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Report to Chairman, Subcommittee on the Civil Service, Committee on Post Office and Civil Service, House of Representatives

October 1992

WHISTLEBLOWER PROTECTION

Determining Whether Reprisal Occurred Remains Difficult

GAO/GGD-93-3

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-249139

October 27, 1992

The Honorable Gerry Sikorski
Chairman, Subcommittee on
the Civil Service
Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

This report is our second response to your request that we review the government's processing of whistleblower reprisal complaints and the Office of Special Counsel's (OSC) effectiveness in protecting whistleblowers from reprisals. In July 1992, we reported to you on federal employees' awareness of whistleblower protection and willingness to report government misconduct.[1]

Results in Brief

We found that even though the Whistleblower Protection Act of 1989 was intended to strengthen and improve protection for whistleblowers, employees claiming reprisal for whistleblowing at OSC are finding that proving their cases is as difficult now as it was before the act was passed. The principal reason remains the lack of sufficient evidence to establish the link between the employee's whistleblowing and the reprisal.

We also found that federal employees do not know where to report misconduct or their whistleblower rights to protection. In addition, agencies are not required to inform employees about whistleblower rights and procedures.

Objective, Scope, and Methodology

To assess the effectiveness of the 1989 act's strengthened provisions, we compared selected data on OSC's decisions on whistleblower complaints filed during selected periods before and after the act's effective date of July 9, 1989, specifically, fiscal year 1987 through the third quarter of 1992. In addition, we obtained overall information on OSC's disposition of the 805 whistleblower reprisal complaints that were filed and closed under the act from July 9, 1989, through September 30, 1991. We obtained more information on the reasons why OSC closed the cases by randomly selecting 406 closed complaints for which OSC determined that insufficient

[1]Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection From Reprisal (GAO/GGD-92-120FS, July 14, 1992).

evidence existed or OSC disproved the complaint. Similar data were not readily available on OSC's disposition of whistleblower complaints and reasons for closing cases before the 1989 act.

We also obtained data from the Merit Systems Protection Board (MSPB) on the disposition of whistleblower complaints of those employees who either appealed OSC's decision to MSPB or went directly to MSPB with their whistleblower complaints. The MSPB data covered 565 complaints filed and closed under the 1989 act from July 9, 1989, through September 30, 1991.

We did not review OSC or MSPB files to determine the adequacy of investigations or the appropriateness of dispositions made by OSC and MSPB of whistleblower reprisal complaints.

As part of our work for the Subcommittee, we are also obtaining information from the 19 largest federal departments and agencies to determine what efforts have been made to inform employees of their right to protection from whistleblower reprisal.

We did our review between August 1991 and July 1992 in accordance with generally accepted government auditing standards.

Background

Statutory protection for whistleblowers was first introduced by the Civil Service Reform Act of 1978 (P.L. 95-454). However, on the basis of reports by us and MSPB as well as OSC's data, Congress subsequently found that the 1978 act was having little impact on encouraging federal employees to blow the whistle and protecting whistleblowers.

In 1984, MSPB reported that between 1980 and 1983 there was no measurable progress in overcoming employee reluctance to reporting fraud, waste, and abuse.[2] According to MSPB's 1983 survey, 69 percent of employees with knowledge of fraud, waste, and abuse did not report it. Most of the employees (53 percent) did not report the misconduct because they believed nothing would be done to correct it. Fear of reprisal was the second most frequent reason given by employees (37 percent) for not reporting misconduct. In 1985, we reported that, in fiscal year 1984, OSC

[2]Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings, U.S. Merit Systems Protection Board (Washington, D.C.: Oct. 1984).

closed 99 percent of the whistleblower complaints without seeking corrective or disciplinary action.[3]

In 1988, the Senate Committee on Governmental Affairs reported that OSC was beginning to place more emphasis on corrective action.[4] OSC was seeking corrective action for reprisals against whistleblowers in about 5 percent of the cases. According to the Committee report, the five-fold increase over the 1 percent we reported earlier was welcomed; however, the higher rate still left many federal employees frustrated.

