

NWC | NATIONAL WHISTLEBLOWER CENTER

1875 CONNECTICUT AVE NW, 10TH FLOOR, WASHINGTON DC 20009 | WWW.WHISTLEBLOWERS.ORG

SPECIAL REPORT ON PERMITTING FEDERAL EMPLOYEES TO THEIR WHISTLEBLOWER CASES HEARD IN U.S. DISTRICT COURTS

Prepared for the United States House of Representatives
Committee on Oversight and Reform, Subcommittee on Government
Operations

By:

[Stephen M. Kohn](#)

Chairman of the Board of Directors

[David K. Colapinto](#)

General Counsel¹

January 28, 2020

In 2008 and 2009 the U.S. House of Representatives, with strong bi-partisan support, [passed bills](#) designed to reform the federal employee whistleblower protection procedures.² A key element of these reforms was to permit federal employees to file whistleblower cases in a U.S. District Court,³ and have their cases heard in a manner consistent with other federal employee discrimination cases, such as Title VII of the Civil Rights Act and the age discrimination laws.

Permitting federal employees an opportunity to have their whistleblower retaliation cases heard in federal court was considered by the House as an essential reform. Effective and realistic procedures to vindicating whistleblower rights is a key requirement for ensuring that employees can safely report waste, fraud and abuse as required under the Merit Systems Principles applicable to all federal employees, 5 U.S.C. § 2301. These Principles state:

¹ Special thanks to NWC Program Manager Kait Pararas for her invaluable research that was incorporated into this report.

² See H.R. 985, linked at <https://www.kkc.com/wp-content/uploads/2019/07/BILLS-110hr985rfs.pdf>.

³ See House Report 110-42 (Part 1), linked at <https://www.kkc.com/wp-content/uploads/2019/07/CRPT-110hrpt42-pt1.pdf>.

Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—
(A) a violation of any law, rule, or regulation, or
(B) 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. § 2301(b)(9).

In 1978 Congress passed the first federal employee whistleblower protection statute that granted employees the right to seek relief for violations of 5 U.S.C. § 2301(b)(9). The procedures required that employees file any adverse action claims with the Merit Systems Protection Board (“MSPB”), a body appointed by the President and confirmed by the Senate. The MSPB was designed to have three members, two who would be members of the President’s political party and one who would be a member of the opposition party.

From the start the MSPB process was highly criticized. Calls to permit federal employees to have direct access to federal court were raised. The whistleblower law was viewed as highly ineffective, and as a result was amended in 1989, 1994 and 2012. Although numerous Members of Congress supported court access for federal employees with the right to request a jury trial, and the full House has voted three times to permit such access, the federal court access reform was not adopted. Instead, Congress enacted numerous other improvements in the law designed to fix problems arising from weaknesses in the original 1978 law. Unfortunately, the three attempts to fix the law were not effective, and currently the entire MSPB process is broken, and thousands of employee cases are now backlogged.

The failure to provide federal employee whistleblowers with direct access to U.S. District Court remains the single biggest problem facing any federal employee who desires to blow the whistle. Consistent with the amendments passed by the House of Representatives in 1994, 2008 and 2009, this Committee should recommend that the Whistleblower Protection Act be amended to permit federal employee whistleblowers with an opportunity to file cases in federal court and seek a jury trial.

The reasons for supporting this legislative fix are numerous. Based on public hearings conducted by this Committee and in the U.S. Senate, there is a strong record supporting this proposal. This includes:

- Professor Robert Vaughn, a highly respected expert on federal employment law, testified before the U.S. Senate as to why federal court access was needed. [See Senate Hearing 111-299](#);

- On May 4, 2009 this Committee held a [hearing on federal court access](#) for federal employees, and the testimony presented at that hearing demonstrated why this reform was needed;⁴
- Every major “good government” or whistleblower support group has endorsed this reform. A [letter placed on the formal record of this Committee was signed by 292 public interest groups](#) strongly endorsing federal court access as the first reform they advocated.⁵

Thus, there already exists a strong record before Congress justifying this needed reform.

