Free Speech at the Crossroads: Whistleblower & First Amendment Protections For Private and Public Employees

Employment Law 2026: Navigating the Field, A Roadmap for Employment Law Success

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Table of Contents

I.Introduction and overview....5

II.Current state of the First Amendment....7

A.The First Amendment prohibits retaliation by government, not private actors....7

B.Sovereign immunity protects the federal and state governments from suits for money, unless the government has consented to be sued....7

C.Qualified immunity protects state and local officials from suits for money, unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known."....8

D.The Eleventh Amendment prohibits suits against a state in federal court....9

E.Speech by public employees is protected if it is on a matter of "public concern."....10

F.Duty speech is not protected, but subpoenaed testimony might not be duty speech....10

G.Employees are protected from a public employer's mistaken perception of protected speech....11

H.Federal civil service law preempts the field for federal employee claims....11

III.The Whistleblower Protection Act (WPA) protects federal employees....12

A.The WPA's basic protections....12

B.The WPA's remedial purpose....12

C.The WPA's coverage....13

D.Lawful disclosures unclassified information if it is about evidence of any violation of any law, rule, or regulation....14

E.What is a "rule."....15

F.Gross mismanagement, a gross waste of funds....16

G.Abuse of authority....17

H.Substantial and specific danger to public health or safety....17

I.Disclosures must be based on a "reasonable belief."....20

J.Disclosures can be made to anyone if they are "lawful."....20

K.Protection of disclosures cannot be denied based on motive, timing, etc....21

L.The MSPB and Courts deny protection for disclosures protected by EEO laws....22

M.Judges deny protection for disclosures of violation by third parties....22

N.Participation claims....23

O."Appealable" and "non-appealable" adverse actions....27

P.Elections of remedies for "appealable" adverse actions....28

Q.Causation standards....30

1. Contributing Factor....30

2. Knowledge/timing test....31

3. Other methods of showing causation....32

4. Clear and Convincing Evidence....33

IV.WPA Procedure: Filing an OSC complaint....37

A.Procedure: Use Office of Special Counsel (OSC) Form 14....37

B.Individual Right of Action (IRA)....38

C.MSPB Proceedings....39

1. Electronic filing is expected through the MSPB's e-appeal system....39

2. Election at MSPB to have a hearing....39

3. AJ will typically ask for a "Jurisdictional Response" and provide 10 days to file it....39

4. Discovery....41

5. Election to file a Petition for Review (PFR) with the MSPB or with the Circuit Court of Appeals....42

D.Resources....43

E.Circuit Court review....43

V.Other Prohibited Personnel Practices (PPPs)....44

A.Listed at 5 U.S.C. § 2302(b)(1)-(14)....44

VI.No election of remedies between OSC and EEO for non-appealable adverse actions....46

VII.Mixed cases....46

A.What is a mixed case?....46

B.Where do you file a mixed case complaint?....47

C.When do you file a "mixed case"?....47

D.Features of a mixed case....48

VIII."Private Sector" remedies available to federal employees....49

IX.Subgroup discrimination and deviation from stereotypes can indicate retaliation against whistleblowers....50

X.The Next WPA Enhancement Act....53

XI.Private sector remedies....54

A.OSH Act, Section 11(c)....54

B.Mine Health and Safety Act....55

C.Environmental laws....55

D.Transportation laws....56

E.Sarbanes-Oxley Act (SOX) and reasonable belief....56

F.Consumer protection whistleblower laws....58

G.Affordable Care Act....61

H.Time limits to file complaints....63

XII.The NRC requires a Safety Conscious Work Environment (SCWE)....65

XIII.Investigatory Process at OSHA....65

A.Directorate of Whistleblower Protection Programs (DWPP) 65

B.Filing an initial complaint....66

C.Timeliness....66

D.The Investigative Process....67

E.Settlements at OSHA....68

F.OSHA updates regulations....69

G.Litigation....70

1. Office of Administrative Law Judges (OALJ) and the Administrative Review Board....70

2. ARB review....71

3. Kick-outs to federal district court....72

H.Extraterritoriality....73

I. ARB addresses documents, confidentiality and adverse actions....77

XIV.North Carolina state law remedies....79

XV.The uneven web of whistleblower protection....80

I. Introduction and overview

America was different in 1791 when the states ratified the First Amendment into our Constitution. American were primarily agricultural workers. Government was the primary threat to individual freedom of speech. The First Amendment reflects the "public interest in having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment[.]" *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968) (protecting teacher Marvin Pickering from retaliation for submitting a letter to the editor complaining that the Board has spent too much on athletics and not enough on academics).

A lot has changed since 1791. Today, most Americans have jobs – and bosses. Under employment-at-will, that boss can fire a worker for any reason, or for no reason, as long as it is not for an illegal reason.

In 2006, the Supreme Court decided that the First Amendment did not protect Deputy DA Richard Ceballos when he testified in court that a deputy sheriff's affidavit in support of a search warrant was falsified. The 5-4 decision held that the First Amendment does not protect speech that the public employer "commissioned" the employee to make as part of their job duties. The majority deflected blame for eroding the First Amendment by noting 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. See, *e.g.*, 5 U. S. C. §2302(b)(8)". *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (citing the federal Whistleblower Protection Act (WPA)).

Thus, whistleblower protection laws represent the extension of First Amendment protections. While the First Amendment typically provides no protection to private sector employees, current

whistleblower laws provide an uneven web of protection for most. They also protect public sector employees in cases that are outside of the First Amendment's protection.

We already have federal laws that say a boss can't fire you because you:

1. asked for minimum wages or overtime (FLSA, 29 U.S.C. § 215(a)(3))
2. organized a union or engage in "protected concerted activity" (NLRA, 29 U.S.C. § 158(a))
3. talked to coworkers about wages, hours or terms and conditions of employment (same)
4. complained about discrimination on the basis of race, color, national origin, religion or gender (Title VII, 42 U.S.C. § 2000e-3(a))
5. complained about unsafe work conditions (OSH Act, § 11(c), 29 U.S.C. § 660(c))
6. raised a compliance concern about a nuclear power plant (ERA, 42 U.S.C. § 5851)
7. raised a concern about water pollution (CWA or FWPCA, 33 U.S.C. § 1367(a), (b))
8. raised a concern about air pollution (CAA, 42 U.S.C. § 7622)
9. raised a concern about improper solid waste disposal (SWDA, 42 U.S.C. § 6971)
10. raised a concern about a superfund site (CERCLA, 42 U.S.C. § 9610)
11. raised a concern about safe drinking water (SDWA, 42 U.S.C. §300j-9)
12. raised a concern about toxic substances (TSCA, 15 U.S.C. §2622)
13. complained about unsafe trucks or excessive hours of service (STAA, 49 U.S.C. § 31105)
14. qualify for a subsidy or other health insurance benefit under the Affordable Care Act. (29 U.S.C. § 218c)

Why can't we have one law that protects workers for all free speech? Politics. The Chamber of Commerce has successfully blocked bills that would modernize Section 11(c) of the OSH Act. In 2010, the Grocery Manufacturers Association lobbied for the Food Safety Modernization Act (FSMA) which protects 20 million Americans from retaliation for reporting food safety issues to your boss or to the

FDA. However, Big Pharma has blocked any similar protection for workers who call the FDA about their products.

Our struggle to protect all workers from retaliation requires us to:

1. Look for ways to enforce and expand the application of existing whistleblower laws, and
2. Advocate for laws that create new protections for those who need them.

II. Current state of the First Amendment

Judges have eroded the First Amendment through doctrines including sovereign immunity, qualified immunity, the 11th Amendment, duty speech (Garcetti) and legislative preemption.

A. The First Amendment prohibits retaliation by government, not private actors.

Famously, the First Amendment applies only to government officials and agencies.

> The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine, as relevant here, a private entity may be considered a state actor when it exercises a function "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).
>
> *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. ___, 139 S. Ct. 1921, 1926 (2019) (5-4 affirming dismissal of First Amendment claim against NYC's community access cable channel operator, Time Warner).

B. Sovereign immunity protects the federal and state governments from suits for money, unless the government has consented to be sued.

Sovereign immunity protects federal and state governments and their officials, for liability in tort claims:

> It is axiomatic that "the United States [is] not suable of common right" but that "the party who institutes such a suit must bring his case within the authority of some act of [C]ongress." *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444, 8 L.Ed. 1001 (1834) (Marshall, C.J.). This is because "[i]t is inherent in the nature

> of sovereignty not to be amenable to the suit of an individual without its consent." The Federalist No. 81, at 486 (Alexander Hamilton)
>
> *Peck v. U.S. Dep't of Labor*, 996 F.3d 224, 230 (4th Cir. 2021) (denying relief to NRC employee fired in violation of the Energy Reorganization Act because "person" under the ERA does not include the sovereign).

Government can waive immunity, for example by statute. But, their "waiver of sovereign immunity must extend unambiguously to ... monetary claims." *Lane v. Peña*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); see also, *FAA v. Cooper* , 566 U.S. 284, 290, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012) (no compensatory damages for violations of the Privacy Act).

For entities created by multi-state compacts, consent of each state is required to waive sovereign immunity. *Buck v. Wash. Metro. Area Transit Auth.*, 427 F. Supp. 3d 60, 62 (D.D.C. 2019) (WMATA immune from statutory whistleblower claims).

NCAJ's Civil Rights Seminar on January 29, included this presentation: "Justice Trey Allen will begin with an overview of North Carolina's immunities (sovereign immunity, public official immunity, governmental immunity)."

C. Qualified immunity protects state and local officials from suits for money, unless they "violate clearly established statutory or constitutional rights of which a reasonable person would have known."

One law that permits monetary claims for violations of the First Amendment is the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, 1985 and 1985(2) (witness protection). For these claims, courts invented the idea that public officials sued for violating someone's rights should have "qualified immunity" if prior court decisions had not made clear that their actions would subject them to liability. "Qualified immunity shields public officials from liability for civil damages if their conduct did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have

known.'" *Dillard v. O'Kelley*, 961 F.3d 1048, 1052 (8th Cir. 2020) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). See also, *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 875 (8th Cir. 2020), cert. denied *sub nom Hoggard v. Rhodes*, 141 S.Ct. 2421, 2422 (2021) (J. Thomas dissenting: "our qualified immunity jurisprudence stands on shaky ground."); Daniel K. Siegel, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in Bellotte v. Edward*s, 90 N.C. L. REV. 1241 (2012).

Still, "it was clearly established that a public employer violates the First Amendment by discharging an employee for speaking as a private citizen on a matter of public concern—even when the employee is high-ranking and the matter is related to her employment—when that speech does not cause material and substantial disruption to the employer's operations." *Henry v. Shaw*, No. 25-469 (9th Cir. 1-20-2026), *7. "Officials can still be on notice that their conduct violates established law even in novel factual circumstances" where no prior case "address[ed] [those] precise facts." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 778 (9th Cir. 2022).

D. The Eleventh Amendment prohibits suits against a state in federal court.

The Eleventh Amendment bars use of the federal courts to sue the states without their permission. It does not apply to claims under federal laws enacted pursuant to the Fourteenth Amendment, Section 5, such as Title VII. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). It also does not protect city or county governments. *Cash v. Granville Cnty. Bd. of Educ*., 242 F.3d 219, 222 (4th Cir. 2001); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

E. Speech by public employees is protected if it is on a matter of "public concern."

The Supreme Court first applied the First Amendment to protect public employee speech in *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968) (Upholding the "public interest in having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment[.]"). But it did so only if the speech involved a matter of public concern.

The First Amendment protects probationary employees. "Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression." *Rankin v. Pherson*, 483 U.S. 378, 383-84, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (finding that "If they go for him [President Reagan] again, I hope they get him" does address a matter of public concern: the policies of the President).

The personnel grievances of public employees are ordinarily not matters of public concern. *Connick v. Myers*, 461 U.S. 138 (1983); *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011) (reversing the Third Circuit's holding that the Petition Clause protects grievants regardless of the content of their grievance).

F. Duty speech is not protected, but subpoenaed testimony might not be duty speech.

As noted above, the 2006 *Garcetti v. Ceballos* decision held that the First Amendment does not protect speech that the employer commissioned the employee to make. This decision created the so-called "duty speech" exception to the First Amendment. However, in *Lane v. Franks*, 573 U.S. 228 (2014), the Court protected Lane's subpoenaed testimony in a federal fraud case, but denied him money damages due to Franks' qualified immunity.

Here is how the Ninth Circuit recently affirmed an interlocutory appeal of a denial of qualified immunity:

> Because Henry's version of the facts is not blatantly contradicted by the record, we assume that there is a genuine factual dispute and that it will be resolved in Henry's favor. With those assumptions, Henry engaged in speech that was related to her employment but not pursuant to her official job duties. When a public employee engages in such speech, she speaks as a private citizen. See, *e.g.*, *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 536, 571-72 (1968)[.]

Henry v. Shaw, No. 25-469 (9th Cir. 1-20-2026), *4.

G. Employees are protected from a public employer's mistaken perception of protected speech.

If a public employer mistakenly believes that an employee engaged in protected speech and retaliates, the victim of that retaliation may still pursue remedies for that retaliation. *Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016) ("When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983 —even if, as here, the employer makes a factual mistake about the employee's behavior.").

H. Federal civil service law preempts the field for federal employee claims.

When Congress passes a law providing procedures and remedies for individuals claiming a violation of the First Amendment, that law can occupy the field and deprive courts of jurisdiction to adjudicate the claims. Such is the case with the 1978 Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111. *United States v. Fausto*, 484 U.S. 439, 443-55, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988); see also *Bush v. Lucas*, 462 U.S. 367, 388-89, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983). Thus,

federal employees facing retaliation must use the procedures established by the Whistleblower Protection Act (WPA), which is part of the CSRA.

III. The Whistleblower Protection Act (WPA) protects federal employees.

A. The WPA's basic protections.

First enacted in 1989, and repeatedly amended, the WPA protects federal employee and applicants for federal employment from retaliation because of their (1) disclosures about certain forms of misconduct, (2) participation in certain proceedings and (3) their refusals to violate a law, rule or regulation. 5 U.S.C. § 2302(b)(8) and (9). It also prohibits federal gag clauses that restrain protected disclosures, 5 U.S.C. § 2302(b)(13), and retaliatory access to or disclosures of medical information. 5 U.S.C. § 2302(b)(14).

The standards for protection can vary by the type of federal agency, the type of employee, the type of activity and even the date of the activity. Be aware of elections of remedies and applicable time limits.

B. The WPA's remedial purpose.

Congress enacted the 2012 Whistleblower Protection Enhancement Act (WPEA) because:

> Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect ''any disclosure'' of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

> S. REP. 112-155, * 4-5, 2012 WL 1377618, 2012 U.S.Code Cong. & Admin.News 589, 593

In *Dep't Homeland Security v. MacLean*, the Court protected a federal air marshal when he leaked to the media an agency plan to stop air marshals from traveling due to a budget constraint. 574 U.S. 383 (2015). This was certainly a disclosure outside the chain of command. It even violated official agency regulations. The Supreme Court held it was protected, noting that, "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks." *Id.* at 393.

"The importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times." *Arnett v. Kennedy*, 416 U.S. 134, 228 (1974) (J. Marshall, dissenting).

C. The WPA's coverage.

The WPA protects employees of:

1. Executive agencies, 5 U.S. C. § 2302(a)(2)(C)
2. Government Publishing Office (GPO), 5 U.S. C. § 2302(a)(2)(C)
3. Government corporations, 5 U.S. C. § 2302(a)(2)(C)(i)
4. FBI has a parallel statute, 5 U.S. C. § 2303
    - **a.** As of 2022, kick-out permitted to MSPB
5. Probationary employees
6. SES
7. IG employees, and others engaged primarily in compliance duties
    - **a.** slightly elevated causation standard at 5 U.S. C. § 2302(f)(2)

The employees of the following are **excluded** from WPA protection:

8. Intelligence Community (IC), 5 U.S. C. § 2302(a)(2)(C)(ii)

IC employees are protected by Intelligence Authorization Act of 2014, 50 U.S.C. § 3234, PPD-19; ICD-120; and/or DOD, Directive-Type Memorandum 13-008. They use the same definition of protected disclosures. 50 U.S.C. § 3234(b). This law also covers employees of contractors. 50 U.S.C. § 3234(c). There are agency-specific procedures for making complaints of retaliation, but the final decision-making is made by DNI and agency heads.

