CHAPTER 3
CLAIMS OF REPRISAL FOR WHISTLEBLOWING

Before turning to a detailed review of the damages provisions in the WPA and the WPEA, we do a brief refresher on claims of whistlebower reprisal in IRAs (individual right of action appeals; *see* 5 USC 1221) and in OAAs (otherwise appealable actions). For a more detailed, comprehensive, and thorough review see Fowler and Vitaro's, *A Guide to the Whistleblower Protection Act & Whistleblower Protection Enhancement Act*, 3rd ed. (Dewey Publications).

I. OAAS AND IRAS, BRIEFLY

OAAs involve personnel actions that are directly appealable to the Board, that is, a personnel action that is within the Board's appellate jurisdiction. Appealable actions are listed in 5 CFR 1201.3, namely, "[r]emovals…reductions in grade or pay, suspension for more than 14 days,…an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511-7514; 5 CFR part 752, subparts C and D)." 5 CFR § 1201.3(a)(1); *see also* 5 CFR 1201.56(b). For example, an employee appeals his removal to the Board and, as pertinent to this text, raises whistleblower reprisal as an affirmative defense. If the affirmative defense is proven, the employee's removal (regardless of its merits) is void and an addendum proceeding for compensatory damages and fees will probably ensue.

Covered "personnel actions" for purposes of an IRA, listed at 5 USC 2302(a)(2)(A) are these:

> (A) "personnel action" means—
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> (i) an appointment;
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> (ii) a promotion;
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> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
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> (iv) a detail, transfer, or reassignment;
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> (v) a reinstatement;
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> (vi) a restoration;
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> (vii) a reemployment;
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> (viii) a performance evaluation under chapter 43 of this title;
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> (ix) 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
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> in this subparagraph;
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> (x) a decision to order psychiatric testing or examination;
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> (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and
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> (xii) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31.

5 USC section 1221(a) sets out the statutory basis for the IRA; subsection (b) makes clear that an employee with an OAA has the election to appeal directly to the Board or to first seek corrective action from OSC.

> (a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), *an employee, former employee, or applicant* for employment may, with respect to any *personnel action* taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section (b)(9)(A)(i),(B), (C), or (D), seek corrective action from the Merit Systems Protection Board.
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> (b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

See Appendix A.

Going further, 5 CFR 1209(b) states:

> *Appeals authorized*. The Board exercises jurisdiction over:
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> (1) *Individual right of action (IRA) appeals*. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing or other protected activity. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

A few threshold points about IRAs are helpful. An IRA may only be filed with the Board after the employee has "exhausted" at OSC. This means that the employee must first file with OSC a complaint that identifies a 2302(a)(2)(A) personnel action taken in reprisal for a protected disclosure. The complaint must be sufficiently detailed for OSC to investigate. After 120 days or when OSC ends its investigation (often referred to as a "closeout" letter), the employee may file her IRA with the Board. Note that even employees with a directly appealable action who go first to OSC are usually required to fully exhaust at OSC before filing at the Board. 5 USC 1209.5(a)(1)–(2). 5 USC 1214(a) explains these timelines:

> (3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and—
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> (A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and
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> (ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or
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> (B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

And for another thing (often a critical and counterintuitive point), IRAs, with one exception, are limited to the issue of whistleblower reprisal; all other issues, e.g., due process, the merits, discrimination, mitigation, are excluded. This can apply even where the retaliatory personnel action is directly appealable within the Board's appellate jurisdiction. In other words, most employees have to elect under 5 USC 7121(g), if they can (the personal action would have to be directly appealable) between filing a complaint with OSC or filing an appeal with the Board. If the former is done and then an IRA is filed, the scope of the IRA is limited to the issue of reprisal.

The election between an IRA and a direct appeal should be knowing. *Agoranos v. DOJ*, 119 MSPR 498, 2013 MSPB 41 (2013), is on point. The Board found appellant's election under 5 USC 7121(g) must be knowing and informed; if not, it is not binding. Appellant went to OSC before filing his removal appeal at the Board, but his election was not informed since he had not been properly advised of his rights in the adverse action notices from his agency. Again, going to OSC before going to the Board on an OAA, converts the appeal to a one-affirmative defense appeal. *Corthell v. DHS*, 123 MSPR 417, 2016 MSPB 23 (2016) , explained:

> Under 5 U.S.C. § 7121(g), an appellant who has been subjected to an action appealable to the Board, and who alleges that he has been affected by a prohibited personnel practice other than a claim of discrimination under 5 U.S.C. § 2302(b)(1), may elect one, and only one, of the following remedies: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed under the provisions of a negotiated grievance procedure; or (3) a complaint following the procedures for seeking corrective action from OSC under 5 U.S.C. chapter 12, subchapters II and III. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 14 (2013); see 5 C.F.R. § 1209.2(d)(1).
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> Here, the appellant raised the matter of his alleged involuntary retirement with OSC before proceeding to the Board. IAF, Tab 1. Ordinarily, an individual who first requests corrective action from OSC will be deemed to have made a binding election to proceed in that forum. *Agoranos*, 119 M.S.P.R. 498, ¶ 14; 5 C.F.R. § 1209.2(d). In such a case, the procedures for an IRA appeal apply, even if the contested personnel action would have been directly appealable to the Board. 5 C.F.R. § 1209.2(d)(2). In adjudicating the merits of such an IRA appeal, Board will limit its inquiry to issues listed at 5 U.S.C. § 1221(e), and will not consider affirmative defenses. 5 C.F.R. § 1209.2(c). Thus, if the appellant were to establish in the context of his IRA appeal that his retirement was involuntary, and thus tantamount to a removal, he could not pursue his discrimination claim, and any failure by the agency to provide him constitutional due process would not by itself entitle the appellant to a remedy.

