

Whistleblower Protection in the United States Government

Presented by Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, at the Vice President's Conference on Fighting Corruption Among Justice and Security Officials (February 24, 1999)

1. The Role of the Whistleblower in the Fight Against Government Corruption

I have been asked to discuss with you today the concept of whistleblower protection and the role it plays in the fight against government corruption. I think it is fair to say that—without effective protections for whistleblowers—any anti-corruption effort is doomed to fail because it denies those seeking to root out official corruption the most valuable source of information about its existence—public employees.

The policies that underlie whistleblower protection laws are clear. They are designed to foster an environment in which public employees feel free to publicly disclose misconduct that they discover during the course of their employment—through public disclosure, the misconduct will be discovered and corrected. In addition, official misconduct will be deterred because the offenders will know that their actions will not go undetected.

The theory is that public employees—because of their work—are uniquely situated to bring attention to official corruption—they are valuable instruments of good government.

At the same time, unlike private citizens in a democracy, they are uniquely vulnerable to retaliation by the very officials and institutions whose corruption they have disclosed. At the one extreme, those officials have the power to take away a whistleblower's livelihood and destroy their professional reputation. Or they can, in more subtle ways, make their daily work lives miserable by isolating them or denying them work assignments and opportunities for advancement.

In the United States, we call these employees—who risk their livelihoods to bring misconduct to light—"whistleblowers": The word itself is of relatively recent origin. It seems to have come into use sometime in the late 1960s or early 1970s. Its basis is clear—like a police officer or soccer referee—a whistleblower makes a loud noise to bring attention to a violation of the laws or rules.

I have been told on occasion that in some cultures, there is a negative connotation to blowing the whistle—that another name for a "whistleblower" is "informer." Informers, of course, are generally feared and disdained. But they are different from whistleblowers. Informers act at the behest of officials, and in their own self-interest. Whistleblowers generally are viewed as anti-authoritarians who act in the public interest, often against their own self interest.

Our popular culture reflects the high esteem in which we hold whistleblowers—In the United States, popular movies such as “Serpico” and “Silkwood” have been made about whistleblowers. The films and popular literature glorify the individual who takes on the system at great personal risk. In our culture such individuals are viewed as heroes.

As I will now describe, our laws and legal institutions similarly reflect the value we give to whistleblowers.

2. The Role of the U.S. Office of Special Counsel in Protecting Government Whistleblowers

My agency, the United States Office of Special Counsel (OSC), was established about 20 years ago, with one of its primary purposes the protection of whistleblowers.

a. OSC was established in the wake of well publicized allegations of retaliation by federal agencies against employees who publicly disclosed wasteful spending and contract abuses—particularly in the defense agencies. A perception arose that employees felt intimidated and, notwithstanding their awareness of corruption and official misconduct, would not go public for fear of losing their jobs. It was felt that public employees needed legal protection and, moreover an advocate that could enforce those protections.

b. OSC’s job is to receive complaints of retaliation, investigate them, and, in appropriate cases, pursue legal remedies. These include corrective action for the injured employee (for example reinstatement to their jobs, backpay, and other forms of compensation). The remedies OSC may seek also include the discipline of agency officials who engage in such retaliation. An independent adjudicatory agency—the Merit Systems Protection Board—resolves complaints that OSC brings against other federal agencies, with some opportunity for review in our federal courts.

In addition, OSC also serves as a channel for employees to anonymously disclose official misconduct. While each federal agency has an Office of Inspector General that is devoted to receiving such disclosures, OSC has government-wide jurisdiction. It can receive disclosures from any federal employee and, in appropriate cases, forward them to the head of the relevant federal agency for an investigation and report which becomes a public document and is transmitted to the President and our Congress.

c. We are an interesting sort of government agency because we are independent of the executive branch. I was appointed by the President, with the approval of the U.S. Senate. But I do not serve at the pleasure of the President. I have a fixed term of five years and I can only be removed for misconduct or malfeasance. My staff is composed largely of career federal employees who have civil service protections that prevent them from being subject to political control.

The reason we are given this unique status is to ensure, as much as possible, that we ourselves will not be subject to influence or pressure when we conduct our investigations or make prosecution decisions. We must be able to advocate on behalf of the lowest level employee of a federal agency against officials at the highest levels, including cabinet secretaries.

