

Blowing The Whistle: Barriers to Federal Employees Making Disclosures



A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board

NOVEMBER 2011



U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*. This report discusses results from MSPB's 2010 Merit Principles Survey regarding perceptions related to whistleblowing and provides a comparison to the results of a similar survey our agency conducted in 1992.

Data from our surveys indicate that since 1992, the percentage of employees who perceive any wrongdoing has decreased. However, perceptions of retaliation against those who blow the whistle remain a serious concern. In both 1992 and 2010, approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing also perceived either threats or acts of reprisal, or both. Additionally, training for employees about the protections available to whistleblowers has improved since 1992, but given that such training is mandated by law, there are still far too many employees who have not received this information.

The survey data also indicate that the most important factor for employees when deciding whether to report wrongdoing is not the personal consequences for the employee. Saving lives was more important to survey respondents than whether they would experience punishment or a reward, and whether the agency would act on a report of wrongdoing mattered more than any fear of an unpleasant consequence for the employee making the report. This means that agencies have the power to influence employees' decisions about reporting wrongdoing. The most important step that agencies can take to prevent wrongdoing may be the creation of a culture that supports whistleblowing.

I believe you will find this report useful as you consider issues affecting the Federal Government's ability to operate efficiently and effectively in these challenging times.

Respectfully,

A handwritten signature in black ink, appearing to read "Susan", followed by a long horizontal line extending to the right.

Susan Tsui Grundmann



BLOWING THE WHISTLE:

BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES



A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD

U.S. MERIT SYSTEMS PROTECTION BOARD

The U.S. Merit Systems Protection Board (“MSPB” or “The Board”) is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454.

The Board’s mission is to protect Federal merit systems and the rights of individuals within those systems. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies.

The topic of this report, whistleblowing, occurs at the intersection of MSPB’s two missions. As a part of its adjudicatory mission, MSPB considers, among other types of cases, appeals brought by individuals who allege that they have been subjected to retaliatory personnel actions because they have disclosed a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

As a part of the studies mission, MSPB has the statutory responsibility to study the health of the merit systems and the extent to which the public’s interest in a civil service free from prohibited personnel practices is being protected. An efficient and effective civil service—a merit principle—requires a workplace in which employees feel that they can safely blow the whistle on wrongdoing. This report is issued solely under the studies function of the MSPB, and any findings or recommendations are not an official “opinion” of the Board in its adjudicatory role.

U.S. MERIT SYSTEMS PROTECTION BOARD

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EXECUTIVE SUMMARY

For more than three decades, the law has recognized the importance of encouraging Federal employees to come forward with reports of any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.¹ This report explores the extent to which Federal employees perceive wrongdoing, the extent to which they report the wrongdoing they see, and what factors influence their decisions to remain silent or to blow the whistle.

Findings and Recommendations

Survey data show that since 1992, the percentage of employees who perceive any wrongdoing has decreased.² However, perceptions of retaliation against those who blow the whistle remain a serious concern. In both 1992 and 2010, approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing also perceived either threats or acts of reprisal, or both. One possible cause for this level of perception may be differences between how the law defines whistleblowing for purposes of protecting individuals from retaliation and how employees define it.³

The survey data also indicate that the most important factors for employees when deciding whether to report wrongdoing are not about the personal consequences for the employee. Saving lives is more important to respondents than whether they will experience punishment or a reward, and whether the agency will act on a report of wrongdoing matters more than any fear of an unpleasant consequence for the employee making the report.

¹ 5 U.S.C. § 2302(b)(8)(A). For ease of reference, throughout this report, a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety may be referred to as “wrongdoing.”

² The survey data discussed in this report are from a survey of more than 13,000 Federal employees in 1992, and a survey of more than 40,000 Federal employees in 2010. Both surveys were conducted by the U.S. Merit Systems Protection Board based on random samples drawn from the Office of Personnel Management’s Central Personnel Data File.

³ As explained in our recent report, *Whistleblower Protections for Federal Employees*, available at www.mspb.gov/studies, not all reports of wrongdoing are protected disclosures, and not all unpleasant reactions by the agency constitute retaliation as defined by the law.

This means that agencies have the power to influence employees' decisions about reporting wrongdoing. We urge agencies to create cultures in which employees will believe that:

- Supervisors and managers want to be told about wrongdoing;
- Supervisors and managers want their employees to come forward to report any basis for a reasonable suspicion of wrongdoing without requiring absolute proof of wrongdoing;
- A report of wrongdoing will result in positive changes; and
- An employee will not be shunned or punished for reporting wrongdoing, but instead will be supported or praised.

Survey data also show that agencies are doing more to train employees about whistleblower protection rights. However, given that this training is mandated by law, there are still far too many employees who reported that they did not receive this training. We therefore urge agencies to improve the quality of employee training about how to make a disclosure, an employee's right to not experience retaliation or threats of retaliation, and how employees can exercise that right.

Our data show that perceptions of retaliation among those identified as the source of a report of wrongdoing have not declined since 1992. As noted in our recent report, *Whistleblower Protections for Federal Employees*, the laws to protect whistleblowers are complex and can create challenging situations for employees. It is possible that amending the law regarding the circumstances under which an individual is eligible for protection as a whistleblower may be beneficial. We encourage Congress to continue to examine and debate how best to achieve the delicate balance between effective management control of the workplace and the need to ensure that employees can bring wrongdoing to light without fear of threatened or actual retaliation.



INTRODUCTION

In the Civil Service Reform Act of 1978 (CSRA), Congress made it illegal to use a personnel action to retaliate against an employee (or applicant for employment) because of the individual's disclosure of a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.⁴ The law to protect whistleblowers was strengthened by the Whistleblower Protection Act of 1989 and its 1994 amendments. The law is remedial—it provides some redress for retaliation. However, to achieve the purpose of the law—encouraging employees to make disclosures—the Government must do more than just provide legal protections against retaliation. Individual agencies must also create cultures that persuade employees that their whistleblowing will make a positive difference towards preventing wrongdoing.

Purpose

The U.S. Merit Systems Protection Board fulfills its mission in part by conducting studies related to the civil service and other merit systems.⁵ It is a merit system principle that all employees should maintain high standards of integrity, conduct, and concern for the public interest.⁶ Disclosing wrongdoing is an important aspect of this principle. MSPB recently issued a report on how the law does and does not protect individuals from reprisal for whistleblowing activities.⁷ To complete the picture, this report will look at the extent to which employees feel able to make these disclosures, and what can be done to encourage more disclosures in the future.

Survey Methodology

This report relies upon data from MSPB's Merit Principles Surveys (MPSs) conducted in 1992 and 2010. In 1992, the survey was administered to 20,851 employees, with 13,432 respondents (representing a 64 percent response rate). The results were published in *Whistleblowing in the Federal Government: An Update*, available at www.mspb.gov/studies.

⁴ 5 U.S.C. § 2302(b)(8)(A). The law also protects individuals from an agency's failure to take a personnel action, or threats to take or not take a personnel action, if the agency's conduct is because of the disclosure of wrongdoing.

⁵ 5 U.S.C. § 1204(a)(3).

⁶ 5 U.S.C. § 2301(b)(4). It is also a basic obligation of public service that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11).

⁷ *Whistleblower Protections for Federal Employees*, available at www.mspb.gov/studies.

The 2010 MPS was administered to 71,970 Federal employees in the departments and agencies listed below.⁸ We oversampled certain populations to ensure a sufficient amount of responses from some subagencies. The final results have therefore been weighted to ensure that the outcomes are representative of most of the Federal Government as a whole.

Survey participation was voluntary. There was a 58 percent response rate overall. Participating departments and agencies included:

- Department of the Air Force
- Department of the Army
- Department of the Navy
- Department of Defense (Other)
- Department of Agriculture
- Department of Commerce
- Department of Justice
- Department of Labor
- Department of Energy
- Department of Education
- Department of Health and Human Services
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of Interior
- Department of State
- Department of Transportation
- Department of the Treasury
- Department of Veterans Affairs
- Environmental Protection Agency
- Federal Deposit Insurance Corporation
- General Services Administration
- National Aeronautics and Space Administration
- Office of Personnel Management
- Social Security Administration

We also sent a brief questionnaire to 32 agencies' Offices of the Inspectors General (OIGs). Twenty-four OIGs responded.

⁸ The electronic version of the survey was offered to 70,675 employees, with 41,680 respondents, for a response rate of 59 percent. The paper version of the survey was mailed to 1,295 employees from the Federal Aviation Administration, with 340 surveys returned, for a response rate of 26 percent.



WRONGDOING, WHISTLEBLOWING, AND RETALIATION OVER TIME

The percentage of respondents who have perceived wrongdoing in their agency has decreased since 1992. Furthermore, respondents are: (1) slightly more likely to report the wrongdoing; (2) less likely to be identified as the source of the report; and (3) less likely to perceive a negative consequence for making the report. However, of those who made a report and were identified as the source, the percentage of respondents who personally experienced reprisal or a threat of reprisal remains virtually unchanged.⁹

When looking at this data, it is important to—as always—caution our audience against reading too much into small changes in survey results. First of all, our MPS is a survey of perceptions, which are subject to human error. An event can occur without being perceived, or can be inaccurately perceived. Additionally, as the size of a sample population shrinks, the margin for error grows.¹⁰ Our questions began with a survey sample of more than 40,000 respondents for 2010, and over 13,000 respondents for 1992. However, with each level of drilling down into respondents who provided a particular answer to a prior question, the population answering the next question becomes much smaller.¹¹ Furthermore, in this report, we are comparing only two points in time. As can be seen in our recent report, *Prohibited Personnel Practices: Employee Perceptions*, available at www.mspb.gov/studies, data regarding perceptions can fluctuate over time and trends do not always occur in a straight line.

⁹ Because our 1992 survey used the term “report” to describe the act of telling others about wrongdoing, we opted to use that term for the 2010 survey as well. However, when it comes to protecting whistleblowers, the Federal Circuit has held that it is *disclosures* that are protected, not reports. See *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001) (holding that “[w]hen an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a ‘disclosure’ of misconduct” and the Whistleblower Protection Act will not apply. This is because “the term ‘disclosure’ means to reveal something that was hidden and not known. It is also quite significant that Congress in the WPA did not use a word with a broader connotation such as ‘report’ or ‘state.’”)