The Whistleblower Protection Act of 1989 (P.L. 101-12) was enacted to strengthen and improve the protection for whistleblowers. The 1989 act separated OSC from MSPB and established OSC as an independent agency. OSC's primary role became to protect federal employees, especially whistleblowers, from prohibited personnel practices and to act in the interests of employees seeking assistance.

Other changes by the Whistleblower Protection Act of 1989 to help whistleblowers included

- easing the employee's burden of proof that reprisal for whistleblowing had occurred,
- allowing employees to file appeals with MSPB if they did not obtain relief through OSC, and
- expanding the definition of a whistleblower-related prohibited personnel practice to include a threat to take or fail to take a personnel action.

The 1989 act lowered the burden of proof for the employee to prove reprisal because, according to the Senate Governmental Affairs Committee report mentioned previously, proving a causal connection between a protected disclosure and an adverse personnel action was difficult. The report said that direct evidence of retaliation was rare because supervisors did not leave a trail for investigators that would show that a prohibited reprisal against employees had occurred. The Senate report noted that in 1985 we found that two-thirds of the complaints reviewed were closed because OSC believed that a causal connection could not be proven.

[3]Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection (GAO/GGD-85-53, May 10, 1985).

[4]Whistleblower Protection Act of 1988, Report of the Committee on Governmental Affairs, United States Senate, Report No. 100-413, July 6, 1988.

The act changed the standard for proving causal connection by requiring proof that the retaliation was a "contributing" factor in the personnel action, rather than a "significant" factor. According to the Senate Governmental Affairs Committee report, showing that an agency official who took a personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude the disclosure was a factor in the action should be sufficient to prove a connection. The Committee believed that this more liberal interpretation should be applied because most reprisal cases are built on circumstantial, rather than direct, evidence.

In addition, because OSC was seeking corrective action in a very small percentage of whistleblower cases, the 1989 act gave employees the right to appeal to MSPB for relief. Employees already had the right to go directly to MSPB for certain types of adverse actions, such as firings and certain suspensions, and may still appeal these actions directly to MSPB. The 1989 act allows employees to appeal to MSPB after first going to OSC if either (1) OSC had terminated its efforts on their cases or (2) OSC had failed to complete its efforts within 120 days after the employee filed a complaint with OSC. The previously mentioned Senate Committee on Governmental Affairs report said that this right of appeal to MSPB, known as an individual right of action (IRA), was important in assuring employees that, if they did not obtain relief through OSC, they could go to MSPB for a hearing and adjudication.

And last, the definition of whistleblower reprisal was expanded to include employers threatening to take or not take a personnel action against employees. The former Special Counsel suggested this addition as a way of assisting OSC in providing additional or expedited assistance to whistleblowers.

Some Provisions of 1989 Act Have Had Impact

Allowing employees to file appeals with MSPB has had a measurable impact on whistleblower reprisal cases. About one-third of those employees appealing to MSPB after going through OSC for assistance are getting relief, usually through settlements (67 of 213 complaints) and sometimes through reversals (8 of 213 complaints) of adverse personnel actions. However, the impact of including in the definition of a whistleblower reprisal a threat to take or not take a personnel action has been minimal to date.

Employees Still Find That Proving Reprisal Is Difficult

OSC data suggested that for employees claiming reprisal for whistleblowing and seeking corrective action through OSC, proving their case is as difficult now as before the 1989 act. The number of whistleblower complaints, corrective and disciplinary actions, and stays increased under the 1989 act. But the increases are generally proportionate to the increases in the volume of complaints filed, and about the same percentage of reprisal complaints filed with OSC for periods we studied before and after the 1989 act's passage resulted in corrective action. Further, lack of evidence to prove a causal connection between personnel actions and disclosures remains the principal reason OSC does not pursue reprisal complaints.

Employees Are Often Unaware of Their Rights

In our July 1992 report we noted that most federal employees said they would be willing to report misconduct. However, the majority of employees said that they had little knowledge about where to report misconduct and their right to protection under the law from whistleblower reprisal. Also, many employees said fear of reprisal for reporting misconduct was a concern.

