection, except that reprisal of federal employees for filing USERRA or Hatch Act complaints with OSC is not permitted.

6 The Civil Service Reform Act listed nine merit system principles that were set forth at 5 U.S.C. § 2301(b):

"(1) Recruitment should be from qualified individuals from appropriate sources in an endeavour to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(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, colour, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(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.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organisational and individual performance.

(8) Employees should be:

(A) protected against arbitrary action, personal favouritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(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."

The thirteen extant prohibited personnel practices are set forth at 5 U.S.C. § 2302(b).

7 Though OSC has jurisdiction over most employees in the civil service, employees of certain agencies – chiefly those that conduct foreign- and counterintelligence, including the Central Intelligence Agency and the National Security Agency – enumerated at 5 U.S.C. § 2302(a)(2)(C) are not covered. For information on whistleblower protections and the disclosure process for employees of the Intelligence Community, see Presidential Policy Directive 19 and the Intelligence Authorization Act for Fiscal Year 2015.

8 Today, OSC is also responsible for advising the federal employees on, and enforcing prohibitions against, certain partisan political activities (Hatch Act), and protecting the federal employment rights of returning members of the uniformed services (USERRA).

9 Other whistleblower protections exist for private sector employees, and information about these protections can be found at www.whistleblowers.gov.

10 For more information on the changes between the WPA and the WPEA, see the House, Senate, and Conference Committee Reports.

11 For more information on whistleblowing in the Intelligence Community, please see Presidential Policy Directive 19, issued by President Barack Obama on 10 October 2012, and available at https://www.fas.org/irp/offdocs/ppd/ppd-19.pdf.

12 For the Office of Special Counsel's brief, please see https://osc.gov/Resources/amicus-berry-v-conyers-northover-2013-03-14.pdf.

13 For the Office of Special Counsel's brief, please see https://osc.gov/Resources/amicus-dhs-v-maclean-2014-09-30.pdf.

14 Department of Homeland Security v. MacLean, No. 13-894 (U.S. 21 January 2015).

15 The statute says: "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority…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 any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation,

or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety…"

16 5 U.S.C. § 2302(b)(9) says that it is a prohibited personnel practice to retaliate against an employee (or applicant, or former employee) for: a) exercising an "appeal, complaint, or grievance right;" b) "testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (a);" (c) "co-operating with or disclosing information to the Inspector General of an agency, or the Special Counsel…;" or (d) "refusing to obey an order that would require the individual to violate a law."

17 Though employees can often appeal directly to the MSPB, file at OSC, or go through their employer's negotiated grievance procedure, this paper will focus mainly on complaints of whistleblower reprisal brought before OSC.

18 Federal employees may be protected for making a disclosure to a person unrelated to the professional context in which the employee discovered the wrongdoing. However, the employee must demonstrate that his or her employer had knowledge of the disclosure to establish a retaliation claim.

19 This figure from fiscal year 2014 will be published in the forthcoming Annual Report to Congress. For more information on OSC's case numbers, please see our Reports and Information page at https://osc.gov/Pages/Resources-ReportsAndInfo.aspx.

20 For more information, see https://osc.gov/Pages/Outreach-2302Cert.aspx.

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