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The Whistleblower Protection Act Burdens of Proof: Ground Rules for Credible Free Speech Rights

Thomas Devine *

1. Introduction

While linguistically a term of professional jargon, no concept is more significant than burdens of proof for whistleblowers to enforce their rights. As the rules of the game for how much evidence is necessary to win, or lose, they establish the boundary between victory and defeat. A law may have best practice rights for freedom of expression, due process and remedies to eliminate the effects of proven retaliation. But if burdens of proof require an unrealistically high evidence bar, they are a fatal Achilles heel for any given case, and for the law's legitimacy.

The United States experience with burdens of proof illustrates how high the stakes are for each side in whistleblower cases. Along with a hostile whistleblower protection agency, the U.S. Office of Special Counsel, frustrations with burdens of proof for the whistleblower protection provision of the Civil Service Reform Act ("CSRA") of 1978¹ led to the

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¹ Pub. L. No. 95 - 454, 5 U.S.C. § 1101 (1978), codified in scattered sections of U.S. Code. The amended text of the 1978 law, which was amended in 1994 to replace "mismanagement" with "gross mismanagement, is codified as follows:

"Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority - ... (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of - **A**) any disclosure of information by employee or applicant which the employee or applicant reasonably believes evidences - **(i)** any

passage of the Whistleblower Protection Act of 1989². Those two Achilles heels were blamed for the CSRA's counterproductive track record: only four whistleblowers had formally won their cases out of some 4,000 complaints³. If there were any doubt about the stakes, in November 1988, after Congress adjourned, President Reagan vetoed the Whistleblower Protection Act of 1988, temporarily frustrating a unanimous congressional mandate⁴. His primary reason, based on objections from Attorney General Richard Thornburgh, was that the burdens of proof were too favorable to employees to effectively maintain discipline in the workplace⁵. Congress reacted by unanimously re-enacting the burdens again by March 1989, and newly-elected President Bush signed the legislation into law⁶.

violation of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences – **(i)** any violation (other than a violation of this section) of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

5 U.S.C. § 2302(b)(8) (2000).

² Pub. L. No. 101 – 12, 103 Stat. 16 (1989), (codified at 5 U.S.C. §§120 – 122 (1994 and Supp. III 1997)).

³ R. Vaughn and T. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent*, 51 *Administrative Law Journal* 531, 534 n. 16 (Spring 1999).

⁴ Memorandum of Disapproval of S. 508, Pub. Papers 1391, 1392 (Oct. 26, 1988).

⁵ *Ibid.*

“Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority – ... (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of – **A)** any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences – **(i)** any violation of any law, rule, or regulation, or **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences – **(i)** any violation (other than a violation of this section) of

This article traces the evolution of U.S. burdens of proof for whistleblowers, and details their current boundaries. The WPA burdens of proof have been adopted in a majority of Intergovernmental Organizations, including the United Nations and the World Bank. Nearly all national laws, however, skip this cornerstone for legitimate protection. The U.S. experience is a valuable lesson learned about the importance of fair rules for the bottom line in whistleblower cases. If free speech rights are at the mercy of arbitrary or unfair standards for the quantum of evidence necessary to win, those rights easily can become false advertising.

2. Components of Whistleblower Protection Act burdens of proof

The three WPA tests for the burden of proof standard include – 1) a causal link that does not require animus to prove a violation of whistleblower rights. 2) the realistic “contributing factor” test for a whistleblower to meet the burden of establishing a *prima facie* case; and 3) a reversed burden of proof requiring “clear and convincing evidence” for an employer as an affirmative defence to prove it acted for independent, innocent reasons even if whistleblowing was a contributing factor. Each is considered below.

Eliminating the Motives Test

Under the Civil Service Reform Act an employer did not violate §2302(b)(8) unless the challenged personnel decision was “in reprisal for” whistleblowing. The WPA replaced that phrase with “because of” protected activity⁷. The same substitution also applies to protection for witnesses in OSC or Office of Inspector General (“OIG”) investigations, as well as for those who refuse an order to violate the law⁸.

The impact is that animus, the employer's punitive or vindictive intent, no longer is necessary. Decisions on personnel actions may not be based on

any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

⁵ U.S.C. § 2302(b)(8) (2000)

⁶ Pub. L. No. 101 – 12, 103 Stat. 16 (1989), (codified at 5 U.S.C. §§ 1201 – 1222 (1994 & Supp. III 1997)).

