



The Whistleblower Protection Enhancement Act of 2012

Jason Zuckerman
Senior Legal Advisor
U.S. Office of Special Counsel
(202) 254-3606
jzuckerman@osc.gov
www.osc.gov



Merit System Principles 5 U.S.C. § 2301 (b)

- (1) Recruit and promote on merit after fair & open competition.
- (2) Treat employees & applicants fairly & equitably.
- (3) Equal pay for equal work & reward excellent performance.
- (4) High standards of integrity, conduct, & concern for public interest.
- (5) Manage employees efficiently & effectively.
- (6) Retain or remove employees based on performance.
- (7) Train employees for better organizational or individual performance.
- (8) Protect employees from improper political influence.
- (9) Protect employees against reprisal for blowing the whistle on misconduct.



The 13 Prohibited Personnel Practices





An employee shall not...

1. Illegally discriminate for or against any employee/applicant.
2. Solicit or consider improper employment recommendations.
3. Coerce an employee's political activity.
4. Obstruct a person's right to compete for employment.
5. Influence any person to withdraw from competition for a position.
6. Give unauthorized preference or improper advantage.
7. Employ or promote a relative.
8. Retaliate against a whistleblower, whether an employee or applicant.
9. Retaliate against employees or applicants for filing an appeal.
10. Unlawfully discriminate for off-duty conduct.
11. Knowingly violate veterans' preference requirements.
12. Violate any law, rule, or regulation which implements or directly concerns the merit principles.
13. Implement or enforce a nondisclosure agreement or policy lacking notification of whistleblower rights.



Four General Categories

- Discrimination
- Hiring practices that offend merit system
- Retaliation for protected activity (including whistleblowing)
- Catch-all: violation of law, rule or regulation that implement merit systems principles (including constitutional rights)



PPPs – Who is not protected?

- Intelligence agencies, such as
 - Central Intelligence Agency
 - Defense Intelligence Agency
 - National Security Agency
 - Federal Bureau of Investigation
- U.S. Postal Service (except nepotism provision)
- Postal Rate Commission
- Non-appropriated fund and Veterans Canteen Service
- National Guard
- Legislative and Judicial Branch
- GAO



PPPs: OSC

- Investigative and prosecutorial authority for PPPs
- Focus on corrective action—can pursue discipline through MSPB:
 - Suspensions
 - Removals
 - Debarment
 - Civil fines





Retaliation

5 U.S.C. § 2302(b)(8), (b)(9)

Taking, failing to take, or threatening to take or fail to take personnel action for —

- Protected whistleblowing
- Exercise of appeal, complaint, or grievance rights
- Testimony or assistance to person exercising such rights
- Cooperation with or disclosures to OSC or IG
- Refusal to obey an order that would require violation of law



Elements of Proof

5 U.S.C. §§ 1214(b); 1221(e)

- Protected Disclosure/Activity
- Personnel action taken, not taken, or threatened
- Actual or constructive knowledge of protected disclosure
- Disclosure/Activity was contributing factor in personnel action



Disclosure Categories

- Violation of any law, rule, or regulation
- Gross mismanagement: substantial risk of significant impact on mission
- Gross waste of funds: more than debatable expenditure
- Abuse of authority
- Danger to public health & safety
- Scientific Integrity: Censorship related to scientific research or analysis. Pub. L. No. 112-199, §110



