

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

The average pretrial and post-trial processing times for general and bad-conduct (BCD) special courts-martial for the first, second and third quarters Fiscal Year (FY) 1998 are shown below. For comparison, the previous FY 97 processing times are also shown below.

General Courts-Martial

	FY 97	1Q, FY 98	2Q, FY 98	3Q, FY 98
Records received by Clerk of Court	712	182	185	183
Days from charges or restraint to sentence	67	67	68	64
Days from sentence to action	90	87	96	98
Days from action to dispatch	10	19	17	8
Days en route to Clerk of Court	10	11	10	9

BCD Special Courts-Martial

	FY 97	1Q, FY 98	2Q, FY 98	3Q, FY 98
Records received by Clerk of Court	156	34	37	28
Days from charges or restraint to sentence	44	42	41	47
Days from sentence to action	75	58	86	97
Days from action to dispatch	10	11	16	8
Days en route to Clerk of Court	9	9	9	11

Courts-Martial and Nonjudicial Punishment Rates

Second Quarter, FY 97

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.38 (1.52)	0.37 (1.46)	0.60 (2.41)	0.36 (1.42)	0.92 (3.70)
BCDSPCM	0.14 (0.57)	0.13 (0.54)	0.29 (1.17)	0.09 (0.36)	0.46 (1.85)
SPCM	0.01 (0.04)	0.01 (0.06)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.21 (0.85)	0.28 (1.12)	0.02 (0.07)	0.02 (0.09)	0.00 (0.00)
NJP	22.61 (90.43)	24.04 (96.17)	20.47 (81.89)	23.50 (93.98)	25.89 (103.56)

Third Quarter, FY 97

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.32 (1.29)	0.31 (1.26)	0.51 (2.03)	0.25 (1.02)	0.94 (3.75)
BCDSPCM	0.13 (0.53)	0.12 (0.48)	0.31 (1.23)	0.08 (0.34)	0.00 (0.00)
SPCM	0.01 (0.03)	0.01 (0.03)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.30 (1.19)	0.37 (1.49)	0.09 (0.36)	0.11 (0.42)	0.00 (0.00)
NJP	21.22 (84.88)	22.50 (90.01)	19.15 (76.58)	21.88 (87.53)	22.01 (88.03)

Figures in parenthesis are the annualized rates per thousand.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 10, is reproduced in part below.

Debate Over the EPA UST Penalty Authority Continues

The Environmental Protection Agency (EPA) has been assessing fines against several Department of Defense (DOD) installations for alleged violations of the underground storage tank (UST) provisions of the Resource Conservation and Recovery Act (RCRA).¹ An opinion from the Department of Justice (DOJ) Office of Legal Counsel (OLC) which defined the EPA's Clean Air Act (CAA) enforcement authorities fueled this action. The DOD is now challenging the EPA's enforcement actions, while engaging in discussions over the EPA's authority to assess punitive penalties against federal agencies. This debate, however, has no effect on an installation's inability to pay state-imposed fines for alleged UST violations.

In early 1997, the EPA began issuing Notices of Violation (NOV) to Army, Air Force, and Navy installations for alleged "minor" violations of the RCRA UST requirements. The EPA requested payment of relatively small (generally less than \$1000) punitive penalties. All the DOD services protested,

questioning the EPA's authority to impose these punitive fines on other federal agencies, as well as the agencies' statutory authority to pay such penalties. The EPA told the services that if they did not promptly pay these "field citations," the affected installations would be assessed inflated penalties as part of formal enforcement actions. The Army and Navy chose to pay their fines, but made it clear that these payments were made "under protest." The Air Force declined to pay a \$600 field citation and soon afterward was assessed a \$70,734 administrative fine. The Air Force and Army have each received an additional NOV. These NOV's have assessed over \$90,000 for alleged UST violations. The authority of the EPA to issue UST NOV's is now being challenged in three pending enforcement actions against Air Force and Army installations.

