



ABA Federal Sector Labor and Employment Law Committee Midyear Meeting

Office of Special Counsel/Whistleblower Update

April 26, 2023

PANELISTS:

- Emilee Collier, U.S. Office of Special Counsel
- Richard Renner, Kalijarvi, Chuzi, Newman & Fitch, PC

The panelists' views are their own and do not necessarily represent those of their employers.

Panel Objectives

- 1) Summarize current state of whistleblower law, including recent decisions that impact retaliation claims;
- 2) Discuss other developments affecting federal sector whistleblowing; and
- 3) Answer audience questions

Jurisdictional & Process Issues

The Merit Systems Protection Board (MSPB) has only the jurisdiction that Congress has given it. Whistleblower issues generally arise from two jurisdictional bases:

1. Direct appeals of five specified adverse actions: a removal, a suspension of more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less. 5 U.S.C. §§ 7512(1)-(5), 7513(d), 7701(a); also denials of a within-grade increase (WIGI) after a request for reconsideration, 5 U.S.C. § 5335(c); 5 CFR 531.410.
2. Individual Rights of Appeal (IRAs) under the Whistleblower Protection Act (WPA), 5 U.S.C. § 1221(a).

Jurisdictional & Process Issues

Direct Appeals

1. Generally, must be filed within 30 days of the effective date. 5 C.F.R. § 1201.22(b)(1). Equitable tolling can apply.
2. Appellants can request a hearing with the appeal, or within any deadline set by the Administrative Judge. If requested, a hearing can be withdrawn any time before the hearing and the case will be decided on the record and briefs.
3. Issues can be added to the case at any time up to the pre-hearing conference. 5 C.F.R. § 1201.24(b).

Jurisdictional & Process Issues

Election of Remedies

1. Election of remedies can apply if the appellant files a union grievance or OSC complaint. 5 U.S.C. § 7121(d), (e), (g).
2. Agency notices must include accurate information about the election of remedies. 5 C.F.R. § 1201.21(d)(1) (“Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board”).
3. Failure to give notice can relieve the appellant of the preclusive effect of electing. *Kaszowski v. Dep’t of the Air Force*, 2023 MSPB 15 (Apr. 4, 2023), ¶¶ 5-7.
4. No election between EEO and WPA.

Jurisdictional & Process Issues

IRA Exhaustion

If there is no immediately appealable adverse action, then WPA retaliation claims must be exhausted through OSC. Under 5 U.S.C. § 1221(a):

[A]n employee, former employee, or applicant for employment may, *with respect to any personnel action taken, or proposed to be taken,* against such employee, former employee, or applicant for employment, as a result of a *prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D),* seek corrective action from the Merit Systems Protection Board.

Jurisdictional & Process Issues

OSC Process

1. Whistleblower retaliation complaints must be filed using the publicly-available OSC complaint form. 5 C.F.R. § 1810.2(c)(1) (“The OSC complaint form must be used to file all such complaints.”)
 - a) Can be filed on-line: <https://osc.gov/Pages/File-Complaint.aspx>
2. OSC may dismiss complaints if they are filed more than 3 years after the adverse action. 5 U.S.C. § 1214(a)(6)(A)(iii).
 - a) A 2017 change. Previously there was no time limit.
 - b) Time limit does not affect MSPB jurisdiction.

Jurisdictional & Process Issues

Amending OSC Complaints

OSC complaints can be supplemented by email.

- *Edwards v. Dep't of Air Force*, 120 M.S.P.R. 307, 317 (2013); *Lewis v. Dep't of Def.*, 123 M.S.P.R. 255, 260 (2016) ("The appellant also may submit his own letters to OSC to demonstrate the scope of the complaints he has exhausted with that agency.");
- *McCarthy v. MSPB*, 809 F.3d 1365, 1374 (Fed. Cir. 2016) (considering "written correspondence concerning [the employee's] allegations.").

Jurisdictional & Process Issues

OSC Preliminary Determination Letters

- OSC must issue a PDL (or “13-day letter”). 5 U.S.C. §1214(a)(1)(D);
- 13-day period can be extended;
- Last chance to “exhaust” protected activities and new adverse actions;
- Good time to list them all and help OSC include them in Individual Right of Action (IRA) appeal letter.

