MSPB report on what is required to establish retaliation and what kind of actions are deemed retaliatory.

MSPB Defines Whistleblower Retaliation

Following is the portion of a recent MSPB report on whistleblower law that focused on defining what types of agency actions constitute retaliation that is prohibited.

Not every form of unpleasantness imposed on a Federal employee as a consequence of whistleblowing is unlawful, and therefore redressable under the whistleblower protection laws. Unlawful retaliation occurs when an "employee who has authority to take, direct others to take, recommend, or approve any personnel action" proceeds to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of " the disclosure of the wrongdoing.125

As the Federal Circuit has put it, to establish that there has been "retaliation for whistleblowing activity, an employee must show both that she engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8) and that the protected disclosure was a contributing factor in a personnel action."126 Without both of these pieces, there can be no case. Thus, the potential whistleblower must not only meet the definitions of disclosure discussed in the previous chapter, but the individual must also show the agency took, or failed to take (or threatened to take or fail to take), a personnel action because of the disclosure.

127 A Personnel Action

"A personnel action" is defined by section 2302(a)(2)(A). Under the statute, any of the following can qualify as a personnel action.

1. An appointment;
2. A promotion;
3. An action under chapter 75 of Title 5 or other disciplinary or corrective action;
4. A detail, transfer, or reassignment;
5. A reinstatement;
6. A restoration;
7. A reemployment;
8. A performance evaluation under chapter 43 of Title 5;
9. A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
10. A decision to order psychiatric testing or examination;128 and
11. Any other significant change in duties, responsibilities, or working conditions.

The third item on this list, disciplinary or corrective actions, applies to more than just actions recorded in an employee’s official personnel file (OPF) such as suspensions or removals. For example, in Johnson v. Department of Health and Human Services, the employee received a letter of admonishment for contacting the Inspector General. The letter was not made a part of the employee’s official record, and was therefore not a

disciplinary action. However, because it was intended to modify the employee's behavior in the future (cause him to not contact the Inspector General again), it was a corrective action and therefore was a covered personnel action for purposes of the WPA.129

The ninth item on the list of potential personnel actions can encompass a frequent yet seemingly minor area of management decisions. Placing an employee in a leave without pay (LWOP) or absent without leave (AWOL) status is a decision concerning pay or benefits, and therefore is a personnel action.130 A denial of annual leave also is a decision concerning benefits under section 2302(a)(2)(A).131 The denial of an opportunity "to earn overtime pay that an employee would otherwise have been provided is clearly a decision concerning pay" and therefore is a personnel action.132 Thus, when dealing with an employee who has reported wrongdoing, even seemingly minor decisions may qualify as a "personnel action" under the WPA.

The last item on the list, "any other significant change in duties, responsibilities, or working conditions" has been read to include a variety of management actions, including retaliatory investigations.

[If] an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant will prevail on his affirmative defense of retaliation for whistleblowing. That the investigation itself is conducted in a fair and impartial manner, or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure… To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations.133

Examples of other retaliatory actions include the suspension of law enforcement authority for a Special Deputy U.S. Marshal and the decision not to extend an employee's overseas tour.134

However, there is one crucial area in which the courts have decided that an action by the agency is not a personnel action under the whistleblower protection statutes: the revocation of a security clearance.135 The Federal Circuit has specifically held that the decision by an agency to revoke a security clearance—even when that clearance is a required condition of employment—will not be subject to review by OSC or adjudication by the MSPB.136 The Supreme Court has held that (in the absence of a law stating otherwise) it is "not reasonably possible" for a body such as the MSPB to review the substance of security clearance decisions and determine what constitutes an acceptable margin of error in assessing the potential risk.137 The Federal Circuit recognizes that this leaves "federal employees without recourse to the Board or the Special Counsel if they believe they have been denied security clearances in retaliation for whistleblowing."138

Take or Fail to Take (Or Threaten to Take or Fail to Take)

It is usually much easier to determine if a personnel action has been taken than it is to determine if an agency has failed to take a personnel action. For example, an appointment is the first item on the list of personnel actions covered by the statute.139 If a person who has blown the whistle in the past applies for a position, but the agency cancels the vacancy announcement and never fills the position, has there been a failure to take a personnel action? According to the Federal Circuit, this can be a failure to take an action

and can qualify as whistleblower reprisal if all the other conditions for whistleblowing are met.140

Similarly, even if the action—or inaction—never reaches fruition, there can still be whistleblower reprisal because it is retaliation just to threaten to take or not take a personnel action. One example of this is a Performance Improvement Plan (PIP). While a PIP is ostensibly given to an employee to aid the employee to improve his or her performance, it is also a necessary step to taking a performance based action such as a reduction in grade or a removal under 5 U.S.C. § 4301 et seq.141 As such, "a PIP by definition involves a threatened personnel action" and can be the basis of a whistleblower reprisal action if all other elements of whistleblowing and reprisal are present.142 However, the organization still has the responsibility to manage all its employees effectively—including those who may be whistleblowers. This responsibility includes taking action related to an employee's performance and conduct—provided that the employee's whistleblowing is not a contributing factor in the decision to take or not to take a particular action.

