



Department of Veterans Affairs

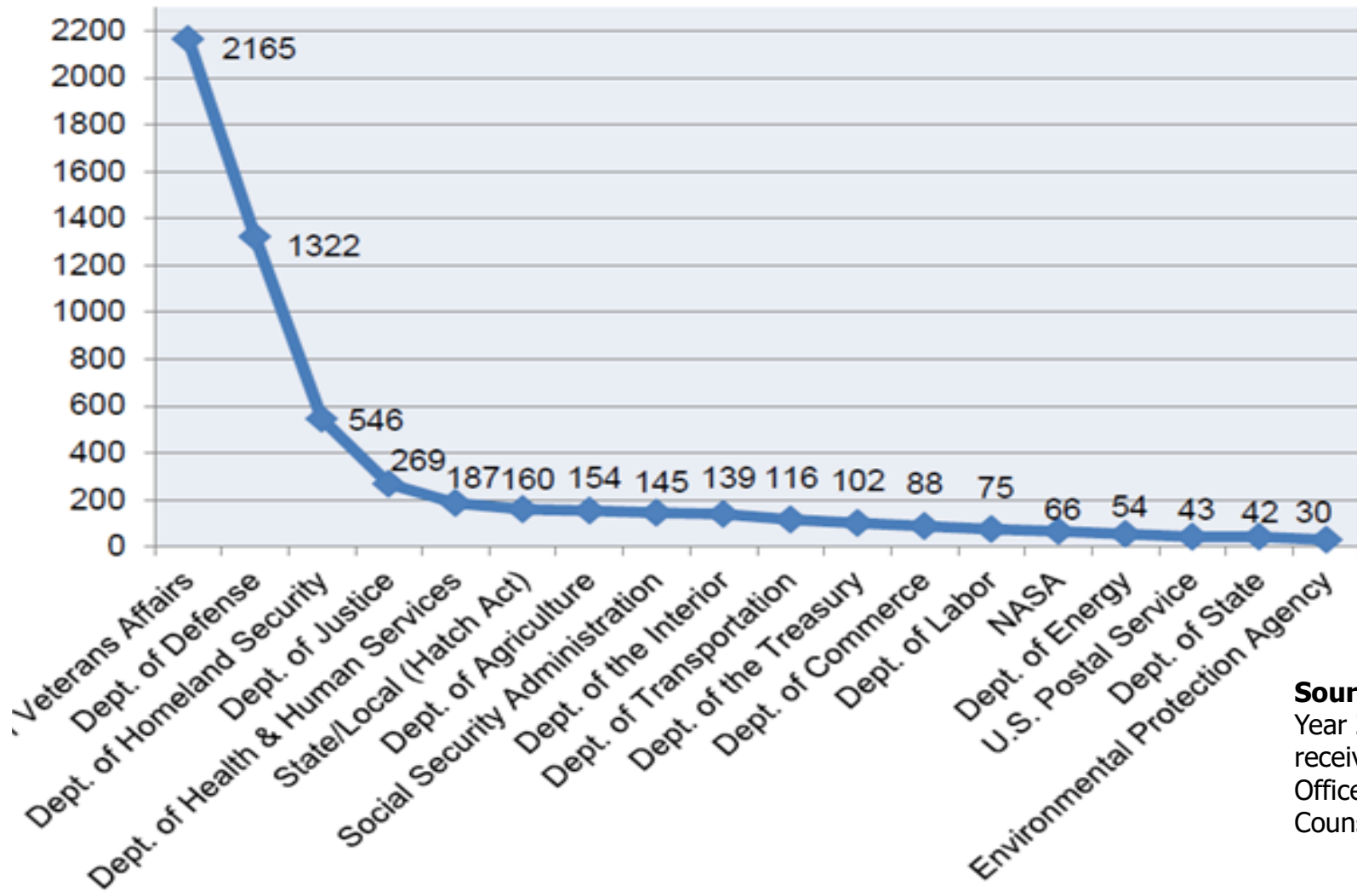
Advising Managers on Whistleblowing

Presented by
Office of General Counsel (OGC) and
Office of Accountability Review (OAR)

Disclaimer: This presentation is meant to be informational and does not constitute legal advice. Please consult with an OGC attorney if you are seeking legal advice.

