

Government Accountability Project

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Memorandum

From: Tom Devine, ext. 124; whistle47@aol.com

Re: Federal Circuit whistleblower decisions since passage of 1994 amendments

Below is an index of all Federal Circuit final decisions on the merits for Whistleblower Protection Act appeals since Congress strengthened the law in October 1994 amendments. The track record is 3-226 against whistleblowers. Precedential decisions are indexed below, as well as non-precedential rulings from 2011 and 2012. For purposes of this memorandum, “decisions on the merits” means a ruling whether an employee’s free speech rights were violated. It does not include rulings on cases disposed or remanded because of issues like harassment not covered under the law, timely filing, improper presentation of legal briefs or due process issues whose correction requires further fact finding.

It may be helpful to preview the abbreviated format for each listed case. At a minimum, it will include the legal citation, (and where possible) identify the employee’s position and the legal element why any given employee lost. The elements will be broken down into four categories: 1) Protected speech (“PS”): whether the employee is entitled to any reprisal protection for his or her disclosures. 2) Knowledge (“K”): whether an official with responsibility to recommend or take a relevant personnel action knew or should have known of the whistleblowing disclosure. 3) Nexus (“N”): whether the disclosure was a contributing factor to alleged discriminatory treatment the employee is challenging. 4) Clear and convincing evidence (“CCE”) for independent justification (“CCE”): whether that degree of evidence proves the agency would have taken the same action for innocent, independent reasons even if the whistleblower had remained silent. Many of the court decisions are highly cursory, but where sufficient facts about whistleblowing are included to be meaningful, that dimension will be added.

An overview of trends can be insightful. For reported and unreported cases, of rulings sufficiently explained to identify the dispositive element, the court based rulings against whistleblowers on the following elements: 1) protected speech: 89; knowledge: 15; nexus: 33; clear and convincing evidence: 34. There was a sharp drop in reported decisions in 2001, the year after legislation with a provision permitting “all circuits review” was first introduced to share the Federal Circuit’s appellate jurisdiction.

2012 (0-4) Groseclose v. Dep’t of the Navy, 459 Fed. Appx. 918 (Jan. 20, 2012)(Navy testing facility manager)(PS)

Dolinsky v. Dep't of Homeland Sec., U.S. App. LEXIS 6054 (Mar. 23, 2012) (Director of Community Operations Program for FEMA) (CCE) (illegal disclosure of classified information)

Strader v. Dep't of Agric., U.S. App. LEXIS 6755 (April 5, 2012) (wildlife specialist with USDA) (CCE) (improper aerial shooting of mountain lions by federal personnel)

Pedeleose v. DOD, 2012 U.S. App. LEXIS 7356 (April 12, 2012) (Industrial engineer at the DOD) (CCE) (incomplete reports)

Duggan v. DOD, 2012 U.S. App. LEXIS 11954 (June 13, 2012)(DOD auditor)(CCE)

2011 (0-7)

*Pearson v. VA, 2011 U.S. App. LEXIS 24787 (Dec. 13, 2011) (Probationary appointee at the Veterans Affairs Illiana Health Care System in Danville, Illinois) (CCE) (superior's improper procurement policies and abuse of authority)

Schoenrogge v. DOJ, 192 L.R.R.M. 2369 (Nov. 14, 2011)(applicant for DOJ legal assistant)(PS)

Himchak v. Merit Sys. Prot. Bd., 2011 U.S. App. LEXIS 22714 (Nov. 10, 2011)(Navy Automation Clerk)(PS)

McWilliams v. MSPB, 430 Fed. Appx. 882 (July 11, 2011)(Air Force Chemistry Supervisor)(PS)

Smets v. MSPB, 426 Fed. Appx. 890 (May 26, 2011)(May 26, 2011)(Air Force Contract Specialist)(PS)(Job duties, disclosure to wrongdoer)

Royal v. Dep't of the Army, 2011 U.S. App. LEXIS 5732 (Mar. 18, 2011) (Korean Language Instructor with the Army's Defense Language Institute Foreign Language Center) (CCE) (abusive behavior by immediate supervisor)

