

Note from the Field

Key Terms in the Whistleblower Protection Act Clarified

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In two recent cases, the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit (CAFC) clarified two key terms in the Whistleblower Protection Act of 1989 (WPA).¹ In *Huffman v. Office of Personnel Management*,² the CAFC focused on the definition of a “protected disclosure,” while in *Schmittling v. Department of the Army*,³ the MSPB provided guidance on whether an agency has taken a “personnel action” regarding the appellant. The CAFC and the MSPB each expanded the interpretation of the term in question in favor of the appellant.

Basic Whistleblowing

The WPA states that an agency may not

take or fail to take . . . a personnel action with respect to any employee . . . because of any disclosure of information by the employee [that] the employee . . . reasonably believes evidences . . . a violation of 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.”⁴

If an appellant files an individual right of action alleging such a transgression, he bears the burden of establishing by a prepon-

derance of the evidence that: (1) such an allegation is a protected disclosure under 5 U.S.C. § 2932(b)(8); and (2) that the disclosure was a contributing factor in the personnel action that the agency took against him. The term “contributing factor” means any factor, taken with other factors, that has a tendency to affect the outcome of a decision in any manner.⁵ One of the many possible ways to show that whistleblowing was a contributing factor in a personnel action is to show that “the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.”⁶ Thus, circumstantial evidence of (1) knowledge of the protected disclosure, and (2) a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was “a contributing factor” in taking personnel action.⁷

If the appellant demonstrates that the disclosure was a contributing factor in the personnel action in question, the agency must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure.⁸ The MSPB has defined clear and convincing evidence as proof sufficient to give “the trier of fact a firm belief or conviction as to the allegations sought to be established.”⁹

The test to determine whether a putative whistleblower has a reasonable belief that management violated the WPA is an objective one; the appellant must show that the matter reported was one that a reasonable person in that position would believe was evidence of “a violation of 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.”¹⁰

1. Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201-1222 (2000)).

2. 263 F.3d 1341 (Fed. Cir. 2001).

3. No. Ch-1221-96-0362-M-1, 2002 MSPB LEXIS 1361 (Sept. 20, 2002).

4. 5 U.S.C. § 2302(b)(8).

5. 5 C.F.R. § 1209.4(c) (1999).

6. 5 U.S.C. § 1221(e)(1)(A)-(B); see *Scott v. Dep’t of Justice*, 69 M.S.P.R. 211, 238 (1995).

7. *Powers v. Dep’t of the Navy*, 69 M.S.P.R. 150, 155 (1990).

8. 5 C.F.R. subpt. 1209.4 (2002); *McDaid v. Dep’t of Housing & Urban Dev.*, 46 M.S.P.R. 416 (1990).

9. 5 C.F.R. § 1201.56(c)(2).

10. 5 U.S.C. § 2302(b)(8); see *Haley v. Dep’t of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), cert. denied, 508 U.S. 950 (1993); see also *Lewis v. Dep’t of Army*, 63 M.S.P.R. 119, 122, aff’d, 48 F.3d 1238 (Fed. Cir. 1993), cert. denied, 516 U.S. 834 (1995).

Huffman Redefines “Protected Disclosure”

In *Huffman v. Office of Personnel Management*,¹¹ the CAFC clarified the term “protected disclosure” in three different situations involving the employee, his supervisor, and the employee’s normal reporting channels. Specifically, the case answered three distinct questions: (1) whether complaints to a supervisor about the supervisor’s wrongful conduct constitute “protected disclosures” under the WPA; (2) whether complaints to a supervisor about the wrongful conduct of other agency employees or other misconduct constitute such disclosures; and (3) whether reports made as part of an employee’s normal work duties constitute disclosures.¹²

The appellant, Kenneth Huffman, filed a complaint with the Office of Special Counsel alleging that he had been removed from his position as an Assistant Inspector General for numerous protected disclosures that he made about his supervisor, various other supervisors, and other employees of the Office of the Inspector General for the Office of Personnel Management where the appellant worked.¹³

Complaining to a Supervisor Is Not a “Disclosure”

The CAFC first analyzed the disclosures that the appellant made about his supervisor, Patrick McFarland. The appellant accused McFarland of pre-selecting an agency employee for a Senior Executive Service position. He further accused McFarland of gross mismanagement when McFarland permitted a company known as All-Star Personnel to perform an organizational study for the Office of the Inspector General.¹⁴