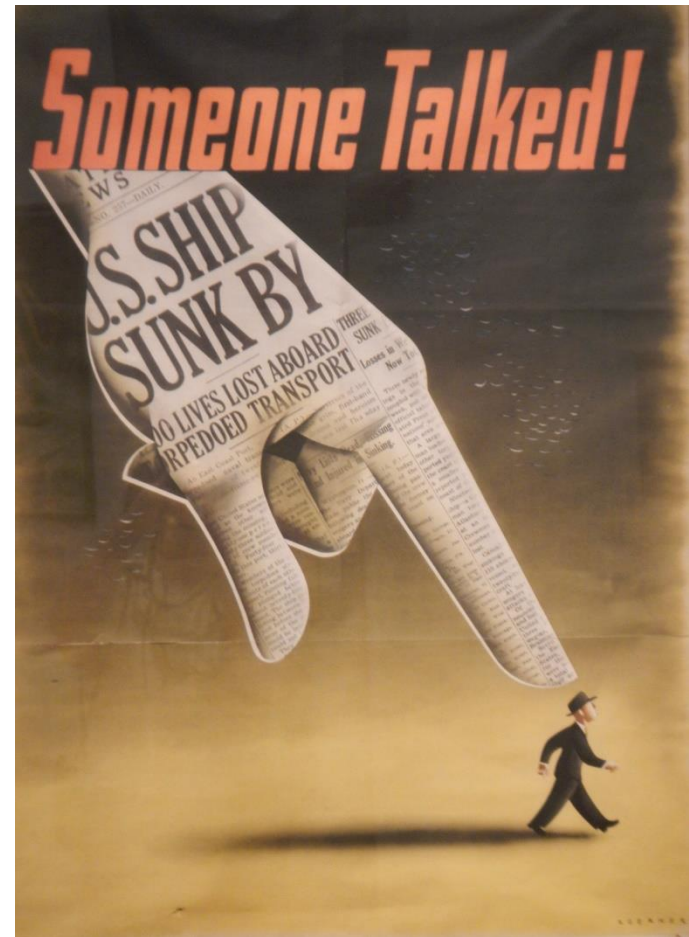
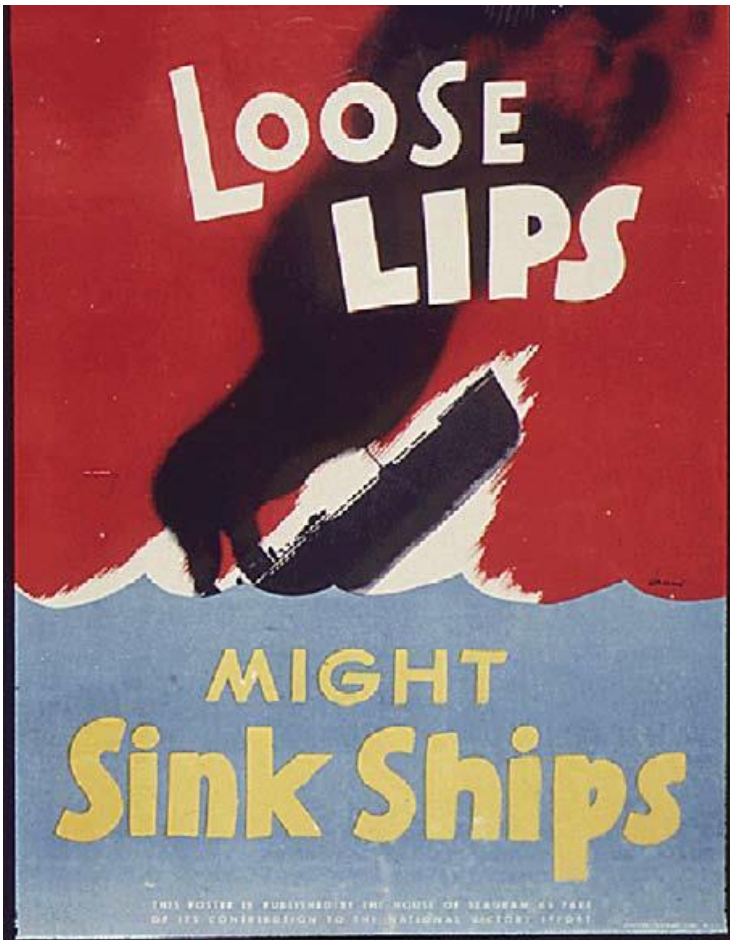
Last updated
on 4/23/2016

Why are we here?



Source: Fiscal Year 2015 cases received by the Office of Special Counsel.

Common misperceptions on whistleblowing



But actually...

- Whistleblower disclosures help expose fraud, waste, abuse, mismanagement, and threats to public health and safety.
- Whistleblowers can help save billions and even human lives.
- Employees who blow the whistle often do it at great cost to their careers and personal lives.



So what's a whistleblower?



- A whistleblower is someone who
 - Makes a “protected disclosure” or
 - Engages in a “protected activity”
- That's it. It does not require any manner of formal process or third party designation.

Protected disclosures

An employee is a whistleblower if he or she reports or makes a complaint about:

1. a violation of law, rule, or regulation;
2. gross mismanagement;
3. gross waste of funds;
4. an abuse of authority;
5. a substantial and specific danger to public health or safety; or
6. censorship related to research, analysis, or technical information.

Protected disclosures

- Disclosures can be made to:
 - Member of Congress
 - Office of the Special Counsel (OSC)
 - Office of Inspector General (OIG)
 - The Secretary of VA
 - Any management official
 - White House
 - Government Accountability Office
 - The media (e.g., Washington Post)
 - You!




Protected Disclosures

As long as the whistleblower reasonably believes that it is true, it is protected.

Reasonable belief: the Director is taking the facility GOV home and using it over the weekend.

But in reality: Director just bought a used GSA fleet car that looks exactly the same as the facility GOV.



But what if they got it all wrong?

Protected disclosures

- It doesn't matter if what employee reports or complains about:
 - Was already disclosed to you or someone else
 - Was disclosed while off duty
 - Was disclosed because it was required by the normal duties of the employees job
 - Was disclosed to the person who participated in the wrongdoing
 - The whistleblower's personal motivation for making the complaint does not matter

- The employee is still a whistleblower!

