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ARTICLE:

RETALIATORY HOSTILE WORK ENVIRONMENT HARASSMENT IS CONSIDERED A PROHIBITED PERSONNEL PRACTICE UNDER THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT[1]

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In these difficult times, it's challenging to be a federal government employee. With the President bragging about "Draining the Swamp" of federal employees, sidelining and silencing federal scientists, criticizing the Federal Bureau of Investigation (FBI), retaliating against federal employee whistleblowers, and terminating Cabinet Departments' Inspectors General for doing their jobs to enforce the laws against federal government waste, fraud, and abuse, as well as retaliating against federal employee whistleblowers, it's important that all federal employees know and protect their rights against whistleblower retaliation in federal employment.

The federal government's Prohibited Personnel Practice (PPP) statute, 5 U.S.C. § 2302, protects federal employee whistleblowers from retaliatory personnel actions. That statute expressly defines a "personnel action" in federal employment to include "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xii). Likewise, it states that "'prohibited personnel practice' means any action described in subsection (b)." *Id.* § 2302(a)(1). The list of PPPs in 5 U.S.C. § 2302(b), includes EEO discrimination in violation of section 717 of the Civil Rights Act of 1964 (42 U.S.C.§ 2000e–16); the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 631, 633a); the Equal Pay Act, Fair Labor Standards Act of 1938 (29 U.S.C. § 206(d)); the Rehabilitation Act of 1973 (29 U.S.C. 791); marital status, veterans status, and political affiliation discrimination; nepotism, whistleblower retaliation, and complaint or grievance activity retaliation. *See id.* § 2302(b). To that end, the Civil Rights Act of 1964, as applied to federal employment, states the following in pertinent part:

> **(a)DISCRIMINATORY PRACTICES PROHIBITED; EMPLOYEES OR APPLICANTS FOR EMPLOYMENT SUBJECT TO COVERAGE**
>
> All ***personnel actions*** affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the

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> judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress ***shall be made free from any discrimination based on race, color, religion, sex, or national origin.***

42 U.S.C. § 2000e-16(a)(emphasis added).

As we all know, the Supreme Court of the United States has repeatedly recognized that hostile work environment harassment on the basis of EEO class membership is an unlawful personnel action in violation of the Civil Rights Acts. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Thus, hostile work environment harassment is a PPP under 5 U.S.C. § 2302(b)(1), which protects federal employees against unwanted and harassing conduct of a discriminatory nature that is severe and pervasive enough so as to alter a term or condition of employment or create a hostile work environment. *See Faragher*, 524 U.S. 775*; Ellerth*, 524 U.S. 742. Likewise, hostile work environment harassment because of whistleblower retaliation is also a PPP in violation of 5 U.S.C. § 2302(b)(8) in that it constitutes "any other significant change in duties, responsibilities, or ***working conditions.***" 5 U.S.C. § 2302(a)(2)(A)(xii)(emphasis added).

Specifically, in *Shivaee v. Department of the Navy*, 74 MSPR 383, 388 (1997)(emphasis added), the United States Merit Systems Protection Board (MSPB or "the Board") explained the statutory change expanding the coverage of whistleblower reprisal cases involving changes of employees' duties as follows:

> Prior to October 29, 1994, the definition of "personnel action" included "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.…" 5 U.S.C. § 2302(a)(2)(A)(x) (1988). We find that the described change in duty site was not a change in duties or responsibilities, and therefore, does not constitute a personnel action under the version of 5 U.S.C. § 2302(a)(2)(A)(x) that was in effect through October 28, 1994, assuming that that version applies. Effective October 29, 1994, the definition above was amended to state: "[a]ny other significant change in duties, responsibilities, or working conditions." Pub. L. No. 103–424 § 5(a)(1), (2), 108 Stat. 4363 (codified as amended at 5 USCA § 2302(a)(2)(A)(xi) (1996)). The 1994 amendment's deletion of the qualifying language "which is inconsistent with the employee's salary or grade level" enlarged the category of actions encompassed in the definition of "personnel action." *See Briley v. National Archives and Records Administration*, 71 MSPR 211, 223 (1996). The legislative history of the amendment shows that, [c]onsistent with the Whistleblower Protection Act's remedial purpose, the provision adding "any other significant change in duties, responsibilities, or working conditions" to listed personnel actions should be interpreted broadly. ***This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit***

> ***system***, and should be determined on a case-by-case basis. 140 Cong. Rec. H11,421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey).

Covarrubias v. SSA, 113 MSPR 583, 589 n.4 (2010)(emphasis added), provided the Board's interpretation of the 1994 legislative change to include infliction (by reason of whistleblowing reprisal) of harassment or discriminatory working conditions:

> The legislative history of the 1994 amendment to the WPA indicates that the term "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include ***"any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system."*** 140 Cong. Rec. H11,421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey)(emphasis added); *see Roach v. Department of the Army,* 82 M.S.P.R. 464, ¶ 24 (1999). We find that the ***appellant's claims of harassment*** and disability discrimination constitute a non-frivolous allegation that she was subjected to a personnel action within the meaning of the WPA.

Finally, hostile work environment harassment was determined to be a form of covered personnel action for purposes of the Whistleblower Protection Act in *Savage v. Department of the Army,* 122 MSPR 612, 627, 629 ¶¶ 23, 27 (2015); *see* 5 U.S.C. 2302 § (a)(2)(A)(xii).

CONCLUSION

Therefore, it is clear that hostile work environment harassment is a personnel action prohibited under the Whistleblower Protection Enhancement Act (WPEA), if it occurs in retaliation for the subject employee's protected whistleblower disclosures. *See* 5 U.S.C. § 2302(b)(8).

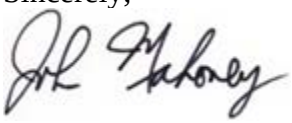
Having specialized in representing federal government employees in whistleblower retaliation complaints for nearly 30 years, my professional legal opinion is that I am seeing more and more cases arising under the Trump Administration involving claims by federal employee whistleblowers that they are being harassed by their agency's managers and supervisors because of their protected whistleblower disclosures. Having also been a federal employment law agency Vice Chairman, executive employee, and an administrative judge who adjudicated federal employee whistleblower retaliation cases, I can assure you that such retaliatory harassment constitutes a PPP under the WPEA, which, if you are successful in litigating an Individual Right of Action (IRA) appeal over that harassment to the MSPB, could lead to an order stopping that ongoing retaliatory harassment; reversing all retaliatory personnel actions at issue with backpay, benefits, interest, and a clean record; restoring any leave taken because of the retaliatory harassment; awarding unlimited proven compensatory damages; and awarding attorneys' fees.

In making protected whistleblower disclosures to the federal government, filing any resulting whistleblower retaliation complaint, and litigating any resulting direct or IRA appeal to the MSPB, it is important that you seek competent legal advice and representation by qualified

federal employment law attorneys, such as those at **THE TOP-RATED FEDERAL EMPLOYEES' LAW FIRM OF JOHN P. MAHONEY, ESQ., ATTORNEYS AT LAW**, in Washington, DC. We represent federal employees in all types of employment law cases, including whistleblower retaliation harassment litigation, to protect their rights and defend their federal careers. For more information and to seek our representation or commentary, please visit our website at www.AttorneyMahoney.com

If you have any questions regarding this matter, please do not hesitate to contact me. Your attention to this matter is appreciated.

Sincerely,



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