When the adverse action is an action against a security clearance, retaliation is prohibited by 50 U.S.C. § 3341(j) (90 days to file a complaint).

9. GAO, 5 U.S. C. § 2302(a)(2)(C)(iii)
10. USPS, ref. ELM Section 666.18, 666.2, 666.3
11. Uniformed members of the Armed Services, ref. 10 U.S.C. § 1034
12. Commissioned Corps of the PHS and NOAA, also ref. 10 U.S.C. § 1034
13. Civilian Employees of nonappropriated fund (NAF) instrumentalities of the Armed Forces, aka Veterans Canteen Service, but see 10 U.S.C. § 1587
14. Political appointees

D. Lawful disclosures unclassified information if it is about evidence of any violation of any law, rule, or regulation.

If a covered employee is going to make a protected disclosure, and they want protection from retaliation, it is helpful if their disclosure is of evidence of "any violation of any law, rule, or regulation." Quoting 5 U.S.C. § 2302(b)(8)(A)(i).

In *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1380 (Fed. Cir. 2008), the Federal Circuit **rejected** the idea that a disclosure would be unprotected because the violation was of "**such a trivial nature**." 543 F.3d 1377, 1380 (Fed. Cir. 2008); s*ee also*, S.Rep. 112-155, p. 8. Thus, there is no "de

minimis" exception for violations of law, rule or regulation. Congress required that waste and mismanagement had to be "gross" to support protected activity, but no such modifier applies to violations of rules. *Compare* 5 U.S.C. § 2302(b)(8)(A)(i), (ii).

In *Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001), the Court said, "when the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule or regulation," he does not have to identify a statutory or regulatory provision by title or number. 265 F.3d 1259, 1266 (Fed. Cir. 2001).

E. What is a "rule."

In *Rusin v. Dep't of the Treasury*, the Board took a broad view of what a "rule" is and held that it includes "an 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." 92 M.S.P.R. 298, 305-07 (2002). It protected a disclosure of violations of agency instructions about the use of government credit cards.

See also 5 U.S.C. § 551(4): (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.

Relying on 5 U.S.C. § 551(4) (1994) (defining a "rule" as "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 ..."), the Federal Circuit treated the Department of Justice/Federal Bureau of

Prisons Suicide Prevention Program ("SPP") Directive as a rule. See. *Herman v. Dep't of Justice*, 193 F.3d 1375, 1380 (Fed. Cir. 1999).

Department of State's Foreign Affairs Manual is a rule. See 3 FAM 4542 (intoxication on duty prohibited). *Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1379 (Fed. Cir. 2008)

But see, *Frericks v. Dep't of the Navy*, 24-9531 (10th Cir. Oct. 9, 2025), *16 (To be protected, a disclosure must "clearly identify" the alleged rule violation, and "must be specific and detailed" rather than make "vague allegations of wrongdoing.").

F. Gross mismanagement, a gross waste of funds

Congress said that "gross" means anything that is more than "*de minimus*." S. REP. 112-155, * 8, 2012 WL 1377618, 2012 U.S.Code Cong. & Admin.News 589. In *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 692 (1946), the United States Supreme Court held that when the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such "trifles" may be disregarded. However, "as little as ten minutes of working time goes beyond the level of *de minimis* and triggers the FLSA." See *Reich v. IBP, Inc*., 38 F.3d 1123, 1126 (10th Cir. 1994). In *Carlsen v. United States*, 521 F.3d 1371 (Fed. Cir. 2008), the court suggested that 10 minutes is regarded as a cutoff; anything under can generally properly be considered de minimis – while anything over cannot.

However, in WPA practice, the agency will seek to place the amount at issue in the context of the size of the entire agency operation. The Board said that gross waste constitutes more than a debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *Nafus v. Dep't of the Army*, 57 M.S.P.R. 386, 393 (1993), overruled on other grounds, *Frederick v. Department of Justice*, 65 M.S.P.R. 517, 531 (1994).

It is important to quantify the amount of the waste. *Frederick v. VA*, 63 MSPR 563, 571 (1994) (no allegation of the amount means no jurisdiction). Strive to recast the disclosure to one in which the employee reasonably believes evidences violations of laws, rules or regulations, fraud or abuse – even if a further investigation demonstrates that no rules or gross waste or fraud actually occurred. *Keefer v. Dept. of Agriculture*, 82 MSPR 87 (1999). In these circumstances, even a zero loss can qualify.

G. Abuse of authority

An abuse of authority is an "arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *D'Elia v. Dep't. of Treasury*, 60 M.S.P.R. 226, 232 (1994), citing 5 C.F.R. § 1250.3(f) (1988). Unlike the phrases "gross mismanagement" and "gross waste of funds," the phrase "abuse of authority" does not contain an expressed *de minimis* standard. *Id*.; *Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, 241 (2001).

Normally, an allegation that the abuser has something personal to gain from the action will be required to show an abuse of authority. *Downing v. Dep't of Labor*, 98 M.S.P.R. 64, 70 (2004) (holding that there was no allegation that a particular individual's rights were affected or that the office closure was for personal gain).

H. Substantial and specific danger to public health or safety

Federal Circuit analyzes several factors to decide if a safety disclosure is worthy enough for protection, including:

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

Chambers v. Dep't of Interior, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (protecting disclosure that budget cut would adversely affect Park Police coverage)

The disclosure of a danger only potentially arising in the future is not a protected disclosure. *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed.Cir.1999). Rather, the danger must be substantial and specific.

Examples of **protected** health and safety concerns include:

iv. Cooling system of a nuclear reactor is inadequate. S.Rep. No. 95-969, at 21 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2743

v. National Park Service Police have inadequate funding (*Chambers*)

vi. Failing to test inspectors for possible exposure to beryllium where test was inexpensive and exposure could lead to fatal lung ailment. *Acting Special Counsel ex rel. Finkel v. Dep't of Labor*, 93 M.S.P.R. 409, 413-14 (2003)

vii. TSA grounding air marshals during an alert of terrorist plans to hijack airplanes. *MacLean v. Dep't of Homeland Sec*., 714 F.3d 1301, 1311 (Fed. Cir. 2013), *aff'd,* 574 U.S. 383, 135 S. Ct. 913, 190 L. Ed. 2d 771 (2015) (it remains to be determined whether Mr. MacLean reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety). On remand, the MSPB ordered DHS to restore Mr. MacLean to his employment position as of April 11, 2006, to award him back pay and interest, and to provide him appropriate consequential relief. *MacLean v. Dep't of Homeland Sec*., 2017 MSPB LEXIS 3176, at *11–13 (M.S.P.B. July 18, 2017) (initial decision); *affirmed on other grounds*, MacLean v. Dep't of Homeland Sec., 754 F. App'x 950, 952 (Fed. Cir. 2018).

Examples of disclosures that are **NOT protected**

viii. EPA is not doing enough to protect the environment. S.Rep. No. 95-969, at 21 (1978), U.S.Code Cong. & Admin.News 1978, pp. 2723, 2743

ix. Disclosure by psychologist that prison did not comply with "the suicide watch room requirements." *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed.Cir.1999) (WPA was "was not intended to apply to disclosure of trivial or *de minimis* matters.").

x. Reassignment of certain staff members' duties and site location had a "negative impact" on the Army's health care mission. *Hansen v. Merit Sys. Prot. Bd*., 746 F. App'x 976, 978, 981 (Fed. Cir. 2018) ("a dispute with a supervisor's discretionary authority that a disinterested observer could not reasonably believe evidence wrongdoing"; disclosure did not specify "quantifiable harm")

xi. A deficit in needed medical services in the mental health unit for homeless veterans. *Griesbach v. Dep't of Veterans Affairs*, 705 F. App'x 962, 963 (Fed. Cir. 2017).

xii. Nuclear detonations go undetected due to inadequate satellite coverage. *Standley v. Merit Sys. Prot. Bd.*, 715 F. App'x 998, 1002-03 (Fed. Cir. 2017) ("Standley's allegations amount to a policy dispute, and the record demonstrates that a disinterested observer could not reasonably believe Mr. Standley's disclosures evidenced either a violation of law [§ 1065 of the National Defense Authorization Act of 2008 ("2008 NDAA"),] or a danger to public health and safety. " "Standley had not alleged quantifiable potential harm or likelihood of harm and, therefore, did not meet his burden to show 'that such an occurrence is more than a possibility occurring at an undefined point in the future.'")

The "**public**" in a public health or safety concern can include a subset, such as a limited number of federal employees. *Woodworth v. Dep't of the Navy*, 105 M.S.P.R. 456, 463-64 (2007) (protecting 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, 413-14 (2003).

Because of the subjective and unreliable standards for "specific and substantial dangers to public health and safety," attorneys can look for "laws, rules and regulations" that prohibit such dangers.

The Occupational Health and Safety Act (OSH Act) applies to federal agencies. 29 U.S.C. § 668 (excluding USPS which is treated as a private sector employer). The OSH Act's General Duty Clause (29 U.S.C. § 654) does NOT apply but specific safety standards do.

A separate federal sector general duty clause is at 29 U.S.C. § 668(a) The head of each agency shall (after consultation with representatives of the employees thereof)— (1) "provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;"). See also 5 U.S.C. § 7902(d): The head of each agency shall develop and support organized safety promotion to reduce accidents and injuries among employees of his [or her] agency, encourage safe practices, and eliminate work hazards and health risks.

An OSHA regulation requires that: The head of each federal agency "must assure safe and healthful working conditions for his/her employees." 29 C.F.R. § 1960.1(g). Federal agencies must provide PPE: "The head of each [federal] agency shall furnish to each employee employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 C.F.R. § 1960.8(a)

I. Disclosures must be based on a "reasonable belief."

"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)." *Ward v. Dep't of the Army*, 67 M.S.P.R. 482, 485-486 (1995); *Russell v. Dep't of Justic*e, 68 M.S.P.R. 337, 342 (1995).

The same doctrine, with separate subjective and objective components is used in private sector whistleblower laws. See pp. 57-58, below.

J. Disclosures can be made to anyone if they are "lawful."

Disclosures can be made to anyone, including MSNBC. *Dep't of Homeland Sec. v. Maclean*, 574 U.S. 383, 393 (2015) ("Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks."). Disclosures must be "lawful." 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 Homeland Security v. MacLean*, 574 U.S. 383 (2015).

Laws prohibiting disclosure of certain information include or cover the Bank Secrecy Act, FDA, IRS, HIPAA (although an exception protects whistleblower disclosures to lawyers and public

health agencies 45 C.F.R. § 164.502(j)(1)), Computer Access and Frauds Act (CAFA), Defending Trade Secrets Act (with an immunity for whistleblowers at 18 U.S.C. §1833(b)).

Disclosures of classified information are permitted to the OSC, IG, or "another employee designated by the head of the agency to receive such disclosures." 5 U.S. C. § 2302(b)(8)(B).

Disclosures to Congress are protected except not information classified by the Intelligence Community (they may make disclosures to IGs and the Director of National Intelligence pursuant to 50 U.S.C. § 3033(k)(5)). 5 U.S. C. § 2302(b)(8)(C). Also, disclosures of "intelligence sources and methods" are not protected. *Id*.

K. Protection of disclosures cannot be denied based on motive, timing, etc.

Disclosures cannot be denied protection because of (5 U.S.C. § 2302(f)(1)):

> (A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);
>
> (B) the disclosure revealed information that had been previously disclosed;
>
> (C) of the employee's or applicant's motive for making the disclosure;
>
> (D) the disclosure was not made in writing;
>
> (E) the disclosure was made while the employee was off duty;
>
> (F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or
>
> (G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

Court's may nevertheless side-step the prohibited considerations and affirm on other bases. Frericks v. Dep't of the Navy, 24-9531 (10th Cir. Oct 09, 2025), *17 (Although the AJ and MSPB considered Mr. Frericks's motive and timing in denying protection to Disclosure Six, they were not the only bases for their conclusions. Instead, the AJ and MSPB evaluated the attendant circumstances in concluding that self-interest and bias undermined the reasonableness of the belief he was disclosing wrongdoing covered by statute.).

L. The MSPB and Courts deny protection for disclosures protected by EEO laws.

A series of cases have held that "disclosures" are not protected under Section 2302(b)(8) – using logic I find to be far fetched and contrary to the plain text and purpose of the WPA. See *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679 (Fed. Cir. 1992); *Young v. Merit Systems Protection Board*, 961 F.3d 1323, 1329 (Fed. Cir. 2020); *Edwards v. Department of Labor*, 2022 MSPB 9, ¶ 27; *Williams v. Department of Defense*, 46 M.S.P.R. 549, 554 (1991). They clearly prefer that EEO cases stay at EEOC. But see "Participation claims" below starting on page 23.

M. Judges deny protection for disclosures of violation by third parties.

Despite the statute's reference to "any disclosure of information," the Board has held that, under the WPA, a disclosure of wrongdoing committed by a non-Federal Government entity may be protected only when the Government's interests and good name are implicated in the alleged wrongdoing, and the employee shows that she reasonably believed that the information she disclosed evidenced that wrongdoing. *Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶ 12 (2005); *Arauz v. Department of Justice*, 89 M.S.P.R. 529, ¶ 7 (2001); see *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (finding a disclosure protected if a disinterested observer could reasonably conclude that the "actions of the [G]overnment" evidence a kind of wrongdoing covered under 5 U.S.C. § 2302(b)(8)).

In *Aviles v. Merit Systems Protection Board*, 799 F.3d 457 (5th Cir. 2015), the Court found that the WPEA had not expanded the scope of the WPA to cover allegations of wrongdoing by non-Governmental entities and that disclosures of private wrongdoing could only be protected if there were allegations of Government complicity in the alleged private wrongdoing.

In *Covington v. Department of the Interior*, 2023 MSPB 5, ¶¶ 16-19, the Board found that the WPEA did not affect the Board's holding in Arauz and agreed with the analysis set forth in Aviles, 799 F.3d at 464-66, that the WPEA did not extend coverage to disclosures of purely private wrongdoing.

Sadly, the Board fails to recognize that if the employee discloses that third-parties are getting away with their violations because the employee's bosses are not enforcing the laws entrusted to them, that is Agency complicity in the violations.

N. Participation claims

Federal employees who participate in grievances, complaints and appeals based on a "right granted by any law, rule, or regulation" are protected from retaliation. 5 U.S.C. § 2302(b)(9)(A). However, employees can appeal their OSC complaints to the MSPB only if their grievance, complaint or appeal is about retaliation prohibited by 5 U.S.C. § 2302(b)(8). Compare 5 U.S.C. § 2302(b)(9)(A)(i) with 5 U.S.C. § 1221(a) (Individual Right of Action (IRA) appeal to the MSPB).

Participation clauses speak in clear, absolute terms, and have accordingly been interpreted as shielding recourse to official proceedings, regardless of the ultimate resolution of the underlying claims on their merits. *See*, *e.g.*, *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998 (5th Cir. 1969). *See also*, *Boyer-Liberto v. Fontainbleau Corp*., 786 F.3d 264, 283 (4th Cir. 2015) (*en banc*) (observing that "effective [Title VII] enforcement could . . . only be expected if employees felt free to approach officials with their grievances[.]" quoting *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 66-67 (2006)).