Federal agencies are not required by the whistleblower statute to inform employees of where to report misconduct or their right to protection from whistleblower reprisal. On the basis of responses received from 14 agencies to our survey, we found that there do not appear to be programs to periodically inform employees of how they are protected from reprisal for whistleblowing. OSC has attempted to inform employees about their protection rights through seminars and workshops. However, such attempts have met with limited success, according to OSC officials. Details on the results of our work are provided in appendix I.

Matter for Congressional Consideration

The results of our work to date have indicated that most federal employees do not know their right to protection from whistleblower reprisal or where to report misconduct. Agencies are not required to inform employees of their rights, and none of the agencies responding to our survey to date reported doing so periodically. Accordingly, the Subcommittee may want to consider amending the whistleblower statutes (5 U.S.C. 1201 et seq.) to require agencies, with OSC's guidance, to inform employees periodically on their right to protection from reprisal and where to report misconduct.

In this regard, one approach to inform employees could be similar to how federal employees are to be informed of ethics laws and regulations.

Under the Ethics in Government Act of 1978, as amended, and Executive Order 12731, October 17, 1990, federal agencies are required to provide ethics orientation to all employees before 1993 under rules and regulations provided by the Office of Government Ethics (OGE). In addition, many employees are to receive annual training. One of the principles of ethical conduct under Executive Order 12731 is that employees are to disclose waste, fraud, abuse, and corruption to appropriate authorities. However, OGE neither requires agencies to nor do the agencies inform employees of their right to protection under the 1989 whistleblower act if an employee believes he or she has suffered a reprisal for such disclosure. Also, OGE does not require agencies to inform employees on where to report misconduct, and the agencies are not informing their employees.

As with the ethics training, agencies could be required to inform employees about their rights as whistleblowers and where to report misconduct. In addition, OSC could be authorized to provide guidance to agencies on such training. OSC could be encouraged to work with OGE to include whistleblower training with existing agency training requirements on ethics.

OSC Comments and Our Evaluation

OSC's written comments on a draft of this report and our specific responses to its comments are in appendix II. In general, OSC's interpretation of its data indicated that employees claiming whistleblower reprisal are having greater success under the Whistleblower Protection Act of 1989 than our analysis of OSC's data indicated.

OSC believed that we misunderstood certain matters regarding measures of effectiveness of its evaluation and processing of whistleblower reprisal complaints. OSC construed our report to mean that federal employees alleging reprisal should be prevailing in greater numbers. This is not our belief, and we made several changes in this report to clarify that, for the vast number of such employees, OSC could not develop enough evidence to determine whether reprisal occurred.

We disagreed with OSC's assertion that employees generally have been more successful in obtaining corrective action under the 1989 act. OSC stated that in the 3 years following passage of the 1989 act, corrective actions, as a percentage of those complaints receiving a more extensive OSC investigation, increased three-fold (or 24 percentage points), from 11 to 35 percent of complaints filed. We disagree with OSC's analysis because (1) it did not include those complaints closed by OSC in its initial screening

process and (2) its analysis made no distinction between complaints filed under the old whistleblower statute and those filed under the 1989 act.

We believe those complaints closed in the initial screening process should be included in the analysis because generally OSC was not able to develop enough evidence to determine whether reprisal occurred, not that it found the whistleblower complaint invalid. We also believe that to assess the effectiveness of the 1989 act, a comparison should be made of those complaints filed under the standards of evidence of the old statute to those filed under the standards of the 1989 act. Rather than make such a comparison, OSC combined all the complaints filed after 1989, regardless of which standards applied. Our comparison of corrective actions to total whistleblower complaints filed under the old statute versus the 1989 act yielded a .5 percentage point increase in corrective actions, from 5.8 percent to 6.3 percent.

OSC did not comment on our matter for congressional consideration concerning amending the whistleblower statute to require agencies to inform employees of their right to protection from reprisal for whistleblowing and where to report misconduct. However, at a July 15, 1992, meeting, OSC agreed in principle with us on this matter.

As agreed with the Subcommittee, we plan no further distribution of this report until 30 days after its issue date, unless you publicly announce its contents earlier. At that time, we will send copies to OSC, MSPB, the departments and agencies that participated in our survey of federal employees, and other interested parties. We will also make copies available to others upon request.