Contributing Factor

For an agency's personnel action, inaction, or threat to constitute reprisal, the whistleblowing must be a contributing factor in the agency's decision to take, not take, threaten to take, or threaten not to take the personnel action.143 "The words a contributing factor... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."144 Although it is very difficult to know what happens inside any person's mind, and those who retaliate will rarely document that a retaliatory motive factored into a decision, it is possible to prove through circumstantial evidence that a disclosure was a contributing factor in the taking or failure to take a personnel action.

There are two basic ways in which a potential whistleblower can establish that a disclosure was a contributing factor: (1) through the use of the knowledge/timing test; or (2) through the use of any other evidence demonstrating that the disclosure was a contributing factor. These two approaches are described below.

Knowledge/Timing Test

To establish under the knowledge/timing test that the disclosure was a contributing factor in the decision to take a personnel action, the whistleblower only needs to show "that the deciding official knew of the disclosure and that the adverse action was initiated within a reasonable time of that disclosure[.]"145

A "reasonable time" is not defined in the statute or regulation. However, the MSPB has found periods of more than a year between the disclosure and the personnel action sufficient to establish the connection.146 The test used by the Federal Circuit appears to be whether or not the time "gap between the disclosures and the allegedly retaliatory action is too long an interval to justify an inference of cause and effect between the two[.]"147

If the knowledge/timing test is met, the "whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that [the] disclosure was a contributing factor to the personnel action[.]"148 In fact, "[o]nce the knowledge/timing test has been met, an administrative judge must find that the appellant has shown that his whistleblowing was

a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable factfinder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action."149

However, as discussed later in this chapter, establishing that the whistleblowing was a contributing factor does not guarantee that the employee will obtain the relief sought.

Other Evidence of a Contributing Factor

While the knowledge/timing test is the most employed method, it is not the only means by which an employee may show that a disclosure was a contributing factor.150 If an employee cannot satisfy the knowledge/timing test, the adjudicator will consider other evidence, such as "the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant."151 It is possible to meet the contributing factor standard by combining the weight of multiple different factors.152

Clear and Convincing Evidence

The law states that a corrective action "may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of " the whistleblowing.153 "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. It is a higher standard than preponderance of the evidence[.]"154

When determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the MSPB considers three factors: (1) whether the agency had legitimate reasons for the personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision to take the personnel action; and (3) any evidence that the agency takes similar personnel actions against employees who are not whistleblowers but who are otherwise similarly situated.155 These three factors have been referred to as the Carr factors.

One example of the application of the Carr factors is Phillips v. Department of Transportation, in which the Board concluded the agency would still have taken the same action in the absence of the protected disclosure. In Phillips, the appellant supervised five employees, all of whom contacted the Office of the Inspector General (OIG) to express concerns about the appellant's activities. After the OIG investigation began, the appellant

was temporarily put on a telecommuting detail to an office in another state. Following this, the appellant made a disclosure that was protected under the WPA. Several months later, the investigation was completed, and the OIG concluded that the appellant had

used her public office for the gain of a private business and had violated the Standards of Ethical Conduct by maintaining a personal friendship with a principal of a carrier over which the appellant was exercising the agency's regulatory authority. Several months after the report of the investigation was issued, the appellant was reassigned from a supervisory position in Montana to a non-supervisory position at the same grade in Illinois.156

In assessing the first factor (any legitimate reasons for the action), the Board noted that the appellant's conduct had caused such concern for her subordinates that five employees had contacted the OIG to report it, and that "the five complainants comprised the entire

Montana Division staff."157 The Board held that "[u]nder these circumstances, the agency was legitimately concerned about returning the appellant to duty in that office, where she would be required to supervise and manage all of these complainants on a daily basis."158 Furthermore, since the agency had sufficient concerns that it temporarily reassigned the appellant during the investigation, before the protected disclosure, their concerns were not a mere pretext.159

When assessing the second factor (any motive for retaliation), the Board noted that one of the officials involved in the decision to reassign the appellant had a strong motive to retaliate because he was a chief subject of the appellant's disclosure. However, another official's motive was unclear, and the two officials most involved in the decision lacked a strong motive to retaliate.160

Lastly, for the third factor (personnel actions for similarly situated individuals), the appellant claimed that employees who committed similar offenses had not been subjected to similar personnel actions, but the Board held that the other employees were not similarly situated because they did not have close social relationships with carriers they regulated, and there was no indication of the problems with the other staff in the office such as was present in the appellant's case.161 Accordingly, the Board held that under the Carr factors, the agency had met its burden to show, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the whistleblowing.162

125 5 U.S.C. § 2302(b).