⁷ n. 3, *supra*.

⁸ 5 USC 2302(b)(9)(B) – (D) (1994& Supp. III 1997).

whistleblowing disclosures, regardless of the presence or absence of retaliation. This eliminates the common employer defence that there are “no hard feelings,” but it is no longer realistic to work with a dissenter after what was said. In the WPA legislative history Congress specifically overruled federal court precedent that required proof of an intent to punish as unduly restrictive⁹. In the aftermath, all that is necessary to prove a violation is a causal link¹⁰.

Easing the Employee’s Burden of Establishing a Prima Facie Case: the “Contributing Factor” Standard

A primary barrier for whistleblowers under the 1978 statute was their inability to meet the burden of proof for a *prima facie* case. If they fail to pass this preliminary test, the case is over. In the absence of statutory direction, the Board consistently adopted the test in *Mt. Healthy v. Doyle*¹¹ for First Amendment relief, which initially meant an employee must prove that protected speech played a “substantial” or “motivating” factor in the contested personnel decision, and gradually increased to requiring that retaliation was the “predominant” motivating factor.¹² This effectively meant that an employee’s preliminary burden was to prove the ultimate bottom line — retaliation was the dispositive factor when challenging termination or other actions.

New standards in the WPA¹³ replaced the former burdens with a more realistic test, both for a *prima facie* case and for the agency’s affirmative

⁹ See S. Rep. No. 100 – 413, at 15 – 16 (1988).

¹⁰ In 2012 as part of the Whistleblower Protection Enhancement Act (“WPEA”), Pub. L. 112 – 199, 126 Stat. 1465 – 76 (2012), Sec. 101(c), Congress restored the requirement for retaliation, for which animus or intent to punish is a prerequisite, in one circumstance – where an action is taken after an employee engages in otherwise protected speech as part of a job duty.

¹¹ 429 U.S. 274 (1977).

¹² *Id.*, at 287; see also *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986); H.R. Rep. No. 100 – 274, at 27 (1987); S. Rep. No. 100 – 413, at 13 – 14 (1988); 135 Cong. Rec. 4509 (1989) (statement of Sen. Levin); 135 Cong. Rec. 5035 (1989) (Joint Explanatory Statement, item 7) In the joint House and Senate Explanatory Statement on the legislation, Congress emphasized unequivocally that it “specifically intended to overrule existing case law, which requires a whistleblower to prove his protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” 135 Cong. Rec. 5033 (1989).

¹³ 5 U.S.C. §§ 1214(b)(4)(B)(i) (OSC litigation) and 1221(e)(1) (Individual Right of Action).

defence. Now the Board must conclude a *prima facie* case has been established when an appellant “has demonstrated that a disclosure described under § 2302(b)(8) was a contributing factor” in the challenged personnel action which was taken or is to be taken against the employee, former employee, or applicant. Although there is no specific statutory definition of “contributing factor,” Congress left no ambiguity about its intent. During floor speeches and consensus legislative histories, the primary sponsors repeatedly defined the burden as follows—“any factor, which alone or in connection with other factors, tends to affect in any way the outcome”¹⁴ In effect, the change lowered the bar for a *prima facie* case from proving that whistleblowing was the decisive factor, or essentially winning the whole case in order to proceed, to merely proving that whistleblowing was relevant for a personnel action.

¹⁴ 135 *Cong. Rec.* 4509 (1989) See *id.* at 4518 (statement of Sen. Grassley); *id.* at 4522 (statement of Sen. Pryor); *id.* at 5033 (explanatory statement of Senate Bill 20); *id.* at 4522 (statement of Rep. Schroeder). This is the verbatim identical definition Senator Levin gave for a “material factor” in the original version of Senate Bill 508. 134 *Cong. Rec.* 19,981 (1988) A concurring letter from Attorney General Thornburgh did not challenge that interpretation: “A ‘contributing factor’ need not be ‘substantial.’ The individual’s burden is to prove that the whistleblowing contributed in some way to the agency’s decision to take the personnel action.” 135 *Cong. Rec.* 5033 (1989).

This resolution affirming the 1988 level of proof reflected the strength of congressional support for whistleblowers, because it was a principal reason for President Reagan’s veto of the bill. The only difference between the 1988 and 1989 version of the WPA on this issue was to insert the word “contributing” in front of “factor,” which in 1988 had been unqualified initially in §§ 1214(b)(4)(B)(1) and 1221(e)(1).