The CAFC rejected the appellant’s argument that the WPA applies when an employee complains to his supervisor about the supervisor’s own conduct. The court relied on *Willis v. Department of Agriculture*,¹⁵ which said that disagreements with supervisors over job-related matters are a normal part of most occupations.¹⁶ It is entirely ordinary for an employee to disagree with a supervisor who overturns the employee’s decision.¹⁷ The Court also cited *Horton v. Department of the Navy*,¹⁸ which holds that allegations directed toward alleged wrongdoers themselves are considered viewable as whistleblowing under the WPA.¹⁹ Criticism directed at a supervisor does not further the WPA’s purpose, which is to encourage disclosure of wrongdoing to persons who may be in a position to remedy it.²⁰

The CAFC examined various dictionary definitions of the word “disclosure,” and held that the appellant’s argument lacked merit.²¹ The essence of this definition is that a disclosure is an act that makes a formerly unknown fact known, or reveals something that was previously hidden. If an employee tells a supervisor of a supervisor’s own misconduct, the court reasoned, the employee is not making a disclosure of misconduct. The court presumed that the supervisor would certainly have known of the existence of any misconduct the supervisor had committed; thus, the employee has not “disclosed” anything. To claim WPA protection, employees should make disclosures to those who can rectify the wrongdoing; the supervisor who has allegedly committed the wrongdoing is not such a person.²²

Complaining to a Supervisor About Co-Workers Is a “Disclosure”

The results are decidedly different when an employee complains to a supervisor about another employee’s misconduct.

11. 263 F.3d 1341 (Fed. Cir. 2001).

12. *Id.* at 1344-45.

13. *Id.* at 1345.

14. *Id.*

15. 141 F.3d 1139 (Fed. Cir. 1998).

16. *Id.* at 1143. Willis, the aggrieved employee, sent letters to his supervisor critical of the supervisor’s actions. The agency ordered Willis’s reassignment. Willis refused and ultimately retired. *Id.* at 1141.

17. *Id.* at 1143.

18. 66 F.3d 279 (Fed. Cir. 1995).

19. *Id.* at 282. John Horton, a librarian, criticized the behavior of other library employees and his supervisor to fellow staff members and his supervisor. As a result of Horton’s comments, his confrontational attitude, and a tantrum, the Navy removed him. *Id.* at 279-80.

20. *Huffman*, 263 F.3d at 1349.

21. See *id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1965); BLACK’S LAW DICTIONARY (7th ed. 1998); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998)).

22. *Id.* at 1350.

Huffman alleged that his agency had hired various auditors under the agency's Outstanding Scholars Program instead of filling the positions through open competition. Huffman accused an Assistant Inspector General of encouraging three of the outstanding scholars to falsify their applications for federal employment.²³ The agency argued that Huffman had disclosed this information to McFarland, a person who did not have the authority to correct the wrongdoing. Therefore, the agency contended, Huffman's disclosures were not protected because an employee, in accordance with *Willis* and *Horton*, must disclose this information to someone in a position to resolve the matter.²⁴

The CAFC rejected the agency's argument, noting that the case law and the legislative history of the WPA recognize that disclosures to the news media, to Congress, and to independent agencies such as the Office of the Inspector General are all protected under the WPA. An employee does not have to disclose information to someone in authority to correct the alleged wrongdoing to invoke WPA protections.²⁵ In *Czarkowski v. Department of the Navy*,²⁶ the MSPB clearly stated that it is a prohibited personnel practice to take—or fail to take—a personnel action because of any disclosure of information by an employee that the employee reasonably believes to be evidence of misconduct or gross mismanagement.²⁷ *Huffman* went further, noting that any government supervisor is in a position to remedy abuse by telling someone who has the authority to correct the wrongdoing.²⁸ The purpose of the WPA is to encourage employees to report matters within the scope of the WPA—even if the receiver of the information lacks the authority to correct the situation. The fact that the news media or a government employee cannot personally resolve the wrongdoing is irrelevant to the question of whether the employee made a protected disclosure.

