

WHAT CONSTITUTES WHISTLEBLOWING?

Many common misperceptions about the Whistleblower Protection Act (WPA) exist amongst federal employees, usually to an employee's detriment. First, although the WPA covers most federal executive branch employees, the WPA does not apply to federal workers employed by the Postal Service or the Postal Rate Commission, the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and any other executive entity that the President determines primarily conducts foreign intelligence or counter-intelligence activities. Second, while the WPA prohibits an agency for retaliating against a "covered" employee for "whistleblowing," very few federal employees understand what exactly constitutes "whistleblowing." The Federal Circuit court case of *Kenneth D. Huffman v. Office of Personnel Management* provides a cautionary tale to other federal employees who believe that they have engaged in "whistleblowing." See *Kenneth D. Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001).

Kenneth D. Huffman filed a complaint with the Office of Special Counsel (OSC) claiming that he had been removed from his position as Assistant Inspector General by his employer, the Office of the Inspector General (OIG) for the Office of Personnel Management (OPM), for making disclosures protected by the WPA. Specifically, Mr. Huffman alleged that he made "protected disclosures" to his supervisor--Patrick McFarland, the Inspector General of the agency--on a number of occasions, which included an allegation that Mr. McFarland improperly preselected an agency employee for a senior executive service (SES) position. See *id.* The Federal Circuit held that the WPA does not apply where an employee makes complaints to the employee's supervisor about the supervisor's own conduct. See *id.* at 1349 [internal citations omitted]. Specifically, the Federal Circuit reasoned "that discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations," and that "it is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision." *Id.* Therefore, Mr. Huffman's disclosure to his supervisor regarding his supervisor's alleged conduct did not fall within the protection of the WPA.

So what constitutes whistleblowing? Whistleblowing involves the disclosure of information that an employee reasonably believes evidences: (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety. Further, the disclosure must be specific and detailed, not vague recollections of wrongdoing regarding broad or imprecise matters. Most importantly, protected disclosures are only those: (1) disclosures made as part of an employee's normal duties outside of normal channels, *e.g.*, the Office of Special Counsel or the Office of Inspector General; or, (2) disclosures an employee made outside of assigned duties to persons in a position to correct the alleged abuse. **Therefore, as a general rule, reporting wrongdoing to the wrongdoer does not constitute whistleblowing.**

Once a "covered" federal employee makes a protected disclosure, the Whistleblower Protection Act prohibits her agency from retaliating against her because she made that protected disclosure. Specifically, her agency is prohibited from threatening to take, taking, or withholding a

personnel decision (e.g., promotions, suspensions, demotions, removals, awards, etc.) in retaliation for her protected disclosure of fraud, waste or abuse. However, the “covered” employee bears the burden of proving her charge of whistleblower reprisal. To meet this burden of proof, she must demonstrate that she made a protected disclosure and the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action. Specifically, she must prove that: (1) the alleged retaliatory official had the authority to *take, recommend, or approve* any personnel action; (2) she made a protected disclosure against the official; (3) the official used his authority to take, or to refuse to take, a personnel action against her; and, (4) the official took, or failed to take, the personnel action against her because of her protected disclosure **which was known to the official when he acted**. For more information about what constitutes whistleblowing, contact Mahoney & Jeffrey, PLLC at 202-312-7100 or www.MahoneyJeffrey.com.

Peter J. Jeffrey, Esq.
Member & Director of Litigation
Mahoney & Jeffrey, PLLC

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