

Whistleblower Protections for Employees with Security Clearances

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The unique legal status of security clearances has made protections for whistleblowers nearly non-existent for decades. Since the Supreme Court’s decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the courts have given the Executive Branch broad authority over national security determinations.² *Egan* actually addressed a narrow question of statutory interpretation:

The narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action.

484 U.S. at 520. However, the policy consideration underlying the Court’s decision broadly prohibits courts from exercising jurisdiction over the Executive Branch’s decisions about who is sufficiently trustworthy to handle our nation’s classified information. The boundaries of *Egan*’s application are frequently tested, most often resulting in expansion of those boundaries.³

This article reviews whistleblower laws that can apply to employees with security clearances, and the laws and policies adopted specifically for the Intelligence Community (IC). U.S. whistleblower

2 L. Fisher, The Law Library of Congress, *Judicial Interpretations of Egan* (2009). Available at <https://fas.org/sgp/eprint/egan.pdf> and https://www.loc.gov/law/help/usconlaw/pdf/egan_public_2009.pdf

3 See E. Fitch and M. Kuntz, *Security Clearance Law and Procedure* (2021 ed.), Chapter 8, for case summaries for *Ciralsky v. CIA*, No. 1:10cv911, 2010 WL 4724279 (E.D. Va. Nov. 15, 2010), *aff’d sub nom. Ciralsky v. Tenet*, 2011 WL 6367072 (4th Cir. Dec. 20, 2011) (unpublished); *Footte v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014); *Hall v. Dept. of Labor*, 476 F.3d 847 (10th Cir. 2007); *Hegab v. Long*, 716 F.3d 790 (4th Cir. 2013), *cert. denied* 134 S. Ct. 785 (2013); *Hill v. Dept. of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988), *cert. denied*, 488 U.S. 825 (1988); *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (*en banc cert. denied sub nom Northover v. Archuleta*, 2014 WL 1271323, 82 USLW 3334, 82 USLW 3564, 82 USLW 3566, 37 IER Cases 1716 (Mar 31, 2014) (No. 13-607); *Rattigan v. Holder*, 780 F.3d 413 (D.C. Cir. 2015) (*Rattigan III*); and, *Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999). [you might want to include *Campbell*, *Whitney v. Carter* (7th Cir), and *Hill v. White* (11th Cir.) here too] See also, *Campbell v. McCarthy*, 952 F.3d 193 (4th Cir. 2020); *Hill v. White*, 321 F.3d 1334 (11th Cir. 2003); and, *Whitney v. Carter*, 628 Fed. Appx’x 446 (7th Cir. 2016). But see, *Webster v. Dept. of Energy*, 486 U.S. 592 (1988); *Hale v. Johnson*, 845 F.3d 224 (6th Cir. 2016); *Greenhouse v. Geren*, Civil Action No. 07-182 (EGS) (D.D.C. Jul. 27, 2009); *Bilski v. McCarthy*, 2017 WL 3484686 (E.D. Ky. Aug. 14, 2017); *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) (*Rattigan II*); *Garcia v. Pompeo*, 2020 U.S. Dist. LEXIS 5159 (D.D.C. Jan. 13, 2020); *Makky v. Chertoff*, 541 F.3d 205 (3d Cir. 2008); *Sanchez v. Dept. of Energy*, 870 F.3d 1185 (10th Cir. 2017); *Dyer v. Dept. of the Air Force*, 971 F.3d 1377 (Fed. Cir. 2020); *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013); and, *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549–50 (9th Cir. 2011).

law is an uneven patchwork of more than 100 federal laws intended to protect against retaliation.⁴

Some whistleblowers may find protections under more than one law, while others can find no protection at all.

Protections specific for employees in the Intelligence Community (IC) are relatively new and dependent on the decisions of agency leaders. Each individual concerned about retaliation may wish to consider alternative remedies based on the nature of the employer, the positions of those responsible for the retaliation, the subject matter of the protected activity, or the type of adverse action taken. This article is intended to describe available whistleblower protections sufficiently to assist in identifying remedies to be considered in individual cases and the time limits to initiate proceedings.

. A The Whistleblower Protection Act (WPA) applies to most civilian federal employees outside the Intelligence Community (IC).

While the Whistleblower Protection Act (WPA) does not apply to employees in the IC,⁵ many federal employees with security clearances work in agencies that are outside the IC and can seek corrective action under the WPA for certain unlawful reprisals. Moreover, the IC's Inspector General (IC IG) uses the law developed under the WPA as a guide for deciding whistleblower appeals within the IC.⁶ The WPA's legislative history and caselaw also provide useful context for other whistleblower proceedings, such as those for employees of contractors under the Defense Contractors Whistleblower Protection Act (DCWPA)⁷ and the National Defense Authorization Act of 2013 (NDAA).⁸

. 1 The WPA serves remedial purposes.

Congress enacted the WPA in 1989 to:

4 Kalijarvi, Chuzi, Newman & Fitch maintains a web page listing over 100 federal laws against discrimination and retaliation. <https://kcnfdc.com/most-legal-claims-have-time-limits/>

5 5 U.S.C. § 2302(a)(2)(C)(ii)

6 IC IG External Review Panel (ERP) Procedures Pursuant to Presidential Policy Director 19 (PPD-19), Section 7(D)(1)(i).

7 10 U.S.C. § 2409.

8 41 U.S.C. § 4712.

strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by — (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing ... that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.⁹

Courts have recognized that, “The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”¹⁰

At 5 U.S.C. § 2302(b), the WPA prohibits officials of most Executive Branch agencies from engaging in 14 enumerated “prohibited personnel practices” or “PPP’s.” Only some of these PPP’s are appealable to the Merit Systems Protection Board (MSPB) through the “individual right of action” or IRA.¹¹

Disclosures are protected if the employee reasonably believes that the information disclosed could be evidence of “(i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety[.]”¹² Frustrated with MSPB and court rulings that limited the application of the WPA, Congress passed the Whistleblower Protection Enhancement Act (WPEA) in 2012. The Senate Report for the WPA¹³ expresses Congress’ particular frustration with the limits courts put on the phrase “any disclosure.” “It is critical that employees know that the protection for disclosing wrongdoing is

9 Pub. L. 101–12, § 2, Apr. 10, 1989, 103 Stat. 16; codified as a note to 5 U.S.C. § 1201.

10 *Handy–Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 540 (6th Cir.2012), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004).

11 5 U.S.C. § 1221(a). These are, specifically, the “disclosures” under 5 U.S.C. § 2302(b)(8), and other whistleblower activities under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C) and (D).

12 5 U.S.C. § 2302(b)(8)(A) protects lawful disclosures, such as those not involving classified information. 5 U.S.C. § 2302(b)(8)(B) protects disclosures to an Inspector General (IG), the Office of Special Counsel (OSC), and other authorized recipients – even if classified information is disclosed. Before submitting classified information to OSC or IG, one should contact the recipient agency so they can give specific and current directions on how to convey that information. 5 U.S.C. § 2302(b)(8)(C) protects disclosures to Congress that include information classified by an agency that is not an element of the IC, and “does not reveal intelligence sources and methods.” Unclassified disclosures to Congress are protected by both § 2302(b)(8)(A) and (C).

13 S. Rep. No. 112-155, pp. 4-5, 2012 U.S.C.C.A.N. 589, 593-94 (2012).

extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.” Clear enough. The WPEA knocked down a number of doctrines the MSPB and Federal Circuit had made up to justify dismissal of WPA claims. Now, Congress has made explicit that claims cannot be denied because the employee’s disclosure was made pursuant to a job duty¹⁴ or while off duty, to a person who engaged in the violation, previously made, made for an improper motive, not made in writing, made before the employment began or because of the amount of time which has passed since the occurrence of the events described in the disclosure.¹⁵

. 2 The WPA’s scope of protection.

Disclosures of gross mismanagement, gross waste and substantial and specific dangers to public health and safety are subjective about what violations are “gross,” “substantial” and “specific.” However, the WPA protects all disclosures of violations of law, rule or regulation, and abuses of authority. The disparity between the subjective categories of protection and the absolute categories creates an incentive to characterize protected activity so that it will be in the latter categories. For example, federal employees who raise concerns about workplace health and safety issues would have a stronger claim of protection by characterizing their concerns as violations of the laws and regulations requiring federal agencies to provide a work space that is safe and free of recognized hazards.¹⁶

Other protected whistleblower activities include exercising a right of appeal, complaint or grievance,¹⁷ testifying or assisting others in the exercise of their rights, cooperating or disclosing

14 If making the disclosure was a normal job duty, the whistleblower must meet the slightly higher causation standard of showing that the adverse action was made “in reprisal for the disclosure[.]” 5 U.S.C. § 2302(f)(2).

15 5 U.S.C. § 2302(f).

16 29 U.S.C. § 668; 5 U.S.C. § 7902(d), 29 C.F.R. § 1960.1(g), 29 C.F.R. § 1960.8(a); 29 C.F.R. § 1960.8(d) (requiring federal agencies to provide personnel protective equipment (PPE)).

17 However, such appeals, complaints or grievances do not create an individual right of action to the MSPB unless the complaint about retaliation for making a protected disclosure pursuant to 5 U.S.C. § 2302(b)(8). See 5 U.S.C. § 1221(a).

information to an inspector general, the Office of Special Counsel, or “any other component responsible for internal investigation or review[.]”¹⁸ The WPA also protects refusal to follow orders for those who have a reasonable belief that the order would require the individual to violate a law, rule or regulation.¹⁹

The WPA prohibits agency attempts to impose or enforce non-disclosure agreements or policies (NDA’s), unless they implement restrictions created or authorized by Congress.²⁰ Finally, the WPA also prohibits accessing a whistleblower’s medical records in furtherance of unlawful retaliation.²¹

. 3 Protection arises from the employee’s reasonable belief.

For disclosures of misconduct, an employee only needs a reasonable belief that the information disclosed would be evidence of that misconduct.²² The MSPB has held that a 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).”²³

In 2012, Congress codified this principle saying:

[A] determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with

18 5 U.S.C. § 2302(b)(9)(A), (B) and (C).

19 5 U.S.C. § 2302(b)(9)(D).

20 5 U.S.C. § 2302(b)(13).

21 5 U.S.C. § 2302(b)(14), added by the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017.

22 5 U.S.C. § 2302(b)(8)(A) and (B), protecting, “any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences— [for example] any violation of any law, rule, or regulation.”

23 *Ward v. Dep’t of the Army*, 67 M.S.P.R. 482, 485-486 (1995); see also, *Russell v. Dep’t of Justice*, 68 M.S.P.R. 337, 342 (1995).

knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.²⁴

The whistleblower's motives for making a disclosure or engaging in protected activity are not a proper basis for denying protection.²⁵ Whistleblowers are not required to follow any prescribed channels or chain-of-command in making lawful disclosures.²⁶ The WPA protects whistleblowers from retaliation for any lawful disclosure.²⁷ For information that is not classified or for which Congress has not prohibited the disclosure, that means the disclosure can be to anyone, even a news outlet.²⁸

. 4 “Mixed cases” can get jury trials.

One thing Congress did not do in the 2012 WPEA is give federal employee whistleblowers a right to a trial by jury in U.S. district courts. However, some whistleblowers do have one avenue to such jury trials: mixed cases.²⁹ A “mixed case” is one in which the federal employee has an action that he or she may appeal to the MSPB and also includes a discrimination claim. With a mixed case, the employee may file a civil action in district court after waiting 120 days for an agency or MSPB decision, 180 days for an EEOC decision on a petition to review an MSPB decision, or within 90 days of an agency or EEOC final decision. The district court would then adjudicate the employee's claims *de novo*.³⁰ Employees who make a timely civil action for their mixed case may demand a jury which can decide the discrimination and whistleblower claims, even though review of an MSPB decision on discipline would be reserved to the judge.³¹ The mixed case statute also saves the claims of employees

24 5 U.S.C. § 2302(b)(ii), appearing after U.S.C. § 2302(b)(14).

25 5 U.S.C. § 2302(f)(1)(C)

26 “[I]t is inappropriate for disclosures to be protected only if they are made . . . to certain employees or only if the employee is the first to raise the issue.” S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). See also, *Detrich v. Dep’t of Navy*, 251 Fed.Appx. 679, 681 (Fed. Cir. 2007) (“An Agency cannot require that protected disclosures be made only to supervisory personnel”).

27 5 U.S.C. § 2302(b)(8)(A).

28 *Dep’t of Homeland Sec. v. Maclean*, 135 S. Ct. 913 (2015).

29 5 U.S.C. § 7702.

30 5 U.S.C. § 7702(e)(3).

31 *Bonds v. Leavitt*, 629 F.3d 369, 383 (4th Cir. 2011) (referencing the employee's right to a jury trial

who make a timely action or appeal, but in the wrong agency.³² The Mixed Case Stature is considered to be one of the more difficult statutes to interpret and follow. Justice Alito once asked, “who wrote this statute? Somebody who ... takes pleasure out of pulling the wings off flies?”³³

. 5 The WPA’s complaint procedure.