Suggs v. VA, 2011 U.S. App. LEXIS 2748 (Feb. 11, 2011)(DVA Housecleaning aide)(K)(violations of collective bargaining agreement)

2010 (0-9)

Considine v. NCUA, 366 Fed. Appx. (Feb. 6, 2010) (Credit Union Examiner) (PS, N)

Auston v. DVA, 371 Fed. Appx. 96 (April 14, 2010) (Clinical Nurse Manager)(N) Inadequate staffing of VA hospital

Montgomery v. MSPB, 382 Fed. Appx. 942 (June 14, 2010)(DOJ OIG auditor)(PS)

Reardon v. DHS, 384 Fed. Appx. 992 (June 21, 2010)(DHS Deputy Assistant Secretary)(PS)(alleged personnel misconduct)

Barela v. MSPB., 388 Fed. Appx. 965 (July 134, 2010)(PS)

Kahn v. DOJ, 618 F.3d 1306 (Sept, 7, 2010)(DEA special agent criminal investigator) (PS) Job duties doctrine disqualifies protection for disclosing purchase of crack cocaine from an unregistered informant.

Layton v. MSPB, 392 Fed. Appx. 875 (Sept. 9, 2010)(Army environmental attorney) Job duties doctrine precludes protection for disclosures of contamination and associated cover-up.

Jones v. Dep't of Veterans Affairs, 2010 U.S. App. LEXIS 23221 (Nov. 9, 2010)(DVA nursing assistant)(CCE)(unidentified patient mistreatment)

Harrison v. Dep't of Agric., 2010 U.S. App. LEXIS 25537 (DEec. 15, 2010)(USDA Human Resources assistant)(PS)(improper bonuses)

2009 ((0-1)

Fellhoelter v. Department of Agriculture, 568 F.3d 965 (6/15/09) (USDA audit manager)(CCE) Alleged fraud by producers on milk grades.

2008 (1-0)

Drake v. A.I.D., 543 F. 3d 1377 (10/07/08) Foreign Service investigator, Granted relief against reassignment. It qualifies as whistleblowing to disclosure drunkenness by State Department personnel at an embassy party.

2007 (0- 4)

Stoyanov v. Dep't Navy. 474 F.3d 1377 *rehearing. en banc denied* (4/13/07) Employees have no WPA rights to challenge retaliation against family members.

Kalil v. Department of Agriculture, 2007 WL 489471 (2/16, 2007). (Administrator at Farm Service Agency) (CCE) Challenged overcharges in debt repayments from farmers. Protected speech disqualified because Mr. Kalil did not have the authority to tell court about false statements by government in litigation. This creates an all-encompassing Catch 22 potentially eliminating any whistleblower protection, because the Willis/Garcetti doctrine disqualifies employees from coverage when they carry out activities for which their jobs do provide authority.

Smart v. MSPB, 2007 WL 130334 (1/16/07). (Air Force police officer) (PS) Challenged allegedly illegal personnel testing system in a grievance, rather than other context.

Louie v. Department of Treasury, 2007 WLR 46022 (1/9/07). (IRS revenue agent) (N)

2006 (1-2)

Greenspan v. DVA, , 464 F.3d 1297 (9/8/06) VA Hospital Medical Director. **Found illegal retaliation, remanding for correct action to cancel reprimand and reduced proficiency rating.** Otherwise-protected disclosure of nepotism and conflict of interest does not lose Act's protection, even through "anchored" in inflammatory manner of delivery.

Fields v. Department of Justice, 452 F.3d 1297 (6/16/06) (DEA supervisory criminal investigator) (PS) Pressure by agency counsel to slant testimony in internal disciplinary proceeding against a subordinate not protected; mandatory disclosures during internal management review about arrest of cooperating source not protected b/c non-discretionary job responsibility.

Garcia v. Department of Homeland Security, 437 F.3d 1322 (2/10/06) INS HQ Assistant Chief Inspector (PS; contents in EEO complaint do not qualify).

