

# ARTICLES

## WHISTLEBLOWER PROTECTION AND THE OFFICE OF SPECIAL COUNSEL: THE DEVELOPMENT OF REPRISAL LAW IN THE 1980s

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## INTRODUCTION

In 1979, Congress established the Office of the Special Counsel (OSC) under the Civil Service Reform Act of 1978 (CSRA or Act)<sup>1</sup> as an independent investigative and prosecutive arm of the United States Merit Systems Protection Board (MSPB or Board).<sup>2</sup> The CSRA enumerated eleven specific prohibited personnel practices<sup>3</sup> and empowered OSC to investigate and prosecute these prohibited practices for corrective and disciplinary action.<sup>4</sup> Without doubt, the protection of employees from reprisal for protected activity, in particular "whistleblowing," was a primary purpose of the Act.<sup>5</sup> Although Congress intended each of the agencies to protect the merit system<sup>6</sup> against prohibited personnel practices, it made OSC

1. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.) (effective Jan. 11, 1979). The CSRA represented the first comprehensive reform of the federal civil service system since the Pendleton Act of 1883. See *Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150, 153-54 (D.C. Cir. 1982) (discussing shortcomings of Pendleton Act and events leading to enactment of CSRA).

2. 5 U.S.C. § 1206 (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1212 (West Supp. 1990)).

3. The prohibited personnel practices are set forth at 5 U.S.C. § 2302(b)(1)-(11) (1988), *amended by* Whistleblower Protection Act of 1989, § 4, 103 Stat. 32 (current version at 5 U.S.C.A. § 2302(b)(1)-(11) (West Supp. 1990)). They cover unlawful discrimination; soliciting or considering recommendations not based on personal knowledge; coercing political activity; reprisals for refusing to engage in political activity; obstructing the right to compete for employment; influencing applicants to withdraw from competition; granting unauthorized preferences; nepotism; reprisals for whistleblowing and exercising appeal rights; discrimination for conduct not adversely affecting performance; and violations of laws, rules, or regulations which directly concern merit system principles. *Id.*

4. 5 U.S.C. § 1206(b)(4)(A)-(E) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(13), 103 Stat. 19 (current version at 5 U.S.C.A. § 1212(a)(2)(A)-(B) (West Supp. 1990)). In addition, OSC enforces provisions of the Hatch Act governing employee participation in partisan political activities, serves as a secure channel through which employees may disclose waste, fraud, and abuse in the federal government, and investigates allegations of other personnel activities prohibited by civil service law, rule or regulation. *Id.* § 1206(b)(2)-(3) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(13), 103 Stat. 19 (current version at 5 U.S.C.A. § 1212(a)(3)-(5) (West Supp. 1990)).

5. *In re Frazier*, 1 M.S.P.R. 163, 165 n.1 (1979); see *infra* note 42 and accompanying text (noting statutory definition of protected whistleblowing activities). According to Senator Patrick Leahy's ground-breaking report on federal whistleblowers, the term whistleblower was coined as "a catch-all word used to describe almost any case involving a federal employee who encounters career problems after bringing information to public light." SENATE COMM. ON GOV'T AFFAIRS, THE WHISTLEBLOWERS: A REPORT ON FEDERAL EMPLOYEES WHO DISCLOSE ACTS OF GOVERNMENTAL WASTE, ABUSE, AND CORRUPTION, 95th Cong., 2d Sess. 10 (Comm. Print 1978) [hereinafter *Leahy Report*]. The Senate committee report accompanying the Civil Service Reform Act defined whistleblowers as federal employees "who disclose illegal or improper government activities." S. REP. NO. 969, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2723, 2730 [hereinafter S. REP. NO. 969].

6. The merit system or merit employment system refers to those civil service laws, rules, and regulations that provide for open competitive examinations to test and evaluate the relative merit and fitness of applicants for positions in the competitive service consistent with the basic principle that appointments to and personnel actions within the civil service be based solely on merit and fitness. See 5 C.F.R. §§ 300.102, 330.101 (1990) (noting policy that competitive hiring practices be based on merit). Existing merit system safeguards ensure that appointments and other personnel decisions are made for proper and lawful reasons and

the system's chief enforcer.<sup>7</sup>

The impetus for statutory protection for whistleblowers derived from a variety of developments, experiences, and events. These include the changing nature of federal government,<sup>8</sup> emerging first amendment doctrines concerning the public employee,<sup>9</sup> a growing

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protect against the improper use or abuse of personnel authorities which may tend to undermine the integrity of the merit system. See 124 CONG. REC. 27,538 (1978) (noting that thrust of CSRA is to assure that federal employee's career prospects are directly tied to performance and to ensure that employee's rights are protected) (statement of Sen. A. Ribicoff). After several unsuccessful attempts at reform, the merit system was introduced to the federal civil service in 1883 by the Pendleton Act of 1883, ch. 27, 22 Stat. 403, to create politically neutral personnel management and to replace a spoils system which had become ingrained in the fabric of American politics. 124 CONG. REC. 27,543-44 (statement of Sen. T. Stevens) (1978). Among the sweeping changes ushered in by the Pendleton Act was the establishment of a three-member, bipartisan Civil Service Commission to provide for competitive examinations, ensure political neutrality, and condition job tenure on actual performance. *Id.* at 27,544.

7. 5 U.S.C. § 1206 (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1212 (West Supp. 1990)); 5 U.S.C. § 2302(c) (1988); see *Special Counsel v. Russell*, 32 M.S.P.R. 115, 120 (1987) (noting that OSC could proceed against employee for sexual harassment despite fact agency heads also had been given authority).

8. For a general discussion of the factors that engendered whistleblower protection in the Act, see Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 616-18 [hereinafter Vaughn, *Statutory Protection*]. Perhaps nowhere was the justification for statutory whistleblower protection made more apparent than in the seven-month study of whistleblowers and whistleblower problems conducted by Senator Leahy and his staff in 1977. The *Leahy Report* identified a number of different justifications for whistleblower protection. The report accepted as its premise the goal of greater efficiency and the elimination of waste, misfeasance, and malfeasance in government. *Leahy Report, supra* note 5, at 10. The report recognized, however, that as the federal government grew "larger and more complex, the opportunities for inefficiency, corruption, mismanagement, abuse of power, and other inappropriate activities bec[a]me more frequent." *Id.* The report found that when employees revealed incidents of such activities and conditions, the bureaucracy tended to react not to the revelations themselves but to the employee who had revealed them. *Id.* at 12. It concluded that in the modern bureaucracies, certain built-in incentives naturally produced this phenomenon. The report stated:

The acid test for an agency is whether it is recognized as a smooth running organization providing a useful public service. As such, federal employees are not encouraged to be on the lookout for waste or inefficiency, as are their private sector counterparts [whose motivation is to maximize profit]. The key to success in the bureaucracy is to be quiet, to do competent work, and to move slowly up the hierarchy.

An employee who makes known instances of governmental waste, misfeasance, or malfeasance upsets the standard operating procedure. His or her questioning of agency patterns and practices may upset the cohesion a large organization needs in order to operate. Any evidence of wrongdoing hurts the agency's image, reflecting poorly upon the officials in charge and possibly jeopardizing its appropriations.

*Id.* at 11-12. In addition, the report noted that concurrent with the growth in the federal bureaucracy, policy makers in the executive agencies were becoming further removed from the information readily accessible to the "policy implementors," those "front line" employees providing government services to the public. *Id.* at 7. This phenomenon, the report concluded, made it even more imperative that lines of "vertical communication" be kept open and protected from interference, which the report found often had not been the case. *Id.* at 16-21.

9. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 563-81 (1970) (discussing emerging first amendment protection for federal employees during 1960s); see also Vaughn, *Statutory Protection, supra* note 8, at 637-41 (discussing first amendment and CRSA whistleblower protections); *Leahy Report, supra* note 5, at 40-47 (discussing first amendment

public distrust of government,<sup>10</sup> increasing attention to the plight of the federal whistleblower,<sup>11</sup> the ineffectiveness of existing remedies and protection mechanisms to protect whistleblowing,<sup>12</sup> the enactment of the federal Freedom of Information Act,<sup>13</sup> and widespread political support for whistleblower reform.<sup>14</sup> In response to these

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and weaknesses of protection that it provides to federal whistleblowers). In 1968, the Supreme Court decided that the first amendment did protect the speech of government employees, rejecting out of hand the notion that government employment was an unprotected privilege. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968); see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (discussing development of first amendment protections for government employees prior to *Pickering* decision). Prior to the CSRA, the first amendment right to free speech and right to petition in whistleblower or grievance-type activities, as delineated in the Supreme Court's decisions in *Pickering* and *New York Times v. Sullivan*, 376 U.S. 254 (1964), figured prominently in judicial decisions. See, e.g., *Burkett v. United States*, 402 F.2d 1002, 1007-08 (Ct. Cl. 1968) (citing *Pickering* and *New York Times* and discussing constitutional protection of free speech); *Swaaley v. United States*, 376 F.2d 857, 863 (Ct. Cl. 1967) (holding petition by federal employee to be covered by first amendment); cf. *Meehan v. Macy*, 392 F.2d 822, 831-35 (D.C. Cir. 1968) (balancing first amendment protection with disharmony produced by unrestrained public speech of government employee), *vacated on other grounds*, 425 F.2d 472 (D.C. Cir. 1969).

10. The Vietnam War and the Watergate scandal contributed to a public mind set that was suspicious of government, accustomed to the expression of dissent, and desirous of more controls to prevent government wrongdoing. Vaughn, *Statutory Protection*, *supra* note 8, at 618.

11. The *Leahy Report* examined 70 whistleblower cases and provided extensive documentation on 15 sampled whistleblower experiences, an unprecedented effort in this area. *Leahy Report*, *supra* note 5, at v. In addition, the case of Ernest Fitzgerald, a civilian employee who in 1968 had revealed to Congress mismanagement and billion-dollar cost overruns in a defense contractor's development of the C5A transport program, had attained public notoriety not only for the extent of Fitzgerald's disclosures, but also for the extent to which the United States Air Force retaliated against him for those disclosures. *Id.* at 6. Fitzgerald brought suit against the United States Air Force for damages claiming unlawful discharge. The case ultimately reached the Supreme Court where it was the subject of two precedent setting decisions on executive immunity. See *Nixon v. Fitzgerald*, 457 U.S. 739, 749 (1982) (holding President has absolute immunity from damages arising from his official acts); *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (holding presidential aides enjoy only qualified immunity from damage suits).

12. The *Leahy Report* documented numerous cases in which the law and the Civil Service Commission were inadequate to protect whistleblowers from reprisal and the threat of reprisal. *Id.* at 36-47. The report found that whistleblowers had been "fired, transferred, reprimanded, denied promotions, RIFFED, . . . harassed through the misuse of formal discipline procedures," and subjected to informal harassment "designed to neutralize [them]." *Id.* at 1. It found that the employee grievance procedures, rather than helping whistleblowers, had served "to significantly weaken their position[s]" and had become "actually a frustrating and biased exercise." *Id.* at 3. It further found that the Commission had been ineffective in protecting whistleblowers and that Congress had not offered real assistance to these employees. *Id.* at 4. Finally, the report concluded that the courts had been "reluctant to play an active role in the whistleblower problem." It stated that "[a]lthough statutes do exist which might be interpreted as applicable to whistleblower cases, the Courts appear to be waiting for Congress and the Executive Branch to resolve this problem." *Id.*

13. See Vaughn, *Statutory Protection*, *supra* note 8, at 617-18 (concluding that passage of Freedom of Information Act in 1976 legitimized notion that federal documents constituted public information which public had legitimate right to know, thus vindicating whistleblowers on same premise).

14. See *id.* at 618-20 (noting that whistleblower protection was supported by Carter Administration—in particular that as candidate, Carter had promised to introduce protections for whistleblowers if elected—and that Act was implemented in Congress "without significant dissent"). "The ideological breadth of the coalition supporting whistleblower protection,"

converging forces, the 95th Congress, for the first time, adopted comprehensive legislation protecting specifically identified employee speech and related activity from reprisal.<sup>15</sup> Although the administration's initial whistleblower protection proposal called only for the protection of allegations of violations of law, rules, or regulations, Congress expanded whistleblowing activities to include disclosures which evidenced mismanagement, a gross waste of funds, an abuse of authority, or a specific danger to public health and safety.<sup>16</sup>

In addition to the protection given to whistleblowing activities, the CSRA protected employees from reprisal for the exercise of any lawful appeal right.<sup>17</sup> During the first decade under the Act, the two

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wrote Vaughn, "indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing." *Id.* at 619-20.

15. The CSRA also included protections for all the rights of the first amendment which include the freedoms of speech, expression, and religion, and the right to petition the government for grievances. 5 U.S.C. § 2301(b)(2) (1988); 5 U.S.C. § 2302(b)(11) (1988), *amended by Whistleblower Protection Act of 1989*, § 4, 103 Stat. 32 (current version at 5 U.S.C.A. § 2302 (West Supp. 1990)). Of course, these constitutionally protected rights predated the CSRA and carried with them similar guarantees against reprisal. *See Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1967) (holding that teacher's statement critical of school board's spending program could not form basis for dismissal from public employment).

16. The relevant portion of the Act provides:

(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—

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) 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) a disclosure to the Special Counsel of the Merit Systems Protection Board, 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) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8), *amended by Whistleblower Protection Act of 1989*, § 4, 103 Stat. 32 (current version at 5 U.S.C.A. § 2302 (West Supp. 1990)).

17. 5 U.S.C. § 2302(b)(9) (1988), *amended by Whistleblower Protection Act of 1989*, § 4, 103 Stat. 32 (current version at 5 U.S.C.A. § 2302(b)(9) (West Supp. 1990)). The Act provides in relevant part:

(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 any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation.

*Id.* § 2302(b)(9), *amended by Whistleblower Protection Act of 1989*, 103 Stat. 32 (current version at 5 U.S.C.A. § 2302(b)(9)(A) (West Supp. 1990)).

protected activities, whistleblowing and the exercise of a lawful appeal right, were the mainstay of the Special Counsel's enforcement program, with whistleblower protection occupying the office's highest priority.<sup>18</sup>

To accomplish the goal of enforcing the CSRA's protections against prohibited personnel practices, Congress provided OSC with investigative and prosecutive authority and authorized the United States Merit Systems Protection Board to hear and adjudicate such prosecutions.<sup>19</sup>

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18. See M. Wieseman, *Remarks of the Special Counsel Before the MSPB Practitioner's Forum*, 87 F.M.S.R. 47, 49 (Nov. 30, 1987). In an audit of the OSC, the Comptroller General of the United States found as of December 1984 that although whistleblower reprisal allegations constituted only 13% of all matters received by OSC, whistleblower reprisal allegations constituted 42% of the cases under active investigation. COMPTROLLER GENERAL OF THE UNITED STATES, *WHISTLEBLOWER COMPLAINTS RARELY QUALIFY FOR OFFICE OF THE SPECIAL COUNSEL PROTECTION 18* (1985) [hereinafter *WHISTLEBLOWER COMPLAINTS*]. Furthermore, the General Accounting Office auditors found that although OSC had referred all new matters after initial intake and inquiry for some fuller investigation at a rate of only 8%, the agency had referred a disproportionate 41% of all whistleblower reprisal allegations for more comprehensive investigation. *Id.* at 20. That OSC employed an initial screening process to identify employee complaints of prohibited personnel practice with potential merit was consistent with Congress' intent that OSC prevent frivolous or unmeritorious cases from clogging the appeals system. *Id.* at 9-10.

19. 5 U.S.C. § 1206(a)(1) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1212(a)(2) (West Supp. 1990)); 5 U.S.C. § 1205(a) (1988), *renumbered and amended by* Whistleblower Protection Act of 1989, § 3(a)(7), 103 Stat. 17 (current version at 5 U.S.C.A. § 1204(a) (West Supp. 1990)). Specifically, the Act provided for both corrective actions and disciplinary actions before the Board. 5 U.S.C. § 1206(c)(1) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. §§ 1212(a)(2)(B), 1214 (West Supp. 1990)); 5 U.S.C. §§ 1206(g), 1207 (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215 (West Supp. 1990)). A corrective action is an administrative proceeding before the MSPB (if the agency has refused to take corrective action upon a request from the Special Counsel) in which OSC reports its findings to the Board and recommends that the Board order an agency to correct the prohibited personnel practice found. 5 U.S.C. § 1206(c)(1) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1214(b)(2) (West Supp. 1990)). A corrective action is remedial in nature and concerns primarily employees or applicants harmed by the violation. Compare 5 U.S.C. § 1206(c)(1) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1214 (West Supp. 1990)) with 5 U.S.C. §§ 1206(g), 1207 (1988) (allowing for disciplinary actions), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. §§ 1212(a)(2)(B), 1215 (West Supp. 1990)). In addition to the authority to request retroactive corrective action for an employee, the Act gave OSC the authority to request the Board to stay temporarily any personnel action pending an OSC investigation where there was reason to believe that a prohibited personnel practice would result or had resulted from a personnel action. *Id.* § 1208, *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1214(b)(1)(A)(i) (West Supp. 1990)). A disciplinary action is also an administrative proceeding before the Board in which OSC seeks to have the Board discipline an employee who has committed a prohibited personnel practice. *Id.* § 1206(g)(1), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215(a)(1) (West Supp. 1990)). Congress established a disciplinary procedure which affords the charged employee with due process rights consistent with the Administrative Procedure Act. See *id.* §§ 554, 556-57 (setting out logistics of hearing process under Administrative Procedure Act). An employee charged with a disciplinary complaint by OSC has a right to answer the complaint, representation, a hearing before the MSPB or an administrative law

Since its inception, OSC's role in the enforcement of the CSRA's protections for whistleblowers has been the subject of intense debate, scrutiny, and controversy.<sup>20</sup> Much of the early controversy centered on the perception that OSC had not succeeded before the MSPB in its mission to obtain relief for employees complaining of whistleblower reprisal and sanctions against managers committing reprisals.<sup>21</sup> Contrary to this perception, the record indicates that OSC has tried to develop a body of administrative law—although, as will be discussed, not always successfully—which maximizes protection for federal employees who engage in protected activity, facilitates OSC's ability to bring successful corrective and disciplinary actions when reprisals occur, and upholds the safeguards of the merit system Congress envisioned. This Article analyzes the first ten years of federal reprisal law under the CSRA. The analysis traces the law's development, explores the impact of that development on federal whistleblower protection policy, and describes the OSC's role in the development of this unique body of law. The Article also describes the recent changes in the federal reprisal law that result from the passage of the Whistleblower Protection Act of 1989 (WPA).<sup>22</sup> The Article concludes that although the Whistleblower Protection Act amendments to the CSRA have enhanced protection for federal employees from reprisal, this legislation may have been

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judge appointed by the Board, a transcript of the hearing, a written decision from the Board to be issued at the earliest practical date, and an appeal to the United States court of appeals for the circuit in which the employee resides or is employed at the time of the action. *Id.* § 1207(a), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215(a)(2) (West Supp. 1990)). The Board may impose removal, reduction in grade, debarment from federal employment not to exceed five years, suspension, reprimand, or a civil penalty not to exceed \$1000. *Id.* § 1207(b), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215(a)(3) (West Supp. 1990)). Because of the deterrent effect of its punitive nature, disciplinary actions promote and encourage the protected activity.