¹⁰ Margin of error is a statistic that is used when a random sample is drawn to represent a larger population. It reflects how much the data provided may differ from what would be obtained if every individual in the larger population had been asked the same question.

¹¹ Because we are drilling down into increasingly smaller segments of our respondents throughout this chapter, and using data from two separate administrations of the survey, there is no single, consistent, margin for error. It can be as much as +/- 5 percent, with a confidence interval of 95 percent. This means we can be 95 percent sure that the data we provide in this chapter is within 5 percent of the data that would be obtained if we posed the question to all Federal employees.

Wrongdoing

Whistleblower protection laws and policies exist to encourage employees to come forward with information they may have about wrongdoing so that the wrongdoing can be addressed and prevented in the future. However, as explained in our recent report, *Whistleblower Protections for Federal Employees*, not all forms of wrongdoing are protected by the law. It is therefore possible for an employee to perceive that he or she has reported someone doing something “wrong” while the law does not consider the report a protected act of whistleblowing. In order to qualify for protection under the Whistleblower Protection Act, the individual must be disclosing a violation of a law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.¹² Because each of these terms has its own definition, it is not practical to educate respondents in a survey as to what “wrongdoing” means under the law. As a result, our respondents were instructed that for purposes of the survey, the term “wrongdoing” refers to the creation or tolerance in the workplace of a health or safety danger, unlawful behavior, fraud, waste, or abuse. Some of our questions used the term wrongdoing, while others used a more specific description of the conduct at issue.

For example, our 1992 and 2010 surveys inquired: “During the last 12 months, did you personally observe or obtain direct evidence of one or more illegal or wasteful activities involving your agency?” In 1992, 17.7 percent of respondents answered yes, and 82.3 percent answered no. In 2010, only 11.1 percent of respondents answered yes, and 88.9 percent answered no. This data indicates that perceptions that wrongdoing has occurred have dropped by more than a third between 1992 and 2010.

However, as can be seen in table 1, below, the nature of the wrongdoing that was perceived has changed only slightly since 1992, with fewer perceptions of waste caused by unnecessary or deficient goods or services, and more waste perceived in the area of badly managed programs. This may be a result of a shift in the Government to a more knowledge-based workforce. With more employees managing and analyzing programs, there may simply be more opportunities to observe wrongdoing in this arena. Declines in perceptions of waste caused by unnecessary or deficient goods or services may be a result of the attention paid in recent years to the need for better contracting controls and improvements in the way contracting officers and their technical representatives are selected and trained.¹³ However, all of the differences between 1992 and 2010 on the table below are within the margin for error, and may not be indicative of major changes in perceptions about how often various types of wrongdoing occur in Federal agencies.

¹² 5 U.S.C. § 2302(b)(8). There are also additional conditions that must be met in order to make a disclosure protected. For more on protected disclosures, see our report, *Whistleblower Protections for Federal Employees*, available at www.mpsb.gov/studies.

¹³ Government Executive, *OMB Sets Standards for Contracting Officials*, available at <http://www.govexec.com/dailyfed/1107/113007e1.htm>. For more on contracting officers and their technical advisors, see *Contracting Officer Representatives: Managing the Government’s Technical Experts to Achieve Positive Contract Outcomes*, available at www.mpsb.gov/studies.

Table 1: Percentage of respondents indicating that the most serious wrongdoing they observed in the last 12 months was in a particular category.

| 1992 | 2010 | Categories |
|-------|-------|---|
| 1.9% | 1.8% | Stealing Federal funds |
| 6.3% | 3.1% | Stealing Federal property |
| 0.2% | 0.2% | Accepting bribes or kickbacks |
| 5.0% | 5.1% | Waste caused by ineligible people receiving funds, goods, or services |
| 17.9% | 13.8% | Waste caused by unnecessary or deficient goods or services |
| 11.9% | 10.1% | Use of an official position for personal benefit |
| 35.3% | 38.9% | Waste caused by a badly managed program |
| 3.9% | 4.8% | Unfair advantage in the selection of a contractor, consultant, or vendor |
| 4.8% | 4.6% | Tolerating a situation or practice which poses a substantial and specific danger to public health or safety |
| 13.0% | 17.6% | Other serious violation of law or regulation |

When asked where the activity occurred, the greatest difference between the 1992 and 2010 responses was the decrease in perceptions that wrongdoing was occurring outside the workgroup but within the agency—nearly 15 percentage points. However, as can be seen in table 2, below, there was not a corresponding drop in perceptions inside the workgroup. Further research would be necessary to determine why these perceptions about the location of wrongdoing have changed.

Table 2: Percentage of respondents indicating that wrongdoing occurred in a particular location.*

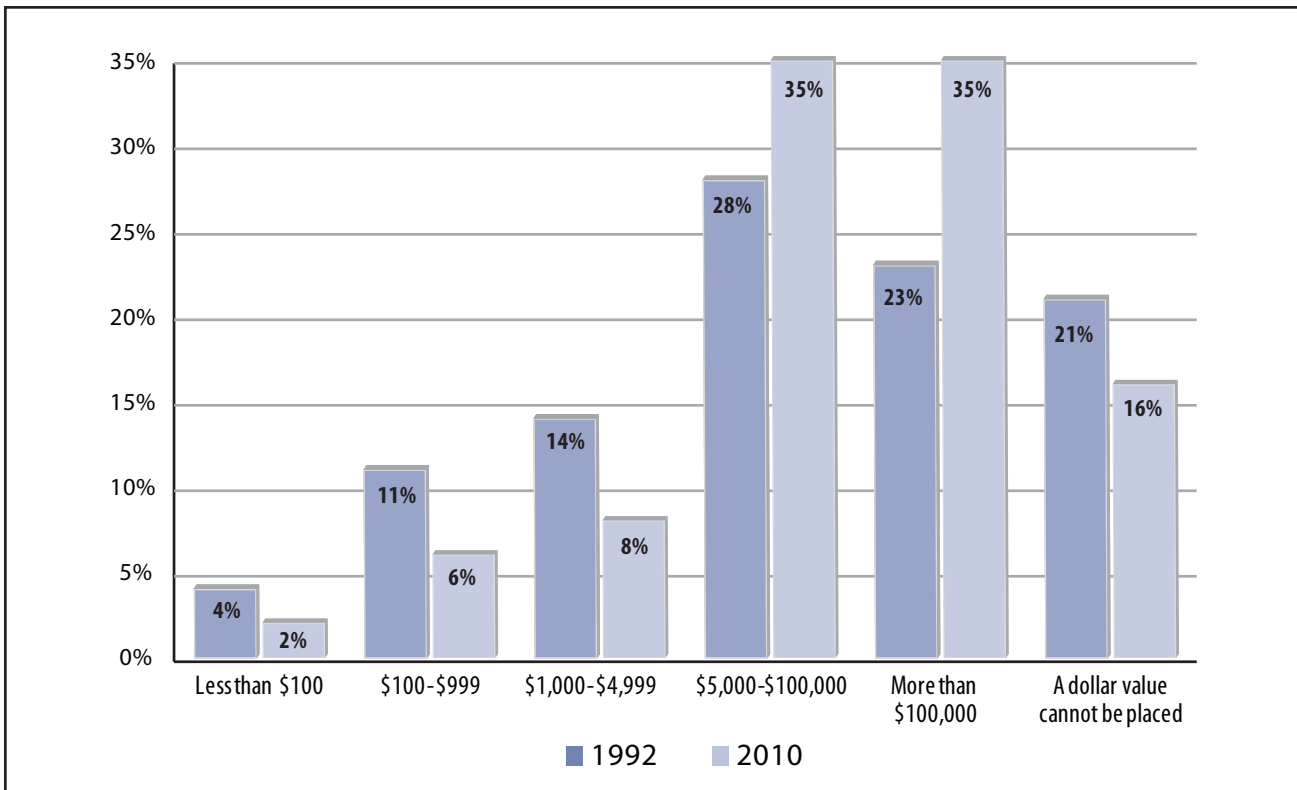
| 1992 | 2010 | |
|-------|-------|--|
| 43.8% | 48.5% | Your workgroup |
| 64.2% | 49.4% | Outside your workgroup, but within your agency |
| 5.4% | 3.3% | Another Federal agency |
| 12.2% | 8.1% | Contractor or vendor |
| 2.4% | 4.5% | Other |

* Respondents were instructed to select all that applied.

The purpose of whistleblower protection laws is to encourage employees to report wrongdoing so that management can make programs more efficient and effective, particularly in terms of preventing taxpayer dollars from being wasted. However, as can be seen in figure 1, below, the cost of wrongdoing has increased since 1992. This does not necessarily mean that waste or fraud consumes a larger share of government resources, but it is certainly possible. According to the bureau of labor statistics, \$5,000 in 1992 equates to \$7,771 in 2010. As products and labor become more expensive, it makes sense that there would be more money at stake in any wrongdoing. Respondents may also be more aware of and sensitive to the financial costs of wrongdoing in the current environment of tight budgets. Because our questions in 1992 and 2010 asked respondents to select from a range of values, and not to provide a specific dollar amount, we cannot report if, after adjusting for inflation, the real cost of the perceived wrongdoing has increased or decreased from 1992 to 2010. However, given the jump in the “more than \$100,000” category from 23 percent to 35 percent, there is the possibility that after adjustment for inflation, the cost of individual acts of wrongdoing may have increased.¹⁴

¹⁴ Not all wrongdoing can be financially quantified. However, the percentage of respondents who stated that a dollar value could not be placed on the activity dropped from 21 percent in 1992 to 16 percent in 2010.

Figure 1: Cost of Wrongdoing by Year.*



* Not adjusted for inflation

However, the news with respect to costs is not all bad. While the perceived cost of wrongdoing went up between 1992 and 2010, the perceived frequency with which the wrongdoing occurred went down very slightly, as can be seen in table 3, below. Respondents in 2010 were more likely than respondents in 1992 to report that the wrongdoing happened once or rarely, and less likely to report that it was occasional or frequent. While the differences in data from 1992 and 2010 are relatively minor, we can, at least, report that perceptions of wrongdoing appear not to have increased in frequency.

