

## Halt, In the Name of Public Safety

The federal government must stop lashing out at whistle-blowers like ex-Park Police chief Teresa Chambers.

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**T**he U.S. Court of Appeals for the Federal Circuit sided with a government whistle-blower last month. Unfortunately, such an event is rare enough to be newsworthy. The Federal Circuit has sole jurisdiction over federal whistle-blower claims. Out of the 186 whistle-blower cases that came before it from October 1994 to Feb. 14, 2008, this employee victory was only the *third time* that the court ruled for the whistle-blower.

This particular case is broader than the individual employee, of course. It is likely to have consequences for workers throughout the federal government who identify risks to health and safety arising from inadequate staffing or funding.

### ICONS AT RISK

The case, *Chambers v. Department of the Interior*, was brought by Teresa Chambers, who, as part of a decades-long career in law enforcement, served as chief of the U.S. Park Police from February 2002 until July 2004. (She's now police chief in Riverdale Park, Md.)

While chief of the U.S. Park Police, Chambers told a *Washington Post* reporter and then a congressional staffer that a decision in 2003 not to seek an increase in the Park Police budget was increasing risks to public health and safety. She pointed particularly to risks of inadequate police protection on park land within the D.C. metropolitan area and around national icons such as the Washington Monument.

After making these communications to the press and to Congress, Chambers was fired. The Merit Systems Protection Board, which hears appeals of civil service terminations, upheld her removal. The board concluded that Chambers had not made disclosures protected by the Whistleblower Protection Act because her remarks reflected only "a classic policy disagreement" about how to allocate limited police resources.

In reaching this result, the board adopted a new and unduly restrictive interpretation of the Whistleblower Protection Act. Under the board's rule, a whistle-blower would be protected only

if the subject of the disclosure is "not debatable among reasonable people." Disagreement over legitimate policy choices would not be protected.

This standard guts vital legal protections for conscientious employees who, at great professional risk, blow the whistle on substantial and specific dangers to the public health or safety. The standard also imperils the public at large, who rely on government whistle-blowers to serve as their eyes and ears about problems within government agencies.

Fortunately, the Federal Circuit, which itself has recently been under congressional scrutiny for its abysmal record with whistle-blower claims, soundly rejected this onerous standard.

### SPECIFIC DANGERS

The Whistleblower Protection Act protects a federal employee who discloses information that she reasonably believes shows "a violation of 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."

In her interview with *The Washington Post*, Chambers identified possible risks to public health and safety on U.S. National Park land that would result from the insufficient funding and inadequate staffing outlined in the National Park Service's budget for fiscal 2004.

She pointed out, among other things, that a decrease in patrol officers on the Baltimore-Washington Parkway could lead to an increase in traffic accidents, the lack of officers at stationary posts on the National Mall might hinder anti-terrorism efforts, and a reduced police presence in local parks could open the way to more drug crimes and vagrancy.

Concerns about these risks had previously been expressed by the police union, the Interior Department's inspector general, and several other officials familiar with park security issues.

After *The Washington Post* published the article attributing several statements about the U.S. Park Police's budget to Chambers, her supervisor fired her based on various charges of misconduct.

Following civil service procedures, Chambers filed a complaint with the Office of Special Counsel asserting a claim of retaliation for a protected disclosure. When that

office delayed in ruling, she appealed to the Merit Systems Protection Board.

### IMPROPER BLENDING

The Merit Systems Protection Board concluded that Chambers' disclosure to the *Post* was not protected because her statements concerned issues of "gross mismanagement" and involved a "policy disagreement over which reasonable minds might differ."

Chambers argued to the Federal Circuit that the board applied an incorrect standard when evaluating her whistle-blower claim. The Federal Circuit agreed, though it did sustain the board on a number of other issues.

The Federal Circuit determined that the board had applied an incorrect standard relating to the disclosure of a risk to public safety. In particular, the board had improperly blended the concepts of gross mismanagement and a risk to public safety.

The Merit Systems Protection Board had relied on *White v. Department of the Air Force* (Federal Circuit 2004), which concluded that a lawful but problematic policy constituted "gross mismanagement" only when reasonable people could not debate the error in the policy. But *White* was about gross mismanagement, not the danger to public health or safety that Chambers had alleged.

The court reasoned that while Chambers expressed a disagreement with a policy decision about allocating taxpayer dollars, her statement disclosed her reasonable belief of a danger to public safety that may have resulted from that decision.

The court thus clarified that although the two concepts of gross mismanagement and public safety might overlap in the law enforcement context, that overlap did not eliminate the statute's separate standards applicable to each category of protected disclosure.

The court acknowledged that the budget for law enforcement necessarily affects public safety and that any policy decision related to police funding could potentially be said to create a safety risk. Nevertheless, the statute created two distinct standards, and "Congress did not intend, in our view, to categorically classify any danger arising from law enforcement solely as a policy issue, to which the standard for gross mismanagement would apply."

To help define a protected disclosure involving public health or safety, the court emphasized that the danger must be "substantial and specific." The likelihood of the harm should not derive from speculative or improbable conditions. And a disclosure about a harm likely to occur in the immediate or near future is more likely to be protected than a disclosure about a harm only in the distant future.

In this case, Chambers described imminent and highly probable harm on national park land that would result from budget shortfalls. Indeed, some of the harm was already occurring.

The Federal Circuit vacated the Merit Systems Protection Board ruling and remanded the case for the board to determine if the dangers Chambers disclosed were "substantial and specific" enough for protection.

### AN OVERDUE REBUKE

The Federal Circuit's decision provides an overdue rebuke

to the Merit Systems Protection Board, which historically has been an inhospitable forum for government whistle-blowers who have suffered retaliation for raising public safety concerns.

Beyond this case, the decision also should give some comfort not only to law enforcement employees but to other workers throughout the federal government who are in a position to identify risks to the public health and safety that arise out of the underfunding or inadequate staffing of important government functions. In virtually all of these cases, the risks posed likely resulted from policy decisions about how to allocate increasingly scarce resources.

The most obvious beneficiaries of the Federal Circuit's decision are federal law enforcement officers and other employees, including many at the Department of Homeland Security and elsewhere, who are charged with guarding against terrorist and other security threats. These employees must often perform their duties without adequate staffing, funding, or other resources because of the competing demands placed upon their employing agencies.

The decision will also have important ramifications outside the law enforcement context. For example, recent studies by independent advisory boards, the U.S. Government Accountability Office, and members of Congress have revealed that the Food and Drug Administration is so underfunded and understaffed that inspections of the food supply have dropped to dangerous levels. Similarly, recent reports about defective and dangerous toys being imported into the United States have brought greater public attention to severe staffing shortages at the Consumer Product Safety Commission.

Under the Merit Systems Protection Board decision, an FDA inspector or CPSC employee would not have been protected against retaliation for revealing the negative impact of inadequate resource allocation upon food or other product safety.

More generally, Chambers' victory is important because her case was so widely publicized. When Chambers was so publicly punished for speaking out, it sent a chill throughout the federal work force. Similarly, the federal work force and whistle-blower advocates were discouraged by the tone of the merit board's decision, which was clearly hostile to the rights of employees to make public their disagreement with management decisions regarding the allocation of resources.

The rebuke of the Merit Systems Protection Board, and Chambers' vindication, was a welcome bit of good news in an environment that has become increasingly hostile to whistle-blowers in the federal government.

In this post-9/11 world, a crabbed view of whistle-blower protection is antithetical to public safety and national security. Chambers should be applauded, not punished, for telling the truth.

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