

Navigating Whistleblower Complaints: Effective Response Strategies

*Annual Training for
Supervisors*



GOALS

Review the Legal Framework for Analyzing Whistleblower Retaliation Claims

Review Strategies for Responding Constructively to Disclosures of Wrongdoing and Allegations of Retaliation

Identify Methods for Fostering an Environment Where Employees are Comfortable and Safe Reporting Concerns

Office of Special Counsel (OSC)

5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800



Authorized to:

- Investigate prohibited personnel practices** and other activities prohibited by civil service law, rule, or regulation
 - Seek corrective action for employees
 - Seek disciplinary action against officials
- Provide safe channel** for whistleblower disclosures
- Advise and enforce** the Hatch Act provisions on political activity by federal, state, and local government employees
- Protect reemployment rights** of military veterans and reservists under **USERRA**

Whistleblower Channel – 5 U.S.C § 1213



Federal employees (whistleblowers) may disclose government wrongdoing (violation of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, a substantial and specific danger to public health or safety, and scientific censorship) to OSC.

Federal law establishes a unique process for disclosures made to OSC. This process is intended to protect the confidentiality of the whistleblower and ensure that the alleged wrongdoing is investigated and, where necessary, corrected. In brief, when a whistleblower disclosure is filed with OSC:

1. You are interviewed by OSC staff to determine whether there is a “substantial likelihood” that the allegation occurred. *The statute requires that the substantial likelihood determination be made in 45 days;*
2. The Special Counsel then may require an agency head to investigate and report on the disclosure. You, the whistleblower, have a statutory right to review and comment on the agency report of investigation;
3. After the investigation, the Special Counsel sends the agency’s report, the whistleblower’s comments, and the Special Counsel’s determination as to the completeness and apparent reasonableness of the agency report and any corrective action, to the President and congressional oversight committees; and
4. The information transmitted to the President is made public on OSC’s website.

OSC does not have independent investigative authority in these cases. However, Congress has given OSC an important oversight role in reviewing government investigations of potential wrongdoing.

