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- **What is the Military Whistleblower Protection Act?**

The MWPA was created by Congress in 1989. The Act does two important things:

- 1) it states that no person may restrict a member of the Armed Forces from lawfully communicating with a Member of Congress or an Inspector General (IG), *and*
- 2) it protects military members who make disclosures of wrongdoing to Members of Congress or an IG from retaliation by other military members. (10 USC § 1034.)

In response to the MWPA, the Department of Defense (DoD) issued DoD Directive 7050.06 making the Act official DoD policy.

- **What kind of communication is “protected” under the Act?**

“Protected communication” is “any lawful communication” made to one of the people listed in the Act. (DoDD § 7050.06.) Enclosure 2 of the Directive defines “protected communication” further by stating that the communication must be:

- 1) made to a Member of Congress; an IG; a member of a DoD audit, inspection, or investigation; a law enforcement organization; any person or organization in the chain of command; or any other person designated pursuant to regulations or other established administrative procedures to receive such communication, *and*
- 2) the member of the Armed Forces must *reasonably believe* the information communicated evidences a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, a substantial and specific danger to public health or safety, or a threat by another member of the Armed Forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, federal, or civilian property.

It is assumed that the term “lawful” means that the communication must be lawful under the Uniform Code of Military Justice (UCMJ) and lawful within the civilian meaning of the term. Examples of unlawful speech under the UCMJ are provoking or reproachful words; words that express an intent to wrongfully injure a person, property, or the reputation of another person; and disrespectful words toward a superior commissioned officer. Examples of civilian unlawful speech would be threats against the President, threatening terrorism against the United States, and defamation.

- **Why is the Military Whistleblower Protection Act Important?**

People in the military do not have the same First Amendment rights as civilians do. DoD Directive 1325.06 addresses dissent and protest among members of the Armed Forces. It states that a “service member’s right of expression should be preserved to the maximum extent possible”. However, this is limited in the sense that the service member’s speech must be “consistent with good order and discipline” and must not conflict with “national security”. The Directive also states that no commander should be indifferent to speech that “if allowed to proceed unchecked, would destroy the effectiveness of his or her unit”. The Directive leaves it in the hands of the “calm and prudent” commander to determine what speech does, or does not, conflict with “national security”, and what speech would harm the effectiveness of a unit.

Whistleblower
(noun) a person who makes public disclosure of corruption or wrongdoing

Essentially, DoDD 1325.06 leaves the question of what free speech rights a service member has entirely up to his or her individual command. The Directive results in command determinations that are inconsistent, often based on preference, and sometimes prejudice. While some service members are able to speak more freely because Directive 1325.06 gives so much power to command discretion, others are subjected to higher levels of punishment and retaliation for speech that should be protected.

The following is an example of how a service member’s speech could be curtailed under DoDD 1325.06, and how the MWPA can provide protection: if a service member writes on a social media outlet that he or she believes the military is deploying service members with severe psychiatric impairments in violation of DoD regulations, and therefore such service members are not legally obligated to deploy, his or her command might find such speech inconsistent “with good order and discipline”, or perhaps even decide that it may encourage others to refuse to deploy (which would violate Article 82 of the UCMJ). As a result, the service member could face retaliation without protection, disciplinary action, or even administrative action including separation. However, under the MWPA, the same service member is given a powerful outlet for this same speech. He or she may communicate this same belief to a Member of Congress, openly or privately, and be protected from reprisal.

- **What kind of retaliation does the Act protect me from?**

Under DoD Directive 7050.06 *no person* is allowed to take any unfavorable personnel action, or withhold any favorable personnel action, because a service member lawfully communicated with a person named in the MWPA (i.e. a Member of Congress) or prepared to lawfully communicate with a person named in the MWPA. In fact, no person is even allowed to make *threats* to take unfavorable personnel actions or withhold favorable personnel actions.

The Directive defines personnel actions as any action that “affects, or has the potential to affect, that military member’s current position or career”. The Directive lists the following actions as examples: refusal to give a promotion; a disciplinary or other corrective action; a transfer or reassignment; a bad performance evaluation; a decision on pay, benefits, awards or training; referring someone for a mental health evaluation; and assigning any significant changes in duties or responsibilities that are inconsistent with the military member’s grade.

• What should I do if I am retaliated against for whistleblowing?