**Believe It
or Not!**

Protected disclosures

- Employees are not required to report problems or make complaints through the “chain of command.”
- If you hear yourself saying the words chain of command, you’re in whistleblower retaliation territory!



Protected Activities

An employee may also be a whistleblower if he or she:

- Files a grievance, appeal or other complaint, i.e. union grievances and EEO complaints.
- Testifies, or otherwise helps someone else file a grievance, appeal or other complaint
- Cooperates with or makes a complaint to OSC or OIG
- Refuses to obey an illegal order



Protected disclosures and VA policy

- A protected disclosure does not include communications concerning policy decisions that lawfully exercise discretionary authority, unless the employee or job applicant making the disclosure reasonably believes that the disclosure evidences—
 - a violation of any 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.

See 5 U.S.C. § 2302(a)(2)(D).

Which of the following is an exercise of discretionary authority and therefore not a protected disclosure?

- a. Engineering Chief authorizes overtime to complete a special project.
- b. Regional Director decides to open the benefits office on Sundays.
- c. VISN approves the construction of a new clinic.
- d. These are all exercises of discretionary authority. However, disclosures about this acts may be protected.

Protected Disclosures

- “Stop the Line” is a VA initiative that encourages employees to speak up about patient safety concerns, even if those concerns involve policy decisions that lawfully exercise discretionary authority.

See <http://www.qualityandsafety.va.gov/StoptheLine/StoptheLine.asp>

Example: A physician tells a technician to hydrate a patient with water rather than intravenous fluid (the typical procedure) prior to a CT Scan. The technician emails his supervisor questioning the physician’s orders.

1. Has the tech made a protected disclosure?
2. Is the tech now a whistleblower?
3. How does Stop the Line play into this matter?



Laws that limit protected disclosures

- A disclosure is not a protected if specifically prohibited by law (limited to statute only); or is required to be kept secret by Executive order in the interest of national defense or the conduct of foreign affairs.

See 5 U.S.C. § 2302(b)(8); *DHS v. MacLean*, 135 S. Ct. 913, 920-21 (2015).

- Laws that specifically prohibit disclosures, absent an exemption, include:
 - The Health Insurance Portability Act of 1996 (HIPAA)
 - The Privacy Act, 5 U.S.C. § 552a
 - 38 U.S.C. § 5701 (protecting Veteran claims information, including medical records)
 - 38 U.S.C. § 5705 (protecting medical quality assurance records)
 - 38 U.S.C. § 7332 (protecting Veteran medical records relating to the diagnosis or treatment of drug and alcohol abuse, HIV, and sickle cell anemia)

Protected disclosures and OIG

- Notwithstanding the previous laws, a VA employee can disclose and legally provide confidential patient health information (PHI) to OIG.

See 5 U.S.C. app., § § 6(a)(1)-(a)(2).

1. Has Mrs. Franklyn made a protected disclosure?
2. Is Mrs. Franklyn a whistleblower?
3. Has she violated any law or regulation?



Dear Inspector General:

My boss just denied benefits to John Smith, SSN 809-00-8780, DOB: 09/09/1929, who is undergoing treatment for alcohol abuse.

He approved benefits for a female Veteran who has no disabilities.

You should look into this.

Sincerely,

Mrs. Morwena Franklyn

Claims examiner <http://printthistoday.com>

Protected disclosures and HIPAA

- HIPAA has a whistleblower exception that allows employees to disclose PHI, if they:
 1. Believe in good faith that VA has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by VA potentially endangers one or more patients, workers, or the public;

AND
 2. Make the disclosure to a:
 - a. health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions (e.g., HVAC, OSC, OIG);
 - b. a health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct (e.g., The Joint Commission); or
 - c. an attorney representing the whistleblower regarding the disclosure or an action that was based on the disclosure.

See 45 C.F.R. § 164.502(j)(1).

Knowledge check

- Dr. Elmo disclosed a Veteran's PHI while raising public safety concerns to :
 - a. A senator serving on the Senate Veterans' Affairs Committee (SVAC).
 - b. The entire SVAC, during a public hearing.
 - c. Disabled American Veterans (DAV) because Dr. Elmo believes they oversee VA Healthcare operations.
 - d. Members of a Disciplinary Actions Board (DAB) because we suspended Dr. Elmo for matters related to patient care.
 - e. The attorney Dr. Elmo hired to represent him before the DAB.
 - f. Dr. Elmo's attorney's paralegal.

1. Are Dr. Elmo's disclosures protected?

2. Does the VA have any reason to discipline Dr. Elmo for PHI violations?



Protected disclosures and the Privacy Act

- The Privacy Act prohibits the disclosure of information from a system of records absent written consent of the subject individual unless the disclosure falls within one of 12 statutory exemptions.
- Disclosures of information to either House of Congress or to any congressional committee with jurisdiction over the matters disclosed is permitted under the Privacy Act. *See* 5 U.S.C. § 552a(b)(9).
- The Privacy Act excludes information not from a system of records, where an employee has first-hand knowledge of that information (i.e., the employee created the information and used it compared to retrieving it from the system of records). *See Bartel v. FAA*, 725 F.2d 1403, 1411 (D.C. Cir. 1984).

Knowledge check



Dr. Elmo won his DAB and also received a monetary settlement after filing a whistleblower complaint with OSC.