Table 3: Percentage of respondents indicating that wrongdoing occurred with a particular level of frequency.

| 1992 | 2010 | Frequency |
|-------|-------|------------------------|
| 12.8% | 14.1% | Once or rarely |
| 33.0% | 27.2% | Occasionally |
| 46.0% | 44.4% | Frequently |
| 8.2% | 14.3% | Don't know/Can't judge |

Whistleblowing

While observing wrongdoing is the first step in the whistleblowing process, not everyone who sees wrongdoing chooses to tell anyone else what they have observed. To blow the whistle, someone has to make some noise. In 2010, respondents were slightly less likely to report that they did not tell anyone about the wrongdoing that they observed compared with survey data from 1992, but in both years, a strong majority of employees told someone. As can be seen in table 4, below, the percentage of respondents who told no one what they observed dropped from 40 percent in 1992 to 34 percent in 2010. In 2010, family, friends, and coworkers were less likely to be told about the wrongdoing than they were in 1992. However, this did not correspond to substantially more people reporting wrongdoing to management. Instead, it seems that venting to equally powerless people dropped, but the willingness of respondents to take action that could lead to change was not substantially changed.¹⁵ (Our next chapter discusses what motivates employees to decide to act and blow the whistle.)

Table 4: Percentage of respondents indicating that they reported the observed activity to a particular individual.

| 1992 | 2010 | |
|-------|-------|----------------------------------|
| 39.8% | 35.0% | I did not report the activity |
| 26.6% | 20.5% | Family member or friend |
| 37.1% | 35.9% | Co-worker |
| 35.9% | 33.4% | Immediate supervisor |
| 20.2% | 19.9% | Higher level supervisor |
| 8.0% | 8.6% | Higher level agency official |
| 5.6% | 5.1% | Agency Inspector General |
| 0.7% | 1.1% | Office of Special Counsel |
| 0.3% | 0.6% | Government Accountability Office |
| 2.7% | 1.5% | Law enforcement official |

¹⁵ The specific facts of the case will determine whether a report of wrongdoing to an individual in one or more of these groups constitutes a protected disclosure. For example, in *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197 (2011), a physician disclosed patient medical records to various Members of Congress as well as others, outside of the Government, in order to draw attention to what he perceived as poor medical treatment for veterans. In this particular case, giving the information to members of Congress was a protected disclosure, while providing the information to others was not protected.

Table 4: Percentage of respondents indicating that they reported the observed activity to a particular individual (continued).

| 1992 | 2010 | |
|------|------|--|
| 5.7% | 7.2% | Union representative |
| 0.2% | 0.6% | News media |
| 1.9% | 1.8% | Congressional staff member or member of Congress |
| 0.7% | 0.6% | Advocacy group outside the Government |
| 3.8% | 8.8% | Other |

* Respondents were instructed to select all that applied.

Retaliation

In order to encourage employees to blow the whistle, the law seeks to protect whistleblowers from personnel actions being threatened or taken because of an employee's disclosure of wrongdoing.¹⁶ However, not all forms of unpleasantness take the form of personnel actions. While retaliatory personnel actions are illegal, other forms of unpleasantness are not. As we explained in our recent report, *Whistleblower Protections for Federal Employees*, a personnel action is:

1. An appointment;
2. A promotion;
3. An action under chapter 75 of Title 5 or other disciplinary or corrective action;
4. A detail, transfer, or reassignment;
5. A reinstatement;
6. A restoration;
7. A reemployment;
8. A performance evaluation under chapter 43 of Title 5;
9. A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
10. A decision to order psychiatric testing or examination; or
11. Any other significant change in duties, responsibilities, or working conditions.¹⁷

As will be discussed in greater depth in our next chapter, the ability of whistleblowers to protect their identity is important to them. Their ability to achieve this anonymity appears to have improved since 1992, as can be seen in table 5, below. In 1992, 53 percent of respondents who made a disclosure reported that they were identified as the source. In 2010, 43 percent reported that they were identified.

¹⁶ 5 U.S.C. § 2302(b)(8).

¹⁷ 5 U.S.C. § 2302(a)(2)(A); see *Whistleblower Protections for Federal Employees*, p. 34, available at www.mspb.gov; 5 U.S.C. § 2302(a)(2)(A).

Table 5: Percentage of respondents indicating that they were identified as the source of the report.

| 1992 | 2010 | Identified |
|-------|-------|--------------------------|
| 53.1% | 42.5% | Yes, I was identified |
| 46.9% | 57.5% | No, I was not identified |

The clearest reason to avoid being identified is to avoid being the target of people who are unhappy about someone making a report of wrongdoing. Our surveys asked respondents about retaliatory personnel actions as well as other forms of unpleasantness. The percentage of respondents who stated that they were identified as the source of a report of wrongdoing without experiencing any unpleasantness increased from 37 percent in 1992 to 44 percent in 2010. As can be seen in table 6, below, of the forms of unpleasantness that were perceived, the greatest drop in perception was that someone above the respondent’s supervisor was unhappy with the respondent for having reported the problem. While there is, of course, more progress to be made, this could reflect a positive trend regarding agency leadership attitudes that we hope to see continued in the future.

Table 6: Percentage of respondents reporting a particular effect as a result of being identified as the source of a report of wrongdoing.

| 1992 | 2010 | Effect |
|-------|-------|---|
| 9.2% | 7.1% | I was given credit by my management for having reported the problem |
| 37.2% | 44.0% | Nothing happened to me for having reported the problem |
| 18.4% | 17.6% | My coworkers were unhappy with me for having reported the problem |
| 31.2% | 28.6% | My supervisor was unhappy with me for having reported the problem |
| 35.8% | 28.0% | Someone above my supervisor was unhappy with me for having reported the problem |
| 12.2% | 13.3% | I was threatened with reprisal for having reported the problem |
| 18.7% | 21.6% | I received an actual reprisal for having reported the problem |

However, we also asked a slightly differently worded question on both surveys: Within the last 12 months, have you personally experienced some type of reprisal or threat of reprisal by management for having reported an activity? (This question did not require the respondent to consider the nature of the threatened or actual reprisal.) The answer to this question remained virtually unchanged, with 36.9 percent of respondents answering yes to

this question in 1992, and 36.2 percent answering yes in 2010. Thus, the fact remains that while there may have been less wrongdoing to report in 2010, among those who made such reports, perceptions of retaliation and threats of retaliation remained a serious problem.

Some of the responses that we received from OIGs also indicated that retaliation is occurring in some cases. We asked the OIGs, “Given what you know about how the system actually works, if someone you deeply cared about privately asked you if they should make a disclosure to an OIG office, what advice would you give?” Many OIGs reported that they would encourage the disclosure, but most also included a cautionary note about the potential consequences, especially the potential for retaliation.

The consequences of retaliation are typically felt most strongly by the whistleblower, but others can be affected as well. As noted in our recent report, *Prohibited Personnel Practices: Employee Perceptions*, employees who are not personally affected by the commission of a prohibited personnel practice may notice when it happens to others in the work unit, and such perceptions can affect the observer’s level of engagement. This is particularly true for the prohibited personnel practice of retaliation for whistleblowing. Thus, in addition to the chilling effect that perceptions of retaliation may have on the willingness of other employees to blow the whistle in the future, perceptions of retaliation for whistleblowing activities also harms the efficiency of the service in other ways.

Possible explanations for these perceptions of retaliation and threats of retaliation include: (1) differences in the way the law defines a protected disclosure versus what respondents consider a report of wrongdoing; (2) differences in the way the law defines retaliation versus what respondents perceive as retaliation; (3) poor communication by management as to its actual motives when discussing actions or potential actions resulting in assumptions of retaliatory causes; or (4) agencies engaging in reprisal or threats of reprisal as defined by law following employee disclosures as defined by law.

Different causes for perceptions of retaliation or threats of retaliation call for different solutions. Where a lack of education is at fault, agencies should better educate their workforces about what constitutes whistleblowing and retaliation under Federal law. (Our recent report, *Whistleblowing Protections for Federal Employees*, available at www.mspb.gov/studies, may be helpful to any educational efforts.)

Where poor communication creates the perceptions, supervisors should be made more aware of how their decisions are perceived and the need to better communicate the reasons behind their decisions. Lastly, where agency officials are engaged in retaliation or threats of retaliation against individuals who disclose wrongdoing, agency leaders need to address the conduct of those supervisors as well as any agency culture that permits such activities to exist.

Congress has debated in recent years whether the law, as currently written, does enough to protect those who report wrongdoing. Because the Board adjudicates whistleblowing

retaliation claims and must apply the law as written and as interpreted by our reviewing court, the Board has not taken a position on any proposed changes to the law. However, these debates are very important because, as explained in our recent report *Whistleblowing Protections for Federal Employees*, the laws to protect whistleblowers are complex and can create challenging situations for employees. Accordingly, we encourage Congress to continue to examine which rules and definitions it deems most appropriate to strike the delicate balance between effective management control of the workplace and the need to ensure that employees can safely bring wrongdoing to light.

As shown in table 7 below, employees currently perceive a wide variety of forms of reprisal.¹⁸ Many types of reprisal showed dramatic increases in perception, particularly being fired, which increased more than nine fold from the percentage in 1992. This percentage of respondents indicating they experienced being fired is odd, because once an employee has been removed, the individual would not be in our survey sample unless he or she had been returned to the position, or had been given a new appointment. However, perceived denials of promotions, opportunities for training, transfers to a new location, suspensions, and demotions all more than doubled in both threats and experienced actions. We note that in 2010, approximately 400 out of more than 40,000 respondents indicated that within the last 12 months, they perceived that they had personally experienced some type of reprisal or threat of reprisal by management for having reported an activity. With a respondent group of only 400, the margin for error is +/- 5 percent. While some of these increased perceptions are within that margin for error, several are substantially outside of it.¹⁹

Table 7: Percentage of respondents reporting that a reprisal or threatened reprisal took a particular form.

| 1992 | | 2010 | | Activity |
|------------|-------------|------------|-------------|---|
| Threatened | Experienced | Threatened | Experienced | |
| 11.8% | 48.2% | 10.8% | 50.3% | Poor performance appraisal |
| 5.1% | 18.5% | 10.3% | 38.9% | Denial of promotion |
| 1.5% | 19.0% | 6.6% | 39.8% | Denial of opportunity for training |
| 2.6% | 30.7% | 8.4% | 46.8% | Denial of award |
| 8.0% | 36.1% | 9.3% | 45.9% | Assignment to less desirable or less important duties |

¹⁸ Not all forms of reprisal in this table are considered “personnel actions” under the law; the Whistleblower Protection Act’s coverage is limited to personnel actions. See 5 U.S.C. § 2302(a)(2)(A); *Whistleblowing Protections for Federal Employees*, available at www.mspb.gov/studies.