In addition to the public record previously filed before Congress, this Committee should also be aware of the following:

- In 1991 Congress granted all federal employees the [right to file discrimination cases in U.S. District Court](#). This includes race, sex, age, disability, national origin, and religious discrimination. It also covers complaints alleging retaliation for raising concerns regarding unlawful discrimination.⁶ Although the MSPB or EEOC would have jurisdiction to hear these cases, employees were given the right to remove their cases into court and have them heard by a jury of their peers. Whistleblower discrimination cases have second-class status. Victims of race, sex, age, or religious discrimination have the right to file cases in court, but whistleblowers do not.
- Under federal law all state, local and municipal employees have the right to file their [cases in federal court](#) and seek a jury trial. It is fundamentally unfair for Congress to have provided this right to all non-federal government employees, but deny this right to federal workers.
- Since 2017 the MSPB has been without a quorum. As a result there is a backlog of over 2,300 cases. Appointing new Board members, which happens whenever a new President is elected, will not solve this problem, as the fair and just adjudication of the backlog alone should take years to resolve. It is unfair that whistleblowers must subject their cases to a politically appointed board that has no mandatory judicial qualifications, and is subject to the whims of the nominating and appointment process. Federal judges are appointed for life and must meet judicial qualification standards set by the Senate Judiciary Committee.

⁴ The House hearing is linked here: <https://babel.hathitrust.org/cgi/pt?id=mdp.39015089031192&view=1up&seq=1>.

⁵ The public interest group letter is linked at <https://www.kkc.com/wp-content/uploads/2019/07/publicinterestletter5.14.09.pdf>.

⁶ The EEOC website explains these processes in detail. See https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm.

- A review of federal court statistics and the statistical surveys of federal employment cases required under the No Fear Act demonstrates that permitting federal court access will not result in “clogging the courts,” but instead will create a strong incentive for the MSPB process to be better administered so employees will not feel compelled to file their cases in court, which can be a far more expensive process for the employee. The statistical analysis, based on statistics provided by federal agencies. See Appendix to this report.
- In 1978 federal employees were not the only class of whistleblowers who were required to use administrative agencies to vindicate their rights. In 1978 Congress also passed whistleblower protections under the Atomic Energy Act (“AEA”), which also required all employees to use an administrative process (under the AEA employees had to file with the Department of Labor). Congress responded to the inherent procedural problems created by denying whistleblowers access to U.S. District Court procedures, and Congress amended the AEA to explicitly permit all nuclear safety whistleblowers the right to file in federal court once they exhausted their remedies under the older law (i.e. [after 1-year employees could file directly in federal court and seek a de novo jury trial](#)). See 42 U.S.C. § 5851.
- The amendment to the AEA permitting employees to file cases in federal court has since become the “best practice” for all modern whistleblower laws. For example, the following laws permit whistleblowers to file in federal court after exhausting their administrative remedies: Sarbanes-Oxley Act, Surface Transportation Act, Consumer Product Safety, Consumer Financial Protection, Food Safety, Tax Evasion, Seaman Safety, Railroad Safety Act, National Transit Systems Security Act, and the Atomic Energy Act.
- Likewise, Congress now also permits employees to directly file whistleblower cases in federal court without having to exhaust any administrative remedies. See anti-retaliation provisions in the False Claims Act, Defense Contractor protections, Monetary Transactions (i.e. banking Frauds, Securities Exchange Act and Commodity Exchange Act.
- Congress amended other earlier whistleblower laws to create a “kick-out” provision permitting employees to remove their whistleblower cases from an administrative agency to federal court. This process has become the recognized “best practice” in all modern whistleblower retaliation laws.

APPENDIX
STATISTICAL SURVEY OF FEDERAL EMPLOYEE CASES FILED IN U.S.
DISTRICT COURT PURSUANT TO ANTI-DISCRIMINATION LAWS

The National Whistleblower Center (“NWC”) conducted a survey of discrimination cases filed within federal agencies in order to determine any burden on the federal court system caused by permitting employees the right to file their discrimination cases in federal court. The NWC based this survey on information published by federal agencies, as required under the No Fear Act. Not every agency published the required statistics, and only ten agencies reviewed broke-down their statistics by identifying new cases filed in federal court as compared to cases pending in federal court.