He is now more committed than ever to safety, which is why he sent an email to everyone in his department and to the chief of staff about his concerns regarding the fitness of Nurse Elmette.

In his email, Dr. Elmo mentioned that he overheard “Nurse Elmette yell at Jane Doe, a Veteran with PTSD.”

1. Is Dr. Elmo a whistleblower, again?
2. Did Dr. Elmo violate the Privacy Act?

Protected disclosures: Tips for our clients

- Promote an atmosphere where employees can report wrongdoings without retaliation. Abide by and enforce the law.
- Take whistleblower disclosures seriously and, when appropriate, investigate.
 - Do not let the managers investigate matters that pertain to them. Instead, inform a senior executive so that he or she can investigate or assign someone to investigate.
 - If a disclosure pertains to a senior leader (e.g., a Senior Executive Service (SES) or SES-equivalent employee), it must be reported to VA's Office of Accountability and Review (OAR).
 - If a disclosure pertains to a possible or actual criminal violation, it must be reported to VA's Office of Inspector General (OIG).
- Have the manager document (e.g., send an email) all steps taken to:
 - acknowledge the whistleblower and his or her disclosure; and
 - investigate the disclosure and, if appropriate, resolve it.

How do you stay out of trouble?

Don't retaliate






Prohibited Personnel Practices (PPPs)

- Retaliation is a type of PPP.
- As a manager or supervisor you should not commit a PPPs.
- **WARNING:** A manager or supervisor who commits a PPP may be subject to disciplinary action. More on that ahead...



13 PPPs: 5 U.S.C. § 2302(b).

1. Discriminate for or against any employee or applicant.
2. Solicit or consider improper employment recommendations.
3. Coerce an employee's political activity.
4. Deceive or willfully obstruct a person's right to compete for employment.
5. Influence any person to withdraw from competition for a position.
6. Give unauthorized preference or improper advantage.
7. Employ, promote, or provide an employment benefit to a relative.
8. Retaliate against a whistleblower, whether an employee or applicant. 
9. Retaliate against employees or applicants for exercising their lawful rights. 
10. Unlawfully discriminate for conduct unrelated to work performance.
11. Knowingly violate veterans' preference requirements.
12. Violate any law, rule, or regulation which implements or directly concerns the merit system principles.
13. Implement or enforce a nondisclosure agreement or policy lacking notification of whistleblower rights. 

PPP 8 - Retaliation against a whistleblower

You may not take, direct others to take, recommend, or approve:

A **personnel action** against an employee or applicant for disclosing information which the employee or applicant reasonably believes evidences:

- (a) a violation of any law, rule or regulation;
- (b) gross mismanagement;
- (c) a gross waste of funds;
- (d) an abuse of authority; or
- (e) a substantial and specific danger to public health or safety.

A note about personnel actions

Within the context of whistleblower retaliation, the term **personnel action** covers not only the traditional personnel actions we are familiar with such as disciplinary actions, performance ratings, promotions, pay actions, and reassignments but also may include the following:

- Letters of counseling (if they contain a threat of future discipline)
- Significant changes in duties
- Changes in responsibilities
- Changes in working conditions
- Temporary details
- Denial of training opportunities that could lead to promotion
- And the most important one....

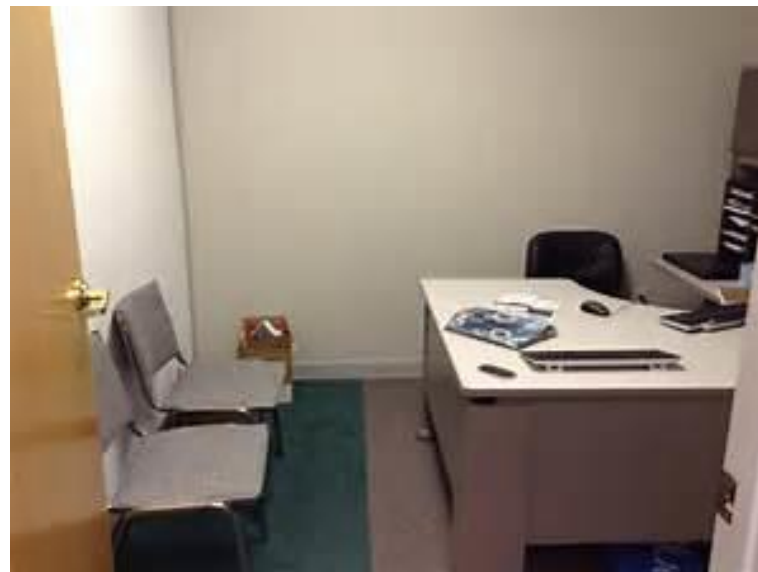
A note about personnel actions

The classic move to the windowless basement office .

Before-Whistleblowing



After-Whistleblowing



PPP 8 - Retaliation against a whistleblower

EXAMPLE:



A Medical Center Director makes a comment that anyone who goes to Congress to complain about staffing problems at the Emergency Department can be easily reassigned.

Anything wrong with that? Why?

PPP 9 - Retaliation for exercising lawful rights

You may not take, direct others to take, recommend, or approve:

A personnel action against an employee or applicant because of:

- (a) exercising an appeal, complaint, or grievance right;
- (b) testifying for or assisting another in exercising such a right;
- (c) cooperating with or disclosing information to the Inspector General or the Special Counsel; or
- (d) refusing to obey an order that would require the individual to violate a law.