20. WHISTLEBLOWER COMPLAINTS, *supra* note 18, at 3-4, 35, 49-50. GAO summarized this controversy in the following terms:

In its 6-year history, OSC has been the object of criticism from federal employee representatives, GAO, and the Congress. OSC has been described as administratively inept, ineffective in prosecuting violations, and of little benefit to federal employee complainants such as whistleblowers alleging management reprisal for their disclosures. As a result, questions have been raised in the Congress as to whether OSC should continue to exist, and if it should, whether alterations are needed in its powers or in its statutory authorization.

*Id.* at 35. After a lengthy investigation, GAO concluded that by 1984 OSC had overcome earlier administrative deficiencies and reported that OSC was effectively handling allegations of reprisal for whistleblowing. *Id.* at 36. In fact, GAO concluded that based on its review of closed files, it "could not disagree with OSC's decision to close these cases." *Id.* at 25.

21. *Id.* at 27 (stating that "[h]istorically, a major focus of the criticism of the Office of the Special Counsel has been that OSC had been unsuccessful in prosecuting complaints of prohibited personnel practices before the Merit Systems Protection Board").

22. Pub. L. No. 101-12, 103 Stat. 16 (effective July 9, 1989) (codified as amended in scattered sections of 5 U.S.C.).

unnecessary had there been greater receptivity to OSC's efforts to shape the law into a reasonable and workable tool for promoting whistleblowing and deterring retaliatory activity in the federal workplace.

### I. *IN RE FRAZIER*: THE BASIC REPRISAL MODEL

The Board's first opportunity to apply the new statutory protections of the CSRA against reprisal came in the case of *In re Frazier*, OSC's first corrective action case.<sup>23</sup> In *Frazier*, four deputy marshals employed by the United States Marshals Service received directed geographic reassignments allegedly in reprisal for whistleblowing and for exercising their lawful appeal rights.<sup>24</sup> After an OSC investigation and an MSPB order temporarily staying the reassignments, OSC moved to halt the reassignments permanently by filing a corrective action with the Board alleging violations of section 2302(b)(8) and (9).<sup>25</sup>

The *Frazier* corrective action was a matter of first impression for the Board. The Board not only had to establish a substantive standard for determining whether the reassignments had violated the statute's proscriptions, it had to define the procedural ground rules

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23. 1 M.S.P.R. 163 (1979).

24. *In re Frazier*, 1 M.S.P.R. 163, 166 (1979). The deputies disclosed information critical of management to two members of Congress and filed or participated in various complaints and grievances concerning race discrimination, work-place harassment, supervisory incompetence, inefficient office procedures, and an incident in which deputies were permitted to play cards and drink alcohol during a morale-building outing on official time, all matters which they reasonably believed evidenced mismanagement and violations of agency regulations. *Id.* at 170-71. The congressional disclosures, which were made after the deputies received no relief through the agency's equal employment opportunity (EEO) and grievance appeal processes, prompted a congressional inquiry to the agency. *Id.* at 171-73. Ray Lora, special assistant to the Director of the Marshals Service, had been sent to the Atlanta office, site of the controversy, to investigate. *Id.* at 172-73. Within a day or two of Lora's investigation, the local United States Marshal, Ronald Angel, recommended to William Hall, Marshals Service Director, that three of the four deputies who had made disclosures be reassigned from the Atlanta office. *Id.* at 173. Angel's recommendation, the deputies alleged, was in reprisal for their disclosures. *Id.* at 166. Hall did not act on Angel's request. *Id.* at 180. Instead, he appointed a management review team to look into the situation at Atlanta and make recommendations to him. *Id.* During the review, the team interviewed each of the complaining deputies and listened to their criticisms. *Id.* at 181. Based on the review, the team concluded, among other things, that there had been a breakdown in communication within the Atlanta Office, that office morale was very low, and that the office was being poorly managed. *Id.* at 181-82. The team made a number of specific recommendations to Director Hall concerning the problems they had discovered, including geographic reassignments for the four whistleblowers and one management official. *Id.* at 182. Hall implemented only the recommendation that the whistleblowers be reassigned. *Id.* at 170. The issue presented was whether Hall or the team members had acted in reprisal for any of the deputies' protected activities. *Id.* at 187.

25. *Id.* at 167.



for the action.<sup>26</sup>

*A. The Corrective Action Provisions of the CSRA*

From the start, OSC took an aggressive, pro-whistleblower stance. In the absence of any statutorily mandated hearing, OSC advocated the adoption of a streamlined dispute-resolution process to be based on the results of OSC's investigation and whatever comments the agency or Office of Personnel Management (OPM) submitted to the Board for consideration under the statute's right-to-comment provision.<sup>27</sup> OSC argued that a full evidentiary hearing was neither required by Congress nor necessary for the Board to determine whether corrective action was appropriate, since the Board had the benefit of the entire fact-finding record of OSC's investigation and the agency's and OPM's comments on the investigation and recommended action.<sup>28</sup>

Nowhere in the 1978 legislation did Congress provide for an evidentiary hearing in cases brought by OSC for corrective action.<sup>29</sup> Congress' only requirement was that the Board give the agency and OPM an opportunity to comment on OSC's findings and recommendations before determining what corrective action was appropriate.<sup>30</sup> Congress' legislative approach in corrective actions was fundamentally different from its approach in disciplinary actions and employee-initiated appeals before the Board. In those procedures, Congress explicitly provided for the right to a hearing.<sup>31</sup> OSC believed it was proposing a procedure that was consistent with congressional intent and would enhance its ability to enforce the law.<sup>32</sup> Such a streamlined process would permit OSC to bring more corrective action cases more quickly, obtain expedited relief for complainants, allocate its limited resources to investigation rather than

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26. *See id.* at 182-200 (discussing standard for determining whether reassignments had violated CSRA).

27. *Id.* at 182. The OSC based its position on 5 U.S.C. § 1206(c)(1)(B), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1214(b)(3) (West Supp. 1990)) and its failure to mention the availability of a hearing. *Id.* at 182-83.

28. *Id.* at 182.

29. *See id.* at 183 (noting lack of specificity of statutory language under which corrective action proceeding is to be conducted).

30. 5 U.S.C. § 1206(c)(1)(B) (1988).

31. *See* 5 U.S.C.A. § 7701 (West Supp. 1990) (providing for hearing); *see also* 5 U.S.C. § 1207 (1988) (providing for hearing), *repealed by* Whistleblowers Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215(a)(2) (West Supp. 1990)).

32. *See* Post-Hearing Brief of the Special Counsel at 5-6, *In re Frazier*, 1 M.S.P.R. 163 (1979) (requiring evidentiary hearing undermines agency willingness to cooperate with OSC and OSC's statutory authority).

litigation, and expand the influence of the office.<sup>33</sup> Under the circumstances, OSC argued, a hearing would only prolong the violation, delay the determination and order for relief, require government resources to be expended needlessly, and duplicate the fact-finding process that OSC had already performed pursuant to its statutory mandate.<sup>34</sup>

In addressing the issue, the Board interpreted the statute's right-to-comment provision as establishing only a minimum requirement.<sup>35</sup> The Board reasoned that it could, in its discretion, permit the agency and OPM an even greater opportunity for persuasion than the statutory right-to-comment requirement.<sup>36</sup> Finding that both OSC and the agency were entitled to a presumption that they were "acting in good faith and according to the law," the Board ordered that a hearing be held to resolve conflicts in testimony.<sup>37</sup> The Board based its ruling on its inherent power under the CSRA to "hear, adjudicate, or provide for the hearing or adjudication, of *all* matters within the jurisdiction of the Board . . . ."<sup>38</sup>

### B. *Reprisal for Whistleblowing*

On the principal issue of whether the Marshals Service had retaliated against the deputies for their disclosures to members of Congress, the Board agreed with OSC on the definition of whistleblowing but resolved the reprisal issue against OSC and the deputies.<sup>39</sup> The OSC contended and the Board agreed that the disclosures, which had prompted the Marshals Service to look into the deputies' situation, were protected under section 2302(b)(8).<sup>40</sup> The agency had argued that the deputies' disclosures were not protected because the deputies had blown the whistle in order to insulate themselves from legitimate disciplinary action.<sup>41</sup> Rejecting the Marshals Service's premise, the Board held that the statute specifically protected disclosures if the discloser "reasonably believes" that his

33. *See id.* at 4-6 (asserting resources of OSC would be "severely strained" were every petition for corrective action to require hearing).

34. *Id.*

35. *See id.* at 183 (noting broad discretion of Board allowed by statute).

36. *See id.* at 183-84 (noting absolute discretion conferred on Board).

37. *In re Frazier*, 1 M.S.P.R. 163, 182-84 (1979).

38. *Id.* 182 (emphasis added). On appeal, the United States Court of Appeals for the District of Columbia affirmed the Board's determination, analogizing the relationship between OSC and the Board to that of a criminal prosecutor and a court. *Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150, 162-63 (D.C. Cir. 1982).

39. *In re Frazier*, 1 M.S.P.R. at 185-90.

40. *Id.* at 186-87.

41. *Id.* at 186.

disclosure evidences one of the subjects identified in the statute.<sup>42</sup> If this condition precedent was satisfied, the Board held, the personal motives of the deputies were not relevant to whether their disclosures were protected.<sup>43</sup> In determining whether disclosures qualified for protection, the Board chose an objective standard of review based on reasonableness, rather than a subjective standard of review based on individual motivation.<sup>44</sup>

Under this standard, the Board found the deputies' disclosures to be reasonably based and, therefore, protected.<sup>45</sup> On the merits of the reprisal allegation, however, it held that OSC had failed to establish that Director Hall, the official who ordered the reassignments, or that the management review team, which recommended the action, had actual or constructive knowledge of the deputies' disclosures to their elected representatives in Congress.<sup>46</sup> In making these factual findings, the Board rejected the testimony of the deputies who claimed that they had discussed their disclosures with the review team.<sup>47</sup> The Board also declined to infer knowledge from circumstantial evidence that other management officials, including the United States Marshal in Atlanta, had knowledge of the

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42. *Id.* The relevant sections of the Act identify the following subjects as within the ambit of protected whistleblowing: "(i) a violation of any law, rule or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety." 5 U.S.C.A. § 2302(b)(8) (West Supp. 1990).

43. *Frazier*, 1 M.S.P.R. at 187.

44. *Id.* The Board wrote:

It is true, as the Marshals Service has emphasized, that Congress has expressed great concern that the whistleblower provisions not be abused by dissident employees who have no legitimate basis for disclosures, but rather are bent upon disruption or upon creating smoke screens to obscure their own wrongdoing. This, however, does not mean that there can never be an element of self-interest in whistleblowing activities protected by section 2302(b)(8). Indeed, since the matters complained of by the deputies in this case directly affect the deputies themselves, their interest is quite consonant with the public interest in improving the management and operations of the Marshals Service.

*Id.* The Board's decision left open the question of whether reasonably based disclosures might not be protected where the discloser's intent in making the disclosure was not consonant with public interest. Both the Board and the Court of Appeals for the Federal Circuit would later revisit this issue in employee-appeal cases with mixed results. See *infra* notes 150, 207-10, 223-27 and accompanying text (discussing seven different cases in which discloser's purpose was not exclusively public interest).

45. *In re Frazier*, 1 M.S.P.R. at 187.

46. *Id.* at 189. The Board considered OSC's argument that it apply the "small plant" doctrine, as used by the National Labor Relations Board in certain unfair labor practice cases, to infer knowledge on the part of Director Hall. *Id.*; see *A.T. Krajewski Mfg. v. NLRB*, 413 F.2d 673, 676 (1st Cir. 1969) (finding inferences from circumstantial evidence as to employer's knowledge permissible when employee engaged in in-plant activity and plant is relatively small). The Board concluded, however, that the "small plant" doctrine was not applicable to the facts in *Frazier* because the work force for which Director Hall was responsible was not small because it included 1,400 employees nationwide. *In re Frazier*, 1 M.S.P.R. at 189.

47. *Frazier* at 188.

deputies' disclosures.<sup>48</sup> Instead, the Board found credible the testimony of Hall and the team members who had denied any knowledge of the deputies' whistleblowing to members of Congress.<sup>49</sup> Finding the requisite element of knowledge to be missing, the Board held that there could be no reprisal for whistleblowing.<sup>50</sup>

Because lack of actual or constructive knowledge is fatal to an allegation of whistleblower reprisal, the Board could have based its finding solely on the absence of this element of proof. However, the Board chose instead to analyze the merits of the agency's justification for the reassignments in order to show further that the reassignments had not been made in reprisal for the deputies' disclosures.<sup>51</sup> After validating the agency's finding that the deputies were "hostile, frustrated, disruptive and demonstrably unable to function effectively in Atlanta," the Board concluded that the management team's recommendations to reassign the deputies were "based upon sound management considerations" and made "to accommodate the competing needs of the dissident deputies and those of the Atlanta office."<sup>52</sup>

Based on the Board's findings that knowledge was lacking and that the reassignment actions had been based on legitimate managerial decisions, the Board delayed discussion of the broader issues concerning what quantum of proof would be required to establish retaliatory motivation and how the burden of proof would be allocated in reprisal cases until its evaluation of OSC's alternative theory for prosecution under section 2302(b)(9).<sup>53</sup>

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48. *Id.*

49. *Id.*

50. *Id.* at 189.

51. *Id.* at 190.

52. *Id.* In reaching its conclusion, the Board credited the testimony of three team members whose assessments of the deputies were summarized in the opinion:

The team determined that four deputies, Frazier, Morris, Reilly and Love, were totally alienated and distrustful of district management and had become so embittered that they could no longer present rational arguments to support their concerns. Moreover, in their testimony before the Board, the team members reiterated some of their findings and the bases upon which they were reached. Gary Mead testified that deputy Frazier was "paranoid" with respect to district management, and was unable to support his general complaints. Mead testified that Love was extremely contemptuous of the district management staff to whom he referred in extremely crude terms. Russell testified that Deputy Reilly was "totally polarized" and made unfounded allegations that district management took kickbacks from airlines used to transport prisoners.

*Id.* at 181-82.

53. Section 2302(b)(9) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation.

C. *Reprisal for the Exercise of Lawful Appeal Rights*

In *Frazier*, OSC had proposed that for reprisal cases under sections 2302(b)(8) and (b)(9), the Board adopt the Supreme Court's model for allocating burdens of proof used in discrimination cases under Title VII of the Civil Rights Act of 1964.<sup>54</sup> The Court's discrimination model placed the initial burden on the party seeking relief to establish a prima facie case of discrimination.<sup>55</sup> Thereafter, the burden shifted to the employer to establish a nondiscriminatory justification for the action.<sup>56</sup> If the employer established a nondiscriminatory justification, the burden shifted back to the plaintiff to demonstrate that the justification was pretextual.<sup>57</sup> In proposing that this model be applied in reprisal cases under the CSRA, OSC argued that in order to account for congressional policy favoring the protection of employees from reprisals and the inherent disparity of power between agency and employee, the Board should evaluate the legitimacy of the employer-agency's justification under a "clear and convincing evidence" standard of proof, which had been applied by some federal circuit courts in Title VII cases.<sup>58</sup>

OSC further proposed that the Board apply an "any part" test in evaluating whether retaliation had tainted the action.<sup>59</sup> If reprisal for protected activity played any part in the decision to take the challenged action, OSC argued, the antireprisal provisions of the statute had been violated and required a remedy.<sup>60</sup> OSC's argument was premised on the assumption that the CSRA had no tolerance for reprisals and was supported by a line of analogous Title VII discrimination cases that had applied the "any part" test.<sup>61</sup> OSC reasoned

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5 U.S.C. § 2302(b)(9) (1988), amended by Whistleblower Protection Act of 1989, § 4(b), 103 Stat. 32 (current version at 5 U.S.C.A. § 2302(b)(9) (West Supp. 1990)).

54. 42 U.S.C. § 2000e (1988).

55. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (outlining steps necessary for plaintiff to prove prima facie case). The four steps are: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for a job the employer was trying to fill; (3) though qualified, the plaintiff was rejected; and (4) thereafter the employer continued to seek applicants with plaintiff's qualifications. *Id.*

56. *Id.*

57. *Id.*

58. Post-Hearing Brief of the Special Counsel at 9, *In re Frazier*, 1 M.S.P.R. 163 (1979) (citing *Day v. Mathews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976) (holding agency has clear and convincing burden of proof that absent admitted discrimination plaintiff would not have been selected); *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 443 (5th Cir. 1974) (stating strong presumption in favor of individual member's class alleging employment discrimination)).

