FROM A UNION PERSPECTIVE

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Whistleblower Reprisal
A Powerful Defense to Adverse Actions

A whistleblower reprisal claim under 5 U.S.C. 2302(b)(8) may serve as an effective tool for turning the tables on the agency in a discipline or performance case. Our firm has used whistleblower reprisal claims as an effective affirmative defense and as a method of demonstrating the good character of our clients. A federal employee may establish whistleblower reprisal by demonstrating the employee disclosed agency 1) violations of law, rule or regulation, 2) gross mismanagement, 3) a gross waste of funds, 4) an abuse of authority, or 5) a substantial and specific danger to public health or safety. An employee must demonstrate the disclosure was a "contributing factor" in the agency personnel decision. Once this burden is met by a preponderance of the evidence, the agency must demonstrate by "clear and convincing" evidence it would have taken the personnel action absent the whistleblower activity. The "clear and convincing" evidence standard is the highest burden of proof in a civil case and is difficult to meet. Employees entitled to use the whistleblower defense include individuals who reasonably believed they were disclosing wrongful activities; employees management "perceived" as whistleblowers; friends and associates of whistleblowers; and, conduits of whistleblower information.

It is surprising how often employees subjected to adverse personnel actions have engaged in whistleblower activity. In recent cases at our firm, whistleblower reprisal claims played an important role in reversing removal decisions. In a performance case, an employee reported an abusive supervisor's conduct to the highest agency official just days before receiving notice of performance deficiencies that led to a removal. A second employee reported funds allocated for computers had been wrongful diverted. Shortly afterwards, the employee was reassigned to a backroom and subsequently removed. A third employee protested the disposal of valuable equipment and found himself removed in a RIF. In each of the cases the removal was overturned. In one case, the removal was overturned because of whistleblower reprisal. In the other cases, the judge or arbitrator did not reach or accept the whistleblower claim, and overturned the removal on other grounds. Our firm is confident that in the cases in which the whistleblower reprisal defense was not successful, nevertheless, the employee's good faith whistleblower activity made a favorable impression on the judge or arbitrator. This is consistent with our belief that an advocate must not only address the agency charges, but should also demonstrate the client's good character and history of worthy service to the agency.

Whistleblowing is evidence of an employee's intent to serve the public interest. Whistleblowing can be evidence of a hard working employee. If you can demonstrate you represent a hardworking and committed employee acting in the public interest, you have shifted a difficult burden on the agency representative who must demonstrate the discipline will promote the efficiency of the service.

Whistleblower reprisal may be contested by filing a grievance under a collective bargaining agreement or in an adverse action appeal to the MSPB. An employee without the protection of a collective bargaining agreement and not subject to an adverse action, may use the "backdoor" to the MSPB through an Independent Right of Action (IRA). An employee acquires the right to file an IRA by first filing a whistleblower reprisal complaint with the Office of Special Counsel (OSC). If the OSC dismisses the complaint, an employee may contest the whistleblower reprisal by filing an IRA with the MSPB within 60 days of the OSC dismissal. Alternatively, if 120 days passes without notice the OSC will represent the employee, the employee may file the IRA.

Good luck.

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