The major contributors to this report are listed in appendix III. If you have any questions about this report, please contact me on (202) 275-5074.

Sincerely yours,

Bernard L. Ungar

Bernard L. Ungar
Director, Federal Human Resource
Management Issues

Contents

Abbreviations

IRA	individual right of action
MSPB	Merit Systems Protection Board
OAA	otherwise appealable action
OGE	Office of Government Ethics
OSC	Office of Special Counsel

Analysis of Whistleblower Reprisal Complaints Under the Whistleblower Protection Act of 1989

Employees Are Not Well Versed on How the Law Protects Them

In our July 14, 1992, report on the results of our governmentwide survey of federal employees, 57 percent of the respondents said they would be willing to report misconduct.[5] However, 38 percent said they were either undecided about reporting or would be unwilling to report misconduct if they became aware of it. Fear of reprisal for reporting misconduct continued to be a concern for 25 percent of the respondents. Also, according to our governmentwide survey, 73 percent of the respondents said that they did not know how the whistleblower statute protects them from reprisal and 70 percent said they did not have enough information about where to report misconduct.

Under 5 U.S.C. 2302(c), the head of each department and agency is responsible for the prevention of prohibited personnel practices, including whistleblower reprisal. However, no legal requirement exists in the whistleblower statutes (5 U.S.C. 1201 et seq.) for the Office of Special Counsel (OSC) or agencies to inform employees about their right to protection from reprisal for whistleblowing or where to report misconduct.

One aspect of our ongoing work for the Subcommittee involves a survey of the 19 largest federal departments and agencies to determine what efforts have been made to educate employees about their rights when they blow the whistle. As of August 27, 1992, we had received responses from 14 agencies. None of the agencies reported having programs to periodically inform employees of how they are protected from reprisal for whistleblowing.

Although not required by the 1989 act, OSC, by participating in federally sponsored seminars and workshops, has attempted to spread the word about employees' rights to be protected from reprisal. However, OSC officials acknowledged that they have had limited success in eliciting agency support of informing employees about their rights under the law and how to go about exercising them.

OSC Finds That Proving Reprisal Is Still Difficult

Although OSC officials told us that they believe it is now easier to prove whistleblower reprisal because of the lower burden of proof for employees, OSC data indicated that proving whistleblower reprisal remains difficult. Under the 1989 act, the principal reason for OSC's decisions to not pursue reprisal complaints is the same as we reported in 1985, the lack of sufficient evidence to establish a causal connection. And expanding the

[5]GAO/GGD-92-120FS.

definition of reprisal to include the threat of a personnel action has had limited impact. In our review of 406 employee complaints, we found that 1 of 16 alleged threats of a personnel action was proven.

According to OSC data, the number of reprisal complaints filed annually by employees has increased since 1989, and so has the number of corrective actions.[6] Generally, the number of OSC investigations, disciplinary actions,[7] and stays (postponed action) has increased. However, the increases in corrective actions, disciplinary actions, investigations, and stays are generally proportionate to the increase in the volume of complaints filed. Table I.1 shows OSC disposition data on whistleblower reprisal complaints by fiscal year from 1987 through the third quarter of 1992.

Table I.1: OSC's Workload Data on Whistleblower Reprisal Complaints, Fiscal Years 1987 Through the Third Quarter of 1992

	Period									
	Fiscal year						Complaints before the 1989 Whistleblower Act[b]		Complaints after the 1989 Whistleblower Act[b]	
	1987	1988	1989	1990	1991	1992[a]	Percent	Number	Percent	Number
	Number									
Total complaints filed	261	274	257	514	478	444	100.0%	736	100.0%	1,492
Referrals to Investigation Division	69	88	46	116	85	125	24.9%	183	23.2%	346
Stay cases	3	7	10	15	10	8	2.2%	16	2.5%	37
Corrective actions or favorable dispositions	6	9	8	23	54	37	5.8%	43	6.3%	94
Disciplinary actions	1	0	4	8	1	0	.7%	5	.6%	9

[a]Through June 30, 1992.

[b]Cumulative complaints before and after the 1989 act do not equal the totals for complaints filed and actions taken during the specific fiscal years indicated. Some complaints filed after the act were processed under the old statute. Also, fiscal year 1989 data cover complaints and actions before and after the July 1989 effective date of the act.