59. Post-Hearing Brief of the Special Counsel at 10-11, *In re Frazier*, 1 M.S.P.R. 163 (1979).

60. *Id.*

61. *Id.* (quoting *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir.), cert. denied, 422 U.S. 1045 (1975); *Perry v. Golub*, 464 F. Supp. 1016 (N.D. Ala. 1978); *Hochstadt v. Worcester*

that retaliation, even if only a partial motivating factor, should be presumed to have a broad chilling effect on other employees who wished to exercise their protected rights under the CSRA.<sup>62</sup> In order to remove the threat of that effect and to maintain a federal work environment that encouraged rather than discouraged protected activity, OSC contended that the Board could not permit actions motivated even partially by reprisal to stand.<sup>63</sup> If protected activity, especially whistleblowing, was to be promoted effectively, neither the agency nor the Board should endorse actions based, even in part, on retaliatory motivation.<sup>64</sup>

Admittedly, the "any part" test could result in the retention of employees whose poor performance or misconduct justified, in the abstract, the agency's action. This was the inevitable result of conflicting purposes within the CSRA. The CSRA's goal of promoting whistleblowing conflicts with its objective of furthering efficiency in government through discretionary management-directed personnel actions.<sup>65</sup> In cases where retaliation was only a partial motivating factor for the personnel action, there was no easy method to achieve fully both objectives. OSC urged the Board to adopt a test for causation in dual motivation cases which would err, if at all, on the side of protecting employees from reprisal.<sup>66</sup>

Without clear congressional guidance, the Board had to make a policy decision. On one side weighed the importance of protecting whistleblowers whose efforts Congress determined would make the government more efficient.<sup>67</sup> On the other side weighed the importance of removing unnecessary obstacles to legitimate management actions which Congress determined had impeded the efficiency of the government prior to the reformation of the Civil Service.<sup>68</sup> The Board struck the balance in the middle. It held that it would reverse actions only where OSC could establish that reprisal was a signifi-

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Found. for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976); and *United States v. Hayes Int'l Corp.*, 295 F. Supp. 803 (N.D. Ala. 1973), *aff'd*, 507 F.2d 1279 (5th Cir. 1975)).

62. *Id.* at 13.

63. *Id.*

64. *Id.* at 10-11.

65. One of the primary purposes of civil service reform under the CSRA was to liberalize personnel rules for management action. As the Senate Report stated: "One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons." S. REP. NO. 969, *supra* note 5, at 4. The perception of reformers was that the "appeals processes [were] so lengthy and complicated that [civil service] managers often avoid[ed] taking disciplinary action." *Id.* at 9.

66. Post-Hearing Brief of the Special Counsel at 10-11, *In re Frazier*, 1 M.S.P.R. 163 (1979).

67. *In re Frazier*, 1 M.S.P.R. 163, 195 (1979).

68. *Id.* at 196.

cant factor in the decision to take the action.<sup>69</sup> Thus, the Board construed the CSRA as tolerating some reprisal motivation in the adverse personnel action as long as the motivation was not significant to the decision. In adopting this significant factor test, the Board specifically reserved judgment on whether it would adopt the defense articulated in *Mt. Healthy City School District Board of Education v. Doyle*<sup>70</sup> as a barrier to remedial action in future cases and held that the facts of *Frazier* did not require it to decide this issue.<sup>71</sup>

To establish reprisal, the Board announced a four-part test that incorporated the significant factor standard. The Board held that OSC must show: (1) the employee engaged in protected activity; (2) the official responsible for the action had actual or constructive knowledge of the activity; (3) the employee was treated in an adverse fashion; and (4) a sufficient causal connection existed between the protected activity and the adverse action to establish that retaliation for the protected activity was a significant factor in the challenged action.<sup>72</sup> The Board in *Frazier* emphasized that proof of reprisal need not depend on direct evidence of the offending official's retaliatory state of mind.<sup>73</sup> Instead, the Board held, the causal link between the protected activity and the adverse action "merely consists of an inference of retaliatory motive for the adverse em-

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69. *Id.*

70. 429 U.S. 274 (1976).

71. *In re Frazier*, 1 M.S.P.R. 163, 195-96 (1979). The *Mt. Healthy* defense derives from a first amendment infringement case decided by the Supreme Court. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1976). The *Mt. Healthy* defense permits an employer to defend successfully against a claim of violation of protected rights by demonstrating with preponderant evidence that it would have taken the same action regardless of the protected activity. *Id.* at 287. In *Mt. Healthy*, the Mt. Healthy School Board refused to renew the employment contract of an untenured teacher who was also the president of the local teacher's union. *Id.* at 281-82. The decision not to rehire the teacher was based on three incidents, the first of which involved the teacher's obscene gestures at students. *Id.* at 282. The second involved a physical altercation between the teacher and a colleague that resulted in controversial suspensions for the two and eventually a walkout by a number of teachers. *Id.* at 281. The third, and most proximate in time, involved the teacher's release to a local radio station of an internal school district memorandum concerning the imposition of a teacher dress code. *Id.* After the lower courts granted the teacher relief based on the School Board's infringement of the teacher's first amendment right to release the dress-code memo to the media, the Supreme Court granted review to determine whether a remedy was constitutionally required in light of the apparent legitimate grounds for the action. *Id.* at 295. Although it recognized that the employee's first amendment activity had played "a substantial part" in the decision not to rehire him, the Court nevertheless was concerned that providing the teacher a remedy could place him in a better position than he would be in had he not engaged in the protected activity. *Id.* Based on this concern, the Court remanded the case for a determination of whether the Board would have taken the same action regardless of the teacher's first amendment activity. *Id.* at 287. If the Board would have taken the same action, then, in the Court's view, the constitutional infringement had not caused the challenged action and no remedy was required. *Id.*

72. *In re Frazier*, 1 M.S.P.R. 163, 196 (1979).

73. *Id.* at 193-94.

ployer action.”<sup>74</sup> As the Board further emphasized, “[retaliatory] motive must in almost all situations be inferred from circumstantial evidence.”<sup>75</sup>

The Board did adopt some of the points advocated by OSC under section 2302(b)(9). For example, OSC urged the Board to consider not only participation in one’s own lawful appeal as an “exercise” of an appeal right, but also participation in the lawful appeal of another.<sup>76</sup> In opposition, the agency argued that mere “participation” as a witness or counselor in an appeal process of another did not constitute an “exercise” of an appeal right which section 2302(b)(9) protected.<sup>77</sup> The Board sided with OSC on this issue and concluded that participation in a lawful appeal by another fell within the protective ambit of the CSRA.<sup>78</sup> The Board wrote:

Protection against reprisal is necessary to prevent employer intimidation of prospective complainants and witnesses, which would dry up the channels of information and undermine the implementation of the statutory policy which the administrative process was established to serve. Thus section 704(a) of Title VII (42 U.S.C. § 2000e-3(a)) makes it unlawful for an employer to discriminate against an employee “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”<sup>79</sup>

As it did in defining the protected activities under section 2302(b)(8), the Board construed the CSRA broadly in determining whether the activities qualified for protection from reprisal.

Turning to the merits of the reprisal allegations based on equal employment opportunities activities, the Board found a violation concerning one of the employees.<sup>80</sup> To correct the violation, the

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74. *Id.* at 193.

75. *Id.* at 193-94. By adopting this four-part test for reprisal, the Board implicitly recognized a distinction between the statutory protections of protected activity under the CSRA and the constitutional protections of first amendment activity. This four-part test did not employ the interest-balancing element that is integral in constitutional analysis. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (adopting balancing test between interest of teacher in commenting on matters of public concern and interest of state in promoting efficiency of public services). Later court decisions would apply the interest-balancing test used in first amendment cases in whistleblower-reprisal actions. *See, e.g.,* Fiorillo v. Department of Justice, 795 F.2d 1544, 1550 (Fed. Cir. 1986) (finding that plaintiff failed to meet public concern prong of balancing test); *Oliver v. Department of Health & Human Servs.*, 34 M.S.P.R. 465, 470, 472 (1987) (holding that whether employee’s speech addresses matter of public concern, and is, therefore, protected, must be determined by content, form, and context of statement); *infra* notes 207-10, 223-27 and accompanying text (discussing application of interest-balancing test).

76. *In re Frazier*, 1 M.S.P.R. 163, 193 (1979).

77. *Id.*

78. *Id.* at 192-93.

79. *Id.* at 192-93 (footnotes omitted).

80. *Id.* at 196. The Board concluded that the reassignment of deputy Frazier was a reprimand.



Board permanently enjoined the employee's pending reassignment.<sup>81</sup> Consistent with its broad authority to address individual and systemic merit system abuses, the Board also ordered the Marshals Service to cease retaliating against the employee for his EEO activities and directed the Marshals Service to correct noted EEO problems in its Atlanta office.<sup>82</sup>

Unlike employees adversely affected by decisions of the Board, OSC lacks authority to appeal adverse Board decisions.<sup>83</sup> The employees who had intervened in the administrative proceeding did appeal the Board's decision to the United States Court of Appeals for the District of Columbia.<sup>84</sup> OSC's attempt to file an *amicus curiae* brief in that appeal, however, was successfully opposed by the De-

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sal for Frazier's long history of involvement in EEO activities. *Id.* The Board found by preponderant evidence that the management review team considered Frazier's EEO complaints in recommending his transfer. *Id.* Moreover, the Board found many instances in which Frazier's supervisors in Atlanta had taken actions against him immediately after he had engaged in protected EEO activities. *Id.* at 198. Because of the number of incidents of reprisal, the Board inferred that the management team and Director Hall participated in the retaliation against Frazier. *Id.* at 194-95.

81. *Id.* at 201.

82. *Id.* at 197-200.

83. Under the CSRA, OSC is without authority to litigate beyond the administrative level. *Id.* at 168. Consequently, the only parties with a right to appeal the *Frazier* decision were the four deputies who had intervened in OSC's case before the Board. *Id.* On numerous occasions, OSC has asked Congress for the authority to appeal decisions of the Board in which it is a party. *See, e.g.,* Office of the Special Counsel, First Annual Report to the Congress On the Activities of the Office of the Special Counsel 23 (1979); Office of the Special Counsel, 1980 Annual Report 31 (1980); Office of the Special Counsel, 1981 Annual Report 32-33 (1981). Recent proposed legislation would have granted OSC such litigation authority. *See* S. 508, 100th Cong., 2d Sess. § 1212(d)(3), 134 CONG. REC. S15,328-37 (daily ed. Oct. 9, 1988) (Whistleblower Protection Act of 1988). However, that legislation was vetoed by President Reagan. *See* Memorandum of Disapproval for the Whistleblower Protection Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988) (outlining concerns about burden of proof and constitutional issues in proposal bill); *infra* notes 240-47 and accompanying text (examining legislative initiatives). The recently enacted Whistleblower Protection Act of 1989 contains no litigation authority for OSC to appeal adverse decisions by the Board. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.). This omission resulted from the compromise agreement which Congress struck with the Bush Administration. 135 CONG. REC. S2780 (daily ed. Jan. 25, 1989) (statement of Sen. C. Levin).

84. Under then existing law, the regional United States Court of Appeals had exclusive jurisdiction to review final orders of the Board on the petition of an employee or applicant adversely affected or aggrieved by a Board decision. *See Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150, 158-59 (D.C. Cir. 1982) (holding § 7703 of CRSA and 28 U.S.C. § 2342 gave court of appeals exclusive jurisdiction to orders of Board). In 1982, Congress created the United States Court of Appeals for the Federal Circuit under the Federal Courts Improvement Act of 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 101, 96 Stat. 25 (codified as amended at 28 U.S.C. § 41 (1988)). Under that Act, Congress gave the Federal Circuit sole jurisdiction over employee appeals from final decisions by the Board in nondiscrimination cases. *See* 28 U.S.C. § 1295(a)(9) (1988) (granting Federal Circuit exclusive jurisdiction of appeal from final order or decision of Board); 5 U.S.C. § 7703 (1988) (granting any adversely affected employee right to appeal nondiscrimination Board decisions to Federal Circuit), *amended by* Whistleblower Protection Act of 1989, § 10, 103 Stat. 35 (current version at 5 U.S.C.A. § 7703 (West Supp. 1990)).

partment of Justice and the Board, effectively precluding OSC from further participation in the case.<sup>85</sup> The court eventually upheld the Board's decision on every issue affecting OSC prosecutions.<sup>86</sup>

## II. THE BOARD ADOPTS THE *MT. HEALTHY* TEST

The next significant Board decision concerning reprisal for protected activity came in December 1981, in *Gerlach v. Federal Trade Commission*.<sup>87</sup> *Gerlach* arose through the Board's employee appeal procedures<sup>88</sup> after the Federal Trade Commission (FTC) had removed Gerlach for alleged poor performance. Gerlach prevailed at the initial decision stage where the Board's presiding official reversed the agency's action, finding that the agency had removed the appellant in part for the grievance she had filed against her supervisor.<sup>89</sup> The agency petitioned the Board to review the initial decision, arguing that the presiding official's finding of reprisal had been in error.<sup>90</sup> Because the case arose from the Board's appellate procedures, OSC was not a party in the case.<sup>91</sup>

As a starting point, the Board succinctly recited the four-part test for reprisal announced in *Frazier*.<sup>92</sup> Applying this four-part test, the Board "agree[d] with the presiding official's holding that the protected conduct was a significant factor in the decision to remove appellant."<sup>93</sup>

Next, the Board confronted squarely the issue it had declined to resolve in *Frazier*, namely, how to deal with a personnel action that

85. See Letter from Acting Special Counsel Mary O. Eastwood to Solicitor General Wade H. McCree Jr. (Mar. 11, 1980) (requesting permission to file *amicus* brief); Transmittal letter from Ruth T. Prokop, Chairwoman, MSPB to Acting Special Counsel Mary O. Eastwood (Mar. 20, 1980) (regarding Eastwood's request to Solicitor General); Letter from Ruth T. Prokop, Chairwoman, MSPB to Solicitor General Wade H. McCree Jr. (Mar. 20, 1980) (opposing Eastwood's assertion of independent authority to request permission to file *amicus* brief); Decision Memorandum by Solicitor General Wade H. McCree Jr. (Apr. 14, 1980) (denying Eastwood's request to file *amicus* brief). Consequently, OSC was denied the opportunity to argue in opposition to the DOJ-MSPB argument.

86. *Frazier*, 672 F.2d at 170.

87. 9 M.S.P.R. 268 (1981).

88. See 5 U.S.C.A. § 7701 (1988) (detailing procedures governing employee appeals of adverse agency actions), amended by Whistleblower Protection Act of 1989, § 6, 103 Stat. 33 (current version at 5 U.S.C.A. § 7701 West 1980 & Supp. 1990)); 5 C.F.R. §§ 1201.11-1201.119 (1990) (MSPB regulations governing same); cf. Procedures for Original Jurisdiction Cases, 5 C.F.R. §§ 1201.121-1201.134 (1990) (outlining procedures governing original jurisdiction cases).

89. *Gerlach v. FTC*, 9 M.S.P.R. 268, 272 (1981).

90. *Id.* at 271.

91. Although OSC had the authority to intervene in the *Gerlach* appeal proceeding, it chose not to do so. See 5 U.S.C. § 1206 (1988) (granting OSC authority to intervene in any proceedings before Board), repealed by Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1212(c) (West Supp. 1990)).

92. *Gerlach*, 9 M.S.P.R. at 272.

93. *Id.* at 273.

may have been taken for both prohibited and legitimate reasons: the so-called “dual motivation” or “mixed motive” case. The Board expressed concern that, as a policy matter, it should not reverse actions unless the most important basis or real motivating factor for the action was a prohibited personnel practice.<sup>94</sup> After reviewing analogous areas of law for guidance,<sup>95</sup> the Board adopted the Supreme Court’s causation standard announced in *Mt. Healthy*<sup>96</sup> for use in dual motivation reprisal cases under the Board’s appellate jurisdiction.<sup>97</sup> The Board paraphrased the Supreme Court’s two-part *Mt. Healthy* test as follows:

First, the employee has the burden of establishing by a preponderance of the evidence that the protected conduct was a “substantial” or “motivating” factor. If the employee carries that burden, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even if the protected conduct had not taken place.<sup>98</sup>

The Board’s purpose in adopting this test was to preclude demonstrably incompetent employees from using their protected activities to shield themselves from valid personnel actions.<sup>99</sup> After consulting the legislative history of the CSRA, the Board concluded that Congress “sought to protect employees from prohibited personnel practices, but at the same time not to insulate them from legitimate conduct or performance-based adverse actions.”<sup>100</sup> Acknowledging that it was not compelled to adopt the *Mt. Healthy* test, the Board nevertheless concluded that it was the best available test for resolving the conflicting purposes of the CSRA in dual-motivation cases.<sup>101</sup> The Board quoted a passage from *Mt. Healthy* which stated that the test was not intended to preclude the “borderline” or “marginal” employee from being vindicated because of a protected

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94. *Id.* at 273 n.5.

95. *Id.* at 276.

96. 429 U.S. 274 (1976).

97. *See supra* note 71 (presenting *Mt. Healthy* context and defense).

98. *Gerlach v. FTC*, 9 M.S.P.R. 268, 275 (1981).

99. *Id.* at 276.

100. *Id.* at 273 (reviewing S. REP. NO. 696, *supra* note 5, at 22).