2005 (0-1)

Carson v. Department of Energy, 398 F.3d 1369 (3/1/05) Nuclear engineer. Cumulative safety violations in nuclear weapons laboratories. (N)

2004 (0-4)

White v. Department of Air Force, 391 F.3d 1377, 391 F.3d 1377 (12/15/04). Replaces earlier "irrefragable proof" test with a substitute applicable only to whistleblowing disclosures of mismanagement: the "reasonable belief" test is not met unless "a conclusion that the agency erred is not debatable among reasonable people."

Sutton v. DOJ, 366 F.3d 322. (5/6/04) (CCE). Assistant U.S. Attorney Office administrative staff. (doesn't describe whistleblowing).

Clark v. MSPB, 361 F.3d (3/17/04). Contract specialist in directorate of community activities in Belgium. (PS; pre-federal employment disclosures do not trigger reprisal protection in later federal employment context). (Doesn't describe whistleblowing.)

Frey v. DOL, 359 F.3d 1355. (3/3/04). Mines Safety Health Administration supervisory coal mine inspector. (K) (racial name calling)

2003 (no reported decisions)

2002 (0-1)

Francisco v. OPM, 295 F.3d 1310 (7/9/02) Navy retiree. (PS) Illegal pension

2001 (1-3)

Langer v. Treasury, 265 F.3d 1259 (6/20/01) IRS Assistant District Counsel. (PS) violation of mandatory controls for confidential grand jury information (unprotected because illegality inadvertent and trivial), and racial imbalance in tax investigations (unprotected because disclosure part of job duties).

Larson v. Army, 260 F.3d 1350 (8/14/01) Army motor vehicle operator. **(Found illegal whistleblower retaliation, and ordered stronger performance appraisal)** (unsafe removal of light fixture from storage facility still containing ammunition)

Yunus v. DVA, 242 F.3d 1367 (3/22/01) VA physician. (CCE) (lack of certification for VA radiologist)

Briley v. NARS, 236 F.3d 1373 (1/22/01) Archivist. (CCE) (failure to properly control classified documents)

2000 (0-10)

Meeuwissen v. Interior, 234 F.3d 9 (12/4/00) Interior Dept. Administrative Law Judge. (PS; “disclosure” only covers initial communication of alleged misconduct; this had been exposed previously) (illegal rulings in Interior Department case law controlling estate proceeds to heirs of Native Americans)

Ince v. Army, 234 F.3d 567 (11/17/00) Army Corps of Engineers electrician (PS; just doing job) (safety violations in connection with electrical installation)

Giove v. Dept. Transportation, 230 F.3d 1333 (10/31/00) FAA Air Traffic Controller. (PS) (testified that air traffic training omission may have contributed to fatal crash)

Nater v. Department of Education (“DOE”), 232 F.3d 916 (5/9/00) Office of Inspector General (“OIG”) auditor. (PS; mere professional disagreements) (pattern of auditing irregularities)

Williams-Moore v. DVA, 232 F.3d 912 (4/10/00) VA nurse. (CCE) (violations of Family Medical Leave Act)

Orr v. Treasury, 232 F.3d 912 (4/10/00) (N) (Whistleblowing not described.)

Bristow v. Army, 232 F.3d 908 Army civilian; job not described further. (CCE)
(Whistleblowing not described.)

Walton v. USDA, 230 F.3d 1383 (2/16/00). Management analyst. (N) (operating private business on government time)

Wilborn v. DOJ, 230 F.3d 1383 (2/16/00) Border Patrol communications assistant. (N)
(Whistleblowing not described.)

Guin v. Air Force, 230 F.3d 1382 (2/10/00) (N) Air Force civilian supervisor. (racial and sexual harassment, and illegal hiring practices)

1999 (0-15)

Brundin v. Smithsonian, 230 F.3d 1373 (12/14/99) Education specialist at Smithsonian American History Museum. (N) (toxic substances in workplace)

Escandon v. DVA, 230 F.3d 1373 (12/13/99) VA Medical Center housekeeping aide. (PS; disclosure of workplace violence and unsafe conditions too imprecise, although specific incidents and medical consequences were described with specificity)

Herman v. DOJ, 193 F.3d 1375 (10/25/99) Chief psychologist at federal prison camp. (PS; alleged illegality and other misconduct "trivial") (whistleblowing was on lack institutionalized suicide watch, and copying of confidential patient information)