Source: OSC.

[6]Corrective action is broadly defined by OSC to include both corrective actions and favorable dispositions. These include (1) agency actions taken in response to OSC's written request for corrective action; (2) settlements at OSC's request between agencies and employees before OSC submits a written request for corrective action; and (3) agency actions taken, with knowledge by the agency of OSC's involvement, that resolves the complaint.

[7]Disciplinary action includes removal from federal employment, suspension, or other discipline as considered appropriate.

OSC has generally opted for working informally with agencies to deal with alleged reprisal rather than requesting the Merit Systems Protection Board (MSPB) to order agency action. OSC has not gone before MSPB since 1982 to seek a corrective action and only once under the 1989 act, in fiscal year 1991, to seek a disciplinary action. OSC attributed all 94 of its corrective actions under the 1989 act to interactions with agencies. Similarly, OSC has arranged directly with agencies that they take disciplinary actions against individuals who allegedly took reprisals against employees. This occurred in all but one of nine disciplinary actions under the 1989 act.

Of the 1,492 complaints processed under the 1989 act, OSC had closed 805 through September 30, 1991. Of these 805 closed complaints, OSC determined that 718 (about 89 percent) did not meet the criteria that OSC uses to pursue a corrective action with MSPB or agencies. Specifically,

- OSC closed 582 (72.3 percent) of the 805 complaints after it determined that insufficient evidence existed to pursue corrective and/or disciplinary actions.
- OSC closed an additional 109 complaints (13.5 percent) after developing what OSC determined was sufficient evidence to disprove the employee claims of reprisal.
- OSC reported that 27 (3.4 percent) of the 805 complaints did not involve a required personnel action.

Table I.2 shows OSC's disposition of all 805 closed complaints under the 1989 act through September 30, 1991.

Table I.2: OSC's Disposition of Closed Complaints Under the Whistleblower Protection Act of 1989, July 9, 1989, Through September 30, 1991

Disposition of complaints	Number	Percent
OSC determined that insufficient evidence existed for OSC to pursue the complaint.	582	72.3
OSC disproved the allegation.	109	13.5
OSC determined that no personnel action was taken, threatened, or not taken.	27	3.4
Agency took corrective action.	27	3.4
Agency and employee resolved the complaint.	13	1.6
OSC deferred to Equal Employment Opportunity Commission for discrimination complaint.	11	1.4
Employee did not supply OSC with additional information requested.	8	1.0
Employee not covered under the law.	6	.7
Employee did not allege a prohibited personnel practice.	5	.6
Employee could not be contacted.	5	.6
Employee withdrew complaint.	5	.6
Agency not covered under the law.	4	.5
Employee filed IRA with MSPB after 120 days elapsed and before OSC terminated its investigation.	3	.4
Total	**805**	**100.0**

Source: OSC.

In order to successfully pursue whistleblower reprisal, OSC said that it must develop sufficient evidence to show that the following four elements exist:

- a protected disclosure was made by a covered federal employee;
- a personnel action was taken, not taken, or threatened after the disclosure;
- the employer had knowledge of the disclosure; and
- a causal connection existed between the personnel action and the disclosure.

In 1985, we reported that 64.5 percent of 76 randomly selected complaints reviewed were closed by OSC because it believed that the required causal connection could not be proven. Under the 1989 act, proving the existence of a causal connection continues to be the element that is most often missing. OSC cited this element as a reason for terminating 356 (55.6 percent) of the instances included in 406 randomly selected complaints

that we reviewed. These 406 complaints were closed by OSC under the 1989 act due to insufficient evidence (303 complaints) and disproved allegations (103 complaints). A breakdown of the reasons for closing the 406 complaints by the four elements is shown in table I.3.

Table I.3: OSC's Reasons for Closing Whistleblower Complaints Due to Insufficient Evidence and Allegation Disproved, July 9, 1989, Through September 30, 1991

Disposition of complaints	Number of complaints reviewed	Reasons for closing complaints by element needed to qualify for protection			
		Employer knowledge	Protected disclosure	Personnel action	Causal connection
Insufficient evidence	303	50	111	64	282
Allegation disproved	103	7	30	22	74
Totals	**406**	**57**	**141**	**86**	**356**

Note: Complaints may contain more than one allegation, and each allegation may not qualify due to the absence of one or more of the four elements. Therefore, the number of elements is greater than the number of complaints.

