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Scared Silent? Whistleblower Disclosures Drop

By Mathew B. Tully

Maybe whistleblowers are just catching their breath or maybe agencies have chilled the air.

Either way, in 2011, for the first time in four years, new whistleblower disclosures received by the Office of Special Counsel dropped 3 percent according to the OSC's latest annual report.

In addition, the decline in disclosures suggests that agencies' increased attempts to punish whistleblowers may be having a chilling effect. This more aggressive approach toward whistleblowers is evidenced by a recent Merit System Protection Board report showing that 21.6 percent of federal employees surveyed in 2010 reported reprisal for whistle blowing, up from 18.7 percent in 1992.

The OSC has recently beefed-up the amount of personnel and resources dedicated to investigating whistleblower reprisal complaints as part of a Retaliation Pilot Program. However, valid claims of whistleblower retaliation will doubtlessly continue to slip past the OSC, which is where all federal employees must first file their whistleblower reprisal complaints involving personnel actions. In the event that OSC declines to pursue corrective action, or fails to take action within 120 days of a complaint's filing, the whistleblower can file an individual right of action, or "IRA" with the MSPB.

Last June, the Federal U.S. Circuit Court of Appeals, in Losada v. Dep't of Defense reversed the MSPB's dismissal of an appeal. In that case, the employee appealed a conduct-based removal, claiming the agency retaliated against him for blowing the whistle. The agency alleged that the employee did not properly disclose an incident of child abuse when the employee did not disclose the incident to a certain agency operating unit, as required by agency procedure. The employee did, however, disclose the incident of the unlawful child abuse to via e-mail to the OSC. In summary, the employee's e-mail to OSC stated that an adult was holding a student down tightly to an agency desk. The employee was subsequently removed from his position.

After multiple appeals, the issue before the Federal Circuit was whether employee's OSC e-mail constituted a protected disclosure. The Federal Circuit sided with the employee. It held that because the employee reasonably believed the contents of the e-mail evidenced a violation of a law, rule, or regulation, remand was proper to determine whether this e-mail qualified as a protected disclosure under the Whistleblower Protection Act.

Federal employees should not let agencies scare them into silence. If employees are aware of wrongdoing, yet have concerns about blowing the whistle, they should consult a federal employment law attorney who can ensure they are able to exercise their rights without impunity.

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