¹⁹ While it is difficult to make further distinctions reliably when dealing with such a small population, it does not appear that gender, salary, or age influenced responses to the questions in table 6. The National Security Personnel System (NSPS) also does not appear to be a factor, as there was no substantive difference between the responses for Department of Defense (DOD) versus non DOD agencies.

Table 7: Percentage of respondents reporting that a reprisal or threatened reprisal took a particular form (continued).

| 1992 | | 2010 | | Activity |
|------------|-------------|------------|-------------|--|
| Threatened | Experienced | Threatened | Experienced | |
| 3.8% | 22.9% | 6.1% | 29.1% | Transfer or reassignment to a different job with less desirable duties |
| 3.1% | 5.2% | 7.1% | 13.7% | Reassignment to a different geographical location |
| 3.3% | 2.5% | 6.8% | 14.7% | Suspension from my job |
| 1.9% | 0.7% | 9.1% | 8.9% | Fired from my job |
| 3.9% | 3.1% | 3.6% | 14.8% | Grade level demotion |
| 3.1% | 48.8% | 9.1% | 63.5% | Shunned by coworkers or managers |
| 8.7% | 47.6% | 11.9% | 54.3% | Verbal harassment or intimidation |
| 2.0% | 1.6% | 1.4% | 6.1% | Required to take a fitness for duty exam |
| 5.3% | 14.5% | 8.0% | 32.7% | Other |

**Respondents were able to select both the “threatened” and “experienced” option for each item if both a threat of retaliation and the actual retaliation occurred.*

As shown in table 8, below, how respondents reacted to the perceived retaliation has changed since 1992. Most notably, employees are less likely to report that they took no action, and more likely to have exercised some avenue of redress.

Table 8: Percentage of respondents reporting a particular response to a perceived reprisal or threat of reprisal.

| 1992 | 2010 | |
|-------|-------|---|
| 45.2% | 26.4% | Took no action |
| 36.2% | 37.6% | Complained to a higher level of agency management |
| 8.4% | 15.6% | Complained to the Office of Inspector General within agency |
| 31.8% | 29.9% | Complained to some other office within agency (for example, the Personnel Office or EEO Office) |
| 17.3% | 20.3% | Filed a complaint through union representative |
| 12.1% | 14.9% | Filed a formal grievance within agency |
| 16.2% | 23.7% | Filed an EEO (discrimination) complaint |
| 1.9% | 9.2% | Filed a complaint with the Office of Special Counsel |
| 1.7% | 4.0% | Filed an action with the Merit Systems Protection Board |
| 11.9% | 18.4% | Took an action not listed above |

One possible explanation for employees being more active in response to perceived retaliation may be improvements in the education of those employees. In our 1992 survey, we asked respondents how knowledgeable they were about the actions they could take if they were to blow the whistle and were retaliated against. In response, 67 percent said they knew “little” or “nothing.” And, when we asked them in 1992 if their agencies had specifically informed them of their rights if retaliated against for whistleblowing, 79 percent said “no.”²⁰ In contrast, in 2010, 55 percent of respondents stated that they agreed that their agency had educated them about what their rights would be if they disclosed wrongdoing, 21 percent neither agreed nor disagreed, and 24 percent disagreed.

While there has been clear improvement in the extent to which agencies have educated employees about their rights with regard to retaliation, more must be done. Under the No Fear Act, agencies are required by law to provide training to their employees regarding their rights and remedies under whistleblower protection laws.²¹ That approximately a quarter of respondents in 2010 disagreed that they had been trained about these rights may indicate that the training has been lacking in some way.

The source of the problem may be that the training being provided is not effective, or that the training is not reaching some employees. In either case, this lack of training is unfortunate, because training appears to have a relationship to respondents’ perceptions about the adequacy of the protections in place for whistleblowers. Of those employees who agreed that their agency had educated them about what their rights would be if they disclosed wrongdoing, 74 percent agreed that the protections against reprisal for disclosing wrongdoing are adequate. In contrast, when respondents reported that their agency did not educate them about their rights, only 14 percent of respondents believed there were adequate protections.

We encourage agencies to consider the training they are providing and the means by which it is provided to see if more effective training programs can be developed in order to increase employee education as mandated by the No Fear Act. However, while the training should be improved, the No Fear Act training that has been provided may be having some effect. As shown in table 8, above, employees’ use of OSC and their particular agencies’ EEO office to address retaliation appears to have increased. As the No Fear Act specifically requires agencies to educate employees about their rights with respect to discrimination and retaliation for whistleblowing, an increase in education may have played some role in the increase in the use of these two avenues for redress. We are also encouraged by respondents’ increased use of their particular agency’s Office of the Inspector General. It appears that progress has been made, but more can still be done.

²⁰ U.S. Merit Systems Protection Board, *Whistleblowing in the Federal Government: An Update* (1993) p. 37, available at www.mspb.gov/studies.

²¹ See Notification and Federal Employee Antidiscrimination and Retaliation (No Fear) Act, P.L. 107-174, §§ 201-202.



BARRIERS AND MOTIVATORS FOR WHISTLEBLOWING

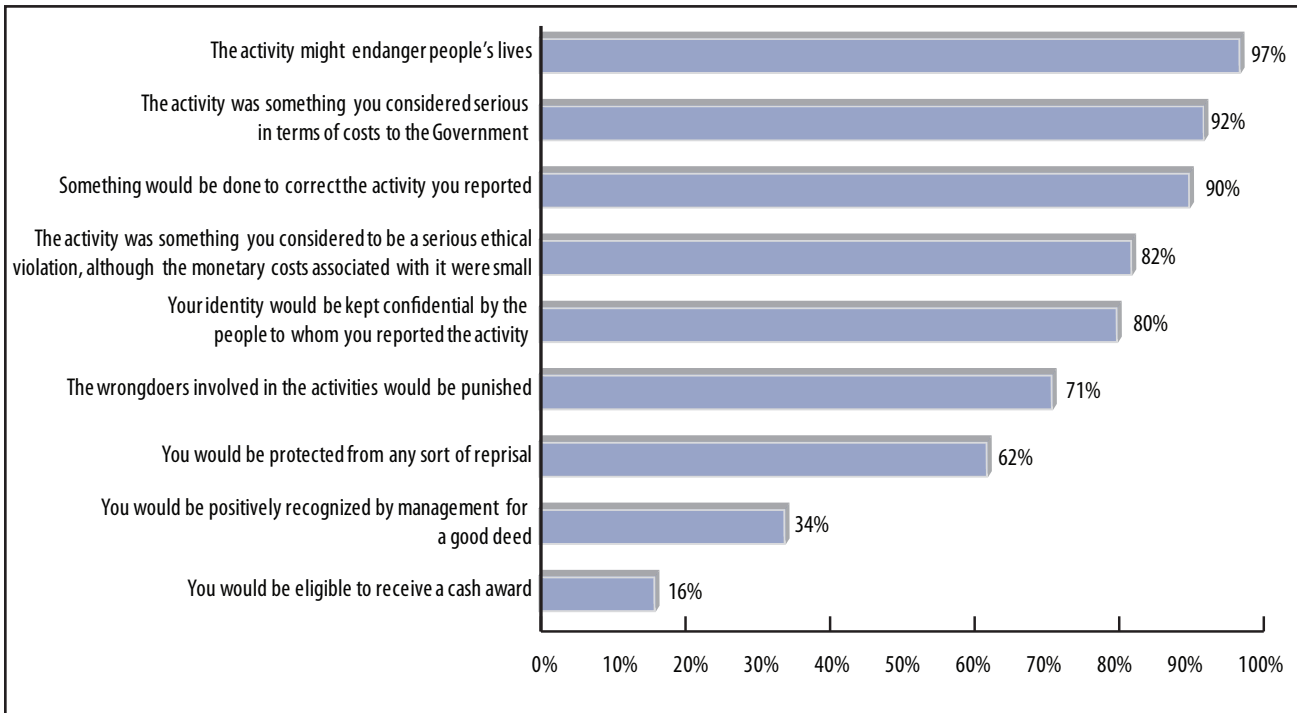
Because one of our goals is to identify what might currently serve as a barrier to whistleblowing, and what agencies can do to encourage employees to make disclosures in the future, this chapter concentrates on data from the 2010 MPS. For those questions that were asked in both 1992 and 2010, a comparison of the data can be found in the Appendix.

Additionally, unlike the last chapter which dealt with increasingly fewer respondents as we went deeper into the whistleblower retaliation process, this chapter uses questions asked of all respondents, which allows us to work with a much smaller margin for error—approximately one half of one percent.

Consequences of the Wrongdoing

In order to see what agencies could do better to encourage disclosures of wrongdoing, we asked survey respondents what would encourage them to report an illegal or wasteful activity. The potential consequences of the wrongdoing, if left unchecked, were extremely important to the respondents. Not surprisingly, as can be seen in figure 2, below, the most important consideration for respondents was whether the wrongdoing might endanger people's lives, followed by the risk of a serious cost to the Government. Personal considerations such as protection from reprisal were somewhat less likely to be important to respondents than people's lives or Government property, and the likelihood of receiving a reward carried even less weight for most respondents.