Participation clauses are "exceptionally broad protections." In *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 582 (6th Cir. 2000) (quoting *Booker v. Brown & Williamson Tobacco Co.,* 879 F.2d 1304, 1312 (6th Cir. 1989)), the Sixth Circuit emphasized:

> The exceptionally broad protections of the participation clause extends to persons who have participated in any manner in Title VII proceedings. *Pettway v. American Cast Iron Pipe Co*., 411 F.2d 998, 1006 (5th Cir. 1969). Protection is not lost if the employee is wrong on the merits of the charge, *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir.1980), nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong. *Pettway*, 411 F.2d at 1007. Thus, once activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation.

Protection under a participation clause does not require any showing of a good faith belief in the disclosed violation. *See, e.g., Glover v. S.C. Law Enforcement Div.,* 170 F.3d 411, 414 (4th Cir. 1999); *Wyatt v. City of Boston,* 35 F.3d 13, 15 (1st Cir. 1994).

The line between "opposition" and "participation" is not always clear, and need not be decided. As the Supreme Court stated in *Crawford v. Metropolitan Government of Nashville and Davidson County*, "[w]hen an employee com-municates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication *virtually always* constitutes the employee's *opposition* to the activity." 555 U.S. 271, 276 (2009) (internal quotation omitted). With this conclusion, the Supreme Court did not have to decide if Crawford's participation in an internal investigation was protected under the participation clause. ***Id***. at 280. The Supreme Court revisited the issue in *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1 (2011), and held that raising internally a concern about FLSA compliance was protected, even though the FLSA protects an employee who "has filed any complaint or instituted or caused to be instituted any proceeding[.]" 29 U.S.C. § 215(a)(3). This FLSA provision is a participation provision, and the Supreme Court found it applied to a verbal concern expressed only internally.

Assisting another federal employee in any complaint, grievance or appeal is protected even if it is about EEO issues. 5 U.S.C. § 2302(b)(9)(B).

Any disclosure to OSC, any IG, or "any other component responsible for internal investigation or review" is protected. As of January 31, 2025, includes disclosures to Sexual Assault Prevention and Response (SAPR) programs; *Reese v. Dep't of the Navy*, 2025 MSPB 1, ¶ 46. In *Reese*, the MSPB requested amicus briefs on the issue at 89 Fed. Reg. 28816-01 (Apr. 19, 2024). NELA and MWELA, OSC, and AFGE submitted helpful briefs. No amicus brief supported the Navy's contentions. In paragraphs 45 and 46, it made its key holding that Reese's engagement of the Navy's Sexual Assault Prevention and Response (SAPR) policy is protected under 2302(b)(9)(C):

> ¶45 While analyzing the pre-2018 NDAA language, the Board held that any disclosure of information to an OIG or OSC was protected, regardless of its content, as long as the disclosure was made in accordance with applicable provisions of law. *Fisher v. Department of the Interior*, 2023 MSPB 11, ¶ 8. ...
>
> ¶46 Although the appellant's activity involved statements about sexual harassment, which implicates the protections of Title VII, this does not preclude coverage under 5 U.S.C. § 2302(b)(9)(C). The language of section 2302(b)(9)(C), which covers cooperating with or disclosing "information" to certain entities, is devoid of content-based limitations. This is notably different from the anti-retaliation provision for protected disclosures, which contains explicit content-based limitations and therefore has been interpreted as excluding disclosures that fall under Title VII. 5 U.S.C. § 2302(b)(8); see, e.g., Spruill v. Merit Systems Protection Board, 978 F.2d 679, 690-92 (Fed. Cir. 1992); Williams, 46 M.S.P.R. at 554. Moreover, although the applicable legislative history of 5 U.S.C. § 2302(b)(8), as discussed by the Board in Williams, 46 M.S.P.R. at 553-54, supports a finding that section 2302(b)(1) and (b)(8) are mutually exclusive, we have found no comparable legislative history that would limit 5 U.S.C. § 2302(b)(9)(C) in this way.

Unfortunately, the Board also bought the Navy's claim that it would have fired Reese anyway because she had been "rude, disrespectful" "false and misleading" and had "instigated and escalated interactions". The Board held this was "clear and convincing evidence" even though they fired her just 4 days after she announced that she was going to the IG with her concerns.

As of February 27, 2025, participation claims under (b)(9)(C) include contacting the Agency EEO office. *Holman v. Dep't of the Army*, 2025 MSPB 2 (Feb. 27, 2025).

> ¶12 Nevertheless, for the following reasons, we find that the appellant made a nonfrivolous allegation that her EEO activity was protected under 5 U.S.C. § 2302(b)(9)(C).4 Under section 2302(b)(9)(C), it is a prohibited personnel practice to take a personnel action against an employee in reprisal for "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law." Although the appellant's EEO activity concerned alleged violations of Title VII, the subject matter of the appellant's activity does not serve to exclude it from the protections of section 2302(b)(9)(C), which, unlike section 2302(b)(8), is devoid of explicit content-based limitations. See *Reese v. Department of the Navy*, 2025 MSPB 1, ¶ 46.

Unfortunately, the *pro se* Appellant there, Ms. Kali Mary Holman, died on July 4, 2024. See https://www.atlantafuneralhome.com/obituary/Kali-Holman

On remand, the MSPB AJ issued an order requiring Holman to respond within 7 days. She failed to do so and the AJ dismissed the case without prejudice. I do not know if OPM filed a petition for reconsideration in Holman non-withstanding the remand and dismissal.

We can all start thinking about using OSC complaints in federal sector retaliation claims based on participation. For federal sector participation claims, the OSC-MSPB route may be more desirable than the federal EEO process. In my opinion, OSC does a better job of getting meritorious cases to settle. If you get to the merits, the agency burden is to prove its same-decision defense by "clear and convincing evidence." 5 USC 1221(e)(2). The OSC-MSPB route may also be faster (with notable exceptions).

On March 7, 2025, OPM filed a notice that it was exercising its right to ask the MSPB to reconsider before it petitions the Federal Circuit for review. See 5 USC 7703(d). Although the MSPB lost its quorum on April 8, 2025, it nevertheless issued an "order" dismissing OPM's petition on November 19, 2025. As of this writing, there has been no OPM petition for review in a circuit court of appeals. The MSPB holdings in *Reese* and *Holman* stand and OSC and the MSPB AJs should be following them to find WPA protection for EEO participation claims.

For a refusal to violate any law, rule or regulation, it is unclear if the employee must show an actual violation, or if a "reasonable belief" will suffice. If there is any doubt about whether an order actually violates the law, it would be helpful to recast the "refusal" as a "disclosure" of evidence of the violation of the law, rule or regulation.

Private sector cases also show rewards for creative use of participation clauses. See, for example, *McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir. 1996) (protected activity includes endeavoring to obtain an employer's compliance); *Yesudian ex rel. United States v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998) (employees are protected while collecting information about a possible fraud "before they have put all the pieces of the puzzle together"); *Wadler v. Bio-Rad Labs., Inc.*, 916

565 F.3d 1176, 1188 (9th Cir. 2019) (whistleblower is protected for raising concerns and has no duty to investigate them).

O. "Appealable" and "non-appealable" adverse actions.

Certain more serious adverse actions are directly appealable to the MSPB. 5 U.S. C. § 7512. They are:

570 1. Removals
2. Suspensions of over 14 days
3. Demotions
4. Denial of Within-Grade-Increases (WIGIs)
5. Furloughs
575 6. *Constructive* adverse actions

5 U.S. C. § 7512; 5 U.S. C. § 7513(d). Restoration of employment after a workplace injury or leave of absence. 5 C.F.R. § 353.304

"Non-appealable" adverse actions include:

7. Probationary and trial period terminations
580 8. suspensions of up to 14 days
9. Non-selection claims
10. Performance ratings
11. hostile work environments (HWEs)
12. other "personnel actions":

585 **a.** detail, transfer, or reassignment; 5 U.S.C. § 2302(a)(2)(A)(iv)

b. denial of training "if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action" 5 U.S.C. § 2302(a)(2)(A)(ix)

a. a decision to order psychiatric testing or examination; 5 U.S.C. § 2302(a)(2)(A)(x)

b. the implementation or enforcement of any nondisclosure policy, form, or agreement; 5 U.S.C. § 2302(a)(2)(A)(xi). This permits enforcement of 5 U.S.C. § 2302(b)(13).

c. any other significant change in duties, responsibilities, or working conditions; 5 U.S.C. § 2302(a)(2)(A)(xii)

These "non-appealable" adverse actions can be redressed through the OSC/MSPB process for WPA claims, described below.

P. Elections of remedies for "appealable" adverse actions.

When alleging a prohibited personnel practice other than under 5 U.S.C. § 2302(b)(1), the employee may elect one and only one of the following:

1. an appeal to the Board under 5 U.S.C. § 7701;
2. a grievance under the applicable negotiated grievance procedures; or
3. a complaint seeking corrective action from the Office of Special Counsel under 5 U.S.C. chapter 12, subchapters II and III.
4. 5 U.S.C. § 7121(g).

CBA grievance can be the best option if the employee has support of the union and the union will take the grievance to arbitration. The union has experience with arbitrations, is competent to complete the process and has a track record showing success in similar cases.

OSC could be viable if there is no directly appealable adverse action. It is also useful if whistleblower retaliation is the only defense as filing with OSC waives all other defenses. If other time limits were missed, OSC may be the only option left. The time limit for an OSC complaint is 3 years, although the only penalty for missing this time limit is that OSC can dismiss without an investigation. See 5 U.S.C. § 1214(a)(6)(A)(iii). Whistleblowers can then make a timely Individual Right of Appeal (IRA) to the MSPB within 65 days.

MSPB appeals must be made within 30 days of the effective date of the adverse action. 5 C.F.R. § 1201.22(b)(1): an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later.

If the Agency failed to give notice of the effect of electing a remedy, then the Agency cannot later assert an election of remedies. *Kaszowski v. Air Force*, 2023 MSPB 15, Docket No. CH-0752-16-0089-I-1 (Apr. 4, 2023). There, the Appellant had elected to challenge her removal via a union-filed grievance. The Union did not pursue arbitration. The AJ found that, pursuant to 5 U.S.C. § 7121(e), the appellant had elected to challenge her removal through the negotiated grievance procedure, which precluded her Board appeal.

The Board's regulations require that, when an agency issues a decision notice to an employee on a matter appealable to the Board, it must provide the employee with notice of the available avenues of relief and the preclusive effect any election will have on the employee's Board appeal rights. See 5 C.F.R. § 1201.21(d)(1). "Given the various laws and [collective bargaining agreements] that come into play, it is essential that agency notices of appeal and grievance rights state the situation clearly with respect to the particular employee against whom the action is being taken." 64 Fed. Reg. 58,798 (Nov. 1, 1999).

For an election of an option to be binding, it must be knowing and informed. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 16 (2013). The Board has held that, when an agency takes an action without informing the appellant of her procedural options under section 7121 and the preclusive effect of electing one of those options, any subsequent election by the appellant is not binding. Id., ¶ 17; cf. *Johnson v. Department of Veterans Affairs*, 121 M.S.P.R. 695, ¶¶ 6-7 (2014) (finding that the appellant's election to grieve his removal was not binding because the agency's removal decision did not inform him of his right to file a request for corrective action with the Office of

Special Counsel (OSC), or of the effect that filing a grievance would have on his right to file an OSC complaint and a subsequent individual right of action appeal before the Board), *aff'd*, 611 F. App'x 496 (10th Cir. 2015).

In *Kaszowski, t*he decision letter did not explicitly inform the appellant that she could raise the matter at issue with the Board or under the negotiated grievance procedure, "***but not both,***" [emphasis added] 5 U.S.C. § 7121(e)(1), nor did it provide her with notice as to "[w]hether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board," 5 C.F.R. § 1201.21(d)(1).

Agencies may wish to review and update, if necessary, the notice of appeal rights language in their decision notices consistent with the applicable statutes and 5 C.F.R. § 1201.21.

Q. Causation standards

1. Contributing Factor

Congress established a bifurcated "contributing factor" / "clear and convincing" framework for the first time in the Whistleblower Protection Act of 1989 (WPA). A federal sector whistleblower must demonstrate that protected activities were a "contributing factor" in the adverse employment action. 5 U.S.C. § 1221(e)(1). In an oft-quoted statement, Congress characterized a "contributing factor" as:

> any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his [or her] protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action.
>
> 135 Cong. Rec. 5033 (1989)

The MSPB's regulation defines "contributing factor" as "any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(d). "Any" weight given to the protected disclosure, alone or in

combination with other factors, can satisfy the "contributing factor" test. *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

This element is "broad and forgiving," requiring the plaintiff to point to "any factor" that "tends to affect *in any way* the outcome of the decision." *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013) (emphasis in original). The contributing factor need not be "significant, motivating, substantial, or predominant." *Id*. (internal quotation marks omitted). An employee may establish a *prima facie* case by circumstantial, as well as direct, evidence. 5 U.S.C. § 1221(e)(1) (knowledge/timing test).

2. Knowledge/timing test

The WPA explicitly provides that temporal proximity alone establishes a contributing factor. 5 U.S.C. § 1221(e)(1)(B) ("the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action."). In *Mastrullo v. Department of Labor*, the Board stated that the contributing factor element can be shown if the personnel action occurred **within 1 to 2 years** after the protected disclosure. 123 M.S.P.R. 110, ¶¶ 18, 21 (2015).

"Lack of knowledge by a single official is not dispositive," *Shriver v. Dep't of Veterans Affairs*, 89 M.S.P.R. 239, 245-46 (2001). Retaliatory motive may originate with "the agency official who ordered the action" *or* "any officials who *influenced* the action." *Soto v. Dep't of Veterans Affairs,* 2022 M.S.P.R. 6, AT-1221-15-0157-W-1, ¶ 14 (April 20, 2022).

The Supreme Court made clear that animus of someone contributing to the decision making process is sufficient to show causation. *Staub v. Proctor Hospital*, 562 U.S. 411 (2011).

A common employer defense is to deny knowledge of the protected activity. It is harder to deny if the whistleblower has made a written disclosure to the manager. "Revealment letters" arose in union organizing. Today, 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) to support a request for official time. A revealment can become stale after about a year. If the employee has engaged in subsequent protected activities, that too can be revealed in writing.

3. Other methods of showing causation

In *Agoranos v. Department of Justice,* 119 M.S.P.R. 498 (June 7, 2013), the Board held that personnel actions taken more than two years after a protected disclosure can meet the knowledge-timing test where they are part of a continuum of related performance-based actions stemming from the protected disclosure.

This holding is consistent with Title VII case law. *Che v. Mass. Bay Transp. Auth*., 342 F.3d 31, 38 (1st Cir. 2003) (temporal proximity or a pattern of antagonism can prove causation) or *Kachmar v. SunGard Data Sys., Inc*., 109 F.3d 173, 177 (3d Cir. 1997) (temporal proximity is unnecessary if there is a "pattern of antagonism" following protected activity).

Direct evidence. If the employer cited the protected activity as one of the specifications in support of an adverse action, that is strong evidence that it was a contributing factor.

Taking adverse action against an employee because the employee "circumvented the **chain of command**" or otherwise went outside of accepted channels constitutes a violation of the whistleblower protection statutes. *Dutkiewicz v. Clean Harbors Envtl. Servs.*, 95-STA-34, D&O of ARB, at 7, 1997 WL 471980 (Aug. 8, 1997), *aff'd*, *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 24 (1st Cir.

1998); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565 (8th Cir. 1980). In *Dep't Homeland Security v. MacLean*, the Court protected a federal air marshal when he leaked to the media an agency plan to stop air marshals from traveling due to a budget constraint. 574 U.S. 383 (2015). This was certainly a disclosure outside the chain of command. It even violated official agency regulations. The Supreme Court held it was protected, noting that, "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks." *Id.* at 393.

Shifting explanations are a well-recognized basis to find causation. *Fassbender v. Correct Care Sols*., LLC, 890 F.3d 875, 890 (10th Cir. 2018); *EEOC v. Sears Roebuck & Co*., 243 F.3d 846, 852–53 (4th Cir. 2001) (an employer's shifting and inconsistent justifications for taking an adverse employment action "is, in and of itself, probative of pretext").