The EPA's shift toward assessing UST fines was a spin-off from a debate with the DOD over the EPA's CAA penalty authorities. This discussion led the OLC to write an opinion in July of 1997, which was favorable to the EPA.² In reaching its conclusions, OLC relied upon the language of certain CAA provisions³ that granted the EPA authority to impose penalties against "persons"—a definition that includes federal agencies. The OLC further examined the legislative history of the CAA to conclude that Congress had made a sufficiently "clear statement" of its intent to allow the EPA to penalize other agencies. The EPA's power could be constitutionally exercised because sufficient controls exist to preclude the need for litigation between agencies.

Relying on the OLC's CAA opinion, the EPA now asserts that a sufficiently "clear statement" of the EPA's authority exists under both RCRA and UST statutes. Specifically, the EPA asserts that it is authorized to include penalties in compliance orders issued for UST violations.⁴ According to the EPA,

1. 42 U.S.C.A. §§ 6991-6992 (West 1998).

2. See Memorandum from Dawn E. Johnson, Acting Assistant Attorney General Counsel, Department of Defense, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, Judith A. Miller, General Counsel, Department of Defense, subject: Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (16 July 1997).

3. See 42 U.S.C.A. §§ 7413, 7602(e).

4. *Id.* § 6991e(c).

these compliance orders apply to any “person.”⁵ For purposes of the UST statutes, the definition of “person” includes “the United States Government.”⁶ The EPA further argues that RCRA expressly provides it with authority to commence an administrative enforcement proceeding against any Federal agency “pursuant to the enforcement authorities contained in this Act.”⁷ The EPA asserts that these “authorities” include the RCRA’s UST sections.

The DOD Office of General Counsel asserts that the CAA situation is not consistent with UST statutory provisions. Congress amended RCRA via the Federal Facilities Compliance Act (FFCA)⁸ to address the limitations of RCRA recognized in *United States Department of Energy v. Ohio*.⁹ There, the United States Supreme Court looked at the language of 42 U.S.C. § 6961 and ruled that the RCRA did not sufficiently express an intent to allow state regulators to enforce punitive penalties against federal agencies.¹⁰ In amending the RCRA, Congress targeted the language of 42 U.S.C. § 6961(a), which relates only to RCRA requirements involving “disposal or management of solid waste or hazardous waste.” Congress did not similarly amend the related provision under the RCRA UST section.¹¹ In the UST-specific language, the RCRA’s applicability to federal facilities is more limited. In *United States Department of Energy v. Ohio*, the Court found that the imposition of punitive penalties was improper in the face of language that limits legal applicability. The DOD concluded that the RCRA UST section does not contain the “clear statement” of the congressional intent that would allow the EPA to assess punitive fines against other agencies. Thus, the RCRA example is distinct from its CAA counterpart.

The DOD has also expressed concern over whether it can legally authorize its components to pay punitive penalties for alleged UST violations, citing Comptroller General authority, the requirements of 31 U.S.C. § 1301, and Article I of the Constitution. Finally, the DOD has raised sovereign immunity issues. It contends that by imposing punitive UST penalties,

the EPA violated the FFCA requirement that grants federal agencies the opportunity to confer with the EPA administrator before an administrative order or decision (such as a penalty) becomes final.¹²

Presently, the question of the EPA’s authority to impose punitive sanctions on other federal agencies for UST violations has not been submitted to DOJ’s OLC. If an installation receives an NOV (or other notice of an EPA administrative action) that seeks to impose penalties for UST violations, the environmental law specialist should immediately consult the servicing major command environmental law specialist and ELD for further assistance. Captain Richards.

Contracting-Out Initiative

The DOD is presently examining all employee positions for opportunities to contract out those positions to the private sector.¹³ All positions are to be examined, and must be coded in one of three ways: as inherently governmental in nature, as a commercial activity exempt from competition under Office of Management and Budget Circular A-76, or as a commercial activity that is eligible for competition. Even installation environmental staffs, normally considered governmental in nature, are being coded during this process.