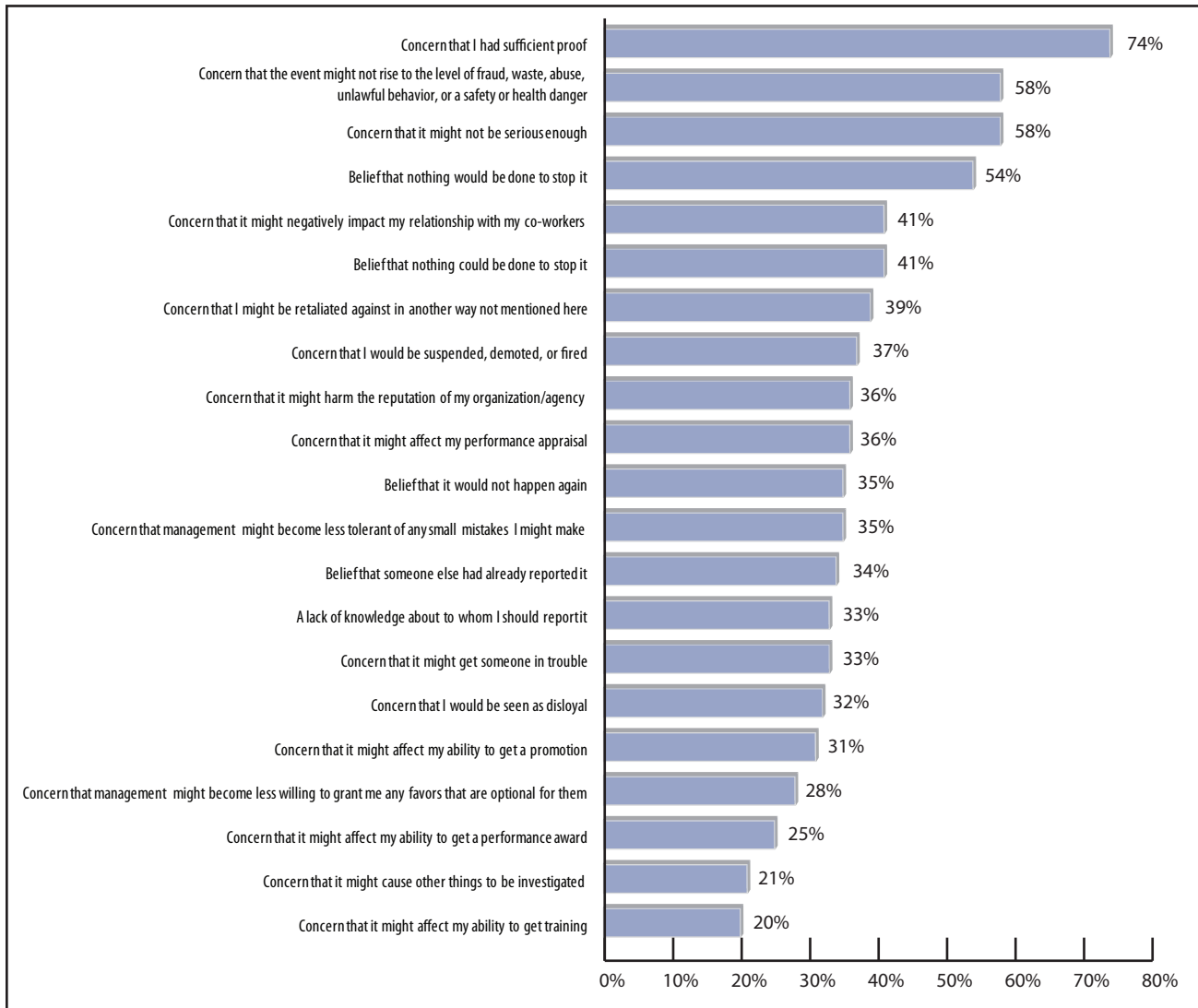
Figure 2: Percentage of respondents indicating a particular consequence would be important to their decision to report wrongdoing.



Management Reaction to the Report

Because barriers to reporting wrongdoing and the question of what can be done to encourage more reports is so important, we also approached the issue from another direction, focusing more heavily on the many different considerations that could come into play. We asked respondents, “If tomorrow you were to observe a health or safety danger, unlawful behavior, fraud, waste, or abuse, to what extent do you think that each of the following would factor into your decision on whether or not to report the wrongdoing?” and provided a long list of possible considerations. As can be seen in figure 3 below, respondents continued to emphasize whether something would likely be done, whereas personal consequences, although important to more than a third of the workforce, were nevertheless more likely to be considered to only a little extent or not at all.

Figure 3: Percentage of respondents indicating that a particular concern would affect their decision to report wrongdoing to some or a great extent.



It appears that respondents want to be sure that they are right about the wrongdoing, and that if they make a report, they will be able to back it up. But, the question of whether something would be done to stop the wrongdoing, which can be closely tied to how well the individual can prove serious wrongdoing, remained high on the list for respondents.

The third most important factor on the short list (consequences, figure 2), and the fourth most important factor on the long list (concerns, figure 3), are within management’s control: Will management do something if they are told about the wrongdoing? Even more than desiring self-protection, employees want to know that if they risk subjecting themselves to the negative consequences that may come with being perceived as a “tattle-tale” they are not taking a risk just to fail. If managers can persuade employees that making a report will make a difference, managers can greatly increase the potential that employees will give them valuable information to correct wrongdoing that has occurred and prevent it from happening again.

Agencies can also act to mitigate any negative effect from the top three concerns in figure 3: sufficiency of the proof; perceived seriousness of the wrongdoing; and concern as to whether the wrongdoing rises to the level of fraud, waste or abuse. The key to addressing these factors is for management to assure the workforce that management will not require absolute proof of wrongdoing or a particularly high level of serious consequences in order for management to care about and seriously investigate the potential wrongdoing.

The whistleblower protection laws do not require an individual to show proof that he or she was right, only that his or her conclusions were reasonable.²² Similarly, the laws can protect a whistleblower, even if the wrongdoing being disclosed is unlikely to result in death or serious injuries. Less serious acts of wrongdoing are still wrong, and a disclosure of such acts is still subject to protection under the law if the wrongdoing is addressed in 5 U.S.C. § 2302(b)(8). While 5 U.S.C. § 2302(b)(8) addresses acts of retaliation, we encourage management to take a similar, expansive approach to deciding what to do about potential wrongdoing. Reporting of reasonable suspicions of wrongdoing should be encouraged, and “minor” wrongdoing is still wrong.

When an individual brings potential wrongdoing to management’s attention, the report should be given serious consideration, and if it seems reasonable to suspect that wrongdoing may have occurred, management should look into the matter more deeply. If management is unable to consider the situation impartially, possibly due to relationships with those involved or a stake in the outcome, the matter should be referred to an impartial individual or office for consideration, such as the Inspector General.

If, after an investigation, it turns out that the individual making the report was incorrect about there being wrongdoing, management should still let the individual know: (1) that the allegation was treated seriously; (2) why management concluded that wrongdoing did not occur; and (3) that the individual did the right thing coming forward and is encouraged to do so again if he or she has a reasonable suspicion that something is improper.

If the investigation reveals that wrongdoing did occur, management should address the wrongdoing, take measures to prevent it from happening again, and let the person who reported it know (to the extent that it is permitted) what management did about the situation. Even if management cannot give the individual details about how the situation was addressed (perhaps because of privacy laws or an ongoing criminal action), management should do what it can, within those limits, to let the reporter know that action was taken and that by coming forward, the reporter made a positive contribution to the public service.

²² *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (holding that “the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude” that wrongdoing as defined in 5 U.S.C. § 2302(b)(8) occurred?).

Reports of wrongdoing that do not appear to be based on a reasonable suspicion may need to be handled more delicately. As the Federal Circuit has noted, “[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations.”²³ Sometimes, the supervisor will have additional information that can explain why there is no cause for concern. Or, perhaps, when faced with the same information, an impartial supervisor might not think it reasonable to be suspicious. But, just because a supervisor does not share an employee’s perceptions regarding potential wrongdoing in one situation does not mean that the employee will never observe wrongdoing in the future that the agency should know about. If, when making a report, the employee feels ignored or that the employee’s concerns are given no value, the employee might be discouraged from coming forward in the future with important information.

Furthermore, as noted in our recent report, *Prohibited Personnel Practices: Employee Perceptions*, employees observe how others in their work unit are treated and make judgments about management from those observations.²⁴ If management is willing to listen fairly to one employee, others may conclude that they too can come to management with their perceptions of wrongdoing. If, on the other hand, employees see their peers being treated dismissively, they may conclude that it is unwise to bother reporting any wrongdoing they have observed themselves. This environment can deprive management of the opportunity to gather important information to protect the agency and the public.

If wrongdoing is happening, it is much better for the agency, and the public, if swift action can be taken to intercede. The American people have a right to know when wrongdoing occurs in their government. However, waiting until the problem gets more serious, or leaks out to the press, is not in the best interest of the agency. The story can be about how an agency identified a problem and fixed it, or the story can be about how an agency ignored or allowed a serious condition to go unchecked.

We recognize that the following recommendation will require a change in culture in some agencies, but we firmly believe that agencies should publicly praise their whistleblowers. Once a problem exists, ignoring it is unlikely to accomplish anything except make it worse. But, going public and saying, “We have great employees who care about preventing wrongdoing and a culture that supports them,” speaks far more highly of an organization than trying to distract people from the issues by attacking the person who comes forward. Praising the whistleblower and speaking openly about how the agency reacted to the whistleblowing will also help persuade employees that reporting wrongdoing will likely result in something being done about the wrongdoing—a factor that weighs heavily with most employees. Unfortunately, when we asked our 2010 MPS respondents if they would be praised at work for disclosing wrongdoing, only 22 percent agreed that this would occur.

²³ *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1348 (Fed. Cir. 2001).

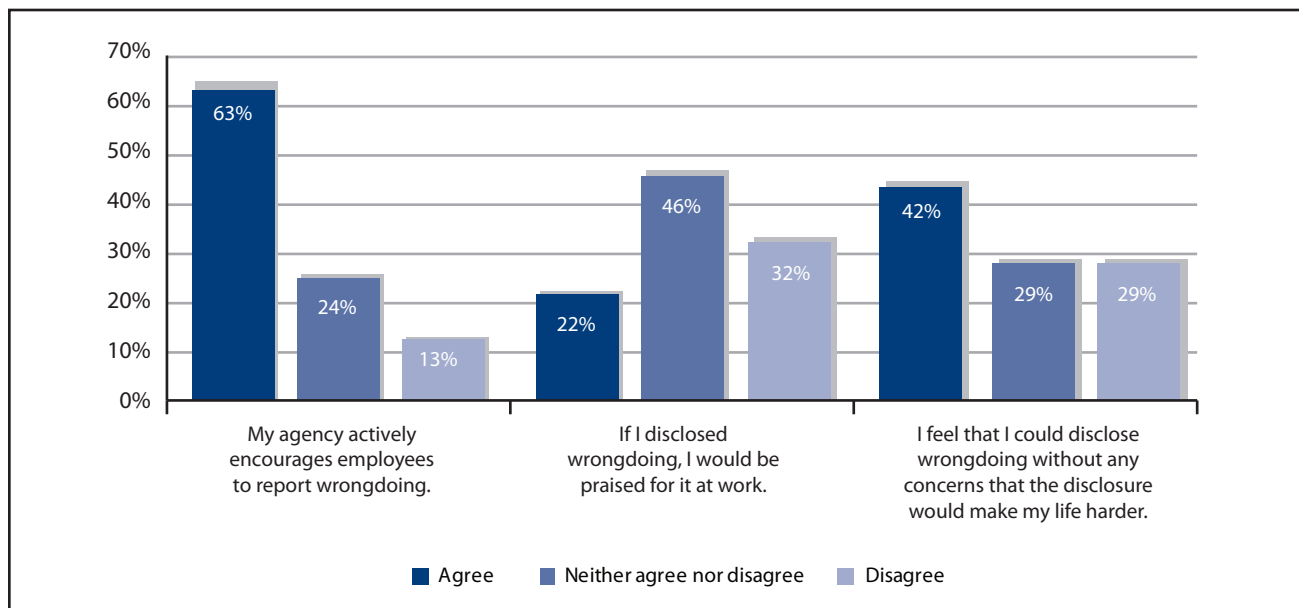
²⁴ *Prohibited Personnel Practices: Employee Perceptions*, available at www.mspb.gov/studies.