Federal employees covered by the WPA can file complaints with the OSC within three (3) years of first learning about each adverse action.³⁴ As previously noted, the WPA does not apply to employees in the IC,³⁵ OSC complaints do not have to be limited to those PPPs that can support an individual right of action (IRA) to the MSPB. OSC can seek relief for violations of any merit system principle or PPP. While OSC has statutory authority to remediate retaliation for opposing discrimination or participating in Equal Employment Opportunity (EEO) proceedings, OSC typically declines to do so where the employee can seek relief through the EEO process.³⁶ Complaints to OSC must be submitted on OSC’s Form 14,³⁷ but that can be accomplished in hardcopy or on-line.³⁸ Subsequent procedures in WPA cases are addressed in other resources.³⁹

on the WPA claim). See also *Perry v. MSPB*, 137 S.Ct. 1975 (2017), in which the Supreme Court recognized the district court’s jurisdiction to hear the mixed case arises from the employee’s allegations and not from any determination of the merits of those allegations.

32 5 U.S.C. § 7702(f).

33 Oral argument transcript in *Perry v. MSPB*, 137 S.Ct. 1975 (2017), p. 43.

34 5 U.S.C. § 1214(b)(6)(A)(iii).

35 5 U.S.C. § 2302(a)(2)(C)(ii)

36 5 C.F.R. § 1810.1.

37 5 C.F.R. § 1800.1(c)(1).

38 <https://osc.gov/Pages/File-Complaint.aspx>

39 See, for example, C. Lerner and J. Zuckerman, *The U.S. Office of Special Counsel’s Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing* (May 19, 2014, OSC), available at <https://osc.gov/Documents/PPP/OSC%27s%20Role/OSC%E2%80%99s%20Role%20in%20Protecting%20Whistleblowers%20and%20Serving%20as%20a%20Safe%20Channel%20for%20Government%20Employees%20to%20Disclose%20Wrongdoing.pdf>; P. Broida, *Guide to MSPB Law and Practice* (2020: Dewey Publications).

. 6 Disclosures to OSC.

OSC also accepts “disclosures” of an employee’s (or an applicant’s or former employee’s) concerns about a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.⁴⁰ Such disclosures are also submitted through OSC’s Form 14, and one Form 14 can combine a disclosure and a complaint of retaliation. For the disclosure, if OSC finds that the submission states a concern within OSC’s jurisdiction, it will typically refer the matter to the agency’s Inspector General (IG) for investigation and a report of the IG’s findings. On reviewing those findings, OSC will invite the whistleblower to respond, unless OSC decided to refer the matter to the Department of Justice for criminal prosecution. OSC might choose to accept the IG’s conclusions, or might choose to make different findings based on the available information. If OSC finds a violation or other misconduct, it reports its findings to the President and to Congress.⁴¹ However, OSC is forbidden from disclosing the identity of the whistleblower without the whistleblower’s consent, except in the rare cases when disclosure, “is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.”⁴²

. 7 The FBI’s unique whistleblower protection.

The WPA does not protect employees of the Federal Bureau of Investigation (FBI),⁴³ but Congress has created a unique protection just for them.⁴⁴ Even preference eligible (veteran) FBI employees who have a right to appeal adverse actions to the MSPB cannot raise whistleblower defenses there, but must instead use this specialized FBI procedure.⁴⁵ There is no time limit for a whistleblower’s initial complaint which may be filed with the Department of Justice’s Inspector

40 5 U.S.C. § 1213.

41 5 U.S.C. § 1213(e)(3).

42 5 U.S.C. § 1213(h).

43 5 U.S.C. § 2302(a)(2)(C)(ii)(I).

44 5 U.S.C. § 2303; 28 C.F.R. Part 27; <https://www.justice.gov/opr/whistleblower-matters>

45 *Parkinson v. Dept. of Justice*, 874 F.3d 710, 713 (Fed. Cir. 2017) (*en banc*).

General (DOJ OIG), or with the DOJ Office of Professional Responsibility (OPR).⁴⁶ These agencies can request a stay of an adverse action at the FBI,⁴⁷ and must eventually make a report of their findings and recommendations to the Director of DOJ's Office of Attorney Recruitment and Management (OARM). If the whistleblower is not satisfied with the findings and recommendations, he or she has 60 days to file a request for corrective action with the OARM director.⁴⁸ While whistleblowers can conduct some discovery during the OARM stage,⁴⁹ OARM does not conduct hearings but instead will review the parties' written submissions to make a decision.⁵⁰ Any party may seek review of the OARM decision by submitting a request to the Deputy Attorney General (DAG) within 30 days of OARM's final determination.⁵¹ The DAG makes the final decision.⁵² Whistleblower advocates have found the FBI whistleblower process to be slow, often taking years to get decisions, and overly deferential to FBI management. The Government Accountability Office investigated the FBI whistleblower protection program and made a series of recommendations in January 2015.⁵³ Responding to concerns about its program, FBI management as called for Alternative Dispute Resolution (ADR), awards of compensatory damages, and increased funding for OARM.⁵⁴ The statute does not provide for any judicial review.⁵⁵ One court has held that Congress did not intend to provide for any judicial review and

46 28 C.F.R. § 27.3(a). OPR typically investigates complaints about a lawyer's violations of professional responsibility rules while OIG handles all other cases.

47 28 C.F.R. § 27.4(b).

48 28 C.F.R. § 27.4(c)(1).

49 28 C.F.R. § 27.4(e)(3) (The Director may "compel the attendance and testimony of, or the production of documentary or other evidence from, any person employed by the Department if doing so appears reasonably calculated to lead to the discovery of admissible evidence, is not otherwise prohibited by law or regulation, and is not unduly burdensome.").

50 28 C.F.R. § 27.4(f) and (g).

51 28 C.F.R. § 27.5.

52 *Id.*

53 *Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints* (GAO: January 2015), <https://www.gao.gov/assets/gao-15-112.pdf>

54 K. L. Perkins, Associate Deputy Director of the FBI, *Whistleblower Retaliation: Improving Protections and Oversight*, Statement Before the Senate Judiciary Committee, March 4, 2015, <https://www.fbi.gov/news/testimony/whistleblower-retaliation-improving-protections-and-oversight>

55 See 64 Fed.Reg. 58782, 58785 (Nov. 1, 1999) (explaining that "[i]f Congress had wanted to provide FBI employees with fora outside the Department to address their whistleblower reprisal

the Administrative Procedures Act (APA)⁵⁶ is not available to create such review.⁵⁷ However, retaliation in the FBI can still provide evidence of a “pattern and practice” in support of other discrimination and retaliation claims, such as those under the Civil Rights Act of 1964.⁵⁸

. 8 WPA claims are subject to an election of remedies.

Federal employee whistleblowers need to be mindful of the laws requiring an “election of remedies.” In particular, if the employee is covered by a union’s collective bargaining agreement (CBA) with a federal agency, then filing a grievance pursuant to that CBA will forfeit the right to file an OSC complaint or MSPB appeal against the same adverse action.⁵⁹ Filing a grievance pursuant to an agency grievance policy that is not part of a CBA is not an election of remedies, and an employ can pursue both the agency grievance and an OSC complaint or MSPB appeal.⁶⁰ Whistleblowers who suffer an adverse action that is directly appealable to the MSPB⁶¹ must also choose between filing that MSPB appeal within 30 days or filing a Form 14 complaint with OSC within 3 years.⁶² Whenever a federal agency imposes a directly appealable adverse action, it is required to provide the affected employee with notice of avenues available for relief and the preclusive effect of electing a remedy.⁶³ The waiver of alternative procedures effected by an election of remedies must be knowing and informed; otherwise it will not be binding on the employee.⁶⁴ There is no law that requires employees to elect between an

claims, it could have included them in the OSC/MSPB scheme[.]”); *Runkle v. Gonzales*, 391 F. Supp. 2d 210, 233 (D.D.C. 2005).

56 5 U.S.C. § 702.

57 *Roberts v. U.S. Dep't of Just.*, 366 F. Supp. 2d 13, 21 (D.D.C. 2005) (“FBI employees may not challenge such decisions in federal court under the APA.”).

58 *Castro v. Sessions*, No. CV 18-476-JFW(PLAX), 2018 WL 6252425, at *4 (C.D. Cal. June 29, 2018).

59 5 U.S.C. § 7121(d) and (g); 5 C.F.R. § 1201.3(c) (for adverse action appeals); 5 C.F.R. § 1201.2(d) for IRAs under the WPA.

60 *Wright v. Dep't of Transp.*, 89 M.S.P.R. 571, 574 (2001).

61 These are a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay (such as by denial of a within-grade increase or “WIGI”), and a furlough of 30 days or less. 5 U.S.C. § 7512.

62 5 U.S.C. § 7121 (g); 5 C.F.R. § 1201.3(c).

63 5 C.F.R. § 1201.21(d).

64 *Agoranos v. Dep't of Justice*, 119 M.S.P.R. 498 (2013), ¶ 16.

OSC complaint and an EEO complaint and employees can pursue both simultaneously. However, as described below, EEOC regulations have their own election of remedies provision for grievances under a CBA.⁶⁵

. 9 The WPA uses a favorable “contributing factor”/“clear and convincing” causation standard.

Congress established a bifurcated “contributing factor”/“clear and convincing” framework for the WPA in 1989.⁶⁶ Under this framework, a federal sector whistleblower must demonstrate that protected activities were a “contributing factor” in the adverse employment action.⁶⁷ This means that an employee must establish by a preponderance of the evidence that protected activity was a factor that, alone or in connection with other factors, tended to affect the employer’s decision to take an adverse action in any way.⁶⁸ Congress, in an oft-quoted explanatory statement, 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.⁶⁹

65 See 29 C.F.R. § 1614.301.

66 Three years later, Congress amended the 1978 whistleblower provisions of the Energy Reorganization Act (1992 ERA amendments) to pointedly insert nearly the exact same burden-of-proof framework. 42 U.S.C. §5851(b)(3). Since then, Congress has used this bifurcated standard of causation for employee protections in the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121; Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Federal Railroad Safety Act, 49 U.S.C. § 20109; National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Affordable Care Act (ACA), 29 U.S.C. § 218c; Seaman’s Protection Act (SPA), 46 U.S.C. § 2114; Consumer Financial Protection Act (CFPA), 12 U.S.C. § 5567; Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; and the National Defense Authorization Act, 41 U.S.C. § 4712(c)(6).

67 5 U.S.C. § 1221(e)(1).

68 *Sylvester v. Parexel Int’l*, ARB No. 07-123, 2011 WL 2165854, *9 (ARB, May 25, 2011); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

69 135 Cong. Rec. 5033 (1989).

“Any” weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the “contributing factor” test. *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

The contributing factor 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.”⁷⁰ The contributing factor need not be “significant, motivating, substantial, or predominant.”⁷¹

An employee may establish a *prima facie* case by circumstantial, as well as direct, evidence.⁷² Evidence of animus is evidence that the protected activity was a contributing factor in the downgraded performance rating.⁷³ The change in treatment of the whistleblower after the protected activity is a well-recognized indicator of causation.⁷⁴ Deviation from normal practice may indicate causation.⁷⁵ In *Kansas Gas & Electric Co. v. Brock*,⁷⁶ a nuclear plant could not escape liability when it fired a whistleblower alleging that he could not “get along” with co-workers.

Conversely, to prevent liability, the federal agency must show “by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.”⁷⁷ By

70 *Lockheed Martin Corp. v. Admin. Review Bd.*, U.S. Dep’t of Labor, 717 F.3d 1121, 1136 (10th Cir. 2013) (emphasis in original) (quoting *Klopfenstein v. PCC Flow Techs.*, No. 04-149, 2006 WL 3246904, at *13 (Admin. Rev. Bd., U.S. Dep’t of Labor May 31, 2006)).

71 *Id.* (internal quotation marks omitted) (quoting *Klopfenstein*, 2006 WL 3246904, at *13).

72 5 U.S.C. § 1221(e)(1) (setting out a knowledge/timing test for federal sector cases); *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012); *Lockheed*, 717 F.3d at 1136 (“Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test.”).

73 *See, e.g.*, American Jurisprudence (2nd), Proof of Facts, “Proof of Retaliatory Termination,” Section 7-1; *Che v. Massachusetts Bay Transp. Authority*, 342 F.3d 31, 38 (1st Cir. 2003) (temporal proximity or a pattern of antagonism can prove causation); *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (temporal proximity is unnecessary if there is a “pattern of antagonism” following protected activity).

74 5 U.S.C. §1221(e); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

75 *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 267 (1977) (“Departures from the normal procedural sequence also may afford evidence that improper purposes are playing a role.”).

76 780 F.2d 1505, 1507 (10th Cir. 1985), *cert. denied* 478 U.S. 1011

77 5 U.S.C. § 1221(e)(2).

enacting this amendment to the WPA, Congress “substantially reduc[ed]” a whistleblower’s burden and sent “a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing.”⁷⁸

The Supreme Court has imposed the “clear and convincing” standard only to protect interests that are “far more precious than any property right.”⁷⁹ It is a heightened standard of proof that “concede[s] the possibility of error” but “ensure[s] that the error is generally in one direction.”⁸⁰ “For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.”⁸¹

It is not sufficient for the Agency to show that it *could* have taken the same action as Congress requires that “the agency demonstrates by clear and convincing evidence that it *would* have taken the same personnel action in the absence of such disclosure.”⁸² The distinction between “would” and “could” is both real and legally significant.⁸³ 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.”⁸⁴ It is easy to see that employers who maintain and have consistently enforced strict disciplinary standards, such as point systems, will have an easier time meeting this standard.

