

REGULATING OUTSIDE ACTIVITIES

WHISTLEBLOWING and other PPPs



Rights of Federal Employees: CSRA and WPA

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5 U.S.C. §§ 1211-19; 5 C.F.R. PART 1800



AUTHORIZED TO —

- INVESTIGATE PROHIBITED PERSONNEL PRACTICES AND OTHER ACTIVITIES PROHIBITED BY CIVIL SERVICE LAW, RULE, OR REGULATION
- SEEK CORRECTIVE ACTION ON BEHALF OF INDIVIDUALS WHO ARE THE VICTIMS OF PROHIBITED PERSONNEL PRACTICES
- SEEK DISCIPLINARY ACTION AGAINST AGENCY OFFICIALS WHO COMMIT PROHIBITED PERSONNEL PRACTICES

REPRISAL FOR WHISTLEBLOWING



- PROTECTED DISCLOSURE
- PERSONNEL ACTION
- KNOWLEDGE
- CAUSAL CONNECTION

WHAT IS WHISTLEBLOWING?



REASONABLE BELIEF DISCLOSURE EVIDENCES:

- A VIOLATION OF ANY LAW, RULE OR REGULATION
- GROSS MISMANAGEMENT
 - MORE THAN *DE MINIMIS*
- GROSS WASTE OF FUNDS
 - MORE THAN A DEBATABLE EXPENDITURE
- ABUSE OF AUTHORITY
- SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH AND/OR SAFETY

WHISTLEBLOWING? (cont'd)



NATIONAL SECURITY MATTERS:

DISCLOSURES ARE NOT PROTECTED, UNLESS MADE TO OSC OR OIG, IF

- PROHIBITED BY LAW, OR
- REQUIRED BY EXECUTIVE ORDER TO BE SECRET FOR NATIONAL SECURITY OR FOREIGN AFFAIRS REASONS

CAUSAL CONNECTION



CONTRIBUTING FACTOR TEST:

ANY FACTOR WHICH ALONE OR IN CONNECTION WITH OTHERS TENDS TO AFFECT IN ANY WAY THE OUTCOME OF THE PERSONNEL ACTION AT ISSUE

- CAN BE ESTABLISHED BY KNOWLEDGE / TIMING ALONE
- OFTEN ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE

AFFIRMATIVE DEFENSE



MT. HEALTHY TEST (MODIFIED):

CLEAR AND CONVINCING EVIDENCE THAT SAME ACTION WOULD HAVE OCCURRED IN ABSENCE OF WHISTLEBLOWING

- STRENGTH OF THE EVIDENCE IN SUPPORT OF THE PERSONNEL ACTION
- EXISTENCE AND STRENGTH OF MOTIVE TO RETALIATE
- TREATMENT OF SIMILAR EMPLOYEES WHO ARE NOT WHISTLEBLOWERS

FIRST AMENDMENT



VIOLATION OF FIRST AMENDMENT IS A PPP:

5 U.S.C. § 2302(b)(12)

- Speech, Press, Association, Petition and Religion
- Speech/Expression: Must Touch Matters of Public Concern
- Balancing Test: Employee-Citizen's Interest in Speaking on Matter of Public Concern v. Employer's Interest in Regulating Speech
- Pickering v. Bd. of Educ., Connick v. Meyers, Garcetti v. Ceballos, Chambers v. Interior

OFF-DUTY CONDUCT



- DISCRIMINATION BASED ON CONDUCT NOT RELATED TO PERFORMANCE, 5 U.S.C. § 2302(b)(10)
- NEXUS BETWEEN OFF-DUTY CONDUCT AND JOB PERFORMANCE (OR EFFICIENCY OF THE SERVICE)
- 5 U.S.C. § 7513 (Efficiency of Service); 5 C.F.R. § 7.1 (Fill Positions on Basis of Merit and Fitness)