

## Questions and Answers on Whistleblower Reform

*Q: Aren't there laws on the books that already protect federal whistleblowers from retaliation when they report waste, fraud and abuse?*

**A:** Yes, Congress has passed three laws since the first was enacted as part of a broader civil service reform act in 1978. But court decisions over the years and a weak administrative process have eroded these protections. Currently, when a federal employee exposes waste, fraud or abuse and is fired or demoted, he or she has less than a one percent chance of fighting these decisions and winning

*Q: Why do the current administrative procedures fail to work?*

**A:** Whistleblowers who are fired or demoted can file a complaint with the Office of Special Counsel (OSC) and appeal to the Merit Systems Protection Board (MSPB). But whistleblowers who try to fight retaliation by appealing to the MSPB face daunting odds. Hearings are conducted by Administrative Judges without any judicial independence who are subject to political pressure.

The Board is not structured or funded to address complex, high-stakes conflicts that can require lengthy proceedings. Judges are under pressure to process as many cases as possible. Realistically, a minor league forum cannot and will not provide justice for those challenging major league government breakdowns.

The Board is hindered by judicial appellate review by the Federal Circuit that has interpreted the whistleblower law in a most restrictive way and against the intent of Congress.

Flaws in the administrative system have been well-documented and were noted by the House Committee on Oversight and Government Reform in 1994 when it stated: “WPA’s rights *have not met their promise on paper*, because the *agencies* responsible for the Act’s implementation *have been hostile*, or at least unwilling, *to enforce its mandate.*”<sup>1</sup>

*Q: How often does the MSPB rule for whistleblowers?*

**A:** For decisions on the merits, its track record is 3-53 against whistleblowers since the year 2000.

*Q: Why does the current system of appellate review fail whistleblowers?*

**A:** Whistleblowers who appeal the decision of the MSPB have access to only one court, the Federal Circuit Court of Appeals, a special federal circuit appellate court designated to hear all whistleblower appeals. This Court consistently has ruled against

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<sup>1</sup> H.R. Report No. 103-769, “Reauthorization of the Office of Special Counsel,” 103rd Cong., 2d Sess., p. 13 (Sept. 30, 1994) (emphasis added)

whistleblowers. And its decisions over the years have gutted the rights for whistleblowers that Congress intended. For example, although the law on paper protects "any" lawful disclosure an employee "reasonably believes evidences" significant misconduct, the Court now excludes the most common situations in which whistleblower disclosures are made. A whistleblower is not protected in these common situations:

- The whistleblower's disclosure is made in the course of doing one's job duties, such as an auditor or safety inspector.
- Someone else previously has pointed out the same misconduct.
- The disclosure concerns the consequences for the public of a policy decision.

*Q: Under the current system, how often do whistleblowers win?*

**A:** Since 1994, when Congress last strengthened whistleblower protections for federal workers, whistleblowers have won only three out of 213 cases filed in the Federal Circuit Court of Appeals. That's a success rate of about one-half of one percent.

*Q: How would access to jury trials help whistleblowers?*

**A:** First, jury trials would give whistleblowers in more complex or high profile cases to go to court another option to fight retaliation when the administrative process fails them.

But equally important, agencies would be more likely to settle with whistleblowers to avoid litigation, and administrative judges, knowing that courts might review their decisions, would be motivated to improve their performance.<sup>2</sup>

*Q: Has Congress given access to jury trials to any types of whistleblowers?*

**A:** Congress has given this right to millions of private-sector, government contractor, and state and local employees under a variety of laws passed in the past decade.

In 2002, Congress granted the roughly 42 million employees of publicly traded corporations strong whistleblower protections in the Sarbanes-Oxley Act, including access to jury trials if they are retaliated against for reporting financial malfeasance.

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<sup>2</sup> As the House Oversight and Government Reform Committee recognized in 1994 "realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit" and adding jury trials as an option would "restore balance to precedents interpreting the Whistleblower Protection Act by creating badly needed competition a choice of fact-finding fora between existing remedies and civil actions providing for jury trials in U.S. District Court; and (2) elimination of the Federal Circuits monopoly on judicial review of Board decisions by also permitting jurisdiction in the U.S. circuit court of appeals where a petitioner resides. These structural changes will provide whistleblowers with the same access to court enjoyed by citizens generally." See 103 H. Rpt. 769, "Reauthorization of the Office of Special Counsel," 103rd Cong., 2d Sess., p. 18 (Sept. 30, 1994).

