

Calendar No. 219

111TH CONGRESS }  
*1st Session*

SENATE

{ REPORT  
111-101

WHISTLEBLOWER PROTECTION  
ENHANCEMENT ACT OF 2009

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 372

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, TO CLARIFY THE DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED PERSONNEL PRACTICES, REQUIRE A STATEMENT IN NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS THAT SUCH POLICIES, FORMS, AND AGREEMENTS CONFORM WITH CERTAIN DISCLOSURE PROTECTIONS, PROVIDE CERTAIN AUTHORITY FOR THE SPECIAL COUNSEL, AND FOR OTHER PURPOSES



DECEMBER 3, 2009.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 2009

89-010

(III) arises out of the same set of operative facts as any civil action against the Government filed by the employee, former employee, or applicant pending in a Federal court; or

(IV) involves a novel question of law; or

\* (iii) under standards applicable to the review of motions to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure, including rule 12(d), the request for corrective action (including any allegations made with the motion under subparagraph (B)) would not be subject to dismissal.

(5) The Board shall grant or deny any motion requesting a certification described under paragraph (4)(ii) within 90 days after the submission of such motion and, in any event, not later than 15 days before issuing a decision on the merits of a request for corrective action.

(6) Any decision of the Board, any administrative law judge appointed by the Board under section 3105 of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case to grant or deny a certification under this paragraph shall be reviewed only on appeal of a final order or decision of the Board under section 7703, if—

(A) the reviewing court determines that the decision by the Board on the merits of the alleged prohibited personnel described in section 2302(b)(8) or (9)(A)(i), (B)(i), (C), or (D) failed to meet the standards of section 7703(c); and

(B) the decision to deny the certification shall be overturned by the reviewing court if such decision is found to be arbitrary, capricious, or an abuse of discretion; and

(C) shall not be considered evidence of any determination by the Board, any administrative law judge appointed by the Board under section 3105 of this title, or any employee of the Board designated by the Board on the merits of the underlying allegations during the course of any action at law or equity for de novo review in the appropriate United States district court in accordance with this subsection.

(7) In any action filed under this subsection—

(A) the district court shall have jurisdiction without regard to the amount in controversy;

(B) at the request of either party, such action shall be tried by the court with a jury;

(C) the court—

(i) subject to clause (iii), shall apply the standards set forth in subsection (e); and

(ii) may award any relief which the court considers appropriate under subsection (g), except—

(I) relief for compensatory damages may not exceed \$300,000; and

(II) relief may not include punitive damages; and

(iii) notwithstanding section (e)(2), may not order relief if the agency demonstrates by a preponderance of the evidence that the agency would have taken the same personnel action in the absence of such disclosure; and

(D) the Special Counsel may not represent the employee, former employee, or applicant for employment.