Tchakmakjian v. DOD, 217 F.3d 855 (10/12/99) DOD civilian employee. Neither job nor whistleblowing further described. (N)

Crews v. Army, 217 F.3d 854 (10/8/99) Army voucher examiner. (P.S.; alleged gross waste trivial) (preferential travel benefits for another employee)

Venziano v. DOE, 189 F.3d 1363 (9/1/99) DOE engineer. (N) (failure to implement OMB management requirements for efficiency of engineering work)

Randles v. VAMC, 215 F.3d 1348 (8/11/99) VA Medical Center physician. (PS; disclosed unauthorized prescriptions to suspected wrongdoer and co-workers, which are ineligible audiences for protected speech)

Carr v. SSA, 185 F.3d 1318 (7/30/99) Social Security Administration Administrative Law Judge. (CCE) (mismanagement of docket)

Eisenger v. MSPB, 194 F.3d 1339 (6/17/99) Job and agency not identified. (PS; supporting testimony to confirm a pioneer witness' charges of document destruction do not qualify as whistleblowing)

Therrien v. DOJ, 194 F.3d 1338 (6/11/99) Marshals Service reality specialist. (PS; disclosures were just doing his job; and charges of illegality were mere policy disagreements) (whistleblowing on alleged violations of law for taxes on forfeited property)

Cordero v. MSPB, 194 F.3d 1338 (6/10/99) FAA Air Traffic Controller (turned down for 33 job applications) (PS; not entitled to whistleblower protection if merely suspected of blowing the whistle) (Mismanagement investigation; not described further.)

Lachance v. White, 174 F.3d 1378 (May 14, 1999) Air Force computer training specialist. (PS; mere policy disagreements; failure to have reasonable belief because did not overcome presumption that government acts "correctly, fairly, lawfully and in good faith" with "irrefragable proof" [undeniable, uncontestable, incontrovertible, or incapable of being overthrown]) (whistleblowing on alleged duplicative computer training program that undermined ongoing, accredited training, with consequences so counterproductive that charges backed by independent management review and duplicative training program canceled by Secretary of Air Force) [Remand; so not included as final decision on merits]

Dews-Miller v. USIA, 194 F.3d 1330 (3/10/99) OIG administrative staff. (N) (credit cards abuses)

Moss v. Air Force, 185 F.3d 883 (2/10/99) Chief of Air Force travel unit at Wright Patman Air Force Base. (PS) (alleged abuse of authority, through improper pressure of another employee to provide adverse information against him)

Smith v. HUD, 185 F.3d 883 (2/9/99) HUD employee; job not described further. (PS; alleged misconduct must be committed by government) (organized crime harassment and threats while at government job)

1998 (0-14)

Waller v. Army, 178 F.3d 1307 (11/10/98) Army wastewater treatment operator (K, N) (falsified flouride readings and water flow report)

Horst v. HHS, 173 F.3d 436 (10/15/98) Indian Health Service education specialist. (PS; unsafe working conditions in disclosure were already known to agency; and N, because she requested the desk audit used to lay her off)

Engler v. Navy, 173 F.3d 435 (10/13/98) Navy nuclear engineering technician (CCE) (higher costs by using engineers for jobs that technicians could perform)

Barry v. Treasury, 173 F.3d 435 (10/13/98) IRS night shift tax examiner (K) (Whistleblowing not described.)

Kewley v. HHS, 153 F.3d 1357 (8/20/98) Indian Health Service clinical supervisor. (CCE) (non-crisis counseling of minors without consent of parent/guardian)

Thompson v. Treasury, 155 F.3d 574 (7/10/98) IRS correspondence exam technician. (PS) (generalized charge of systematic IRS corruption and racism, and defamatory attack on supervisor)

Thomas v. Navy, 155 F.3d 570 (6/5/98) Fails to describe job, alleged whistleblowing, or reason for adverse decision below. Upholds ruling against whistleblower claim, with explanation that Administrative Judge wasn't biased and did not err by failing to accept new post-hearing evidence into the record.