Conversely, employers who are presenting after-the-fact explanations should have a much harder time.

78 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

79 *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (termination of parental rights); see also, e.g., *Addington v. Texas*, 441 U.S. 418, 424 (1979) (requiring interests “more substantial than mere loss of money”).

80 Ralph K. Winter, Jr., *The Jury and the Risk of Non-persuasion*, 5 Law & Soc’y Rev. 335, 339-40 (1971); cf. 4 William Blackstone, Commentaries *352 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

81 *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (ERA nuclear whistleblower case).

82 5 U.S.C. § 1221(e)(2). Accord, *Ready Mix Concrete v. NLRB*, 81 F.3d 1546, 1553 (10th Cir. 1996) (quoting *Presbyterian/St. Luke’s Med. Center v. NLRB*, 723 F.2d 1468, 1480 (10th Cir. 1983)).

83 *Knight v. Comm’r*, 552 U.S. 181, 187-88, 192 (2008).

84 *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360, 115 S. Ct. 879, 885, 130 L. Ed. 2d 852 (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”).

The “clear and convincing” standard must take into account the appellant’s countervailing evidence. Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established.⁸⁵ In conducting this analysis, the MSPB must consider all of the relevant factors and evidence, and it must not exclude or ignore countervailing evidence by only looking at the evidence that supports the agency’s position.⁸⁶

In determining whether the agency can meet that burden, the MSPB considers the following three 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. These are called the *Carr* factors in reference to *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

“Subjective criteria are ready mechanisms for discrimination.”⁸⁷ An Agency defense founded on subjective, pretextual or conclusory assessments of performance would be a weak case that is insufficient to permit an Agency to prevail.⁸⁸

In *Miller v. Dep't of Justice*,⁸⁹ the Federal Circuit looked past the normal deferential standard of review on factual issues and held that the government failed to show, by “clear and convincing” evidence, that the agency would have reassigned Mr. Miller even if he never made his protected disclosures. The Federal Circuit reiterated what it said in *Whitmore v. Dep't of Labor*:

“Clear and convincing evidence” is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the

85 5 C.F.R. § 1209.4(e); *Rychen v. Dept. of Army*, 51 M.S.P.R. 179, 184 (1991).

86 *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 14 (2015).

87 *Juaregui v. City of Glendale*, 852 F.2d 1128, 1136 (9th Cir. 1988); accord *Tomasso v. Boeing Co.*, 445 F.3d 702, 706 (3d Cir. Pa. 2006); see also, *Henry v. Lennox Indus., Inc.*, 768 F.2d 746, 751 (6th Cir. 1985) (“The articulated reason for the employment decision is subject to particularly close scrutiny when the [employer’s] evaluation is subjective.”); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988).

88 *Miller v. Dep't of Justice*, 842 F.3d 1252 (Fed. Cir. 2016); *Larson v. Dep't of the Army*, 260 F.3d 1350, 1356-57 (Fed. Cir. 2001).

89 842 F.3d 1252 (Fed. Cir. 2016).

employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was “tainted.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards [I]t is entirely appropriate that the agency bear a heavy burden to justify its actions.⁹⁰

In *Miller*, the Court stated, “We hold that no reasonable factfinder could find Warden Upton’s conclusory testimony about how OIG directed him to be strong evidence of independent causation.” The court added, “The Government’s evidence is weak, particularly when considered in light of the record evidence endorsing Mr. Miller’s character.”⁹¹ The court emphasized that it was not altering the MSPB’s finding that the Warden’s testimony was credible, only that it was not the strong evidence required by the WPA.

In *Whitmore*, the Federal Circuit explained policy reasons for holding agencies to such a high burden:

The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment actions against a whistleblower carries its statutory burden to prove – by clear and convincing evidence – that the same adverse action would have been taken absent the whistleblowing. . . . Congress decided that we as a people are better off knowing than not knowing about [the matters disclosed by whistleblowers], even if it means that an insubordinate employee . . . becomes, via such disclosures, more difficult to discipline or terminate. Indeed, it is in the presence of such non-sympathetic employees that commitment to the clear and convincing evidence standard is most tested and is most in need of preservation.⁹²

The Federal Circuit decided *Whitmore* and *Miller* during a five-year congressional experiment in “all-circuit review” of MSPB decisions under the WPA. Under all-circuit review, whistleblowers could file petitions for review of the final MSPB orders in WPA cases not just to the Federal Circuit, but to “any court of appeals of competent jurisdiction.”⁹³ In 2018, Congress made all-circuit review permanent,⁹⁴ and the Federal Circuit’s interest in upholding the “clear and convincing” standard

90 680 F.3d 1353, 1367 (Fed. Cir. 2012).

91 842 F.3d at 1259.

92 680 F.3d at 1377.

93 5 U.S.C. § 7703(b)(1)(B).

94 Pub. L. 115–195, § 2(c), July 7, 2018, 132 Stat. 1510, provided that: “The amendments made by this section [amending this section] shall take effect as if enacted on November 26, 2017.”

appears to have waned.⁹⁵

. *B* Title VII of the Civil Rights Act applies to most federal employees, including those in the Intelligence Community.

The Civil Rights Act of 1964 is the anti-discrimination law for which Dr. Martin Luther King, Jr., led the March on Washington. Its Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin.⁹⁶ It also prohibits retaliation for opposing unlawful discrimination and for participating in Equal Employment Opportunity (EEO) proceedings.⁹⁷

Related federal laws against employment discrimination include the Age Discrimination in Employment Act (ADEA),⁹⁸ Rehabilitation Act⁹⁹ (applying the Americans with Disabilities Act¹⁰⁰ to federal employees), Equal Pay Act (EPA),¹⁰¹ and the Genetic Information Nondiscrimination Act of 2008 (GINA).¹⁰² Kalijarvi, Chuzi, Newman & Fitch maintains a web page listing over 100 federal laws against discrimination and retaliation.¹⁰³

. 1 Title VII protects federal employees from discrimination.

In 1972, Congress amended Title VII to protect federal employees from discrimination.¹⁰⁴ The

95 *McGinn v. Dep't of Homeland Security*, No. 18-1414 (Fed. Cir. September 6, 2019); *Lalliss v. Dep't of Veterans Affairs*, No. 2020-2241 (Fed. Cir. March 4, 2021); *Smith v. General Services Administration*, No. 2020-1463 (Fed. Cir. March 11, 2021).

96 42 U.S.C. § 2000e-2(a)(1).

97 42 U.S.C. § 2000e-3(a).

98 29 U.S.C. § 621, and sequence.

99 29 U.S.C. § 791, and sequence.

100 42 U.S.C. § 12101, and sequence.

101 29 U.S.C. § 206(d).

102 42 U.S.C. § 300gg-51.

103 <https://kcnfdc.com/most-legal-claims-have-time-limits/>

104 42 U.S.C. § 2000e-16(a); Pub. L. 88-352, title VII, § 717, as added Pub. L. 92-261, § 11, Mar. 24, 1972, 86 Stat. 111. Congress extends coverage to “[employees](#) or applicants for employment (except with regard to aliens employed outside the limits of the United [States](#)) in military departments as defined in [section 102 of title 5](#), in executive agencies as defined in [section 105 of title 5](#) (including [employees](#) and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive

amendment says that, “All personnel actions affecting employees or applicants . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.”¹⁰⁵ Congress authorized the Equal Employment Opportunity Commission (EEOC) to enforce Title VII in the federal sector and to “issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.”¹⁰⁶

. 2 Title VII complaint procedures.

Private sector employees, and employees of state and local governments typically have 300 days to file a discrimination complaint under Title VII (180 days for employees not covered by a state or local agency enforces a law that prohibits employment discrimination on the same basis).¹⁰⁷ For federal employees, the EEOC requires that they make their first contact with their agency’s EEO office within forty-five (45) days of each adverse action.¹⁰⁸ For adverse personnel actions in the private sector, the time to file a complaint starts with the employee’s first notice of the employer’s final decision to impose that adverse action.¹⁰⁹ However, federal employees can commence a claim that a “personnel action” is discriminatory within 45 days of the effective date of that personnel action.¹¹⁰ Other resources

service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress[.]”

105 42 U.S.C § 2000e–16(a).

106 42 U.S.C § 2000e–16(b).

107 42 U.S.C § 2000e–5(e)(1). One can get EEOC’s position on the time limit for particular state and local jurisdictions through the Commission’s geographic list of local offices at <https://www.eeoc.gov/field-office>. After going to the page of the applicable District or local office, look for the “Timeliness” button on the left. Some interstate agencies have claimed that since they are not subject to state or local laws, they are governed by the 180 day time limit even when they operate in states with a Fair Employment Practices Agreement (FEPA). The Metropolitan Washington Airports Authority (MWAA) and Washington Metropolitan Area Transit Authority (WMATA) are examples.

108 29 C.F.R. § 1614.105(a)(1).

109 *Delaware State College v. Ricks*, [449 U.S. 250, 262](#), n. 16, [101 S.Ct. 498](#), [66 L.Ed.2d 431](#) (1980); *Green v. Brennan*, 136 S. Ct. 1769, 1778 (2016) (holding that the time to file a complaint against a constructive discharge commences with the employee’s resignation).

110 29 C.F.R. § 1614.105(a)(1); *Green v. Brennan*, 136 S. Ct. 1769, 1776 n.5 (2016) (no “personnel action” was alleged by Green).

are available to guide subsequent proceedings in Title VII cases.¹¹¹ Federal employees are subject to an “election of remedies” which allows them to challenge an adverse action through a negotiated union collective bargaining agreement (CBA), or through an EEO complaint, but not both.¹¹² Similarly, employees who have suffered an adverse action that is directly appealable to the MSPB must choose between starting with an agency EEO complaint and investigation or filing a direct appeal to the MSPB.¹¹³

Employees of federal contractors will typically use the private sector remedies against the contractor that employs them. However, if the adverse action against them was caused by or effectuated with federal officials, the affected employees can claim that the contractor and the federal agency were “joint employers.” Such claims typically require that the employee make a timely complaint against the federal agency, just as the agency’s employees must, and can also file a timely private sector complaint against the contractor. When a federal contractor takes an adverse action against an employee at the request of a federal official, the National Defense Authorization Act of 2013 (NDAA) specifically provides that the employer is still liable, “unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.”¹¹⁴

Employees in the private sector with EEO claims can file charges of discrimination directly with the EEOC or with state and local fair employment agencies. State and local laws can be more favorable to complainants by allowing them more time to file, providing compensatory damages without any cap,¹¹⁵ or by defining adverse actions, such as sexual harassment, more broadly. Some local

111 See, for example, E. Hadley and N. Davis, *A Guide to Federal Sector Equal Employment Law and Practice* (2020: Dewey Publications); R. McKnight, *Representing Plaintiffs in Title VII Actions* (2019: Wolters Kluwer); National Lawyers Guild Labor & Employment Committee, *Employee and Union Member Guide to Labor Law* (2016 Thompson Reuters).

112 29 C.F.R. § 1614.301.

113 29 C.F.R. § 1614.302.

114 41 U.S.C. § 4712(a)(3)(B). See the discussion of the NDAA claims below.

115 Compensatory damages under Title VII have been capped at between \$50,000 and \$300,000 (depending on the number of employees the employer has) since 1991. 42 U.S.C. § 1981a(b)(3).

practitioners may prefer to use the state courts if they resist issuing summary judgments and permit attorney participation in jury selection. However, including a Title VII claim in a state court action will permit the employer to remove the case to federal court.

EEOC has authority to commence and litigate claims that employers have engaged in unlawful discrimination or retaliation. However, it has the resources to litigate only a small portion of the worthy complaints it receives. As such, the large majority of complaints will be closed with a “notice of right to sue” or NRTS. The NRTS will inform the complainant of a 90-day time limit from receipt of the notice to file his or her claims in court or forever lose the right to pursue those claims.¹¹⁶ For this reason, it is important to keep EEOC informed about any changes in address. If the complainant has a lawyer, the lawyer should receive the NRTS. No matter who receives it, it is important to note the date of receiving the NRTS. Filing a lawsuit well before the 90th day will avoid the too-frequent dispute about when the NRTS was received and whether the lawsuit should be dismissed for being untimely. If an EEOC charge has been pending for more than 180 days, the complaint does not have to wait for a NRTS before filing in court.¹¹⁷

. 3 Title VII protects individuals from intersectional and subgroup discrimination.

Employers may well have policies that protect or even promote the employment of minorities but still have trouble when those minorities act in unexpected ways, such as by blowing the whistle on illegal conduct. Discrimination against a subgroup of a protected minority is just as unlawful as discrimination against the entire class. Particularly for whistleblowers who are women or minorities, the Title VII claim might offer the greatest potential for recovery.