Knowledge Check

Dr. Neal is a lead researcher of the causes of Veterans suicide .

One day, the Chief of Staff (COS) learns that Dr. Neal filed a complaint with OIG about the safety of research participants.

A few days later, the COS emails the Chief of Research and they both agree that they cannot trust Dr. Neal anymore.

A few weeks later, the Chief of Research tells the COS that Dr. Neal often seems depressed and she believes that he should no longer lead a suicide research project. COS agrees.

The next day Dr. Neal is transferred to another research project.

Anything wrong?



PPP 13 - Nondisclosure agreements without certain language

All nondisclosure agreements must contain the following statement:

"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

What the Whistleblower has to prove:

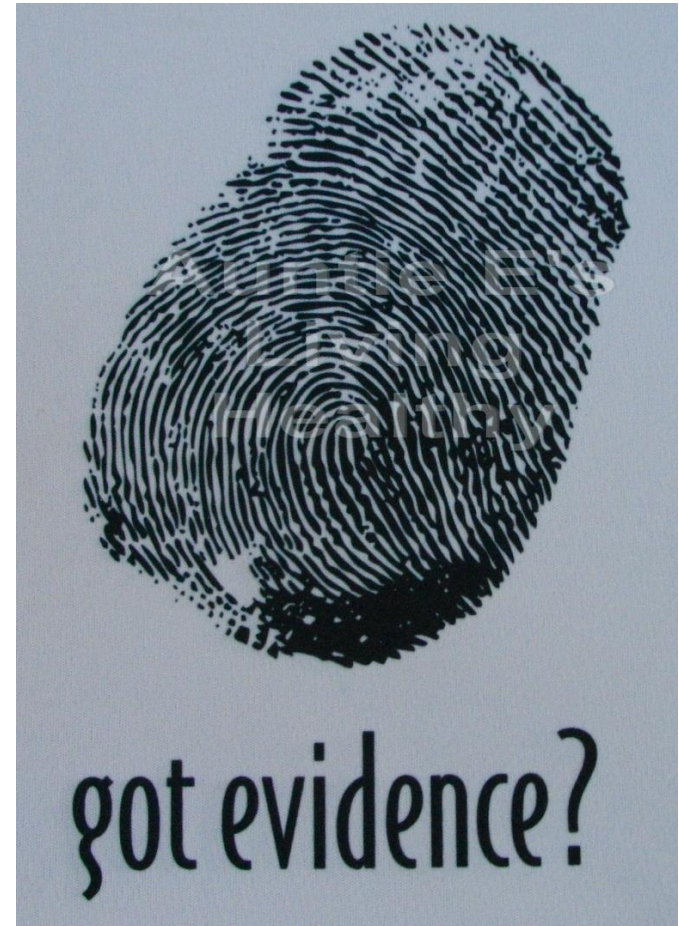
An employee filing a whistleblower retaliation complaint must show that:

- 1) he or she engaged in an activity that he or she reasonably believed to be a protected disclosure;
- 2) the employer knew about the protected disclosure and the identity of the employee making the disclosure;
- 3) the employer took, failed to take (e.g., such as in the case of a promotion), threatened to take, or influenced an official to take a personnel action against the employee; and
- 4) the protected disclosure was a **contributing factor (tangentially related)** in the personnel action.

What the Agency has to prove:

If all the previous elements are met, the agency then has to show by clear and convincing evidence that it would have taken the same action without the disclosure. **Clear and convincing (75%)** evidence factors include the:

- strength of the evidence in support of the personnel action;
- existence and strength of a motive to retaliate; and
- treatment of similar employees who are not whistleblowers.



Let's say there was retaliation...

let's talk about

Corrective action

Corrective action

Assuming the elements of a whistleblower retaliation are met and the agency cannot show by clear and convincing evidence that it would have taken the same action without the disclosure, then corrective action is provided.



Back pay, clean record, etc.



Attorney fees



Medical expenses

Corrective action



UNLIMITED COMPENSATORY DAMAGES

Discipline for Retaliators

If retaliation occurred, disciplinary action **may** be warranted.



Disciplinary action against retaliators

- Disciplinary action is only warranted if VA can prove, by preponderant evidence (51%), that the protected disclosures or activity was a significant motivating factor (plays an important role and is not a factor that is only tangentially related) for the personnel action.
- *Douglas* factors apply. Additionally, consider the following:
 - The length of time since the retaliatory act.
 - What was the intent behind the manager's action against the whistleblower?
 - Whether the management official was following the advise of HR or the OGC.
 - Whether the retaliation may cause a chilling effect on others.
- **Caution:** If a whistleblower has an open complaint with OSC, (1) VA must notify OSC before taking disciplinary action against the retaliating management official AND (2) OSC must concur with any disciplinary action, before it is taken by VA. See 5 U.S.C. § 1214 (f).