101. *Id.* at 276. The Board stated:

After careful review of the decision utilizing the *Mt. Healthy* test, . . . we have concluded that it constitutes an approach which is inherently logical and totally consistent with the Civil Service Reform Act and its legislative history. It presents a coherent analytical framework for determining causality assuring that an employee who may have engaged in protected activity is not thereby granted immunity from the ordinary consequences of misconduct or poor performance and equitably allocates the burdens of proof.

activity.<sup>102</sup>

### III. EXTENSION OF THE *Mt. Healthy* TEST TO OSC CORRECTIVE ACTIONS

In 1981, while *Gerlach* was pending before the Board, OSC filed two corrective action cases charging reprisal for protected activity, *Special Counsel ex rel. Rohrmann v. Department of State*<sup>103</sup> and *Special Counsel ex rel. Mortensen v. Department of the Army*.<sup>104</sup> *Rohrmann* involved the suspension and geographic reassignment of a passport officer by the Department of State after the officer had written a series of memoranda to his supervisors, the Secretary of State, and the President, accusing the State Department of incompetence and indifference in the management of its fraud detection program.<sup>105</sup> After considering *Rohrmann's* removal, the State Department finally imposed a fourteen-day suspension and reassigned him from New York to Boston for failing to return fraud case files that he had removed from his office in order to expose what he believed to be mismanagement.<sup>106</sup>

*Mortensen* involved the proposed removal of an Army chemist for insubordination and unsatisfactory performance.<sup>107</sup> An OSC investigation revealed reasonable grounds to believe that the Army wanted to remove *Mortensen* because she had filed EEO complaints against the Army and had made communications concerning the Army's treatment of her outside EEO channels, activities protected by section 2302(b)(8) and (9).<sup>108</sup> In both *Rohrmann* and *Mortensen*, the facts raised the possibility that management officials may have acted out of a combination of legitimate and illegitimate motives. The presence of dual or mixed motives prompted the Board in *Rohrmann* and *Mortensen* to consider whether the *Mt. Healthy* test adopted in *Gerlach* should be applied to cases brought by the Special

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102. *Id.* at 275 (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1976)).

103. 9 M.S.P.R. 363 (1982).

104. 16 M.S.P.R. 178 (1983).

105. *Special Counsel ex rel. Rohrmann v. Department of State*, 9 M.S.P.R. 363, 365 (1982).

106. *Id.* at 366. Neither a 14-day suspension, nor a reassignment constitutes a personnel action appealable directly to the Board. See 5 U.S.C.A. §§ 7512-7513 (West 1980) (listing personnel activities covered under direct appeal provisions). Under the CSRA, these actions were reviewable by the Board only through an OSC corrective action. See 5 U.S.C.A. § 1206(c)(1) (West Supp. 1988) (outlining cases reviewable by corrective action), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1212 (West Supp. 1990)).

107. *Rohrmann*, 9 M.S.P.R. at 367-71; *Special Counsel ex rel. Mortensen v. Department of the Army*, 16 M.S.P.R. 178, 185 (1983).

108. *Id.* at 179-80.

Counsel for corrective action.<sup>109</sup>

The cases were assigned to an administrative law judge (ALJ) for a recommended decision. *Rohrmann* was first to reach the Board for final decision and was the case in which the Board decided to extend the tests of *Gerlach* and *Mt. Healthy* to corrective action cases brought by the Special Counsel. In *Rohrmann*, the ALJ found a prima facie case of reprisal.<sup>110</sup> The ALJ, however, upheld the agency's action by concluding that the agency would have taken the action regardless of the employee's protected activity.<sup>111</sup> OSC filed exceptions to the recommended decision, challenging the ALJ's application of the *Mt. Healthy* test to deny corrective action.<sup>112</sup> *Rohrmann* went to the Board for consideration prior to the issuance of the *Gerlach* decision.<sup>113</sup> The issue before the Board was a narrow one: whether, in an action brought by OSC pursuant to its enforcement responsibilities, an agency should be allowed to take a personnel action against an employee whose protected activity was a significant factor in the agency's action, when the agency would have taken the same action for legitimate reasons.

Once again the Board confronted the fundamental conflict between the employee's right to engage in protected activity and the agency's authority to manage its work force, with OSC advocating a tilt toward employee rights. As a threshold matter, the Board found in both *Rohrmann* and *Mortensen* that the personnel actions were motivated in significant part by protected activity sufficient to establish a prima facie case of reprisal.<sup>114</sup> OSC argued that as a matter of public policy, employees should be protected from adverse personnel actions once retaliatory animus had been shown to be a significant factor in the action, even if this meant that some misconduct or poor performance would be overlooked.<sup>115</sup> This was necessary,

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109. *Id.* at 187.

110. Recommended Decision of the Administration Law Judge at 24-25, Special Counsel *ex rel.* Rohrmann v. Department of State, 4 M.S.P.R. 363 (1982) (finding sufficient evidence to support inference that protected conduct was significant factor in adverse action).

111. *Id.* at 26 (concluding that because of insubordination, employee would have been subject of adverse action even if he had not made his disclosures).

112. Exceptions to the Recommended Decision of the Administrative Law Judge at 2-4, Special Counsel *ex rel.* Rohrmann v. Department of State, 9 M.S.P.R. 363 (1982).

113. Special Counsel *ex rel.* Rohrmann v. Department of State, 9 M.S.P.R. at 367.

114. In *Rohrmann*, the Board found that the employee's protected activity, whistleblowing, provided partial motivation for the disciplinary action. Special Counsel *ex rel.* Rohrmann v. Department of State, 9 M.S.P.R. 363, 366 (1982). In *Mortensen*, the Board found that the employee's EEO complaints were causally connected to the decision to discipline. Special Counsel *ex rel.* Mortensen v. Department of Army, 16 M.P.S.R. 178, 184 n.9 (1983). In both cases, the Board concluded that OSC had established a prima facie case of reprisal for protected activity.

115. Exceptions to the Recommended Decision of the Administrative Law Judge at 3, Special Counsel *ex rel.* Rohrmann v. Department of State, 9 M.S.P.R. 363 (1982); OSC Reply

OSC asserted, because decisions motivated by both retaliatory and legitimate reasons had a detrimental effect on the merit system.<sup>116</sup> OSC reasoned that if promotion of protected activities like whistleblowing was Congress' intent, retaliatory action should not be condoned regardless of whether the agency had established an alternative, legitimate motive for the decision.<sup>117</sup> OSC warned that, if adopted, the *Mt. Healthy* test could invite agencies to engage in *post hoc* rationalizations and make it more difficult for OSC to protect employees from reprisal.<sup>118</sup>

One of the practical dangers of adopting the *Mt. Healthy* test was that the "could have" and "would have" distinction would easily blur. Although the *Mt. Healthy* test required the employer to establish by preponderant evidence that it would have taken the same action regardless of the employee's protected activity, in practice, evidence that it could have taken the action would become the only available means to meet circumstantially the "would have" burden, absent unusual circumstances.<sup>119</sup>

In fact, in December 1981, while *Rohrmann* and *Mortensen* were pending before the Board, an MSPB presiding official, purportedly applying the *Gerlach-Mt. Healthy* test, used a "could have" standard in *Spadaro v. Department of the Interior*,<sup>120</sup> a dual motivation employee-appeal case.<sup>121</sup> In *Spadaro*, OSC exercised its independent intervention authority in support of the employee who alleged that his thirty-day suspension was a reprisal for whistleblowing.<sup>122</sup> The pre-

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Brief for Petitioner at 2-4, Special Counsel *ex rel.* *Mortensen v. Department of Army*, 16 M.S.P.R. 178 (1983).

116. OSC Reply Brief for Petitioner at 2-6, Special Counsel *ex rel.* *Mortensen v. Department of Army*, 16 M.S.P.R. 148 (1983).

117. *Id.* at 4.

118. Exceptions to the Recommended Decision of the Administrative Law Judge at 3-4, Special Counsel *ex rel.* *Rohrmann v. Department of State*, 9 M.S.P.R. 363 (1982); OSC Reply Brief for Petitioner at 14-16, Special Counsel *ex rel.* *Mortensen v. Department of Army*, 16 M.S.P.R. 178 (1983).

119. In *Mortensen*, OSC objected to the application of *Mt. Healthy* on these grounds. OSC Reply Brief for Petitioner at 27, Special Counsel *ex rel.* *Mortensen v. Department of Army*, 16 M.S.P.R. 178 (1983) (asserting *post hoc* rationalization as to what agency might have done absent improper motive is mere speculation). In his recommended decision to the Board, the ALJ concluded that the Army would have taken the same action regardless of the employee's protected conduct because "an organization cannot retain on its rol[ll]s an insubordinate and poor performing employee." Recommended Decision of the Administrative Judge at 26, Special Counsel *ex rel.* *Mortensen v. Department of Army*, 16 M.S.P.R. 178 (1983). Having found that the employee had been insubordinate and a poor performer, the ALJ reasoned that the action was justified. *Id.* at 18-26. Thus, proof that the employee had engaged in misconduct and was a poor performer became sufficient to establish that the agency "would have" taken the same action regardless of the protected activity.

120. 18 M.S.P.R. 462 (1983).

121. *Spadaro v. Department of the Interior*, 18 M.S.P.R. 462, 465 (1983).

122. The CSRA authorized OSC to intervene in any proceeding before the Board. 5 U.S.C.A. § 1206 (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat.

siding official who heard the initial appeal applied *Gerlach* to conclude that a reprisal motivation had been a significant factor in the decision to suspend.<sup>123</sup> The presiding official, however, upheld the suspension because he found that the agency could have imposed the suspension for insubordination and misuse of a government telephone, as the agency had charged, even if the protected activity had not occurred.<sup>124</sup> OSC asked the Board to reverse the presiding official's decision, arguing that the standard was erroneous, and urged the Board to instruct its presiding officials on the type and quality of proof necessary to satisfy the "would have" standard under the *Mt. Healthy* test.<sup>125</sup> OSC expressed particular concern that presiding officials and the Board would accept as dispositive the self-serving statements of officials shown to have used prohibited motives to influence their decisions.<sup>126</sup> These officials were likely to testify that they would have taken the same action regardless of whether the employee engaged in the protected activity.<sup>127</sup>

The Board in *Spadaro* ultimately rejected the presiding official's interpretation of *Mt. Healthy* and concluded that the agency had not established by preponderant evidence that it would have taken the

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18 (current version at 5 U.S.C.A. § 1212(c) (West Supp. 1990)). The Whistleblower Protection Act of 1989 has limited this authority. See 5 U.S.C.A. § 1212(c)(2) (West Supp. 1990) (detailing powers and functions of OSC concerning investigation and litigation of employee claims). While the Senate Report acknowledged that the committee was not aware of any instances in which the OSC had inappropriately intervened in employee appeals, Congress acted to limit OSC intervention only with the consent of the individual initiating the action. S. REP. No. 413, 100th Cong., 2d Sess. 1, 10 (1988). Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16, 20 (1989) (codified at 5 U.S.C.A. § 1212(c)(2) (West Supp. 1990)) (providing that OSC may not intervene in action under section 1221 or appeal under section 7701 without consent of individual).

123. *Spadaro*, 18 M.S.P.R. at 465.

124. *Id.*

125. Brief for Special Counsel as Intervenor at 7, *Spadaro v. Department of the Interior*, 18 M.S.P.R. 462 (1983).

126. *Id.* at 5-6.

127. OSC wrote:

Under the circumstances any statements at the hearing by officials who took the action must be viewed with extreme skepticism. By acting from personal vindictiveness, they have shown that they are "out to get" this employee and are willing to bend the rules to achieve this goal. It is very easy indeed to claim that the action would have been taken anyway. Who, after all, can dispute such an assertion? Yet the claim must be recognized for what it is: pure conjecture as to what the agency officials might have done had they not yielded to the temptation to use the personnel power for petty, vindictive purposes. Aside from the ill will they clearly feel towards the employee, the officials have additional reasons to shade the truth since a finding of retaliatory conduct exposes them to disciplinary action by the Special Counsel.

It is respectfully suggested, therefore, that the Board hold as a matter of law that the bald statements of agency officials cannot serve as a basis for finding that the agency would have taken the action even absent the retaliatory motive. Rather, to meet its burden under *Gerlach*, the agency must present objective evidence tending to corroborate this claim, not evidence manufactured later to support the penalty.

*Id.* (citations omitted).

same action absent the protected activity.<sup>128</sup> Recognizing the “highly individualized” nature of dual motivation cases, the Board stated that the agency’s burden was not merely to establish that it could have taken the action, but that “this appellant, in this branch of this agency, with its own history of disciplining employees for similar infractions, would, in fact, have received the discipline imposed absent the protected conduct.”<sup>129</sup> The Board then listed several examples of ways in which agencies might satisfy the “would have” standard.<sup>130</sup> This decision not only instructed the Board’s adjudicators on the proper application of the *Mt. Healthy* test, but also signalled agencies that the Board would strictly review personnel decisions infected with consideration of protected conduct.<sup>131</sup>

In the OSC corrective action cases of *Rohrmann* and *Mortensen*, the Board, spurred by its reasoning in *Gerlach* and the advocacy of OPM and the agencies to apply *Mt. Healthy* in OSC corrective actions, ultimately adopted the *Mt. Healthy* standard over OSC’s objection.<sup>132</sup> The Board relied on the legislative history of the CSRA to support its assertion that the statute was not intended to protect employees who engaged in misconduct.<sup>133</sup>

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128. *Spadaro*, 18 M.S.P.R. at 467.

129. *Id.* at 465.

130. The Board wrote:

[T]he types of evidence which might serve to meet an agency’s burden also will vary with each case. For example, the agency might show that other employees who were accused of the same or similar offenses but who had not engaged in protected activities were disciplined in a like manner. The agency could also demonstrate that a table of penalties in use at the agency supports the discipline applied to the particular offense. In the case of problem behavior which is unique in the agency’s experience, the agency might attempt to show that the particular behavior is of such a serious nature that reasonable people could not differ with the conclusion that the chosen discipline was necessary even if the prohibited motive did not exist. . . .

*Id.* at 466.

131. One of the charges leveled against OSC during congressional hearings on the Whistleblower Protection Act was that OSC believed the *Mt. Healthy* “would have” standard should be applied as a “could have” standard. See *Whistleblower Protection Act of 1986: Hearings on H.R. 25 Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 103 (1986) (statement of Rep. P. Schroeder) (stating that burden of proof under *Mt. Healthy* test is easier for employer than employee); *Whistleblower Protection Act of 1987: Hearings on H.R. 25 Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 104 (1987) (statement of Thomas Devine, legal director, Government Accountability Project) (stating that whistleblower will be inviting “Big Brother” to find evidence supporting firing of employee to meet standard). As OSC’s reported intervention in support of the whistleblower-appellant in *Spadaro* demonstrated, the OSC’s position has been to oppose strongly any dilution of the “would have” standard.

132. Special Counsel *ex rel.* Rohrmann v. Department of State, 9 M.S.P.R. 363, 367 (1982); Special Counsel *ex rel.* Mortensen v. Department of Army, 16 M.S.P.R. 178, 187 (1983).

133. The Board wrote:

Finally, it should be noted that this section is a prohibition against reprisals. *The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action.* If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings,



Using the *Mt. Healthy* test, the Board easily upheld the actions taken by the agencies in *Rohrmann* and *Mortensen*.<sup>134</sup> In both cases, the agencies established that the employees had engaged in misconduct warranting discipline.<sup>135</sup> Having established this, the agencies prevailed on the ultimate issue of whether they would have taken the action regardless of the retaliatory animus by merely demonstrating that the actions were otherwise justified.<sup>136</sup> Without access to judicial review, OSC could not challenge the Board's decision to apply *Mt. Healthy* in corrective action cases.<sup>137</sup> Nevertheless, the Board's clear directions in *Spadaro* on the application of the *Mt. Healthy* test ensured that the doctrine would not be misconstrued to

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or if an employee has engaged in action which would constitute dismissal for cause, the fact the employee "blows the whistle" on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action. Whether the disciplinary action is a result of the individual's performance on the job, whether it is a reprisal because the employee chose to criticize the agency, is a matter for judgement to be determined in the first instance by the agency, and ultimately by the Special Counsel and the Merit Systems Protection Board.

*Rohrmann*, 9 M.S.P.R. at 368-69 (citing S. REP. No. 969, *supra* note 5, at 22 (emphasis added)). Explaining its intentions, the Board wrote:

Accordingly, we have decided, for reasons set forth herein, to adopt the *Mt. Healthy* test for corrective action proceedings involving allegations of a violation of section 2302(b)(8). That test, as it will henceforth be applied in such cases, has two parts. First, the Special Counsel has the burden of establishing by a preponderance of the evidence that the protected conduct was a "significant factor" in the challenged agency action. If the Special Counsel meets this burden, the burden shifts to the agency to prove by a preponderance of the evidence that it would have taken the same action regardless of the protected conduct. It is our intention that the *Mt. Healthy* test must be used in corrective action proceedings just as it will be used in appeals, *i.e.*, as a method of allocating the burdens of proof and as an analytical tool for determining ultimate causality, and not as a method of dictating the order of presentation of evidence.

*Id.* at 371 (citation omitted).

134. *Id.* at 371 (affirming ALJ's finding that action was motivated in part by employee's insubordination); *Mortensen*, 16 M.S.P.R. at 187 (finding that Army had demonstrated legitimate managerial reasons for its action).

135. *Rohrmann*, 9 M.S.P.R. at 366-67 (agreeing that employee's action constituted insubordination); *Mortensen*, 16 M.S.P.R. at 190 (discussing agency's concerns with employee's insubordination and unsatisfactory job performance).

