

Equal Due Process Protection for Federal Whistleblowers

“The jury system is the cornerstone of our system of civil justice.”

Report to Accompany the Civil Rights Act of 1991, which extended jury trials to federal employees in discrimination cases. As members of the community, juries are uniquely situated to respond appropriately to employment wrongs in order “to deter future repetition of the prohibited conduct.”

All federal employees who file discrimination claims under the major traditional employment laws, such as Title VII of the Civil Rights Act, have a right to a trial by jury. Unfortunately, in 1978, when the Civil Service Reform Act was initially passed, federal employee whistleblowers were excluded from this basic due process right.

The administrative process set forth in the 1978 Reform Act (and subsequently amended by the Whistleblower Protection Act of 1989) has not worked. By denying whistleblowers the same due process rights afforded other federal employees who allege discrimination, the government has communicated the wrong message to its workforce. Whistleblowers deserve the same protections against discrimination as those who allege discrimination on the basis of age, sex, race, religion or disability.

If Congress enacts legislation granting access to jury trials for federal employees who are whistleblowers, the administrative process for adjudicating a whistleblower case will be comparable to the adjudication process for Title VII cases. Under both the whistleblower law and Title VII, claims are initially reviewed by an executive agency.

If the employee is not satisfied with the results of this agency review, the employee can seek a hearing on the merits before the EEOC (Title VII) or the Merit Systems Protection Board (Whistleblower).

Unfortunately, whistleblowers are stuck with the administrative process, and are not permitted to have their cases heard in court – and are denied all of the due process protections afforded all persons in federal court proceedings.

Federal employees who file Title VII claims are permitted to seek relief in federal court.

One of the central arguments raised against court access for whistleblowers is the specter that employees will over-use the court system. This is simply not true, as a court proceeding is far more expensive than an administrative hearing. **(See our fact sheet on the anticipated the court burden if federal whistleblowers gain access to jury trials.)**

The right of employees to have their cases heard in court is one of the most important checks on the current administrative processes afforded federal employees under Title VII. Federal agencies have an incentive to ensure that the internal agency review process and the EEOC administrative processes work, so that cases can be resolved without a court case.

In the whistleblower context, the MSPB should remain the primary forum for WPA cases, if it properly changes its current practices and provides for adjudications in a manner similar to the EEOC.

However, because whistleblowers have no court access, the MSPB's procedures have been radically deficient when compared to the due process rights afforded in federal court. Since 2000, for example, for decisions on the merits, the MSPB's track record is 3-53 against whistleblowers.

Once federal whistleblowers have access to federal court, one should hope and expect that the MSPB reforms its past practices and becomes a forum that will actually serve the Congressional purposes for protecting whistleblowers.