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Lessons From the Air Forceâ€™s Mortuary Scandal

By Mathew B. Tully

Bringing to light wrongdoing in the federal government can be a thorny matter. The law is very specific about how and to whom federal employees must “blow the whistle” in order to be considered a bona fide whistleblower

and qualify for protection from retaliation. One misstep, and a federal employee could find himself or herself out of a job with little or no recourse.

According to a new Merit Systems Protection Board

report, 74 percent of federal employees surveyed stated that concerns about not having enough evidence to prove their employer’s wrongdoing would affect their decision to blow the whistle. Additionally, 58 percent of employees polled said their willingness to come forward would be hindered by concerns that the employer’s wrongdoing might not be serious enough to qualify as fraud, waste, abuse, unlawful behavior or a threat to the public health or safety.

The recent news of the Department of the Air Force’s improper handling and transporting of deceased military personnel and dependents is providing federal employees with an illustrative example of how to blow the whistle the right way. Additionally, this case shows federal employees that there is merit to bringing an agency’s wrongdoing to light.

In this case, whistleblowers employed at the mortuary located at Dover Air Force Base disclosed information concerning the wrongful preparation of a Marine’s remains, mortuary employees having lost body parts of the deceased, and the improper handling and transporting of contagious remains and fetal remains of military dependents.

In the spring of 2010, the Office of Special Counsel referred these disclosures to then-Secretary of Defense, Robert Gates, prompting an investigation into the matter headed by the Office of the Inspector General for the Department of the Air Force. During the investigation, the mortuary’s director allegedly terminated one of the whistleblowers and subjected two others to adverse personnel actions. Consequently, the three whistleblowers all filed complaints with the OSC alleging that the actions taken against them by the Air Force were the result of unlawful whistleblower retaliation.

In a Nov. 8, 2011, letter to President Barack Obama about the OSC’s report on the Dover Air Force whistleblowers, Special Counsel Carolyn N. Lerner substantiated that her agency’s investigation had revealed “substantial evidence of gross mismanagement, [and] violations of rules and regulations.” For an employee to be protected under the Whistleblower Protection Act, his or her disclosure must relate to these two types of wrongdoing or a gross waste of funds, abuse of authority or a substantial and specific threat to public safety or health. Further, disclosures must be made through the proper channels, such as the OSC or an agency’s inspector general.

A common mistake made by federal employees when attempting to blow the whistle on threats to public health or safety is failing to disclosure information that establishes what the MSPB calls a “reasonable expectation of future harm.” For example, in the 2005 case Mogyorossy v. Dept. of the Air Force, the MSPB

said a security guard’s complaint about receiving insufficient training amounted to “speculation that there could possibly be danger at some point in the future.”

Further, prospective whistleblowers often slip when confusing genuine violations of law with what the U.S. Court of Appeals for the Federal Circuit has called the “minor or inadvertent miscues occurring in the conscientious carrying out of a federal official’s or employee’s assigned duties.” That was the case in Langer v. Dept. of the Treasury, in which an IRS assistant district counsel complained about secretaries’ handling of pink envelopes that might contain confidential information, contrary to a personnel policy he personally developed as an exemption to agency procedures. In short, whistleblowers need to be sure a violation concerns an actual law, rule or regulation and constitutes more than a minor misstep.

Between 1992 and 2010, the number of federal employees who claimed to have experienced reprisal for disclosing agency wrongdoing rose from 18.7 percent to 21.6 percent, according to the recent MSPB survey. To protect their jobs, whistleblowers not only need to prove that they made a protected disclosure, but must also show that they were subjected to an adverse personnel action as direct result of their protected disclosure. Whistleblowers facing retaliation should immediately consult with a federal employment law attorney because there are strict requirements and deadlines for filing complaints with the OSC and MSPB appeals.

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. The information in this column is not intended as legal advice.