Discipline for Retaliators

VA HANDBOOK 5021/15

JULY 19, 2013

PART I APPENDIX A

Nature of the Offense	1 st offense	2 nd offense	3 rd offense
Reprisal against an employee for providing information to an Office of Inspector General (or equivalent) or Office of Special Counsel, or to an EEO investigator, or for testifying in an official proceeding.	14 days suspension to Removal	Removal	<i>(nada. Zilch. You were already fired)</i>

Advice for managers & supervisors

- *Don't ignore* employee reports of wrongdoing.
- *Investigate* the matter and report it to your supervisor.
- If the complaint is about you, *elevate* it to a senior leader.
- *Remind* your staff that you will not retaliate against them for making a protected disclosure.
- *Don't take it personally*. Even when it's all about you.
- *Be careful* about what you say and write.
 - For the most part, *assume* it may become public.
- Be mindful. *Avoid* even the appearance of retaliation.
- Deal with problems when they occur to avoid the appearance of an improper motive. *Timing is everything*.
- *Be consistent* in managing your employees.

More advice

- *Document* all personnel actions (in the broadest sense of the term). Contemporaneous notes are best.
- Keep you cool. *Diffuse* tensions.
- *Stay as neutral* and factual as possible.
- *Do not engage* in personal attacks. Even if it is all horrible lies.
- *Do* hold employees accountable, including whistleblowers.
- *Seek advice* from HR, OGC, and OAR.

Situational Example

- A VA handbook requires that employees submit a request for IT equipment via the intranet.
- You are a manager at a facility where employees typically email your local IT officer for the equipment.
- John, who has worked as a VA employee at your facility for 10 years, emails you and states that:
 - his colleagues are not complying with the VA handbook requirements
 - these employees are emailing the local IT officer, who is providing them with equipment, which the employees promptly sell on an online auction website.

Situational Example

1. Is John a whistleblower? Why?
2. What should you do once you receive John's email?
3. What should you do if you find out that:
 - a. John also emailed the IT officer and requested IT equipment, in violation of the VA handbook?
 - b. John actually hacked into his colleagues' emails to provide you with documentation?
4. What if you find out that John was mistaken and his colleagues actually entered in their requests on the intranet, but John continues to email you about his allegations?
5. What if, after his email to you, John comes in late every day and, when you ask, he states he is a whistleblower and you can't touch him?

Knowledge Check

Kylie, a nurse, calls the OIG Hotline alleging that management is allowing nurses to change Veteran appointments without notifying the respective Veterans.

Several weeks after calling the Hotline, Kylie is reassigned to a Community-Based Outpatient Clinic (CBOC). Kylie objects to the reassignment because she now has to drive farther and won't earn overtime.

And most importantly, she believes the reassignment is in retaliation for blowing the whistle, so she files a retaliation complaint with OSC.

Does Kylie have a viable OSC Whistleblower Retaliation complaint?

- A. Yes. Why?
- B. No. Why?
- C. Maybe. Why?



Knowledge check

The Director of a Regional Office was chatting with Juan, when Juan mentions that his manager has taken several adverse personnel actions against Regional Office staff.

Juan talked about an instance when his manager denied a colleague a career development detail for no apparent reason. Juan hinted that his manager was on a power trip and that maybe someone should report her to OIG.

The next day, the Juan 's manager calls him into her office and states that Juan should not be gossiping about his colleagues and their office business with the Director. Juan 's manager also tells him that she is prepared to take action against anyone who raises the matter again.

1. Did Juan make a protected disclosure?
 - A. Yes
 - B. No
2. Can Juan file a whistleblower retaliation complaint?
 - A. Yes
 - B. No



Knowledge Check

Shawn wrote to the VA Secretary that his supervisor, Andy, regularly violates Federal Acquisition Regulations.

Andy, Shawn's manager, trusts his employees to do their jobs and does not monitor when they come in or leave, as long as they get their work done. Andy finds out about the complaint against him, but mistakenly believes it was Desiree, Shawn's coworker, who wrote to the VA Secretary. Desiree, like her colleagues, is an employee who comes in late and leaves early, but gets her work done.

A few weeks after Andy finds out about the complaint, Andy starts monitoring Desiree's arrival and departure time. A month later, Andy suspends Desiree for a day for constantly coming in late.

Did Andy retaliate against Desiree?

- A. Yes
- B. No
- C. Maybe

Knowledge Check

Ed and Ruth met at a Medical Center, fell in love, and got married. Ed and Ruth are both probationary employees and work at the same office, which is managed by Kevin. One day, Ed tells Kevin that the office is improperly disposing of excess inventory in violation of the law. Kevin asks Ed which law was broken. Ed replies that he does know the specific law, but believes the way the office is disposing the inventory is a huge waste of taxpayer dollars.

Kevin, upset at Ed's unsubstantiated allegations, tells other managers that Ed is a backstabber who they should not hire. He also tells his peers that Ruth supports Ed in making these unsubstantiated allegations. A few months later, Kevin terminates Ed and Ruth, during their probationary periods, because their performance was lackluster. Typically, Kevin has counseled other employees during their probationary periods, if their performance is lacking. However, he did not do so with either Ed or Ruth.

Which of the following is true?

- a. Kevin only retaliated against Ed.
- b. Kevin retaliated against both Ed and Ruth.
- c. Kevin did not retaliate against Ed because Ed did not state what law was broken.
- d. Kevin did not retaliate against either, because he removed them during the probationary period.



