Whistleblower Protection

Introduction

In 1989, Congress unanimously passed the Whistleblower Protection Act (WPA) as the premier merit system law for accountability to taxpayers. Since 1994, when amendments strengthening the WPA were added, it has been functionally overturned by a series of increasingly hostile decisions by the U.S. Court of Appeals for the Federal Circuit. The most immediate obstacle is a series of precedents creating exceptions to coverage for "any" lawful disclosure evidencing specified, significant misconduct. Contrary to explicit statutory language, court precedents now exclude disclosures to co-workers, supervisors or others in the chain of command, those suspected of wrongdoing, and those where an employee is doing his or her job by making a disclosure. A 1999 court decision made it all but impossible for whistleblowers to qualify for protection by establishing a presumption that the government "acts in accordance with the law" and by requiring the whistleblower to prove otherwise with "irrefragable"--uncontested and undeniable--evidence.

For the last 16 years, Congress has unanimously approved an appropriations amendment known as the "anti-gag statute" applying to the WPA and related good government statutes, such as the Lloyd-Lafollette Act. The "anti-gag statute" protects merit system worker communications with Congress from nondisclosure rules or similar types of gag orders. However, as an appropriations clause, the amendment's effectiveness has been hampered because it does not include an available remedy. Protections of communications to Congress are so important that they should become a permanent law rather than being subject to annual reaffirmation as an appropriations amendment.

The U.S. Office of Special Counsel (OSC), which since 1978 has had a mandate to defend the merit system, must obtain Department of Justice (DOJ) approval to appeal cases in federal court, or even to file "friend of the court" briefs. In these cases, DOJ is in an adversarial role to those seeking to enforce merit systems protections, and as a result consistently refuses to appeal cases in federal court. Since DOJ routinely is adverse counsel in the litigation, it consistently refuses. It is important to note that other independent agencies, such as the Merit Systems Protection Board and the Federal Labor Relations Authority, enjoy independent litigating authority.

Bills to Restore Whistleblower Protections: The Senate and House Versions of the Federal Employee Protection of Disclosures Act

During the 109th Congress significant steps were taken to restore whistleblower protections when committees in both chambers reported out bills amending the

Whistleblower Protection Act. The Senate version of the Federal Employee Protection of Disclosures Act (S. 494) was included as an amendment to the Defense Authorization bill passed by the full Senate. S. 494 restores federal court judicial review to whistleblowers that had been stripped by previous bad court decisions and allows the Merit Systems Protection Board to decide if an employee's security clearance determination was affected by whistleblower activities and provide appropriate relief, including recommendations that the security clearance be restored. The bill also gave whistleblowers specific authority to disclose classified information to Members of Congress on relevant oversight committees or their staff who have the appropriate security clearances.

In May 2006, the House Government Reform Committee reported out its version of the Federal Employee Protection of Disclosures Act (H.R. 1317). The bill amended the Whistleblower Protection Act to give jury trial rights to federal government workers, the same as those granted to corporate whistleblowers by the Sarbanes-Oxley Act in 2002, and granted Transportation Security Officers protection from retaliation from supervisors when they blow the whistle on breaches of security. Although great strides were taken in the last Congress on the issue of whistleblower protection reform, including a strong demonstration of bipartisan support for federal workers seeking to report wrongdoing and protect the public, neither version of the Federal Employee Protection of Disclosures Act was included in the legislation that was ultimately passed by the House and Senate.

Offensive Behavior by the Office of Special Counsel

Since 2004, the head of the Office of Special Counsel (OSC), Scott Bloch, has taken numerous steps to thwart the rights of federal employees and trample on the rights of his own employees at OSC. In April 2004, Bloch, the principal protector of federal civil service rights and federal whistleblowers, sent a gag order to his own staff which likely violates the Whistleblower Protection Act. This order stated that "the Special Counsel has directed that any official comment on or discussion of … sensitive internal agency matters with anyone outside OSC must be approved in advance…" Bloch also forbade his staff from discussing anti-discrimination policy with outsiders, including other federal employees and agencies asking for guidance.

In addition to this likely violation of the very law his office is supposed to enforce, Bloch has also given a handful of dedicated, career OSC employees 10 days to agree to move to offices thousands of miles from their Washington, D.C. homes or face termination. All of the affected employees work in the OSC's whistleblower protection unit and were hired before Bloch's tenure began. None of Bloch's hand-picked hires was transferred. Those selected for transfer were senior employees who had questioned either the OSC's current management practices or policy decisions made by Bloch. Meanwhile, the number of political appointees under Bloch has doubled.

Bloch's actions have resulted in the steep decline in enforcement of whistleblower protections for federal workers. Corrective action for all prohibited personnel practices has dropped roughly in half over the last two years. The number of whistleblowing disclosures referred for some form of agency investigation has not increased; in fact, as a percentage of the overall disclosures received, the number referred for investigation has dropped dramatically.

AFGE will stand behind the federal employees at the Office of Special Counsel in their struggle to enforce the Whistleblower Protection Act on behalf of all federal employees in spite of the efforts of the Special Counsel himself to thwart them.

Conclusion

AFGE strongly supports legislation to give all federal employees enforceable whistleblower protections, including Transportation Security Officers and national security workers and urges both the House and Senate to vote on final passage of these bills during the 110th Congress.