Jurisdictional & Process Issues

OSC Final Determination

- OSC issues two letters
 - One is the “IRA” letter with a statement of appeal rights to MSPB. This should list the protected activities and adverse actions.
 - Makes a good exhibit for the IRA appeal to the MSPB to show exhaustion
 - The other “close-out” letter explains the reasons.
 - Can request not to receive this letter
 - If you do receive it, you do not have to disclose it to the Agency or MSPB.
- 5 U.S.C. §1214(a)(2)(B): A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

Jurisdictional & Process Issues

IRA Appeal

- Whistleblowers may seek corrective action for prohibited personnel practices described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D). 5 U.S.C. § 1221.
- IRA rights expanded beyond section 2302(b)(8) by 2012 Whistleblower Protection Enhancement Act.
- MSPB appeals can be filed on-line from mspb.gov under “Appeals” or “Electronic Filing” and “New Appeal.”
- Permitted after 120 days from filing at OSC.
- Required within 65 days of OSC close-out. 5 C.F.R. §1209.5(a)(1).

Jurisdictional & Process Issues

IRA Jurisdictional Order

- Jurisdictional memo
 - Due in 10 days; can make a motion to extend time
 - Need to prove “exhaustion” through OSC
 - 5 U.S.C. § 1221(a): Employee “may, **with respect to any personnel action taken, or proposed to be taken**, ... seek corrective action from” the MSPB
 - AJs also want to see exhaustion of each protected activity
 - Save your original OSC complaint and emails to OSC. Can make a FOIA to OSC *after* case is closed.
 - Need to allege:
 - Protected activity
 - Agency knowledge of protected activity
 - Personnel action, 5 U.S.C. §2302(a)(2)
 - Protected activity was a “contributing factor” in the adverse action
 - For the merits, allegations are sufficient, don’t need affidavits or exhibits. *Perry v. MSPB*, 137 S. Ct. 1975, 1984 (2017)

Retaliation Framework

5 U.S.C. §§ 1221; 2302(b)(8), (b)(9)

Must show —

- Protected disclosure or protected activity;
- Personnel action taken, not taken, or threatened;
- Protected disclosure or activity was contributing* factor in personnel action

*Except in cases arising under 5 U.S.C. § 2302(b)(9)(a)(ii)

Retaliation Framework

5 U.S.C. §§ 1221; 2302(b)(8), (b)(9)

If *prima facie* case is established, the employing agency must show — by clear and convincing evidence — that it would have taken same action without disclosure.

- Strength of evidence in support of personnel action
- Existence & strength of motive to retaliate
- Treatment of similar employees who are not whistleblowers

Retaliation Framework

5 U.S.C. § 2302(b)(8), (b)(9)

Taking, failing to take, or threatening to take or fail to take a personnel action for —

- Protected whistleblowing, or
- Protected activity:
 - Exercise of appeal, complaint, or grievance rights
 - Testimony or other assistance to person exercising such rights
 - Cooperation with or disclosures to OSC, IG, or internal investigative component
 - Refusal to obey an order that would require violation of law, rule, or regulation

Protected Disclosures

5 U.S.C. § 2302(b)(8)

Disclosure Categories

- Violation of any law, rule, or regulation
- Gross mismanagement
- Gross waste of funds
- Abuse of authority
- Substantial & specific danger to public health or safety
- Censorship related to research, analysis, or technical information

Protected Disclosures

5 U.S.C. § 2302(b)(8)

What counts as a lawful disclosure of information?

- Under section 2302(b)(8)(A), disclosures are lawful if they do not violate a law passed by Congress or an Executive Order “in the interest of national defense.”
- Violation of a regulation does not make a disclosure unlawful. *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015).

Protected Disclosures

5 U.S.C. § 2302(b)(8)

Reasonable Belief

- *Ward v. Dep't of the Army*, 67 M.S.P.R. 482, 485-486 (1995); *Russell v. Dep't of Justice*, 68 M.S.P.R. 337, 342 (1995).
 - “The [whistleblower] need not prove that the condition reported established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A)(i) or (ii), but he [or she] must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one that a reasonable person in the employee’s position would believe to evidence one of the situations specified at 5 U.S.C. § 2302(b)(8).”
- Reasonable belief is also used in other whistleblower laws
 - Subjective and objective components. *Sylvester v. Parexel Int’l LLC*, ARB 07-123, 2011 WL 2517148 (ARB May 25, 2011)
 - Objective reasonableness “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).
 - The reasonable belief standard requires an examination of the reasonableness of an employee’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities. *See, e.g., Knox v. U.S. Dep’t. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006) (Clean Air Act case).