Source: OSC's close-out letters to complainants.

Whistleblowers Sometimes Obtain Relief at MSPB

MSPB and OSC data on reprisal complaints filed under the 1989 act showed that about one-third of those employees who sought corrective action through MSPB after OSC closed the cases obtained relief through either settlements or reversals of adverse personnel action. Similarly, about one-third of those employees who pursued alleged reprisal directly with MSPB obtained relief.

In addition to the individual right of action (IRA) granted in the 1989 act, employees may file whistleblower reprisal complaints directly with MSPB if they are alleging that they are the victim of a reprisal involving an adverse action of the type appealable to MSPB. Such adverse actions, referred to as otherwise appealable actions (OAA), include removal for unacceptable performance, reduction in grade, and suspension for more than 14 days. OAAs do not include such actions as transfers, reassignments, or change in duties without reduction in grade. Employees pursuing OAAs may go to OSC first, if they so choose, and may also later appeal the action to MSPB after OSC notifies the employee either that OSC is not pursuing the complaint or that 120 days have expired since OSC received the complaint.

According to MSPB data, MSPB closed a total of 565 complaints alleging reprisal for whistleblowing under the 1989 act. Of these, 380 were OAAs,

and 185 were IRAs. MSPB settled the dispute or reversed the agency's actions in favor of the employees in 188 (33.3 percent) of the 565 complaints. For 213 complaints (28 OAAs initially filed with OSC and 185 IRAs) that were closed by OSC, MSPB settled or reversed the agency's action in 75 (35.2 percent) of the complaints. Table I.4 shows the details of the complaints filed and resolved at MSPB.

Table I.4: MSPB's Closed Complaints Under the Whistleblower Protection Act of 1989, July 9, 1989, Through September 30, 1991

	Complaints		
Type of action	**Total**	**Settled**	**Reversed actions**
IRA			
Closed at OSC	175	52	5
Past 120 days at OSC	10	5	0
Subtotal	**185**	**57**	**5**
OAA			
Started at MSPB	352	106	7
Started at OSC	28	10	3
Subtotal	**380**	**116**	**10**
Totals	**565**	**173**	**15**

Source: MSPB.

According to an MSPB official, there are two primary reasons for the high percentages of settlements and reversals. First, the official said that MSPB trains its employees on finding alternative ways of informally resolving disputes, and MSPB emphasizes settling disputes rather than determining who is right. Second, he said that MSPB is the final place to resolve disputes, unless one of the parties chooses to pursue the case in the United States Court of Appeals for the Federal Circuit. Therefore, both parties may be more willing to come to a resolution rather than pursue the dispute any further.

Comments From the Office of Special Counsel

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The Special Counsel

September 4, 1992

Bernard L. Ungar
Director
Federal Human Resource Management Issues
General Government Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Ungar:

Thank you for providing the Office of Special Counsel (OSC) an opportunity to review the draft report entitled "Whistleblower Protection: Proving Whistleblower Reprisal Remains Difficult." We would like to offer a few observations and comments to correct what appear to be misunderstandings of certain matters regarding the OSC's evaluation and processing of whistleblower reprisal complaints.

See comment 1.

See comment 2.

The overall conclusion of the draft report is that despite passage of the Whistleblower Protection Act (WPA) of 1989, proof of whistleblower reprisal remains difficult. A corollary to this conclusion is the implication that federal employees alleging reprisal to the OSC should be prevailing in greater numbers, and that they are not. The analysis supporting these conclusions, however, appears to have proceeded, in part, from the faulty premise that all complaints of reprisal submitted to the OSC constitute legally valid claims. This analytical error is amply demonstrated by reference to Table I.3 which shows that of the 406 OSC matters identified but not reviewed by the GAO, 141 matters (35 percent) were closed because of insufficient evidence that the complainants had ever engaged in any whistleblowing in the first instance. It seems illogical to include data relating to non-whistleblowers to establish that genuine whistleblowers have difficult evidentiary burdens. Similarly, 86 of the 406 matters (21 percent) were closed because of insufficient evidence that the complainants had been subjected to a personnel action as defined in 5 U.S.C. § 2302(a)(2), another critical jurisdictional element. In these matters where no personnel action has occurred, it is conceptually impossible for an employee to prevail, except in those instances when an employee is alleging the threat of a personnel action.