For example, Dr. Marsha Coleman-Adebayo was an African-American senior policy analyst at the Environmental Protection Agency (EPA) when she raised concerns about unhealthy conditions in a

116 42 U.S.C § 2000e-5(f)(1)

117 *Id.*

South African vanadium mine controlled by an American company, Union Carbide.¹¹⁸ As the EPA's White House liaison for the U.S.-South Africa Binational Commission, also called the Gore-Mbeki Commission, she was tasked with helping the Nelson Mandela government make the transition from apartheid to democracy. She discovered that workers at Union Carbide's vanadium mine had tongues that were turning bright green, blood coming from their eyes, ears and genitals, a black substance seeping from their skin, and adverse reproductive effects. She reported these concerns to her superiors who asked her to stop raising the issue and decorate her office instead. In 1996, she commenced an EEO complaint against the EPA alleging race and gender discrimination and a hostile work environment (HWE). On August 18, 2000, a jury found the EPA was liable for the HWE and awarded Dr. Coleman-Adebayo \$600,000 in damages.¹¹⁹ The EPA had the Department of Justice's judgment fund pay those damages, leaving the EPA budget unaffected. Dr. Coleman-Adebayo then led the campaign for passage of the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 ([No FEAR Act](#)). No FEAR requires federal agencies to pay for damages arising from their violations of Title VII directly from their own budgets, and requires annual training of all federal employees on the laws and procedures against retaliation.¹²⁰

Title VII has long been used to protect subgroups of protected classes from what might be called "intersectional" discrimination. In *Phillips v. Martin Marietta Corp.*,¹²¹ Phillips sued for violations of Title VII alleging that she had been denied employment because of her sex. The District Court granted summary judgment for her employer even though the company was not accepting job

118 See, for example, Cynthia Gordy, *The High Cost of Being an EPA Whistleblower* (Nov. 3, 2011, The Root), <https://www.theroot.com/the-high-cost-of-being-an-epa-whistleblower-1790866682>; Dr. Marsha Coleman-Adebayo, *No Fear: The Whistleblower's Triumph Over Corruption and Retaliation at the EPA* (2011: Lawrence Hill).

119 See Section 101(3) of the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174, 116 STAT. 566, 567, codified as a note to 5 U.S.C. § 2301.

120 See Sections 201, 202(c) of the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174, 116 STAT. 566, 568-69, codified as a note to 5 U.S.C. § 2301.

121 400 U.S. 542 (1971).

applications from women with pre-school-age children (although it employed men with pre-school-age children). The District Court noted that 70-75% of the applicants for the position she sought were women and 75-80% of those hired for the position, assembly trainee, were women. In vacating the judgment, the Supreme Court made clear that unless a condition qualifies as a *bona fide* occupational qualification (BFOQ), such distinctions are discriminatory. Being nice to most women does not justify discrimination against others.

In *Connecticut v. Teal*,¹²² Black employees of a Connecticut state agency were promoted provisionally to supervisors. To attain permanent status, they had to participate in a selection process that required a passing score on a written examination. Subsequently, an examination was given to 48 Black and 259 White candidates. Fifty-four percent (54%) of the Black candidates passed, approximately 68% of the passing rate for the white candidates. The Black employees that failed sued alleging that their employer had violated Title VII by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded Blacks and was not job related. In the meantime, however, their employer made promotions from the eligibility list, the overall result being that 22.9 percent of the Black candidates were promoted but only 13.5 percent of the white candidates were promoted. The employer argued that this "bottom-line" result, more favorable to Blacks than to Whites, was a complete defense to the suit. The Supreme Court rejected this argument. Justice Brennan argues against this "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."¹²³

In the age discrimination case of *Hazen Paper Co. v. Biggins*,¹²⁴ the plaintiff was terminated at 62 years old and just a few weeks short of the years of service he needed for his pension to vest. The

122 457 U.S. 440 (1982).

123 *Id.* at 455.

124 507 U.S. 604 (1993)

Court made the critical point that employer decisions, “based in large part on *stereotypes unsupported by objective fact*,” are “*the essence of what Congress sought to prohibit* in the ADEA[.]”¹²⁵ This is equally applicable to whistleblowers shunned as “trouble makers,” unable to go along with illegality just to get along with management. In *Kansas Gas & Electric Co. v. Brock*,¹²⁶ the nuclear plant could not escape liability when it fired a whistleblower alleging that he could not “get along” with co-workers.

. 4 Unlawful discrimination can be proved with circumstantial evidence.

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.”¹²⁷ “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”¹²⁸ Similarly, in *Aman v. Cort Furniture Rental Corp.*,¹²⁹ 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.” That is why, in *Desert Palace, Inc. v. Costa*,¹³⁰ 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,

125 *Id.* at 610-11, (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (emphasis added).

126 780 F.2d 1505, 1507 (10th Cir. 1985), cert. denied 478 U.S. 1011.

127 *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2105 (2000).

128 *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006).

129 85 F.3d 1074, 1081-82 (3d Cir. 1996).

130 539 U.S. 90, 100 (2003).

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.¹³¹ The law calls for consideration of all the surrounding circumstances to understand the disparate treatment at issue in its context.¹³²

. 5 Title VII causation standards.

Title VII’s causation standards have been the subject of a series of Supreme Court decisions. In 1989, a plurality opinion in *Price Waterhouse v. Hopkins*¹³³ held that employees could prevail if they proved that unlawful discrimination was “a motivating part in an employment decision.” The employer could still avoid liability if it could prove that it would have made the same decision if discrimination had played no role in the process. In 1991, Congress amended Title VII to provide that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹³⁴ In such cases, if the employer demonstrates that it “would have taken the same action in the absence of the impermissible motivating factor,” then it will be liable for declaratory relief, injunctive relief and attorney’s fees, but not for reinstatement or damages.¹³⁵

In 2013, the Supreme Court noticed that Congress had established the “motivating factor” standard for discrimination claims under 42 U.S.C § 2000e–2, but not for retaliation claims under 42

131 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)).

132 *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”).

133 490 U.S. 228, 250 (1989).

134 42 U.S.C § 2000e–2(m).

135 42 U.S.C § 2000e–5(g)(2)(B).

U.S.C § 2000e-3.¹³⁶ For private sector retaliation claims, Section 2000e-3 prohibited discrimination “because” the employee opposed an unlawful employment practice or participated in a proceeding. Therefore, victims of retaliation have to prove that their protected activities were a “but for” cause of the adverse action. In subsequent cases, the Supreme Court made clear that a “but for” cause does not have to be the sole cause; rather it requires only a showing that the protected activity was the straw that broke the camel’s back, so to speak.¹³⁷

Noticing that Congress used different language in anti-discrimination provisions for federal employees,¹³⁸ the Supreme Court recently held that federal employees only need to show that the unlawful motive “plays any part in the way a decision is made[.]”¹³⁹ To receive the remedies of reinstatement, backpay and compensatory damages, however, the employee would have to show that the unlawful discrimination was a “but for” cause of the adverse personnel action.¹⁴⁰

. 6 Title VII applies in the Intelligence Community and claims can be processed with declassified versions of evidence.

Employees can pursue discrimination claims even when proving or defending those claims involves classified information. In 1996, the General Accounting Office¹⁴¹ conducted a study of personnel practices in the intelligence agencies and found that, “very few adverse action cases involve sensitive information.”¹⁴² GAO found:

136 *University of Tex. Southwestern Medical Center v. Nassar* , [570 U.S. 338, 346–347](#), [133 S.Ct. 2517, 186 L.Ed.2d 503](#) (2013).

137 *Burrage v. United States*, 571 U.S. 204 (2014); *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2D 218 (2020).

138 In *Babb*’s case, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a), provided that, “All personnel actions affecting employees or applicants ... shall be made free from any discrimination based on age.” Title VII, 42 U.S.C § 2000e-16(a), has an equivalent provision saying, “All personnel actions affecting employees or applicants ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.”

139 *Babb v. Wilkie*, 140 S. Ct. 1168, 1174 (2020).

140 *Id.* at 1177-78.

141 In 2004, GAO’s name was changed to the [U.S. Government Accountability Office \(U.S. GAO\)](#).

142 *Personnel Practices at CIA, NSA and DIA Compared with Those of Other Agencies*, available at <https://www.gpo.gov/fdsys/pkg/GAOREPORTS-NSIAD-96-6/content-detail.html>, p. 5.

EEO discrimination complaints are processed just like in other federal agencies, with procedures that involve internal investigations and possible external proceedings by EEOC and U.S. district courts. During fiscal years 1992 through 1994, the average time to process a complaint at DIA was faster than the federal average.¹⁴³

The report goes on to explain how intelligence agencies can remove classified information to produce unclassified versions for use in civil litigation. Each intelligence agency has a unit dedicated to this function and can be used in this case as it is in other civil litigation matters. If a case is inextricably intertwined with classified information, such as where the complainant is a covert undercover employee or the misconduct itself is classified, intelligence agencies have established processes to allow private attorneys limited access to relevant classified information, and all potential venues for a complaint have the ability to receive classified information as needed.

. CThe FCA protects and rewards employees of government contractors who blow the whistle on fraud.

Congress passed the False Claims Act (FCA)¹⁴⁴ on March 2, 1863, in response to unscrupulous contractors selling the Union Army decrepit horses, sick mules, faulty rifles and ammunition, and rancid rations. Its sponsor, Senator Jacob M. Howard, justified giving rewards to whistleblowers even though they may have engaged in unethical behavior themselves. He said, “I have based the [awards] upon the old-fashioned idea of holding out a temptation, and ‘setting a rogue to catch a rogue,’ which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.”¹⁴⁵

. 1 FCA *qui tam* actions provide awards for whistleblowers.

The FCA prohibits those receiving contracts, grants or other financial benefits from the federal

143 *Id.*, p. 16.

144 Codified at 31 U.S.C. § 3729, and sequence; originally enacted at 12 Stat. 696.

145 K. Stier, *When Bad Things Happen to Good Rogues*, Pacific Standard, March 28, 2010 (updated May 3, 2017), <https://psmag.com/news/when-bad-things-happen-to-good-rogues-11512>.

government from obtaining those benefits through any material false statement. Those found to have engaged in a fraud against the federal government are assessed a civil penalty of between \$5,000 and \$10,000 for each fraudulent claim, plus three times the amount of the government's damages.¹⁴⁶

In its most well-known provision, the FCA provides for whistleblowers, called "relators," to receive a percentage of the government's recovery from an action initiated, under seal, by the whistleblower.¹⁴⁷ The percentage can range from 15 to 30 depending on whether the government chooses to intervene in the action and the "extent to which the person substantially contributed to the prosecution of the action."¹⁴⁸ Between 1986 when Congress strengthened the FCA and 2020, the federal government has obtained over \$64 billion in judgments and settlements under the FCA.¹⁴⁹ In fiscal year 2020, the government recovered \$2.2 billion under the FCA, of which \$1.8 billion came from actions filed by whistleblowers.¹⁵⁰

. 2 *Qui tam* claims must be filed under seal, and whistleblowers must protect the seal by refraining from disclosures about the pending claims.

To permit the government an opportunity to investigate a fraud claim without alerting the fraudsters about the investigation, the FCA requires relators to file their claims under "seal."¹⁵¹ Relators who breach the seal by disclosing the existence of the sealed claim risk forfeiting their right to any award.¹⁵²

Whistleblowers are not permitted to file *qui tam* cases without representation by an attorney.¹⁵³

146 31 U.S.C. § 3729(a).

147 31 U.S.C. § 3730(b).

148 31 U.S.C. § 3730(d)(1).

149 <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>

150 *Id.*

151 31 U.S.C. § 3730(b)(2).

152 *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016) ("whether dismissal is appropriate should be left to the sound discretion of the district court.")

153 See, for example, *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (representation by an attorney safeguards the government's interests).

While it is wise for attorneys to be mindful of the possibility of a *qui tam* action for whistleblowers, it is unwise to attempt such a proceeding without associating with attorneys who are experienced in their unique procedures and have successful relationships with the government attorneys who would be involved. For example, the damages flowing from malpractice in a *qui tam* case would exceed the insurance limits carried by most attorneys.

. 3 *Qui tam* awards are for the first to file.

To receive a *qui tam* award, the relator must file the first sealed complaint against the particular fraud.¹⁵⁴ Because *qui tam* claims are claims of fraud, they must be plead with particularity.¹⁵⁵ The complaint should “identify ‘the who, what, when, where, and how of the misconduct charged,’ as well as ‘what is false or misleading about [the purportedly fraudulent] statement, and why it is false.’”¹⁵⁶

. 4 Civilian federal employee claims are disfavored but possible.

The FCA prohibits members of the armed forces from being *qui tam* relators.¹⁵⁷ Recognizing that Congress did not include federal civil servants in this prohibition, courts have split on whether such claims are “original sources” whose claims can be brought after a public disclosure.¹⁵⁸ Such claims would be more sympathetic if the employee tried to initiate a government action against the

154 31 U.S.C. § 3730(b)(5) (“no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”).

155 Fed. R. Civ. P. 9 (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

156 *Cafasso ex rel. United States v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011); see also, *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 196 (4th Cir. 2018) (“requirement[] for pleading presentment with particularity.”).

157 31 U.S.C. § 3730(e)(1).

158 Allowing claims by federal employees: *United States ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996) (exposing fraud was not part of the employee’s duties); *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1214 n.11 (10th Cir. 2003); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991). Disallowing federal employee claims: *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (en banc) (employee of agency’s Inspector General was engaged to expose fraud); *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17, 20 (1st Cir. 1990).

fraud through official channels but was rebuffed.