Protected Disclosures

5 U.S.C. § 2302(b)(8)

To assess a disclosure of substantial and specific danger to public health or safety, consider:

- the likelihood of harm resulting from the danger;
- when the alleged harm may occur; and
- the nature of the harm, i.e., the potential consequences.

Chambers v. Dep't of Interior, 515 F. 3d 1362, 1369 (Fed. Cir. 2008).

Protected Disclosures

5 U.S.C. § 2302(b)(8)

- Remember: the disclosure of a danger only potentially arising in the future is not a protected disclosure. Rather, the danger must be substantial and specific. *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed.Cir.1999).
- But the “public” in this provision can include a subset of the whole, such as a limited number of federal employees.
 - *Woodworth v. Dep't of the Navy*, 105 M.S.P.R. 456, 463-64 (2007) (perceived danger to a limited number of government personnel and not to the public at large).
 - *Acting Special Counsel ex rel. Finkel v. Dep't of Labor*, 93 M.S.P.R. 409, 414 (2003).

Protected Disclosures

5 U.S.C. § 2302(b)(8)

In *Edwards v. Dep't of Labor*, 2022 M.S.P.B. 9 (May 5, 2022), the Board held that disclosures about violations of EEO laws are not protected by the WPA.

- Relied on legislative history and case law in excluding EEO-related disclosures from protection and declining to extend IRA appeal rights to employees who allege retaliation for disclosing such matters.
- Overruled two previous decisions, *Armstrong v. Dep't of Justice*, 107 M.S.P.R. 375 (2007) and *Kinan v. Dep't of Defense*, 87 M.S.P.R. 561 (2001), to the extent that they covered claims of reprisal for opposition to practices made unlawful by Title VII.

Protected Disclosures

5 U.S.C. § 2302(b)(8)

- Although section 2302(b)(8) refers to “any disclosure” that falls into one of the specified categories of wrongdoing, not all disclosures about non-governmental misconduct are protected.
- In *Covington v. Dep’t of Interior*, 2023 MSPB 5 (Jan. 13, 2023), the Board held that “[a] disclosure of wrongdoing committed by a non-Federal Government entity is protected only when the Government’s interests and good name are implicated in the alleged wrongdoing.”
 - Board found that Covington’s disclosures about violations by the Navajo Nation did impact the interests and good name of the government and were therefore protected.
- See also *Arauz v. Dep’t of Justice*, 89 M.S.P.R. 529, ¶¶ 6-7 (2001); *Aviles v. MSPB*, 799 F.3d 457, 464-66 (5th Cir. 2015); and *Oram v. MSPB*, No. 2021-2307, 2022 WL 866327 (Fed. Cir. Mar. 23, 2022).

Protected Activities

5 U.S.C. § 2302(b)(9)

In *Pridgen v. OMB*, 2022 MSPB 31 (Sept. 12, 2022), the MSPB held that cooperating with or disclosing information to oversight entities under section 2302(b)(9)(C) is protected “irrespective of whether an individual had a reasonable belief that she was disclosing wrongdoing[.]”

In other words, it is the act of disclosure/cooperation with these entities that is protected, rather than the content of the communications.

Protected Activities

5 U.S.C. § 2302(b)(9)

In *Mosley-Dawson v. Army*, 2023 MSPB LEXIS 754 (Feb. 8, 2023)(non-precedential), the MSPB reached a similar conclusion, noting that the employee's prior OSC complaint was protected under section 2302(b)(9)(C) regardless of whether it contained protected disclosures or sought to remedy a violation of section 2302(b)(8).

The MSPB also confirmed that raising a disclosure in an OSC complaint cannot be the basis for applying the doctrine of collateral estoppel in a later IRA appeal.

Protected Activities

5 U.S.C. § 2302(b)(9)

Although non-precedential, numerous MSPB Initial Decisions provide insight into which entities/processes may qualify as a “component responsible for internal investigation or review.”

Protected	Not Protected
Command Investigations	Complaint to Office of General Counsel
Computer Incident Response Team report	Union communications
Joint Patient Safety Report	Congressional committees
Workplace Violence Program report	Disruptive Behavior Reporting System*
Office of Compliance and Business Integrity complaint	Quality Management Coordinator*

*Decision primarily based on lack of evidence about investigative function or responsibilities.