Environmental law specialists should be aware of current statutory and regulatory authority which designates many positions on environmental staffs as governmental in nature. Under the Sikes Act,¹⁴ positions that implement and enforce integrated natural resource management plans cannot be contracted-out. This interpretation is further supported by explicit legislative history that states that activities related to fish and wildlife management and policy activities are inherently governmental responsibilities.¹⁵ *Department of Defense Instruction 4715.3* and *Army Regulation 200-3* also reiterate this point.¹⁶ Environmental law specialists should ensure that responses to the DOD

5. *Id.* § 6991e(a).

6. *Id.* § 6991(6).

7. *Id.* § 6961(b)(1).

8. *Id.* §§ 6961-6964.

9. 503 U.S. 607 (1992).

10. *Id.* at 628.

11. 42 U.S.C.A. § 6991(f).

12. *Id.* § 6961(b)(2).

13. As part of the Defense Reform Initiative Directive No. 20, the services were directed to submit an inventory of inherently governmental and commercial activities not later than 31 October 1998.

14. Sikes Act, Pub. L. No. 99-561, § 3, 100 Stat. 3149, 3150-51 (1986) (including extensions and amendments) (codified as amended at 16 U.S.C.A. § 670a (d)).

15. H.R. REP. NO. 100-129(I), at 6 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5254, 5257.

tasker accurately code these positions. Lieutenant Colonel Polchek.

Fines and Penalties Update

At the close of the third quarter of FY 1998, four new fines had been assessed against Army installations. Of the 172 fines assessed against Army installations since FY 1993, RCRA fines (96) continue to predominate, followed by the CAA (44), the Clean Water Act (23), the Safe Drinking Water Act (6), and the Comprehensive Environmental Response and Compensation and Liability Act (CERCLA) (3).

Interestingly, in the latest reporting quarter, fines have been assessed under the CAA almost as frequently as those assessed under RCRA. Because these two statutes have differing waivers of sovereign immunity, the scope of federal liability also differs. State regulators are often confused by an installation's ability to pay punitive fines and penalties assessed under RCRA, but not the CAA. Installation environmental law specialists must get involved with state agencies early in the process to ensure that they are aware that payments of fines and penalties by Army installations are governed by, inter alia, the Supreme Court decision of *United States Department of Energy v. Ohio*.¹⁷ Major Egan.

How to Tell One Superfund Preliminary Assessment from Another

This is a quick guide to help you distinguish two documents that bear similar names—the Preliminary Assessment (PA) and the Preassessment Screen (PAS). Each considers different aspects of a hazardous substance cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.¹⁸ A PA supports the selection of a cleanup remedy. The second document, a Natural Resource Damage (NRD) PAS, is an initial examina-

tion of environmental damages that may remain after cleanup. Both the PA and PAS can dovetail. For example, the CERCLA Response PA can focus on remedying environmental concerns caused by contamination. Conversely, the NRD PAS uses the CERCLA remedy as a baseline to determine residual damages to natural resources. With so much overlap, confusion naturally arises. The following information should help environmental law specialists distinguish a PA from a PAS.

A CERCLA Response Preliminary Assessment is the initial screening device used to determine the level of cleanup needed to counter a hazardous substance release.¹⁹ The EPA uses the Response PA to determine if a site should be placed on a list for priority cleanup. A lead agency uses this PA to determine whether cleanup is needed at a particular site, and whether it should initiate a removal or remedial action.²⁰ The PA provides a review of existing data, including management practices and information from potentially responsible parties (PRPs). This information forms the basis for later response actions.²¹

There are two types of CERCLA Response PAs: the Remedial PA and Removal PA. Both are prepared at the beginning of a cleanup and involve an initial assessment of a site.²² The Remedial PA looks at available facts to determine the level of cleanup. This includes information on the source and nature of the release, exposure pathways and targets, and recommendations on further action.²³ The Removal PA examines the same sort of information, but focuses on immediate threats to health or the environment to determine if quick action is needed. When a response action is unclear, the PA provides the first informational round-up for a decision-maker who will later choose between a removal and remedial action. All of these PAs have one thing in common, though—they focus on public health concerns posed by a release.²⁴

