Veterans Affairs Case Offers Clarification on WPA Burden of Proof

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In *Sistek v. Dep’t of Veterans Affairs*, 955 F.3d 948, 954 (Fed. Cir. 2020), the Federal Circuit clarified a federal whistleblower’s burden of proving retaliation when the discrimination he alleges is not specifically identified as a prohibited personnel action in the *Whistleblower Protection Act of 1989* (“WPA”), 5 U.S.C. § 2302(b)(8). The WPA protects federal employees who disclose evidence of illegal or improper government activities. Under the WPA, an agency may not take or threaten to take certain personnel actions because of a protected disclosure by an employee.

This blog reviews the elements of a WPA claim, then discusses how *Sistek* affects these proof requirements when the retaliation consists, in part, of subjecting the employee to an internal investigation.

### I. Background on the Whistleblower Protection Act

To state a claim under WPA, an employee must allege that (1) there was a disclosure or activity protected under the WPA; (2) there was a personnel action authorized for relief under the WPA; and (3) the protected disclosure or activity was a contributing factor to the personnel action. See 5 U.S.C. § 1221(e)(1). If the appellant makes out a prima facie case, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *see Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 970–71 (Fed. Cir. 2009). The WPA is a “remedial statute,” and its terms are to be construed “broadly.” *Weed v. Soc. Sec. Admin.*, 113 M.S.P.R. 221, 227 (2010). *See also Fishbein v. Dep’t of Health & Human Servs.*, 102 M.S.P.R. 4, 8 (2006) (“Because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act.”).

#### A. Protected Disclosures

An employee engages in a protected disclosure when he or she makes a formal or
informal communication of information that he or she reasonably believes evidences “any 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 and safety.” 5 U.S.C. § 2302(b)(8)(A). The WPA also protects disclosures that an employee reasonably believes are evidence of censorship related to research, analysis, or technical information that the employee believes is, or will cause, either 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.” Pub. L. No. 112-199, sec. 110, 126 Stat. 1465 (Nov. 27, 2012). Protected disclosures include those made to a supervisor or to a person who participated in the activity that was the subject of the disclosure, as well as those made “during the normal course of duties of an employee.” Id.; Day v. Dep’t of Homeland Sec., 119 M.S.P.R. 589, 599 (2013).

The WPA defines a “disclosure” very broadly. See 5 U.S.C. § 2302(a)(2)(D) (“‘disclosure’ means a formal or informal communication or transmission”). The relevant inquiry is whether an employee “reasonably believed” that the disclosure evinces a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority, or; a substantial and specific danger to public health or safety. See, e.g., Miller v. Dep’t of Homeland Sec., 2009 WL 1445346 (M.S.P.B. May 4, 2009) (employee’s criticisms of new policies were protected disclosures under WPA because he reasonably believed that these policy changes would pose a substantial and specific danger to public safety).

**B. Personnel Action**

Under the Whistleblower Protection Act, a “personnel action” may refer to:

1. an appointment;
2. a promotion;
3. an action under chapter 75 of this title or other disciplinary or corrective action;
4. a detail, transfer, or reassignment;
5. a reinstatement;
6. a restoration;
7. a reemployment;
8. a performance evaluation under chapter 43 of this title or under title 38;
9. a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
10. a decision to order psychiatric testing or examination;
11. the implementation or enforcement of any nondisclosure policy, form, or agreement; and
12. any other significant change in duties, responsibilities, or working conditions;
5 USCA § 2302(a)(2)(A). The list is comprehensive, and covers a wide swath of adverse personnel actions.

**C. Contributing Factor**

Under the “knowledge/timing test,” an individual may demonstrate that a protected disclosure was a contributing factor to a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See Atkinson v. Dep't of State*, 107 M.S.P.R. 136, 141 (2007) (citing 5 U.S.C. § 1221(e)(1)).

However, whistleblowing activities may still be a contributing factor in the taking or failure to take a personnel action, even absent evidence that the deciding official had knowledge of the whistleblowing activities. *See Dorney v. Dep't of Army*, 117 M.S.P.R. 480, 485–86 (2012). If the deciding official was influenced by one with knowledge of the whistleblowing activities, then such activities may be a contributing factor to personnel actions under the WPA. *Id.*

**II. Sisterk v. Dep’t of Veterans Affairs**

**A. Facts and Procedural History**

Between 2012 and 2014, Leonard Sistek, Jr., then-director at the Department of Veterans Affairs (“VA”), disclosed information to agency staff, one of his supervisors, and the VA’s Office of the Inspector General (“OIG”) about inappropriate financial practice within the VA. Shortly thereafter, his supervisor appointed an Administrative Investigation Board (“AIB”) to investigate unrelated misconduct within the organization. His supervisor formally added Mr. Sistek as a subject of the investigation.

The AIB investigation found that the management team, which included Mr. Sistek, failed to report allegations about an inappropriate sexual relationship between two other staff members, and it recommended that Mr. Sistek receive “an admonishment or reprimand.” Consistent with the recommendation, Mr. Sistek’s supervisor issued a letter of reprimand in August 2014. In January 2015, without explanation, Mr. Sistek’s second-level supervisor rescinded the letter of reprimand and expunged it from Mr. Sistek’s record. In March 2015, the OIG confirmed that the concerns previously raised by Mr. Sistek were justified, and that the VA had violated appropriations law and used funds in unauthorized ways.

Mr. Sistek filed a complaint with the U.S. Office of Special Counsel (“OSC”), alleging
whistleblower reprisal. After OSC issued a closure letter, Mr. Sistek filed an individual right of action appeal.