It 2005, Congress granted similar strong protections to nuclear workers, including federal employees of the Nuclear Regulatory Commission and Department of Energy. In addition, during the last Congress, government contractor, and state and local government employees received the same strong protections in these recent laws:

- Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c), (trucking and cross country bus carriers) (2007)
- Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3), (railroads) (2007)
- National Transit Systems Security Act, 6 USC 1142(c)(7), (metropolitan transit) (2007)
- Defense Authorization Act, 10 USC 2409(c)(2), (defense contractors) (2007)
- Consumer Products Safety Improvement Act, 15 USC 2087(b)(4), (retail commerce) (2008)
- American Recovery and Reinvestment Act, section 1553(c)(3), (corporate or state and local government stimulus recipients) (2009)

*Q: Wouldn't access to jury trials cause federal employees to file thousands of lawsuits and burden the courts?*

**A:** There is no evidence that this would happen. For example, federal employees now can sue in federal court when they believe they have suffered discrimination because of their age, disability, religion, national origin, race or gender. They can also sue for damages in federal court for violations of the Privacy Act and for pre-enforcement injunctive relief for violations of the First Amendment.

Of the 8,000 complaints annually reviewed by administrative judges each year under the Equal Employment Opportunity law, just about one percent go to court. In 2007, for example, the United States was the defendant in 857 employment cases.

When you look at whistleblower complaints filed by private-sector workers, the court burden appears to be significantly lighter. For example, in the first three years after enactment of the Sarbanes-Oxley Act, fewer than 500 employees filed a whistleblower complaint, and only 54 whistleblowers went to court, or about 18 whistleblower cases annually.

Keep in mind, too, that to pursue a court case, a whistleblower has to spend about \$50,000 in legal fees, a difficult hurdle, particularly for a federal worker who has lost his job.

*Q: Will granting federal employees access to jury trials prevent federal managers from exercising legitimate supervisory oversight of federal staff?*

**A:** Federal managers have certainly been able to supervise employees who for years have had a right to a jury trial if they want to pursue a discrimination complaint.

It does not appear that the passage of whistleblower laws giving access to jury trials has had any impact on the normal patterns of disciplinary and performance-based actions by managers. Reviews of these actions before and after the passage of such laws don't record any change.

Keep in mind that filing a whistleblower complaint does not protect any federal employee from a legitimate action by a federal supervisor. Managers only have to prove that a federal whistleblower deserved to be fired for other legitimate reasons. As a matter of course, a manager ought to be keeping a record of employee performance, and periodically evaluating employees. This historic record can document whether an employee deserved to be terminated or demoted for reasons independent of any disclosure of waste, fraud and abuse.

The solution for effective management is not to deprive whistleblowers of credible rights to defend themselves when harassed for challenging government breakdown. It is to hire and train managers who are not afraid to exercise their own authority for the proper reasons.

*Q: Won't extending whistleblower protections cost a lot of money?*

**A:** On the contrary, costs will be minimal, and the advantage of having federal workers empowered to protect the public against the misuse of federal tax dollars or threats to public health and safety will potentially save billions of dollars, not to mention thousands of lives.

The Congressional Budget Office 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. Looking at the entire impact of the House-passed HR 985 from the 110<sup>th</sup> Congress, and estimating the total costs of the legislation, which also would include transportation screeners as covered employees, here's what the CBO stated: "CBO estimates that implementing H.R. 985 would cost \$5 million a year and about \$25 million over the 2008-2012 period, assuming appropriation of the necessary amounts. Enacting the legislation could affect direct spending, but we estimate any amounts would not be significant in any year."

And the estimated benefits of whistleblower protections may be considerable. The private sector certainly recognizes that. A recent PriceWaterhouseCoopers study, which surveyed more than 5,400 companies in 40 countries, concluded that whistleblowers initially detected corporate fraud much more effectively than either internal auditors or law enforcement agencies. "In virtually every region of the world, whistle-blowing is playing a role in uncovering the activities of wrongdoers," the study observed.<sup>3</sup>

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<sup>3</sup> *Economic crime: people, culture and controls: The 4<sup>th</sup> biennial Global Economic Crime Survey.*