Although the change satisfied the concerns of Attorney General Thornburgh about possible abuses, all parties agreed that it merely was a more precise synonym for what Congress had intended all along. “Contributing” refers to the relevance of evidence, not its significance. As amplified in the Explanatory Statement, “This is not meant to change or heighten, in any way, the standard in S. 20, which is that the disclosure must be ‘a factor’ in the action. The word ‘contributing’ is only intended to clarify that the factor must contribute in some way to the action against the whistleblower.” 135 *Cong. Rec.* 5033 (1989) When defining “contributing factor” Congress specified that the definition literally applied to the term “factor as well.” *Id.* See also the explanation of Senator Levin, the primary congressional negotiator with the White House for the 1989 consensus: “I believe this was clear in the original statutory language. To me, there was no doubt that a factor in an action is something that contributes to that action. Indeed, my dictionary defines a ‘factor’ as ‘one of the elements contributing to a particular result or situation.’” 135 *Cong. Rec.* 4509 (1989).

Raising the Employer's Reverse Burden of Proof for an Affirmative Defence: Clear and Convincing Evidence

The final step in the *Mt. Healthy* standard is an affirmative defence for the employer. The burden of proof shifts, and the employer must demonstrate by a preponderance of the evidence that the personnel action would have occurred anyway in the absence of protected speech¹⁵. While adopting this standard¹⁶, the Merit Systems Protection Board (“MSPB”), which is responsible for due process administrative hearings to enforce whistleblower rights, made it even more difficult for whistleblowers in two significant respects. First, after an employee established a *prima facie* case the Board only shifted the burden of production for evidence to the employer. The burden of proof always remained with the employee¹⁷. Second, in a 1987 decision, *Berube v. General Services Administration*¹⁸, the Board reversed eight years of administrative precedents and all constitutional law, effectively replacing “would have” with “could have” acted for innocent reasons¹⁹. By allowing after – the – fact justifications, the Board invited new investigations to rationalize prior reprisals, and made it nearly impossible for whistleblowers to prevail. There is a skeleton in nearly everyone’s closet if the government looks hard enough. Congress’s final amendment to the legal standards cancelled *Berube* and completed codification of a modified *Mt. Healthy* standard more sympathetic to employees by raising the preponderance of evidence burden to a significantly tougher hurdle. Under 5 U.S.C. §§ 1214(b)(4)(B)(ii) and 1221(e)(2)²⁰, the Board may not order corrective action if the agency demonstrates through “clear and convincing evidence” that it “would have taken the same personnel action in the absence of such disclosure”. By imposing this test Congress also conveyed an unequivocal message about its intention to reverse prior case law trends. Through the upgrade from a “preponderance of the evidence” standard to “clear and convincing evidence,” Congress intended to place

¹⁵ See *Mt. Healthy*, 429 U.S. at 287.

¹⁶ See *Gerlach v. Federal Trade Commission*, 8 M.S.P.B. 599 (1981).

¹⁷ See *In the Matter of Frazier*, 1 M.S.P.B. 159 (1979), *aff'd*, *Frazier v. MSPB*, 672 F.2d 150 (D.C. Cir. 1982).

¹⁸ 30 M.S.P.R. 581 (1986), *remanded* 820 F.2d 396 (Fed. Cir. 1987), 37 M.S.P.R. 448 (1988).

¹⁹ See *Berube*, 820 F.2d 396, 400 – 01 (Fed. Cir. 1987).

²⁰ These provisions refer to OSC litigation and Individual Right of Action cases, respectively.

whistleblowing on a legal pedestal²¹.

At least on paper, it succeeded. Under longstanding legal norms, the substitution significantly increases the government's burden. "Preponderance of the evidence" means "more likely than not," or more than 50%²². By contrast, "clear and convincing evidence" means the matter to be proven is "highly probable or reasonably certain"²³. Indeed, since 1899 the standard as articulated by the California Supreme Court is evidence "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind"²⁴. For civil service law, the Federal Circuit adopted a definition that the test requires "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable'"²⁵. A survey of judges revealed that in practice the standard requires a 70 – 80% quantum of evidence²⁶.