The complete statistical data based published by various federal agencies is linked below. The major findings are as follows:

1. Using the FY 2018 data, the NWC identified 10 agencies that reported complete data. Calculating percentages from these 10 agencies, the following is demonstrated:
 - A. 1,222 new administrative discrimination complaints were filed, but only 50 cases were filed in federal court, less than 4% of the total. Thus, over 96% of federal employees who filed discrimination claims used the administrative process, despite having access to federal court.
 - B. The total number of new civil cases (all types) filed in federal courts in FY 2018 were 282,936. Providing federal employees access to district court trials had no material impact on the U.S. court system.
2. Only two executive departments published statistics as to how many new discrimination cases were filed in federal court during FY 2018. These numbers were very small, 17 and 11 respectively.
3. Five executive branch cabinet offices provided statistics on how many discrimination cases were pending in court, regardless of the year they were filed. These numbers also demonstrate that permitting whistleblowers to file claims in federal court will not create any burden on the federal judicial system. The breakdown is as follows:⁷
 - Department of Agriculture: 46
 - Department of Commerce: 17
 - Department of Homeland Security: 86
 - Department of Transportation: 20

⁷ It should be noted that while information on the entire Department of Defense is not available, the Department of Air Force did publicly post their annual report. The Air Force saw 21 new cases filed and 22 cases pending in federal district court in FY 2018.

- Department of Treasury: 51
4. The NWC was also able to review data published by a number of smaller federal agencies. The statistics published by these agencies are consistent with the numbers seen in the Cabinet departments:
- Consumer Financial Protection Bureau: 2
 - Council of the Inspectors General on Integrity and Efficiency: 0
 - Federal Communications Commission: 4
 - Federal Housing Financing Agency: 2
 - Federal Elections Commission: 0
 - Federal Deposit Insurance Corporation: 3
 - General Services Administration: 0
 - National Archives: 0
 - National Credit Union Administration: 0
 - Pension Benefit Guaranty Corporation: 2

Based on the No Fear Act reports published by various executive department agencies, there are a very low volume of discrimination cases filed in federal district court, despite the fact that all employees have an opportunity to file their cases in that forum. Because there are far more discrimination cases filed by the federal workforce than there are whistleblower cases, we assume that the total number of whistleblower cases filed in federal court will be significantly lower than those filed under the discrimination laws.

FY 2018 Data by Agency
[FDC refers to federal district court]

Department of Agriculture

New Administrative Complaints	New FDC Cases	Pending FDC Cases
522	17	46

Department of Commerce

New Administrative Complaints	New FDC Cases	Pending FDC Cases
186	11	17

Department of Homeland Security

New Administrative Complaints	New FDC Cases	Pending FDC Cases

1,472	N/A	86
-------	-----	----

Department of Transportation

New Administrative Complaints	New FDC Cases	Pending FDC Cases
271	N/A	20

Department of Treasury

New Administrative Complaints	New FDC Cases	Pending FDC Cases
447	N/A	51

Department of Air Force (Department of Defense)

New Administrative Complaints	New FDC Cases	Pending FDC Cases
358	21	22

Federal Communications Commission

New Administrative Complaints	New FDC Cases	Pending FDC Cases
9	N/A	4

Federal Housing Financing Agency

New Administrative Complaints	New FDC Cases	Pending FDC Cases
6	1	2

Federal Elections Commission

New Administrative Complaints	New FDC Cases	Pending FDC Cases
1	0	0

National Credit Union Administration

New Administrative Complaints	New FDC Cases	Pending FDC Cases
14	0	0

Federal Deposit Insurance Corporation

New Administrative Complaints	New FDC Cases	Pending FDC Cases
33	0	3

National Archives

New Administrative Complaints	New FDC Cases	Pending FDC Cases
24	0	0

General Services Administration

New Administrative Complaints	New FDC Cases	Pending FDC Cases
84	0	0

Consumer Financial Protection Bureau

New Administrative Complaints	New FDC Cases	Pending FDC Cases
21	N/A	2

Council of the Inspectors General on Integrity and Efficiency

New Administrative Complaints	New FDC Cases	Pending FDC Cases
0	0	0

Pension Benefit Guaranty Corporation

New Administrative Complaints	New FDC Cases	Pending FDC Cases
18	N/A	2