126 Briley v. National Archives & Records Administration, 236 F.3d 1373, 1378 (Fed. Cir. 2001). See also 5 U.S.C. § 1221(e)(1); Yunus v. Department of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001); Meuwissen v. Department of the Interior, 234 F.3d 9, 12 (Fed. Cir. 2000).

127 As will be discussed later, the timing between the agency's knowledge of the whistleblowing and the taking of the personnel action can be used to establish that the disclosure was a contributing factor in the decision to take the personnel action.

128 The inclusion of a psychiatric exam as a personnel action may appear odd in comparison to the other items on the list, but it reflects the history of whistleblower retaliation. Historically, one method used to deflect attention from a potential whistleblower's charges was (and still is) to attack the credibility of the potential whistleblower and make the situation about the person doing the reporting rather than the original wrongdoing being reported. Requiring the potential whistleblower to submit to a psychiatric examination is therefore a particularly suspect activity.

129 Johnson v. Department of Health and Human Services, 93 M.S.P.R. 38, ¶ 15-16 (2002) (holding "that the letter of admonishment was not a part of the appellant's official personnel records is irrelevant to the question of whether it was a covered personnel action.")

130 McCorcle v. Department of Agriculture, 98 M.S.P.R. 363, ¶16 (2005).

131 Marren v. Department of Justice, 50 M.S.P.R. 369, 373 (1991).

132 DiGiorgio v. Department of the Navy, 84 M.S.P.R. 6, ¶ 18 (1999).

133 Russell v. Department of Justice, 76 M.S.P.R. 317, 324-25 (1997).

134 Johns v. Department of Veterans Affairs, 95 M.S.P.R. 106, ¶¶ 11-13 (2003); Woodworth v. Department of the Navy, 105 M.S.P.R. 456, ¶ 18 (2007).

135 The Board has held that "in an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination." Egan v. Department of the Navy, 28 M.S.P.R. 509, 519 (1985). (In Egan v. Department of the Navy, 802 F.2d 1563, 1575 (Fed. Cir. 1986), the Federal Circuit reversed this holding by the Board, but that court was in turn reversed by the Supreme Court, which supported the Board's interpretation of the law. Department of the Navy v. Egan, 484 U.S. 518, 526-32 (1988)).

136 When applying the Supreme Court's Egan decision to the issue of whistleblowers, the Board has held, and the Federal Circuit has affirmed, that "because the [Whistleblower Protection] Act does not specifically authorize the Board to review security clearance determinations, it cannot serve as a basis for Board jurisdiction" in a WPA case. Hesse v. Department of State, 217 F.3d 1372, 1380 (Fed. Cir. 2000). There are also no Fifth Amendment Due Process Clause rights regarding the revocation of a security clearance. Robinson v. Department of Homeland Security, 498 F.3d 1361, 1364-65 (Fed. Cir. 2007).

137 Department of the Navy v. Egan, 484 U.S. 518, 529 (1988).

138 Hesse v. Department of State, 217 F.3d 1372, 1380 (Fed. Cir. 2000).

139 5 U.S.C. § 2302(a)(2)(A)(i).

140 Ruggieri v. Merit Systems Protection Board, 454 F.3d 1323, 1326 (Fed. Cir. 2006).

141 For more on performance-based actions taken under Chapter 43 of Title 5, please see our recent report, Addressing Poor Performers and the Law, available at www.mspb.gov/studies.

142 Gonzales v. Department of Housing and Urban Development, 64 M.S.P.R. 314, 319 (1994). See also Czarkowski v. Department of the Navy, 87 M.S.P.R. 107, ¶ 18 (2000); Hudson v. Department of Veterans Affairs, 104 M.S.P.R. 283, ¶ 15 (2006).