Protected Activities

5 U.S.C. § 2302(b)(9)(D)

- The Follow the Rules Act (FRA), signed into law on June 15, 2017, addressed the scope of protections afforded to employees under 5 U.S.C. § 2302(b)(9)(D).
- Prior to the amendment, section 2302(b)(9)(D) stated that federal employees were protected from retaliation for “refusing to obey an order that would require the individual to violate a law....”
- The FRA explicitly protects those who refuse an order that would violate a rule or regulation as well.
- Earlier this year, the Board held that the FRA is not retroactive. Thus, it cannot be applied to personnel actions taken before the law was passed. *Fisher v. Dep’t of the Interior*, 2023 MSPB 11 (Mar. 16, 2023).

Protected Activities

5 U.S.C. § 2302(b)(9)(D)

What is a “rule”?

- *Rusin v. Dep't of the Treasury*, 92 M.S.P.R. 298, 305-07 (2002)
 - “the determination of whether or not something is a ‘rule’ for purposes of the Whistleblower Protection Act (WPA) cannot be based merely on its title” and a “more substantive examination” is required.
 - “[A]n established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation; or a prescribed guide for action or conduct, regulation or principle.” *Id.*, at 305-307 (citing Black's Law Dictionary 1330 (7th ed. 1999) and Barron's Law Dictionary 427 (3rd ed. 1991).
 - The instructions pertaining to using government credit cards was possibly protected.
- 5 U.S.C. § 551(4):
 - “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
- In *Herman v. Dep't of Justice*, 193 F.3d 1375, 1380 (Fed. Cir. 1999), the court assumed that an SPP Directive is a rule, citing 5 U.S.C. § 551(4) (1994).
- In *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1379 (Fed. Cir. 2008), the court found that the State Department's Foreign Affairs Manual is a rule.

Agency Defenses

Employer Knowledge

A common agency defense is to deny knowledge of the employee's protected activity.

- More challenging if the whistleblower made a written disclosure to the manager
- “Revelment letters” arose in union organizing
- A request for official time can serve the same purpose:
 - I request _____ hours of official time to meet and confer with an attorney about making disclosures to the Inspector General and the Office of Special Counsel. I make this request pursuant to 5 C.F.R. Section 5.4. Please let me know if you will approve this request for official time. Thank you.
- For federal sector EEO cases, cite 29 CFR Section 1614.605(b)