"**Pretext** exists when an employer does not honestly represent its reasons for terminating an employee." *Miller v. EBY Realty Group LLC*, 396 F.3d 1105, 1111 (10th Cir. 2005). "Resort to a pretextual explanation is, like flight from a scene of the crime, evidence of consciousness of guilt, which is, of course, evidence of illegal conduct." *Sheridan v. DuPont,* 100 F.3d 1061, 1069 (3d Cir. 1996) (quoting *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995)).

The use of **false evidence** reveals knowledge that the party cannot win with the truth. *Martin v. Norris*, 82 F.3d 211, 216 (8th Cir. 1996). Merely being "fishy and suspicious" can be sufficient to undermine an employer's defense. *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000) (quotations omitted).

4. Clear and Convincing Evidence

The WPA permits a finding for the Agency if "the agency demonstrates by **clear and convincing evidence** that it ***would*** have taken the same personnel action in the absence of such

disclosure." 5 U.S.C. § 1221(e)(2) (emphasis added). The "same personnel action" means the exact same. *Whitmore*, 680 F.3d at 1374.

The "clear and convincing" standard is a heightened standard of proof that "concede[s] the possibility of error" but "ensure[s] that the error is generally in one direction." Ralph K. Winter, Jr., *The Jury and the Risk of Non-persuasion*, 5 Law & Soc'y Rev. 335, 339-40 (1971). Through this high standard, Congress decided that whistleblower protections would not be limited to perfect people. "For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies . . . face a difficult time defending themselves." *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997); see also, *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012).

In determining whether the agency can meet that burden, the Board considers the following three "*Carr*" factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The Federal Circuit explained the first *Carr* factor as follows in *Miller*, 842 F.3d at 1259:

> The first *Carr* factor is "the strength of the agency's evidence in support of its personnel action." *Carr*, 185 F.3d at 1323. We do not focus our review of this *Carr* factor on whether the agency has put forward some evidence purporting to show independent causation, but instead we focus on whether such evidence is strong. *See id.* at 1323-24.

The second *Carr* factor, the Agency's motive to retaliate, considers the nature of the whistleblower's disclosures to see if it impugns the reputation of the Agency those officials represent. *Whitmore*, 680 F.3d at 1371 ("When a whistleblower makes such highly critical accusations of an agency's conduct, an agency official's merely being outside that whistleblower's chain of command,

not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment."). It does not require a showing of personal animus against the protected activity, also evidence of such animus can certainly help.

The Federal Circuit explained the third *Carr* factor (comparators) in *Miller v. Dep't of Justice*, 842 F.3d 1252, 1262 (Fed. Cir. 2016):

> The Government provided no evidence that the treatment of Mr. Miller is comparable to similarly situated employees who are not whistleblowers, and the court may not simply guess what might happen absent whistleblowing. The burden lies with the Government.
>
> … [T]he Government's failure to produce evidence on this factor "may be at the agency's peril" considering the Government's advantage in accessing this type of evidence. *Whitmore*, 680 F.3d at 1374 (internal citations omitted). Indeed, "the absence of any evidence concerning *Carr* factor three may well cause the agency to fail to prove its case overall." *Id*.

It is not sufficient for the Agency to show that it ***could*** have taken the same action. *Ready Mix Concrete v. NLRB*, 81 F.3d 1546, 1553 (10th Cir. 1996). The WPA requires the employer to show that it "***would*** have" taken the same action. 5 U.S.C. § 1221(e)(2). The distinction between "would" and "could" is both real and legally significant. See *Knight v. Comm'r*, 552 U.S. 181, 187-88, 192 (2008). The Supreme Court has observed that "proving that the same decision would have been justified ... is not the same as proving that the same decision would have been made." *McKennon v. Nashville Banner Pub. Co*., 513 U.S. 352, 360 (1995) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion) (employer's legitimate reason for discharge in mixed motive case will not suffice "if that reason did not motivate it at the time of the decision").

"Subjective criteria are ready mechanisms for discrimination." *Juaregui v. City of Glendale*, 852 F.2d 1128, 1136 (9th Cir. 1988); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988). An agency defense founded on subjective, pretextual or conclusory assessments would be a weak and

insufficient to permit an agency to prevail. Accord, *Miller v. Dep't of Justice*, 842 F.3d 1252, 1260 (Fed. Cir. 2016).

"Dissenters and whistleblowers rarely win popularity contests or Dale Carnegie awards. They are frequently irritating and unsettling." *Greenberg v. Kmetko*, 840 F.2d 467, 477 (7th Cir. 1988) (en banc) (Cudahy, J., dissenting).

One's First Amendment rights cannot be constrained because the content of their expression is unpopular or will provoke a hostile reaction. *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 134 (1992). In *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985), *cert. denied* 478 U.S. 1011, the nuclear plant could not escape liability when it fired a whistleblower alleging that he could not "get along" with co-workers. No one likes to be criticized. Some workers may see how management responds to a whistleblower and see an opportunity for personal gain by joining on ostracism of that whistleblower.

Whistleblowers can be allowed some leeway for disruptive behavior in connection with protected activity. *Sandul v. Larion,*119 F.3d 1250, 1254–57 (6th Cir. 1997) (vacating grant of summary judgment to police officers in suit by automobile passenger arrested for disorderly conduct for shouting obscenity and giving the finger to police officer); *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) (just the finger); *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965) ("The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.").

The Department of Labor takes a similar approach in whistleblower cases:

> The Secretary [of Labor] has concluded that the operative determination of whether intemperate or insubordinate (unauthorized) behavior may be eligible for protection requires a balancing of interests: "[t]he right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its

> business by correcting insubordinate acts." *Kenneway v. Matlack*, Inc., No. 1988-STA-020, slip op. at 3 (Sec'y June 15, 1989). Even unauthorized conduct may be protected as long as it is lawful and "the character of the conduct is not indefensible in its context." *Id*.
>
> *Lee v. Parker-Hannifin Corp., Advanced Products Business Unit*, ARB No. 10-021, ALJ No. 2009-SWD-3, slip op. 11-12 (ARB Feb. 29, 2012).

IV. WPA Procedure: Filing an OSC complaint

A. Procedure: Use Office of Special Counsel (OSC) Form 14

Use of the form is required. 5 C.F.R. § 1800(c)(1). Filing on-line with osc.gov generates the required form. The complainant can include supplemental material, but consider that supplemental material can be submitted separately to the investigator. The original OSC complaint is often requested to show exhaustion or otherwise during MSPB discovery.

There is NO TIME LIMIT for OSC complaints. However, OSC can decline to investigate complaints filed over 3 years after the adverse action. 5 U.S.C. § 1214(a)(6)(A)(iii). OSC's declination has no effect on the MSPB's IRA jurisdiction.

Complaints can include "disclosures." 5 U.S.C. § 1213. OSC makes referrals to the Agency IG. But, the OSC reviews the IG report to make its own conclusions. Reports sent to President, Congress and the public. https://osc.gov/PressReleases. Complaints that include disclosures are sent to the Disclosure and Retaliation section (DR).

OSC can seek informal (from the Agency) or formal (from the MSPB) stays of an adverse action. 5 U.S.C. § 1214(b)(1).

OSC complaints can be amended by email. *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.").

OSC must acknowledge complaints and report on the status of investigations. 5 U.S.C. § 1214(a)(1). If OSC finds merit in the complaint, the staff will typically not say so to the Complainant or the representative. Instead, OSC staff will ask for the Complainant's settlement position and seek a settlement between the parties. OSC may refer the case to its ADR Unit for mediation.

Agencies would know that OSC's efforts to seek a settlement mean that OSC has found merit in the case. If a settlement is reached during the OSC investigation, then there is no MSPB case in which to file the settlement agreement, and the MSPB regulations for enforcement do not apply. Settlements could be enforced in the Court of Claims. Alternatively, the settlement agreement could provide that the parties will not seek dismissal of the OSC complaint until the Agency has complied with the agreement, or with certain terms of the agreement.

If OSC decides to dismiss the case, OSC must issue "13-day" letters before dismissing it. 5 U.S.C. § 1214(a)(1)(D). This is an opportunity to explain to OSC any errors of fact or law in its reasoning. The 13 days can be extended upon request.

OSC will issue TWO (2) letters upon dismissal. One letter is intended to be shown to the MSPB to show exhaustion. It will list the protected activities and adverse actions alleged. The other states OSC's reasons for dismissal. OSC's letters about the reasons for dismissal **CANNOT be used as evidence**, and disclosure CANNOT be compelled without the whistleblower's consent. 5 U.S.C. § 1214(a)(2)(B)

B. Individual Right of Action (IRA)

IRA appeals to the MSPB are available only for PPPs (b)(8) and (b)(9)(A)(i), (B), (C), or (D). See 5 U.S.C. § 1221(a).

The time limit is 65 days from OSC close-out. 5 U.S.C. § 1214(a)(3)(A)(ii); 5 C.F.R. § 1209.5(a)(1). IRAs can be filed if OSC fails to act within 120 days. 5 U.S.C. § 1214(a)(3)(B).

MSPB has special rules for IRAs at 5 C.F.R. Part 1209.

For PPPs that have no IRA, OSC can file complaints at the MSPB. 5 U.S.C. § 1214(b)(2)(C).

C. MSPB Proceedings

1. Electronic filing is expected through the MSPB's e-appeal system

MSPB appeals can be filed on-line from mspb.gov under "appeals" or "Electronic Filing" and "New Appeal." OSC or the employee can seek a stay of an adverse action. 5 U.S.C. § 1221(c).

2. Election at MSPB to have a hearing

A hearing can be requested with the appeal, or separately within the time limit set by the ALJ. 5 C.F.R. § 1201.24(e). Once made, an election to have a hearing can be withdrawn any time before the hearing. If a hearing is held, the AJ is granted deference in findings about credibility. Issues to be considered may be added at any time, up to and including the pre-hearing statements and conference. 5 C.F.R. § 1201.24(b).

3. AJ will typically ask for a "Jurisdictional Response" and provide 10 days to file it.

Experienced counsel who are not swamped will prepare this memo before filing the IRA appeal. The 10 days can be extended by motion.

To establish jurisdiction over an IRA appeal, the appellant must make non-frivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure, or engaging in other protected activity; and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take a personnel action. *Yunus v. Dep't of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Dep't of Treasury*, 92 M.S.P.R. 298, ¶¶ 11-12 (2002).

To meet the nonfrivolous standard, the appellant need only allege facts that, if proven, would show that the appellant made a protected disclosure, i.e., that the matter disclosed was one which a reasonable person in his or her position would believe evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8). *Mudd v. Dep't of Veterans Affairs*, 120 M.S.P.R. 365, 370 (2013). The Board accepts nonfrivolous allegations to determine the Board's jurisdiction to hear a matter on the merits. Accord *Cassidy v. Department of Justice*, 118 M.S.P.R. 74 (2012); *Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371 (Fed.Cir. 2001); *Riley v. Department of the Army*, 55 MSPR 671, 677 (1992). Any doubt or ambiguity as to whether appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Ingram v. Department of the Army,* 114 M.S.P.R. 43, ¶ 10 (2010); *Kahn v. Department of Justice,* 528 F.3d 1336, 1341 (Fed. Cir. 2008).

Whether an allegation is nonfrivolous is determined on the basis of the written record. *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."). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief. See *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996). Instead of fixating on the precise words used, the charge and related documents must be liberally construed. *Loe v. Heckler*, 768 F.2d 409, 420 (D.C. Cir. 1985) (Ginsburg, J.). If the appellant establishes Board jurisdiction over her IRA appeal, she has the right to a hearing on the merits of her claim. *See Mason v. DHS,* 116 M.S.P.R. 135, ¶ 7 (2011).

Previous Board and Federal Circuit case law is outdated as it does not conform to the Supreme Court's decision in *Fort Bend Cnty., Tex., v. Davis*, 587 U.S. ___, 139 S. Ct. 1843, 1849 (2019). Failure to exhaust is an affirmative defense that is forfeited if the opposing party does not raise it in a timely

manner. The MSPB has also erred in holding that failure to exhaust a particular protected activity deprives it of jurisdiction. *Fort Bend Cnty.* 139 S. Ct. at 1849 (holding that exhaustion is nonjurisdictional in Title VII explaining, "The Court has characterized as nonjurisdictional an array of mandatory claim-processing rules and other preconditions to relief."); *Mount v. U.S. Dep't of Homeland Sec.*, 937 F.3d 37, 45 (1st Cir. 2019) ("[T]he text of the WPA does not dictate such a stringent exhaustion requirement.").

A nonfrivolous allegation is one that, "if proven, could establish the matter at issue." 5 C.F.R. § 1201.57(b). The allegation need not be *actually proven* at this stage. Under the Whistleblower Protection Act ("WPA"), an allegation is nonfrivolous when it is (a) non-conclusory, (b) facially plausible, and (c) material to the legal issues in the appeal. 5 C.F.R. § 2101.4(s). The only determination that may properly be made at this stage is whether any of Appellant's allegations is wholly conclusory, implausible, or immaterial. Any analysis beyond that goes to the merits of his case and is unnecessary to the threshold inquiry on jurisdiction. Moreover, "[a]ny doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction." *Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, ¶ 10 (2010).

4. Discovery

MSPB has strict rules for timely commencement and subsequent processing of discovery. 5 CFR § 1201.73. The rules make clear that AJ enforcement of discovery is disfavored and only those who jump all the hoops on time can get an order compelling discovery. Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response. 5 CFR § 1201.73(d)(1).

Discovery requests, including notices of deposition, must specify the time for responding, and the date time and place of depositions. 5 CFR § 1201.73(a). A notice of deposition that says "at a date, time and place to be agreed upon" is not enforceable. The time to respond to written discovery is TWENTY (20) days. 5 CFR § 1201.73(d)(2).

Any motion for an order to compel or to issue a subpoena must be filed with the judge: (A) Within 20 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired; or (B) Within 10 days of notice that a nonmoving party or nonparty provided an evasive or incomplete answer or response to a discovery request. 5 CFR § 1201.73(d)(3) (as amended September 9, 2024).

The time to serve subsequent discovery requests is TEN (10) days after receipt of a discovery response. 5 CFR § 1201.73(d)(2).

5. Election to file a Petition for Review (PFR) with the MSPB or with the Circuit Court of Appeals

Time to file PFR with MSPB is 35 days from Initial Decision. 5 C.F.R. § 1201.114(e). Time can be extended by motion supported by declaration. 5 C.F.R. § 1201.114(f). Extensions of up to 30 days are routinely granted upon filing a compliant request.

To file with the Circuit Court of Appeals, miss the deadline to file a PFR with the MSPB, and then file a PFR with the Federal Circuit within 60 days of that deadline. 5 C.F.R. § 1201.113; 5 U.S.C. § 7703(b)(1).

If the case involves any issue of discrimination that could have been brought to the EEOC, then no Circuit Court of Appeals has jurisdiction, but the employee has 30 days to file a de novo mixed case civil action. 5 U.S.C. § 7703(b)(2); 5 U.S.C. § 7702. Otherwise, a PFR must be filed in the Federal Circuit within 60 days (waiving any discrimination claims).

When the MSPB lacks of a quorum, serious thought should be given to the option to appeal from an ID directly to a circuit court of appeals.

D. Resources

5. Electronic filing is available through "e-Appeal" https://e-appeal.mspb.gov/etk-mspb-appeals-prod/login.request.do

6. MSPB weekly Case Reports are available at: https://www.mspb.gov/decisions/casereports.htm

7. *A Guide to Merit Systems Protection Board Law and Practice*, by Peter Broida

E. Circuit Court review

Time to file a petition for review in circuit court is SIXTY (60) days from when the MSPB issues a final order, or when an AJ's Initial Decision becomes final. 5 U.S.C. § 7703(b)(1)(B).