. 5 *Qui tam* claims arising based on classified information.

Qui tam actions can be pursued even when the government contract or other evidence in the case is classified. Relators with security clearances are not authorized to disclose the classified information to unauthorized persons, such as most attorneys who would handle a *qui tam* case. However, such relators could retain counsel to file a sealed *qui tam* complaint alleging that the grounds for the action are classified and will be disclosed to authorized government representatives during the government's investigation. The complaint should not contain classified information, in part because the complaint will eventually be unsealed and made available in the public record. Federal agencies may also allow private attorneys limited access to relevant classified information.

. 6 The FCA's anti-retaliation provision.

The FCA also has an anti-retaliation provision that protects "lawful acts done by the employee, contractor, agent or associated others ... to stop 1 or more violations[.]"¹⁵⁹ Courts have interpreted this text broadly to effectuate the Act's purpose and do not require the whistleblower to prove more than a reasonable belief.¹⁶⁰ Congress understood that employees would be unlikely to speak up or contact federal authorities if their protection were lost if their employers, in subsequent litigation, could persuade a court that no violation had actually occurred. Employees are also protected when they refuse to participate in a fraud.¹⁶¹

159 31 U.S.C. § 3730(h)(1), and therefore called an "h" claim by FCA practitioners.

160 The Supreme Court has explained that 31 U.S.C. § 3730(h) protects an employee's conduct "even if the target of an investigation or action to be filed was innocent." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel Wilson*, 545 U.S. 409, 416, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005). See also, *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (A plaintiff engages in protected activity "if she reasonably believed that [the defendant] was possibly committing fraud against the government, and she investigated the possible fraud."); *Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 479 (7th Cir. 2004); *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir. 2002).

161 *Chorches v. American Med. Response, Inc.*, 865 F.3d 71, 96 (2d Cir. 2017).

Whistleblowers are protected when they are taking their initial lawful steps to stop a violation – and they are not required to investigate their concern before disclosing it.¹⁶² In *Singletary v. Howard University*,¹⁶³ the court emphasized that a 2009 amendment eliminated the requirement that the protected activity be in furtherance of a *qui tam* action. The court looked to “Section 3730(h)(1)’s second prong, which, unlike the first, is not tied to the prospect of a False Claims Act proceeding,” and noted that other circuits had recognized the significant expansion in protection wrought by the 2009 amendment:

Instead, the plain statutory text focuses on the whistleblower’s “efforts to stop” violations of the statute before they happen or recur. See *United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 201 (4th Cir. 2018) (“The apparent purpose of the [second prong] is to untether these * * * protected efforts from the need to show that [a False Claims Act] action is in the offing. Indeed, we and other circuits have recognized that the amended language broadens the scope of protected activity.”); *United States ex rel. Chorches v. American Med. Response, Inc.*, 865 F.3d 71, 97 (2d Cir. 2017) (the second prong “broaden[s] the universe of protected conduct under [Section] 3730(h), at least with respect to ‘efforts to stop’ [False Claims Act] violations”).

The *Singletary* court specifically found that “the focus of the second prong is preventative—stopping ‘violations’—while the first prong is reactive to an (alleged) actual violation of the statute.”¹⁶⁴ Many whistleblower protection provisions cover employees who report or oppose what they reasonably believe to be unlawful conduct. That is because “a layperson should not be burdened with the ‘sometimes impossible task’ of correctly anticipating how a given court will interpret a particular statute.”¹⁶⁵

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

163 939 F.3d 287, 295-96 (D.C. Cir. 2019).

164 Citing, *Carlson v. DynCorp Int’l LLC*, 657 F. App’x 168, 171 (4th Cir. 2016) (“It would be nonsensical to say that these efforts only become protected activity if a lawsuit under the [False Claims Act] becomes a distinct possibility—the second prong is explicitly untethered from any such action.”).

165 *Singletary v. Howard University*, 939 F.3d 287, 296-97 (D.C. Cir. 2019), citations omitted.

. 7 The FCA uses a “reasonable belief” standard for determining protection.

The reasonable belief standard for protected activity clearly requires an examination of the reasonableness of a whistleblower’s beliefs, but *not* of whether the whistleblower actually communicated the reasonableness of those beliefs to management.¹⁶⁶ 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.”¹⁶⁷ Whistleblower protections were “intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise.”¹⁶⁸ Employees do not have to use the word “fraud” to establish employer knowledge of their efforts to stop a violation; there is no requirement to use any particular magic words.¹⁶⁹

. 8 Procedures for retaliation claims.

Whistleblowers who suffer retaliation on account of their efforts to stop a fraud can pursue a claim for relief as part of a sealed *qui tam* action. If they are not pursuing a *qui tam* action, they can pursue the retaliation claim independently as a regular civil action. Either way, the retaliation claim can be plead with ordinary notice pleading and does not have to be plead with particularity.¹⁷⁰ Remedies for retaliation include reinstatement, double back pay with interest and compensation for special damages including attorney’s fees and costs.¹⁷¹

Employees who suffered retaliation for raising concerns about contractor fraud should also

166 *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006).

167 *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009).

168 *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1002 (9th Cir. 2009) (SOX case).

169 *U.S. ex rel. Elms v. Accenture LLP*, 341 F. App’x 869, 874 (4th Cir. 2009) (Finding sufficient allegations that Elms was fired shortly after disclosing that Avanade was “short-changing the government.”).

170 *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 200 (4th Cir. 2018) (“[R]etaliatio[n] claims under § 3730(h) are not subject to Rule 9(b) ’s heightened particularity requirement. Instead, a plaintiff need only satisfy Rule 8(a)’s notice-pleading standard.”); *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 433 (4th Cir.2015).

171 31 U.S.C. § 3730(h)(2).

consider pursuing a DCWPA or NDAA claim as described in the next section. Doing so does not breach the FCA's seal since the IG investigating this retaliation claim is typically the same IG the Department of Justice will be working with to investigate the *qui tam* claim. By preserving both the FCA and the DCWPA or NDAA claims, the whistleblower could potentially recover both the double backpay provided by the FCA and the compensatory damages permitted by the DCWPA or NDAA. Moreover, the DCWPA and NDAA claims will be decided with a more favorable standard of causation.

. 9 Other award programs.

Other federal laws provide for awards to whistleblowers. These include programs operated by the Securities and Exchange Commission (SEC),¹⁷² Commodity Futures Trading Commission (CFTC),¹⁷³ the Internal Revenue Service (IRS)¹⁷⁴ and banking regulators.

. D *The Defense Contractors Whistleblower Protection Act and the NDAA also protect employees of government contractors who blow the whistle on fraud.*

First enacted in 1986, the Defense Contractors Whistleblower Protection Act (DCWPA) protects employees of defense and NASA contractors from retaliation when they report gross waste, gross mismanagement, abuse of authority, a violation of law, rule or regulation related to the federal contract or grant, or a substantial and specific danger to public health or safety.¹⁷⁵ These categories match the categories of protection for disclosures under the federal employees' Whistleblower Protection Act (WPA) discussed above. The DCWPA protects the employee so long as he or she "reasonably believes" that the "information" the employee discloses "is evidence of the" wrongdoing.

Similarly, the National Defense Authorization Act of 2013 (NDAA),¹⁷⁶ protects the employees

172 <https://www.sec.gov/whistleblower>

173 <https://www.whistleblower.gov/>

174 <https://www.irs.gov/compliance/whistleblower-informant-award>

175 10 U.S.C. § 2409(a)(1).

176 41 U.S.C. § 4712.

of contractors, subcontractors, grantees and subgrantees of federal agencies other than the Defense Department and NASA.¹⁷⁷ Thus, employees of entities that are receiving federal funds should be protected by the DCWPA, or the NDAA, but not both.

. 1 The DCWPA and NDAA protect disclosures to designated classes of recipients.

Unlike the WPA, the DCWPA and NDAA only protect those disclosures made to a limited number of recipients¹⁷⁸:

- (A) A Member of Congress or a representative of a committee of Congress.
- (B) An Inspector General.
- (C) The Government Accountability Office.
- (D) An employee of the Department of Defense or the National Aeronautics and Space Administration, as applicable, responsible for contract oversight or management.
- (E) An authorized official of the Department of Justice or other law enforcement agency.
- (F) A court or grand jury.
- (G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

In addition to protecting disclosures, both the DCWPA and NDAA protect an employee who, “initiates or provides evidence of contractor, subcontractor, or grantee misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract or grant” by providing that the employee so participating “shall be deemed to have made a [protected]

177 The NDAA has an antecedent in the 2009 American Reinvestment and Recovery Act (“ARRA”), Pub. L. 111-5, Section 1553; 48 C.F.R. § 3.907, and sequence. The ARRA’s anti-retaliation provision protected concerns arising in programs funded by the ARRA’s economic stimulus. While the anti-retaliation provision is still in effect, there are not many programs that are still operating with ARRA funding. The NDAA’s anti-retaliation provision represents an expansion of whistleblower protection to cover employees working through any Executive Branch federal funding.

178 10 U.S.C. § 2409(a)(2); 41 U.S.C. § 4712(a)(2).

disclosure[.]”¹⁷⁹ Both the DCWPA and NDAA prohibit retaliation “even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.”¹⁸⁰ This provision eliminates the “government official made me do it” defense. It does not eliminate the “Congress made me do it” defense if the employer can cite a law requiring the action alleged to be retaliatory.

. 2 The DCWPA and NDAA exhaustion requirement.

Both the DCWPA and NDAA have requirements for administrative exhaustion through the funding agency’s Inspector General (IG).¹⁸¹ Complaints must be submitted within three (3) years of the alleged reprisal.¹⁸² To avoid defenses claiming a failure to exhaust, complainants should be careful to identify all responsible parties. Some federal contracts and grants are funneled through a series of related entities, and the careful whistleblower wants to be sure that the responsible parties who will have adequate resources at the end of the case are named in the IG complaint or a timely amendment thereto. Complaints should also list the protected activities alleged to have contributed to the adverse action. In a small portion of cases, the employer may cite some other protected activity (whether actually undertaken by the complainant or not¹⁸³) as the reason for the adverse action, and failure to list that protected activity should not prevent relief where the parties and adverse actions were correctly identified.¹⁸⁴ As to the adverse actions, the whistleblower should be aware of the employer’s actions

179 Quoting NDAA at 41 U.S.C. § 4712(a)(3)(A). DCWPA’s equivalent provision is at 10 U.S.C. § 2409(a)(3)(A).

180 Quoting NDAA at 41 U.S.C. § 4712(a)(3)(B). DCWPA’s equivalent provision is at 10 U.S.C. § 2409(a)(3)(B).

181 Quoting NDAA at 41 U.S.C. § 4712(b)(1)). DCWPA’s equivalent provision is at 10 U.S.C. § 2409(b)(1).

182 10 U.S.C. § 2409(b)(4); 41 U.S.C. § 4712(b)(4).

183 *Heffernan v. City of Paterson*, 578 U.S. ___, 136 S. Ct. 1412 (2016) (mistaken belief of protected activity still supports a retaliation claim).

184 *Mount v. Department of Homeland Security*, 937 F.3d 37 (1stCir. 2019). A blog about this case is at <https://kcnfdc.com/blog/whistleblower-claims-can-be-exhausting-but-need-not-always-be-exhausted/>

causing harm. Discharges, discipline, demotions, non-selections, and the like are “discrete” adverse actions occurring at a particular time and causing a distinct harm. They should each be asserted in the complaint. Other adverse actions could be grouped together as a hostile work environment (HWE) claim and then all the adverse actions should be considered together to determine if they are sufficiently material to dissuade reasonable employees from engaging in protected activities.¹⁸⁵

The NDAA thrust the responsibility to investigate and write reports onto the IGs without their request, and without providing the IGs sufficient additional resources and training to handle whistleblower retaliation investigations. Congress was thinking that having the IGs receive these complaints would facilitate having the IG consider whether the underlying violation should also be investigated. However, the process of having the IGs warm up to the advantages of protecting whistleblowers has been slow and uneven. The DCWPA and NDAA permit the IGs to decline to investigate at all if they find the complaint is “frivolous, fails to allege a violation ..., or has previously been addressed in another Federal or State judicial or administrative proceeding initiated by the complainant.”¹⁸⁶ While such declinations are disappointing, they should not affect subsequent adjudication in the U.S. District Court as that proceeding is “de novo.”¹⁸⁷

. 3 The DCWPA and NDAA use the favorable “contributing factor”/“clear and convincing” causation standard.

The DCWPA and NDAA incorporate the favorable “contributing factor”/“clear and convincing evidence” bifurcated causation standard used by the WPA¹⁸⁸ and described above in Section A. Unlike the WPA, whistleblowers covered by the DCWPA or NDAA, after exhausting the IG investigation, can

185 *Green v. Brennan*, 136 S. Ct. 1769 (2016).

186 Quoting NDAA at 41 U.S.C. § 4712(b)(1). DCWPA’s equivalent provision is at 10 U.S.C. § 2409(b)(1).

187 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4712(c)(2). See, for example, *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239, 246 (4th Cir. 2009) (“By definition, *de novo* review entails consideration of an issue as if it had not been decided previously.” Quoting *United States v. George*, [971 F.2d 1113, 1118](#) (4th Cir. 1992)).