Current Perceptions of Agency Culture

The importance of cultural improvements was another area stressed by the OIGs. We asked the OIGs what agencies could do under the current laws to increase the potential that an employee who observes wrongdoing would report it. Several OIGs responded that it would be helpful if senior leadership sent the message to the workforce that as Federal employees, reporting wrongdoing is an important part of their jobs and a valuable public service.

As can be seen in figure 4, below, less than two-thirds of respondents agreed that their agency actively encourages employees to report wrongdoing. Additionally, only forty-two percent of respondents reported that they could disclose wrongdoing without making their lives any harder. Lastly, as mentioned earlier, when we asked respondents if they would be praised for reporting wrongdoing, only 22 percent agreed that this would happen. Thus, it is clear that more should be done to improve agency cultures.

Figure 4: Percentage of respondents indicating an agency culture that supports whistleblowing.



Trust that wrongdoing can be safely exposed is important for reasons beyond the benefits of management learning important information about wrongdoing. Of those employees who reported feeling that they could disclose wrongdoing without any concerns that the disclosure would make life harder, 64.7 percent can be characterized as “engaged” employees.²⁵ In contrast, of those who disagreed that they could make the disclosure, only 18.5 percent were engaged, and of those who neither agreed nor disagreed that a disclosure could be

²⁵ Engaged employees have a heightened connection to their work, their organization, or the people they work for or with that causes them to produce better results for the organization. The greater an employee’s engagement, the more likely it is that the employee will go above and beyond minimum requirements and expend discretionary effort to provide excellent performance. For more on engagement and MSPB’s engagement index, see U.S. Merit Systems Protection Board, *The Power of Federal Engagement*, available at www.mpsb.gov/studies; see also *Managing for Engagement—Communication, Connection, and Courage*, available at www.mpsb.gov/studies.

made without personal consequences, only 39.3 percent were engaged. A similar effect occurred for our survey questions about being actively encouraged to report wrongdoing and receiving praise for reporting wrongdoing. A culture that supports whistleblowing activities tends to also be a culture that fosters engagement among employees.²⁶

It is important to recognize that this culture is not just a result of the relationship between a supervisor and his or her employees. Coworkers can make an employee's life easier or harder as well, and a spirit of cooperation and teamwork is one of the factors used by MSPB to measure engagement. It is therefore important that management create a culture where employees will not be shunned by their peers for coming forward with reports of wrongdoing.

We also asked respondents how adequate they believed the protections against reprisal were for Federal employees who report wrongdoing. More than 50 percent stated that they believed the protections were adequate, while 28 percent said the protections were inadequate, and 20 percent indicated that they considered the protections neither adequate nor inadequate. It is unclear how well respondents understand the protections available to them. However, with more than a quarter of respondents believing the protections are inadequate, there is a potential that, to the extent that a fear of retaliation plays a role in the decision to blow the whistle, perceptions of inadequate protections could discourage employees from reporting wrongdoing.

As indicated earlier in this chapter, concern about retaliation is often not the most important consideration for most employees when deciding to disclose wrongdoing, but this concern still can play a substantial role. Educating employees about their rights may help dispel some concerns and thereby encourage more disclosures. Additionally, such education also may persuade employees that the agency will not want to retaliate against employees who come forward with reports of wrongdoing. On its face, an agency that wants employees to know their rights simply appears less likely to be an agency that is interested in violating those rights. Improving the agency's culture is one more reason to ensure that the training mandated by the No Fear Act is provided effectively.

Whom to Tell About Wrongdoing and Preserving Anonymity

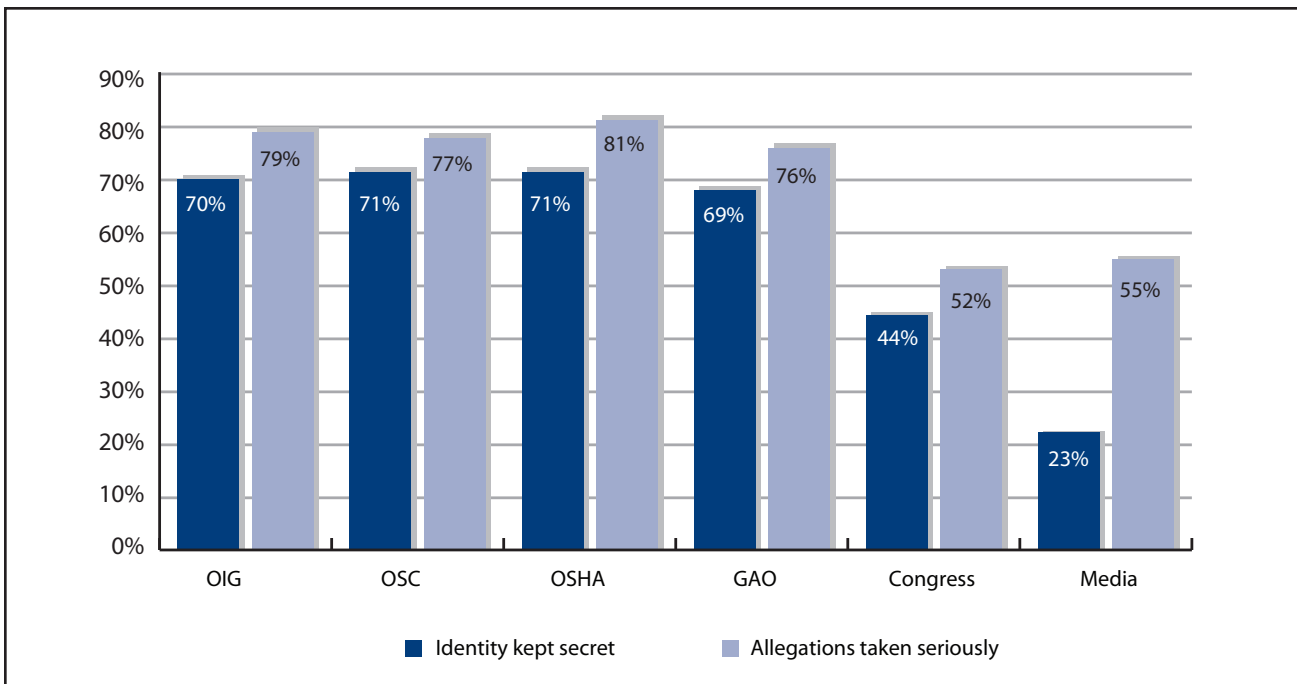
We asked respondents: "If you were to observe or have evidence of wrongdoing, how important would it be to you that you be able to report it without disclosing your identity?" Eighty percent of respondents indicated that anonymity would be either important or very important to them. The information provided to us by OIGs also indicates that anonymity is important. As one OIG put it, "it encourages reporting and makes retaliation nearly impossible." But, anonymity and confidentiality are not easy to achieve, and not all entities are trusted to the same degree.

²⁶ Retaliatory action because of whistleblowing activity is a prohibited personnel practice. As discussed in our recent report, *Prohibited Personnel Practices: Employee Perceptions*, available at www.mspb.gov/studies, employee perceptions of management committing prohibited personnel practices tends to correlate with low engagement.

Whom to Tell

We asked respondents to what extent they believed that various organizations would keep their identity a secret if the respondent asked for confidentiality. We also asked about the extent to which the respondents believed that organizations would take the reports seriously, given the emphasis that respondents placed on whether something would be done about the wrongdoing when deciding to make a disclosure. The results, shown in figure 5, below, show a higher level of confidence in Federal agencies than in Congress or the media.

Figure 5: Percentage of respondents indicating their level of trust in various agencies, organizations, or institutions.



It is worth noting that this is a survey of Federal employees in the Executive branch. It may well be that these respondents—as civil servants—have a strong and invested opinion regarding how hard working and dedicated most civil servants are. This could cause the respondents to be more inclined to trust Federal employees assigned with investigating wrongdoing to act professionally, both with regard to taking any allegations seriously and preserving confidentiality.

In contrast, the U.S. Congress and the media were not held in high regard in 2010 among the American people as a whole. In the summer of 2010, at approximately the same time that our survey was administered, a Gallup poll showed that only 11 percent of the public had confidence in Congress, and 22-25 percent had confidence in television news and newspapers, respectively.²⁷

Just as managers cannot expect employees to entrust them with disclosures of wrongdoing if the employees do not have confidence in them, a low approval rating for Congress and the media may have a relationship to the willingness of individuals to trust Congress or the media to respect a request for confidentiality or to take allegations seriously. It is particularly interesting that the media had the lowest levels of trust in confidentiality, given the journalistic concept of protecting a source and the fact that some American journalists have gone to prison to protect a source from being named. While the media is not a branch of the government, it is, nevertheless, an important player in exposing wrongdoing, both inside and outside the government.

Preserving Anonymity

Unfortunately, while anonymity is important to most employees, making an anonymous disclosure can be difficult. OSC will not accept anonymous disclosures, although agency OIGs will.²⁸ Even if an individual contacts an OIG and does not provide his or her name, it can be problematic to maintain anonymity. As one OIG put it, the “OIG’s ability to allow whistleblowers to remain anonymous is frequently rendered ineffective by the malefactors’ ability to use circumstantial evidence to determine the identity of the discloser.”