We must also be able to take positions on behalf of whistleblowers that may be disfavored by other federal agencies. OSC, in fact, recently took such a position in a case before the Merit Systems Protection Board, in which we are arguing that the revocation of a security clearance is a "personnel action" and that, as such, a retaliatory clearance revocation may be found illegal by that Board. In that case, we are being opposed by our Department of Defense, Department of Justice and Intelligence agencies, which believe that such national security related decisions should never be subject to third party review.

3. Whistleblower Protection Law

a. Employees Covered

The laws that OSC enforces cover the majority of federal employees, including those in law enforcement positions. This includes our customs service, our border patrol, our drug enforcement administration and federal police officers. Our jurisdiction does not extend to certain agencies whose work is exclusively national security related, or to the FBI (which now has its own set of internal protections for whistleblowers). Our jurisdiction also extends to claims made by applicants for federal jobs.

b. Legal Protections Provided

The laws we enforce make it illegal to take a "personnel action" against an employee because the employee has made a protected disclosure. The law is intentionally broad in its definition of what sorts of disclosures are protected and in what constitutes a "personnel action." It was also written in such a way as to make it as easy as possible to prove the relationship between the disclosure and the personnel action. It is fair to say that the law was written to ensure that all doubts are resolved in favor of protecting an individual who makes a public disclosure.

A protected disclosure is the disclosure of any information that an employee reasonably believes evidences a violation of law, rule or regulation, a gross waste of funds, gross mismanagement, an abuse of authority, or a significant and specific danger to public health or safety. A disclosure can be made to any person in order to be protected. It need not be made through some prescribed channel. It is important that a disclosure need not be accurate in order to be protected—it is enough if the person making it is acting in good faith and with a

reasonable belief in its accuracy. If protection depended upon accuracy, it would clearly chill employees from making disclosures.

A personnel action is virtually any employment related decision that has an impact on an employee at the worksite. Such actions range from removal to the denial of promotions, details or training opportunities. They include geographic reassignments, and even the creation of a hostile working environment.

Causation is shown by establishing that an employee's protected disclosure was a contributing factor in a personnel action—we do not have to show that it was dispositive or even significant. The contributing factor test is important because it is rarely clear that a personnel action was taken solely for purposes of retaliating. An employer can almost always articulate legitimate reasons for a personnel action. Those legitimate reasons may exist in conjunction with the retaliatory motive. But because we want to resolve every doubt in favor of the whistleblower, the personnel action will be found illegal unless the employer can provide clear and convincing evidence that he would have taken the same action even if the employee had not engaged in protected activity.

C. The Complaint Process:

The Office of Special Counsel investigates complaints filed by employees who allege whistleblower retaliation. In 1998, we received about 600 complaints alleging whistleblower retaliation.

We employ a staff of professional investigators who have the power to compel witness testimony and the production of documents.

We also have the power to request a stay of a personnel action, before the completion of our investigation, where we have reasonable grounds to believe retaliation has occurred. This is important because it enables us to get quick relief for an employee who is threatened with irreparable harm.

Our attorneys review the investigators' reports to determine whether an illegal personnel action has occurred. If we determine that it has, then I send a letter to the head of the agency requesting voluntary corrective action. If the agency does not comply, then my office prosecutes the case. An evidentiary hearing is held and a decision issued by an administrative judge, with appellate review by the Merit Systems Protection Board (MSPB), a three member administrative board. If the whistleblower does not prevail, he or she may take an appeal to court. The agency, however, generally has no right of appeal.

If we do not believe that retaliation has occurred, OSC will close the case. That is not necessarily the end of the matter, however. Because it is so important to protect whistleblowers, the law provides that persons alleging whistleblower

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retaliation can pursue an individual right of action before the MSPB after they have exhausted their remedies before OSC.

As I mentioned earlier, OSC has another important power—the power to seek disciplinary action against an agency official who has engaged in retaliation. OSC may file a petition with the Merit Systems Protection Board asking that it order discipline against such an official with sanctions as severe as removal from federal employment. Our disciplinary action power is intended to deter and punish retaliation.

Conclusion

In conclusion, as I have described, providing legal protection to whistleblowers is a key component of any systematic effort to root out corruption in government institutions. In the United States, we believe that our scheme of legal protections, in conjunction with independent investigation and review of allegations of retaliation, provides whistleblowers with strong assurances against retaliation and encouragement to come forward and speak out in the public interest. While no system of whistleblower protection is fool-proof, there is no question that—in the absence of any legal protection—the public would lose the benefit of the surest source of information about corruption: the government employee with the integrity and courage to reveal it.