188 10 U.S.C. § 2409(c)(6); 41 U.S.C. § 4712(c)(6).

bring their claims to U.S. district court and demand a jury trial.¹⁸⁹

. 4 The DCWPA and NDAA provide a 2-year window for actions in court.

The DCWPA and NDAA each provide for a two-year window in which the whistleblower can file a civil action in U.S. district court. Careful attention to when this window starts will lead to informed decision-making about whether to consent to an IG's request for additional time to complete its investigation as the start date of the window is pegged to the deadline for the IG's report.¹⁹⁰ The the head of the affected federal agency issues a timely decision, that decision starts the two-year window.¹⁹¹ Note, though, that the report of the IG is not the final agency decision. The laws state that the the IG's report goes to the agency head who is to make the final order within thirty (30) days. If the there is no timely decision, and the employee did not agree to an extension of time, then the two-year window starts on the 210th day after the employee filed the complaint with the IG. If the employee agrees to an IG's request for an extension of time to complete the investigation, and if no showing is made that the employee's bad faith caused the delay, then the two-year window starts on the 30th day after the extended period expires. Thus, if an employee is eager to get to court and does not want to have the IG's report, then the employee would be unlikely to agree to requests to extend the time. If the employee would like to have the benefit of the IG's full report, or wants to extend the time available before facing a deadline to file in court, then the employee would be more likely to consent to extensions of time.

Upon a finding of unlawful retaliation, either by the agency head or the court, the employee can seek abatement of the reprisal, reinstatement, back pay, compensatory damages, attorney's and expert

¹⁸⁹ 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4712(c)(2).

¹⁹⁰ *Id.*

¹⁹¹ If the order denies relief, then the statutes make clear that the denial starts the two-year window. 10 U.S.C. § 2409(c)(2); 41 U.S.C. § 4712(c)(2). If the order grants relief, either the agency or the employee can commence an action to enforce it, and the statute does not specify a time limit for doing so. 10 U.S.C. § 2409(c)(4); 41 U.S.C. § 4712(c)(4). However, prudent employees would not test a court's patience with unreasonable delays.

witness fees, and costs.¹⁹²

. EOther specialized whistleblower protections can apply in the private and federal sectors.

As mentioned previously, there are over 100 federal anti-retaliation laws.¹⁹³ Many of them can protect employees with security clearances from certain forms of retaliation. When an employee suffers and adverse action, it is a good time to pause briefly and consider the range of potential claims that might be available. Consider what the employee might have said or done that upset those who could have influenced the decision. Consider what biases could have been at play, or have been observed in the workplace. Consider what threats might be perceived by the decision-makers. Consider the employer's and the employee's litigation history. Each of these considerations could connect to one or more laws that protect employees from retaliation. It is best to undertake this consideration before the applicable statutes of limitations begin to run.

Some of the oldest whistleblower protection laws are among the weakest. Six federal environmental protection laws have antiquated whistleblower protections that require filing an initial complaint with the Occupational Safety and Health Administration (OSHA) with thirty (30) days of the first notice of an adverse action.¹⁹⁴

. 1 The Department of Labor program protects whistleblowers in a variety of industries and areas of concern.

The Department of Labor (DOL), through OSHA, the Office of Administrative Law Judges (OALJ) and the Administrative Review Board (ARB), enforces 25 whistleblower protections, generally

192 10 U.S.C. § 2409(c)(1); 41 U.S.C. § 4712(c)(1).

193 Kalijarvi, Chuzi, Newman & Fitch maintains a web page listing over 100 federal laws against discrimination and retaliation. <https://kcnfdc.com/most-legal-claims-have-time-limits/>

194 These are the Clean Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act ("Super Fund" or CERCLA), 42 U.S.C. § 9610; Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9; Solid Waste Disposal Act (SWDA, which includes the Resource Conservation and Recovery Act, RCRA), 42 U.S.C. § 6971 Toxic Substances Control Act (TSCA), 15 U.S.C. §2622; and the Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1311, 1367(a), (b).

organized into laws addressing workplace safety, environmental protection, transportation safety, consumer protection, and financial misconduct.¹⁹⁵ They have time limits ranging from 30 to 180 days to file an initial complaint with OSHA. Complaints to OSHA can be filed at any OSHA office by FAX or online.¹⁹⁶ OSHA even accept telephone complaints, but most practitioners prefer to have written documentation of the initial complaint and its timely filing.

For some whistleblower laws enforced by DOL, the federal government has waived sovereign immunity so that federal employees can make retaliation complaints. These include the Clean Air Act (CAA),¹⁹⁷ Comprehensive Environmental Response, Compensation and Liability Act (“Super Fund” or CERCLA),¹⁹⁸ Energy Reorganization Act (ERA, for employees of the Nuclear Regulatory Commission, contractors or subcontractors of the Commission, and the Department of Energy), Safe Drinking Water Act (SDWA),¹⁹⁹ Toxic Substances Control Act (TSCA, for complaints involving lead- based paint).²⁰⁰ For the Clean Water Act (CWA) and Solid Waste Disposal Act (SWDA), Congress’ explicit provisions for coverage of federal facilities permits the DOL to find that federal employees are protected when raising concerns about compliance at those facilities.²⁰¹

. 2 The OSH Act is particularly weak in protecting workplace health and safety whistleblowers.

One federal law enforced by OSHA is particularly weak, that is Section 11(c) of the

195 Lists of these laws are at <https://kcnfdc.com/most-legal-claims-have-time-limits/> and <https://www.whistleblowers.gov/statutes>

196 https://www.whistleblowers.gov/complaint_page

197 *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec’y May 18, 1994); 42 U.S.C. §§ 7418(a), 7602(e), 7622(a) and (b).

198 *Id.* and 42 U.S.C. § 9610; *Pogue v. United States Dept. of the Navy*, 87- ERA-21 (Sec’y May 10, 1990), *rev’d on other grounds*, *Pogue v. United States Dept. of Labor*, 940 F.2d 1287 (9th Cir. 1987).

199 *Id.* and 42 U.S.C. §§ 300(f)(11) and (12), 300j-9(i).

200 *Stephenson v. National Aeronautics & Space Administration*, 94-TSC-5 (Sec’y July 1, 1995) (dismissing the complaint because it did not involve lead-based paint).

201 *Conley v. McClellan Air Force Base*, Case No., 84-WPC-1, Sec. Dec., Sept. 7, 1993, slip op. at 2-9.

Occupational Safety and Health Act (OSH Act).²⁰² Ironically, it is also the law under which OSHA receives the most whistleblower complaints.²⁰³ Not only does the OSH Act require that complaints be filed within 30 days, but if OSHA does not choose to file a lawsuit over the case, the whistleblower has no right to ask for an ALJ hearing or to go to court. The case can be dismissed without ever affording the whistleblower a due process hearing. In FY 2020, after receiving 2,539 complaints of retaliation for raising workplace safety concerns – in the first year of the COVID-19 pandemic – OSHA found merit in precisely 20 complaints.²⁰⁴

. 3 Two transportation laws have elections of remedies.

The Federal Railroad Safety Act (FRSA) and National Transit Systems Security Act (NTSSA) have election of remedies provisions that could prevent a whistleblower from pursuing relief under other laws after filing an OSHA complaint.²⁰⁵ Thus, if a railroad worker files a FRSA complaint with OSHA and subsequently files a lawsuit in state court arising from the same adverse action, that court case would be subject to dismissal.²⁰⁶ However, if the first action alleged that the adverse action was motivated by bias unrelated to the FLSA, one court of appeals has held that the election of remedies does not bar the second suit under the FRSA.²⁰⁷ The ARB has held that the election of remedies does not apply to a grievance and arbitration under Section 3 of the Rail Labor Act.²⁰⁸ If an election of

202 29 U.S.C. § 660(c).

203 In FY 2020, OSHA received 2,539 whistleblower complaints under the OSH Act out of 3,448 total whistleblower complaints. https://www.osha.gov/sites/default/files/3D_Charts-Received_Closed.pdf

204 *Id.*; OSHA also reported settlements in 524 OSH Act cases, but the quality of those settlements is not reported.

205 FRSA, 49 U.S.C. § 20109(f) (“An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.”); NTSSA, 6 U.S.C. § 1142(e) (“An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public transportation agency.”).

206 *Welch v. Union Pac. R.R. Co.*, No. 16-cv-00431 (W.D. Mo. Aug. 4, 2016) (2016 U.S. Dist. LEXIS 102193; 2016 WL 4154760).

207 *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 628 (4th Cir. 2015) (“a suspension on the basis of race is not ‘the same allegedly unlawful act’ as a suspension in retaliation for FRSA whistleblowing.”)

208 *Mercier v. Union Pacific R.R.*, ALJ No. 2008-FRS-4 (June 3, 2009).

remedies might be problematic, consider that OSHA has no regulations that require an initial complaint to cite the law under which the complaint is filed.

The OALJ staff maintain a digest of whistleblower cases that is an excellent resource for many issues that arise in whistleblower cases, both in DOL and elsewhere.²⁰⁹

. *FJudicial abstention under Egan.*

The Supreme Court in *Egan* was concerned with “the protection of classified information” which “must be committed to the broad discretion of the agency responsible[.]” *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988). Thus, *Egan* does not always bar claims arising from a supervisor’s decision not to submit a request for an employee’s security clearance to the Agency’s office that makes the normal decisions on clearances. *Greenhouse v. Geren*, Civil Action No. 07-182 (EGS) (D.D.C. Jul. 27, 2009). Similarly, a claim that an Agency official knowingly submitted false information in an effort to get a clearance suspended can survive a challenge based on *Egan*. *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) (*Rattigan II*).

Noting that *Egan* was decided by statutory interpretation, the Supreme Court permitted an openly gay man to challenge a denial of a clearance based on his disclosure of his status of being gay on constitutional grounds. In *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), the governing statute, Section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), authorized the CIA Director to terminate employees “whenever [the Director] shall deem such termination necessary or advisable in the interests of the United States.” *Id.* at 594, 108 S.Ct. 2047. John Doe, a pseudonym, had worked for the CIA for nine (9) years before disclosing his homosexuality in 1982. The CIA decided that even though Does was not ashamed of his sexual orientation, it was still a security concern and warranted termination of his employment. The Court held that Section 102(c) barred review under the Administrative Procedures Act (APA), but did not preclude judicial review of

209 <https://www.dol.gov/agencies/oalj/topics/libraries/LIBWHIST>

“colorable constitutional claims arising out of the actions of the Director.” *Id.* at 603, 108 S.Ct. 2047. At least one district court has interpreted *Webster* to allow judicial review of claims that a security decision was based on the complainant’s First Amendment-protected activities, such as criticizing the government. *Garcia v. Pompeo*, 2020 U.S. Dist. LEXIS 5159 (D.D.C. Jan. 13, 2020). However, this remains an open question in the D.C. Circuit. See, *Palmieri v. United States*, 896 F.3d 579, 590 (D.C. Cir. 2018) (J. Kastias, concurring: “the Court avoids deciding whether *Egan* bars non-frivolous constitutional challenges to the denial or revocation of a security clearance.”).

Similarly, *Egan* does “not [protect] general national-security concerns such as those applicable in determining whether an individual has the physical capacity to guard a nuclear plant.” *Hale v. Johnson*, 845 F.3d 224, 230 (6th Cir. 2016) (permitting a claim of disability discrimination under the Rehabilitation Act).

While *Egan* prevented court review of an agency decision to remove an employee for a program that involved classified information, “plaintiffs’ suspensions without pay and removal from federal service. The Secretary has not shown that the plaintiffs’ reassigned positions *outside* the AA&E program were ‘sensitive’ positions.” *Bilski v. McCarthy*, 2017 WL 3484686 (E.D. Ky. Aug. 14, 2017).

A federal contractor’s employee can bring a discrimination claim for wrongful termination even when the employer’s defense is that the federal government denied the employee a security clearance that the contractor said was a requirement for the job. *Zeinali v. Raytheon Co.*, 636 F.3d 544, 549–50 (9th Cir. 2011). Mr. Zeinali disputed “the *bona fides* of Raytheon’s professed security clearance requirement, and he introduces evidence showing that Raytheon retained similarly situated non-Iranian engineers who lacked security clearances.” 636 F.3d at 546.

A decision to deny building access is different than a security clearance decision and thus can be reviewed by courts. *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013) (dismissing the Title VII claim based

on Title VII's exclusions of national security programs).

. G The MSPB can review and enforce procedural protections in denials of security clearances.

The Supreme Court expressly allowed judicial review of administrative suspensions:

An employee who is removed for “cause” under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clearance was denied, **and whether transfer to a nonsensitive position was feasible**. Nothing in the Act, however, directs or empowers the Board to go further.

Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (emphasis added). Granting or denying monetary relief does not require the court to order access to classified information or otherwise review the security clearance decisions. However, this option is only available to federal employees with MSPB appeal rights, which are not provided for employees of the Intelligence Community.

. H Confidential disclosures of “urgent concerns” in the Intelligence Community.