²¹ Congress left no doubt that it intended a significant break from prior law. After summarizing the changes in the prima facie test and Mt. Healthy affirmative defense, Senator Cohen emphasized, "Those are important changes. They mark significant changes in existing law." 135 Cong. Rec. 4517 (1989). The Explanatory Statement on Senate Bill 20 again put the intent in perspective.

By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action. 135 Cong. Rec. 5033 (1989) (emphasis added).

At the same time, Congress also made clear that it did not intend to provide self – described whistleblowers with employment immunity. "[T]his new test will not shield employees who engage in wrongful conduct merely because they have at some point 'blown the whistle' on some kind of purported misconduct." *Id.* Senator Cohen again put the changes in perspective. "We do not want to see a situation where individuals who are either mischievous, maladjusted, or have personal agendas try to hide behind this legislation. That is why I think this represents an appropriate balance [...]" 135 Cong. Rec. 4517 (1989)(remarks of Senator Cohen).

²² *Brown v. Bowen*, 847 F.2d 342, 345 – 46 (7th Cir. 1988).

²³ *Ragbir v. Holder*, 389 Fed. Appx. 80, 2010 U.S. App. LEXIS 16860, quoting *Black's Law Dictionary* 636 (9th Ed. 2009).

²⁴ *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58, 543 (1899).

²⁵ *Price v. Symsek*, 988 F.2d 1187, 1191 Fed. Cir. 1993), quoting *Buildex, Inc. v. Kason Indus., Inc.*, 861 F.2d 1461, 1463 (Fed. Cir. 1988).

²⁶ McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 *Van L Rev.* 1293, 1328 – 29 (1982) (presenting survey of 170 federal judges in which 112 assessed CCE as requiring a 70 – 80% quantum of proof, 26 requiring more and 31 requiring less); *United States v. Fatco*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff'd*, 603

There were two primary reasons why Congress attempted to create far more difficult evidentiary standard for acceptance of what could be pretextual excuses to harass. First, as a matter of accountability, there should be heightened scrutiny for an action already established as taken for partially illegal reasons. Second, a government agency has a large advantage in access to evidence and records to create the appearance of a decision on grounds independent of whistleblowing²⁷.

A third reason is equally compelling – the “presumption of government regularity.” This doctrine gives the government such a powerful handicap that it could meet the preponderance simple majority standard with a minority of evidence for a pretext. As stated by the Federal Circuit Court of Appeals in *Lachance v. White*²⁸, any analysis of whistleblower claims must start from the “presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations [...] And this presumption stands unless there is ‘irrefragable proof to the contrary.’” (citations omitted)²⁹.

F.2d 1053, (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 62 L. Ed. 2d 755, 100 S. Ct. 1018 (1980).

²⁷ As Senator Levin explained, “Clear and convincing evidence” is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was “tainted.” Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency’s decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions. 135 *Cong. Rec.* S2780 (Mar. 16, 1989). *See also* 135 *Cong. Rec.* H747 – 48 (daily ed., March 21, 1989)(explanatory statement on Senate Amendment to S. 20); *Gergick v. General Services Administration*, 43 M.S.P.R 651, 663 n.14 (1990).

²⁸ 174 F.3d 1378 1381, *Rebearing en banc Denied*, 1999 U.S. App LEXIS 18378 (Fed. Cir. 1999), *cert. denied* 528 U.S. 1153 (2000).

²⁹ “Irrefragable” means “incontrovertible, undeniable, incontestable, or incapable of being refuted or overthrown”. *The New Webster’s Comprehensive Dictionary of the English Language*, American International Press, New York (1985 Deluxe Edition), at 510. In 2012 again as part of the Whistleblower Protection Enhancement Act, Congress reduced the burden to overcome any government presumptions from “irrefragable proof” to “substantial evidence.” WPEA, *supra* note 11, Section 103. This largely neutralized the presumption’s still – existing handicap.

Evolution of the Burdens of Proof in Practice

While the mandate to even the odds appeared clear, the implementation has been far more murky. As a result, both burdens of proof have required subsequent congressional modification since 1989. With respect to the contributing factor test, the Federal Circuit Court of Appeals quickly created an imposing roadblock. In *Clark v. Department of Army*³⁰, it threatened to functionally cancel the WPA by holding that an employee fails the contributing factor test if an agency demonstrates it “could have” taken the action for legitimate reasons. Besides scrambling the employee and agency burdens of proof, the precedent restored the *Berube* doctrine permitting after – the – fact justifications for reprisal.