Like the PA (generally used by a lead agency), a NRD PAS is an initial information screen. It is generally compiled for the benefit of the NRD trustee (usually a federal or state official or Native American tribe).²⁵ According to the Department of Inte-

16. *Department of Defense Instruction 4715.3* states that functions regarding the management and conservation of natural and cultural resources shall not be contracted. U.S. DEP'T OF DEFENSE, INST. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996). Similarly, *Army Regulation 200-3* states that management and conservation of natural resource functions are inherently governmental functions. U.S. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES-LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 2-7a (28 Feb. 1995).

17. 503 U.S. 607 (1992).

18. 42 U.S.C.A. §§ 9601-9675.

19. 40 C.F.R. § 300.5 (1998).

20. 42 U.S.C.A. §§ 9616(b); 40 C.F.R. §§ 300.410(a), 300.420(a), (b).

21. See 40 C.F.R. § 300.410(c)(2).

22. See generally *id.* §§ 420(b), 300.410(a), (b).

23. *Id.* § 300.420(a), (b).

24. *Id.* §§ 410, 415(a).

rior's regulations, the NRD PAS provides a trustee with data about the natural resources affected by a hazardous substance release, identifies other potential trustees, and gives guidance on whether a CERCLA response remedied environmental injuries.²⁶ The PAS also states whether a trustee could maintain a successful legal claim²⁷ that would justify undertaking a more rigorous damage assessment.²⁸

Unlike the CERCLA Response PA, the NRD PAS is primarily focused on environmental injuries, rather than matters of human health. Likewise, it does not focus on a risk assessment, but examines whether contamination at a site exceeds specific concentration levels for pollutants.²⁹ Another key difference is timing. The NRD PAS follows the remedy that the Response PA helped to define. This is because the NRD PAS looks to residual damages—environmental damages not corrected by the CERCLA remedy—though it may use relevant information gathered in the Response PA.³⁰

Five Similarities Between the PA and the PAS: Both documents...

1. Look to existing data, including exposure pathways and initial sampling.
2. Seek to detect and quantify a potential hazardous substance release.
3. Identify some of the key players (lead agencies, trustees, PRPs).
4. Provide the first compilation of information for later documents.
5. Act as a screen to determine subsequent action, including emergency responses.

Five Differences Between the PA and the PAS:

1. The CERCLA Response PA concerns multifaceted elements of a cleanup action, while the NRD PAS examines restoration of the environment.

2. The CERCLA Response PA focuses on how to respond to any potential threats to human health and environment. The NRD PAS examines the environmental damages remaining after that response action is complete.

3. The CERCLA Response PA is more action-oriented than its NRD counterpart. The Response PA guides the lead agency's decision to undertake a removal or remedial action, or it justifies no-action. The NRD PAS informs the Trustee on whether to write another document (the NRD Assessment).

4. The CERCLA Response PA focuses on potential human and environmental risks. The NRD PAS does not examine risk per se, but predetermined exposure levels.

5. A CERCLA Response PA focuses on cleanup, not subsequent legal claims. The opposite is true for the PAS. The NRD Trustee uses the PAS, in part, to demonstrate the likelihood of success in making a claim for damages.

If you have any further questions about PAs or PASs, contact this office. Ms. Barfield.

Litigation Division Notes

Military Retiree Medical Care— Broken Promises or Failure to Read the Fine Print?

Introduction

Few military personnel issues have provoked as much emotion and media interest as have recent lawsuits by military retirees challenging restrictions on their access to medical care.³¹ This note discusses recent litigation over the alleged erosion of medical benefits enjoyed by military retirees. In addition to explaining the nature and status of these suits, it provides background information to judge advocates in the field concerning the government's position that retiree medical benefits have always been subject to limitations imposed by statute and regulation.