The Federal Circuit held in *Kammunkun v. DOD*, 800 Fed. Appx 916 (Fed. Cir. 2020), held that Board regulation, 5 CFR 1209.2(d), does not apply to supervisors and managers:

> The administrative judge dismissed Ms. Kammunkun's Chapter 75 action because (a) Ms. Kammunkun had previously elected to contest her removal with the Office of Special Counsel and subsequent individual right of action appeal; and (b) the election requirement of 5 C.F.R. § 1209.2(d) prevented Ms. Kammunkun from also challenging her removal via a Chapter 75 action. The administrative judge's decision became the decision of the MSPB.
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> The administrative judge erred in interpreting 5 C.F.R. § 1209.2(d), which applies only to employees, as applying to Ms. Kammunkun, who was a supervisor. Section 1209.2(d) states that, "[u]nder 5 U.S.C. 7121(g)(3), an *employee* who believes he or she was subjected to a covered personnel action in retaliation for whistleblowing or other protected activity" may elect only one of three listed remedies. 5 C.F.R. § 1209.2(d)(1) (emphasis added). An "employee" for purposes of 5 U.S.C. § 7121(g)(3) is defined by 5 U.S.C. § 7103(a)(2), which specifically excludes "supervisor[s]." It is undisputed that Ms. Kammunkun was a supervisor. Pet'r's Br. 3; Resp't's Br. 1. Accordingly, the election requirement of § 1209.2 does not apply to Ms. Kammunkun.

II. THE BURDENS, ANALYTICS, ELEMENTS IN A WHISTLEBLOWER REPRISAL CLAIM

An appellant has the burden to prove, in an IRA or in an affirmative defense, reprisal for whistleblowing. The whistleblower must prove she made a (b)(8) protected disclosure and that disclosure was a contributing factor in a retaliatory personnel action listed above under 2302(a)(2)(A).

A. A PROTECTED DISCLOSURE

Protected disclosures are defined at 5 USC 2302(b)(8):

(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 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;

Each of these classifications of wrongdoing has its own nuances, but a key point: the disclosure does not have to be correct; the test is did the employee or applicant have a reasonable belief that the disclosure evidenced wrongdoing; put differently, "could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence" wrongdoing as defined in 5 USC 2302(b)(8). *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). The standard is objective, not subjective.

B. PROTECTED ACTIVITY

IRAs and damages provisions now encompass 2302(b)(9)(A)(i) and (B), (C) and (D) protected activity claims.:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

…

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for

employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8); and

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law.

The elements and burdens in a (b)(9) case are found in the 5 USC 1221(e) framework (i.e., contributing factor and clear and convincing evidence). *Alarid v. Dept. of Army*, 122 MSPR 600, 2015 MSPB 50 (2015), *supra* and *Elder v. Dept. of Air Force*, 124 MSPR 12, 2016 MSPB 41 (2016) (Board made clear that the standard set forth in *Warren v. Dept. of Army*, 804 F.2d 654 (Fed. Cir. 1986), is inapplicable to claims alleging reprisal for filing a Board appeal under 5 USC 2302(b)(9)(A)(i); instead, the reprisal claim must be analyzed under the burden-shifting standard set forth in 5 USC 1221(e): the appellant first must establish by preponderant evidence that he engaged in protected activity that was a contributing factor in the personnel action; if he does, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity).

We return for the moment to (b)(8) reprisal claims and say that for the most part it is fairly easy to identify and prove a protected disclosure. Causation, that is, that the protected disclosure was a contributing factor (that is reprisal) in a covered personnel action, gets a little more tricky, though not difficult.

C. CAUSATION: THE CONNECTION TO A RETALIATORY PERSONNEL ACTION

The appellant must prove that the disclosure (or protected activity) contributed to the agency taking, failing to take, or threatening to take a covered personnel action. Restated, the agency took, failed to take, or threatened to take a "personnel action" and protected disclosure or activity was a "contributing factor" in the personnel action. Compare to other analytical models on causation, contributing factor is a relaxed standard. Contributing factor "means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. DOJ*, 2 F.3d 1137 (Fed. Cir. 1993).

Causation is usually proven by the knowledge/timing standard (as Congress sought to make clear in both the WPA of 1989 and in the 1994 amendments). *Mason v. DHS*, 116 MSPR 135, 2011 MSPB 39 (2011); *Wadhwa v. VA*, 110 MSPR 615, 2009 MSPB 33, *aff'd*, 353 Fed. Appx. 435 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 2084 (2010); *Musselman v. Dept. of Army*, DA-1221-14-0499-W-3 (NP 6/17/2016) ("An appellant can establish contributing factor by showing that the official responsible for the personnel action knew of the protected activity 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.").

The knowledge/timing factor test is codified at 5 USC 1221(e):

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section