We asked OIGs what could be done to better preserve anonymity. *The Board does not endorse any particular approach to this issue. We only share this information to help the reader understand the difficulties with anonymous reports and what OIGs, as experts in disclosures and investigations, shared with us.* One OIG recommended that the individual making a report contact the OIG anonymously, provide in the report as many details as possible that are known by multiple parties, and include a list of names of potential candidates for further information to be contacted by the OIG. The individual could plant his or her name among the many names provided. In that way, the individual could make it possible for the OIG to gather needed information and if anything in the report of investigation could be tracked back to the individual as the sole party with the

²⁷ Gallup, “Congress Ranks Last in Confidence in Institutions,” available at <http://www.gallup.com/poll/141512/congress-ranks-last-confidence-institutions.aspx>. Gallup’s poll was conducted July 8-11, 2010. The MPS was conducted from July 15-September 24, 2010.

²⁸ Office of Special Counsel, <http://www.osc.gov/wbdiscEval.htm>. (“OSC will generally not consider anonymous disclosures. If a disclosure is filed by an anonymous source, the disclosure will be referred to the Office of Inspector General in the appropriate agency. OSC will take no further action on the disclosure.”)

information, it would appear that the discloser was *forced* to provide the information as a part of an agency investigation rather than be seen as the instigator of the investigation.²⁹

Another OIG recommended against anonymity if the employee has already brought his or her concerns to management's attention, or if the allegations the employee presents are known to only a handful of individuals. Under these conditions, this OIG recommended that the individual sign a consent form giving OIG permission to release his or her identity, as that could potentially make future retaliation against the employee easier to prove as whistleblower retaliation because the individual would be better able to establish that the officials not only might have suspected but actually knew that the individual was the one who made the disclosure to the OIG.³⁰

Disclosures Matter

When the CSRA was first enacted, it was noted that:

In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses.³¹

We asked OIGs how important disclosures from current or former employees of the agency are when it comes to the OIGs' ability to identify and investigate illegal activities, fraud, waste, or abuse. We also inquired why the disclosures were important. Their comments indicated that the disclosures were at least somewhat useful, and the overwhelming majority of comments indicated that the disclosures were very important. Many OIGs stated that the disclosures had led to successful criminal prosecutions and cost savings. Below are a few examples of the comments that we received:

- Employee disclosures are very important. The most significant efforts made by my agency during the past year were based, initially, on the reports of an anonymous whistleblower.

²⁹ An employee's failure to cooperate with an official investigation or lack of candor during an investigation can be grounds for an adverse action. See *Ludlum v. Department of Justice*, 278 F.3d 1280 (Fed. Cir. 2002); *Little v. Department of Transportation*, 112 M.S.P.R. 224 (2009); *Social Security Administration v. Steverson*, 111 M.S.P.R. 649 (2009); *Pedelease v. Department of Defense*, 110 M.S.P.R. 508 (2009); *Jackson v. Department of the Army*, 99 M.S.P.R. 604 (2005).

³⁰ For more on the difficulties an employee may encounter when seeking protection against whistleblower retaliation, and using the knowledge/timing test as a means to establish retaliation, please see our recent report, *Whistleblower Protections for Federal Employees*, available at www.mspb.gov/studies.

³¹ S. Rep. 95-969, 8 (1978 U.S.C.C.A.N. 2723, 2730). (This is the Senate Report that accompanied the Civil Service Reform Act of 1978.)

- Disclosures have been the number one source of information leading to the identification and investigation of illegal activities, fraud, waste, and abuse.
- Disclosures from current or former employees have been critical to many of our investigations, as in many instances only current or former employees would possess the pertinent information.
- Disclosures from current or former employees are very important. They are closest to the work and have the most opportunity to identify fraud... Some of our largest cases, dollar-wise and impact-wise, have been from employee referrals.
- Disclosures and complaints to the Hotline serve as a primary source of identification and investigations of fraud, waste, abuse and wrongdoing. These disclosures are important because the individuals making them often have first-hand knowledge, insight, and investigative leads that will assist in any IG effort.

Employees are the most valuable asset that agencies have to reduce fraud, waste, and abuse. As shown throughout this chapter, factors related to an agency's culture tend to be important to employees when they decide whether to report wrongdoing that they have observed. We therefore encourage agencies to do more to create a culture that encourages employees to come forward with valuable information that could make the agencies more effective and efficient. As one OIG put it, "a culture committed to supporting employees who blow the whistle or report fraud, waste and abuse coupled with meaningful enforcement against the retaliator will go a long way to improving reporting and enhancing the well-being of the civil service."



CONCLUSION

We have seen some progress in the Federal Government with respect to effectively utilizing Federal employees to reduce or prevent fraud, waste, and abuse. Since 1992, the percentage of employees who perceive any wrongdoing has decreased, and for those who perceive wrongdoing, the frequency with which they observe the wrongdoing has also decreased. Additionally, in comparison to 1992, respondents in 2010 were slightly more likely to report the wrongdoing and less likely to think they have been identified as the source of the report.

However, among those individuals who indicated that they reported the wrongdoing and were identified as the source of the report, the potential for retaliation remains a serious problem, with approximately one-third of such respondents in both 1992 and 2010 perceiving either threats or acts of reprisal, or both.

Furthermore, when wrongdoing occurs, it is expensive, perhaps more so now than in 1992. So, while progress has been made to reduce wrongdoing, it is more important than ever that employees report wrongdoing when it does occur.

In 1978, Congress enacted a law to protect whistleblowers, and then amended that law in 1989 and 1994 to strengthen those protections. However, the percentage of individuals who perceived that they were retaliated against after being identified as whistleblowers has not changed substantially since 1992. The law contains what some perceive as substantial gaps in protection. In recent years, Congress has considered enacting further amendments to provide employees with better protection from retaliation. However, even if amended, laws to protect employees from retaliation can go only so far in encouraging reports of wrongdoing because a fear of retaliation for whistleblowing activity is only one of many factors that can influence an employee's decision to report wrongdoing.

Ultimately, the best way to ensure that employees will report wrongdoing is a combination of: (1) creating agency cultures that encourage whistleblowing by making it clear that management wants to stop wrongdoing, and (2) providing legal protections for whistleblowers who experience retaliation or threats of retaliation.

Whistleblower protection laws are necessary to encourage employees to report wrongdoing. While notable progress has been made in educating employees about their rights under the law with respect to protection from reprisal, training in this area can and should be improved. However, in the end, the redress for whistleblowing retaliation will not affect

disclosures of wrongdoing as much as a culture in which employees believe that their whistleblowing will make a real difference. From the President and the Congress, to the agency leaders they nominate and confirm, and down through the ranks of the career civil service, we encourage all of those in a position of influence to set the tone that reporting wrongdoing is a public service and a public duty and that retaliation against whistleblowers will not be tolerated. The law is important, but the law cannot do it alone.



APPENDIX: 1992 AND 2010 MPS DATA FOR WHISTLEBLOWING

As mentioned earlier, MSPB has been conducting Government-wide surveys at regular intervals for nearly 30 years. In 1992, a large portion of our MPS survey was dedicated to issues related to whistleblowing and whistleblower retaliation. For our 2010 MPS, we deliberately asked several of the same questions we asked in 1992 to see if the passage of eighteen years and amendments to the Whistleblower Protection Act in 1994 had any discernable impact.³² We remind readers that survey data includes a margin for error, and small differences in data should not be given too much importance. Furthermore, there are myriad factors that can influence data, including the fact that the Federal workforce and the work it performs has changed greatly over the past eighteen years. However, the data is presented below, side by side, for comparison.

| 1992 | 2010 | |
|--|-------|-----|
| During the last 12 months, did you personally observe or obtain direct evidence of one or more illegal or wasteful activities involving your agency? (Note: Do not answer "yes" if you only read about the activity in the newspaper or heard about it as a rumor.) | | |
| 17.7% | 11.1% | Yes |
| 82.3% | 88.9% | No |

³² For some questions, the order in which responses were offered to respondents was different in 2010 than it had been in 1992. For these questions, the order has been changed on this table to make comparing the two years easier.

| 1992 | 2010 | |
|---|-------|---|
| If you answered yes to the question above, then please select the activity below that represents the most serious problem you personally observed. (Please mark only one.) | | |
| 1.9% | 1.8% | Stealing Federal funds |
| 6.3% | 3.1% | Stealing Federal property |
| 0.2% | 0.2% | Accepting bribes or kickbacks |
| 5.0% | 5.1% | Waste caused by ineligible people receiving funds, goods, or services |
| 17.9% | 13.8% | Waste caused by unnecessary or deficient goods or services |
| 11.9% | 10.1% | Use of an official position for personal benefit |
| 35.3% | 38.9% | Waste caused by a badly managed program |
| 3.9% | 4.8% | Unfair advantage in the selection of a contractor, consultant, or vendor |
| 4.8% | 4.6% | Tolerating a situation or practice which poses a substantial and specific danger to public health or safety |
| 13.0% | 17.6% | Other serious violation of law or regulation |

| Where did this activity occur or originate? (Please mark ALL that apply.) | | |
|--|-------|---|
| 43.8% | 48.5% | Your workgroup |
| 64.2% | 49.4% | Outside your workgroup, but within your agency |
| 5.4% | 3.3% | Another Federal agency |
| 12.2% | 8.1% | Contractor or vendor |
| 2.4% | 4.5% | Other |
| If a dollar value can be placed on this activity, what was the amount involved? | | |
| 4.1% | 2.2% | Less than \$100 |
| 10.8% | 5.5% | \$100-\$999 |
| 13.6% | 7.6% | \$1,000-\$4,999 |
| 28.0% | 34.7% | \$5,000-\$100,000 |
| 23.0% | 34.5% | More than \$100,000 |
| 20.5% | 15.5% | A dollar value cannot be placed on the activity |

| 1992 | 2010 | |
|--|-------|------------------------|
| How frequently did this activity occur? | | |
| 12.8% | 14.1% | Once or rarely |
| 33.0% | 27.2% | Occasionally |
| 46.0% | 44.4% | Frequently |
| 8.2% | 14.3% | Don't know/Can't judge |