Agency Defense

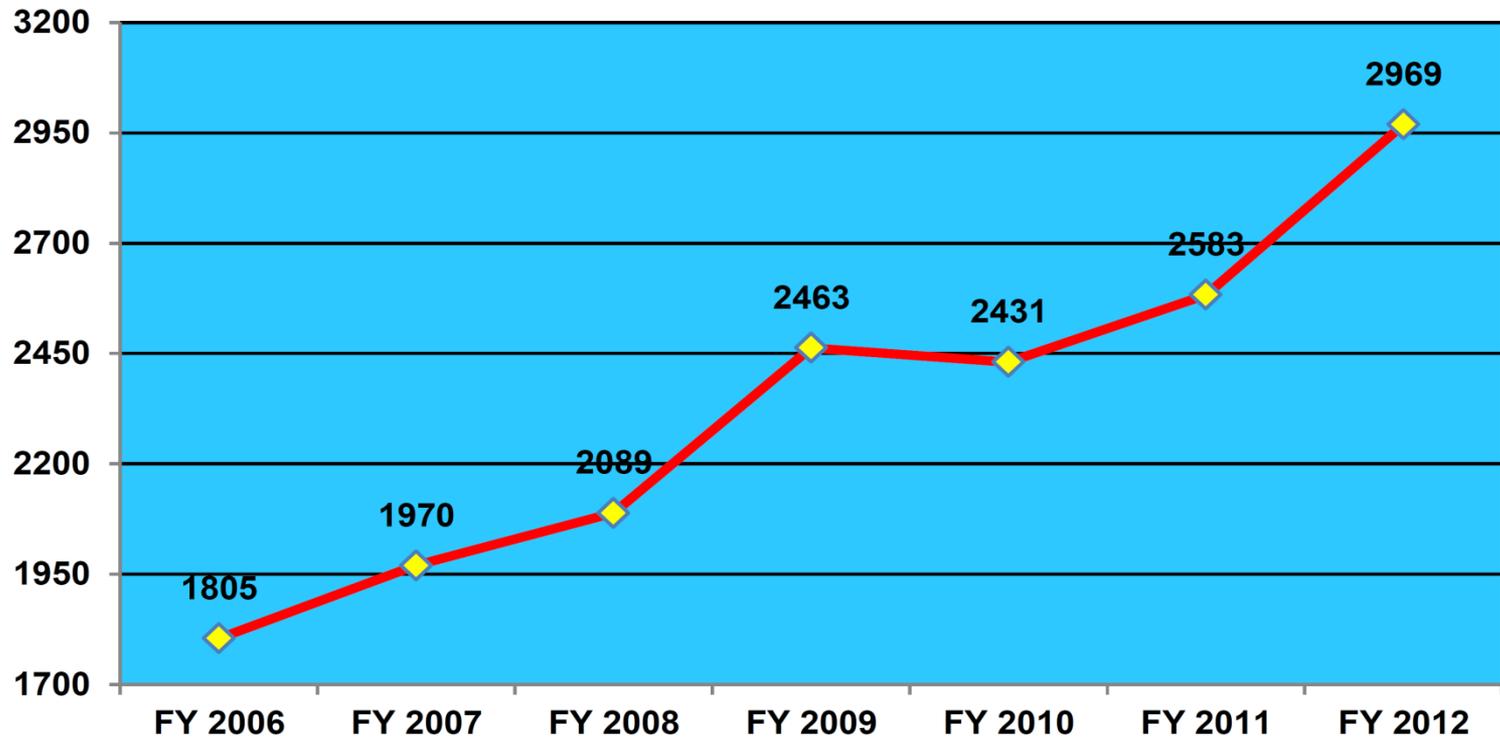
If Knowledge-Timing test is met

Agency must show — by clear and convincing evidence — that it would have taken same action without disclosure

- Strength of evidence in support of personnel action
- Existence & strength of motive to retaliate
- Treatment of similar employees who are not whistleblowers



New PPP Complaints





Whistleblower Protection Enhancement Act of 2012

- P.L. 112-199 (President signed 11/27/12).
- Effective 12-27-12 (TSA provisions eff. 11/27/12).
- Legislative history: S. Rep. 112-155 (House, 9/28/12; Senate 11/13/12).



Legislative Background

- CSRA protected whistleblowers to promote efficiency.
- Without adequate assurances, whistleblowers won't come forward.
- WPA and 1994 Amendments expanded protections.
- Federal Circuit then limited WPA protections (e.g., *Horton*, *Willis*, *Huffman*, *Meuwissen*).
- 2001-2012: Congress worked to overturn decisions.
- WPEA protects any disclosure of a statutory condition: violations, gross waste, gross mismanagement, abuse of authority, and danger to public health or safety.
- Protection under WPEA is extremely broad.



Principal Purposes of WPEA

- Clarify law, close loopholes, restore original intent.
- Strengthen OSC's ability to pursue disciplinary action.
- Protect disclosures concerning scientific integrity.
- Enhance remedies for whistleblowers.
- Restrict certain agency nondisclosure policies.
- Expand IRA rights to 5 U.S.C. § 2302(b)(9) activity.
- Provide all-circuit review of whistleblower appeals.
- Ensure due process in whistleblower appeals.
- Extend WPA protections to TSA screeners.
- Create new whistleblower ombudsman position.



