

OSC: Whistleblower Disclosures "Skyrocketed"

By Mathew B. Tully Federal employee whistleblowing activity has reached screeching levels, with the government's watchdog agency, the Office of Special Counsel (OSC), seeing a surge of new disclosures of wrongdoing in fiscal year 2012. And with a new law expanding whistleblower protections expected to attract even more disclosures, the risk of federal employees having to fight whistleblower retaliation on their own is only getting greater. In its "Fiscal Year 2014 Congressional Budget Justification and Performance Budget Goals," the OSC reported that its whistleblower disclosure unit received 1,148 new disclosures, up 24 percent from the previous fiscal year. This jump in new disclosures is especially significant because in fiscal year 2011 the OSC experienced its first annual decline in new disclosures since fiscal year 2007. Helping the agency rebound from that dip were high-profile cases, including the whistleblower retaliation case at Dover Air Force Base, where employees successfully challenged the agency's reprisal in retaliation for complaining about the abhorrent treatment of the remains of service members by mortuary officials. Revelations over a General Services Administration (GSA) conference in Las Vegas in 2010 that cost taxpayers \$823,000 also likely encouraged many federal employees to blow the whistle on other types of gross mismanagement or waste of funds. In order to be protected against retaliation for blowing the whistle under the Whistleblower Protection Act (WPA), federal employees must make disclosures to entities such as the OSC or an agency's inspector general (IG). The disclosures must relate to actual or reasonably believed violations of law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority; or a substantial and specific danger to public health or safety. It is a prohibited personnel practice (PPP) to retaliate against a whistleblower. Federal employees who have been subjected to retaliation can file a complaint with the OSC, which will investigate the matter and, if it deems necessary, attempt to negotiate corrective action with the agency. In fiscal year 2012, the OSC received 2,969 PPP complaints, up 15 percent from the previous year. The OSC reported it achieved favorable outcomes in 75 percent of whistleblower retaliation cases and 89 percent in PPP cases, which can also include discrimination, nepotism, coercion for partisan political purposes, and favoritism, among others. The big question now is whether the OSC will be able to maintain this impressive success rate as it braces for an even greater deluge of new disclosures and retaliation complaints. With the Whistleblower Protection Enhancement Act (WPEA) expanding the protections afforded to whistleblowers, the OSC told Congress it "expects the rapid increase in disclosures and retaliation cases to accelerate." The agency warned Congress that it "operates on a shoestring" and "the shoestring is pulling tighter and fraying as the demand for OSC's services far outpaces its resources." For fiscal year 2014, the OSC requested \$20.6 million, which would allow it to hire 11 more full-time employees (FTE), bringing its total FTEs to 120. With or without this funding, the OSC will doubtlessly be juggling a heavier workload. The chances of meritorious whistleblower retaliation cases falling through the cracks will only grow. If the OSC decides not to pursue corrective action or fails to act on a complaint within 120 days, the employee can file what is known as an individual right of action (IRA) with the Merit Systems Protection Board (MSPB). In its "Fiscal Year 2012 Annual Performance Report and Fiscal Years 2013-2014 Performance Plan," the MSPB said it expects the WPEA to "increase the number

of individual right of action (IRA) and otherwise appealable action whistleblower appeals." The WPEA, which president Barack Obama signed last November, should also "reduce the number of dismissals through the expanded definition of a protected disclosure." The definition was expanded to include disclosures made to a supervisor or official authorized to recommend, direct, or approve personnel actions. These officials are prohibited from retaliating against whistleblowers for disclosures of information even previously revealed; disclosures regardless of the employee's motive in disclosing; disclosures not made in writing or made while off duty; and disclosures relating to events that happened long ago. So, one way or another, it looks like whistleblowers – backed by their attorneys – will be battling retaliation at the MSPB. To that, I quote Shakespeare's King Henry V, "Once more unto the breach dear friends, once more..."