SPEAK OUT

Although the MWPA states that “members of the Armed Forces shall be free from reprisal for making or preparing to make a protected communication”, the Act standing alone does not *prevent* your command from retaliating. What the Act *does* do is establish a complaint and investigation process for a service member who *is* retaliated against *after* whistleblowing. Complaints should be made within 60 days from the time you became aware of the retaliation. However, if you miss the deadline, you have an opportunity to explain why.

If you are retaliated against for whistleblowing, there are several ways you can file a complaint. But first, you must be able to show evidence that you:

- 1) made a “protected communication” to someone named in the MWPA, *and*
- 2) that the management official who engaged in the retaliatory act against you *knew* of your protected communication, *and*
- 3) that there was an actual adverse or unfavorable personnel action taken or threatened, or that a positive personnel action was withheld, *after* the management official became aware of your protected communication.

Once you are prepared to prove all three elements, you have several options for reporting. First, you should get the PDF titled “Guide to Filing a Military Whistleblower Reprisal Complaint” on the Office of the IG website: www.dodig.mil/HOTLINE/reprisalmil.html. This guide provides step-by-step directions for preparing a whistleblower reprisal complaint. Once you have all the necessary documentation, you can either 1) mail your complaint packet to Defense Hotline, The Pentagon, Washington, DC 20301-1900; 2) fax it to 703-604-8567, DSN 664-8567; 3) file it online at www.dodig.mil/HOTLINE/reprisalmil.html if the complaint is not classified, or <http://www.dodig.mil/HOTLINE/classifiedcomplaint.html> if the complaint is classified; or, 4) email the information to hotline@dodig.mil. Submission by email is not recommended since unencrypted email messages are vulnerable to eavesdropping.

Another good resource for service members facing retaliation for whistleblowing, or even for a service member who is considering exercising his or her rights under the MWPA and wants advice ahead of time, is the Whistleblower Protection Ombudsman (WHPO) for the Department of Defense. In 2012 the Whistleblower Protection Enhancement Act was passed which requires IGs to designate WHPOs. WHPOs 1) educate agency employees about prohibitions on retaliation for protected disclosures, *and* 2) educate service members who have made, or are contemplating making, a protected disclosure about the rights and remedies against retaliation for protected disclosures.

You can email the WHPO directly from this webpage: <http://www.dodig.mil/programs/whistleblower/>.

• What happens after I file a reprisal complaint?

Once you have filed a complaint, you will be contacted by a member of the office of the IG who will tell you that an investigation will be conducted, and who will conduct it. The purpose of the investigation will be to determine whether the evidence proves four key questions. The first three questions are the questions you had to answer in your complaint. The fourth question is, “does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?”.



The investigator will research all pertinent laws, rules, and regulations that apply to the retaliatory action under review, and collect as many relevant documents as possible. The investigator will also identify and interview all key witnesses, usually beginning by interviewing the service member who initiated the complaint. During this

interview, you will have the opportunity to help identify witnesses and answer any questions the investigator may have. You may be interviewed again later if the investigator has further questions.

Once the investigator has examined all laws, documentation and witness testimony, he or she will write a report analyzing the evidence. All conclusions will be based on the evidentiary standard of “preponderance of the evidence”. This means the investigator will give greater weight to evidence he or she finds most credible, and will use that evidence to determine whether it is “*more* probable than not” that the four components of the reprisal complaint are true. The report will usually conclude with recommendations for resolution.

Once the investigator has completed the report, you will receive a copy. This copy may be redacted. Another copy of the report will be submitted to the IG. If you believe the investigation was inadequate or biased, you may request a review by the Board for Correction of Military Records (BCMR). The BCMR *may* allow a hearing to examine and cross-examine witnesses, take depositions, and – if necessary – conduct a hearing. Under certain circumstances, you may be represented by outside counsel or a judge advocate.

If the investigation is considered competent, the Secretary (which is the Secretary of Defense for all branches except the Coast Guard in which case it is the Secretary of Homeland Security) will issue a final decision based on your complaint and the investigation report.

- **What happens if the Secretary agrees that I was retaliated against?**

The Secretary will correct whatever effects the retaliatory action had on your personnel record. The Secretary may also take disciplinary action against the individual who committed the retaliatory action. However, disciplinary action is *not* required. If you are not satisfied with how the matter was handled, you may submit a request for review to the Secretary of Defense. The Secretary of Defense will make a decision to either uphold or overturn the decision and actions of the Secretary of the respective military department within 90 days after you requested a review. The Secretary of Defense’s decision is final.



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Military Law Task Force of the National Lawyers Guild

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