Through the Intelligence Community Whistleblower Protection Act of 1998,²¹⁰ Congress authorized the Inspector General of the Intelligence Community (IC IG) and intelligence agency Inspectors General to receive confidential disclosures of “urgent concerns” and pass them along to the congressional intelligence committees.²¹¹ Urgent concerns can come from “employee of an element of the intelligence community, an employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community[.]”²¹² If the IC IG or agency Inspector General finds the concern “credible,” then the statute provides for the Director of National Intelligence (DNI) or the agency head to submit it to the congressional intelligence committees within 21 days of the initial disclosure to IC IG or agency Inspector General. If the DNI or agency head fails to do so, then the employee who submitted the concern can, after requesting and receiving directions

210 Pub. L. No. 105-272, title 7.

211 50 U.S.C. § 3033(k)(5).

212 50 U.S.C. § 3033(k)(5)(A).

from the DNI or agency head, submit the urgent concern directly to the congressional intelligence committees.²¹³

The statute defines an “urgent concern” to include any of the following:

(i) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information, but does not include differences of opinions concerning public policy matters.

(ii) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.

(iii) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, constituting reprisal or threat of reprisal prohibited under subsection (g)(3)(B) of this section in response to an employee’s reporting an urgent concern in accordance with this paragraph.²¹⁴

IC whistleblowers who submit an urgent concern are entitled to confidentiality, “unless the Inspector General determines that such disclosure is unavoidable during the course of the investigation or the disclosure is made to an official of the Department of Justice responsible for determining whether a prosecution should be undertaken[.]”²¹⁵ In the most famous test of this requirement to protect the confidentiality of whistleblowers, Sen. Rand Paul sought to disclose the name of the supposed whistleblower during the Senate trial on President Trump’s first impeachment. Chief Justice Roberts refused to allow the question to be read during the trial and Senate leaders supported that refusal.²¹⁶

The statute also prohibits retaliation for submitting any disclosure or complaint to the IC IG or agency Inspector General, “unless the complaint was made or the information was disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.”²¹⁷ Congress specifically

213 50 U.S.C. § 3033(k)(5)(D).

214 50 U.S.C. § 3033(k)(5)(G).

215 50 U.S.C. § 3033(g)(3)(A).

216 K. Cheney, B. Everett, A. Desiderio, “John Roberts refuses Rand Paul's whistleblower question,” Politico, 1/30/2020, <https://www.politico.com/news/2020/01/30/john-roberts-rand-paul-whistleblower-109527>

217 50 U.S.C. § 3033(g)(3)(B).

provided that anyone claiming such a reprisal occurred can submit a complaint to the IC IG or agency Inspector General as another urgent concern.²¹⁸ Anyone suffering such a reprisal could also consider using the complaint procedures in Presidential Policy Directive 19 and the 2014 Intelligence Authorization Act and described below.

Other avenues for lawful disclosures of classified information can include anyone in the employee's supervisory chain-of-command, up to and including an agency head, the DNI, the federal agency's Inspector General, or the IC IG, or the Office of Civil Liberties, Privacy, and Transparency (CLPT) of the affected federal agency or the DNI. Classified disclosures are also possible to a federal agency's Office of General Counsel (OGC), Equal Employment Opportunity (EEO) Office, or the Office of Special Counsel (OSC), but prior arrangements should be made to assure that the person receiving the information has the appropriate security clearance.

. I Military Whistleblower Protection Act (MWPA) protections for members of the armed services.

Members of the armed services, and the commissioned officers of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA), are excluded from protection under the civilian Whistleblower Protection Act (WPA).²¹⁹ In its place, the Military Whistleblower Protection Act (MWPA) offers a different protection.²²⁰

. 1 The MWPA's scope of protection.

The MWPA protects disclosures about:

(A) A violation of law or regulation, specifically including laws and regulations prohibiting rape, sexual assault, or other sexual misconduct, sexual harassment, or unlawful discrimination (on the basis of race, color, religion, sex, or national origin).

218 50 U.S.C. § 3033(g)(3)(A)(iii), quoted above.

219 5 U.S.C. §§ 1221(a), 2105(a) and 2101(3); see also *Special Counsel ex rel. Hardy v. Dep't of Health & Human Servs.*, 117 M.S.P.R. 174, 177 (2011).

220 10 U.S.C. § 1034.

(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.²²¹

when such disclosures are made to:

(i) a Member of Congress;

(ii) an Inspector General;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command;

(v) a court-martial proceeding; or

(vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.²²²

The MWPA also protects any lawful disclosure to any member of Congress or any Inspector General,²²³ and participation or assistance in any investigation or proceeding about a protected disclosure or a claim of a violation of the MWPA.²²⁴

. 2 Adverse actions that the MWPA can redress.

The following adverse actions can form the basis of a MWPA complaint:

(i) The threat to take any unfavorable action.

(ii) The withholding, or threat to withhold, any favorable action.

(iii) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade.

(iv) The failure of a superior to respond to any retaliatory action or harassment

221 10 U.S.C. § 1034(c)(2)(A) through (C).

222 10 U.S.C. § 1034(b)(2)(B)(i) through (vi).

223 10 U.S.C. § 1034(a) and (b)(1)(A).

224 10 U.S.C. § 1034(b)(1)(C).

(of which the superior had actual knowledge) taken by one or more subordinates against a member.

(v) The conducting of a retaliatory investigation of a member.

The DNI Guide provides this list adverse actions that can be redressed:

Any action taken on a member of the Armed Forces that affects, or has the potential to affect, that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluations under DoD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the member's grade.²²⁵

By covering this range of adverse actions, the MWPA is actually superior to the civilian WPA in that “any unfavorable action” can be challenged, including an investigation of the whistleblower.

. 3 MWPA’s complaint procedure.

Service members seeking redress for unlawful retaliation can file complaints with an appropriate Inspector General (IG).²²⁶ The time limit to file a complaint is one year after discovery of the adverse action, but the IG has discretion to investigate untimely complaints.²²⁷ Service members within the Defense Department can file their complaints with DoD IG,²²⁸ or with the IG of their service (in which case, the IG will notify DoD IG).²²⁹ DNI provides a guide listing information to include in the complaint.²³⁰

225 Guide to Filing a Military Whistleblower Reprisal Complaint, Section 3(e). The Guide is in the Appendix and available at: https://www.dni.gov/ICIG-Whistleblower/resources/Guide_to_Filing_a_Military_Reprisal_Complaint.pdf

226 10 U.S.C. § 1034(c)(1).

227 10 U.S.C. § 1034(c)(5)

228 The online complaint form on the DoD Hotline website is at <https://www.dodig.mil/Components/Administrative-Investigations/Whistleblower-Reprisal-Investigations/Whistleblower-Reprisal/> (last visited March 14, 2021). Alternatively, one may send the to: Defense Hotline, The Pentagon, Washington, DC 20301-1900; or fax to: 703-604-8567, DSN 664-8567.

229 10 U.S.C. § 1034(c)(4)(B).

230 The Guide to Filing a Military Whistleblower Reprisal Complaint is in the Appendix and available at: https://www.dni.gov/ICIG-Whistleblower/resources/Guide_to_Filing_a_Military_Reprisal_Complaint.pdf

The IG cannot deny relief to a whistleblower because:

- (A) the communication was made to a person who participated in an activity that the member reasonably believed to be covered by paragraph (2);
- (B) the communication revealed information that had previously been disclosed;
- (C) of the member's motive for making the communication;
- (D) the communication was not made in writing;
- (E) the communication was made while the member was off duty; and
- (F) the communication was made during the normal course of duties of the member.²³¹

The IG's report is issued to the Secretary of the member's service. That Secretary's decision is reviewed by the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) who makes the final decision on the complaint.²³²

DoD's Directive provides for the following relief in cases where an unlawful reprisal is found:

1. Order the record of the Service member corrected.
2. Take any appropriate disciplinary or corrective action against the individual who committed the restriction or reprisal.²³³

Veterans can also seek correction of military records through the Board for Correction of Military Records (BCMR) of the appropriate service. Correction is particularly useful when it upgrades a less than honorable discharge.²³⁴ Effective April 7, 2021, DoD has established a Discharge Appeal Review Board (DARB) to consider appeals of denials by BCMRs for service members with separation

231 10 U.S.C. § 1034(c)(3). These clarifications correspond with provisions of the 2012 Whistleblower Protection Enhancement Act, 5 U.S.C. § 2302(f), that sought to reverse MSPB and Federal Circuit decisions that made up reasons to deny protection that had no basis in the statutory reference to "any disclosure." S. Rep. No. 112-155, pp. 4-5, 2012 U.S.C.C.A.N. 589, 593-94 (2012).

232 DoD Directive 7050.06, Section 1(f) (April 17, 2015).

233 DoD Directive 7050.06, Section 4(c) (April 17, 2015).

234 A free Discharge Upgrades manual is available from the Military Law Task Force (MLTF) of the National Lawyers Guild (NLG) at <https://nlgmltf.org/programs-and-services/military-law-library/memos/discharge-upgrades/>

dates on or after December 20, 2019.²³⁵

The MWPA applies to the record correction board of each service. In one case, the Navy admitted that it had trained BCNR staff to apply an improperly narrow interpretation of the MWPA.²³⁶

. *J Intelligence Authorization Act and PPD-19 protections for whistleblowers against retaliation.*

During congressional consideration of the 2012 Whistleblower Protection Enhancement Act (WPEA), the House Intelligence Committee refused to allow the Whistleblower Protection Act to cover employees in the Intelligence Community (IC). On October 10, 2012, President Obama therefore created a procedure to protect IC whistleblowers through Presidential Policy Directive 19.²³⁷ Congress thereafter codified a significant portion of this protection through two provisions in the 2014 Intelligence Authorization Act.²³⁸ In 2018, Congress extended the protections to employees of contractors, subcontractors, grantees, subgrantees, or personal services contractors, of an agency. A key feature of both of these provisions is that decisions about whether unlawful retaliation has occurred are made by top leaders of the IC itself, and not by any specialized independent body as the Merit Systems Protection Board (MSPB) used for the civilian WPA.

Whistleblower advocates had more confidence in the PPD-19 protection when the program was led by Daniel P. Meyer, a former whistleblower and whistleblower advocate with Public Employees for Environmental Responsibility (PEER). From 2004 to 2010, Mr. Meyer served as Director, Civilian

235 <https://www.defense.gov/Newsroom/Releases/Release/Article/2564345/dod-announces-new-discharge-appeal-review-board-option/source/GovDelivery/>

236 *Bradley v. Spencer*, 2019 WL 1567838 (D.Conn. Apr. 11, 2019), at *3 n.3 (“ Defendant admits that the training materials plaintiff identified misstate the law and represents that the BCNR has corrected its training program accordingly”); *id.* at *4 (ordering remand to reconsider denial of upgrade application by Black lesbian sailor subjected to retaliation and separated with an OTH after she filed sexual harassment complaint, where BCNR failed to follow MWPA).

237 A copy of PPD-19 is in the appendix, and available at <https://www.dni.gov/ICIG-Whistleblower/resources/PPD-19.pdf>

238 50 U.S.C. § 3234 (protecting IC federal and contractor employees from adverse employment actions) and 50 U.S.C. § 3341(j) (prohibiting retaliatory security clearance and access determinations).

Reprisal Investigations (DCRI) for the U.S. Department of Defense Inspector General, where he led two investigative teams: the National Security Reprisal Team (NSRT) and the Procurement Fraud Reprisal Team (PFRT).²³⁹ In 2010, he became Director for Whistleblowing and Transparency (DW&T) responsible for developing policy for protecting whistleblowers in the IC, handling sensitive disclosures to Congress, and overseeing the Department's participation in qui tam cases under the False Claims Act (FCA). In 2013, Mr. Meyer transitioned to the DNI's office as Executive Director for Intelligence Community Whistleblowing & Source Protection. As the IC's top protector of whistleblowers, he gave the program a reputation of integrity that has been missing since his departure in 2018. Since leaving the government, Mr. Meyer has returned to his advocacy role in support of protecting whistleblowers.²⁴⁰

. 1 Scope of protection for IC whistleblowers.

On March 20, 2014, DNI issued Intelligence Community Directive 120 (ICD-120).²⁴¹ It defines a "protected disclosure" in the IC as a disclosure to:

a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General (IG) of the employing agency or employing IC element, to the DNI, to the Inspector General of the IC (IC IG), or to a congressional intelligence committee or a member of a congressional intelligence committee consistent with the procedures prescribed by Congress in the Intelligence Community Whistleblower Protection Act of 1998, Section 8H of the Inspector General Act of 1978, and similar provisions in Section 103H of the National Security Act of 1947 and Section 17 of the Central Intelligence Agency Act of 1949, or to an employee designated by any of the above officials for the purpose of receiving such disclosures,

which the employee reasonably believes evidences:

239 [https://en.wikipedia.org/wiki/Daniel_P._Meyer#Director,_Whistleblowing_&_Transparency_\(2010_to_2013\)_and_Director,_Civilian_Reprisal_Investigations_\(2004_to_2010\)](https://en.wikipedia.org/wiki/Daniel_P._Meyer#Director,_Whistleblowing_&_Transparency_(2010_to_2013)_and_Director,_Civilian_Reprisal_Investigations_(2004_to_2010))

240 See M. E. Andersen & D. Meyer, *Revamped Security Clearance Process Could Provide Leverage Over Those Who Punish Whistleblowers*, JUST SECURITY, (July 22, 2019), <https://www.justsecurity.org/65012/revamped-security-clearance-process-could-provide-leverage-over-those-who-punish-whistleblowers/>

241 ICD-120, as updated in 2016, is available at <https://www.dni.gov/ICIG-Whistleblower/resources/ICD-120.pdf>

a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety

This is the same scope of subject matter Congress protects for disclosures under the WPA.²⁴² However, the civilian WPA protects whistleblowers from retaliation for any lawful disclosure.²⁴³ For information that is not classified or for which Congress has not prohibited the disclosure, that means the disclosure can be to anyone, even a news outlet.²⁴⁴ In the IC, however, management has provided a list of the permissible recipients and disclosures outside this list are not protected and can result in the loss of a security clearance, access and even employment. Still, affording even this limited scope of protection is a watershed of expansion for whistleblower rights within the IC. Time will tell if training the 2 million employees with security clearances about these acceptable and protected avenues of protection will reduce the occurrence of unauthorized disclosures, such as those made by Chelsea Manning in 2010 and Edward Snowden in 2013, or even Daniel Ellsberg in 1971.