Complaining During the Normal Course of Job Duties Is a "Disclosure"

Finally, the court examined the scope of protections the WPA affords to an employee who discloses wrongdoing in the normal course of his duties. Examples of such disclosures could include law enforcement officers or inspectors general who investigate other government employees' malfeasance or nonfeasance of duty, and later prepare and submit reports through normal duty channels. The CAFC readily conceded that neither its own jurisprudence nor the WPA has been completely clear about this issue. The court resolved this question by focusing on those employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel.²⁹ The court's analysis suggests that it focused on the risk the employee incurred by making the disclosure. If an employee risks physical harm or loss of employment by making a disclosure in the normal course of duties, the disclosure will probably qualify for protection under the WPA.³⁰

Czarkowski illustrates this principle perfectly. In the normal course of her duties, the appellant, who worked in contracting, issued a "stop work" order to a contractor for various performance deficiencies.³¹ After the appellant issued her order, the agency relieved her of her responsibilities regarding the project and issued her a performance appraisal with a close-out rating. The agency then sent the appellant a memorandum that informed her that her performance was unacceptable and that it was giving her an opportunity to improve her performance.³² The MSPB noted that this memorandum was the equivalent of a Performance Improvement Plan.³³ Such a draconian measure threatened the appellant's job security by menacing her with an adverse personnel action. *Czarkowski* could thus claim WPA protection because of the significant risk of losing her job for performing normally assigned duties.³⁴

23. *Id.*

24. *Id.* at 1351.

25. *Id.*

26. 87 M.S.P.R. 107 (2000).

27. *Id.* ¶ 16.

28. *Huffman*, 263 F.3d at 1351.

29. *Id.* at 1352.

30. *See id.*

31. *Czarkowski*, 87 M.S.P.R. 107, ¶ 8. According to the appellant, the contractor's statement of work did not list the specific size of the product to be delivered or the way to deliver the equipment. The contractor also repeatedly postponed the contract delivery date. *Id.*

32. *Id.* ¶ 2.

33. *Id.* ¶ 21.

34. *Id.* ¶¶ 16-17.

Both *Huffman* and *Czarkowski* expand WPA protection to include those disclosures made by employees in the regular course of those duties if the employees find themselves the subject of adverse personnel actions as a result of those disclosures.

Schmittling: An Agency's Failure to Act Can Trigger WPA Protection

In *Schmittling v. Department of the Army*,³⁵ the appellant was the Chief of the Automated Systems and Management Accounting Division, at the GS-15 pay grade. Schmittling alleged that shortly after he made a protected disclosure, the agency reassigned another employee to a vacant position that Schmittling had sought. The agency ultimately assigned the appellant to a customer service position. Schmittling claimed that the agency's decision to place the other employee in the vacant position effectively blocked his assignment to that position during a reduction in force (RIF).³⁶ The appellant alleged that the agency did not assign him to his desired position because he "blew the whistle" on several unauthorized agency expenditures.³⁷

The agency argued that the appellant's reassignment to the customer-service position instead of the position he sought was the result of the appellant's voluntary actions. The agency

argued that the appellant recommended that the agency abolish his original position in the upcoming RIF. The agency argued that because the appellant voluntarily offered his position for RIF, he had no claim to the vacant position.³⁸

The MSPB examined the legislative history of the WPA and 5 U.S.C. § 2302, which defines "prohibited personnel action" to include a failure to take a personnel action.³⁹ The MSPB noted that "[n]o distinction . . . is made in the legislative history between protecting whistleblowers from personnel actions taken, as opposed to personnel actions not taken."⁴⁰ If the agency's failure to take a personnel action is retaliation for making a protected disclosure, the agency has committed a prohibited personnel action. In *Schmittling*, the MSPB held that the agency failed to assign the appellant to the vacant position because of his protected disclosures.⁴¹

Conclusion

In the last two years, the MSPB has greatly expanded the scope of the WPA in favor of those making protected disclosures. The MSPB considers most disclosures of serious management misconduct to be protected disclosures; the reporting of a supervisor's own alleged misconduct to that supervisor stands as an exception to this general rule.⁴²

35. No. Ch-1221-96-0362-M-1, 2002 MSPB LEXIS 1361 (Sept. 20, 2002).

36. *Id.* at *1-2.

37. *Id.*

38. *Id.* at *11-12.

39. *Id.* at *13-16 (citing 5 U.S.C. § 2302 (2000)).

40. *Id.* at *16.

41. *Id.* at *28-31.

42. Readers who have questions about these and other rapidly changing WPA issues are welcome to contact the author at PJANOFF@SPD.USACE.army.mil.