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See comment 3.

This error may have resulted from the GAO's misunderstanding of what is meant by our use of the term "insufficient evidence." The OSC uses this term, for example, to close a matter during initial review when it becomes apparent that the evidence is insufficient as a matter of law. Thus, the term will also be used in a situation when there is no evidence to satisfy a jurisdictional requirement, or to prove an element of the claimed offense itself. This is why this term has been used to close a matter when the complainant clearly did not engage in whistleblowing, or did not suffer any personnel action as an act of reprisal. It would be a mistake to infer that a matter closed by the OSC on the grounds of insufficient evidence represented a "close call" by this agency. Matters involving "close calls" are always referred to the OSC's Investigation Division.

See comment 4.

The draft report recognizes that the OSC is in fact obtaining greater numbers of corrective actions since the enactment of the WPA, but dismisses this achievement as not particularly significant since the number of corrective actions has remained proportionate to the total volume of complaints filed. The analytical error here is manifest since the total volume of complaints filed would include, for example, matters erroneously filed with the OSC, claims of reprisal erroneously made, or reprisal claims filed in an attempt to shield the complainant from the consequences of demonstrated poor performance or misconduct. These are specifically the types of matters the Congress has repeatedly stated were never intended to be implicated in whistleblower protection. Why, then, should any number which obviously includes such matters be considered in determining the effectiveness of whistleblower protection?

See comment 5.

A more useful perspective from which to view the effectiveness of the WPA would be to examine the percentage of cases referred to the OSC's Investigation Division that ultimately resulted in corrective action, since these are the matters which are at least facially valid. We believe that this would be a more precise assay of the WPA, and reference to the GAO's data, contained in Table I.1, provides this perspective. Since enactment of the WPA, during the years 1990, 1991, and three-fourths of 1992, the OSC has obtained corrective action in 35 percent of the matters referred for investigation, i.e., those matters having at least facial validity as a claim of reprisal. In the three years preceding the enactment of the WPA (1987, 1988 and 1989), the corresponding percentage was only 11 percent. Thus, these numbers demonstrate a three-fold increase in corrective actions, and provide a more accurate reflection of the impact of the WPA on the OSC's enforcement efforts.

Now on p. 4.
See comment 6.

As a final comment, the draft report states on page seven that "[a]bout one-third of those employees appealing to MSPB after going through OSC for

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Now on pp. 14 and 15.

assistance are getting relief, either through settlements or reversals of adverse personnel actions." A more detailed, but similar observation is made beginning on page 20 of the draft report to and including page 22. To the casual reader, the import of this and similar statements could be that the OSC has been "wrong" in deciding not to pursue about one-third of the whistleblower reprisal matters it has reviewed. Nothing could be further from the truth.

Now on p. 15.

On the basis of the data which the GAO received from the MSPB, and which is set out in Table I.4 on page 22 of the draft report, the MSPB, during the period July 9, 1989 to September 30, 1991, found reprisal for whistleblowing pursuant to a final decision and order in only eight matters which had been previously closed by the OSC, out of a total of 213 matters. Stated another way, the OSC's determinations that no reprisal for whistleblowing could be legally established were confirmed in over 96 percent of the matters filed with and fully adjudicated by the MSPB. This is an enviable record for any federal investigative and prosecutive agency, and reflects favorably on the quality and professionalism of the OSC's staff. Given this record, the statement quoted above, and others, could cause readers to draw conclusions concerning the OSC's investigative and legal review procedures completely unsupported by the actual facts. To be fair and accurate, the very small number of actual disagreements between the OSC and the MSPB on the merits of whistleblower reprisal claims should be noted in the narrative of the draft report, separate from the discussion of the vastly larger number of agency/employee settlements to which the OSC is never a party.

