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Mr. Thomas F. Day
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September 4, 2015

Subject: The Zero Tolerance for Retaliation Against Whistleblowers Act

Dear Mr. Day:

Following this cover letter is my draft of the Zero Tolerance for Retaliation Against Whistleblowers Act. I would appreciate your input so that I can incorporate your ideas into this draft so that I can move forward with obtaining sponsors for the Bill and get it moving forward in the legislative process. Unlike other proposed legislation that has sought to impose mandatory penalties on the wrongdoer, this proposal is directed at ending retaliation by authorizing various persons in the current processes for the disclosure, investigation, and adjudication of acts of retaliation with the ability to order the termination of persons who are found to have committed, or recommended, an act of retaliation. Most importantly, please contact me if your Member would be willing to serve as a sponsor for this Act (in a final form); or even more importantly if your Member could not support the concept of this legislation, please let me know so that I can address your concerns.

Frankly, I cannot come up with a single good reason to justify retaliation, nor can I find a single reason to defend anyone who retaliations against a whistleblower thereby keeping these people at the trough of the taxpaying public. If you have a different opinion, please be bold enough to enlighten me and your colleagues by offering your amendments and arguments as quickly as possible for what you would need to see changed in the proposed Act such that your Member would be able to step forward as a sponsor for the Bill.

In April and May of this year, I spent five of my days off to visit the offices of every Member of Congress to hand out an open letter entitled, "Acquisition Reform Begins with Zero Tolerance for Acts of Retaliation Against Whistleblowers." That letter expressed my personal views with regard to whistleblower protections as well as my views on acquisition reform with an emphasis on the U.S. Coast Guard as the best organization for the implementation those reforms. While I will address acquisition reforms in later correspondence, this letter includes my draft of what I believe are the essential elements of an Act to end retaliation.

While I am providing a draft of the proposed Act, I certainly lack the knowledge and expertise to suggest that this is the final form of what I hope will become law. In fact, the interest in ending retaliation was so well received during the initial visits to key offices that I am hoping to find the best legislative track to expedite a

final version and get it enacted as soon as possible. I know that there are those among you who have that expertise to improve this draft and I look forward to hearing from you with your ideas and textual changes.

At the same time, I want to emphasize that this proposal does -- NOT -- impose a penalty on persons who may have committed some wrongful act that is the basis of a whistleblower's disclosure. While I am in my second go around as a whistleblower and I do think that disciplinary action should be taken against wrongdoers, I also believe that there are frequently mitigating circumstances and that we must respect the process to determine what disciplinary action is most appropriate. Disciplinary action for retaliators does not warrant similar consideration once there is a finding of retaliation by an empowered authority.

With more than two decades of federal service, I have seen first-hand the devastating impact of retaliation on the federal workforce that goes well beyond the immediate impact on the whistleblower. For each reported infraction that makes its way into the statistics book, there are many more that are rightfully ignored by the federal employee because decades of hollow legislative patches have shown that standing up for what is right is most assuredly an act of career suicide. Enacting this proposed legislation as expeditiously as possible is essential to restore the federal employee's ability to safely perform their duties without fear of retribution. It is also a critical step to persuade the public that their elected officials are genuinely concerned about the quality of the services they are provided for the expenditure of their tax dollars.

Whistleblowing is all about helping our institutions perform at the highest level and in this regard, "Whistleblowers are American Heroes." Even when a whistleblower acts on a belief of wrongdoing, but is later shown to have been incorrect; they have provided an invaluable service to the public and to their management chain. On the other hand, the objective of the retaliator is to conceal acts of wrongdoing. The choice I am presenting to you is to decide which of these individuals you want to support -- whistleblower or perpetrator.

The more that can be done to end acts of retaliation and the faster that this can be done, the greater the benefit to everyone involved. If there is no retaliation, nobody gets fired or loses their job as the result of this Act and the Federal workforce can perform at its highest level. Instead of appropriating millions of tax dollars to expand the funding of MSPB, OSC, and/or agency legal staff to handle retaliation cases, many whistleblowers can come forward to save billions of dollars in wasted spending or to save lives. The efficiency of spending in every federally funded program will be improved saving an unimaginable amount of tax dollars.

I do understand that the work of Congress is performed through committees and I will be doing my best to work most directly within that process. I know it is late in the legislative process for this calendar year, but with your help I would certainly do everything possible to find a way to enact this legislation as soon as possible.

I am employed by the U.S. Coast Guard and I am handling two pending cases at the Merit Systems Protection Board (MSPB) as a *pro se* litigant. I do not need any help with these cases at this time. It should also be readily apparent that I am acting on my own initiative and do not represent any other persons, organizations, or the U.S. Coast Guard in any official capacity. Therefore, my availability is limited to my days off (every other Monday from 9/14/2015) or on Monday, Tuesday or Friday afternoons after about 4:00 p.m. Nevertheless, I look forward to hearing from you.

Sincerely,

THOMAS F. DAY
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One Hundred Fourteenth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on ___ Monday.,
the ___ day of ___, two thousand and fifteen*

An Act

To amend 5 CFR 4 of the Code of Federal Regulations various sections of title 5, United States Code, to implement the policy of zero tolerance for retaliation against whistleblowers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC 1. SHORT TITLE.

This Act may be cited as the “Zero Tolerance for Retaliation Against Whistleblowers Act of 2015”.