Whistleblowers have the option of seeking review of MSPB final orders either in the Federal Circuit, "or any court of appeals of competent jurisdiction." All Circuit Review Extension Act (ACREA), 5 U.S.C. § 7703(b)(1)(B).Congress included the All-Circuit Review Act as part of the WPEA because:

> Restricting appeals to one judicial circuit undermines the basic principle of appellate review applicable to all other whistleblower laws. That principle is based on an informed peer review process which holds all circuit judges accountable. . . . [As appeals courts disagree with each other,] courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute.
>
> By segregating federal employee whistleblowers into one judicial circuit, the WPA avoids this peer review process. In the Federal Circuit no other judges critically review the decisions of the Court, no "split in the circuits" can ever occur, and thus federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable. A "split in the circuits" is the primary method in which the U.S. Supreme Court reviews wrongly decided appeals court decisions.

Id. at 11 (quoting attorney Stephen Kohn, Chair of the National Whistleblowers Center).

Congress gave other circuits jurisdiction precisely so they can disagree with Federal Circuit decisions that fail to protect whistleblowers. Congress went on to admire the way other whistleblower cases are decided in circuit courts by saying, "a multi-circuit appellate review process is available under existing law for many other types of whistleblower claims" and the WPEA would "conform the system for judicial review of federal whistleblower cases to that established for private sector whistleblower cases[.]" *Id*. at 12.

V. Other Prohibited Personnel Practices (PPPs)

A. Listed at 5 U.S.C. § 2302(b)(1)-(14)

1. discrimination
    - **a.** Title VII, ADEA, Equal Pay Act, disability (Rehab Act)
    - **b.** Also marital status or political affiliation
    - **c.** OSC and the MSPB will not enforce them when a remedy is available through the EEO procedures, see 5 C.F.R. § 1810.1; *Edwards v. Department of Labor*, 2022 MSPB 9 (2022), *aff'd Edwards v. Merit Sys. Prot. Bd.*, No. 2022-1967 (Fed. Cir. 2023))
2. References not based on merit
3. Coercing political activity
4. Deceiving or obstructing applicants for federal employment
5. Influencing an applicant to withdraw
6. grant any preference or advantage not authorized by law, rule, or regulation
7. nepotism
8. Whistleblower disclosures
9. Other protected activities

10. The "Catch-All." "discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others"

    a. Protected LGBTQI+ employees before EEOC protected them in *May v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012)

    b. Protects probationary and trial period employees today

    c. Consideration of criminal convictions permitted for suitability and fitness determinations.

11. Veterans preferences

12. Violations of any other law, rule or regulation, including the Merit System Principles in 5 U.S.C. § 2301

13. Implement or enforce any Non-Disclosure Agreements (NDAs) and Gag Orders

    a. such orders must state: "These 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 relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

    b. May not restrict communications to Congress, OSC or any IG

14. Accessing or disclosing medical information

Employees and applicants can file OSC complaints about ANY PPP. If there is no IRA available through 5 U.S.C. § 1221(a), OSC can still makes its own determination and either reach a settlement with the Agency, or commence its own proceeding at the MSPB. 5 U.S.C. § 1214(b)(2).

VI. No election of remedies between OSC and EEO for non-appealable adverse actions.

Adverse personnel actions that are not directly appealable to the MSPB (where mixed cases can be adjudicated) can be challenged through the EEO process and OSC simultaneously. As noted above, OSC can decline to investigate if the only protected activity is also protected by EEO laws. 5 CFR § 1810.1. OSC's decision to decline investigation has no effect on the MSPB's jurisdiction over a subsequent timely IRA appeal.

Collateral estoppel and res judicata can still apply if either proceeding results in a final order.

VII. Mixed cases

Congress provided rules, but little guidance and no statement of purpose. Mixed cases are controversial because most judges outside the Supreme Court disfavor them.

A. What is a mixed case?

It must include "an action which the employee or applicant may appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A). This certainly includes the appealable adverse actions, listed above, from 5 U.S. C. § 7512. Does it also include whistleblower claims for which an "Individual Right of Action" (IRA) appeal can be made to the MSPB? The Fourth Circuit said "no" in a split decision. *Zachariasiewicz v. U.S. Dep't of Justice*, 48 F.4th 237 (4th Cir. 2022). Judge Diaz dissented saying, "I would instead take Congress at its word that an employee need only allege agency action he can appeal to the Board, directly or not, to sustain a mixed case—as is true in an IRA appeal. So I dissent." 48 F.4th at 250.

It must also include an allegation of discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16),
(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

> (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
>
> any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

5 U.S.C. § 7702(a)(1)(B)

B. Where do you file a mixed case complaint?

15. MSPB; 5 U.S.C. § 7702(a)

16. "an agency" presumably through its investigation of formal EEO complaints; 5 U.S.C. § 7702(b)

17. Through a union grievance and arbitration process authorized by U.S.C. § 7121 (so, not USPS union contracts).

Employees **may not use more than one** (except for USPS union employees). See 29 C.F.R. § 1614.302(b). There is a savings clause for filing in the wrong agency. 5 U.S.C. § 7702(f):

> (f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

C. When do you file a "mixed case"?

Direct appeals to the MSPB must be filed within 30 days of the effective date of the adverse action. 5 C.F.R. § 1201.22(b)(1). In mixed cases, the employee may also file within 30 days "after the date of the appellant's receipt of the agency's decision on the appealable action[.]" 5 C.F.R. § 1201.154(a). This is a reference to the Agency FAD. 5 C.F.R. § 1201.154(b).

EEO complaints must be initiated through a request for informal counseling to the Agency's EEO office within 45 days of "the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1).

Because the federal government's administrative procedures for resolving complaints of discrimination are complex and confusing, individuals sometimes file their complaints with the wrong agency. In an effort to deal with this problem, Congress adopted a savings clause: "[i]n any case in which an employee is required to file any action ... under this section and the employee timely files the action ... with an agency *other than the agency with which the action ... is to be filed,* the employee shall be treated as having timely filed the action ... as of the date it is filed with the *proper* agency." 5 U.S.C. § 7702(f) (emphasis added). So how does this provision apply where, as here, the complainant initiates an action before the wrong agency—timely according to the rules of that agency but untimely according to the rules of the proper agency? In *Schlottman v. Perez*, 739 F.3d 21, 22 (D.C. Cir. 2014), the Court stated, "[b]ecause we understand that the savings clause measures timeliness with respect to the deadlines for filing with the *proper* agency, we affirm the district court's dismissal of the complaint.

D. Features of a mixed case

"Agency" has 120 days to decide both the civil service and discrimination claims. 5 U.S.C. § 7702(a)(2). An MSPB AJ has 120 days from the date the employee raises a claim of discrimination. 5 C.F.R. § 1201.156(b). Employees can get an Agency EEO investigation and then appeal to the MSPB. See, 29 C.F.R. § 1614.302(d)(1)(i); 5 C.F.R. § 1201.154(b)(2) (allowing MSPB appeal after 120 day period has expired).

Union arbitration decisions in mixed cases are subject to petitions for review to the MSPB. 5 C.F.R. § 1201.155. PFRs must be filed within 35 days of the arbitrators decision, or within 30 days of receipt of the decision, whichever is later.

Agency EEO FADs in mixed cases may be appealed to the MSPB. 29 C.F.R. § 1614.302(d)(1)(ii). MSPB decisions on discrimination claims can be appealed to EEOC. 29 C.F.R. § 1614.303. Time

limit is 30 days from a final MSPB decision. Decisions of the MSPB on PFRs are final when issued. AJ Initial Decisions are final on the 35th day after issuance if no PFR is filed; 5 C.F.R. § 1201.113.

If the EEOC and MSPB disagree about an employee's discrimination claim, a "special panel" will be convened to resolve the dispute. 5 U.S.C. § 7702(d).

Employees can file in federal district court any time after the 120 day time limit for a final decision has passed and there is no final decision. 5 U.S.C. § 7702(e). However, if a Final Agency Decision (FAD) is issued, then the time limit is 30 days of the (FAD). 29 C.F.R. § 1614.310. It is also 30 days of a final MSPB decision. 5 C.F.R. § 1201.157.

District court will have jurisdiction over civil service issues even if discrimination claim fails on the merits. *Perry v. Merit Sys. Protection Bd.*, 137 S.Ct. 1975 (2017) (reaffirming the district court's jurisdiction over all claims in a mixed case). *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011) (remanding the WPA claim for a jury trial, even after affirming dismissal of the discrimination claim).

A jury's decision on the discrimination claim is binding on the court's review of the civil service claims. "The Seventh Amendment demands that facts common to legal and equitable claims be adjudicated by a jury." *U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc.,* 675 F.3d 394, 404 (4th Cir. 2012), citing *Lytle v. Household Mfg*., 494 U.S. 545, 550, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990) ("When legal and equitable claims are joined in the same action, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.") (quotation marks omitted).

VIII. "Private Sector" remedies available to federal employees.

Several whistleblower protections enacted for the private or state and local sectors actually protect federal employees as well.

1. Federal Water Pollution Control Act (WPC or Clean Water Act) applies to "federal facilities" pursuant to 33 U.S.C. 1323(a). See *Conley v. McClellan Air Force Base*, 84-WPC-1 (Sec'y Sept. 7, 1993).

2. Clean Air Act protects federal employees. *Erickson v. U.S. Environmental Protection Agency*, ARB Nos. 04-024, 04-025, ALJ Nos. 2003-CAA-11 and 19, 2004-CAA-1 (ARB Oct. 31, 2006) (although EPA OIG and individual supervisors are not "employers" separate from the EPA itself); *Fox v. U.S. Environmental Protection Agency*, 2004-CAA-4 and 10, 2005-CAA-6 (ALJ Mar. 1, 2005), recon. denied (ALJ Mar. 15, 2005); *Jones v. EG & G Defense Materials, Inc*. ,1995-CAA-3 (ARB Sept. 29, 1998) (relying on 42 U.S.C. § 7602(e)); *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994).
3. Energy Reorganization Act (ERA) was amended in 2005 to cover employees of the NRC, DoE, and NRC contractors. 42 U.S.C. § 5851.
4. Solid Waste Disposal Act (SWDA), *Greene v. Environmental Protection Agency*, 2002 SWD 1 (ALJ Feb. 10, 2003) (EPA is an "employer").
5. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Super Fund"). *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994), the Secretary found that CERCLA, 42 U.S.C. §§ 9610, 9620(a)(1), expressly subjects an agency of the United States to the employee protection provision. Specifically, the Secretary found EPA to be a "person" within the meaning of 42 U.S.C. § 9610.
6. Safe Drinking Water Act (SDWA). *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994). [I]mmunity is waived under the CERCLA, SDWA, and CAA by expressly including the United States within the definition of the term "person." The Federal facilities provisions of the SDWA, CAA, CWA, and SWDA, while describing Federal agencies reasonably expected to be affected, can be construed to waive immunity generally, thereby providing Federal employees as well as non-Federal employees with statutory whistleblower protection.
    a. Note that the Safe Drinking Water Act also permits "where appropriate, exemplary damages." 42 U.S.C. §300j-9(i)(2)(B)(ii).

Each of these federal environmental laws has a time limit for complaints to OSHA. 180 days for ERA, 30 days for each of the others. See 29 CFR Section 24.103(d). Collateral estoppel may apply to decisions under these laws if federal employees subsequently seek relief under the WPA.

IX. Subgroup discrimination and deviation from stereotypes can indicate retaliation against whistleblowers.

The Supreme Court has recognized that discrimination against a subgroup of a protected class is just as unlawful as discrimination against the whole class. *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971) (refusal to hire women with pre-school-age children held unlawful). Being nice to most women does not justify discrimination against others.

Similarly, in *Connecticut v. Teal*, 457 U.S. 440 (1982), Justice Brennan rejected a "non-discriminatory" bottom line in writing that "Congress never intended to give an employer license to discriminate against some [persons of a certain race] merely because he favorably treats other members of the employees' group." *Id*. at 455.

See also, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993) (employer decisions "based in large part on ***stereotypes unsupported by objective fact***," are "***the essence of what Congress sought to prohibit*** in the ADEA," quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (emphasis added)). See also, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989) (woman who deviates from stereotype protected from discrimination).

These doctrines are equally applicable to whistleblowers shunned as "trouble makers," unable to go along with illegality just to get along. In *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985), cert. denied 478 U.S. 1011, the nuclear plant could not escape liability when it fired a whistleblower alleging that he could not "get along" with co-workers.

Modern adjudicators of employment discrimination cases understand that modern employers know the rules and know how to avoid admissions of illegality. Eyewitness testimony concerning an "employer's mental process" seldom exists. Questions facing the triers of fact in discrimination cases are "both sensitive and difficult." *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 120 S.Ct. 2097, 2105 (2000). "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. … It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action … ." *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006). Similarly, in *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074 (3d Cir. 1996), the court articulates a fact of life: "It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality

discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind." *Id*. at 1081-82. That is why, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), Justice Thomas said that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" Accordingly, a determination of the central issue of intent must include consideration of all the surrounding circumstances. Indeed, employee protection cases may be based entirely on circumstantial evidence of discriminatory intent. See *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall* , 629 F.2d 563, 566 (8th Cir. 1980)).

The law calls for consideration of all the surrounding circumstances to understand the disparate treatment at issue in its context. Accord *Oncale v. Sundowner Offshore Servs., Inc* ., 523 U.S. 75, 82 (1998); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir.1990)("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario"). In assessing a dispute about intent, courts must consider the totality of circumstances. *United States v. Arzivu*, 534 U.S. 266 (2002) (Justice Rehnquist admonishes the lower courts for examining the facts surrounding the investigatory stop in isolation. Only by viewing the totality of the circumstances could the court give due weight to the factual inferences drawn by the border patrol agent in deciding to conduct the stop.) As such, the evidentiary standard for relevance under F.R.E. 401 tends to be "extremely liberal" in employment cases. *Douglass v. Eaton Corp*., 956 F.2d 1339, 1344 (6th Cir. 1992); *Parker v. Secretary, U.S. Dept. of Housing and Urban Dev*., 891 F.2d 316, 322 (D.C. Cir. 1989). Per se rules of relevance or discoverability are improper. The Supreme Court recently made clear that categorical limits on relevant evidence are improper in discrimination cases. *Sprint/United*

Management Co. v. Mendelsohn , 552 U.S. 379 (2008) (Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules. See Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 864).

X. The Next WPA Enhancement Act.

Since Congress passed the 2012 Whistleblower Protection Enhancement Act (WPEA), it has gone back to amend 5 U.S.C. § 2302 EIGHT additional times. It is time for the NINTH.

Here is our proposal for the next WPEA:

1. Permitting federal court jury trials like EEO claims, but without the cap
2. Eliminating the requirements for public health and safety concerns to be "substantial and specific."
3. Adding to 2302(f)(1) these additional prohibited reasons for excluding a disclosure from protection:
   - **a.** the persons committing any violations or other misconduct are or are not federal employees (to reverse Aviles)
   - **b.** the violation of law, rule or regulation is a violation of an anti-discrimination law listed in section (b)(1) or subject to processing by the EEOC
   - **c.** the violation or other misconduct is unlikely to recur
   - **d.** the protected activity was not described in any complaint to the Office of Special Counsel, as long as the adverse action was so described.
4. Adding to 5 U.S.C. § 1221(e)(2) the following:
   - **a.** Agency evidence will not be clear and convincing if:
     - **i.** it includes a subjective assessment
     - **ii.** it is based on negative perceptions expressed after protected activity
     - **iii.** it is intertwined with the protected activity
     - **iv.** it is pretextual
     - **v.** it is uncorroborated

vi. the evidence is disputed and the Agency could have collected or preserved evidence, such as electronically stored information or video or audio surveillance, but failed to do so.

vii. The Agency's action against the employee or applicant is unprecedented or otherwise a deviation from its standard of discipline (as established by recent discipline against non-whistleblowers) or a deviation from normal practices

viii. the evidence is of conduct by the employee or applicant that did not cause significant harm to the Agency

ix. the Agency treated the employee or applicant more harshly than it treated employees who committed the misconduct the employee or applicant disclosed.

x. the Agency could have used a lesser level of progressive discipline.