The Administrative Judge (“AJ”), considered whether the investigation and resulting letter of reprimand constituted prohibited personnel actions. The AJ determined that a retaliatory investigation is not a personnel action under the WPA and declined to order corrective action in favor of Mr. Sistek. See Sistek v. Dep’t of Veterans Affairs, 2018 MSPB LEXIS 3010 (M.S.P.B. Aug. 8, 2018). The AJ’s initial decision became the final decision of the MSPB, and Mr. Sistek petitioned the Federal Circuit for review.

B. The Federal Circuit’s Finding of Harmless Error

The Federal Circuit affirmed the Board’s decision. First, it reasoned that the WPA’s list of eleven specific personnel actions does not mention a “retaliatory investigation,” or indeed, “any investigation at all.” Sistek v. Dep't of Veterans Affairs, 955 F.3d 948, 954 (Fed. Cir. 2020). Second, the court found that the investigation against Mr. Sistek did not significantly alter his job or working conditions, and thus did not fall within the last catchall provision of the WPA’s list of personnel actions. “[I]nvestigations may qualify as personnel actions ‘if they result in a significant change in job duties, responsibilities, or working conditions.’” Sistek, 955 F.3d at 955 (quoting S. Rep. No. 112-155, at 20 (2012)). The court elaborated that in certain circumstances, “an investigation alone could constitute a significant change in working condition,” or “a retaliatory investigation could contribute toward the creation of a hostile work environment that is actionable as a significant change in working conditions.” Id. In such circumstances, a retaliatory investigation would be a qualifying personnel action under the WPA. The Sistek Court held, however, that the investigation did not establish a significant change in working conditions because Mr. Sistek was interviewed once, did not offer evidence of a hostile work environment, and the resulting letter of reprimand was later rescinded and expunged. See id. at 956.

Third, the court considered Mr. Sistek’s effort to bring his claim within the rationale of controlling precedent on retaliatory investigations. See Russell v. Dep’t of Justice, 76 M.S.P.R. 317 (1997). In Russell, a whistleblower disclosed misconduct by two of his superiors, after which, one of the superiors initiated an investigation of the whistleblower's conduct, resulting in disciplinary charges against the whistleblower and the whistleblower’s demotion. Id. at 321. The Board held that the agency investigation was evidence of prohibited retaliation because the investigation was “so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency [did] not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure.” Id. at 324. “That the investigation itself is
conducted in a fair and impartial manner, or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure.” *Id.* (citing 5 U.S.C. § 1221(e)(2)). In other words, if an agency investigation leads to an adverse personnel action, that investigation—coupled with the ensuing personnel action—is prohibited retaliation, unless the agency can demonstrate that it would have commenced the same investigation and taken the same personnel action absent the protected disclosure. “To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations.” *Id.* at 325.

The *Sistek* court acknowledged that *Russell* is “the Board’s foundational decision in this area,” and that the drafters of the Whistleblower Protection Enhancement Act (“WPEA”), Pub. L. No. 112-199, 126 Stat. 1465 (2012), intended that *Russell* would remain “governing law.” *Sistek*, 955 F.3d at 955. Applying *Russell*, the *Sistek* court found that the Board erred by failing to consider Mr. Sistek’s allegedly retaliatory investigation as part of its evaluation of the letter of reprimand. See *id.* at 957. Applying *Russell*, the VA’s investigation into Mr. Sistek was “so closely related” to the letter of reprimand “that it could have been a pretext for gathering evidence to retaliate.” *Russell*, 76 M.S.P.R. at 324. By “fail[ing] to apply *Russell* in evaluating the letter of reprimand,” the Board committed error. *Sistek*, 955 F.3d at 957.

Regardless, the *Sistek* Court held that the Board’s error was harmless. *Id.* The Court distinguished the present facts from the facts of *Russell* “because here there is no evidence that the official who initiated the allegedly retaliatory investigation had knowledge of any protected disclosures.” *Id.* The Court held that the supervisor who initiated the investigation lacked both actual and constructive knowledge of Mr. Sistek’s protected disclosures, and further, Mr. Sistek did not allege such knowledge. By failing to allege knowledge, Mr. Sistek could not demonstrate that his protected disclosure was a contributing factor to the alleged personnel action. In other words, even if the investigation and letter of reprimand were an adverse action, the WPA claim would have nonetheless failed because Mr. Sistek did not present sufficient evidence that his whistleblowing was a contributing factor in his adverse action.

### III. Significance of *Sistek*

*Sistek* reaffirmed the holding of *Russell*, that a retaliatory investigation may be a prohibited personnel action if it leads to a significant change in job duties, responsibilities or working conditions; if it creates a hostile working environment, or; if it is “closely related” to a personnel action under the WPA. If Mr. Sistek had demonstrated facts to meet the knowledge/timing causation test, then the Court
would have remanded the case to the Board to consider whether the investigation and letter together were qualifying personnel actions. And Russell would mandate that the answer is yes.

Further, if an employee can demonstrate that an investigation was undertaken in retaliation for a protected disclosure, the WPA provides that the Board may order corrective action that includes “fees, costs, or damages reasonably incurred due to an agency investigation” that is “commenced, expanded, or extended in retaliation” for a protected disclosure or activity—i.e., a retaliatory investigation. 5 U.S.C. §§ 1214(h), 1221(g)(4).

“So long as a protected disclosure is a contributing factor to the contested personnel action, and the agency cannot prove its affirmative defense, no harm can come to the whistleblower.” Marano v. Dep't of Justice, 2 F.3d 1137, 1142 (Fed. Cir. 1993). The WPA thus continues to protect federal whistleblowers from retaliatory investigations, and Sistek merely provides a cautionary note about establishing the causation element of such a claim.