136. In *Rohrmann*, the agency proved conclusively that it would have taken the same action regardless of the protected activity. *Rohrmann*, 9 M.S.P.R. at 371. In *Mortensen*, the Board concluded that the employee's first-level supervisor, who was primarily responsible for proposing the removal, had not acted out of retaliatory animus, but had acted for legitimate reasons. *Mortensen*, 16 M.S.P.R. at 188. The Board ascribed reprisal motivation only to the deciding official, who was the second-level supervisor. *Id.* Because the first-level supervisor would have proposed removal regardless of the protected activity, the Board inferred that the action would have been taken regardless of the second-level supervisor's animus since it was the second-level supervisor's practice to support the decisions of the subordinate managers. *Id.* at 191. Therefore, the Board found that the agency established a *Mt. Healthy* defense notwithstanding its detection of retaliatory animus on the part of the deciding official. *Id.*

137. See 5 U.S.C. § 1207(c) (1988) (establishing no OSC administrative appeal from Board order; only employee subject to disciplinary action may obtain judicial review under this provision), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215(a)(4) (West Supp. 1990)).

the detriment of employees who engaged in protected whistleblowing.<sup>138</sup> Indeed, since the Board's clarification of the *Mt. Healthy* test in *Spadaro*, OSC has encountered little resistance from agencies in response to OSC requests for corrective action in individual cases. This, in turn, has produced a significant improvement in OSC's success rate at obtaining relief for victims of reprisal and other prohibited personnel practices.<sup>139</sup>

#### IV. DISCIPLINARY ACTION CASES AND THE *MT. HEALTHY* TEST

*Special Counsel v. Cummings*<sup>140</sup> was the first case prosecuted by OSC for disciplinary action of a supervisor because of reprisal for protected activity. OSC alleged that Cummings, a Regional Administrator for the Department of Housing and Urban Development (HUD), reassigned two employees in reprisal for disclosures made prior to Cummings' appointment.<sup>141</sup> Before going to HUD, Cummings had been a management agent for a HUD-insured non-profit housing project.<sup>142</sup> The disclosures were of particular significance

138. See *supra* notes 130-31 and accompanying text (discussing *Spadaro* discussion of examples of why agencies could satisfy "would have" standard, and strong signal Board sent agencies on personnel decision in retaliation for protected conduct).

139. Under the CSRA, agency heads and subordinate officials with delegated personnel management authority are responsible for preventing prohibited personnel practices and enforcing civil service laws, rules, and regulations. 5 U.S.C.A. § 2302(c) (1988), amended by Whistleblower Protection Act of 1989, § 4, 103 Stat. 32 (current version at 5 U.S.C.A. § 2302(c) (West Supp. 1990)). This statutory responsibility and OSC's demonstrated willingness to litigate prohibited personnel practices have resulted in an increasing number of voluntary corrective actions from agencies upon request without resort to formal litigation. During fiscal 1986, five matters were settled by OSC and the agency prior to the initiation of formal action. *Treasury, Postal Service, and General Gov't Appropriations for Fiscal Year 1988: Hearings on H.R. 2907 Before the Subcomm. on Treasury, Postal Service, and General Gov't of the House Comm. on Appropriations*, 100th Cong., 1st Sess. 159 (1988) (statement of Mary F. Wiesemen, Special Counsel of Board); see also *id.* at 161-63 (discussing OSC internal corrective actions obtained as of March 2, 1987). During fiscal year 1988, OSC was involved in 33 corrective actions. *Treasury, Postal Service, and General Gov't Appropriations for Fiscal Year 1990: Hearings Before the Subcomm. on Treasury, Postal Service, and General Gov't of the House Comm. on Appropriations*, 101st Cong., 1st Sess. 463 (1989) (statement of Mary F. Wiesemen, Special Counsel of Board) (presenting preliminary figures pending completion of annual report to Congress). During fiscal year 1987, Special Counsel Mary F. Wiesemen achieved 38 corrective actions through this referral-negotiation process. Office of Special Counsel, A REPORT TO CONGRESS FROM THE OFFICE OF THE SPECIAL COUNSEL FISCAL YEAR 1987 10 (1988). Similarly, during his tenure, former Special Counsel K. William O'Connor testified before a congressional subcommittee that he had found no reason to file corrective actions with the Board because "corrective action ha[d] been secured by agency action responsive to OSC requests." *Whistleblower Protection: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 240 (1985) (statement of K. William O'Connor, Special Counsel) [hereinafter *Whistleblower Protection Hearings*].

140. 20 M.S.P.R. 625 (1984). *Cummings* was filed May 18, 1982, by Special Counsel Alex Kozinski, the first Special Counsel to be confirmed by the Senate. 127 CONG. REC. 11,125 (1988). Mr. Kozinski was succeeded in October, 1982, by K. William O'Connor. 128 CONG. REC. 25,930 (1982).

141. *Special Counsel v. Cummings*, 20 M.S.P.R. 625, 627 (1984).

142. *Id.* at 628.

to Cummings because they contained information which opposed his use of tenant security deposits to repay debts incurred through repairs on property under his management.<sup>143</sup> In addition, the disclosures led to the cancellation of HUD contracts with two associates of Cummings.<sup>144</sup>

In *Cummings*, OSC, for the first time, departed from its opposition to the *Mt. Healthy* test and supported its extension to OSC disciplinary actions.<sup>145</sup> The Board, however, found it unnecessary to reach that issue, holding that OSC had failed to establish a prima facie case that the reassignments had been taken in reprisal for protected activity.<sup>146</sup> In making its determination, the Board issued only a brief decision, adopting the administrative law judge's recommended decision in the case.<sup>147</sup>

In August 1983, OSC filed a series of disciplinary actions charging federal officials at various agencies with reprisal for protected activity. The first, *Special Counsel v. Hoban*,<sup>148</sup> eventually became OSC's first contested disciplinary action for reprisal to result in the Board's

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143. *Id.*

144. Post-Hearing Brief of Petitioner at 9-13, *Special Counsel v. Cummings*, 20 M.S.P.R. 625 (1984).

145. *Cummings*, 20 M.S.P.R. at 629; see also Post Hearing Brief for Petitioner at 6, *Special Counsel v. Cummings*, 20 M.S.P.R. 625 (1984) (stating "[a]pplication of the *Mt. Healthy* standard seems entirely apposite to disciplinary action proceedings"). OSC briefs in the case do not explain the reason for the shift. It is evident from the briefs submitted that OSC believed there was no legitimate justification for Cummings' actions and therefore believed that, even under the *Mt. Healthy* test, the Board would find that reprisal had occurred, regardless of what standard was employed. *Id.* at 6-8. In support of its case, OSC presented evidence that prior to Cummings' appointment, the employees had supported positions which were injurious to the economic interests of Cummings and his friends. *Id.* at 9-13. OSC also presented evidence that after his appointment, Cummings had made derogatory statements about the two employees; that Cummings used unusual procedures to effect the actions; that Cummings specifically had the positions created for the employees; and that there was a greater need for the employees' services in their former positions. *Id.* at 14-26. This evidence, however, persuaded only one of the three Board members that the reassignments had been taken in reprisal for protected activity. *Cummings*, 20 M.S.P.R. at 656 (Board Member Devaney, dissenting). Upon examining the "evidentiary context," Board Member Devaney concluded in his dissent that the uncontroverted facts supported the testimony of one of Cummings' top advisors that Cummings had been out to get the two employees for what they had done to him when he had been in private business. *Id.* at 655-56.

At the time OSC urged the application of *Mt. Healthy* in *Cummings*, K. William O'Connor had recently been appointed Special Counsel. K. William O'Connor was confirmed in October, 1982. 128 CONG. REC. 25,930 (1982). In subsequent cases filed by Special Counsel O'Connor, OSC renewed its opposition to the *Mt. Healthy* defense. See *infra* notes 151 & 154 and accompanying text (discussing OSC advocacy for "any part" test). In this context, OSC's support for the *Mt. Healthy* test in *Cummings* must be viewed as an aberration.

146. *Cummings*, 20 M.S.P.R. at 626-27 (1984). Because it concluded that *Cummings* did not involve reprisal motivation, the Board held that the question of whether to apply *Mt. Healthy* and *Gerlach* to OSC disciplinary actions was not before it. *Id.* at 627 n.2. The Board specifically reserved that question for a case involving dual motivations. *Id.*

147. *Id.* at 627.

148. 24 M.S.P.R. 154 (1984).

imposition of sanctions against a retaliating official.<sup>149</sup> The Board's decision in *Hoban* failed to reach the *Mt. Healthy* issue, however,<sup>150</sup> and did not alter the existing status of reprisal law.<sup>151</sup> Nor did it indicate what the Board's position on the *Mt. Healthy* issue might be in a disciplinary action reprisal case.

With the filing of two more disciplinary cases charging reprisal for protected activity, *Special Counsel v. Harvey*<sup>152</sup> and *Special Counsel v. Starrett*,<sup>153</sup> OSC successfully placed before the Board the issue of what test for reprisal would be used in disciplinary actions. In both cases, OSC argued for the adoption of an "any part" test.<sup>154</sup>

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149. *Special Counsel v. Hoban*, 24 M.S.P.R. 154, 161-62 (1984). In *Hoban*, OSC charged a Veterans Administration Chief of Police with having changed the duties of a subordinate in reprisal for the subordinate's disclosure of information evidencing mismanagement. *Id.* at 155-56. The reprisal charged was sustained both by the administrative law judge and the Board. *Id.* at 156.

150. The Board's only discussion in *Hoban* of substantive law in the reprisal area concerned the standard to be used in determining whether a disclosure qualified for protection. *Id.* at 160. In this regard, the Board agreed with the position advanced by OSC and reaffirmed its previous position that the discloser need only reasonably believe that the information he or she is disclosing constitutes one of the conditions in section 2302(b)(8) in order to qualify for protection. *Id.* It specifically rejected the notion that the information reported must establish one of the conditions to qualify for protection. *Id.* The Board wrote, "The whistleblower's evidence must show that 'a reasonable person in the employee's position would believe' that the matter reported was protected by [section] 2302(b)(8)." *Id.*

151. OSC took the position in *Hoban* that the *Mt. Healthy* defense was not appropriate in a disciplinary case because it would have the effect of condoning the retaliatory actions of the accused official in dual motivation cases where the official could successfully muster a *Mt. Healthy* defense. Petitioner's Memorandum of Points and Authorities in Support of Proposed Finding of Fact and Conclusions of Law at 4-5, *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984). Rather, OSC argued for the adoption of the "any part" test, its original position in *Frazier*. *Id.* at 4-6; see *supra* notes 64-66 and accompanying text (discussing OSC's proposal of "any part" test).

152. 28 M.S.P.R. 595 (1984), *rev'd sub nom. Harvey v. M.S.P.B.*, 802 F.2d 537 (D.C. Cir. 1986). On August 24, 1983, OSC filed a five-count disciplinary complaint in *Harvey*. Complaint for Disciplinary Action, *Special Counsel v. Harvey*, 28 M.S.P.R. 595 (1984). The complaint charged the Assistant Inspector General for the Department of Energy with, *inter alia*, recommending the geographic reassignment of a subordinate member of the Senior Executive Service in reprisal for that official's having disclosed information, which he reasonably believed evidenced abuse of authority, waste, and mismanagement in the Office of the Inspector General, to congressional investigators, a White House staff member, and OSC. *Id.* at 9-10.

153. 28 M.S.P.R. 60 (1985). On August 31, 1983, OSC filed a four-count disciplinary complaint against three high-ranking officials of the Defense Contract Audit Agency (DCAA), including the agency's Director, charging that the officials denied a subordinate auditor a waiver of the agency's rotation policy and geographically reassigned him in reprisal for the auditor's having disclosed to the media information which he reasonably believed evidenced a gross waste of funds. Complaint for Disciplinary Action, *Special Counsel v. Starrett* at 6-7, 28 M.S.P.R. 60 (1985). A fourth DCAA official was also charged in the original complaint with having retaliated against the auditor in reprisal for the auditor's having filed an EEO complaint. *Id.* at 4. That case was severed from the main case and was decided on June 21, 1985. *Special Counsel v. Brown*, 28 M.S.P.R. 133, 134-35 n.1 (1985).

154. Post Hearing Brief for Petitioner at 20-22, *Special Counsel v. Harvey*, 28 M.S.P.R. 595 (1984); Post Hearing Brief in Support of Complaint at 64, *Special Counsel v. Starrett*, 28 M.S.P.R. 60 (1985). Then *Special Counsel O'Connor* explained the decision to press for the "any part" test before the House oversight committee:

*Harvey* was the first of the two cases to be decided.<sup>155</sup> In addition to sustaining the allegations of reprisal and imposing disciplinary measures against the supervisor, the Board made two significant rulings in *Harvey* which promoted OSC's enforcement of the CSRA's reprisal protections. First, the Board agreed with OSC that a draft of a letter, an unsent appeal for help addressed to OSC, constituted protected activity.<sup>156</sup> The Board held that even though OSC could not establish that Harvey knew at the time of the reprisal that the employee had sent the letter to OSC, the fact that he had knowledge of the employee's intention to send it was sufficient to protect the employee from reprisal for having written the letter.<sup>157</sup>

Next, the Board rejected the *Mt. Healthy* defense in OSC disciplinary actions.<sup>158</sup> In doing so, the Board endorsed OSC's argument that disciplinary actions did not involve the same concerns that had prompted the Board to adopt *Mt. Healthy* in corrective actions.<sup>159</sup> The Board noted that in *Gerlach*, *Rohrmann*, and *Mortensen*, it had been concerned with the prospect that failure to apply the *Mt. Healthy* defense might result in possible unjust enrichment for employees whose conduct or performance justified the actions taken against them.<sup>160</sup> In the Board's view, disciplinary cases did not present the same concern.<sup>161</sup> The Board wrote:

[O]ur concern here is not whether the actions taken against [the employee] were effected on legitimate grounds, would have been taken despite protected activity, and should be allowed to stand. Our concern in a disciplinary action . . . is whether a respondent

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My view of the law is this — . . . if there is a whiff of reprisal in an action, then that action ought to be the basis for discipline and that person who was the subject of that reprisal ought to be restored. But that is not the law. The law is a significant factor. If you make the law say if there is [a] whiff of reprisal even the most *de minimis*, then that will change the mix a great deal. But that is not the law. The law is as it is interpreted in the courts and it is a significant factor.

*Whistleblower Protection Hearings, supra* note 139, at 260-61 (statement of K. William O'Connor, Special Counsel).

155. The Board issued its decision in *Harvey* on December 6, 1984. Special Counsel v. *Harvey*, 28 M.S.P.R. 595 (1984), *rev'd sub nom.* 802 F.2d 537 (D.C. Cir. 1986). *Starrett* was decided on June 13, 1985. Special Counsel v. *Starrett*, 29 M.S.P.R. 60 (1985), *rev'd*, 792 F.2d 1246 (4th Cir. 1986).

156. *Harvey*, 28 M.S.P.R. at 605.

157. *Id.* Because the Board found that the employee's activities were protected by sections 2302(b)(9) (covering exercise of appeal rights) and 2302(b)(10) (addressing conduct not related to performance), it did not analyze the case under section 2302(b)(8) (whistleblowing). *Id.* at 604 n.16.

158. *Id.* at 609. The Board held that its rejection of *Mt. Healthy* would apply to all disciplinary actions for reprisal under the statute. *Id.*

159. *Id.*

160. *Id.*; see *supra* notes 94-102, 114-19, 133-39 and accompanying text (noting Board's purpose in adopting *Mt. Healthy* test to preclude employees from hiding behind shield of protected activity).

161. *Harvey*, 28 M.S.P.R. at 609.

should escape discipline for a prohibited personnel practice even if there is a lawful reason for taking the personnel action.<sup>162</sup>

The Board observed that the absence of the concern about unjust enrichment removed the basic premise for the adoption of the *Mt. Healthy* defense in corrective actions.<sup>163</sup>

However, the Board refused to adopt the "any part" test advanced by OSC. Instead, the Board employed the significant factor standard that it had been using in various incarnations since *Frazier*:<sup>164</sup> a prohibited causal connection is established if the protected activity is a significant factor in the decision to take the action.<sup>165</sup>

The Board in *Harvey* announced its rejection of the *Mt. Healthy* defense for all OSC disciplinary actions in a separate portion of its decision discussing discrimination based on the employee's performance of his duties,<sup>166</sup> activity prohibited by section 2302(b)(10) of the statute. Consequently, the Board's rejection of the *Mt. Healthy* test and adoption of the significant factor test for all forms of prohibited reprisal was dicta.<sup>167</sup> The Board later applied this significant factor test to section 2302(b)(8) whistleblower reprisals in *Starrett*.<sup>168</sup> In *Starrett*, the Board held that three Defense Contract Audit

162. *Id.* In fact, the employee-victims in *Harvey* and *Starrett* obtained relief without OSC having to file formal corrective actions on their behalf. *Whistle Blower Protection Act of 1987: Hearings on S. 508 Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Sen. Comm. on Gov't Affairs*, 100th Cong., 1st Sess. 405 (1987) (statement of Mary F. Wieseman, Special Counsel of Board). In *Starrett*, OSC obtained two stays of the proposed geographic reassignment from the MSPB. *Id.* The reassignment was first stayed temporarily by the Board and later voluntarily delayed by DCAA. *Id.* At OSC's request, Defense Secretary Caspar Weinberger took steps to prevent the employee's reassignment. *Id.* Prior to the completion of the Board's disciplinary proceedings, and in response to the Special Counsel's request, the agency rescinded its decision to reassign the whistleblower. In *Harvey*, the employee-victim voluntarily transferred to another agency before the disciplinary action had been filed. *Harvey*, 28 M.S.P.R. at 598.

163. *Harvey*, 28 M.S.P.R. at 609.

164. *See, e.g.*, *Gerlach v. FTC*, 9 M.S.P.R. 272, 274-77 (1981) (noting that appellant must demonstrate that protected conduct was "substantial" factor in personnel decision) (citing *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-86, 287 (1977)); Special Counsel *ex rel. Rohrmann v. Department of State*, 9 M.S.P.R. 363, 371 (1982) (establishing that protected activity must be "significant factor" in challenged action) (citing *Mt. Healthy City School Dist.*, 429 U.S. at 285-86); *Spadaro v. Department of Interior*, 18 M.S.P.R. 462, 464 (1983) (applying *Mt. Healthy* test); *Peedin v. Department of Navy*, 23 M.S.P.R. 549, 552 (1984) (noting that Board's finding of no reprisal for protected activity not determinative of whether reprisal was motivating or substantial factor in agency's subsequent removal of appellant for different charges); *Chandler v. Department of Treasury*, 13 M.S.P.R. 90, 95 (1982) (noting that while employer rebutted this presumption by showing action would have been taken anyway, protected activity was substantial or motivating factor in agency's subsequent removal) (citing *Gerlach*, 9 M.S.P.R. at 276).