Background

25. 42 U.S.C.A. § 9607(f)(1), (2). See 40 C.F.R. § 300.615 (containing information on NRD trustees).

26. 43 C.F.R. §§ 11.23(b), (e)(1)-(5) (1996).

27. *Id.* § 11.23(b).

28. See 43 C.F.R. §§ 11.30-11.84 (containing guidance on assessments).

29. 43 C.F.R. §§ 11.25(e), 11.22(b), 11.23(e)(3).

30. 43 C.F.R. § 11.23(e)(5). See *In Re Acushnet River and New Bedford Harbor*, 712 F. Supp. 1010, 1035 (D. Mass. 1989).

31. See, e.g., Nick Adde, *A Broken Promise? No Free Health Care*, ARMY TIMES, Aug. 24, 1998, at 7.

The military services have traditionally provided “free” medical services to active duty members in order to maintain the physical health of the force in peacetime and to treat casualties in time of war.³² Military retirees and their family members, however, historically have enjoyed much more limited medical benefits. Before the Dependent’s Medical Care Act was enacted in 1956,³³ there was no statutory authority to provide any sort of medical treatment to retirees. During that time regulations enacted by the individual services generally authorized local commanders to admit and treat retirees and their families, so long as treatment could be extended without adversely affecting the primary mission of treating the active force.³⁴

Retirees, who relied upon alleged promises of free medical care for life in deciding to pursue military careers³⁵ have various complaints: resource constraints have reduced the numbers of retirees treated at military medical facilities; some military medical facilities that previously treated military retirees have closed incident to base realignment and closure; implementation of TRICARE (under which retirees must pay an annual premium in order to enjoy healthcare benefits comparable to active duty family members); and, the Medicare program (the primary vehicle by which military retirees and their family members receive healthcare upon reaching age sixty-five). While many retirees have clear expectations of “free” medical care, it is also clear that these expectations have never had any basis in law, regulation, or the express terms of any enlistment contracts.

The Lawsuits

The Army has lead litigation responsibility for a number of suits that have been brought by military retirees. The following is a brief summary of these cases.

In *Coalition of Retired Military Veterans v. United States*,³⁶ the plaintiffs are all members of a nonprofit military retirees group. They allege that the government violated the Fifth Amendment’s Due Process Clause by depriving them of free medical care for life, which they were promised when they decided to pursue their military careers. The court granted the government’s motion to dismiss. The court held that the lawsuit challenged nonreviewable military decisions involving the allocation of healthcare resources and, alternatively, that plaintiffs had no constitutionally protected property or contractual interest. The plaintiffs have appealed that decision to the U.S. Court of Appeals for the Federal Circuit.

In *Schism v. United States*,³⁷ the plaintiffs filed a class action suit alleging that the government breached their enlistment contracts, violated Fifth Amendment’s Due Process and Equal Protection Clauses, and engaged in impermissible age discrimination by “revoking or limiting access to military hospitals, in-patient and out-patient care, and medicine to [plaintiffs and other military retirees].” On 11 June 1997, the court granted the Army’s motion to dismiss for lack of jurisdiction with respect to plaintiffs’ Federal Tort Claims Act and age discrimination claims.³⁸ The court denied the motion with respect to the Fifth Amendment Due Process and Little Tucker Act claims as to plaintiffs who elected to pursue military careers prior to 1956 (the effective date of the statute providing the retirees can receive medical care at military facilities on a “space available” basis).³⁹ On 31 August 1998, the court granted the government’s motion for summary judgment on the plaintiffs’ remaining claims, finding that they have no legal entitlement to “free” medical care.⁴⁰ The plaintiffs will likely appeal.

