Why Access to Jury Trials Will Neither Burden the Courts Nor Stifle Federal Managers

The Sarbanes-Oxley Act of 2002 (SOX) law's track record demonstrates that allowing federal employee whistleblowers to bring a civil action in district court is not likely to result in a meaningful increase in federal court cases against the government. The expected caseload is small, and is greatly outweighed by the social value of encouraging whistleblowers to come forward to air their claims of waste, fraud and abuse.

In the first three years after SOX was passed, 491 employees (of the 42 million employees working at publicly-traded corporations) filed a case. Seventy-three percent of the 491 cases, --361 cases in all -- were resolved at the informal investigation fact-finding stage before reaching any due process litigation burdens on the employer.

In the first three years after SOX became law, only 54 whistleblowers, or an average of 18 court cases annually, sought de novo court access, pursuant to SOX's administrative exhaustion provision.

Extrapolating the SOX experience to the federal workforce, we can predict an average of 37 cases in federal court in a typical year. This would have only a marginal impact on an overall federal district court civil caseload of 250,000 filings annually.

This is how we arrived at our estimate.

- Although the pool of covered federal employees (approximately 2.5 million) is drastically smaller than the number of employees working in publicly-traded corporations, federal employees file a significantly higher number of complaints annually with the Office of Special Counsel (OSC) than do corporate employees at the Department of Labor under SOX.
- In FY2006, federal employees brought 736 complaints to the OSC alleging reprisal for whistleblowing. This was an average year, compared with 748, 690, and 768 in the three previous years.
- Consistent with SOX, approximately 80% were terminated, withdrawn, or settled after completing this stage. During 2006, 146 new whistleblower cases were brought before administrative judges at the Merit Systems Protection Board (MSPB) under the Whistleblower Protection AC (WPA).[1] Only 89 of these cases were considered on the merits (or dismissed on non-procedural grounds).[2]

- During the first three years of SOX, 41% of the cases brought before a Labor Department Administrative Law Judge were removed to federal district court after exhausting the 180-day administrative remedy. If we assume a similar percentage of

[1] Of these, 18 were screened out because of settlements, withdrawal, or a failure to timely file the appeal. More commonly, in 39 cases, failure to exhaust OSC remedies resulted in a dismissal by MSPB on jurisdictional grounds.

[2] A large percentage of these 89 cases were also dismissed on jurisdictional grounds, with the AJ ruling that the employee failed to make a non-frivolous allegation that she engaged in protected speech. Although technically "jurisdictional" rulings, and therefore do not allow for a due process hearing, these are arguably decisions on the merits that *will* likely confer jurisdiction once the definition of "any" disclosure is restored.

federal employee cases removing their case to district court, this would result in approximately 35 court cases/year when jurisdictional concerns are taken into consideration.

As a comparison, EEOC administrative judges review 8,000 claims brought annually by federal employees, or over 50 times the number of whistleblower cases that are brought before Administrative Judges at the MSPB. Under EEO law, all federal employees may bring a civil action in federal court for a jury trial if 180 days have passed after filing an initial complaint, or within 90 days of receipt of the Commission's final decision after an appeal. The United States was the defendant in 857 civil rights employment cases in 2007.

Despite a significant number of EEOC claims, the Administrations of both George H.W. Bush and George W. Bush endorsed access to the courts for EEOC complaints. And there has been no evidence that EEOC complaints have overburdened the courts.

For these reasons, we believe that whistleblower cases likely will have an insignificant impact on the government's overall employment litigation docket.

The Congressional Budget Office (CBO) agrees with us. CB0 consistently has concluded that the Whistleblower Protection Act legislation would not cause a significant drain even on Merit System Protection Board resources, let alone the courts.

CBO's finding is consistent with the track record for docket burdens under the four new corporate whistleblower protection laws passed by the last Congress and administered at the Department of Labor. (DOL) Overall these four new laws provide anti-retaliation rights to over 20 million new workers in the retail, railroad, trucking, cross country motor transit, and metropolitan public transportation sectors.

The feared surge of litigation did not take place. Out of the 14 whistleblower laws DOL administers, since 2008 the four new statutes accounted for only 124 out of 3,221 new whistleblower complaints filed with DOL – a 3.3% increase.

The track record is even more reassuring on district court burdens. Since 2008 and the enactment of these four statutes protecting corporate whistleblowers, and the defense authorization act providing jury trials to defense contractors after an Inspector General investigation, there have been only 22 new court filings by whistleblowers.

In the whistleblower context, the MSPB will remain the primary forum for WPA cases, and is capable of effectively handling many of the cases when the proposed changes in HR. 1507 / S. 372 are enacted. Yet, it is imperative that juries, the "cornerstone" of our civil law system, be allowed to hear a limited number of high stakes whistleblower cases in order to create balance with the administrative system. Only then will Congress' intent to protect the courageous federal employees who report waste, fraud and abuse be fully realized.

At the same time critics have predicted a surge of litigation, they have warned that jury trials will lead to a sharp drop in management actions that impose accountability for misconduct and poor performance. The explanation is that whistleblowers will intimidate federal managers by threatening jury trials.

Critics have raised the same objection whenever federal whistleblower protections are strengthened, dating back to the initial passage of the Whistleblower Protection Act in 1989.

For example, an analysis of MSPB appeals indicates that federal agencies continued to dismiss workers at the same rate before and after the passage of whistleblower laws.

The WPA was signed into law in March 1989. From 1986-88, there were 175 MSPB decisions concerning employee complaints concerning dismissal or demotion for misconduct or poor performance. s.[3] From 1989-91 there were 174 MSPB decisions.

Likewise, after the District of Columbia enacted a whistleblower law enforced by jury trials in 2000, the number of complaints about firings or demotions stayed the same. There were 220 DC decisions on worker complaints from 1996 to 2000, before the whistleblower law with access to jury trials was approved. The number of decisions remained unchanged from 2001 to 2005, after the law was passed.[4]

	SOX (average 2002-05)	WPA (2006)	Fed Employee EEO (2007)
Complaints Filed	163	736 (FY)	
Administrative appeals	43	146 (89)[5]	7,876
Court Actions	18	61 (37)[6]	857[7]

[3] Compiled using search terms "7701(c) 7513 4303" in the MSPB database of Westlaw, searching each calendar year individually.
[4] Represents the total number of reported decisions in state and federal court under §1-615.5 et. seq. of the DC Code. We attempted to find data from either the filing or administrative levels, but the data was not available from that many years ago on such short notice.
[5] Total after those dismissed for jurisdictional concerns are removed.
[6] Projected
[7] Cases in which the U.S. was the defendant in an employment-related civil rights claim.