Whistleblower Protection Extends To Federal Workers Who Violate Agency Regulations

1.21.15

Today the U.S. Supreme Court held that an agent of the Transportation Security Administration (TSA) who disclosed information that was prohibited by TSA regulations, was nonetheless protected under the Whistleblower Protection Act. The Court’s reasoning centered around the fact that “regulations” are not “laws.” DHS v. MacLean.

Background
Robert MacLean was an Air Marshall employed by the TSA. In 2003, the TSA sent a text message to its marshalls canceling missions on flights from Las Vegas shortly after the Agency had received information of a plot to hijack U.S. airliners.

Believing he was acting to alert the flying public to potential danger, MacLean disclosed the contents of the text message to an MSNBC reporter. At the time, the TSA had not classified the text messages as sensitive security information, the disclosure of which is prohibited by federal regulations promulgated by the Secretary of Transportation and authorized by the Aviation and Transportation Security Act (ATSA).

McLean’s disclosure was revealed in a subsequent investigation unrelated to the 2003 incident. After MacLean revealed his role in the 2003 incident, the TSA retroactively designated the text messages as sensitive security information and terminated MacLean from his job for disclosing it. The Merit Systems Protection Board upheld his dismissal, finding that he was not protected by the Whistleblower Protection Act (WPA) because his disclosure was expressly prohibited by law. But the U.S. Court of Appeals for the Federal
Circuit reversed, finding that the regulations prohibiting disclosure of sensitive security information did not qualify as “laws,” and that MacLean was entitled to present evidence that his disclosure was protected conduct under the Act.

**Whether Whistleblower’s Disclosure Was Specifically Prohibited By Law**

The WPA prohibits federal government officials in a position of authority from discharging or taking other “personnel action” against a government employee when the employee discloses information that the employee reasonably believes evidences “a substantial and specific danger to public health or safety . . . .” But this protection does not apply, and the Government is not barred from taking an adverse personnel action, if the disclosure is specifically prohibited by law.

The Secretary of Transportation expressly adopted regulations prohibiting the disclosure of sensitive security information such as the information contained in the text message disclosed by MacLean, relying on a statutory mandate in the ATSA directing that the Secretary “shall prescribe regulations prohibiting disclosure of information . . . if the Secretary of Transportation decides disclosing the information would . . . be detrimental to transportation safety.”

The Government contended that the Congressional directive to prescribe regulations found in the ATSA renders the disclosure of the text message (and similar sensitive security information) “prohibited by law,” which would exclude MacLean’s disclosure from the protections of the Whistleblower Protection Act.

**Supreme Court Rules In Favor Of Whistleblower**

In a 7 to 2 decision, the Supreme Court found the Government’s arguments unpersuasive. Writing for the majority, Chief Justice John Roberts found the text of the statute clear and unambiguous, noting that Congress unequivocally excluded agency regulations from the Act’s definition of the phrase “prohibited by law.” The Court pointed to Congress’s wording excluding protection for disclosures that are “specifically prohibited by law” instead of “specifically prohibited by law, rule or regulation” to mean that Congress meant to exclude rules and regulations. The Court also reasoned that interpreting the word “law” to include rules and regulations would mean that agencies could defeat all possible whistleblower protections by simply implementing regulations that “specifically prohibited” all whistleblowing.

The Court also rejected the Government’s argument that MacLean was prohibited from making his disclosure by the Homeland Security Act section that provides for the TSA to create regulations prohibiting the disclosure of security-sensitive information. The Court found that the provision did not prohibit anything; it merely authorized the TSA to prescribe regulations. Accordingly, by its terms, it did not prohibit MacLean’s disclosure.
Moreover, the Court found unpersuasive the Government’s “doom and gloom” prediction of widespread disclosure of sensitive information by rogue federal employees while impotent agencies stand by helplessly hamstrung by the Whistleblower Protection Act. The Court acknowledged that the Government’s concerns are legitimate but stated that they must be addressed by Congress or the President, not the Court.

**Dissent Finds Disclosure Prohibited By Homeland Security Act**

Justice Sotomayor, joined by Justice Kennedy, agreed with much of the majority’s reasoning but differed on the effect of the Homeland Security Act’s mandate that the TSA prescribe regulations prohibiting the disclosure of security-sensitive information. The dissent points to Congress’s use of the word “shall” to mean that Congress’s intent was that such disclosures would be prohibited. The dissenting justices believe that MacLean’s disclosure contravened Congress’s intended mandate and therefore, was “prohibited by law” and not protected by the WPA. Justice Sotomayor wrote that the majority’s decision “has left important decisions regarding the disclosure of critical information completely to the whims of individual employees.”

**Impact Of The Court’s Decision**

The Court’s decision in MacLean’s favor may have far reaching implications in federal whistleblower law. By excluding agency regulations from the Act’s definition of “expressly prohibited by law,” the Court has expanded the protections afforded to whistleblowers and curtailed the power of federal agencies to control the release of potentially sensitive information unilaterally. The decision is consistent with Congress’s intent in enacting the Whistleblower Protection Act and the whistleblower provision in other federal statutes: to encourage federal employees to report government wrongdoing without fear of reprisal.

Although the decision explicitly addresses only the provisions of the Whistleblower Protection Act, it provides clear direction to courts how to interpret the phrase “prohibited by law” when addressing similar provisions in other legislation setting forth whistleblower protections. Going forward, federal agencies will be required to ensure that Congress or the President has acted to restrict sensitive government information, through express law or executive order, before seeking to address unauthorized disclosures like MacLean’s.

This means that potential whistleblowers like MacLean will have clearer direction concerning whether or not their disclosures will be protected. More importantly, federal agencies will have less power unilaterally to decide whether information within their control receives whistleblower protection.

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