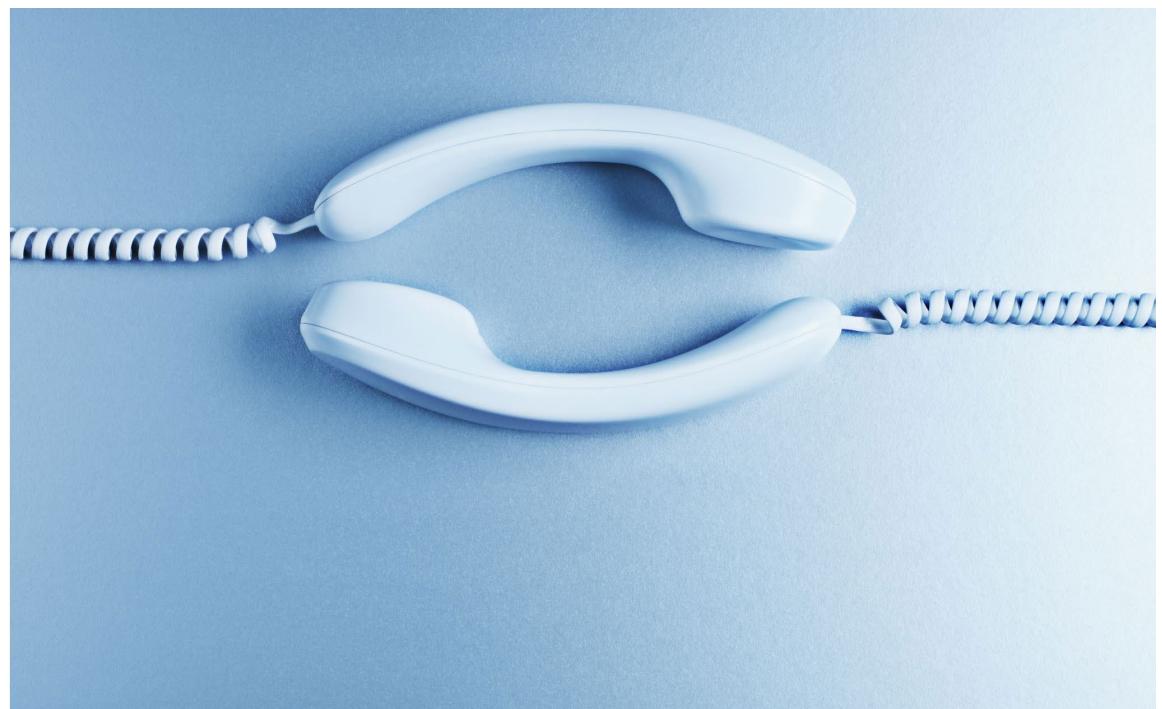


Retaliation Refresher

Alleging Retaliation

Supervisors may not take, fail to take, or threaten to take or withhold a personnel action for:

- Protected disclosures (i.e., disclosing wrongdoing) – statutory categories listed on slide 9
- Protected activity – statutory activities listed on slide 12





Preponderance of the Evidence

Elements of Proof: Retaliation

1. **Protected disclosure** of information under 5 U.S.C § 2302(b)(8) or employee engaged in **protected activity** under 5 U.S.C § 2302(b)(9)
2. **Personnel action** taken, not taken, or threatened
3. **Actual or constructive knowledge** of protected disclosure or activity; and
4. **Contributing factor** (disclosure or activity was a contributing factor in the personnel action)
 1. Sufficient **timing** between the disclosure or activity and the personnel action at issue; OR
 2. Circumstantial evidence



Protected Disclosures Defined

5 U.S.C. § 2302(a)(2)(D)

“formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure 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.



Protected Disclosures Defined

5 U.S.C. § 2302(a)(2)(D)

- Violation of any law, rule, or regulation: ***no de minimis exception***
- Gross mismanagement: ***substantial risk of significant impact on mission***
- Gross waste of funds: ***more than debatable expenditure***
- ***Abuse of authority***: arbitrary and capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *D'Elia v. Dep't of the Treas.*, 60 M.S.P.R. 226(1994)
- Substantial and specific danger to public health or safety: ***imminent and reasonably foreseeable harm, not speculative***

Note to 2302: Censorship related to scientific research or analysis that causes the above



Disclosure Exception

Otherwise valid disclosure NOT protected when

- Prohibited by **law**, or
- Required by Executive Order to be kept secret for national security or foreign affairs

Unless made to

- OSC/IG or authorized agency unit
- Congress (unless from Intelligence Agency, or reveals intelligence sources and methods)



2302 (f) Disclosures not excluded

- Generally protected when made to **any person**, even wrongdoer. No Chain of Command requirement
- Disclosure had been **previously disclosed**
- Whistleblower's **personal motivation does not negate** reasonable belief
- Disclosure made when **off duty**, or before **appointment**
- Still **protected if employer mistakenly believes** employee is a whistleblower, e.g., "perceived whistleblower"

2302(f)(2): Disclosure made in normal course of duties for employee the principal job function of whom is to regularly investigate and disclose wrongdoing requires extra showing of reprisal.



Protected Activities Defined

5 U.S.C. § 2302(a)(2)(D)

Includes:

- Exercise of appeal, complaint, or grievance rights
 - IRA appeal for grievance “with regard to whistleblowing”
- Testimony or other assistance to person exercising such rights
- Cooperation with or disclosures to OSC, OIG, or any component responsible for internal investigation or review
- Refusal to obey an order that would require violation of law, rule, or regulation



Personnel Action

5 U.S.C. § 2302(b)(8) & (b)(9)(A)(i), (B), (C), and (D)

➤ Official Definition – 5 U.S.C. § 2302(a)(2)(A)

- Unofficial definition: anything that would require an SF-52; significant change in duties; decision concerning pay, awards, or benefits; non-disclosure order

➤ Personnel Action Must be Taken, Not Taken, or Threatened

- **Failure:** non-performance of something that is due, required, or expected.
- **Threatened:** objective, concrete indication that an action is impending (Performance Improvement Plan/Demonstration Period)

➤ Hostile Work Environment

- Individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, ... and are likely to have a chilling effect on whistleblowing. *Skarada v VA*, 2022 M.S.P.B. 17 (2022)

➤ Investigation

- **Not covered**, but WB can recover costs if retaliatory. 5 U.S.C. § 1214(i).
- If reprisal, invalidates resulting personnel action. *Russell v. DOJ*, 76 M.S.P.R. 317 (1997)
- Covered if significant change in work conditions. *Sistek v VA*, 955 F.3d 948 (Fed. Cir. 2020)

➤ Was the Action Voluntary?