Clarify Law, Close Loopholes, Restore Original Intent

5 U.S.C. § 2302(f)

- *Horton v. Dep't of the Navy*, 95 FMSR 7033, 66 F.3d 279 (Fed. Cir. 1995) (WB to wrongdoer).
- *Willis v. Dep't of Agriculture*, 98 FMSR 7008, 141 F.3d 1139 (Fed. Cir. 1998)(WB part of normal duties); *Huffman v. OPM*, 101 F.M.R.S. § 7045, 263 F.3d 1341 (Fed. Cir. 2001) (same).
- *Meuwissen v. Dep't of Interior*, 101 FMSR 7008, 234 F.3d 9 (Fed. Cir. 2000) (WB already known).
- Motive for WB not disqualifying.
- Elapsed time between WB and personnel action not disqualifying.
- Oral WB protected.
- WB occurring off duty protected.



Strengthen OSC's Ability to Pursue Disciplinary Action

5 U.S.C. § 1204(m), 1212(h), 1215(a)

- Establishes Burden of Proof in W/B Disciplinary Actions: Significant Motivating Factor.
 - Overturns *Special Counsel v. Santella*, 94 FMSR 5606, 65 MSPR 452 (1994).
 - Restores *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).
- Shifts burden of paying prevailing party's attorneys' fees to employing agency.
- Combined penalties permitted.
- Authorizes OSC amicus briefs in WB cases.



Protect Scientific Integrity

Pub. L. No. 112-199, 110, 126 Stat. 1465, 1471 (2012)

- Ensures scientific integrity by protecting disclosures of scientific or technical censorship when employee reasonably believes censorship may cause:
 - Violation of law, rule or regulation, gross waste, gross mismanagement, abuse of authority, or substantial or specific danger to public health or safety;
- Censorship defined: any effort to distort, misrepresent, or suppress research, analysis, or technical information.



Whistleblower Remedies

5 U.S.C. § 1214(h), 1221(g)

- WPA authorized *status quo ante*, back pay, medical costs, attorney fees, consequential damages.
- WPEA adds:
 - Reasonably foreseeable compensatory damages.
 - Damages reasonably incurred from retaliatory investigation that results in personnel action.



Nondisclosure Policies

5 U.S.C. § 2302(a)(2)(A), (b)(13)

- WPEA adds new PPP, (b)(13):
- PPP to implement or enforce any nondisclosure policy, form or agreement that alters existing whistleblower right unless agreement contains notice that policy, form or agreement incorporates existing rights.
- Applicable to WB rights concerning:
 - Classified information
 - Communications to Congress
 - Disclosures to Inspector General
 - Whistleblower protection



IRA Rights for (b)(9) Protected Activity

5 U.S.C. § 1214, 1221, 2302(b)(9)

- Extends IRA Remedies to retaliation for certain (b)(9) protected activity:
 - Exercise of appeal, complaint or grievance right concerning protected whistleblowing, e.g., cpt to OSC, IRA.
 - Testify for or assist one who exercises right to appeal, complain or grieve.
 - Cooperate with IG or OSC.
 - Refuse to obey order that would require violation of law.
 - Adopts Contributing Factor/Clear and Convincing Evidence Test for (b)(9).



All-Circuit Judicial Review

5 U.S.C. § 7703(b)

- WPEA creates option for all-circuit judicial review of MSPB final decisions involving matters that could be subject to IRA, i.e., whistleblowing or most activity protected under (b)(9).
- Ends monopoly of Federal Circuit in whistleblower cases.
- Two-year sunset provision (thru Dec. 27, 2014).



Due Process in Whistleblower Appeals

5 U.S.C. § 1214

- Former practice: Board may resolve merits of IRA/whistleblower cases in any order that is efficient, including allowing agency to present affirmative defense first.
- WPEA requires Board to allow employee to present evidence of prima facie case before allowing agency to present evidence of affirmative defense.



TSA Screeners

5 U.S.C. § 2304

- WPEA extends WPA rights to TSA screeners:
 - Aviation and Transp. Security Act authorized TSA to establish own personnel system.
 - Administrator had final decision authority.
 - WPEA grants TSA screeners IRA rights.



Whistleblower Ombudsman

5 U.S.C. App., 3

- Amends Inspector General Act of 1978:
 - Ombudsman educates employees on whistleblower protections.
 - Ombudsman not legal representative, agent, or advocate of the employee or former employee.
 - Excludes intelligence agencies covered by Presidential Policy Directive – PPD-19 (10/10/12).



Effective Date

- Effective date of WPEA was Dec. 27, 2012 (TSA provisions effective Nov. 27, 2012).
- The MSPB ruled that the WPEA standard for determining whether a disclosure is protected will apply to appeals that were pending at the time the act went into effect. *Day v. Department of Homeland Security*, 113 LRP 26751 (MSPB 06/26/13).