In *McGinley v. United States*,⁴¹ the plaintiffs are seeking to certify a class action and limit their recovery to \$10,000 per plaintiff. They are also seeking injunctive relief to stop Medicare B deductions from their retirement pay. The two named

32. See generally DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, MILITARY COMPENSATION BACKGROUND PAPERS 661-68 (5th ed. 1996) [hereinafter MILITARY COMPENSATION BACKGROUND PAPERS]. For most of the nation’s history, even active duty personnel did not enjoy the broad right to medical care they have in recent decades. In the past, service members were generally only entitled to medical treatment while “on duty.” See *Morrow v. United States*, 65 Ct. Cl. 35 (1928) (holding that a naval officer is not entitled to reimbursement of medical expenses incurred during period of leave, even though leave was canceled upon his admission to a civilian hospital and no military facilities were available; the applicable statute authorized reimbursement only for medical expenses incurred while “on duty;” mere cancellation of leave was not sufficient to restore the officer to duty).

33. 10 U.S.C.A. §§ 1071-1098 (West 1998).

34. MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 32, at 609-10.

35. One court has specifically noted that it “does not doubt that recruiters made specific promises to certain recruits who relied upon those promises.” *Coalition of Retired Military Veterans v. United States*, No. 2:96-3822-23 (D. S.C. Dec. 10, 1997).

36. *Id.*

37. 972 F. Supp. 1398 (M.D. Fla. 1998).

38. *Id.* at 1407.

39. *Id.* at 1406.

40. *Schism*, No. 3:96-349 (N.D. Fla. Aug. 31, 1998) (order granting motion for summary judgment).

plaintiffs in the suit entered the service prior to 1956 and served continuously until retirement. The case is presently pending a decision on the government's motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted.

*Feathers v. United States*⁴² is the fourth lawsuit filed by military retirees who claim they were induced to pursue military careers, in part, by promises of free health care for life. The plaintiffs in this case are pursuing a class action on behalf of all military retirees over sixty-five years of age who are having deductions made from their social security payments for Medicare benefits. The complaint was filed on 1 July 1998, and the government will soon file a motion to dismiss or a motion for summary judgment.

Conclusion

To date, no court has ruled that military retirees are entitled to the extensive, no-cost, medical care sought by plaintiffs in the above actions. Although many retirees firmly believe they are entitled to such benefits, there has never been a basis in law or regulation for any claim that military retirees are entitled to "free medical care for life." Lieutenant Colonel Elling, Major Broyles.

Federal Circuit: Disagreement with Supervisor is Not a Whistleblower Disclosure

In responding to a charge of whistleblower retaliation, whether in court or in the administrative arena, it is often necessary to determine whether the disclosures allegedly made by the complainant are the type that the Whistleblower Protection Act⁴³ was designed to shelter. In a recent case, *Willis v. Department of Agriculture*,⁴⁴ the Court of Appeals for the Federal Circuit held that criticisms made by an employee to the supervisors who are the subject of his complaints do not constitute protected disclosures under the Act.

Mr. Willis was a district conservationist with the United States Department of Agriculture (USDA). Among his duties was a requirement to inspect farms to insure that they conformed to conservation plans endorsed by the USDA.⁴⁵ In 1992, Willis surveyed seventy-seven farms and determined that sixteen were not in compliance with the conservation plan. A number of the farms appealed and Willis' decisions on all but one of the appealing farms were overturned. Later, Willis' supervisor counseled him in writing for various reasons including the poor quality reviews of his office.⁴⁶ Willis replied in a letter addressing each of his supervisor's comments. Willis later retired rather than face an involuntary transfer.

After he retired, Willis wrote a letter to the Center for Resource Conservation alleging that his supervisors had improperly reversed his determinations pertaining to compliance with farm conservation plans.⁴⁷ Later, Willis wrote a letter to the Director of the Office of Personnel Management alleging that improper personnel actions based on the reversal of his compliance determinations had forced his retirement. Willis then wrote to the Office of Special Counsel (OSC) requesting an investigation of the allegedly improper personnel actions that were taken against him. Dissatisfied with OSC, Willis filed an individual right of action (IRA) appeal with the Merit Systems Protection Board (MSPB) alleging that adverse personnel actions had been taken against him in retaliation for disclosures he made with regard to the conservation compliance decisions that he had made which had been reversed.⁴⁸ Willis maintained that his disclosures were protected by the Whistleblower Protection Act. An MSPB Administrative Judge dismissed Willis' whistleblower claim and that decision was affirmed by the full Board.⁴⁹