- E.g., resignation or retirement





Burden Shifting

5 U.S.C. § 1221(e)(1)

Prima Facie case = Official knew of disclosure and took personnel action within 1 to 2 years. *Agoranos v. DOJ, 119 M.S.P.R. 498 (2013)*

Burden shifts to agency to prove by Clear and Convincing Evidence

- If longer time, by circumstantial evidence

Factors: *Carr v. SSA, 185 F.3d 1318 (Fed. Cir. 1999)*

- *Strength of the evidence* in support of the personnel action
- Existence and strength of *motive to retaliate*
- Treatment of *similar employees*



What Do You Think?

Mallory asks for a meeting with her boss, Katrina, to discuss their organization's safety regulations that often go ignored. They discuss the problem, but Mallory never submits a written complaint.

Is this a protected disclosure?

1. Yes.
2. No.

Answer

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Yes. Mallory's disclosure is protected. She is alleging a violation of agency regulations. There is no requirement for her to document her concern in writing.

However, please note that a manager or supervisor ***is generally not required*** to determine if the employee's disclosure of information meets the legal definition of a protected disclosure.



Respond Constructively

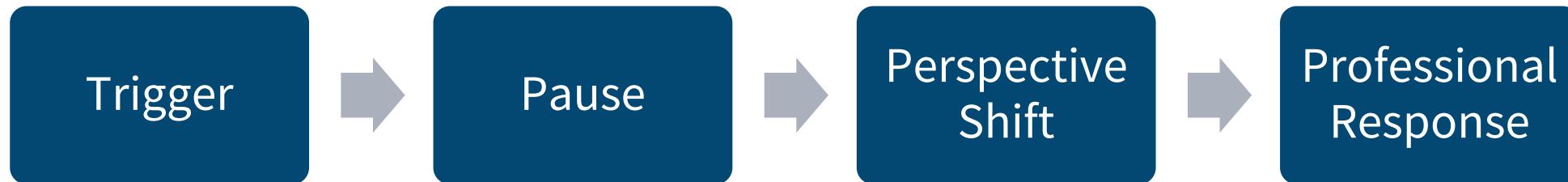


Engaging in Constructive Conversations:

Steps You Can Take to Engage Effectively



Change Your Emotions



- Recognize Emotional Triggers:** Whistleblowing can evoke surprise or defensiveness – acknowledge without reaction.
- Pause Before Reacting:** Avoid immediate judgment.
- Shift Perspective:** See disclosure as an opportunity for integrity and ensuring accountability, not as a personal attack.
- Respond with Neutrality and Respect:** Thank the employee, use calm and professional language.
- Focus on Facts, Not Feelings:** Separate emotions and commit to fairness.

Your role: Stay objective, protect rights, and build trust.

Engage in Active Listening

Neutral

- Encourage employee to continue
- Demonstrate interest in what the employee is saying

Reflective

- Display empathy
- Help employee recognize and evaluate feelings

Clarifying

- Gather additional information

Summarizing

- Bring discussion into focus
- Repeat back main points

Barriers to Active Listening



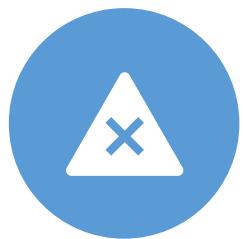
AVOID ARGUING, BEING DEFENSIVE OR TRYING TO JUSTIFY A POSITION



AVOID ANALYZING EMPLOYEE OR THEIR MOTIVATION



AVOID MINIMIZING THE EMPLOYEE'S MESSAGE OR FEELINGS



AVOID INTERRUPTING OR REDIRECTING THE CONVERSATION



BE AWARE OF NEGATIVE BODY LANGUAGE – RAISED EYEBROW, ROLLING EYES, TURNING AWAY FROM EMPLOYEE

Identify the Goals of the Conversation

The following points will assist managers and supervisors with responding to disclosures and allegations of retaliation:

Assess	Are they sharing information for supervisory awareness, requesting an investigation, or seeking guidance on how to file a complaint?
Inform	Inform the employee of their right to disclose government wrongdoing or allege retaliation to anyone (unless barred from release by statute), including but not limited to, OSC and/or the OIG.
Alert	Alert employee to agency policy on protecting confidentiality and share your obligation to alert the appropriate agency investigative authority if, for instance, the employee discloses a danger to public health or safety or any other imminent harm.

Foster a Retaliation Free Environment





Encourage

- **Employees to report wrongdoing** – raise whistleblowing during staff meetings, highlight disclosures that resulted in positive change. Supervisors set the tone!
- Please note that pursuant to the Whistleblower Protection Enhancement Act of 2012 (WPEA), **a protected disclosure can be made to a wide variety of individuals**, and not just to those who are “authorized” to hear the disclosure. See, e.g., 5 U.S.C. § 2302(f).

Inform and Remind

- Employees that they **DO NOT** have to go through their supervisory chain to make a disclosure.

Assure and Ensure Employees

ASSURE

Employees that they have protections from retaliation for whistleblowing

ENSURE

Employees can always contact the OSC or OIG if they believe that they are experiencing retaliation or want to make a disclosure

Establish a Positive Culture Around Whistleblowing:

- You can always come to me, but you do not have to
- Reporting violations of law and mismanagement makes our organization better
- Reporting gives us the opportunity to change things for the better

Influence the Climate with Open Communication:

- My direct supervisor can be reached at...
- Identify other offices at your agency that may be able to review or investigate disclosure
- OSC can be reached at...
- OIG can be reached at...

What Do You Think?

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Chris works for the Procurement Office as a Contract Specialist. While working on a contract, Chris discovers that one of the supervisors in the procurement office, not in his chain of command, executed duties as a Contracting Officer without the certifications required by the Federal Acquisition Regulations. Chris reports this information to you, his supervisor. What is the best course of action?

- A. Tell Chris that if he goes down this road it will not help his career.
- B. Inform Chris that the information is not accurate and that he should be careful about spreading rumors.
- C. Direct Chris to make a written statement and then submit the statement to the OIG.
- D. Investigate his complaint.
- E. Ask Chris how he wants to proceed and if you can document his concerns.

Answer

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E. The best course of action is to ask Chris how he wants to proceed and if you can document his concerns. Is he bringing the information to your attention for supervisory awareness? Does he want to know how and where to file a complaint? Listen to Chris, thank him for bringing his concerns to your attention, and alert him to his rights under the law.

Remember: Sometimes employees just want to be heard and ensure that someone at the agency is listening and hearing their concerns. In the rare circumstance where you are required to elevate the disclosure, be transparent and tell Chris why you must report the incident.

How Can You Succeed?

1

Be knowledgeable about whistleblowing procedures and protections

2

Be consistent in managing employees

3

Be measured in speech and actions

4

Be mindful of how you engage when you have differing points of view, e.g., body language

5

Seek advice from your local experts when unsure

Additional Resources

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Handouts

- [Retaliation for Making a Protected Disclosure Handout](#)
- [Retaliation for Engaging in Protected Activity Handout](#)
- [Your Rights When Reporting Wrongs](#)
- [Your Rights When Reporting Wrongs at a Government Corporation](#)

Videos

- [OSC's Retaliation Overview Video](#)
- [OSC's Prohibitions on Non-Disclosure Video](#)
- [OSC's Disclosures of Wrongdoing Video](#)

OSC Contacts

- www.osc.gov
- Questions about this training or content: certification@osc.gov
- For more information on filing a complaint or making a disclosure: 202-804-7000, 800-872-9855, or submit a question at info@osc.gov. OSC may not provide advice regarding the merit of a complaint or whether the allegation meets the statutory definitions.