XI. Private sector remedies

A. OSH Act, Section 11(c)

In 1970, Congress passed the Occupational Safety and Health (OSH) Act. Legislators wisely anticipated that employees would be an important source of tips about unsafe practices in workplaces, but they would be reluctant to speak up if they could be fired for doing so. Section 11(c) of the OSHA Act, 29 U.S.C. §660(c), prohibits employers from taking reprisals against employees who raise safety concerns or participate in official investigations. Congress did not create a private right of action for the whistleblowers, but instead authorized only the Secretary of Labor, if OSHA finds violations, to file enforcement actions in federal court . Congress also established a 30-day time limit for initial complaints. Even with these shortcomings, Section 11(c) complaints still make up most of the whistleblower complaints received by the Department of Labor.[1]

1 Specifically, 1,932 of the 3,303 complaints received in FY 2017. See https://www.whistleblowers.gov/factsheets_page/statistics

B. Mine Health and Safety Act

Also in 1970, Congress passed the anti-retaliation provision of Federal Mine Health and Safety Act, now at 30 U.S.C. § 815(c). In *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975), Judge Wilkey captured the essence of whistleblower protection and held that the protection for causing a complaint to be filed with the government also protects internal whistleblowing:

> Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. [fn 24] The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management. Only if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.
>
> n. 24 Responsible mine operators who comply with health and safety standards have an obvious interest in seeing uniform standards enforced throughout the industry: competitors who get away with cutting costs by cutting safety are really engaged in unfair competition; the temptation to meet it by engaging in similar tactics is ever-present.
>
> ***
>
> To hold that Phillips was not protected against discharge because he took the first prescribed step under the Kencar procedure to invoke the Mine Safety Act, to hold that only a miner's discharge after he reaches the Bureau of Mines with his complaint is protected by the Safety Act, would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines.

Today, mine safety whistleblowers are entitled to interim orders of reinstatement unless MSHA finds that the retaliation complaint is "frivolously brought." 30 U.S.C. § 815(c)(2).

C. Environmental laws

As the environmental movement led to a rash of lawmaking, Congress used Section 11(c) of the OSH Act, and the Mine Health and Safety Act as models for creating whistleblower protections. Congress passed seven environmental laws with whistleblower protections, and these laws gave

whistleblowers ownership of their own claims and a right to litigate those claims before administrative law judges (ALJs). Still, complaints had to be filed within 30 days of each adverse action. See 29 CFR § 24.103(d).[2] Nuclear whistleblowers are allowed 180 days to file a complaint, and are entitled to conspicuous posting of the OSHA poster about this protection. 42 U.S.C. § 5851(i).

Two environmental laws, the Safe Drinking Water Act, 42 U.S.C. §300j-9, and the Toxic Substances Control Act, 15 U.S.C. §2622, permit recovery of exemplary or punitive damages.

D. Transportation laws.

Congress used similar language in the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, the 2007 Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109, the National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142, and the Seaman's Protection Act (SPA), 46 U.S. C. § 2114. Together, these laws cover practically all transportation workers. The pattern points to a congressional desire to draw upon the established body of law for a broad scope of protection.

Two of these laws include election-of-remedies provisions that bar the complaint if the whistleblower has sought "protection under both this section and another provision of law for the same allegedly unlawful act[.]" 6 U.S.C. § 1142(e); 49 U.S.C. § 20109(f). The FRSA also protects, "requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician[.]"49 U.S.C. § 20109(c)(2).

E. Sarbanes-Oxley Act (SOX) and reasonable belief.

While SOX is outside the scope of this panel, some SOX cases have set important precedent for all DOL whistleblower cases.

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2 My article about the environmental laws is at http://www.taterenner.com/whistleblowers.php

On May 25, 2011, the Administrative Review Board (ARB) issued its most significant decision construing the scope of protected conduct under SOX, *Sylvester v. Parexel International, LLC.*, ARB No. 07-123, 2007-SOX-039, 042, 2011 WL 2165854, at *18 (ARB May 25, 2011). After inviting and receiving supplemental *amicus* briefs from divergent stakeholders, the ARB issued an *en banc* decision that swept away years of restrictive applications of SOX and protected activities in general. Gone is the rule that protected activity is limited to disclosures of conduct that "definitively and specifically" relates to one of the six categories of unlawful acts set forth in the statute. Gone are the *Iqbal* and *Twombly* pleading standards for DOL complaints. Moreover, the days in which ALJs would grant motions to dismiss should now be largely gone. "SOX claims are rarely suited for Rule 12 dismissals." *Id*. at 13. The ARB explains:

> They involve inherently factual issues such as "reasonable belief" and issues of "motive." In addition, we believe ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort.

In place of the old "definitive and specific" standard for determining whether an activity is protected, the ARB now uses the "reasonable belief" standard. The ARB noticed that the Senate Committee Report for SOX actually adopted this standard from *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993). S. Rep. 107-146 at 19 (May 6, 2002). To be "reasonable," a belief must be sincerely held (subjective test) and objectively reasonable (objective test). 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).

Importantly, a "reasonable belief" is determined based on the complainant's experience and observations, and not on what the complainant communicated to the employer. *Sylvester*, p. 15, citing, *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006). "Certainly, those communications [to

the employer] may provide evidence of reasonableness or causation, but a complainant need not actually convey reasonable belief to his or her employer." *Id*. citing, *Collins*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004) (it is sufficient that the recipients of the whistleblower's disclosures understood the seriousness of the disclosures).

In a concurring opinion, Judge E. Cooper Brown said of the reasonable belief standard that, "This is not a demanding standard." *Sylvester*, p. 33. Employees are protected when they raise concerns about future violations, too. "As we explained in *Sylvester*, disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen." *Funke v. Federal Express*, ARB No. 09-004, ALJ No. 2007-SOX-043, slip op. 11 (ARB July 8, 2011),[3] citing *Sylvester*, ARB No. 07-123, slip op. 16.

"[O]bjective reasonableness is a mixed question of law and fact" and thus subject to resolution as a matter of law "if the facts cannot support a verdict for the non-moving party." *Welch v. Chao*, 536 F.3d 269, 278 (4th Cir. 2008) (SOX case).

F. Consumer protection whistleblower laws.

Five modern whistleblower laws protect consumers from dangerous products, unsafe food, unfair financial practices and reprisals for exercising rights under the Affordable Care Act.

The Consumer Product Safety Improvement Act (CSPIA), 15 U.S.C. § 2087, protects those who raise concerns within the jurisdiction of the Consumer Product Safety Commission (CPSC). Other statutes within the scope of this whistleblower protection include the Children's Gasoline Burn Prevention Act (Pub. L. 110-278, 122 Stat. 2602 (2008)), the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.), the Flammable Fabrics Act (15 U.S.C. 1191 et seq.), the Poison Prevention

3 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_004.SOXP.PDF

Packaging Act (15 U.S.C. 1471 et seq.), the Refrigerator Safety Act (15 U.S.C. 1211 et seq.), and the Virginia Graeme Baker Pool and Spa Safety Act (15 U.S.C. 8001 et seq.). Food, cars and some other consumer products are excluded.[4]

The Dodd-Frank Act included a new protection for whistleblowers raising concerns within the scope of the Consumer Financial Protection Bureau. 12 U.S.C. § 5567. Pursuant to 12 U.S.C. § 5481(14), this scope includes a variety of consumer protection laws involving mortgages, debt collection, electronic funds, discrimination, billing, and credit reports.[5] This law also generally makes unenforceable predispute agreements that require arbitration of CFPA claims. 12 U.S.C. §5567(d).

The Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d, protects twenty million Americans who work with food production, transport, storage, preparation or sales. Although the text of the FSMA limits the scope of protection to food safety concerns enforced by the Food and Drug Administration (FDA), the reasonable belief doctrine will often apply for those raising other concerns, such as concerns about meat, eggs and dairy products enforced by USDA. Refusing to violate standards or serve unsafe food would also be protected.

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4 The Consumer Product Safety Act also excludes tobacco, pesticides, firearms, aircraft, boats, drugs, medical devices and cosmetics. 15 U.S.C. § 2052(a)(5). However, the ARB has held that a food safety whistleblower can find protection based on a reasonable belief that the CPSIA provided protection. *Saporito v. Publix Super Markets, Inc*., ARB No. 10-073, ALJ No. 2010-CPS-1, Decision and Order of Remand (ARB Mar. 28, 2012).

5 Specifically, these laws are the Alternative Mortgage Parity Act of 1982, 12 U.S.C. §§ 2801 et seq. (2006); the Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667 et seq. (2006); most of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693 et seq. (2006); the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq. (2006); the Fair Credit Billing Act, 15 U.S.C. §§ 1666 et seq. (2006); most of the Fair Credit Reporting Act, 15 U.S.C §§ 1681 et seq. (2006); the Home Owners Protection Act of 1998, 12 U.S.C. §§ 4901 et seq. (2006); the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. (2006); parts of the Federal Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f) (2006); parts of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802-09 (2006); the Home Mortgage Disclosure Act of 1975, 12 U.S.C §§ 2801 et seq. (2006); the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1601 note (2006); the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101 et seq. (2006); the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (2006); the Truth in Savings Act, 12 U.S.C. §§ 4301 et seq. (2006); section 626 of the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8; and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 (2006).

In 2012, Congress created a new whistleblower protection in the Moving Ahead for Progress in the 21st Century Act (MAP-21), P.L. 112-14, codified at 49 U.S.C. 30171.[6] MAP-21 protects the employees of motor vehicle manufacturers, part suppliers, or dealerships when they raise concerns about defects or other noncompliance with the safety, reporting and notification requirements. MAP-21 and the FSMA fill important holes left by the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087; 29 C.F.R. Part 1983. Since auto safety is regulated by the National Highway Traffic Safety Administration (NHTSA), and not the Consumer Product Safety Commission, the CPSIA protection offered nothing to auto safety whistleblowers. Now MAP-21 provides that protection.

Under MAP-21, the time limit to file an initial retaliation claim is 180 days. Once an employee shows the protected activity was a contributing factor in the adverse action, the employer can prevail only with clear and convincing evidence that it would have taken the same action without the protected activity. Once a case has been pending at the Department of Labor for 210 days without a final order, and the complainant has not caused that delay through bad faith, the complainant may file a civil action in U.S. District Court, and may demand a jury trial. MAP-21 does not provide for any punitive damages, and does not provide any protection from forced arbitration agreements. If a complainant files a frivolous claim, the Department of Labor may order reverse attorney's fees of up to $1,000.

6 Available at: http://www.whistleblowers.gov/acts/map21.html

G. Affordable Care Act.

Section 1558 of the Affordable Care Act, 29 U.S.C. § 218C, protects employees when they receive a subsidy for health care insurance, or take other actions to assist with enforcement of the insurance provisions of the Act. On October 16, 2016, OSHA issued final rules for handling whistleblower complaints under Section 1558 of the Affordable Care Act. See 29 CFR Part 1984, 81 FR 70620. OSHA's background statement contains a helpful description of the new employee protection:

> Section 1558 of the Affordable Care Act amended the Fair Labor Standards Act (FLSA) to add section 18C, 29 U.S.C. 218C (section 18C), which provides protection to employees against retaliation by an employer for engaging in certain protected activities.
>
> Under section 18C, an employer may not retaliate against an employee for receiving a credit under section 36B of the Internal Revenue Code of 1986 (Code) or cost-sharing reductions (referred to as a "subsidy" in section 18C) under the Affordable Care Act. ***
>
> Since 2015, under section 4980H of the Code, certain employers (referred to as applicable large employers) must either offer health coverage that is affordable and that provides minimum value to their full-time employees (and offer coverage to their dependents), or be subject to an assessable payment (referred to as an "employer shared responsibility payment") payable to the IRS if any full-time employee receives the premium tax credit for coverage through an Exchange. Thus, the relationship between the employee's receipt of the premium tax credit and the potential employer shared responsibility payment imposed on an applicable large employer could create an incentive for an employer to retaliate against an employee. Section 18C protects employees against such retaliation.
>
> Section 18C also protects employees against retaliation because they provided or are about to provide to their employer, the federal government or the attorney general of a state, information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of or amendment made by title I of the Affordable Care Act; testified or are about to testify in a proceeding concerning such violation; assisted or participated, or are about to assist or participate, in such a proceeding; or objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any provision of title I of the Act (or amendment), or any order, rule, regulation, standard, or ban under title I of the Act (or amendment). Among other provisions, title I of the Affordable Care Act

> includes a range of health insurance market reforms such as: The prohibition on lifetime and annual dollar limits on essential health benefits, the requirement for non-grandfathered plans to cover certain recommended preventive services with no cost sharing, and a prohibition on pre-existing condition exclusions.

Some employers reviewed their employees to determine which of them may expose the employer to tax penalties under the ACA. Some of these employees have been discharged, or had their hours reduced. Consider that the Department of Labor and courts have recognized valid whistleblower claims arising from an employer's mistaken belief that the employee engaged in protected activity,[7] or an anticipation of future protected activity.[8] Why should employees be denied protection under the ACA when their employer anticipates that their employment will lead to their participating in subsidies or other benefits or proceedings under the ACA?

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7 Indeed, it is incorrect to say that a prima facie case of retaliation requires a showing of protected activity at all. An employer subjected to a law enforcement investigation might mistakenly retaliate against an employee who engaged in no protected activity. That employee is still protected from "discrimination" on account of identification, albeit mistaken, as a whistleblower. *Reich v. Hoy Shoe, Inc*., 32 F.3d 361, 368 (8th Cir. 1994); *Brock v. Richardson*, 812 F.2d 121, 123-25 (3d Cir. 1987); *Evans v. Baby Tenda*, 2001 CAA 4 (ALJ Sept. 30, 2002) (Complainant terminated in part on the mistaken belief that she had taken actions that actually had been taken by another employee; ALJ held that: "If an employer is free to fire anyone other than the [employee who actually engaged in the protected activity], then that employer is free to eviscerate the [Act]."). See also, *Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016), discussed above.

8 *Grant v. Hazelett Strip-Casting*, 880 F.2d 1564, 1570 (2nd Cir. 1989)(finding protected activity in attempting to gather evidence for a future lawsuit). The "filed or about to be filed" language in the anti-retaliation prohibition of the False Claims Act protects employees who are collecting information about possible fraud "before they have put all the pieces of the puzzle together." See, *e.g*., *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998). In *MacLeod v. Los Alamos National Laboratory*, 94-CAA-18 (ARB Apr. 23, 1997), the complainant threatened to allege that she had not been properly supervised or certified , and that if she was going to be held accountable, then everyone up the line should be held accountable. The Board held that the threat to expose alleged wrongdoing was protected. While Complainant may not have exhibited the maturity or responsibility that her supervisor sought in an employee by failing to "take ownership" of the mistake, Complainant was making protected allegations and threats to expose wrongdoing by management. See also, *Saporito v. Central Locating Services, Ltd*., ARB No. 05-004, ALJ No. 2004-CAA-13 (ARB Feb. 28, 2006), slip op. At 10 (threat to report violations in the future is protected); *Oliver v. Hydro-Vac Services, Inc*., 91-SWD-1 (Sec'y Nov. 1, 1995) (Complainant was protected in that he was about to contact the authorities about his concerns).

Note that Section 1557 of the ACA contains a broad anti-discrimination provision. As this section is part of Title I of the ACA, raising concerns about discrimination in health benefits would be within the protection of Section 1558.

Employees have 180 days to commence their ACA retaliation claims.