Before the Federal Circuit, Willis conceded that the letters he wrote after his retirement were not covered by the Whistleblower Protection Act. He contended, however, that the complaints that he made to his supervisors about the reversal of his conservation compliance determinations were protected disclosures.⁵⁰

41. No. 97-1140 (M.D. Fla. Aug. 31, 1998) (order granting motion for summary judgment).

42. No. 98-451 (E.D. Ark. filed July 1, 1998).

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

44. 141 F.3d 1139 (Fed. Cir. 1998).

45. *Id.* at 1140.

46. *Id.* at 1141.

47. *Id.*

48. *Id.* at 1142.

49. *Id.* at 1141.

50. *Id.* at 1141.

To succeed in a claim of retaliation for whistleblowing, an employee must show that a protected disclosure was made and that it was a contributing factor in an adverse personnel action.⁵¹ The employee must prove that the adverse personnel action resulted from a prohibited personnel practice specified in 5 U.S.C.A. § 2302(b)(8). In *Willis*, the Federal Circuit noted that the Whistleblower Protection Act's aim was to encourage federal employees to reveal wrongdoing to officials who have the ability to rectify the situation without fear of reprisal. "Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision."⁵² Willis simply complained to his supervisors about reversing his compliance determinations. While he was employed, Willis did not take any steps to communicate with any higher officials in a position to remedy improper activity.⁵³

In determining whether alleged whistleblowing by a federal employee is protected, simple complaints or criticisms to the employee's own supervisors about job-related issues will not be considered protected disclosures under the Whistleblower Protection Act. In order to be protected, disclosures must ordinarily be made to a higher authority under circumstances that would cause that person to believe that he is at risk for some disciplinary or adverse action as a result of the disclosures. Major Wilson.

Practice Pointer: Proving a Complainant/Plaintiff Is Aware of Required EEO Procedures

It is advantageous to both the installation commander and to the defense of the Army in federal discrimination cases for civilian employees to be familiar with Equal Employment Opportunity (EEO) reporting procedures.⁵⁴ Timely employee participation is critical to an effective command EEO Program. Employees can quickly resolve workplace disputes to minimize

an adverse impact on morale. Conversely, if an employee does not exhaust administrative remedies, his administrative complaint or federal suit might be dismissed.⁵⁵ When facing a government motion to dismiss a judicial complaint, plaintiffs often allege a lack of notice of the required EEO procedures. A proactive preventative law practice by labor counselors is critical to ensuring both that these employees are familiar with the reporting requirements and document these requirements.

The simplest, but perhaps least effective manner⁵⁶ for labor counselors to ensure this familiarity is to spot check EEO and work area bulletin boards to ensure posting of the required information. The names of EEO counselors, their business phone numbers, work addresses, and the time limits for contacting a counselor are required to be posted.⁵⁷ Outdated or missing posters indicate that the workforce and the command may not understand the importance of the timing of this initial contact.⁵⁸ Copies of outdated posters with a record of where they were posted should be kept for at least five years to minimize the possibility that a recalcitrant plaintiff will allege that he would have filed sooner but was not informed about the process.⁵⁹

Another way to prove that employees had notice of required EEO procedures is through the new employee inprocessing session. While many installations mention the EEO system and procedures in this session, the problem lies in documentation. Specifically, either the attendees or the contents of the orientation are not documented. Therefore, the proactive labor counselor should ensure that not only are these records kept, but also maintained for the entire period that an employee works for the installation.

Finally, perhaps the best way to document current knowledge is through the commander's reading file that contains policy letters. This file should contain a brief explanation of the EEO program and the administrative process. It should also be mandatory reading for all employees. This requirement could pay large dividends if the employees are required to initial a routing slip or sign a statement indicating that they read the information in the file. By updating the file with each new

51. 5 U.S.C.A. § 1221(e)(1).