165. *Harvey*, 28 M.S.P.R. at 604 n.17 (citing *In re Frazier*, 1 M.S.P.R. 163, 163 (1979) *rev'd*, 792 F.2d 1246 (4th Cir. 1986)); *see also* Special Counsel *v. Zimmerman*, 36 M.S.P.R. 274, 305-06 (1988) (discussing development of legal framework applicable to cases of alleged reprisal under section 2302(b)(9)).

166. *Harvey*, 28 M.S.P.R. at 609.

167. *Id.*

168. Special Counsel *v. Starrett*, 28 M.S.P.R. 60, 66 (1985) (citing *In re Frazier*, 1 M.S.P.R.

Agency (DCAA) officials, including the Director, had committed the prohibited personnel practice of reprisal for whistleblowing.<sup>169</sup>

Significantly, the Board in *Harvey* analogized the alleged section 2302(b)(9) violation to prohibited retaliation based on the filing of a discrimination complaint under Title VII of the Civil Rights Act of 1964.<sup>170</sup> The Board cited approvingly a federal district court decision which had imposed a presumption of reprisal in a Title VII retaliation case where the natural consequence of the personnel action was to discourage the protected activity. That court created a presumption that an employer intended to discourage employees from exercising their Title VII rights when retaliation occurred.<sup>171</sup> Finding that the personnel action was "based" in significant part on protected activity, the Board held that reprisal had occurred.<sup>172</sup> In this manner, the Board construed the antireprisal statute as if it were an antidiscrimination statute.<sup>173</sup>

With victories in *Hoban*, *Harvey*, and *Starrett*, OSC appeared to be

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163, 163, *rev'd*, 792 F.2d 1246 (4th Cir. 1986)). In *Starrett*, the Board proclaimed that the significant factor test it was applying was consistent with the test it had applied in *Frazier*:

Where protected whistleblowing activity plays a significant role in the decision to take a personnel action against an employee, section 2302(b)(8) has been violated. We have held in *In re Frazier*, . . . that a prohibited personnel practice has been committed under section 2302(b)(9) if the protected activity is a significant factor in the decision to take a personnel action, adverse to the interests of an employee, or applicant for employment, who has exercised an appeal right granted by law. That same rule applies, under section 2302(b)(8), to protected disclosures of whistleblowers.

*Id.* (citations omitted).

169. *Id.* at 69-70. In a severed case, the Board followed the course it established in *Harvey* and held that the "significant factor" test was the proper standard to apply in disciplinary actions for reprisal under section 2302(b)(9) for the exercise of an appeal right. *Special Counsel v. Brown*, 28 M.S.P.R. 133, 137-38 (1985). However, on the merits, the Board concluded that the protected activity, giving testimony at an MSPB hearing, was not a significant factor in the challenged action, an accelerated geographic reassignment out of the region. *Id.* at 140. The Board held that although the official considered the employee's testimony criticizing DCAA management in making the decision to reassign, it was the mutual mistrust and strained personal relations between the employee and the regional supervisors, of which the employee's testimony was only a small manifestation, that actually motivated the decision. *Id.* at 139. Moreover, the Board noted several actions by the official that were inconsistent with a retaliatory motive, such as the official's attempt to accommodate the employee's inability to fly by assigning him to a region which minimized flight travel. *Id.*

170. *Harvey*, 28 M.S.P.R. at 605.

171. The Board quoted:

Specific evidence of intent to discriminate is not an indispensable element of proof of violation of Section 704(a). . . . [A]n employer's protestation that it did not intend to discriminate is unavailing where a natural consequence of its action was such discouragement toward employees from exercising their rights under Title VII. Concluding that employees' discouragement from exercising their rights will result from acts of retaliation, it is *presumed* that the employer intended such consequences.

*Id.* at 605-06 (quoting *Mead v. United States Fidelity & Guar. Co.*, 442 F. Supp. 114, 129 (D. Minn. 1977) (citation omitted) (emphasis added)).

172. *Id.* at 606.

173. *Id.* at 605 (writing that "circumstances of this case bear a similarity to proof of the element of intent in discrimination cases").

on its way to establishing a viable enforcement program.<sup>174</sup> The Board decisions in those cases increased the likelihood that OSC would prevail in future reprisal cases. As in *Frazier*, the Board explicitly acknowledged that reprisal could be established by inference where a significant causal connection between the protected activity and the challenged action existed.<sup>175</sup>

## V. REVIEW BY THE COURTS

The disciplined officials in *Harvey* and *Starrett* appealed their Board decisions to the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Fourth Circuit, respectively.<sup>176</sup> Subsequently, the D.C. Circuit and the Fourth Circuit reversed *Harvey's* demotion and *Starrett's* removal, respectively.<sup>177</sup> *Starrett* was decided first.<sup>178</sup> In that decision, the Fourth Circuit overturned the Board's disciplinary sanc-

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174. In *Hoban*, the Board ordered the offending official's demotion from GS-9, Chief of Police, to GS-5, Step 1, Police Officer. Special Counsel v. Hoban, 24 M.S.P.R. 154, 162 (1984). In *Harvey*, the Board ordered the offending official's demotion from the Senior Executive Service to a nonmanagerial GS-14 position, for a period of three years from the date of demotion. Special Counsel v. Harvey, 28 M.S.P.R. 605, 611 (1985), *rev'd sub nom.* Harvey v. M.S.P.B., 802 F.2d 537 (D.C. Cir. 1986). In *Starrett*, the Board ordered Director *Starrett's* removal from federal service and fined him \$1,000. Special Counsel v. Starrett, 28 M.S.P.R. 65, 75 (1985), *rev'd*, Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir. 1986). It also ordered the demotion of two subordinate managers to nonsupervisory positions one grade below their previous grade for a minimum period of three years and fined them each \$500. *Id.*

175. *Starrett*, 28 M.S.P.R. at 70-71 n.7 (stating that law guarantees that protected disclosures may not be a significant factor in decision to take adverse action); *Harvey*, 28 M.S.P.R. at 604 n.17 (stating proof of causal connection is prima facie showing of retaliation); *Hoban*, 24 M.S.P.R. at 160 (noting that all evidence taken together led to conclusion that reprisal had occurred).

176. *Harvey v. M.S.P.B.*, 802 F.2d 537 (D.C. Cir. 1986); *Starrett v. Special Counsel*, 792 F.2d 1246 (4th Cir. 1986). Under the CSRA, employees in an OSC disciplinary action had the right to appeal the Board's final order imposing discipline to the United States court of appeals for the judicial circuit in which the employee resided or was employed at the time of the action. 5 U.S.C. § 1207(c) (1988), *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 18 (current version at 5 U.S.C.A. § 1215(a)(4) (West Supp. 1990) (delineating right to appeal final order to United States Court of Appeals for the Federal Circuit)).

177. *Harvey*, 802 F.2d at 552; *Starrett*, 792 F.2d at 1255. The Eleventh Circuit appeal was mooted by the Board's own dismissal of the disciplinary actions against *Starrett's* subordinate managers after receiving the Fourth Circuit's decision. Special Counsel v. Starrett, 30 M.S.P.R. 424 (1986).

178. *Starrett*, 792 F.2d at 1246. Although the caption of the case listed the Special Counsel as the respondent and the decision referred to the Special Counsel as the responding party, *id.* at 1246, in fact, pursuant to statute, the Board, as the administrative body responsible for the decision, was the responding party. 5 U.S.C. § 1205(h) (1988) (authorizing Board to represent itself in civil actions brought in connection with its functions under Title V with exception of litigation in Supreme Court), *amended by and renumbered by* Whistleblower Protection Act of 1989, § 3(7)(F), 103 Stat. 17 (current version at 5 U.S.C.A. § 1204(i) (West Supp. 1990)). Just as Congress had given OSC no authority to appeal an adverse decision by the Board, it had given OSC no authority to defend a favorable decision of the Board in the United States courts of appeals. *Id.* § 1206, *repealed by* Whistleblower Protection Act of 1989, § 3(a)(8), 103 Stat. 19 (current version at 5 U.S.C.A. § 1212 (West Supp. 1990)).



tions for Director Starrett on the facts.<sup>179</sup> Although the court agreed with the Board that Starrett had “considered” protected activity in making his decision to deny the employee’s request for a waiver of the agency’s rotation policy, the court held that such consideration did not establish improper retaliatory motive.<sup>180</sup> The court noted that “[t]here is simply no evidence that Starrett had improper motives or that [the employee’s] whistleblowing, *qua* whistleblowing, entered into his decision not to grant [the employee] a waiver to DCAA policy.”<sup>181</sup> Thus, the court’s decision turned on insufficient proof of subjective retaliatory motivation.

Although the court’s decision in *Starrett* turned on the facts of that particular case, it revealed an unwillingness to infer retaliatory motivation from the established causal connection between the protected activity and the personnel action. Thus, the court’s approach was at odds with the Board’s observations in *Frazier* that “[retaliatory] motive must in almost all situations be inferred from circumstantial evidence.”<sup>182</sup>

In *Harvey*, the D.C. Circuit also reversed key factual determinations that had formed the bases for the Board’s findings of prohibited personnel practices, including reprisal for protected activity.<sup>183</sup> In doing so, the court rejected the Board’s finding of fact that reprisal had been established through the existence of a causal connection between the protected activity and the personnel actions.<sup>184</sup> Citing *Starrett*, the D.C. Circuit endorsed the notion that consideration of protected activity in the course of making a management decision was not alone sufficient to establish the particular retaliatory motivation which Congress intended to proscribe.<sup>185</sup> The court wrote:

Harvey’s action in not recommending [the employee] for the SES opening was not in retaliation for [the employee’s] exercise of his appeal rights or an attempt to deter him from exercising those rights, but was a management decision about [the employee’s] qualifications, both technical and personal. To be sure, that man-

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179. *Starrett*, 792 F.2d at 1255.

180. *Id.* at 1254.

181. *Id.* at 1255 (emphasis in original).

182. *In re Frazier*, 1 M.S.P.R. 163, 194 (1979).

183. *Harvey v. M.S.P.B.*, 802 F.2d 537, 547 (D.C. Cir. 1986).

184. *Id.* On this issue the court stated:

We need not, today, define the precise contours of a claim of retaliatory conduct on the part of a supervisor. We need only observe that previously we have decided that retaliation is to be defined broadly to include any action *designed to punish an employee for exercising his protected rights or to deter him from exercising those rights.*

*Id.* (emphasis added).

185. *Id.* at 548 (citing *Starrett*, 792 F.2d at 1246).

agement decision was based on an opinion that Harvey formulated of [the employee] based in part on [the employee's] allegations in his draft complaint [to the Special Counsel] and his efforts to use the draft to preserve his job. In that regard, of course, there is some link between Harvey's actions and [the employee's] protected conduct. But it is not the type of prohibited link covered by the Act. . . . Formulating an adverse opinion of an employee, based upon what he has written and thereby not recommending him for certain jobs, is not the same as taking action against an employee in an attempt to thwart his exercise of his protected rights. If it were, it would mean that one in an executive position can never exercise his considered judgment in making personnel recommendations when asked to do so when that judgment is based on anything even tangentially related to the exercise of protected conduct.<sup>186</sup>

Unstated, but nevertheless at the heart of these two appellate court decisions, was the courts' predilection to uphold federal managers' "business judgments," even where such judgments are proven to be significantly linked to protected activity. This is clear from the courts' criticism of the significant factor test. The Fourth Circuit wrote:

We observe that such difference, [between corrective action and disciplinary cases] valid as it may be in some contexts, may not support the use of a standard of causation which inadequately protects personnel, like Starrett, who are forced to make scores of personnel decisions which may peripherally or incidentally involve situations where employees have engaged in protected practice. The Act was designed to prohibit retaliation or reprisals by personnel because of *improper* consideration of protected actions. The standard of proof used must insure that the *motivation* for the adverse action was an improper one. There is no support in the legislative history of the Act for any particular standard of causation, but the standard used by the Board for any action under the Act . . . must not be so loose or weak as to punish those not motivated by improper purposes.<sup>187</sup>

These decisions are more likely to discourage, rather than to encourage, whistleblowing and other protected activities by their endorsement of adverse management decisions that are based significantly on protected activity. For the courts to remove such decisions from the reach of the law because the official purportedly believed he or she was acting for legitimate purposes undermines

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186. *Id.* (citations omitted).

187. *Starrett v. Special Counsel*, 792 F.2d 1246, 1253 n.12 (4th Cir. 1986) (emphasis added); *see also Harvey v. M.S.P.B.*, 802 F.2d 537, 548 n.5 (D.C. Cir. 1986) (citing *Starrett*).

the plainly stated whistleblower protections of the CSRA.<sup>188</sup> Prior to *Harvey* and *Starrett*, it had not been apparent that supervisors, who acted to the disadvantage of an employee based in significant part on that employee's protected conduct, could successfully defend their decisions by arguing that they thought they were acting "reasonably."<sup>189</sup>

## VI. BOARD REACTION TO UNITED STATES COURTS OF APPEALS DECISIONS

The judicial rejection of the Board's factual conclusions in *Starrett* and *Harvey* was not an endorsement of the Board's more expansive view of reprisal. The Board's reaction to the appellate decisions would be crucial to OSC's prospects for bringing successful disciplinary and corrective actions based on reprisal for protected activity.

In *Special Counsel v. Mongan*,<sup>190</sup> a disciplinary case filed prior to and decided after *Harvey* and *Starrett*, the Board applied the significant factor test in spite of the reservations of the D.C. Circuit and the Fourth Circuit.<sup>191</sup> The Board, however, displayed sensitivity to those concerns by specifically noting that if it had applied *Mt. Healthy* to the facts of *Mongan*, it would have found the defense unavailing.<sup>192</sup> In *Special Counsel v. Zimmerman*,<sup>193</sup> another disciplinary

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188. See *infra* notes 234-38 (discussing conflict and court's effort to balance two distinct policies of CSRA—to promote and encourage disclosure of waste, fraud, abuse of authority and mismanagement and to promote management discretionary authority to eliminate inefficiency).

189. A test based on the individual motivation of the manager is inherently problematic. See Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 696-97 (1987-88) (discussing problems with motivation tests). First, the natural inclination when analyzing a management decision, both from the public's perspective and from a managerial perspective, is not to focus on why the decision was made, but rather on what the decision was. Motivation tests run counter to this inclination. Second, even when, as here, the law requires that the inquiry focus on why the decision was made, that inquiry is inherently a difficult one to undertake for a number of reasons. Probing the motivations of individuals does not lend itself to exactitude. Personnel actions may be taken for a number of conflicting reasons, and may be the product of different individuals. Those responsible for a particular decision may disagree among themselves about the reasons for the decision. Even after all relevant documents are reviewed and material witnesses interviewed, the history of the action may remain unclear. Finally, individual managers may choose not to reveal or to lie about their motivations.

190. 33 M.S.P.R. 392 (1987).

191. The complaint in *Mongan* was filed November 25, 1985, prior to the circuit court decisions in *Starrett* and *Harvey*, which were decided June 5, and October 7, 1986, respectively, *Starrett*, 792 F.2d at 1246; *Harvey*, 802 F.2d at 537.

192. *Special Counsel v. Mongan*, 33 M.S.P.R. 392, 396 (1987) (noting after independent review that respondent did not establish by preponderant evidence that he would have denied promotion anyway). *Mongan*, a regional administrator for the Department of Housing and Urban Development (HUD), refused to approve the promotion of his former secretary in reprisal for her disclosures to HUD's Regional Inspector General for Investigations (RIGI) during an investigation into the propriety of a HUD award. In the course of the investigation, RIGI examined whether a former official had violated 18 U.S.C. § 207(g) by communicating

case filed prior to and decided after *Harvey* and *Starrett*, the Board again applied the significant factor test to find reprisal based on the filing of an EEO complaint.<sup>194</sup> In a footnote, the Board again stated, in deference to the Fourth Circuit's concerns in *Starrett*, that it would have reached the same conclusion under *Mt. Healthy*.<sup>195</sup>

## VII. RESTATEMENT OF THE GERLACH-MT. HEALTHY TEST

While the Fourth Circuit and the D.C. Circuit were reviewing the Board's rulings in *Harvey* and *Starrett*, the Federal Circuit embarked on a restatement of the elements of a reprisal case. Development of the Federal Circuit standard occurred in the Board's appellate jurisdiction cases without input from OSC.<sup>196</sup> Under the Federal Circuit standard as articulated in *Warren v. Department of the Army*,<sup>197</sup> the party claiming reprisal must establish that: (1) a protected disclosure was made; (2) the accused official knew of the claimant's disclosure; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) after careful balancing of the intensity of the motive to retaliate against the gravity of employee misconduct or poor performance, a nexus is established between the adverse action and the motive.<sup>198</sup>

In *Warren*, the Federal Circuit noted that the four elements were drawn verbatim from *Hagmeyer v. Department of Treasury*<sup>199</sup> and that the authority for them was *Frazier*.<sup>200</sup> In describing this approach to reprisal cases, the court in *Warren* stated that:

The wording there found [in *Frazier*], though different, in essence is the same, but more elaborate and analytical, which was to be

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with HUD employees concerning the grant. The secretary had told investigators that Mongan had spoken with the former HUD official several times since the official's return to the private sector. *Id.* at 394. Mongan asserted that his decision not to approve the promotion stemmed from his belief that the employee could not be trusted with confidential information, and from his adherence to an agency policy limiting the number of positions at the grade of the proposed promotion. *Id.* at 396. After the completion of the disciplinary action, OSC obtained corrective action for the secretary through agreement with the agency.

193. 36 M.S.P.R. 274 (1988). *Zimmerman* involved religious discrimination prohibited by Title VII of the Civil Rights Act of 1964. One of the counts charged Zimmerman with a host of retaliatory actions after being informed that the employee intended to file an EEO complaint against him. *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 279 (1988).

194. *Id.* at 289.

195. *Id.* at 292 n.15 (noting that even under more stringent *Mt. Healthy* test, employee's protected activity was still motivating factor).

