



PEER
PUBLIC EMPLOYEES
FOR ENVIRONMENTAL
RESPONSIBILITY

Webinar

Speaking Up Under Trump

What to Know About
Whistleblowing &
Free Speech



Meet the Speakers



Joanna Citron Day, JD, General Counsel, PEER

Why Public Employees Need to Know Their Rights Now



Paula Dinerstein, JD, Senior Counsel, PEER

Whistleblower Rights for Federal Employees



Colleen Zimmerman, JD, Staff Counsel, PEER

The First Amendment: Your Right to Dissent in Your Private Capacity



Kyla Bennett, PhD, JD, Director of Science Policy, PEER

The Whistleblower Experience and Alternatives to Whistleblowing



Moderated Q&A

Why Public Employees Need to Know Their Rights Now



Joanna Citron Day, JD
General Counsel, PEER

Whistleblower Rights for Federal Employees



Paula Dinerstein, JD
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What avenues do federal employees have to challenge disciplinary actions taken in retaliation for speaking out and RIF's?



Options for challenges are the Office of Special Counsel (OSC), Merit Systems Protection Board (MSPB), Equal Employment Opportunity Commission (EEO) and courts.



For members of bargaining units there are union grievances.



Administrative avenues required before you can go to court. Federal employees can represent themselves, but it is always best to have a lawyer specialized in the field.

Whistleblower Law

There are several grounds on which federal employees can challenge actions against them, including that the action is not justified by the facts (they didn't do it).

Whistleblowing is actually a *defense* to an adverse action – claiming that even if an employee engaged in the charged conduct, discipline is not permitted if it is based on retaliation for whistleblowing.
Shield not a sword.

Whistleblowing disclosures must be of:

- a violation of law or regulation
- a danger to public health or safety
- gross mismanagement or abuse of authority

Court interpretations of what is covered are complex – federal employees should consult an attorney to determine how to frame a disclosure to be covered or if they will not be covered.

Unfortunately, both whistleblower fora – MSPB and OSC – have been largely neutered by Trump firing the Special Counsel and one of the MSPB Board members so the Board doesn't have a quorum. But they still have some utility.

The Office of Special Counsel (OSC)

Hears complaints based on whistleblowing and other prohibited personnel practices (PPPs) such as nepotism or discrimination.

Trump fired the Special Counsel. The Acting Special counsel is not friendly to whistleblowers but claims he will let the staff continue their work without interference. The Special Counsel nominee is virulently anti-federal workers and may not be confirmed.

File with a simple form, probationers may file.

Federal employees can also make disclosures of wrongdoing to OSC not about their personnel situations.

Merit Systems Protection Board (MSPB)

- Basic civil service court.
- Challenges to major personnel actions: firing, demotion, unpaid suspension of more than 2 weeks – no probationers
- But RIFs can be challenged, including by probationers
- Simple on-line complaint but then demanding process leading to trial-type hearing before an administrative judge
- 3 levels – administrative judge hearing, appeal to the Board, appeal to US Circuit Court of Appeals
- Even without a quorum federal employees can have a hearing, appeal to court if they lose. If they win, agency can appeal to Board and it may sit for years
- Trump nominee to Board may be approved soon and restore quorum but already significant backlog
- Because both OSC and MSPB options are weak, we often combine with publicity to pressure agency to settle

Equal Employment Opportunity Commission (EEOC)

- For claims of racial, national origin, gender, disability, etc. discrimination
- First step contact EEO counselor at employee's agency
- Choose EEO counseling or alternative dispute resolution (ADR) (mediation)
- If unsuccessful, can file discrimination complaint with EEO office
- Agency investigation. Decision or hearing before EEOC judge.
- Federal court challenge – jury trials (unlike in whistleblower claims)

Union Grievances

- Grievance process available to union members and employees in bargaining units
- Usually involve arbitration
- Collective Bargaining Agreements (CBAs) usually cover firings and RIFs
 - For whistleblowing and other PPPs, election of remedy between union grievance, OSC, MSPB and EEO
 - Wherever one files first is binding and cannot be changed
 - With OSC and MSPB crippled, union grievance becomes more attractive, but Trump is trying to nullify CBAs. Stay tuned.

Disclosures to Congress

- Can disclose to individual members or committees
- Seek hearings, investigations, information or other requests to the executive
- Lloyd-LaFollette Act: 5 USC § 7211. Employees' right to petition Congress:

"The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

However, to challenge an adverse personnel action, must go through OSC or MSPB – can't go straight to court under this statute

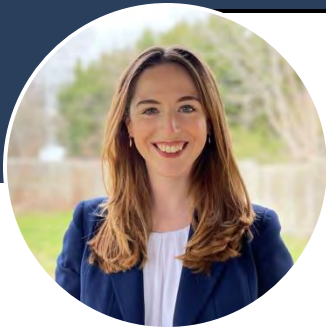
Conflict of Interest Laws and Government Ethics

- Even after leaving government, employees subject to conflict of interest laws and government ethics regulations
- 18 USC 207: Cannot take part in a suit against the government or advocacy to the government concerning a matter worked on during employment
- Different rules for different activities for different periods of time (permanent, one year, two year)
- Subject to criminal penalties though rarely enforced
- Considering taking action? Consult your agency ethics official. If you doubt their advice, consult an attorney.