In the 1994 amendments to the WPA, Congress erased the threat from *Clark*. The Act was revised to provide that employees can successfully prove the connection between whistleblowing and prohibited personnel practice through a time lag after knowledge of protected activity, when “the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action”³¹. As a matter of law, the employee establishes a *prima facie* case by passing this knowledge – timing test³². The legislative history reaffirms that this standard has been met when an action is taken after protected speech but before a new performance appraisal³³. In theory, a knowledge/time gap pegged to performance appraisals would have a year’s ceiling between protected activity and alleged retaliation. Recent Merit Board decisions, however, have expanded the period to prevail as a matter of law from 15 months³⁴ up to two years³⁵.

Congress also restored the proper context for attacks on the employee – the agency’s affirmative defence. In its detailed rejection of the *Clark* approach, the Senate Report also restored the proper context for employee and agency arguments. “[The Committee] reaffirms that Congress intends for a[n] agency’s evidence of reasons why it may have

³⁰ 997 F.2d 1466 (Fed. Cir. 1993).

³¹ 5 U.S.C. § 1221(e)(1)(B) (1994).

³² *Mason v. Department of Homeland Security*, 116 M.S.P.R 135, 146 (2011); *Gonzalez v. Dept. of Transp.*, 109 M.S.P.R 250, 259 – 60 (2009); *Carey v. Veterans Administration*, 93 M.S.P.R 767, 681 – 82 (2003).

³³ *S. Rep. No. 103 – 358*, at 7 – 8. See also 145 *Cong. Rec.* 29,353 (1994) (statement of Rep. McCloskey).

³⁴ *Inman v. Veterans Administration*, 112 M.S.P.R 280, 283 – 84 (2009).

³⁵ *Schnell v. Department of Army*, 114 M.S.P.R 83, 93 (2010).

acted (other than retaliation) to be presented as part of the affirmative defence and subject to the higher [clear and convincing] burden of proof.” The “clear and convincing evidence” standard took on a new life, however. Instead of a composite “highly probable or reasonably certain” standard, the Federal Circuit Court of Appeals and the Merit Systems Protection Board created a formula unique to whistleblower law. They interpreted the general standard to reflect consideration of three factors: “(1) the strength of the evidence in support of the personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any other evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated”³⁶.

Unfortunately, this creative formula in practice tended to excuse, rather than enforce, a high standard and led to the acceptance of possible agency pretexts. To illustrate, there has not been a quantum of “clear and convincing evidence” required for each factor³⁷. As the Federal Circuit reaffirmed in 2012 in *Whitmore v. Department of Labor*³⁸ “Carr does not impose an affirmative burden on the agency to produce evidence with respect to each and every one of the three Carr factors to weigh them each individually in the agency’s favor”. As a result, the evidentiary standard itself has been ignored routinely, except as a springboard for discussion of one or more factors – not all of which must be considered³⁹. Indeed, with respect to the strength of evidence against a whistleblower, that factor has been assessed under the modest preponderance of the evidence standard instead of the WPA clear and convincing test⁴⁰.

Hostile judicial activism also transformed the other two factors into barriers for protection instead of objective criteria. For example, early precedents deemed irrelevant an institutional motive to retaliate. The conflict had to be personal. That meant the whistleblower would lose under this criterion unless the same official accused of misconduct

³⁶ *Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 115 (1998); see also *Rutberg v. Occupational Safety and Health Review Comm’n*, 78 M.S.P.R. 130, 141 (1998).

³⁷ *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, 77 (2010).

³⁸ 680 F.3d 1353, 1374 (Fed. Cir. 2012).

³⁹ *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 – 52(1995), *aff’d*, 96 F.3d 1367 (Fed. Cir. 1996); *Brewer v. Department of the Interior*, 76 M.S.P.R. 363, 370 – 71 (1997); *DeGraaf v. Department of Veterans Affairs*, 73 M.S.P.R. 224 (1997); *Charest v. Federal Emergency Management Administration*, 54 M.S.P.R. 436, 437 – 43 (1992).