52. *Willis*, 141 F.3d at 1142.

53. *Id.* at 1144.

54. Many lawsuits filed against the Army are subject to a dispositive motion for the employee's failure to properly exhaust required EEO procedures.

55. *See Brown v. General Servs. Admin.*, 425 U.S. 820 (1976).

56. This is the least effective because in a minority of circuits proof of posting the required information will not overcome plaintiff's claim of unfamiliarity for the purposes of a motion to dismiss or for summary judgment. A plaintiff's unsubstantiated claim that he was unfamiliar with the required procedures will result in the court finding that there is a genuine issue of material fact. *See Bragg v. Reed*, F.2d 1136, 1139 (10th Cir. 1979).

57. 29 C.F.R. § 1614.102(b)(6) (1998).

58. An employee who alleges impermissible discrimination must contact an EEO counselor within 45 days of the alleged discriminatory action. 29 C.F.R. § 1614.

59. Agency carelessness in counseling can extend an employee's right to sue almost indefinitely. *See, e.g., Weick v. O'Keefe*, 26 F.3d 467 (4th Cir. 1994) (dealing with an employee who timely contacted the EEO counselor was not required to file a formal administrative complaint within any definite time period where the counselor failed to give her notice of the final interview; the court held that filing of an administrative complaint three years after nonselection was timely).

commander, the employees will receive the latest EEO information, and the Army will have written proof to defend against those employees who claim that they are unfamiliar with the EEO administrative requirements. Major Martin.

Practice Pointer: Litigation Report Checklist for Civilian Personnel Cases

The prudent labor counselor will call his Litigation Division attorney (DSN 426-1600) immediately upon learning of a new

lawsuit. Next, the labor counselor should prepare the singularly most important document for the Army's defense of a lawsuit: the litigation report. The majority of civilian personnel lawsuits are eliminated, or the issues therein significantly reduced, through a dispositive motion that is based almost entirely upon a quality litigation report prepared by the installation labor counselor. The following checklist provides a guide to assist labor counselors in preparing a winning report. Major Berg.

Litigation Report Checklist

References: AR 27-40, Para. 3-9; Individual litigation attorneys

1. Statement of Facts

Complete Statement of Facts.

- All facts pertaining to claims raised in the judicial complaint.
- All facts pertaining to potential defenses to claims in the judicial complaint.
- Dates for all complaints and responsive actions.

All Facts Supported by Documents/Statements.

- All supporting documents and statements are attached and tabbed.
- Statement of facts references all supporting tabbed evidence.

2. Setoff or Counterclaim

Discuss any prior settlements or settlement offers.

Discuss any possible counterclaim, i.e. fraud.

3. Responses to Pleadings

Prepare a Draft Answer to the Judicial Complaint.

- Respond to each and every fact asserted.
- Deny what is false.
- Admit what is true.
- If neither, deny as presented and aver or explain our position.
- Explains tangential facts not contained in litigation report.
- Factual supplement to the litigation report.

4. Memorandum of Law

Prepare Brief Statement of the Legal Issues and Potential Defenses.

- Format not important.
- View it as a lawyer to lawyer memo highlighting the legal issues.
- Do not worry about legal citations.
- Do not let this requirement delay the litigation report.

5. Potential Witness Information

Complete List of Potential Witnesses.

- Work address and phone number.
- Home address and phone number if available (for emergency use).
- Brief statement of witness relevance and to what they can attest.

6. Exhibits

Copy of all relevant documents attached and tabbed.

Index/List of tabs and exhibits included.

7. Distribution

Two Copies to the Litigation Attorney.

One Copy to the Assistant U.S. Attorney who is assigned to the Case.

Computer Disk of Litigation Report included.

- WordPerfect format preferred. (DOJ format)
- MS Word format acceptable.
- Include copy of any MSPB or EEOC briefs available.
- Label disk.