| Did you report this activity to any of the following? (Please mark ALL that apply.) | | |
|--|-------|--|
| 39.8% | 35.0% | I did not report the activity |
| 26.6% | 20.5% | Family member or friend |
| 37.1% | 35.9% | Co-worker |
| 35.9% | 33.4% | Immediate supervisor |
| 20.2% | 19.9% | Higher level supervisor |
| 8.0% | 8.6% | Higher level agency official |
| 5.6% | 5.1% | Agency Inspector General |
| 0.7% | 1.1% | Office of Special Counsel |
| 0.3% | 0.6% | Government Accountability Office |
| 2.7% | 1.5% | Law enforcement official |
| 5.7% | 7.2% | Union representative |
| 0.2% | 0.6% | News media |
| 1.9% | 1.8% | Congressional staff member or member of Congress |
| 0.7% | 0.6% | Advocacy group outside the Government |
| 3.8% | 8.8% | Other |

| 1992 | 2010 | |
|---|-------|--------------------------|
| If you DID report this activity, were you identified as the source of the report | | |
| 53.1% | 42.5% | Yes, I was identified |
| 46.9% | 57.5% | No, I was not identified |

| If you were identified, what was the effect on you personally as a result of being identified? (Please mark ALL that apply.) | | |
|---|-------|---|
| 9.2% | 7.1% | I was given credit by my management for having reported the problem |
| 37.2% | 44.0% | Nothing happened to me for having reported the problem |
| 18.4% | 17.6% | My coworkers were unhappy with me for having reported the problem |
| 31.2% | 28.6% | My supervisor was unhappy with me for having reported the problem |
| 35.8% | 28.0% | Someone above my supervisor was unhappy with me for having reported the problem |
| 12.2% | 13.3% | I was threatened with reprisal for having reported the problem |
| 18.7% | 21.6% | I received an actual reprisal for having reported the problem |

| Within the last 12 months, have you personally experienced some type of reprisal or threat of reprisal by management for having reported an activity? | | |
|--|-------|-----|
| 36.3% | 35.9% | Yes |
| 63.7% | 64.1% | No |

| 1992 | | 2010 | | |
|--|-------------|------------|-------------|--|
| Did the reprisal or threat of reprisal take any of the following forms? (Please mark ALL that apply.) | | | | |
| Threatened | Experienced | Threatened | Experienced | |
| 11.8% | 48.2% | 10.8% | 50.3% | Poor performance appraisal |
| 5.1% | 18.5% | 10.3% | 38.9% | Denial of promotion |
| 1.5% | 19.0% | 6.6% | 39.8% | Denial of opportunity for training |
| 2.6% | 30.7% | 8.4% | 46.8% | Denial of award |
| 8.0% | 36.1% | 9.3% | 45.9% | Assignment to less desirable or less important duties |
| 3.8% | 22.9% | 6.1% | 29.1% | Transfer or reassignment to a different job with less desirable duties |
| 3.1% | 5.2% | 7.1% | 13.7% | Reassignment to a different geographical location |
| 3.3% | 2.5% | 6.8% | 14.7% | Suspension from my job |
| 1.9% | 0.7% | 9.1% | 8.9% | Fired from my job |
| 3.9% | 3.1% | 3.6% | 14.8% | Grade level demotion |
| 3.1% | 48.8% | 9.1% | 63.5% | Shunned by coworkers or managers |
| 8.7% | 47.6% | 11.9% | 54.3% | Verbal harassment or intimidation |
| 2.0% | 1.6% | 1.4% | 6.1% | Required to take a fitness for duty exam |
| 5.3% | 14.5% | 8.0% | 32.7% | Other |

| 1992 | 2010 | |
|--|-------|---|
| In response to the reprisal or threat of reprisal, did you take any of the following actions? (Please mark ALL that apply.) | | |
| 45.2% | 26.4% | Took no action |
| 36.2% | 37.6% | Complained to a higher level of agency management |
| 8.4% | 15.6% | Complained to the Office of Inspector General within agency |
| 31.8% | 29.9% | Complained to some other office within agency (for example, the Personnel Office or EEO Office) |
| 17.3% | 20.3% | Filed a complaint through union representative |
| 12.1% | 14.9% | Filed a formal grievance within agency |
| 16.2% | 23.7% | Filed an EEO (discrimination) complaint |
| 1.9% | 9.2% | Filed a complaint with the Office of Special Counsel |
| 1.7% | 4.0% | Filed an action with the Merit Systems Protection Board |
| 11.9% | 18.4% | Took an action not listed above |

| How important, if at all, would each of the following be in encouraging you to report an illegal or wasteful activity? | | |
|---|-------|-----------------------------------|
| The activity might endanger people's lives | | |
| 95.7% | 91.2% | Very Important |
| 3.1% | 6.0% | Somewhat Important |
| * | 1.8% | Neither Important nor Unimportant |
| * | 0.4% | Somewhat Unimportant |
| 1.8% | 0.7% | Unimportant** |
| The activity was something you considered serious in terms of costs to the Government | | |
| 66.5% | 60.0% | Very Important |
| 31.1% | 32.4% | Somewhat Important |
| * | 5.5% | Neither Important nor Unimportant |
| * | 1.0% | Somewhat Unimportant |
| 2.4% | 1.2% | Unimportant** |

* This response option was not offered on the 1992 survey for this question.

** This option was phrased as "Not Important" on the 1992 survey.

| 1992 | 2010 | |
|---|-------|---|
| How important, if at all, would each of the following be in encouraging you to report an illegal or wasteful activity? (Continued) | | |
| | | Something would be done to correct the activity you reported |
| 69.2% | 57.4% | Very Important |
| 27.7% | 32.6% | Somewhat Important |
| * | 7.6% | Neither Important nor Unimportant |
| * | 0.9% | Somewhat Unimportant |
| 3.6% | 1.6% | Unimportant** |
| | | The wrongdoers involved in the activities would be punished |
| 41.5% | 38.3% | Very Important |
| 38.0% | 33.1% | Somewhat Important |
| * | 21.4% | Neither Important nor Unimportant |
| * | 3.0% | Somewhat Unimportant |
| 14.5% | 4.3% | Unimportant** |
| | | You would be protected from any sort of reprisal |
| 68.8% | 59.3% | Very Important |
| 23.8% | 2.5% | Somewhat Important |
| * | 10.3% | Neither Important nor Unimportant |
| * | 1.7% | Somewhat Unimportant |
| 7.4% | 3.1% | Unimportant** |
| | | You would be positively recognized by management for a good deed |
| 22.2% | 16.8% | Very Important |
| 23.2% | 17.4% | Somewhat Important |
| * | 39.1% | Neither Important nor Unimportant |
| * | 5.9% | Somewhat Unimportant |
| 54.7% | 20.8% | Unimportant** |

* This response option was not offered on the 1992 survey for this question.

** This option was phrased as "Not Important" on the 1992 survey.

| 1992 | 2010 | |
|-------|-------|--|
| | | Your identity would be kept confidential by the people to whom you reported the activity |
| 55.4% | 52.6% | Very Important |
| 28.7% | 26.9% | Somewhat Important |
| * | 13.7% | Neither Important nor Unimportant |
| * | 2.9% | Somewhat Unimportant |
| 15.9% | 3.9% | Unimportant** |
| | | The activity was something you considered to be a serious ethical violation, although the monetary costs associated with it were small |
| 50.1% | 48.5% | Very Important |
| 41.3% | 33.3% | Somewhat Important |
| * | 12.5% | Neither Important nor Unimportant |
| * | 1.6% | Somewhat Unimportant |
| 7.8% | 4.0% | Unimportant** |
| | | You would be eligible to receive a cash award |
| 9.6% | 6.7% | Very Important |
| 18.6% | 8.9% | Somewhat Important |
| * | 37.0% | Neither Important nor Unimportant |
| * | 4.0% | Somewhat Unimportant |
| 71.8% | 42.5% | Unimportant** |

* This response option was not offered on the 1992 survey for this question.

** This option was phrased as "Not Important" on the 1992 survey.

| 1992 | 2010 | |
|---|-------|-----------------------------|
| How likely would you be to “blow the whistle” when the wrongdoer is: | | |
| Your supervisor | | |
| 28.0% | 30.1% | Very Likely |
| 34.7% | 31.8% | Somewhat Likely |
| * | 16.4% | Neither Likely nor Unlikely |
| 16.9% | 8.0% | Somewhat Unlikely |
| 11.5% | 6.0% | Very Unlikely |
| 8.9% | 7.8% | Don't Know/Can't Judge |
| A higher level supervisor | | |
| 30.9% | 32.1% | Very Likely |
| 34.2% | 31.2% | Somewhat Likely |
| * | 15.9% | Neither Likely nor Unlikely |
| 14.8% | 6.9% | Somewhat Unlikely |
| 11.9% | 6.2% | Very Unlikely |
| 8.4% | 7.7% | Don't Know/Can't Judge |
| A coworker (in your work group) | | |
| 29.7% | 32.1% | Very Likely |
| 40.9% | 36.0% | Somewhat Likely |
| * | 16.7% | Neither Likely nor Unlikely |
| 15.3% | 5.5% | Somewhat Unlikely |
| 6.4% | 2.7% | Very Unlikely |
| 7.6% | 6.9% | Don't Know/Can't Judge |

* This response option was not offered on the 1992 survey for this question.

| 1992 | 2010 | |
|-------|-------|---|
| | | A Federal employee outside your work group |
| 39.6% | 38.5% | Very Likely |
| 37.4% | 34.1% | Somewhat Likely |
| * | 14.6% | Neither Likely nor Unlikely |
| 9.7% | 2.9% | Somewhat Unlikely |
| 5.1% | 2.3% | Very Unlikely |
| 8.2% | 7.6% | Don't Know/Can't Judge |
| | | A contractor or vendor |
| 59.4% | 50.3% | Very Likely |
| 25.6% | 28.2% | Somewhat Likely |
| * | 11.0% | Neither Likely nor Unlikely |
| 4.3% | 1.4% | Somewhat Unlikely |
| 3.2% | 1.8% | Very Unlikely |
| 7.4% | 7.2% | Don't Know/Can't Judge |
| | | A political appointee in your agency |
| 49.1% | 41.8% | Very Likely |
| 25.5% | 26.4% | Somewhat Likely |
| * | 13.8% | Neither Likely nor Unlikely |
| 6.2% | 2.6% | Somewhat Unlikely |
| 6.3% | 3.5% | Very Unlikely |
| 12.9% | 11.8% | Don't Know/Can't Judge |

**This response option was not offered on the 1992 survey for this question.*

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