⁴⁰ *Scott v. Department of Justice*, 69 M.S.P.R. 211, 221 – 22 (1995); *Braga v. Department of the Army*, 54 M.S.P.R. 392, 399n.6 (1992), *aff’d* 6 F.3d 787 (Fed. Cir. 1993)(Table).

participated in the retaliation. Institutional motive was not on the table, and attacking high level agency officials would not suffice⁴¹. As the MSPB analyzed in *Fisher v. Environmental Protection Agency*⁴²,

There also is no indication that any official that may have been involved in the decision to suspend the appellant had any motive to retaliate against him because of his disclosures... [W]e note that the disclosures address the actions of agency heads and other top – level agency managers, both within and outside the appellant’s agency, and only tangentially address the actions of the officials that were involved in the appellant’s disciplinary action. We discern no indication from the record, apart from appellant’s speculation, of the existence of any motive to retaliate against the appellant on the part of the agency officials who were involved in his suspension.

The third factor was similarly limited. Adopting restrictive doctrines from related precedents on discriminatory penalties, the Federal Circuit and MSPB rejected disparate treatment claims unless the comparator employee was in an identical or nearly identical job and was charged with “substantially similar” violations⁴³. The Board held that “[f]or other employees to be similarly situated [...] all relevant aspects of the appellant’s employment situation must be ‘nearly identical’ to those of comparative employees”⁴⁴. To indicate the scope of the limitation, that factor has been interpreted to require that the comparator “was alleged to have engaged in all of the misconduct the respondent was charged with”⁴⁵. Further, the comparator had to have a nearly identical position, or even be in the same work unit⁴⁶.

In short, through restructuring a longstanding legal doctrine the Federal Circuit and MSPB transformed the WPA provision designed to heighten the agency’s burden for independent justification into a vehicle to enable pretexts. Frustrated with this defiance of intent, the U.S. House of Representatives passed the Whistleblower Protection Enhancement Act of 2007⁴⁷ that codified the traditional definition to replace the factors:

⁴¹ *Carr*, 185 F.3d at 1323; *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R 615 (2009).

⁴² 108 M.S.P.R 296, 306 – 07 (2008).

⁴³ *Casias v. Department of the Army*, 62 M.S.P.R 130, 131 – 32.

⁴⁴ *Span v. Department of Justice*, 93 M.S.P.R 195, 202 (2003).

⁴⁵ *Carr*, *supra*, 185 F.3d at 1323.

⁴⁶ *Brown v. Department of Treasury*, 61 M.S.P.R 484, 490 – 93 (1994); *Catau v. Department of Health and Human Services*, 13 M.S.P.R 230, 232 (1982).

⁴⁷ <http://www.opencongress.org/bill/110 - h985/show>; H.R. 985, Whistleblower Protection Enhancement Act (110th Cong., 1st Sess.).

“ ‘[C]lear and convincing evidence’ means evidence indicating that the matter to be proved is highly probable or reasonably certain”⁴⁸.

While the final version of the WPEA passed five years later did not contain a definition, the Federal Circuit and the Board may have been paying attention. Recent case law, while not rejecting the *Carr* factors, largely has restored Congressional intent by rolling back earlier decisions that had severely diluted agency burdens. In a May 2012 decision, *Whitmore v. Department of Labor*⁴⁹, the Federal Circuit consolidated and expanded agency burdens within the *Carr* framework. In overview, the court recognized that the “clear and convincing” standard is “reserved to protect particularly important interests in a limited number of civil cases” and cited the WPA legislative history that Congress intended this principle to govern the Whistleblower Protection Act⁵⁰.

Whitmore applied this premise to the government’s burden on the weight of evidence factor, requiring that whistleblowers be allowed to present all material witnesses and evidence to rebut the conclusion – independent of the agency’s initial preponderance of the evidence burden to uphold actions in the absence of a retaliation defence.

If considerable countervailing evidence is manifestly ignored or disregarded in finding a matter clearly and convincingly proven, the decision must be vacated and remanded for further consideration where all the pertinent evidence is weighed...[Excluding material witnesses from the retaliation claim] prevents whistleblowers from effectively presenting their defences, and leaves only the agency’s side of the case in play. This can have a substantial effect on the outcome of the case⁵¹.

The Federal Circuit also restored a more realistic framework to evaluate retaliatory motive, recognizing the relevance of an institutional animus. In *Whitmore* it favorably cited earlier MSPB precedents holding that general attacks on agency leadership “would reflect poorly” on field staff; and those high-level officials who propose or decide actions against whistleblowers are threatened by disclosures of misconduct in lower ranks⁵². *Whitmore* solidified those gains and expanded the scope of motive to all those affected directly or indirectly by the consequences of a

⁴⁸ *Id.*, Sec. 3(b).