Knowledge check

The New York Times

Op.Ed. by Loretta Martin, MD: The Department of Veterans Affairs is putting politics above Veterans. VA has a policy of hiring minority doctors of lesser qualifications to check the boxes on the VA's Affirmative Action Plan. This should be illegal. That's my personal view as a doctor and one who cares for the welfare of our Veterans.

Dr. Martin, a prominent VA cardiologist, writes an editorial article for the New York Times, criticizing the affirmative action plan at her Medical Center as jeopardizing patient care. Dr. Martin does not use her job title and indicates in the letter that her views represent her personal opinion.

After receiving word of the article, James, the Medical Center Director, terminates Dr. Martin's appointment because he believes that Dr. Martin's article is unfairly critical of the Medical Center and VA. Has James retaliated against Dr. Martin?

- a. Yes
- b. No
- c. Maybe

Knowledge Check

1. Simon was a witness in George's OSC complaint against Pam. Pam found out that Simon testified in favor of George and decreased his performance award. Has Pam committed a PPP?
 - a. Yes
 - b. No

2. Martin discloses to OIG that his supervisor, Gloria, misused her government credit card by purchasing airline tickets to Hawaii for personal travel. It turns out that Gloria actually used her government credit card to purchase airline tickets to Hawaii for official agency travel. Has Martin made a protected disclosure?
 - a. Yes
 - b. No

3. Jessica discloses to a coworker that her supervisor, Andrea, falsified 30 minutes on her timecard. Andrea left work 30 minutes early, but her timecard reflected that she worked a full day. Has Jessica made a protected disclosure?
 - a. Yes
 - b. No, because she only told a coworker.
 - c. No, because 30 min. is too small a time to matter.
 - d. Both B and C

Investigating protected disclosures and whistleblower retaliation complaints



If someone blows the whistle...



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- investigate the disclosure;
- investigate and take corrective action for the employee, if whistleblower retaliation is found;
- investigate and take disciplinary action against anyone who retaliates against whistleblowers.

For technical guidance about investigations see VA Handbook and Directive 0700.

When not to Investigate

However, you should not investigate actions if:

- There is a possible criminal violation. In these cases, you must contact OIG.
- The disclosure pertains to a senior leader.* In these cases, you must contact OAR.
- The disclosure relates to you, in which case, you should refer it to your supervisor.

* All positions centralized to the Secretary; SES or SES-equivalent employees; employees appointed under 38 USC § 7306; Network Directors, Deputy Network Directors, Medical Center Directors, Associate and Assistant Medical Center Directors, Chiefs of Staff and Nurse Executives in the Veterans Health Administration; Regional Office Directors, Area Directors, and Deputy Directors in the Veterans Benefits Administration; Cemetery Directors and Memorial Service Network Directors in the National Cemetery Administration; and GS-15 program office and regional office heads within the Staff Offices and Staff Organizations.

Investigating disclosures

- If an employee makes a disclosure, management should investigate the disclosure.
- Investigations generally consist of simple fact-findings to more complicated Administrative Investigations Boards.
- Typically, a simple investigation would be done by a first-line supervisor and would involve:
 - Talking to the employee who made a disclosure to find out more details about what happened, when, and where.
 - Document the discussion (e.g., report of contact)
 - Remember to follow collective bargaining agreements when dealing with a unionized employee.
 - Talking to other employees or witnesses who may have observed the issue being disclosed.
 - Document the discussion (e.g., report of contact)
 - Remember to follow collective bargaining agreements when dealing with a unionized employee.
 - Ask for emails or ask Information Technology to pull the relevant emails.
 - Review relevant laws, regulations, and VA policies.
 - Contact an OGC attorney if you need assistance.
 - Draft a report of findings and submit it to your supervisor.
 - You can inform the employee who made the disclosure that you've completed your investigation.

Investigating retaliation complaints

- If an employee alleges that he or she was retaliated against because of a disclosure, management must investigate to determine if retaliation occurred.
- If retaliation occurred, management must determine if:
 - corrective action (e.g., putting the employee back into his or her office) is warranted for the employee who made the disclosure; and
 - disciplinary action is warranted against the employee who retaliated.
- Whistleblower retaliation investigations on senior leaders should only be conducted by Office of Accountability and Review (OAR).

Investigating retaliation complaints - Step 1

- 1A. Did the employee make a protected disclosure about:
- A. a violation of law, rule, or regulation;
 - B. gross mismanagement;
 - C. gross waste of funds;
 - D. an abuse of authority;
 - E. a substantial and specific danger to public health or safety; or
 - F. censorship related to research, analysis, or technical information?; OR
- 1B. Did the employee engage in a protected activity such as assisting someone exercising his or her lawful rights?

Investigating retaliation complaints - Step 2

Did management know about the protected disclosure or protected activity?

- Best sources for information are admissions, e-mails, documents, and testimony.

Investigating retaliation complaints - Step 3

Did a management official take a personnel action against the whistleblower?

- Remember that “personnel action” is defined broadly to include disciplinary action, reassignment, transfer to a new office or desk, changing work hours, etc.
- Remember that “Taken” is defined as actually taken, failed to take (e.g., in the case of a promotion), threatened to take, or influenced someone else to take a personnel action against the whistleblower.

Investigating retaliation complaints - Steps 4 and 5

Step 4: Was the protected disclosure or activity a contributing factor (tangentially related) in the personnel action.

