

Calendar No. 39

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-30

FOLLOW THE RULES ACT

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 576

TO AMEND TITLE 5, UNITED STATES CODE, TO EXTEND CERTAIN
PROTECTIONS AGAINST PROHIBITED PERSONNEL PRACTICES, AND
FOR OTHER PURPOSES



APRIL 24, 2017.—Ordered to be printed

—
U.S. GOVERNMENT PUBLISHING OFFICE

69-010

WASHINGTON : 2017

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Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 576]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 576) to amend title 5, United States Code, to extend certain protections against prohibited personnel practices, and for other purposes, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 576, the Follow the Rules Act, is to protect Federal employees from retaliation for refusing to obey an order that would violate a rule or regulation.

II. BACKGROUND AND THE NEED FOR LEGISLATION

This legislation arises in response to a recent decision in Federal court interpreting the scope of a provision within the Whistleblower Protection Act, commonly referred to as the “right-to-disobey” provision. The “right to disobey” provision protects Federal employees

from retaliation “for refusing to obey an order that would require the individual to violate a law.”¹

The United States Court of Appeals for the Federal Circuit was asked to interpret the scope of that provision recently in *Rainey v. Merit Systems Protection Board*.² In *Rainey*, Doctor Timothy Allen Rainey, a Federal employee serving as a contracting officer representative for the United States Department of State, alleged:

[T]hat his duties as a contracting officer representative had been taken away because he had refused his supervisor’s order to tell a contractor to rehire a terminated subcontractor. Dr. Rainey argued that his refusal was based on his view that carrying out the order would have required him to violate Federal Acquisition Regulation . . . by improperly interfering with personnel decisions of a prime contractor and requiring the prime contractor to operate in conflict with the terms of the contract.³

The Federal Circuit held that the “right-to-disobey” provision in the Whistleblower Protection Act “is limited to orders that are contrary to a statute, and does not encompass orders that are contrary to a regulation.”⁴ As a result, the Court ruled against Dr. Rainey, finding that the agency was justified in its actions against Dr. Rainey.

In limiting the “right-to-disobey” provision, the Federal Circuit relied on a 2015 Supreme Court case, *Department of Homeland Security v. MacLean*.⁵ In that case, the Court was interpreting the “right-to-disclose” provision of the Civil Service Reform Act of 1978, which prohibits agencies from retaliating against a Federal employee who discloses an alleged “violation of any law, rule, or regulation, or mismanagement, a gross waste of funds . . .” so long as “such disclosure is not specifically prohibited by law.”⁶

The Court reasoned that “Congress’s choice to say specifically prohibited by law’ rather than specifically prohibited by law, rule, or regulation’ suggests that Congress meant to exclude rules and regulations.”⁷ Accordingly, the Court held that the limit on lawful disclosure applied only to a *statute* that would prohibit the disclosure, and not to a rule or regulation.⁸

As part of its findings in the Whistleblower Protection Act, Congress wrote that “protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service.”⁹ This Committee takes very seriously its responsibility to ensure whistleblowers who report allegations of waste, fraud, abuse, and wrongdoing are protected from retaliation.

In the 114th Congress, this Committee heard from numerous Federal whistleblowers who testified regarding Federal agency retaliation against employees who disclose misconduct, waste, fraud,

¹ Whistleblower Protection Act of 1989, §4(b), Pub. L. No. 101–12, 103 Stat. 16. (1989). See also 5 U.S.C. §2302(b)(9)(D).

² *Rainey v. Merit Systems Protection Board*, 824 F.3d 1359 (2016).

³ *Id.* at 2.

⁴ *Id.* at 11.

⁵ *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015).

⁶ 5 U.S.C. §2302(b)(8)(A); *MacLean*, 135 S. Ct. at 915 (emphasis added).

⁷ *MacLean*, 135 S. Ct. at 919.

⁸ *Id.* at 921.