⁴⁹ 630 F.3d 1353 (Fed. Cir. 2012).

⁵⁰ *Id.*, at 1367 – 68.

⁵¹ *Id.*, at 1368, 1371.

⁵² *Id.*, at 1371, citing *Phillips v. Dep’t of Transp.*, 113 M.S.P.R. 73, 83 (2010); and *Chambers v. Dep’t of the Interior*, 116 M.S.P.R. 17, 55 (2011), respectively.

whistleblower's disclosure⁵³. The court further explained that the high agency burden is necessary due to its inherent advantage in defending innocent intentions.

When a whistleblower makes such highly critical accusations of an agency's conduct, an agency official's merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment. Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate⁵⁴.

Finally, in *Whitmore* the court explicitly rejected earlier narrow holdings on discriminatory treatment compared to similarly situated employees who had not blown the whistle.

We cannot endorse the highly restrictive view of *Carr* factor three adopted by the AJ in this case. One can always identify characteristics that differ between two persons to show that their positions are not "nearly identical", or to distinguish their conduct in some fashion. *Carr*, however, requires the comparison employees to be "similarly situated" – not identically situated – to the whistleblower. To read *Carr* factor three so narrowly as to require virtual identity before the issue of similarly situated non – whistleblowers is ever implicated effectively reads this factor out of our precedent...⁵⁵.

The court's overarching principle to restore proper boundaries for this factor was accepting and emphasizing a broad handicap for whistleblowers in applying the clear and convincing standard. It emphasized that "even where the charges have been sustained and the agency's chosen penalty is deemed reasonable, the agency must still prove by clear and convincing evidence that it would have imposed the *exact same penalty* in the absence of the protected disclosures...Perhaps the most helpful inquiry in making this determination is *Carr* factor three, and its importance and utility should not be marginalized by reading it so narrowly..."⁵⁶. It applied that principle to hold that those with equivalent responsibilities who engage in the same type of misconduct (uncivil

⁵³ *Id.*, at 1371.

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.*, at 1367.

⁵⁶ *Id.*, at 1374 (emphasis in original).

behavior and workplace violence) are similarly situated⁵⁷. On balance, *Whitmore* did not erase the balancing test for the clear and convincing evidence standard. Indeed, it reaffirmed that the defendant agency does not need to produce evidence for each factor⁵⁸. If the decision's principles are enforced consistently at the administrative level, however, whistleblowers will have the fair fight Congress intended when defending themselves against agency pretexts.

Restoring the Right to a Full Hearing

An unintended side effect of the agency's reverse burden of proof actually made it an obstacle to the employee's due process rights for an administrative day in court. The Board, with Federal Circuit approval, began a practice of presuming that the whistleblower passed the contributing factor test and established a *prima facie* case of retaliation. It then would start the hearing with the agency's affirmative defence that it would have acted anyway in the absence of protected activity. When agencies prevailed in that defence, employees would lose without ever getting a chance to put on their own cases proving retaliation⁵⁹.

This created several unacceptable side effects. First, it meant whistleblower cases would be completed without a ruling whether the employee disclosed evidence of government illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. This prevented a public record of alleged government misconduct, the whole purpose for whistleblowing. Second, it meant that the whistleblowers were thoroughly and often viciously attacked when they asserted their rights, without any chance to present evidence that their rights had been violated. Acting on their rights was prolonging expensive conflict for years, for a hearing where they would be attacked with a likelihood they could not fight back.

Congress rejected this "disturbing trend of denying employees' right to a due process hearing and a public record to resolve their WPA claims"⁶⁰. In the WPEA it neatly solved the problem. An agency may not present its

⁵⁷ *Id.*, at 1373.

⁵⁸ *Supra* note 38.

⁵⁹ *Fellboetler v. Department of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009); *McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R 594, 612 (2011).

⁶⁰ *S. Rep. No. 112 – 155 to Accompany S. 743*, 112th Cong., 2nd Sess. (2012), at 23; *see also H. Rep. 112 – 508, Part 1*, 112th Cong., 2d. Sess. 5 (2012).

affirmative defence unless the employee first has established a *prima facie* case⁶¹. While the problem has been solved, it is a significant lesson learned for all whistleblower laws that include a reverse burden of proof.