Step 5: Can management show, by clear and convincing evidence (75%) that it would have taken the same action without the disclosure or activity?

Consider:

- The timing of the disclosure or activity and the personnel action. Whether other similarly situated employees were treated similarly.
- Whether the management official made derogatory comments about the employee based on his or her whistleblower disclosures. These comments may be made orally or in writing, or both.
- Whether there is a legal basis for taking the personnel action.

Investigating retaliation complaints - findings

- If you've considered steps 1-5 **AND** management cannot show by clear and convincing evidence, that it would have taken the same action without the disclosure or activity, then retaliation occurred.
- If retaliation occurred, correction action is warranted.
- If retaliation occurred, disciplinary action may be warranted.

Corrective Action

- If retaliation occurred, correction action is warranted.
- Corrective action includes placing the employee back into the position had retaliation not occurred (includes working conditions, placement back to former position, higher performance rating, restoring annual or sick leave used, etc.)
- Corrective action may include:
 - Compensatory damages (pain and suffering)
 - Medical fees
 - Attorney fees
 - Other reasonable and foreseeable consequential damages, including reasonable expert witness fees.
- Work with OGC to determine appropriate corrective action.

Disciplinary Action

- If retaliation occurred, disciplinary action **may** be warranted.
- Disciplinary action is only warranted if VA can prove, by preponderant evidence (51%), that the protected disclosures or activity was a significant motivating factor (plays an important role and is not a factor that is tangentially related) for the personnel action.
- Consider the table of penalties and Douglas factors when proposing discipline.
- You may also want to consider:
 - the length of time since the retaliatory act.
 - whether the management official sought the advice of HR or OGC and whether the management official followed the advice.
 - length of time the management official has been a supervisor.
 - whether management actions would have a chilling effect on other employees.
- OSC must approve discipline against a management/subject official when it has an open investigation.
- Work with the OGC to review anticipated disciplinary actions.

Back to OSC... additional considerations



Office of Special Counsel: Disclosures

- Accepts protected disclosures.
- If OSC believes the protected disclosure is authentic, they can order VA to investigate and prepare a report.
 - Typically, such investigations are performed by VA's Office of Medical Inspector.
- OSC can share VA's report with the whistleblower for comments.
- OSC then shares the VA's report, the whistleblower comments, and its own comments with the President and congressional committees with jurisdiction over the agency.

See 5 U.S.C. § 1213

Office of Special Counsel (OSC): Investigations

- Accepts PPP complaints, including whistleblower retaliation complaints.
- If OSC believes that a PPP occurred, OSC will begin to investigate.
 - If not, then OSC can close its investigation and notify the whistleblower, who then can file an Individual Right of Action with the Merit Systems Protection Board (MSPB).
 - OSC can request a stay of any personnel action (until it completes its investigation), which OSC believes to have been taken as a result of a PPP.
 - OSC may ask VA for an informal stay, which is typically granted.
 - If an informal stay is not granted, OSC may petition the MSPB for a stay, which is also typically granted. *See* 5 U.S.C. § 1214
- Once OSC has begun its investigation, they will contact VA to ask for documents and interview witnesses.

Office Special Counsel: Investigation tips

- For the sake of coordination, OSC communications should be directed to OGC (District Counsel or, in VACO, the Personnel Law Group).
- OGC should coordinate document requests with their clients, request documents through the e-discovery process and Clearwell, and review documents before they are produced to OSC.
 - In general, attorney-client privileged documents should either be withheld or, if demanded by the OSC, produced in redacted form.
 - Documents withheld due to privilege, should be mentioned in VA's response to OSC or through an attached privilege log.
- OGC should coordinate witness interviews, for awareness purposes, but should not attend those interviews.
 - OGC may prepare witnesses for interviews, but such preparation should be a general overview of the interview process and should not be focused on the substance of the witnesses' testimony.

Office of Special Counsel: Mediation

- OSC can accept requests for mediation.
- OSC typically refers certain investigations to mediation, especially if the cases concern policy disputes or the evidence provided by the whistleblower is weak.
- If OSC believes that a PPP occurred, OSC will recommend corrective action for the whistleblower.
 - VA can negotiate corrective action with OSC.
 - If VA and OSC cannot agree on corrective action, OSC will formalize a report of their investigation and send it to the Secretary, to the Office of Personnel management, and, at OSC's discretion, the President.
 - If VA still fails to take corrective action, OSC can petition the Merit Systems Protection Board (MSPB) to order corrective action.

Office of Special Counsel: Discipline

- If OSC believes a PPP occurred, OSC may recommend disciplinary action for the retaliator.
- VA can negotiate disciplinary action with OSC.
- VA must obtain OSC's permission before taking disciplinary action against a retaliator who is a subject official of the OSC's investigation. *See* 5 U.S.C. § 1214 (f).
- If VA and OSC cannot agree on disciplinary action, OSC can petition the Merit Systems Protection Board (MSPB) to order disciplinary action against the retaliator.
 - In this role, OSC serves as the prosecutor with the Board or an administrative law judge (not an administrative judge) serving as the judge and the employee serving as the defendant.

See 5 U.S.C. § 1215

Questions? Who should I contact?



The Office of General Counsel

Find your office:

<https://vawww.ogc.vaco.portal.va.gov/SitePages/Location.aspx>