1445 **H. Time limits to file complaints.**

Time limits to file complaints have been expanded to 90 or 180 days in modern laws, although Section 11(c) and the environmental laws still impose a 30-day time limit. Here is a chart of these laws and their time limits:

Time limit	Law	Citation
30 Days	Occupational Safety and Health Act	29 U.S.C. §660, Section 11(c)
	Federal Water Pollution Control Act (FWPCA)	33 U.S.C. §1367
	Clean Air Act (CAA)	42 U.S.C. §7622
	Comprehensive Environmental Response, Compensation and Liability Act ("Superfund Law" or CERCLA)	42 U.S.C. §9610
	Safe Drinking Water Act (SDWA)	42 U.S.C. §300j-9(i)
	Solid Waste Disposal Act (SWDA); including the Resource Conservation and Recovery Act (RCRA)	42 U.S.C. §6971
	Toxic Substances Control Act (TSCA)	15 U.S.C. §2622

60 Days	International Safe Container Act (ISCA)	46 U.S.C. §80507
60 Days	Mine Health and Safety Act (complaints go to MSHA)	30 U.S.C. §815(c)
90 Days	Asbestos Hazard Emergency Response Act (AHERA)	15 U.S.C. §2651(b)
	Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)	49 U.S.C. §42121
180 Days	Other laws enforced by OSHA, including STAA, ERA, SOX, FRSA, NTSSA, PSIA, CPSIA, ACA, SPA, FSMA, CFPA and MAP21.	

In addition, Congress has attached independent whistleblower protections to a wide variety of laws. Many of these, such as the Fair Labor Standards Act, 29 U.S.C. § 215(c), the False Claims Act, 31 U.S.C. § 3730(h), and the banking laws, provide for a direct cause of action in federal court. Others, such as the National Labor Relations Act, 29 U.S.C. § 157, and sequence, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), and the Military Whistleblower Protection Act, 10 U.S.C. § 1034, create their own administrative procedures for enforcement. Finally, building on the success of qui tam actions under the False Claims Act, some new laws are creating rewards for whistleblowers who help federal and state agencies collect funds, fines and penalties. These include the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 7 U.S.C. § 26; 17 C.F.R. 165 (commodities), and 5 U.S.C. § 78u-6; 17 C.F.R. Parts 240, 249 (SEC awards), and a whistleblower reward program at the IRS.

This paper is meant to provide an overview of whistleblower laws to assist practitioners with claim identification, and initiation of complaints in the correct forum. For those 22 laws enforced

through the Department of Labor program,[9] that begins the complaint process begins with filing a claim with OSHA.

XII. The NRC requires a Safety Conscious Work Environment (SCWE).

The growth and development of internal compliance programs has set new industry standards. The Nuclear Regulatory Commission (NRC) promulgated 10 CFR Part 21 in 1977 to require the reporting of certain defects and noncompliances. It implements Section 206 of the Energy Reorganization Act of 1974 (ERA), as amended, relating to noncompliance. The ERA also contains a whistleblower protection at 42 USC § 5851. NRC also requires licensees to maintain a "safety conscious work environment" (SCWE) that encourages employees to participate in safety programs. 61 FR 24336.

XIII. Investigatory Process at OSHA

A. Directorate of Whistleblower Protection Programs (DWPP)

Late in 2012, OSHA established the Director of the new Whistleblower Protection Program (DWPP).[10] The Directorate has its own web page: http://www.whistleblowers.gov/ It is at:

Directorate of the Whistleblower Protection Program (DWPP)
U.S. Dept. of Labor, OSHA
200 Constitution Avenue, NW, Rm N-4624
Washington, DC 20210
(202) 693-2199
Call OSHA Toll Free: 1-800-321-OSHA (6742)

Creating DWPP raised the visibility of whistleblower protection and signaled greater emphasis on OSHA's enforcement of those laws.

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9 DWPP's informative desk reference of the laws within its jurisdiction is at: http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf

Desk Aids for particular laws are available at: https://www.whistleblowers.gov/desk-aids

10 See the August 1, 2011, report: http://www.whistleblowers.gov/report_summary_page.html

B. Filing an initial complaint.

No particular form of pleading is required for initial complaints at DWPP. See, for example, 24 CFR § 24.103(b). Although a pleading comparable to those in federal courts can also be used, a simple letter is sufficient. Complaints can also be filed by phone, fax, or on-line. Complaints can be amended or supplemented.

While a whistleblower complaint filed at DOL need not meet *Iqbal-Twombly* plausibility pleading standard, it is important to describe the protected activities, list all the adverse actions, and identify all the responsible entities to ensure that the complainant exhausts administrative remedies at OSHA.

Once a whistleblower complaint is filed, OSHA will typically forward a copy to the federal agency with enforcement authority over the issues raised in the protected activity. For example, an AIR 21 complaint will be forwarded to the FAA, STAA complaints to FMCS, food safety complaints to FDA, and so on so they are aware of the underlying allegations (e.g., airline safety violations) and investigate accordingly

C. Timeliness

In *Avlon v. American Express Co*., ARB No. 09-089, ALJ No. 2008-SOX-51, Final Decision and Order of Remand (ARB May 31, 2011),[11] the ARB reversed an ALJ dismissal on timeliness, holding that the statute of limitations period starts with the "final, definitive and unequivocal notice of an adverse employment decision."[12] *Avlon*, p. 12.

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11 Available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_089.SOXP.PDF

12 The ARB held that a statue of limitations in whistleblower cases starts to run when an employee receives "final, definitive and unequivocal notice of an adverse employment decision." *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No.2008-SOX-055, slip op. At 6 (ARB Apr. 30, 2009); *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, -128; ALJ No. 1997-ERA-053, slip op. at 40-41 (ARB Apr. 30, 2001), citing *Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus

D. The Investigative Process

OSHA conducts investigations through regional a team of Whistleblower Investigators (WBIs) located through the country. The structure is regional: WBIs report to Regional Supervisory Investigators who, in turn, typically report to an Assistant Regional Administrator. If there is enough evidence to open an investigation, a WBI investigates the cases and is often also involved in attempting to resolve the case informally. The investigatory and settlement procedures are set forth in OSHA's Whistleblower Investigations Manual that was updated in 2017.[13] If a case does not settle, OSHA issues findings, which take different formats depending on the statute. Some statutes also require OSHA to issue Due Process Letters before issuing final findings.

DWPP statistics[14] show that from 2007 to 2017, OSHA issued 29,382 determinations, of which 533 were merit findings. Thus, merit findings issue at a rate of 1.8%. 6,806 cases settled, and another 533 "kicked out" to federal court.

OSHA has adopted an Expedited Case Processing (ECP) policy that permits a complainant to request that the OSHA investigation be closed administratively to permit the complainant to request a

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contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful), and *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). "The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation." *Overall*, ARB Nos. 98-111, -128, slip op. at. 40. "Final" and "definitive" notice is a "communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change." *Snyder*, ARB No. 09-008, slip op. at 6; *see also Halpern* v. *XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005). Unequivocal" notice is a "communication that is not ambiguous, i.e., free of misleading possibilities." *Ibid.; see also Halpern*, ARB No. 04-120, slip op. 3, *cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994). See also, *Poli v. Jacobs Engineering Group, Inc*., ARB No. 11-051, ALJ No. 2011-SOX-27, Decision and Order of Remand (ARB Aug. 31, 2012).

13 Available at: https://www.whistleblowers.gov/sites/default/files/CPL_02-03-007_annotated.pdf

14 Available at: https://www.whistleblowers.gov/factsheets_page/statistics

hearing with an Administrative Law Judge (ALJ). Electing to use the ECP will save a complainant months or years of waiting for OSHA to complete an investigation – a wait that most often ends in a disappointing result.

E. Settlements at OSHA.

OSHA encourages early resolution and assists with those efforts. In addition to assisting with negotiation efforts, OSHA has an Alternative Dispute Resolution (ADR) Program[15] – which is essentially pre-litigation mediation. The program is separate from Settlement Judge Program of the Office of Administrative Law Judges (OALJ), which is available once cases are in litigation before the OALJ. Participating in the OSHA ADR program can result in a delay in issuance of an OSHA determination. Settlement agreements reached through mediation (as other agreements should be) need to be submitted to OSHA for approval. The approval process assures that the agreement contains no restraints on future protected activities. In addition, OSHA evaluates whether a clause barring rehiring will preclude the complainant from working in his or her profession, although OSHA does not prohibit no rehire bans in settlement agreements.

F. OSHA updates regulations.

OSHA has updated its regulations for several whistleblower statutes in recent years. Changes include allowing OSHA to receive and record **oral complaints.** Having an OSHA investigator record a telephone call can meet the time limit for a complaint (which can be amended in writing later). See, for example, 29 CFR 1978.103(b) ("No particular form of complaint is required. A complaint may be filed orally or in writing.") Also, complainants and their counsel should find it easier to receive materials submitted by the employer:

15 Available at: https://www.osha.gov/news/newsreleases/trade/08192015

> 29 CFR Section 1978.104(c) provides that, throughout the investigation, the agency will provide the complainant (or the complainant's legal counsel if the complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint, with confidential information redacted as necessary, and the complainant will have an opportunity to respond to such submissions; and
>
> 29 CFR Section 1978.104(f) provides that the complainant will receive a copy of the materials that must be provided to the respondent under that paragraph, with confidential information redacted as necessary.

In 2016, OSHA issued final rules for handling whistleblower complaints under the 2010 Seaman's Protection Act. See 29 CFR Part 1986. The new regulation makes clear that the SPA covers all ships flying American flags, or owned by Americans. As mentioned above, in 2016, OSHA issued final rules for handling whistleblower complaints under Section 1558 of the Affordable Care Act. See 29 CFR Part 1984.

On July 10, 2012, OSHA issued final rules for handling whistleblower cases under the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087. The regulations are at 29 C.F.R. Part 1983. OSHA's discussion of three public comments is at 77 Fed. Reg. 40494.[16] The time for filing an initial OSHA complaint for a consumer product safety whistleblower remains 180 days. 15 U.S.C. § 2087(b)(1). After an OSHA determination, the time to request a hearing is thirty (30) days. 15 U.S.C. § 2087(b)(2)(A). The time to petition the ARB for review of an ALJ decision is just fourteen (14) days, and that petition must set out the legal issues for which review is sought. 29 C.F.R. § 1983.110(a).

16 Available at http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/FEDERAL_REGISTER/77_FED_REG_40494.HTM or http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/FEDERAL_REGISTER/77_FED_REG_40494.PDF

G. Litigation

1. Office of Administrative Law Judges (OALJ) and the Administrative Review Board.

Most whistleblower laws enforced through the Department of Labor permit parties to seek *de novo* review of OSHA determinations through an ALJ hearing. A request for such a hearing must be filed within 30 days of receipt of the OSHA determination. The request can be faxed to the Chief ALJ at (202) 693-7365. It must also be served on each respondent and on OSHA. If OSHA issues an order of reinstatement under the modern whistleblower laws (ERA, STAA, AIR21, SOX, PSIA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, FSMA, MAP21), the employer can appeal, but the reinstatement order goes into effect while the appeal is pending.

In 2015, OALJ issued a new set of procedural rules, currently codified at 29 CFR Part 18. This is the first major revision of the rules in 30 years. The revisions make significant changes in discovery, hewing more closely to the current Federal Rules of Civil Procedure. NELA[17] and one author[18] submitted comments, focusing on the problems associated with summary decision and limits on discovery, and the need for addressing electronic discovery and filing. NELA suggested that OALJ consider adopting the Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action currently being implemented in federal district courts around the country.[19] Some ALJs now issue detailed discovery orders patterned on these protocols. One new rule, 29 CFR 18.32(a)(2), defines a "day" to end at 4:30 pm. Both NELA and this author objected to this proposal without success.

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17 Available at http://www.regulations.gov/contentStreamer?objectId=09000064811fa9cf&disposition=attachment&contentType=pdf

18 Available at http://www.taterenner.com/RennerComments20130204.pdf

19 See generally, *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action*, Federal Judicial Center (November 2011), available at: http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

2. ARB review.

ALJ decisions, in turn, can be reviewed by DOL's Administrative Review Board (ARB). Petitions for review to the ARB must typically be filed within 14 days. Being even one day late can result in a loss of all further rights to appeal. The petition must generally set out the legal issues upon which review is sought. The ARB needs this list up front to assess whether to accept the case for review. If the ARB accepts the case for review within 30 days of the filing of the petition for review, it will issue a briefing schedule. If it does not accept the case for review, the ALJ's decision becomes a final order of the Secretary of Labor that can be appealed to the appropriate U.S. Court of Appeals. If the ARB reviews the case, it generally takes between 6 and 36 months to issue a final order. Orders are available from http://www.oalj.dol.gov/LIBARB.HTM and they are digested at http://www.oalj.dol.gov/LIBWHIST.HTM

Petitions for review to the Administrative Review Board (ARB) must list the legal issues for which review is sought. Failure to list an issue means the ARB "may" deem the issue waived. The comments explain that this time to file the petition can be extended upon motion. A safer practice may be to file a petition for review, and seek an extension of time to complete or supplement the statement of legal issues for which review is sought. Being one day late in filing a petition for review can result in denial of review. *Prince v. Westinghouse Savannah River Co*., ARB No. 10-079, ALJ No. 2006-ERA-1, Decision and Order Denying Motion for Reconsideration (ARB Feb. 2, 2011),[20] *aff'd* by Fourth Circuit in Case No. 11-1322, *cert. denied,* 01/14/2013. .

However, even if a party neglected to identify an issue in the petition for review, that does not prevent the ARB from addressing it to avoid a "manifest injustice." In *Avlon v. American Express Co*., ARB No. 09-089, ALJ No. 2008-SOX-51, Final Decision and Order of Remand (ARB May 31, 2011),

20 All ARB decisions are available at:
http://www.oalj.dol.gov/Public/ARB/REFERENCES/Caselists/ARBLIST_ALPHA3.HTM

AMEX sought reconsideration arguing that the timeliness issue was not raised in Avlon's *pro se* brief. The ARB denied reconsideration. *Avlon v. American Express Co*., ARB No. 09-089, ALJ No. 2008-SOX-51, Order Denying Reconsideration (ARB Sept. 14, 2011).[21] The ARB did not base its decision on Avlon's pro se status, but rather on the "manifest injustice" that would result from failing to correct the "central issue" of the ALJ's decision. Moreover, the ARB did not need any further fact-finding to resolve the timeliness issue.

3. Kick-outs to federal district court.

Under certain statutes, Complainants are permitted to file de novo claims in U.S. district court when the DOL process fails to result in a final order within a statutory time limit. The time limits are set for the STAA, FRSA, NTSSA, CPSIA, ACA, SPA, CFPA, FSMA and MAP-21 (after 210 days), ERA (365), and SOX (180). CPSIA, ACA, CFPA and FSMA also permit a kick-out within 90 days of OSHA determinations.

In *Jones v. SouthPeak Interactive Corp*. 777 F.3d 658 (4th Cir. 2015), the court held that 4-year statute of limitations applies pursuant to 28 U.S.C. § 1658(a). In *Jordan v. Sprint Nextel Corp*., 3 F. Supp. 3d 917 (D. Kan. 2014), the court concluded that no statute of limitations applies to kick-outs as they are "otherwise provided by law." Following *Jordan*, the current DOL practice is to wait until the whistleblower actually files a complaint in U.S. District Court before DOL will dismiss its complaint.

Deciding whether to, and when to, kick out is a tactical decision for complainants and their counsel. Factors considered include the costs, delays, familiarity with the tribunals, knowing who the ALJ is, the size of potential awards and the availability of jury trials.

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21 Available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_089A.SOXP.PDF

H. Extraterritoriality

Employers are increasingly transnational, and discerning the application of U.S. law to a particular adverse action may deserve focused attention. The employment agreement might be reached in one country to affect employment performed in another country or in multiple countries. Protected activity may similarly disclose violations occuring in more than one country.