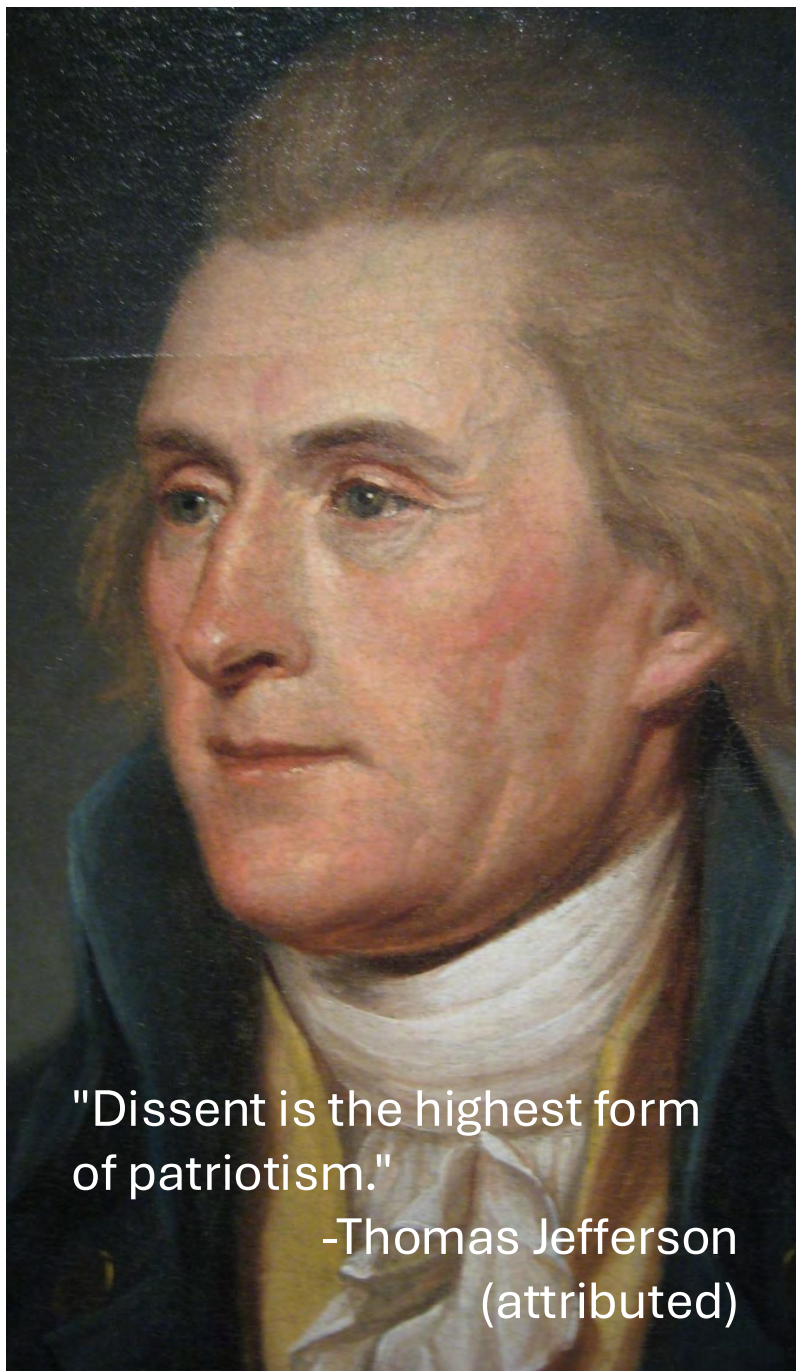
Thank you.

The First Amendment

Your Right to Dissent in Your Private Capacity



Colleen Zimmerman, JD
Staff Counsel, PEER



"Dissent is the highest form
of patriotism."

-Thomas Jefferson
(attributed)



"Get in good trouble,
necessary trouble, and help
redeem the soul of America."

-John Lewis



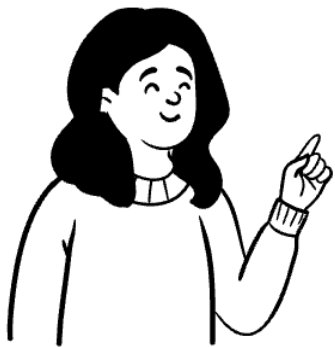
"Dissents speak to a future
age."

-Ruth Bader Ginsburg

First Amendment Rights as a Federal Employee

In general, if you are speaking:

- as a private citizen,
- about a matter of public concern, and
- your speech does not interfere with a legitimate government interest,



your speech is protected.

First Amendment Rights as a Federal Employee

However, there are exceptions:

- Classified Information
- Confidential Business Information
- Hatch Act
- Agency-specific rules



It's always best to obtain legal advice.

Carolyn McConnell v. National Labor Relations Board

McConnell engaged in environmental advocacy

- ✓ as a private citizen,
- ✓ about a matter of public concern, and
- ✓ her speech did not interfere with her job.

Yet, the agency

- ✓ filed a criminal referral,
- ✓ asked for an IG investigation, and
- ✓ issued a letter of counseling.

NLRB claimed that she likely violated a federal criminal conflict of interest law.

PEER filed a lawsuit against the NLRB, challenging the agency's interpretation of the law to protect McConnell's free speech rights.



Key Takeaways

- Federal employees do not forfeit their rights to free speech, freedom of association, and the ability to petition the government.
- Those who exercise their rights are courageous, but it is not without risk.
- It is always best to obtain legal advice to help you figure out whether or not particular types of speech are likely to be legally protected.



The Whistleblower Experience and Alternatives to Whistleblowing



Kyla Bennett, PhD, JD
Director of Science Policy, PEER

Resources for Whistleblowers

- Contact PEER – peer.org/contact-legal-team
- PEER Legal Resource Center – peer.org/resource-center
- Caught Between Conscience and Career (POGO, GAP, PEER)
– peer.org/survival-guide
- Government Accountability Project – whistleblower.org
- Climate Science Legal Defense Fund – csldf.org
- Civil Service Strong – civilservicestrong.org

Support PEER

- Want to support whistleblowers? Support the work of PEER: peer.org/donate

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