We trust that these comments will be helpful to you in putting your report in final form. If we can provide any additional information, please do not hesitate to call me.

Sincerely,

Kathleen Day Koch

Kathleen Day Koch

The following are GAO's comments on OSC's September 4, 1992, letter.

GAO Comments

1. Throughout its comments, OSC indicated that it is our belief that reprisal occurred but could not be proven. This is not our belief, and we revised the report title and made several other changes to avoid this implication. In the vast majority of the cases, we acknowledge that the evidence accumulated by OSC was inconclusive as to whether reprisal occurred.

2. We did not say or mean to imply that all complaints filed by employees constitute legally valid claims. Rather, the data showed that for most complaints insufficient evidence was available for OSC to determine whether the claims were valid. Specifically, table I.3 shows that of the 406 complaints, 303 (75 percent) were closed due to insufficient evidence. Further, OSC stated in its letter that because the alleged protected disclosures (35 percent) and personnel actions (21 percent) could not be proven or were disproven, certain complaints (matters) were closed. As our note to table I.3 indicates, complaints sometimes contain more than one allegation. Moreover, an allegation may be disallowed for any of the four reasons cited in table I.1, or for a combination of reasons. OSC incorrectly refers to 141 matters (complaints) closed because of insufficient evidence that the complainants had ever engaged in any whistleblowing in the first instance. The 141 in table I.3 refers to the number of times OSC cited this as one reason for disallowing an allegation. Thus, the 141 cannot be equated with 141 matters (complaints) closed. Similarly, the 86 in table I.3 does not refer to 86 matters.

3. We have used the term "insufficient evidence" as used by OSC in recording and reporting data in its matters reporting system. As we used the term, it means that OSC was not able to develop enough evidence to determine whether one or more of the required elements for proving whistleblower reprisal existed. When OSC is able to develop enough evidence to disprove a complaint, data on such complaints are recorded and reported separately.

4. We agree with OSC that all complaints of reprisal submitted to OSC do not constitute valid claims of reprisal. However, OSC could not quantify the erroneous claims. Because we were not able to quantify the erroneous complaints, either before or after the 1989 act, we used available OSC data in our analyses to determine the relative changes between the two periods.

5. We do not agree with OSC that comparing the corrective actions to cases referred to the Investigation Division is any more useful for viewing the effectiveness of the Whistleblower Protection Act of 1989. OSC's perspective ignores its own decisions during the initial screening process to not pursue most of the reprisal complaints filed by federal employees. We acknowledge, however, that it is another way to characterize how well OSC is handling its caseload. However, OSC did not accurately calculate the change in corrective actions before and after the 1989 act when compared to referrals for investigation. In its analysis, OSC combined data on complaints processed under the old whistleblower statute with data on complaints processed under the 1989 act. This combination produced a much higher percentage of corrective actions than was actually the case. Specifically, OSC used numbers for specific fiscal years indicated in table I.1 to compute a three-fold increase, from 11 percent to 35 percent, in corrective actions after the 1989 act. OSC should have used 43 corrective actions for 183 referrals before the act (23.5 percent) and 94 corrective actions for 346 referrals after the act (27.2 percent), a 3.7 percentage point increase. Because of OSC's interpretation of the data in table I.1, we added a clarifying footnote.

6. OSC is correct, as we stated in table I.4, that MSPB had reversed the agency's action against the employee in 8 of 213 complaints that first went to OSC. A much larger number of complaints was settled between agencies and employees after employees unsuccessfully complained to OSC and then appealed to MSPB. Further, we are not questioning the eight reversals at MSPB or the quality and professionalism of OSC's staff. In the objective, scope, and methodology section of this report, we stated that we did not review OSC or MSPB files to determine the adequacy of their investigations or the appropriateness of the disposition of the cases. Although we do not believe that our presentation of the data on employees who get relief from MSPB either through settlements or reversals of adverse personnel actions is misleading, we added clarifying language in the report. Just as OSC counts settlements in its corrective actions, the cases MSPB settled should be counted to arrive at a fair assessment of the relief employees are obtaining by going to MSPB and the effect of this added protection provided by the 1989 act.

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