For the DOL whistleblower program, extraterritoriality has arisen mostly in AIR 21 and SOX cases, but it can arise under other statutes.

The Supreme Court recognizes a presumption against extraterritorial application of U.S. laws. *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010). While confirming that the presumption against extraterritoriality should apply "in all cases," the Supreme Court admits that the presumption "is not self-evidently dispositive, but…requires further analysis." *Morrison*, 130 S. Ct. at 2881, 2884. The *Morrison* Court espouses a "transactional" test to rebut the presumption against extraterritoriality in securities cases — "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id*. At 2886.

The First Circuit's decision in *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006), rejected a claim of extraterritorial application because the employee produced no evidence that the U.S. parent company had directed his termination by e-mail or somehow otherwise controlled his employment. 433 F.3d at 2 (noting that the district court found that Carnero "had no contact with the defendant in Massachusetts" and that defendant did not "in any way direct or control" his employment); *see also* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 Harv. J. on Legis. 425, 496 (2009).

Application of SOX to protected activity arising under the Foreign Corrupt Practices Act remains untested.

In *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011) (en banc),[22] aff'd as *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014), the ARB acknowledged that conduct abroad in some circumstances may have a sufficient territorial connection to the U.S. to be protected under SOX, although there was no protected activity ultimately in that case.

On January 11, 2013, Chief ALJ Stephen L. Purcell, overruled the respondent's motion to dismiss based on extraterritoriality in *Dos Santos v. Delta Airlines, Inc.*, 2012-AIR-00020, Order Denying Respondent's Motion to Dismiss (Jan. 13, 2013).[23] Although Jose Dos Santos worked in Paris during the relevant times, Judge Purcell noted that the retaliation involved denials of his requests for promotions to positions in Atlanta, Georgia.

Chief Judge Purcell, at p. 19, also considered the case-by-case approach he found in *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011) (en banc),[24] aff'd as *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014). "Just as the ARB did in *Villanueva*, I decline the invitation to manufacture my own test for determining the territoriality of all complaints filed under Section 42121 of AIR21." *Id*. at 20. He then looked to AIR 21's remedial purpose. "I find that the general focus of AIR21 is to ensure the safety of the air traveling public by strengthening the United States' aviation system." *Id*. at 22. "So while the legislative history supports that the general focus of AIR21 is to bring about fundamental improvements in air safety, it also suggests that Congress intended to achieve that goal by regulating the air carriers that operate within

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22 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_108.SOXP.PDF

23 Available at http://www.oalj.dol.gov/Decisions/ALJ/AIR/2012/DOS_SANTOS_JOSE_v_DELTA_AIR_LINES_INC_2012AIR00020_(JAN_11_2013)_072345_ORDER_SD.PDF

24 Available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_108.SOXP.PDF

the domestic aviation system and under the purview of FAA regulations." *Id*. Chief Judge Purcell looked to an earlier SOX case:

> In a pre-Morrison Section 806 case brought by a foreign-based employee of a foreign subsidiary of a publicly-traded company listed on the New York Stock Exchange, the ALJ in *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, slip. op. at 2, 25 (ALJ Mar. 23, 2009) considered the extent to which a multinational company may be held liable under Section 806 for a retaliatory termination of an employee stationed overseas. In denying the respondents' motion for summary decision, the ALJ spent considerable time expounding on the predominant purpose of Section 806, concluding that because "the predominant purpose of Section 806 is fraud detection, not worker protection," it is improper to treat Section 806 as a traditional labor law. *Walters*, ALJ No. 2008-SOX-070, slip. op. at 11.

Chief Judge Purcell continued at p. 24: "As with Section 806 of SOX, Section 42121 of AIR21 provides an incentive to airline workers which promotes aviation safety inasmuch as 'it provides job security … as a means of encouraging employees voluntarily to take an action Congress deems in the public interest.'" Quoting *Walters* at 13. In applying this approach to the Dos Santos case, Chief Judge Purcell observed at p. 26 that his aviation safety complaints addressed the safety of aircraft that fly between Paris and the U.S. Dos Santos also made complaints about retaliatory harassment to Delta officials in the U.S., and those officials did nothing to abate that harassment. However, "Neither the location of the employee's job, nor the location of the employer, is conclusive of the territoriality of this complaint, because, as explained above, Section 42121 is not chiefly a labor law." *Dos Santos* at 28. At page 29, Chief Judge Purcell concluded as follows:

> In sum, virtually all of the key elements of Complainant's complaint demonstrate a substantial connection with the United States' domestic aviation system, as he complained to U.S-based officials regarding violations of Federal aviation safety laws by an American air carrier, and he suffered retaliatory adverse actions that may be attributable to Respondent's management-level employees in the United States. As a U.S.-based airline that is indisputably subject to FAA regulations, Delta's alleged violation of FAA safety regulations is exactly the kind of non-compliance that Section 42121 aims to deter by empowering airline employees to report misconduct without fear of retaliation, and the ordinary enforcement of the instant complaint fits squarely within the AIR21's focus of ensuring aviation

> safety. Contrary to Respondent's belief, the physical location of Complainant's job is not decisive as to this complaint's territoriality.

This type of reasoning points the way to using U.S. whistleblower protections for employees working outside the United States. By connecting their protected activity to the remedial purposes of the U.S. law, workers anywhere in the world may find protection through the Department of Labor.

In *Blanchard v. Exelis Systems Corp.*, ARB No. 04-113, ALJ No. 2004-STA-21, Decision and Order of Remand (ARB Aug. 29, 2017), the complainant worked for a U.S. Government contractor at the U.S. Air Force Base in Bagram, Afghanistan. The ARB, reversing the ALJ, held that Blanchard's case did not implicate foreign law, but arose under U.S. law so that SOX would apply. The ARB holding in Blanchard has not been reviewed by any Court of Appeals. However, in ***Perez v. Citigroup, Inc.***, ARB No. 2017-0031, ALJ No. 2015-SOX-00014 (ARB Sept. 30, 2019), the ARB flatly held that SOX does not apply outside U.S. borders.[25]

I. ARB addresses documents, confidentiality and adverse actions.

A classic employer defense in whistleblower cases is to attack the whistleblower for violating company confidentiality rules in making the disclosures at issue. In *Vannoy v. Celanese Corp*., ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011), the ARB addressed the conflict between the protection of the law and the restraints of company policy. The law won. At pp. 15-17, the ARB explained how Congress clearly intended that employees would be protected in "lawfully" collecting inside information about violations of law, even though the conduct, "may have violated company policy[.]"[26] The ARB cited to 17 C.F.R. § 240.21F-17(a), the SEC's new Dodd-Frank rule prohibiting

25 See also, this excellent blog: https://www.zuckermanlaw.com/sp_faq/sox-whistleblower-law-extraterritorial-application/

26 Courts have held that collecting evidence can be protected under other laws. *Grant v. Hazelett Strip-Casting*, 880 F.2d 1564, 1570 (2nd Cir. 1989)(finding protected activity in attempting to gather evidence for a future lawsuit); *Niswander v. Cincinnati Insurance Co*., 529 F.3d 714, 728 (6th Cir. 2008)(delivery of documents in discovery is protected if the employee reasonably

employers from enforcing or threatening to enforce confidentiality agreements to prevent whistleblower employees from cooperating with the SEC. The ARB recognizes that the employee protection work within the context of other enforcement laws, and needs to follow their contours to assure a continuity of protection.

Also in *Vannoy*, p. 14, the ARB held that being placed on paid administrative leave can constitute an adverse employment action. The ARB revitalized the 1998 holding in *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-038, slip op. At 4-5 (ARB Apr. 20, 1998) (although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus). In the July 24, 2013, remand decision,[27] the ALJ awarded Mr. Vannoy $380,738 in economic and non-economic compensatory damages, plus interest and attorney's fees.

Another material issue for whistleblowers is the ability to keep confidential the fact that the whistleblower made official complaints. It can be particularly important that the confidentiality be maintained with respect to the perpetrators of the misconduct that is the subject of the whistleblower's complaint. In *Menendez v. Halliburton, Inc*., ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5, Decision and Order of Remand (ARB Sept. 13, 2011),[28] the ARB affirmed in part and reversed in part and ALJ dismissal. The ARB reversed on the issue of whether a disclosure of the whistleblower's name in a document retention email constituted an adverse action. The ARB noted, at pp. 5-6, that Menendez had taken care to assure that he was entitled to confidentiality of his identity under SEC and company

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believes the documents support the claim of a violation of law); *Quinlan v. Curtiss-Wright Corp*., 204 N.J. 239 (2010) (New Jersey Law Against Discrimination).

27 Available at http://www.oalj.dol.gov/Decisions/ALJ/SOX/2008/VANNOY_MATTHEW_v_CELANESE_CORPORATION_2008SOX00064_%28JUL_24_2013%29_121259_CADEC_SD.PDF

28 Available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_002.SOXP.PDF

policy. After the disclosure, Halliburton granted Menendez a paid administrative leave of six (6) months. After Halliburton and the SEC concluded their investigations (finding no violations requiring any action), Halliburton cancelled the paid leave and directed Menendez to return to work. Menendez resigned and brought a claim for constructive discharge. The ARB explained that *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), addressed the *degree* of actionable harm under Title VII. There, a plaintiff bringing a retaliation claim need only show the employer's challenged actions are "materially adverse" or "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." The ARB notes, however, that SOX's language goes farther than Title VII's by providing that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." This language explicitly proscribes non-tangible activity, which expresses a congressional intent to prohibit a "broader spectrum of adverse action against SOX whistleblowers." The ARB adds, "This difference in statutory construction convinces us that adverse action under SOX Section 806 must be more expansively construed than that under Title VII."

The ARB, at p. 23-24, discusses the importance of anonymous reporting under Section 301 in SOX's statutory scheme. "We consider Section 301 a critical component of SOX," the ARB said at p. 24. Considering in the overall context of the case, the ARB concluded that, "Halliburton's action constituted adverse action[.]" *Id*. The ARB noted that after the disclosure of his role in reporting concerns, there was a "reluctance of Menendez's co-workers to associate with him[.]" *Id*. at p. 25. The ARB adds, "Evidence of record strongly suggests that the exposure of Menendez's identity led inexorably to the circumstances and events that followed, including the isolation and loss of professional opportunities and advancement." *Id*. at p. 26. "Nevertheless, substantial evidence supports the ALJ's ultimate conclusion that Menendez was not constructively discharged." *Id*. at p. 28. The ARB also held that claims of "isolation, removal of job duties, demotion, and constructive discharge did not

independently constitute adverse action." *Id*. at p. 33. On remand, the ALJ again dismissed Menendez's complaint binding that Halliburton proved by clear and convincing evidence that it had "legitimate business reasons" for disclosing Menendez's name. The ARB reversed this holding, found causation, and affirmed an alternative award of $30,000 in compensatory damages and attorney's fees.[29] In finding causation, the ARB relied on *Araujo v. N.J. Transit Rail Operations Inc.,* No. 12-2148, 2013 WL 600208, at *6, *10 (3d Cir. Feb. 19, 2013) ("It is worth emphasizing that the AIR-21 burden-shifting framework . . . is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard.").

XIV. North Carolina state law remedies

The Retaliatory Employment Discrimination Act (REDA), N.C.G.S. § 95-240, and sequence, protects employees from retaliation for participation in certain procedings for public health and safety. The time limit to file a complaint with the North Carolina Department of Labor (NCDOL) is 180 days. After NCDOL issues a Notice of Right to Sue (NTRS), the employee has 90 days to file the claim in Superior Court.

There is also a protection for employees who obtain or attempt to obtain orders against domestic violence. N.C.G.S. § 50B-5.5(a). Again, the time limit to file complaints is 180 days. It is enforced through the same process as REDA claims.

Public policy tort claim are also available: *Sides v. Duke Hosp.*, 328 S.E.2d 818 (1985); *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693-694, 575 S.E.2d 46, 51-52 (2003). The statute of limitation for torts in this state is years.

The Whistleblower Act for public employees is at N.C.G.S §§ 126-84 to 126-88. State employees may pursue a grievance, and then appeal to the Office of Administrative Hearings (OAH)

29 *Menendez v. Halliburton, Inc*., ARB No. 12-026, ALJ No. 2007-SOX-5, Final Decision and Order (ARB Mar. 20, 2013), available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/12_026.SOXP.PDF

within 30 days of a final decision on the grievance. N.C.G.S §§ 126-34.01 to 34.3. Other public employees can seek relief under REDA or in Superior Court, with a time limit of one year. N.C.G.S § 126-86.

XV. The uneven web of whistleblower protection.

There are still big holes in the web of whistleblower protections. In 2011, traffic accidents killed 32,367 people in America and injured 2,217,000 more.[30] Other consumer products killed 35,900 Americans in 2008.[31] Workplace accidents killed 4,609 Americans in 2011,[32] and injured about 3,000,000 more.[33] Foodborne illness kills about 3,000 Americans a year, and hospitalizes 128,000 more.[34] U.S. commercial aircraft accidents with fatalities are a rarity. Each of these safety areas has a federal law focused on protecting whistleblowers.

In 1994, adverse drug reactions in U.S. hospitals caused 63,000 fatalities.[35] "Overall, 51 percent of approved drugs have serious adverse effects which are not detected prior to approval." - JAMA 1998; 279:1571-1573. Adverse drug events cause 700,000 emergency room visits and cost $3.5 billion annually.[36] The CDC says that adverse drug events caused 120,000 hospital admissions, while American Medical News reports 400,000.[37] There is no federal law focused on protecting the employment of whistleblowers who raise safety concerns about medications, let alone protecting health care safety concerns generally. Similarly, there is no federal law to prohibit firing private sector

30 See http://www-nrd.nhtsa.dot.gov/Pubs/811754AR.PDF

31 See http://www.cpsc.gov/PageFiles/134720/2010injury.pdf

32 See http://www.bls.gov/news.release/cfoi.nr0.htm

33 See http://www.bls.gov/news.release/osh.nr0.htm

34 See http://www.fda.gov/Food/ResourcesForYou/HealthEducators/ucm095399.htm Another 48 million of us are sickened by foodborne illness each year.

35 See http://jama.jamanetwork.com/article.aspx?articleid=187436

36 See http://www.cdc.gov/medicationsafety/basics.html

37 See http://www.amednews.com/article/20110613/profession/306139944/2/

employees for disclosing tax violations or misclassification of workers as independent contractors.

Advocates need to be aware of other avenues of protection. Food, product safety and auto safety whistleblowers are likely to raise issues that could affect consumer liability litigation. Identifying the trial lawyers handling these liability claims could be mutually beneficial for both the whistleblower and the injured consumer. Moreover, federal and state governments could be among the affected consumers. Advocates may benefit from considering whether qui tam litigation might be worthwhile under the False Claims Act.

Claims against publicly traded companies should raise an inquiry about whether the whistleblower's concerns touch on the company's public disclosures. Public disclosure issues might or might not have contributed to the employer's decision to impose the adverse action. If so, counsel might consider pursuing relief under the Sarbanes-Oxley Act (180 day time limit to file an OSHA complaint). Either way, counsel might consider submitting a whistleblower claim to the Securities and Exchange Commission (SEC). Whistleblowers can submit a Form TCR, and then monitor the SEC announcements of recoveries that are eligible for whistleblower awards.

Mindful attention to the latest developments in whistleblower law will help connect prospective employment law clients to their best remedies. The attached chart of federal whistleblower laws may seem exhaustive, but it still leaves holes big enough for some of our greatest public health dangers. Our mindful attention will also help us focus attention on filling the holes in our uneven web.

Appendices

1. OSHA Desk Aid[38]
2. Chart of Federal Whistleblower Laws[39]
3. OSHA Whistleblower Complaint Form[40]

38 DWPP's informative desk reference of the laws within its jursidiction is at: http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf

39 Available from https://www.taterenner.com/fedchart.php

40 Complaints can now be filed on-line at https://www.whistleblowers.gov/complaint_page