196. See *Sullivan v. Department of Navy*, 720 F.2d 1266, 1276 n.3 (Fed. Cir. 1983) (noting that since 1982, Federal Circuit has had exclusive jurisdiction to hear nondiscrimination appeals of Board decisions by federal employees) (citing Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(9) (1988)).

197. 804 F.2d 654 (Fed. Cir. 1986).

198. *Warren v. Department of Army*, 804 F.2d 654, 657-58 (Fed. Cir. 1986).

199. 757 F.2d 1281 (Fed. Cir. 1985).

200. *Warren*, 804 F.2d at 657.

expected as the Board was writing on a clean slate in interpreting a statute then new. The conclusion must follow that this court in . . . *Hagmeyer* was not undertaking to reassign to the four tests exactly the tasks they were to perform, but simply to identify them so the employee's success in invoking them could be ticked off and weighed according to *Frazier*.<sup>201</sup>

Contrary to the court's assertion, part four of the *Warren* test departed from the Board's decisions in *Frazier* and *Gerlach*. The Federal Circuit's new test required the Board to refocus the inquiry from the search for the significance of the protected activity in the challenged personnel action to the balancing of competing interests which were defined, respectively, as evidence of an employer's specific motive to retaliate and evidence of the gravity of the whistleblower's alleged misconduct. Under *Warren*, the court would find a prohibited nexus only if the whistleblower could prove that the intensity of the motive to retaliate against him was greater than the seriousness of his alleged misconduct. Thus, the court introduced in mid-decade a new analytical approach to the developing body of administrative law.

In addition to this restatement, the Federal Circuit also began to insinuate first amendment principles into cases alleging reprisal for whistleblowing. In 1986, the Federal Circuit held in *Fiorillo v. Department of Justice*,<sup>202</sup> that "in the context of an adverse action against a public employee, the rights under section 2302(b)(8)(A) (prohibition of reprisal) and the First Amendment's right to free speech have been considered coextensive rights."<sup>203</sup> In fact, up until that time, the opposite had been considered true.<sup>204</sup> In 1982, the Board held that the right to engage in whistleblowing under section 2302(b)(8) was independent of the right to free speech.<sup>205</sup> This dis-

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201. *Id.*

202. 795 F.2d 1544 (Fed. Cir. 1986).

203. *Fiorillo v. Department of Justice*, 795 F.2d 1544, 1549 (Fed. Cir. 1986) (citing *Gerlach v. FTC*, 9 M.S.P.R. 268 (1981)). *Fiorillo* concerned whether a prohibited personnel practice had occurred in the termination of a prison guard's appointment for disclosures he had made to the press which had brought discredit to the agency. *Id.* at 1545. A stipulation between the parties that the removal action was based on the disclosures left the court to decide only whether the disclosures qualified for protection under section 2302(b)(8) and whether the nature of the causal connection between the disclosures and the termination action constituted prohibited reprisal. *Id.* at 1546-47.

204. Although the Board in *Gerlach* did analogize reprisal law to first amendment law, it did so only in the limited context of dual motivations. *Gerlach v. FTC*, 9 M.S.P.R. 268, 274-75 (1981). In *Gerlach*, the Board adopted only the dual causation analysis of *Mt. Healthy* that was aimed at determining the appropriateness of relief. The Board did not adopt the interest-balancing elements of the Supreme Court's first amendment analysis that are aimed at determining if a constitutional violation has occurred. *Id.* at 276; *cf. Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (balancing teacher's interest as citizen in making public comment against state interest in promoting efficiency of public services).

205. See Special Counsel *ex. rel. Rohrmann v. Department of State*, 9 M.S.P.R. 363, 366 n.4

inction was implicit in the Board's application of the "reasonable basis" test to determine whether a disclosure is protected.<sup>206</sup> Under traditional first amendment analysis, determination of whether a disclosure is protected turns, not on whether a reasonable basis exists for the disclosure, but on whether the disclosure involves a matter of public concern and whether the legitimate interests of the government to take the action outweighs the interests of the employee as a citizen to make his disclosures.<sup>207</sup>

To the extent that *Fiorillo* applied the balancing test from *Pickering* to reprisal for whistleblowing, it moved the focus of the law even further from the causation test of *Gerlach-Mt. Healthy* than had the retaliatory-motivation balancing test of *Warren*. Although *Warren* represented a new approach in federal reprisal law, it did not depart significantly from the prior case law's analytical objective of determining the existence of a prohibited connection between the whistleblowing and the personnel action. *Fiorillo*, however, departed significantly from this analytical approach. *Fiorillo's* interest-balancing test minimized the importance of a causal connection by concerning itself with the relative weights of the government's interest to take the personnel action and the employee's interest to blow the whistle. Under *Fiorillo*, the party with the more compelling in-

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(1982) (holding that *Pickering* balancing-of-interests standard "does not establish the standard for protected conduct under 5 U.S.C. § 2302(b)(8)"). For a discussion of the differences between the first amendment and the statutory protections of the CSRA, see Vaughn, *Statutory Protection*, *supra* note 8, at 637-41.

Professor Vaughn argues that Congress concluded it was necessary to provide more protection to the whistleblower under the CSRA than the first amendment provided in order to advance Congress' goal of promoting whistleblowing. *Id.* at 640-41. Thus, the statute did not concern itself with balancing the interest to disclose against the interest to prevent disruption in the government, as first amendment analysis would have done. Rather, the statute spoke only of the reasonableness of the disclosure and whether reprisal occurred. *Id.* Congress determined that as a matter of policy the promotion of whistleblowing outweighed any incidental disruption to the government that the whistleblowing disclosures might have caused. *Id.* This interpretation seems correct because in 1978, when the CSRA was passed, first amendment rights and limitations on public employees had been well established in *Pickering*. See, e.g., *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 255 (9th Cir. 1976) (holding firing of federal worker who openly flaunted homosexuality on job proper); *Ring v. Schlesinger*, 502 F.2d 479, 487 (D.C. Cir. 1974) (firing of public teacher critical of principal not in violation of first amendment); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 554 (1973) (noting established interest of government in limiting political activities of federal employees). So, to the extent that whistleblowing involves speech that is in the "public interest," section 2302(b)(8) would have been unnecessary if Congress merely wanted extant first amendment law to apply.

206. See Vaughn, *Statutory Protection*, *supra* note 8, at 637-41 (differentiating section 2302(b)(8)'s reasonable basis test from first amendment balance of interests test).

207. See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (protecting freedom of expression requires balancing employee's interest in commenting on matters of public concern against state interest in promoting efficiency of its employees); *Pickering*, 391 U.S. at 568 (balancing interests of teacher as citizen in commenting on matters of public concern against state's interest as employer in promoting efficiency of public services).

terest at stake would prevail. A *Fiorillo-Pickering* balancing test theoretically permits an agency to prevail even where retaliatory motivation outweighed the gravity of the employee's misconduct or poor performance as long as the interests of the government outweighed the interests of the whistleblower. This would probably occur where the disclosure itself was trivial or where the disruption caused by the disclosure was so great that the interests of the government could overcome the interests in protecting the disclosure. Nevertheless, under a first amendment balancing test, an agency could base its action solely on the protected activity and still not violate the statute.

In addition to introducing the first amendment calculus into reprisal law, *Fiorillo* undermined the Board's reasonable basis test for protected activity in another important way. Whereas the Board had held consistently that reasonableness, not personal motivation, was to be the determinative factor in evaluating whether a disclosure qualified for protected status under section 2302(b)(8), *Fiorillo* held that "to be given 'whistleblower' status and thus the protections under 5 U.S.C. § 2302(b)(8), the *primary* motivation of the employee must be the desire to inform the public on matters of public concern, and not personal vindictiveness."<sup>208</sup> This, of course, echoed the whistleblower-as-model-citizen arguments which the Board had seemingly rejected in *Frazier*.<sup>209</sup> In two broad strokes, *Fiorillo* significantly altered the landscape of federal reprisal law by introducing the first amendment balancing-of-interests test to weigh the relative importance of an employee's whistleblowing against management's discretionary authority to take personnel actions, and by introducing a subjective motive test to measure the civic-mindedness of the whistleblower's intentions.<sup>210</sup>

Post-*Fiorillo* Federal Circuit decisions have not applied its first amendment analysis to claims of reprisal for whistleblowing.<sup>211</sup> Even so, *Fiorillo* suggests that future reprisal cases in the Federal Circuit may produce additional anomalies, thereby making federal reprisal law even more unsettled.

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208. *Fiorillo v. Department of Justice*, 795 F.2d 1544, 1550 (Fed. Cir. 1986).

209. *In re Frazier*, 1 M.S.P.R. 163, 186-87 (1979) (noting that there can be element of self-interest in protected whistleblowing activities); see also *Berube v. General Servs. Admin.*, 30 M.S.P.R. 581, 596 (1986) (quoting *Special Counsel v. Starrett*, 28 M.S.P.R. 60, 70 n.7 (1985) (noting that laws' protections extend to employees who reasonably believe their charges regardless of alleged personal motivations), *rev'd on other grounds*, 792 F.2d 1246 (4th Cir. 1986)), *rev'd on other grounds*, 829 F.2d 396 (Fed. Cir. 1987).

210. See Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 AM. U.L. REV. 825, 844-46 (1987) (criticizing *Fiorillo* decision).

211. See *Mings v. Department of Justice*, 813 F.2d 384, 387-88 (Fed. Cir. 1987) (allowing removal of INS employee due to letter indicating bias against Catholics and Hispanics).

VIII. BOARD ADOPTS FEDERAL CIRCUIT *WARREN* TEST IN  
EMPLOYEE APPEAL CASES

In a significant 1987 case, the Board applied the Federal Circuit's four-part test announced in *Warren*. The case, *Oliver v. Department of Health & Human Services*,<sup>212</sup> was an employee appeal in which OSC did not participate. Oliver, a mid-level manager at the National Institutes of Health (NIH), appealed her removal for misconduct to the Board.<sup>213</sup> Oliver's misconduct concerned a series of memoranda she had written to high-level officials at NIH.<sup>214</sup> In her memoranda, Oliver expressed great dismay over low minority and female participation in an agency grant program intended to promote affirmative action, and over certain changes in the program that she believed were detrimental to her career.<sup>215</sup> She charged her supervisors with discriminatory treatment of program participants, improper program practices, and racist hiring practices, which she believed evidenced mismanagement.<sup>216</sup> She also charged her supervisors with having mistreated her on matters concerning her performance evaluation, office space, and travel schedule.<sup>217</sup> The agency removed her for disrespectful conduct and insubordination after she disobeyed instructions to use only the employee grievance procedures to express her discontent and after she refused to provide information to an advisory board reviewing her program.<sup>218</sup>

Oliver argued that her removal was based on her memoranda, which, although strongly worded and highly critical of her superiors, should have been protected as whistleblowing under section 2302(b)(8).<sup>219</sup> The Board rejected the argument, comprehensively reexamining CSRA reprisal law and adopting the *Warren* standard.<sup>220</sup> Applying this standard, the Board concluded that the agency's motive to retaliate did not outweigh the gravity of the employee's misconduct and, therefore, the agency's removal action did not constitute a reprisal for whistleblowing.<sup>221</sup>

In discussing whether Oliver's memoranda met the threshold test of protected activity under section 2302(b)(8), the Board, without

212. 34 M.S.P.R. 465 (1987).

213. *Oliver v. Department of Health & Human Servs.*, 34 M.S.P.R. 465, 467 (1987).

214. *Id.* at 467-68.

215. *Id.* at 467.

216. *Id.* at 470.

217. *Id.* at 470-71.

218. *Id.* at 468.

219. *Id.* at 469-75.

220. *Id.* (arguing appellant's desire to malign targets of disclosure much greater than mismanagement addressed).

221. *Id.*



explanation, cited the first amendment test in *Osokow v. Office of Personnel Management*,<sup>222</sup> that disclosures must touch matters of public concern to qualify for protection.<sup>223</sup> While the Board in *Oliver* did not specifically reject the utility of the traditional reasonable basis test in whistleblower reprisal cases, its reference to *Osokow* was surprising given its previous position that the first amendment “d[id] not establish the standard for protected conduct under 5 U.S.C. § 2302(b)(8).”<sup>224</sup> The Board’s resort to first amendment law as an appropriate analytical model for section 2302(b)(8) cases recurred when the Board discussed the protective scope of section 2302(b)(8). The Board wrote:

The Board is not alone in employing this kind of analysis to determine whether conduct which might appear to be protected loses that status for any reason. For example, even when dealing with paramount constitutional issues, the Supreme Court has recognized in first amendment cases to which we analogize, that whether an employee’s speech addresses a matter of public concern, and is therefore protected, is circumscribed, and must be determined by the content, form and context of a given statement, as revealed by the whole record. . . . While the case presently before the Board was not argued in the first amendment context, the analogy is nevertheless apt, and supports the notion that in determining whether speech is protected, it is necessary to carefully scrutinize the facts surrounding the employee’s declaration.<sup>225</sup>

In addition to its use of first amendment law, the Board followed the course taken by the Federal Circuit in *Fiorillo* when it analyzed Oliver’s conduct under an ethical standards test similar to the model citizen test of *Fiorillo*.<sup>226</sup> The Board wrote:

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222. 25 M.S.P.R. 319 (1984).

223. *Oliver v. Department of Health & Human Servs.*, 34 M.S.P.R. 465, 470 (1987) (citing *Osokow v. Office of Personnel Management*, 25 M.S.P.R. 319 (1984), in support of its finding that allegations of disparate treatment toward minorities in Oliver’s memoranda enjoyed qualified immunity under section 2302(b)(8)). *Osokow* was not, however, a section 2302(b)(8) case; it was a first amendment case. In *Osokow*, the Board had used the *Pickering* balancing test to find an employee’s leaflet not protected under the first amendment because the leaflet had only limited connections with matters of public concern. *Osokow*, 25 M.S.P.R. at 323. Yet, it was this finding that the Board in *Oliver* specifically cited in support of its decision to grant Oliver’s whistleblowing qualified immunity under the antireprisal statute. *Oliver*, 34 M.S.P.R. at 470.

224. Special Counsel *ex. rel.* *Rohrmann v. Department of State*, 9 M.S.P.R. 363, 366 n.4 (1982); see also *supra* notes 204-05, 209, 242 and accompanying text (discussing first amendment standard relating to 2302(b)(8) violations).

225. *Oliver*, 34 M.S.P.R. at 472 (citing two first amendment cases, *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Murray v. Gardner*, 741 F.2d 434, 438 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985)).

226. See *supra* notes 202-10 and accompanying text (discussing model citizen test in *Fiorillo*).

In enacting 5 U.S.C. § 2302(b)(8)(A), Congress sought to protect whistleblowers whose “dedication to the highest moral principles” helps create “a more effective civil service . . . .” It recognized that this protection was not absolute, however, by providing certain exceptions, *e.g.*, employees who claim to be whistleblowers in order to avoid an otherwise meritorious adverse action. . . . Thus, in deciding whether certain types of conduct should be immunized from sanction because of the law, the Board has held that the relevant inquiry is whether expanding the protections of the law to include the conduct under review would effectuate the purposes of 5 U.S.C. § 2302(b)(8). . . . We conclude, for the following reasons, that protecting appellant’s diatribe would not further the purpose of the law.<sup>227</sup>

The *Oliver* decision represents a discernable shift away from the objective reasonable basis test and towards a more fluid balancing-of-interests test more characteristic of first amendment and, in general, constitutional law. Under this new approach, disclosures which do not touch matters of general public concern and employees who do not blow the whistle out of “the highest moral principles” may not be found deserving of protection from reprisal under section 2302(b)(8), even if there is a reasonable basis for the disclosures. In this sense, statutory protection from reprisal risks become a privilege accorded to those who act for “the highest moral principles” on matters of public concern, instead of a right granted to all federal employees who reasonably believe that the information they disclose evidences one of the enumerated improprieties in the statute. Such a standard changes the emphasis of the statute from one which promotes reasonably based disclosures of wrongdoing under an objective standard of review, to one which promotes only morally principled disclosures under a subjective standard of review. Arguably, it simply mirrors existing first amendment protections. For federal employees trying to decide whether or not to blow the whistle, this shift makes predetermination of the protected status of an intended disclosure less predictable. Emphasis on the ethical quality of the whistleblower’s motivation and the public-interest nature of the disclosure as outcome-determinative factors in the establishment of parameters for protected activity may deter employees from whistleblowing rather than encouraging them. Furthermore, a first amendment approach may be too narrow and lead to the punishment of a protected disclosure which is not in the general “public interest” and which causes disruption. Such an approach could also lead to the blending of broad policy disagreements publicly articu-

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227. *Oliver*, 34 M.S.P.R. at 472 (citations omitted).

lated by federal employees on the one hand with protected disclosures of wrongdoing on the other. Congress, however, intended the former to be subject to a first amendment balancing test and the latter to be absolutely protected if reasonably believed.

The implications of *Oliver* to whistleblower protection reach beyond the facts of that case. The Board concluded in *Oliver* that the general content of Oliver's disclosures concerning affirmative action policies qualified for protection either as matters of public concern or as matters of a more personal nature which satisfied the reasonable basis test.<sup>228</sup> It also concluded that the agency removed Oliver because the tone and wording of her disclosures, some of which were of a personal nature, were "abusive," "insolent," "caustic," and "insubordinate."<sup>229</sup> The Board then measured Oliver's personal motives in making her disclosures against the newly adopted "highest moral principles" standard.<sup>230</sup> Under this test, the Board found that the offensive tone of the disclosures required it to strike the *Warren* balance in favor of the agency.<sup>231</sup>

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228. *Id.* at 470. In reaching this conclusion, the Board declared that Oliver's personal motivations did not bear on the reasonableness of her disclosures, reaffirming its long-held position on this issue. *Id.* This statement is anomalous in light of the Board's ultimate findings on the propriety of her disclosures.

229. *Id.* at 474. The Board described Oliver's memos as having unfairly characterized her supervisors as lacking personal integrity and moral authority; as dishonest, incompetent, appallingly ignorant, hysterical, irrational and ludicrous in the extreme; of not being qualified for their positions; instituting management practices akin to lunacy; and possessing paranoid assumptions and a lynch mob mentality. *Id.* at 472.