⁹ Whistleblower Protection Act of 1989, §2(a)(2), Pub. L. No. 101–12, 103 Stat. 16. (1989).

and abuse.¹⁰ The majority staff for the Committee also issued a 359-page report about its investigation into systematic failures at the Tomah Veterans Affairs Medical Center, detailing the culture of fear and whistleblower retaliation at the facility¹¹ and heard from Federal employees who contacted the Committee through the Chairman’s whistleblower hotline. In both the 114th and 115th Congresses, the Committee passed bipartisan legislation to strengthen whistleblower protection laws and to reauthorize the Office of Special Counsel, the Federal agency charged with investigating and redressing Federal employee whistleblower retaliation claims.¹²

The Committee believes that refusing to obey any order that would violate a law, rule, or regulation, or that a Federal employee reasonably believes would violate a law, rule, or regulation, is precisely the type of action from which Federal employees should be protected against retaliation. The Follow the Rules Act would ensure that Federal employees are protected in these circumstances.

III. LEGISLATIVE HISTORY

S. 576, the Follow the Rules Act, was introduced on March 8, 2017, by Chairman Ron Johnson, Ranking Member Claire McCaskill, and Senators Chuck Grassley and Tammy Baldwin. Senator Ron Wyden joined as a cosponsor on March 21, 2017. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 576 at a business meeting on March 15, 2017. No amendments were offered. The legislation was passed by voice vote en bloc with Senators Johnson, Portman, Lankford, Daines, McCaskill, Carper, Tester, Heitkamp, Peters, Hassan, and Harris present.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the “Follow the Rules Act.”

Section 2. Prohibited personnel action based on ordering individual to violate rule or regulation

This section makes it a prohibited personnel practice to take, fail to take, or threaten a personnel action against a Federal employee because the Federal employee refused to obey an order that would violate a law, rule or regulation.

¹⁰*Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015). See also *Improving VA Accountability: Examining First-Hand Accounts of Department of Veterans Affairs Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (2015). See also *Joint Field Hearing: Tomah VAMC: Examining Quality, Access, and a Culture of Overreliance on High-Risk Medications*, Hearing Before the H. Comm. on Veterans’ Affairs and the S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong. (2015).

¹¹Majority Staff Report, S. Comm. on Homeland Sec. & Governmental Affairs, *The Systematic Failures and Preventable Tragedies at the Tomah VA Medical Center*, 114th Cong. (2016).

¹²S. 582, 115th Cong. (2017); S. 585, 115th Cong. (2017); A bill to enhance whistleblower protection for contractor and grantee employees, Pub. L. No. 114–261 (2016).

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MARCH 21, 2017.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 576, the Follow the Rules Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

S. 576—Follow the Rules Act

S. 576 would expand the protections against retaliation that are currently given to whistleblowers that refuse to violate federal laws. Under the bill those protections would be extended to employees who refuse to violate federal rules and regulations.

The Merit Systems Protection Board (MSPB) hears claims against federal agencies brought by whistleblowers. Expanding the scope of the retaliation protections to include violations of federal rules and regulations could increase the number of such hearings and related costs. However, based on information from the MSPB on the likely number of new cases under the bill, CBO expects that whistleblower cases dealing with violations of rules and regulations would be limited in number. Furthermore, based on an analysis of the cost of whistleblower cases, even if the number of cases increased by 20 percent (something CBO thinks would be unlikely) under the bill, CBO estimates that the annual cost to process them would be less than \$500,000.

Enacting the legislation could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. However, CBO estimates that any net increase in spending by those agencies would be negligible. Enacting S. 576 would not affect revenues.

CBO estimates that enacting S. 576 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 576 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On February 13, 2017, CBO transmitted an estimate for H.R. 657, the Follow the Rules Act, as ordered reported by the House Committee on Oversight and Government Reform on February 2, 2017. The two pieces of legislation are similar, and CBO’s estimates of the budgetary effects are the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

* * * * *

Subpart A—General Provisions

* * * * *

CHAPTER 23—MERIT SYSTEMS PRINCIPLES

* * * * *

SEC. 2302. PROHIBITED PERSONNEL PRACTICES.

(a) * * *

(b) * * *

(1) * * *

* * * * *

(9) * * *

(A) * * *

(B) * * *

(C) * * *

(D) for refusing to obey an order that would require the individual to violate a law, *rule, or regulation*;

* * * * *