143 5 U.S.C. § 1214(b)(4)(B)(i); 5 U.S.C. § 1221(e)(1). In 1993, the Federal Circuit held that circumstantial evidence of a personnel action taken soon after a protected disclosure was made was insufficient to establish a prima facie case of reprisal. Clark v. Department of the Army, 997 F.2d 1466 (Fed. Cir. 1993), cert. denied, 510 U.S. 1091 (1994). This decision was expressly overruled by an Act of Congress. Public Law No. 103-424, codified at 5 U.S.C. § 1221(e)(1)(A) and (B); S. Rep. 103-358, 7 (1994 U.S.C.C.A.N. 3549, 3555) (stating that "[t]his provision reverses the holding of Clark v. Department of Army, decided July 1, 1993, by the U.S. Court of Appeals for the Federal Circuit.") See also Horton v. Department of the Navy, 66 F.3d 279, 284 (Fed. Cir. 1995).

144 Marano v. Department of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal punctuation deleted). This test was specifically intended to overrule earlier case law, which required a whistleblower to prove that his protected conduct was a significant, motivating, substantial, or predominant factor in a personnel action in order to overturn that action. Id.

145 Reid v. Merit Systems Protection Board, 508 F.3d 674, 678-79 (Fed. Cir. 2007) (internal punctuation deleted). See also Kewley v. Department of Health & Human Services, 153 F.3d 1357, 1361 (Fed. Cir. 1998).

146 See Inman v. Department of Veterans Affairs, 112 M.S.P.R. 280, ¶ 12 (2009) (a gap of approximately 15 months between the disclosure and the action satisfied the knowledge/timing test); Redschlag v. Department of the Army, 89 M.S.P.R. 589, ¶ 87 (2001) (a gap of approximately 18 months after one disclosure and more than one year after another disclosure satisfied the knowledge/timing test); Russell v. Department of Justice, 76 M.S.P.R. 317, 323 (1997) (a gap of 7 months satisfied the knowledge/timing test); Easterbrook v. Department of Justice, 85 M.S.P.R. 60, ¶ 10 (2000) (a gap of 7 months satisfied the knowledge/timing test). But see Costello v. Merit Systems Protection Board, 182 F.3d 1372, 1377 (Fed. Cir. 1999) (personnel action taken more than 2 years after the disclosure did not satisfy the knowledge/timing test).

147 Costello v. Merit Systems Protection Board, 182 F.3d 1372, 1377 (Fed. Cir. 1999).

148 Kewley v. Department of Health and Human Services, 153 F.3d 1357, 1362 (Fed. Cir. 1998) (quoting Marano v. Department of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

149 Schnell v. Department of the Army, 114 M.S.P.R. 83, ¶21 (2010) (emphasis added). See also Carey v. Department of Veterans Affairs, 93 M.S.P.R. 676, ¶ 13 (2003).

150 The knowledge/timing test is "only one of many possible ways that a whistleblower" can show that the whistleblowing was a factor in the personnel action. S. Rep. 103-358, 8 (1994 U.S.C.C.A.N. 3549, 3556).

151 Powers v. Department of the Navy, 69 M.S.P.R. 150, 156 (1995) (internal citations deleted).

152 See Marano v. Department of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993); Mausser v. Department of the Army, 63 M.S.P.R. 41, 45 (1994); Powers v. Department of the Navy, 69 M.S.P.R. 150, 156 (1995).

153 5 U.S.C. § 1221(e)(2) (emphasis added).

154 5 C.F.R. § 1209.4 (d). See also Horton v. Department of the Navy, 66 F.3d 279, 284 (Fed. Cir. 1995).

155 Schnell v. Department of the Army, 114 M.S.P.R. 83, ¶23 (2010) (citing Carr v. Social Security Administration, 185 F.3d 1318, 1323 (Fed. Cir. 1999)). In Schnell v. Department of the Army, the appellant claimed that the agency's retaliation took the form of his non-selection for a temporary promotion. In response, the agency submitted affidavits from Calvert and Neitzel [the first and second level supervisors] containing only general statements that they never took any retaliatory personnel actions against the appellant. Neither Calvert nor Neitzel, however, provided any detailed explanation as to why the agency selected other applicants over the appellant for these positions that had considerable overlap with his then current position. Nor did the agency present any other evidence of the selection procedure that it followed in filling the positions or that would explain why the appellant was not considered the top applicant for them. As a result, the agency failed to meet its burden to create in the minds of the Board members the required "firm belief " that the action would have taken place in the absence of the whistleblowing. Id. ¶

156 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶¶ 2-6, 19 (2010).

157 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶ 19 (2010).

158 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶¶ 12-18 (2010).

159 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶¶ 20-21 (2010).

160 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶¶ 26-29 (2010).

161 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶ 30 (2010).

162 Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶ 31 (2010).