

Whitmore Case Gives Clear and Convincing Evidence Burden Teeth

- The Federal Circuit in *Whitmore v. Dep't of Labor* (2012) held that:
 - Employees are entitled to discovery and presentation of witnesses and evidence concerning all three *Carr* factors.

 - If the disclosures are highly critical of the agency then retaliatory motive can be shown even if the proposing and deciding officials –
 - 1) Are not directly implicated by the disclosures,
 - 2) Are outside of the whistleblower's chain of command, and
 - 3) Do not know the whistleblower personally.

 - The Board must consider that proposing and deciding officials several degrees removed from the whistleblower could have been selected precisely to "build a more defensible case."

 - Evidence of retaliatory motive on the part of agency officials who may have influenced the decision-makers must be considered.

 - The deciding officials' mere denial of retaliatory motive is not sufficient to meet the agency's burden.

 - The third *Carr* factor concerning similarly situated non-whistleblower employees should be read broadly to permit relevant evidence of disparate treatment, even if the comparison employee was not identically situated or did not engage in identical conduct.

In Addition, *Whitmore* Held:

- Even where the charges have been sustained and the agency's chosen penalty is deemed reasonable, the agency must still prove that it would have imposed the *exact same penalty* in the absence of the protected disclosures.

- The Administrative Judge cannot ignore evidence which tends to show retaliation and must discuss and evaluate all the relevant evidence in his/her decision.

- Where an employee behaves unprofessionally, the Administrative Judge must consider the possibility that a hostile work environment in response to the whistleblowing provoked the employee.