

***Prima Facie* Case before MSPB**

To establish a *prima facie* case for a Whistleblowing defense:

- Must prove by a preponderance of the evidence that:
 - 1) Employee made a protected disclosure under 5 U.S.C. § 1202(b)(8) or there was a situation covered by (b)(9); and
 - 2) That this was a contributing factor to the adverse employment action.
- Contributing factor can be shown by employer's actual or constructive knowledge of the disclosure and proximity in time to the adverse action, or by other means.

Constructive knowledge includes "cat's paw" theory which is based on an old fable in which a sly monkey convinces a cat to reach into a fire to get roasting chestnuts. The cat is duped, burns its paw, and the monkey enjoys the chestnuts. In the discrimination context, the theory means that an employer – like the duped cat – can be liable:

- If an ultimate decision-maker was "duped" by a biased manager who reports misconduct by the employee; and
 - The reports from the biased manager were not truthful.
- Contributing factor can be one among many. In theory, it is easier to prove than "but for" cause.