Expansion of the Doctrine

Since 1989, the Whistleblower Protection Act burdens of proof have become the precedent followed generally by Congress in other contexts. The standards have been implemented in 13 corporate whistleblower statutes that cover nearly the entire private sector⁶². In October 2012 President Obama even included them as the standard to adjudicate rights under Presidential Policy Directive 19, executive action that created whistleblower protection for employees in the intelligence community or others alleging retaliatory security clearance actions that denied them access to classified information necessary to do their jobs⁶³. Internationally, the WPA burdens of proof have become the norm for whistleblower policies at Intergovernmental Organizations. (“IGO”) In 2005 the United Nations began a pattern of adopting modern whistleblower policies with the burdens of proof as a cornerstone. Encouraged by a U.S. appropriations prerequisite for funding IGO’s, the trend since has spread to the World Bank and African Development Bank⁶⁴.

The WPA test has not been included in any national whistleblower laws outside the United States. Indeed, few national whistleblower laws have

⁶¹ WPEA, *supra* note 11, sec. 114, *Scope of Due Process*.

⁶² Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(3); Federal Rail Safety Act (U.S. rail workers) 49 USC 20109(c)(2)(A)(i); National Transportation Safety and Security Act (U.S. public transportation) 6 USC 1142(c)(2)(B); Consumer Product Safety Improvement Act (U.S. corporate retail products) 15 USC 2087 (b)(2)(B), (b)(4); Sarbanes Oxley Act (U.S. publicly – traded corporations), 18 USC 1514(b)(2)(c); Surface Transportation and Assistance Act (U.S. corporate trucking industry) 49 USC 31105(b)(1); American Recovery and Reinvestment Act of 2009 (U.S. Stimulus Law) P.L. 111 – 5, Section 1553(c)(1); Affordable Care Act, sec. 1558(b)(2); Food Safety Modernization Act (U.S. food industry) 21 USC 1012(b)(2)(C) and (b)(4)(A); Dodd Frank Act (U.S. financial services industry) sec. 1057(b)(3); National Defense Authorization Act of 2013, P.L. 112 – 139, sections 827 – 28, (112th Cong., 2d Sess.).

⁶³ U.S. White House, Presidential Policy Directive 19 (October 10, 2012), <https://www.fas.org/irp/offdocs/ppd/ppd-19.pdf> (accessed August 11, 2013).

⁶⁴ UN ST/SGB/2005/21, sections 5.2 & 2.2; WFP ED 2008/003, sections 6 and 13; World Bank Staff Rule 8.02, sec. 3.01; AfDB Whistleblowing and Complaints Handling Policy, section 6.6.7; Foreign Operations Act, Section 1505(11).

any burdens of proof. The concept is beginning to take root, however. There is some form of reverse burden of proof in Croatia, Luxemburg, Norway, Slovenia and the United Kingdom. The G20 and Parliamentary Assembly of the Council of Europe also have recommended the reverse burden⁶⁵.

3. Conclusion

Over the last 25 years, codifying modern burdens of proof has become the most significant cornerstone, and sometimes controversial issue when enacting U.S. whistleblower laws. When Congress considered diluting the WPA reverse burden to “preponderance of evidence” from “clear and convincing evidence” in a political compromise for access to WPEA jury trials, thirty three law professors protested⁶⁶. In the end, whistleblower rights advocates ended up rejecting court access because the price of partially restoring antiquated legal burdens of proof was too high.

As new whistleblower laws are adopted at an accelerating pace, fair burdens of proof are a cornerstone that should be built into the any credible law’s structure. Fair rules of the game are a necessity for rights to be free speech breakthroughs, rather than traps that end up rubber stamping retaliation. The public policy and personal stakes for whistleblowers are too significant for arbitrary judgments of how high an evidence bar employees must overcome to defend themselves successfully. Even with unbiased tribunals, it is unrealistic for whistleblowers effectively to defend their rights if they do not know how much and what type of evidence is necessary to win.

⁶⁵ P. Stephenson, M. Levi, *The Protection Whistleblowers: A Study on the Feasibility of a Legal Instrument on the Protection of Employees who Make Disclosures in the Public Interest*, Council of Europe, Strasburg, 2012.

⁶⁶ Letter from Robert Vaughn, *et. al.* to Representative Edolphus Towns *et. al.* (September 7, 2010) (available at www.whistleblower.org).

Adapt International Network



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