

Key Excerpts from ruling of Administrative Judge
Pamela B. Jackson

Although the agency does not dispute that the appellant has exhausted her remedies before OSC, it does dispute that the oral and written counselings, the alleged harassment, including the “physical assault” are “personnel actions” within the meaning of the WPA.

Specifically, she notes that the agency took no steps to separate her from Lugo, but left the two working together, notwithstanding the appellant’s requests that she and Lugo be separated. The appellant alleges that the matter should have been elevated to the agency’s Office of Professional Responsibility (OPR), but the agency failed to do so.

I am persuaded that an agency’s failure to appropriately discipline an offending employee for the type of conduct at issue in the instant appeal could have a chilling effect on whistleblowing or otherwise undermine the merit system. I, therefore, find that the agency’s alleged failure to appropriately discipline Lugo for inappropriately touching or “assaulting” the appellant could constitute harassment rising to the level of a “personnel action” cognizable under the WPA

The agency argues that the appellant “did not have a good-faith belief that agency officials violated any law, rule or regulation,” and quoting Paflrey, goes so far as to state, “the agency did not fund the construction using split purchases,” and “Mr. Harris and Hempe followed all applicable Agency policy.” I am, frankly, astounded by the agency’s representations and arguments. Unless it did not read its own OIG report, I cannot fathom how it could make such assertions. Clearly, its own OIG specifically found evidence of FAR violations almost identical to the appellant’s allegations or disclosures. In my view, such is more than enough to conclude that the appellant’s belief that FAR violations were occurring or had occurred was reasonable. Moreover, even in the absence of the OIG findings, I note that it is undisputed that FAR regulations prohibit breaking down larger purchases into smaller ones to circumvent FAR requirements.⁹ At the time appellant made her disclosure to the OIG, she had specific evidence and/or belief, based upon the agency’s own data, that certain construction projects had been parceled out in increments of \$2,000 or less, with the total project costing in excess of \$18,000. I, therefore, conclude that a disinterested observer with knowledge of the facts known to the appellant at the time could reasonably conclude that the matter disclosed showed a violation of the FAR. Accordingly, I find that the appellant made protected disclosures.

The appellant has established that her whistleblowing activity was a contributing factor in the personnel actions at issue.

In fact, he told her the opposite – that she would be disciplined if she went outside her chain of command. In my view, such instructions stifle whistleblowing activity, especially if one is not comfortable reporting whistleblower activity to one’s supervisor

The appellant argues in her closing brief not that Lugo assaulted her because of her whistleblower activity; rather, she argues that the agency failed to sufficiently punish Lugo for his conduct because of her whistleblower activity, and the agency's failure to do so added to the environment of harassment.

As to Myrna Palfrey's knowledge, Palfrey, in a declaration submitted by the agency, denied having knowledge of the appellant's whistleblowing activity until August 30, 2013, when she was informed by the Human Resources office of the appellant's appeal to the Board. I, however, was not impressed by Palfrey's denial. I note, as concluded by the OIG, that Palfrey failed to tell the truth on more than one occasion during the OIG investigation, and I have no confidence that she would be any more honest or forthright before the Board. I, therefore, did not credit her declaration of "no knowledge." I also note that she, unlike Stiner, was one of the subjects of the investigation. Furthermore, notwithstanding her denial of such, the record reflects that she was friendly with the Harrises, the other subjects of the investigation. I, therefore, find it more likely than not that Palfrey had more than a casual interest in the origin of the complaints being investigated.

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