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**GAO**

**Testimony**

Before the Subcommittee on the Civil Service  
Committee on Post Office and Civil Service  
House of Representatives

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**WHISTLEBLOWER  
PROTECTION**

**Employees' Awareness and  
Impact of the Whistleblower  
Protection Act of 1989**

Statement of  
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General Government Division



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Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to take part in the Subcommittee's hearing on whistleblower protection and the Office of Special Counsel (OSC). You asked us to summarize our recent work on whistleblower protection and OSC. Since July 1992, we have issued reports dealing with federal employees' awareness of whistleblower protection, the effectiveness of the Whistleblower Protection Act of 1989, and agencies' implementation of the whistleblower statutes.

Overall, our work has shown that despite the intent of the 1989 act to strengthen and improve whistleblower protection, employees are still having difficulty proving their cases. Employees are not aware of their right to protection, and agencies are not informing them of this right.

THE PURPOSE OF THE WHISTLEBLOWER PROTECTION ACT  
OF 1989 WAS TO STRENGTHEN PROTECTION OF EMPLOYEES

Statutory protection for whistleblowers was first introduced by the Civil Service Reform Act of 1978 (P.L. 95-454). However, on the basis of reports by the Merit Systems Protection Board (MSPB) and GAO, as well as OSC's data, Congress subsequently found that the 1978 act was having little impact on encouraging federal employees to blow the whistle and protecting whistleblowers. In 1984, for example, MSPB reported that between 1980 and 1983 there was no measurable progress in overcoming employee reluctance to reporting fraud, waste, and abuse.<sup>1</sup> And we reported that, in fiscal year 1984, OSC closed 99 percent of the whistleblower reprisal complaints without seeking corrective or disciplinary action.<sup>2</sup>

In an attempt to deal with such reported problems, Congress enacted the Whistleblower Protection Act of 1989 (P.L. 101-12) to strengthen and improve protection for whistleblowers. The act, among other changes, separated OSC from MSPB and established OSC as an independent agency. The act expanded OSC's role in protecting federal employees, especially whistleblowers, from prohibited personnel practices.

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<sup>1</sup>Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings, U.S. Merit Systems Protection Board (Washington, D.C.: Oct. 1984).

<sup>2</sup>Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection (GAO/GGD-85-53, May 10, 1985).

Other changes in the act to help whistleblowers included

- easing the employee's burden of proof that reprisal for whistleblowing had occurred, and
- allowing employees to file appeals with MSPB if they did not obtain relief through OSC.

EMPLOYEES CONTINUE TO HAVE  
DIFFICULTY PROVING REPRISAL

In October 1992, we reported that even though the 1989 act was intended to strengthen and improve protection for whistleblowers, employees claiming reprisal for whistleblowing at OSC were finding that proving their cases was as difficult then as it was before the act was passed.<sup>3</sup> The principal reason remained the lack of sufficient evidence to establish the link between the employee's whistleblowing and the reprisal.

OSC disagreed with our conclusion that proving reprisal remained difficult, indicating that employees claiming reprisal under the 1989 act were having greater success than our analysis of OSC's data indicated. However, we found that although the number of whistleblower reprisal complaints, corrective and disciplinary actions, and stays (postponed action) had increased under the 1989 act, the increases were generally proportionate to the increases in the volume of complaints that had been filed. We also found that before and after the 1989 act's passage, about the same percentage (5.8 percent versus 6.3 percent) of reprisal complaints filed with OSC resulted in some form of corrective action.

On the positive side, we found that allowing employees to file appeals with MSPB was having a measurable impact on whistleblower reprisal cases. About one-third of those employees appealing to MSPB after going through OSC for assistance were getting relief, usually through settlements and sometimes through reversals of adverse personnel actions.

MOST EMPLOYEES DO NOT KNOW HOW THE WHISTLEBLOWER STATUTES  
PROTECT THEM, AND AGENCIES ARE NOT INFORMING THEM

In July 1992, we reported on the results of a governmentwide survey of federal employees.<sup>4</sup> The survey indicated that most

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<sup>3</sup>Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult (GAO/GGD-93-3, Oct. 27, 1992).

<sup>4</sup>Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection From Reprisal (GAO/GGD-92-120FS, July 14, 1992).

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

On a related issue, in March 1993 we reported that there were wide disparities in how the 19 agencies we reviewed had implemented the whistleblower statutes.<sup>5</sup> Some agencies had informed employees about their whistleblower protection rights, but most agencies had neither informed their employees nor developed policies and procedures for implementing the 1989 act.

Under 5 U.S.C. 2302(c), the head of each department and agency is responsible for preventing prohibited personnel practices, including whistleblower reprisal. However, no explicit requirement exists in the whistleblower statutes (5 U.S.C. 1201 et seq.) for OSC or the agencies to inform employees about their right to protection from reprisal or where to report misconduct. OSC, to its credit, has attempted to spread the word about employees' right to be protected from reprisal. However, as OSC officials acknowledge, they have had limited success in eliciting the support of the agencies to inform employees of what their rights are under the law and how to go about exercising them.

The lack of agency commitment appears to us to be a major problem in the whistleblower program. If the program is to be successful, agencies' support for the program is critical. Employees should be encouraged to call improprieties to the attention of management and be assured that such actions will not result in reprisal. All too often in the past, such assurances have been absent and employees did not know how much agency support they would receive.

ALL EMPLOYEES ARE NOT COVERED  
UNDER THE WHISTLEBLOWER STATUTES

Our March 1993 report also observed that not all federal employees were protected against reprisal by the whistleblower statutes. Congress specifically excluded certain agencies and employees from certain civil service provisions of Title 5 of the U.S. Code with the passage of the Civil Service Reform Act of 1978. One of the specific exclusions under Title 5 was protection against prohibited personnel practices, including whistleblower reprisal. Additionally, some agencies' enabling legislation has been interpreted to exclude all or some of their

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<sup>5</sup>Whistleblower Protection: Agencies' Implementation of the Whistleblower Statutes Has Been Mixed (GAO/GGD-93-66, Mar. 5, 1993).

employees from the civil service provisions of Title 5; as a result, the employees are not covered under the whistleblower statutes.

The 19 agencies in our review identified over 220,000 employees, most of them in the Departments of Defense and Veterans Affairs, in positions not covered by the whistleblower statutes. While some exempt agencies, such as the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, offer limited whistleblower protection, further analysis may be necessary to clearly identify employees not covered by the whistleblower statutes and to assess whether further coverage is warranted.

#### RECOMMENDATIONS TO CONGRESS AND THE SPECIAL COUNSEL

To address these problems, we recommended in our recently issued reports that Congress consider amending the whistleblower statutes (5 U.S.C. 1201 et seq.) to require agencies, with OSC's guidance, to develop policies and procedures for carrying out the provisions of the whistleblower statutes and to inform employees periodically on their right to protection from reprisal and where to report misconduct.

We also recommended that the Special Counsel, with agencies' assistance, assess whether whistleblower protection coverage needs to be extended to those positions currently not covered by the whistleblower statutes and recommend any coverage changes to Congress. OSC officials were in general agreement with our recommendations to Congress and the Special Counsel.

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Mr. Chairman, this concludes my statement on the work we have done to date. In the future, we will be reporting to the Subcommittee on the results of an ongoing survey of federal employees who have sought whistleblower protection from OSC.

I will be pleased to answer any questions you or the members of the Subcommittee may have.

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