Agency Defenses

5 U.S.C. § 1221(e)

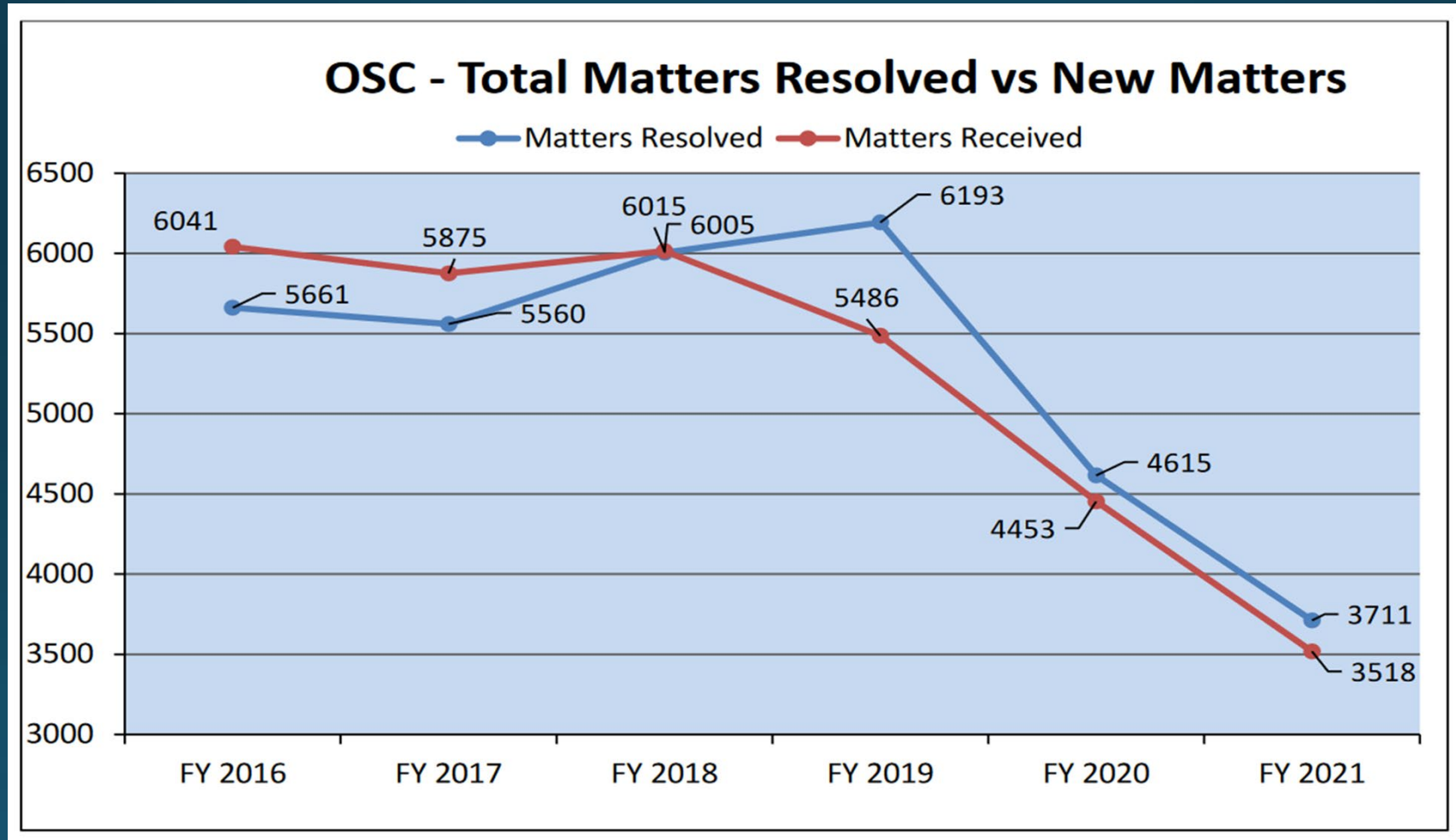
- In *Karnes v. Dep't of Justice*, 2023 MSPB 12 (March 20, 2023), the MSPB confirmed that the employee was entitled to corrective action based on the existence and strength of the agency's motive to retaliate, even though it had strong evidence in support of the challenged personnel action.
- The decision underscores that the *Carr* factors are not discrete elements, each of which must be proven by clear and convincing evidence, but rather weighed together to determine whether the evidence is clear and convincing as a whole.
- The MSPB considers all evidence presented, including evidence that detracts from the conclusion that the agency met its burden.

Other Whistleblowing Developments

- Now that MSPB quorum has been restored, OSC is making use of its statutory authority to seek formal stays of certain personnel actions under investigation.
- Regardless of quorum, OSC also obtains informal stays from employing agencies in appropriate cases.
 - In FY21, OSC secured 38 informal stays in prohibited personnel practice cases, providing temporary relief to filers as OSC investigated their claims.

Other Whistleblowing Developments

OSC Case Filings Decreased During the Pandemic



Other Whistleblowing Developments

Agencies should prioritize the development and maintenance of a robust, pro-whistleblowing culture to ensure that employees:

- Remain alert to potential problems;
- Understand the value of reporting such issues as they arise;
- Have confidence that they will not face retaliation for their whistleblowing

Other Whistleblowing Developments

Whistleblower Protection Improvement Act (WPIA)

- Would allow court access and jury trials after 180 days
- Grant corrective action for retaliatory investigations
- Make temporary relief easier for employees
- Cover non-career SES, and the PHS and NOAA corps
- Permit courts to award attorney's fees

As H.R. 2988, the WPIA passed the House on
09/15/2022

Other Whistleblower Protections

Intelligence Authorization Act of 2014

50 U.S.C. § 3234; PPD-19; ICD-120; DOD, Directive-Type Memorandum 13-008

- Same definition of protected disclosures. 50 U.S.C. § 3234(b)
- Covers employees of contractors. 50 U.S.C. § 3234(c)
- Agency-specific procedures
- Final decision-making by DNI and agency heads
- Security clearance retaliation is covered by 50 U.S.C. § 3341(j) (90 days to file a complaint)

Questions?