230. *Id.* at 474.

231. The Board wrote:

We conclude that, while appellant's allegations were in and of themselves protected, the bulk of them do not concern the public interest when considered in their entirety. Rather, her apparent interest in causing office disruption, as evidenced by her insubordination, and her obvious desire to malign the targets of her disclosures, as evidenced by her insolent manner and caustic style, substantially overshadowed the alleged waste, fraud, or mismanagement addressed.

*Id.* at 474.

In denying Oliver's petition on appeal, the Federal Circuit endorsed the Board's analysis of Oliver's disclosures. The court wrote:

Oliver argues that it is impossible to separate the protected disclosures from the words used to make them. This is incorrect. As this court has previously held, the circumstances surrounding the making of protected disclosures may provide independent ground for disciplinary action which do not violate 5 U.S.C. § 2302(b)(8). . . .

Oliver also contends that the board (sic) erred in considering the nexus requirement because nexus was conceded by the agency. According to Oliver, the agency's only reason for firing her was her disclosures, and the board's inquiry should have ended when it found the disclosures to be protected. The board correctly considered the nexus requirement because the circumstances surrounding the disclosures had to be considered. The board found that, while the disclosures were protected, they were not primarily concerned with matters of public interest. . . . As the board found, [her] comments demonstrate a desire to cause disruption and to malign her supervisors which outweighs the alleged waste and mismanagement disclosed.

Next, Oliver claims that the board's opinion upholds the removal on a totally dif-

It can reasonably be argued that section 2302(b)(8) protections could not have been meant to apply to statements which were so inflammatory in tone and style that they constituted misconduct under a subject-neutral standard.<sup>232</sup> *Oliver*, then, could have been decided by finding that the inflammatory parts of *Oliver's* charges had been unreasonable and were not, therefore, protected by section 2302(b)(8) under the reasonable basis test. Instead, the Board granted qualified protection to *Oliver's* disclosures in their entirety and then stripped them piecemeal of their qualified protections under the first amendment, model-citizen, and *Warren*-balancing tests. If the Board had found *Oliver's* highly inflammatory language not reasonably based, it could have sustained the agency's disciplinary action as easily under the existing standards of *Gerlach-Mt. Healthy* without having to inject moral and first amendment principles into the *Warren* reprisal equation.

#### IX. A TEN-YEAR SUMMARY OF FEDERAL REPRISAL LAW

The past ten years have witnessed the beginnings of the development of federal reprisal law created by the CSRA. Thus far, the law has struggled to resolve the inevitable conflict between two distinct congressional policies of the CSRA that have sometimes been at cross purposes with each other. One of those policies promotes and encourages the disclosure of waste, fraud, abuse of authority, and mismanagement.<sup>233</sup> It accepts as necessary the attendant disruption that such disclosures may engender. The other promotes management's discretionary authority to eliminate disruptions caused by inefficiency by encouraging management to discharge employees "who cannot or will not improve their performance to meet required standards."<sup>234</sup> The Board and the few federal courts which have confronted this conflict have attempted to devise analytical models to accommodate both competing interests.<sup>235</sup> However, the

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ferent ground from that relied upon by the agency. This argument is without merit.

As we discussed above, the wording of *Oliver's* disclosures can be considered apart from the disclosures themselves, which is what the board did in this case.

*Oliver v. Department of Health & Human Servs.*, No. 87-3527, slip. op. at 4-5 (Fed. Cir. Apr. 20, 1988) (citations omitted).

232. See *Oliver v. Department of Health & Human Servs.*, 34 M.S.P.R. 465, 475 (1987) (noting that "[n]othing in 5 U.S.C. § 2302(b)(8), its legislative history, or the cases interpreting it indicates that all statements made in the course of alleged whistleblowing no matter the degree of the invective employed, are unconditionally protected").

233. 5 U.S.C.A. § 2301(b)(9) (West Supp. 1990).

234. *Id.* § 2301(b)(6).

235. See *supra* note 198 and accompanying text (discussing federal circuit court standard applied to whistleblower claiming reprisal); see also *Hagmeyer v. United States*, 757 F.2d 1281, 1284 (Fed. Cir. 1985) (discussing elements of reprisal cases); *Sullivan v. Department of Navy*, 720 F.2d 1266, 1275 (Fed. Cir. 1983) (discussing same); *In re Frazier*, 1 M.S.P.R. 163, 165-66

balance these models have struck has not been consistent and has sometimes created ambiguous and elusive standards which offer only marginal guidance to the two million civil service employees who must conform their conduct to these standards.

The record demonstrates that OSC, recognizing that an effective whistleblower protection program may require the vindication of a few marginal employees because of their protected disclosures, has advocated interpretations of the law which would favor whistleblowers and encourage whistleblowing activities. Response by the Board and the courts to OSC's advocacy has been decidedly mixed. Initially, the Board rejected OSC arguments for an expansive interpretation of the substantive and procedural safeguards for whistleblowers under the CSRA.<sup>236</sup> However, by mid-decade, OSC had made some progress before the Board in expanding the law's protection.<sup>237</sup> More recent judicial interpretations have indicated that on the tenth anniversary of the CSRA, the pendulum had swung back in favor of management discretion to the detriment of whistleblower protection, making it more difficult for OSC and whistleblowers to prevail in litigation before the Board.<sup>238</sup>

#### X. THE WHISTLEBLOWER PROTECTION ACT OF 1989: A RENEWED COMMITMENT TO PROTECT WHISTLEBLOWERS FROM REPRISAL

As early as 1986, Congress began to move in earnest to draft legislation to toughen the CSRA protections against reprisal for whistleblowing. That year, the House passed H.R. 4033<sup>239</sup> which provided, among other things, the right of any individual who may have suffered a prohibited personnel practice to appeal directly to the MSPB, regardless of the significance of the personnel action suf-

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(1979) (discussing same), *aff'd*, 672 F.2d 150 (D.C. Cir. 1982) (noting whistleblower claim must be scrutinized so protection not misused to thwart disciplinary action).

236. See *supra* notes 114-39 and accompanying text (discussing Board's acceptance of *Mt. Healthy* reprisal test requiring that protected conduct be significant factor in challenged agency action over OSC's objection).

237. In the mid-eighties, OSC efforts met with only partial success before the Board. The Board rebuffed two OSC attempts to extend CSRA protections from reprisal to federal employees of two entities. *Special Counsel v. Everett*, 28 M.S.P.R. 348, 352-53 (1985) (refusing CSRA protections for National Guard technicians); *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 230-32 (1986) (refusing CSRA protections for Peace Corps Country Directors). However, OSC was successful in extending protections to reemployed annuitants. *Acting Special Counsel v. United States Customs Serv.*, 31 M.S.P.R. 342, 348-51 (1986).

238. See Vaughn, *Civil Service Reform Act of 1978 and Legal Regulation of Public Bureaucracies*, 31 *How. L.J.* 187, 194-95 (1988) (discussing restrictive approaches taken by courts to whistleblowing issues and OSC, including judicial rebuff of OSC's attempt to enforce ethics regulations through its disciplinary action authority).

239. H.R. 4033, 99th Cong., 2d Sess., 132 CONG. REC. 25,156-62 (1986).

ferred, and to obtain judicial review of the Board's decision in the federal district courts.<sup>240</sup> The bill would have lowered the standard of proof for whistleblower reprisal from preponderant evidence to substantial evidence and would have required OSC to represent all alleged victims of prohibited personnel practices before the Board.<sup>241</sup> H.R. 4033 further proposed to permit agencies to defend against a prima facie case of reprisal by showing that the challenged action had been based solely on legitimate management reasons.<sup>242</sup>

In 1987, Congress returned to the issue of whistleblower protection with renewed commitment to enhance the existing protections for victims of whistleblower reprisal. Both the House and the Senate drafted versions of the "Whistleblower Protection Act of 1987."<sup>243</sup> Both bills contained a private right of action,<sup>244</sup> expanded judicial review options,<sup>245</sup> and a lower burden of proof for employees in whistleblower reprisal cases.<sup>246</sup> By 1988, Congress passed S. 508, a modified version of the Senate bill from the previous year, only to see it pocket-vetoed by outgoing President Reagan.<sup>247</sup>

However, in March 1989, a compromise was reached between the Congress and the new administration which resulted in S. 20,<sup>248</sup> the Whistleblower Protection Act of 1989 (WPA).<sup>249</sup> This reform bill contains most of the pro-whistleblower features of earlier proposals with the exception of authority for the Special Counsel to seek judicial review of a decision of the MSPB, a prominent feature in earlier proposals.<sup>250</sup> The most significant change to the substantive law

240. *Id.* § 1221. Under the CSRA, only employees who had completed their one-year probationary period in the competitive service and certain veterans holding appointments in the excepted service were given the right to appeal to the MSPB. 5 U.S.C. § 7511 (1988). Even then, the right was limited to actions which were significant, i.e., removal, suspension for more than 14 days, reduction in grade, reduction in pay, and certain furlough decisions. *Id.*

241. H.R. 4033, *supra* note 239, § 1214.

242. H.R. 4033, *supra* note 239, §§ 1212, 1214, & 1221. The Senate failed to act upon the House bill during the 99th Congress.

243. H.R. 25, *Whistleblower Protection Act of 1987: Hearings on H.R. 25 Before the Subcomm. of Civil Service of the Comm. on Post Office and Civil Services*, 100th Cong., 1st Sess. (1987); S. 508, 100th Cong., 1st Sess., 134 CONG. REC. S15328-35 (daily ed. Oct. 7, 1988).

244. H.R. 25, *supra* note 243, § 1221(a); S. 508, *supra* note 243, § 1221(a).

245. H.R. 4033, *supra* note 243, § 1214(c); S. 508, *supra* note 243, § 1214(c).

246. H.R. 4033, *supra* note 243, § 2302(b)(8); S. 508, *supra* note 243, § 2302(b)(8).

247. See Memorandum of Disapproval by President Reagan 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988) (noting President's withholding of approval of S. 508 because bill would alter proper balance under existing law between whistleblower protection and effective management of federal workforce and would unconstitutionally restrict Executive's power to supervise Special Counsel and resolve disputes between Special Counsel and MSPB).

248. S. 20, 101st Cong., 1st Sess., 135 CONG. REC. H740 (daily ed. Mar. 21, 1989).

249. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

250. The Whistleblower Protection Act of 1989 provides for a new independent right of action to whistleblowers alleging a violation of section 2302(b)(8). 5 U.S.C.A. § 1221 (West

was the deletion of the word reprisal from sections 2302(b)(8) and (9) and the substitution of the phrase "because of."<sup>251</sup> Congress made these changes in direct response to what it perceived to be the unduly restrictive decisions of the Board and the courts which had made it difficult to prove reprisal.<sup>252</sup> The legislative history of this amendment reveals that congressional reformers were critical of the *Starrett* and *Harvey* courts for having misinterpreted the CSRA's protection for whistleblowers in section 2302(b)(8) with their punitive-intent requirement,<sup>253</sup> a criticism the Special Counsel had advanced in congressional hearings.<sup>254</sup> The change expressed Congress' intent that the statute prohibited actions that are based on protected conduct, regardless of the personal motivation of the responsible officials. If a causal link can be established between the protected conduct and the personnel action, the statute has been violated.<sup>255</sup>

The new law goes even further. It defines precisely what quantum of proof is required to justify corrective action in section 2302(b)(8) cases. Believing that the existing law required proof that the protected disclosure be a significant or substantial factor in the action taken, Congress lowered the threshold burden of proof by establishing a "contributing factor" test in corrective action cases under sec-

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Supp. 1990) (allowing individual right of action in certain reprisal cases). The new amendment to the CSRA also permits the victim of a retaliatory personnel action based on protected disclosures to request the MSPB to stay the alleged retaliatory action prior to hearing, an option previously granted only to the Special Counsel. *Id.* § 1221(c). The new law does require the individual to file a preappeal complaint with OSC and wait 120 days or until OSC has terminated its investigation, which ever occurs first, before filing an appeal with the Board. *Id.* § 1214(a)(3).

251. *Id.* § 2302(b)(8)-(9) (prohibiting personnel actions which are threatened, taken, or not taken because of conduct protected by those subsections).

252. See S. REP. No. 413, 100th Cong., 2d Sess. 15-16 (1988) (noting Board has been overly restrictive in standards for proving reprisal).

253. See *id.* (commenting on Court of Appeals' narrow definition of retaliation and reprisal).

254. See *Whistleblower Protection Act of 1987: Hearings Before the Senate Subcomm. on Federal Services, Post Office, and Civil Services of the Comm. on Government Affairs*, 100th Cong., 1st Sess. 408 (1987) (statement of Mary F. Wieseman, OSC) (criticizing court decisions in whistleblower reprisal cases).

255. See *id.* at 15 (noting that employee has established prima facie case when it is shown whistleblowing was factor in personnel action). Explanatory text on the genesis and purpose of the amendments to section 2302(b)(8) appears in the 1988 Senate committee report on S. 508 that was incorporated by reference into the legislative history of S. 20. 135 CONG. REC. S2794 (daily ed. Mar. 16, 1989) (remarks of Sen. C. Levin); 135 CONG. REC. H747 (daily ed. Mar. 21, 1989) (remarks of Rep. G. Sikorski). The Senate committee report stated: "In effect, [the courts' interpretations] could require employees in corrective action cases to show not just that an action against them was based on a protected disclosure, but also that the official's motives in taking the retaliatory action were inappropriate." S. REP. No. 413, *supra* note 252, at 15. By substituting a "because of" causation standard, the reformers intended to make clear that the precise state of mind of the responsible officials was not the litmus test for a violation. "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." *Id.* at 16 (emphasis added).

tion 2302(b)(8).<sup>256</sup> Based on the explanatory discussion in the enactment history of the WPA, it seems clear that the new contributing factor standard was intended to make corrective action the norm whenever a protected disclosure, alone or in connection with other factors, tended to affect in any way the outcome of the decision.<sup>257</sup> With these two important changes, Congress returned the focus of whistleblower protection inquiry to the factors considered by the employer in making a personnel decision and away from the particular motivations of the employer. The WPA amendments ensure a whistleblowing-neutral decision-making process that is more consistent with the CSRA goals of promoting and encouraging federal employees to disclose evidence of waste, fraud, and abuse of authority than the prevailing motivation-based inquiry established by case law.

### CONCLUSION

With the recent passage of the WPA amendments, the federal civil service begins its next decade under the CSRA with new standards designed to ease the burden on employees and the OSC to prove that employees have been disadvantaged by their whistleblowing. The congressional creators of whistleblower protection firmly rejected the law's development at the Board and in the courts during the first decade under the CSRA. The WPA returns us to 1979, when the law of reprisal began its development. Where the WPA amendments will lead in the next ten years is, of course, unknown.<sup>258</sup> What is clear from this survey of the OSC's role in the

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256. See 5 U.S.C.A. §§ 1214(b)(4), 1221(e) (West Supp. 1990) (providing "the Board shall order such corrective action as the Board considers appropriate if the [Special Counsel, appellant employee, former employee, or applicant] has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against [the individual]").

257. 135 CONG. REC. S2779-80 (daily ed. Mar. 16, 1989) (remarks of Sen. C. Levin) (providing retaliation requires showing disclosure was only contributing and not substantial factor); see *id.* at S2781 (reprinted letter from Attorney General Thornburgh to Sen. Levin, Mar. 3, 1989) (clarifying new standard as contributing factor); *id.* at S2787 (remarks of Sen. W. Cohen) (whistleblowing need only be contributing factor); *id.* at S2788 (remarks of Sen. C. Grassley) (same); *id.* at S2793 (remarks of Sen. D. Pryor) (contributing factor is new standard). On the House side, see 135 CONG. REC. H747 (daily ed. Mar. 21, 1989) (remarks of Rep. S. Kursh) (agreeing to clarify word "factor" by adding "contributing"); *id.* at H751 (remarks of Rep. P. Schroeder) (contributing factor means any factor that tends to affect outcome); *id.* at H752 (remarks of Rep. B. Gilman) (contributing factor is new standard).

258. In December 1990, the Board issued its first decision on the merits of a claim of whistleblower "reprisal" under the WPA. *McDaid v. Department of Housing and Urban Dev.*, No. AT122190W0400, slip op. (M.S.P.B. Dec. 6, 1990). Rather than clarify the conceptual differences between the causal connection requirement of the "because of" clause of the WPA and the retaliatory motivation requirement of pre-WPA case law, the *McDaid* decision left this issue open for future interpretation. In *McDaid*, the Board frequently used the words "retaliation," "retaliatory motive," "protected disclosures," and "whistleblowing activity" in-



development of reprisal law in the first decade of the CSRA is that OSC efforts to expand the legal protections for whistleblowers through the MSPB have had mixed results. Some of these efforts have succeeded. When they did not, the OSC has been constrained, as it must be, to operate within the framework of the law as interpreted by the Board and the courts. The adoption of the WPA amendments, however, reflects to a large extent OSC's historical advocacy in the development of federal reprisal law.

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terchangeably in its first discussion of "the nature of the parties' respective burdens" under the new law. *Id.* at 6-8, 10-12. It is far from clear whether the Board intended *McDaid* to require proof of personal retaliatory motivation on the part of an agency official or whether it merely intended to hold that prohibited reprisal or retaliation under the WPA occurs whenever the protected disclosure or whistleblowing is a contributing factor in the challenged action. Since the *McDaid* decision, at least one administrative judge has held that the critical inquiry in whistleblower cases focuses on the presence or absence of evidence of retaliatory animus. *See* *Rockwell v. Department of the Navy*, No. SE075299010267, slip op. at 21 (M.S.P.B. Dec. 17, 1990) (noting that 'contributing factor' concept relates primarily to creation of retaliatory animus). These recent developments suggest that the personal motivation controversy in federal reprisal law may still be unsettled.

