

## **MSPB: Perceived Whistleblowers Can Be Protected from Retaliation**

By Ryan C. Green

Perception can mean protection. That is the message the U.S. Merit Systems Protection Board (MSPB)

sent when it decided to give a former U.S. Department of Veterans Affairs employee whistleblower protections as she attempted to reenter the federal civil service. The Board took this step, even though it, four years ago, ruled her disclosures failed to meet the standard for such protections.

King v. Dept. of the Army

held federal employees are afforded anti-retaliation protections of the Whistleblowers Protection Act (WPA) absent actual whistleblowing

. The Board vacated an administrative judge's initial decision and remanded the case after Diane King claimed another federal agency's refused to hire her because of her past whistleblowing

activities.

Ms. King worked for the Department of Veterans Affairs as a medical technologist. In 2005, she received a letter of reprimand for alleged misconduct. This action prompted her to file a complaint with the U.S. Office of Special Counsel (OSC). She accused the Agency of retaliating against her for reporting patient neglect. After the OSC closed its inquiry, Ms. King filed an individual right of action (IRA) appeal with the MSPB

. The Board, in 2007, held that her "bare allegations of patient neglect" failed to constitute a disclosure under the law.

Two years later, Ms. King applied for a vacancy with the U.S. Department of the Army. During her job interview, she was asked about her separation from the Department of Veterans Affairs, to which she responded she was "fired for whistleblowing." The Agency did not select Ms. King for the position, prompting her to again appeal to the MSPB

alleging whistleblower retaliation. An administrative judge initially dismissed the appeal on jurisdictional grounds because, rather than identifying a specific protected disclosure, Ms. King argued that her prior appeal confirmed her status as a whistleblower

, which resulted in the nonselection. The Board held that actual disclosure was unnecessary if the agency officials involved in the personnel action perceived the employee as whistleblower.

What Federal Employees Need to Know:

The WPA protects federal employees from retaliation for properly disclosing violations to a law, rule or regulation, gross mismanagement or gross waste of funds, a substantial and specific danger to public health and safety, and the abuse of authority.

Generally, unlawful retaliation occurs when an employer with knowledge of an employee's whistleblowing

activities subjects him or her to a personnel action because of a protected disclosure.

Nonselection for appointments and the cancellation of vacancy announcements are personnel actions covered by the WPA, along with other personnel actions such as failure to promote and termination.

Federal employees who do not make protected disclosures but are perceived by a supervisor as being whistleblowers

, due to either mistaken identity or because they are believed to potentially engage in future whistleblowing

, are covered under WPA's anti-retaliation provision.

Most federal employees are required to file complaints of whistleblower retaliation with the OSC.

The employee can file an IRA appeal with the MSPB

if the OSC closes the whistleblower's case without effecting a desired corrective action or 120 days after the complaint was filed with the OSC.

Federal employees who have been subjected to personnel actions because of actual or perceived whistleblowing

activities should contact a federal sector employment attorney.

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