Willis v. USDA, 141 F.3d 1139 (4/15/98) USDA conservationist. PS; because failing soil conservation plans for regulatory noncompliance merely was doing his job, and dissent about regulatory violations permitted by reversal of his rulings was disagreement to supervisor not eligible to be a whistleblowing disclosure. This WPA case law was the forerunner for the Supreme Court's 2006 *Garcetti* decision similarly stripping government workers of constitutional rights while they are carrying out job duties.

Head v. Post Office, 152 F.3d 947 (4/10/98) Postal mechanic. (K) (Whistleblowing not described.)

German v. DOE, 152 F.3d 947 (4/7/98) Energy Department mechanical engineer. (PS) (improper procurement and use of certain machine shop equipment)

Holtgrewe v. FDIC, 152 F.3d 944 (3/18/98) FDIC assistant bank examiner. (N; disclosures several years before alleged retaliation are too remote.) (Whistleblowing not described.)

Tesanovich v. DOJ, 135 F.3d 778 (2/6/98) Assistant U.S. Attorney assigned to border corruption task force. (CCE)

King v. SSA, 135 F.3d 776 (1/15/98) Social Security hearing clerk. (CCE) (Whistleblowing not described.)

Harper v. DVA, 135 F.3d 776 (1/13/98) SES manager responsible for agency acquisitions. (PS) (criticism of agency connected with proposed legislation affecting procurement price for pharmaceuticals)

1997 (0-3)

Powell v. Air Force, 132 F.3d 54 (12/10/97) Air Force environmental protection specialist. (CCE) (embezzlement, backdating form, mismanagement)

Srinivasan v. MSPB, 129 F.3d 134 (10/10/97) IRS tax technician. (PS) (travel fraud)

Geyer v. DOJ, 116 F.3d 1497 (6/18/97) Immigration inspector. (CCE) (Scheduling precludes compliance with mandatory pace for immigration services.)

1996 (0-8)

Lessard v. Navy, 104 F.3d 375 (12/6/96) General foreman of navy boiler plant. (PS) (falsified pay records)

Dooley v. DVA, 101 F.3d 717 (11/21/96) DVA cemetery caretaker. (K) (Cemetery manager's handling of his duties and hiring practices.)

Kell v. DVA, 101 F.3d 716 (11/14/96) Veteran Services Officer. (PS) (covering up fraud in state vouchers for veteran education services.)

Lopez v. HUD, 98 F.3d 1358 (9/19/96) Temporary HUD equal opportunity specialist. (PS, because disclosures of negligence in monitoring state housing discrimination cases aren't protected as gross mismanagement.)

Serrao v. MSPB, 95 F.3d 1569 (9/17/96) Department of Commerce Office of Export Enforcement Special Agent. (PS, because whistleblowing disclosures within a grievance aren't protected.)

Meadows v. USDA, 92 F.3d 1207 (7/16/96) Farmers Home Administration employee. (Neither job, whistleblowing or reason for decision are discussed beyond generic references.)

Locus v. HHS, 91 F.3d 171 (6/19/96) National Institute of Environmental Health Sciences contracting specialist. (No further details are provided about the dispute, other than that whistleblowing was about treatment of employees.)

Marchese v. Navy, 91 F.3d 168 (5/30/96) Navy historian. (K) (Whistleblowing not described.)

1995 (0-4)

Aliota v. DVA, 73 F.3d 381 (12/31/95) VA Hospital pharmacy chief. (CCE) (Whistleblowing not described.)

Horton v. Navy, 66 F.3d 279 (9/12/95) Marine Corps librarian. (PS, because disclosures to co-workers, possible wrongdoers or supervisor don't count as whistleblowing) (sleeping on the job, falsified time cards, failure to process books)

Watson v. DOJ, 64 F.3d 1524 (8/29/95) Border Patrol agent. (PS and CCE; disclosure wasn't protected and he would have been fired anyway for waiting too long (12.5 hours, overnight) to report another agent's shooting and unmarked burial of an unarmed Mexican after an implied death threat by the shooter if silence were broken.)

Pyles v. Department of Defense, 61 F.3d 918 (7/5/95) Pentagon auditor. (CCE)
(Whistleblowing not described.)