SEC. 2. PROHIBITED PRACTICES

(a) IN GENERAL.—Part 4 of title 5, Code of Federal Regulations, is amended --

(1) by adding the following section to Part 4:

“Sec. 4.4 Prohibition against retaliation against whistleblowers.”

(2) by inserting the following § 4.4 after § 4.3

“No person employed in the executive branch of the Federal Government, or any agency or department thereof, shall take any action to retaliate against any person who has made a lawful disclosure as defined in Section 2302(b)(8) or (b)(9) of title 5, or as defined in Section 1034(2) of title 10.

SEC. 3 REMOVAL FOR ACTS OF RETALIATION

Part 433 is added to the Code of Federal Regulations to read as follows:

PART 433 – REMOVAL FOR ACTS OF RETALIATION

§ 433.101 If the Head of the Agency determines from the results of any internal or external investigation, administrative process, grievance, or other agency resource; that a person has knowingly committed, or

recommended, an act of retaliation against a whistleblower, who has made a lawful disclosure as defined in Section 2302(b)(98) or (b)(9) of title 5, or as defined in Section 1034(2) of title 10, by taking, or failing to take, a personnel action with regard to the whistleblower, the Head of the Agency shall order the termination of the retaliator from Federal Service, shall order that the retaliator be debarred from Federal employment for a period of not less than five years, and shall order that the retaliator be debarred from serving in any capacity on any contract or subcontract which receives Federal funds for a period of not less than five years. This authority may not be delegated to a lower level official.

SEC. 4 POWERS AND FUNCTIONS OF THE MERIT SYSTEMS PROTECTION BOARD

Section 1204(b)(2) of title 5, United States Code, is amended by adding (2)(C) to read as follows:

(C) order the agency to terminate from Federal Service, and to debar from Federal employment for a period of not less than five years, and to debar from serving in any capacity on any contract or subcontract which receives Federal funds for a period of not less than five years; any person who is found to have knowingly committed, or recommended, an act of retaliation against a whistleblower, who has made a lawful disclosure as defined in Section 2302(a)(2) of title 5, by taking, or failing to take, a personnel action with regard to the whistleblower.

SEC. 5. DISCIPLINARY ACTION.

(a) AFFIRMATIVE DEFENSE

In any action under sections 1221 or 7701 of title 5, an employee may petition to Merit Systems Protection Board to order the actions in sections 3 or 4 as part of relief upon a finding of prohibited personnel practice.

Section 1215(a)(3), 1221 and 7701 of title 5, United States Code, are amended by adding the following at the end of each section:

If a final order of the Board determines that a person has knowingly committed or recommended an act of retaliation against a whistleblower, who has made a lawful disclosure as defined in Section 2302(a)(2) of title 5, by taking, or failing to take, a personnel action with regard to the whistleblower, the Board shall order the termination of the retaliator from Federal Service, shall order that the retaliator be debarred from Federal employment for a period of not less than five years, and shall order that the retaliator be debarred from serving in any capacity on any grant, contract, or subcontract which receives Federal funds for a period of not less than five years.

SEC. 6. GRIEVANCE PROCEDURES.

Section 7121(2)(A) of title 5, United States Code, is amended by adding (iii) to read as follows:

(iii) the agency to terminate from Federal Service, and to debar from Federal employment for a period of not less than five years, and to debar from serving in any capacity on any grant, contract, or subcontract which receives Federal funds for a period of not less than five years.; any person who is found to have knowingly committed, or recommended, an act of retaliation against a whistleblower, who has made a lawful disclosure as defined in Section 2302(b)(8) and (b)(9) of title 5, by taking, or failing to take, a personnel action with regard to the whistleblower. An aggrieved employee who elects to pursue relief for an act of retaliation through the negotiated grievance process may request any or all of the disciplinary actions herein defined.

SEC. 7 ACTIONS COVERED.

Section 7512 Actions Covered of title 5, United States Code, is amended by striking “and” from item (4) and adding items (6) and (7) to read as follows:

(6) debar from Federal employment; and

(7) debar from serving in any capacity on any grant, contract, or subcontract which receives Federal funds.

SEC. 8 CAUSE AND PROCEDURES.

Section 7513 Cause and Procedures of title 5, United States Code, is amended by adding the following to item (a) so that it reads as follows:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service. Because acts of retaliation against whistleblowers foster an atmosphere of fear for reporting wrongdoing among the workforce, retaliation promotes a continuation and/or expansion of acts of wrongdoing which contribute to the public’s lack of trust in government and its officials. Therefore, any act of retaliation against a whistleblower is deemed to be contrary to promoting the efficiency of the service.

SEC. 9 PROTECTED COMMUNICATIONS; PROHIBITION OF RETALIATORY PERSONNEL ACTIONS.

Section 1034(f)(3) of title 10, United States Code, is amended by adding (f)(c) to read as follows:

(C) If the Secretary determines that a person has knowingly committed or recommended an act of retaliation against a whistleblower, who has made a lawful disclosure as defined in Section 1034(2) of title 10, by taking, or failing to take, a personnel action with regard to the whistleblower, the Secretary shall order the termination of the retaliator from Federal Service or separation from the Armed Forces, shall order that the retaliator be debarred from Federal employment for a period of not less than five years, and shall order that the retaliator be debarred from serving in any capacity on any grant, contract, or subcontract which receives Federal funds for a period of not less than five years.