. 2 IC whistleblower reprisal complaints are filed with IG's.

PPD-19 required the head of each IC Element to certify that its policies “provide a process for employees to seek review of Personnel Actions they allege to be in violation of this directive[.]” This certification was due within 270 days of PPD-19, or by July 7, 2013. Eight years later, individual agency policies are generally not publicly available. DNI directs whistleblowers to each agency’s IG to make retaliation complaints.²⁴⁵

The U.S. Department of Agriculture (USDA) issued Department Regulation No. 4600-002 on September 13, 2013, to establish “the policies and procedures for USDA employees and contractors to file whistleblower reprisal complaints with the USDA Office of Inspector General (OIG).” Section B(3)

242 5 U.S.C. § 2302(b)(8).

243 5 U.S.C. § 2302(b)(8)(A).

244 *Dep't of Homeland Sec. v. Maclean*, 135 S. Ct. 913 (2015).

245 <https://www.dni.gov/ICIG-Whistleblower/protected.html#hotlines>

(b) permits employees to make complaints with the OIG by telephone, fax, email or regular mail.²⁴⁶ Complainants should not include any classified information with the OIG Hotline staff, but should instead wait for a request from the appropriate OIG personnel. USDA prohibits complainants from using any “surrogate” from submitting a complaint and instead requires complainants to make their allegations of whistleblower reprisal “directly.”²⁴⁷ While this policy seems to prohibit complainants from being represented by an attorney for submission of the complaint, the policy does permit an award of attorney’s fees to prevailing complainants.²⁴⁸ Therefore, the policy clearly anticipates that whistleblowers may use an attorney’s services, but just not for submission of their initial complaints. When the OIG has finished its investigation, it will notify the complainant by letter and inform the complainant of how to request a redacted copy of the report.²⁴⁹

PPD-19, Section C, provides for an External Review Panel (ERP) to “external review” decisions regarding IC whistleblower complaints, although such decisions are just recommendations to the Agency head. On July 13, 2013, the IC IG issued a memorandum of ERP procedures which adopt the law developed under the WPA as a guide for deciding whistleblower appeals within the IC.²⁵⁰ The IC IG excludes from consideration any challenge to terminations of employment in the interests of national security.²⁵¹ For federal and private sector employees with security clearances, PPD-19 and the Intelligence Authorization Act provide an avenue to make complaints within 90 days of an alleged

246 Telephone: (800) 494-9121; Facsimile: (202) 690-2474; E-mail: usda.hotline@oig.usda.gov; U.S. mail: USDA OIG, P.O. Box 23399, Washington, DC 20026.

247 USDA Department Regulation 4600-002, Section B(3)(c). However, OIG may make an exception in the case of complaints referred by a Member of Congress or a congressional committee.

248 USDA Department Regulation 4600-002, Section B(5)(b) states, “To the extent authorized by law (including the Back Pay Act), corrective action may include, but is not limited to, reinstatement, reassignment, the award of reasonable attorney’s fees, other reasonable costs, back pay and related benefits, travel expenses, and compensatory damages.”

249 USDA OIG will also send the report to USDA’s Office of Homeland Security and Emergency Coordination (OHSEC). USDA Department Regulation 4600-002, Section B(4).

250 IC IG External Review Panel (ERP) Procedures Pursuant to Presidential Policy Director 19 (PPD-19), Section 7(D)(1)(i). Available in the Appendix and at <https://fas.org/irp/dni/icig/erp-proc.pdf>.

251 Congress permits the Secretary of Defense (at 10 U.S.C. § 1609), the CIA Director (at 50 U.S.C. § 3036(e)) and the heads of other executive agencies (at 5 U.S.C. § 7532) to terminate or suspend employees in the interests of national security without recourse to civil service appeals.

reprisal in the denial or revocation of a clearance or access.²⁵² For other adverse actions, there is no time limit to initiate a complaint.²⁵³

For retaliation complaints, PPD-19 directs each element of the IC to have a whistleblower protection policy. While the agency-level policies are not presently available, they apparently start with the complaint to the agency's IG and end with the Agency's final decision. Each agency is required to notify its employees and contractors of its employee protection policies.²⁵⁴ Agency policies, "to the extent practicable, will permit individuals to retain their government employment status while the review is pending."²⁵⁵ The process, "to the fullest extent possible, shall include an opportunity for the employee to present relevant evidence such as witness testimony."²⁵⁶

Any employee or contractor who is dissatisfied with an Agency's final decision in a whistleblower complaint can, within 45 days of that decision, submit a request to the IC IG for an External Review Panel (ERP). The IC IG has discretion about whether to defer to the Agency's final decision or convene the ERP.²⁵⁷ If the IC IG decides to convene an ERP, then the IC IG will designate two other members to join the IC IG as the ERP.²⁵⁸ The other ERP members will not be from the Agency that issued the final decision.²⁵⁹

When the ERP makes recommendations, it issues them to the head of the Agency that made the final decision.²⁶⁰ That Agency head is to report back to the ERP and DNI about what action was taken on the ERP's recommendations.²⁶¹ If the agency head fails to make such a report within 90 days, then

252 50 U.S.C. § 3341(j)(4)(A).

253 50 U.S.C. § 3234.

254 ICD-120, Section H(3)(a).

255 ICD-120, Section F(1)(a).

256 *Id.*

257 ICD-120, Section G(1)(a).

258 ICD-120, Section G(1)(b).

259 *Id.*

260 ICD-120, Section G(2).

261 *Id.*

the DNI will notify the President.²⁶² That is presently the end of the road for IC whistleblower complaints.

. ***KRight to counsel in official investigations.***

Federal law states:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.²⁶³

Unfortunately, federal agencies, and even Inspectors General are not always compliant, and do not always give reasons for refusing to allow a person to be accompanied by the legal counsel of their choice. Employees with EEO cases have a separate right to representation by the person of their choice.²⁶⁴

The Department of Justice (DOJ) has repeatedly attempted to restrain its employees from disclosing non-classified workplace information to private attorneys.²⁶⁵ These attempts today would be unlawful to the extent that they fail to notify employees of their right to make disclosures that are protected under whistleblower laws.²⁶⁶ Classified information can be disclosed only to those persons who have the appropriate clearance for that information, but federal agencies can permit private attorneys to have limited access to classified information. When disputes about DOJ's restraints reached the D.C. Circuit Court of Appeals in 1982 and 2000, DOJ's policies did not fare well. In two cases, the D.C. Circuit held that DOJ employees have a right to disclose non-classified information to the private attorneys when those attorneys would have a professional obligation to protect the

²⁶² *Id.*

²⁶³ 5 U.S.C. § 555(b).

²⁶⁴ 29 C.F.R. § 1614.605(a).

²⁶⁵ *Martin v. Lauer*, 686 F.2d 24 (D.C.Cir. 1982); *Jacobs v. Schiffer*, 204 F.3d 259 (D.C.Cir. 2000);

<https://kcnfdc.com/blog/can-a-federal-employee-be-prohibited-from-talking-to-a-lawyer/>

²⁶⁶ 5 U.S.C. § 2302(b)(13); [Pub. L. 112–199, title I](#), §104(b)(1), Nov. 27, 2012, [126 Stat. 1467](#).

confidentiality of the information.²⁶⁷

. *L* Pre-publication review.

As a condition for receiving a clearance to access sensitive compartmented information (SCI), individuals must sign Standard Form 4414.²⁶⁸ Similarly, recipients of classified information must sign Standard Form 312. Each of these forms requires the individual to agree to submit to pre-publication review of certain publications. Numerous other federal agencies have their own contracts that require submission to pre-publication review.²⁶⁹ These obligations arise from the contracts with the government and are interpreted as matters of contract law. *United States v. Bolton*, Case No. 1:20-cv-1580-RCL, 12-13 (D.D.C. Oct. 1, 2020). The individuals signing the agreements are bound by their terms for the remainder of their lives.

The secrecy contract with the government is “no ordinary contract; it gave life to a fiduciary relationship and invested in [the individual] the trust of the [government agency].”²⁷⁰ Thus, the Supreme Court has held that the pre-publication provisions of the agreements are constitutional and do not violate the First Amendment, even if the proposed publication contains no classified information.²⁷¹

The Agency agreements vary somewhat in the scope of publications that must be submitted for pre-publication review. SF 4414 (for SCI), for example, applies to:

²⁶⁷ *Jacobs v. Schiffer*, 204 F.3d 259, 265-66 (D.C.Cir. 2000) (in the whistle-blower context, where a legal question arises as to whether a contemplated public disclosure would be prohibited by law, “[s]urely, [the employee] must be allowed to consult his [or her] attorney for an answer to that question absent some strong governmental interest in limiting such communications.” Quoting *Martin v. Lauer*, 686 F.2d 24, 33 n. 41 (D.C.Cir. 1982)).

²⁶⁸ Exec. Order No. 13,526 at § 4.1(a)(2), 75 Fed. Reg. 707, 720 (Dec. 29, 2009). Standard Forms 312 and 4414 are provided in the appendix.

²⁶⁹ The Knight First Amendment Institute at Columbia University provides a helpful collection of these agreements at <https://knightcolumbia.org/content/prepublication-review-by-agency-and-agreement>

²⁷⁰ *Snapp v. United States*, 444 U.S. 507, 510 (1980), quoting with approval Judge Hoffman’s dissent at [595 F.2d 926, 938](#) (CA4 1979).

²⁷¹ *Snapp v. United States*, [444 U.S. 507, 509](#) n.3 (1980).

any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure.

SF 312 (for classified information) applies to information that is intended for disclosure where the author is “uncertain about the classification status of [the] information.” The CIA’s agreement applies to any material

that mentions CIA or intelligence data or activities or material on any subject about which the author has had access to classified information in the course of his employment or other contact with the Agency.

[Or] which contains any mention of intelligence data or activities, or contains any other information or material that might be based on [information obtained in the course of employment that is classified or information obtained in the course of employment that is in the process of a classification determination.

Pre-publication review applies not only to a disclosure intended to be public, but also to disclosures to individuals, including to attorneys representing the individual. In a 2020 lawsuit against former National Security Advisor John Bolton, the government asserted that his provision of the manuscript for *In the Room Where it Happened* to the publisher was a violation, even before that book went to press.²⁷²

Agencies have a responsibility to process pre-publication review with reasonable promptness. SF 4414 requires that the government must make an initial response to a submission within thirty working days.²⁷³ Prompt processing of review is one of the factors courts considered in finding that the requirements for pre-publication review were constitutional.²⁷⁴ Courts are likely to respect the federal agency’s determinations of what information is classified.²⁷⁵ The federal agency may share the

272 *United States v. Bolton*, Case No. 1:20-cv-1580-RCL, 11 (D.D.C. Oct. 1, 2020) (*Bolton* case) (SF 4414 “also obligated Bolton not to *share* the contents of the manuscript with anyone until he received written clearance.”).

273 SF 4414, ¶ 5.

274 *Bolton*, 14 (“Prepublication review slows, but does not prevent, former officials’ speech. And this fact curtails the process’s First Amendment implications.”).

275 *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1371 (4th Cir. 1975) (“As long as it remains classified, however, there should be no further judicial inquiry.”).

proposed publication with other agency officials. As the agency will typically ask for the names of the individual's current or former supervisors, pre-publication review can be particularly problematic for whistleblowers who want to disclose misconduct committed by a supervisor.²⁷⁶ During the review process, agency officials might also change the classification status of particular information; thus, information that had not previously been classified might become classified.²⁷⁷

Making a publication without clearance can lead to an assignment to the government of all profits and royalties from that publication.²⁷⁸ If the publication included classified information, releasing it can be a criminal offense.²⁷⁹

276 Kel McClanahan, Executive Director, National Security Counselors, Testimony Before the House of Representatives Committee on Oversight and Reform Subcommittee on Government Operations, 14 February 2020, available at <https://www.congress.gov/116/meeting/house/110405/documents/HHRG-116-GO24-20200128-SD005.pdf>

277 See, for example, the *Bolton* case, 10, n. 5, 16, n. 7.

278 See, for example, SF 4414, ¶ 12; SF 312, ¶ 5; *Snepp v. United States*, 444 U.S. 507 (1980).

279 18 U.S.C. §§ 793, 794, 798, and 952.