

EMPOWER OVERSIGHT

Whistleblowers & Research



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May 17, 2023

U.S. Office of Special Counsel
1730 M Street NW, Suite 218
Washington, D.C.

Dear OSC investigator:

I represent [REDACTED], an IR-04 Supervisory Special Agent with the Criminal Investigation (CI) division of the Internal Revenue Service (IRS). [REDACTED] is well known within the agency for helping to stand up the Joint Chiefs of Global Tax Enforcement, described in further detail below, and for his work as the case agent on investigations into Credit Suisse and HSBC Switzerland, resulting in over \$3 billion in tax dollars being recovered by the United States government.

For protected disclosures to a series of audiences about a particular criminal tax enforcement case, [REDACTED] has been retaliated against in a violation of 5 U.S.C. § 2302(b)(8). First [REDACTED] was excluded from the case he had worked for nearly three years and regarding which he made protected disclosures. [REDACTED] was next passed over for a promotion for which he was clearly most qualified. The retaliation through failure to select appears to have been accomplished through granting another employee an unauthorized advantage, a further violation of § 2302(b)(6). Most recently, [REDACTED] was formally removed from the case regarding which he made protected disclosures, a further instance of retaliation.

I. Disclosures to IRS and DOJ

In January 2020 [REDACTED] was assigned to a criminal investigation of a high-profile, controversial subject. The case was investigated jointly with the Federal Bureau of Investigation (FBI). Although [REDACTED] chain of command still technically included his Assistant Special Agent in Charge (ASAC) and Special Agent in Charge (SAC), for the purposes of this case he reported to a Director of Field Operations (DFO), Michael Batdorf. DFO Batdorf reported to the Deputy Chief of IRS CI, who in turn reported to the Chief of IRS CI. For most of fiscal year 2020, Don Fort served as Chief of IRS CI, with James Lee as his deputy; on October 1, 2020, Lee succeeded Fort as Chief of IRS CI.

[REDACTED] protected disclosures began in the summer of 2020, when he began noting irregularities in how the Department of Justice (DOJ) was handling the case, both in the U.S. Attorney's Office (USAO) for the District of [REDACTED] and in the DOJ Tax Division. [REDACTED] informed his management chain that DOJ's handling of the case failed to follow established precedent. Because details of [REDACTED] disclosures may implicate provisions found in 26 U.S.C. § 6103 prohibiting the dissemination of taxpayer information, further details may be obtained from the DOJ Office of Inspector General (OIG), which is currently investigating the disclosures.

In a charged meeting on October 7, 2022, U.S. Attorney for the District of [REDACTED] became aware that both the IRS and the FBI had longstanding concerns about the handling of the case, and that [REDACTED] had been communicating his concerns up his chain of command. After [REDACTED] continued to communicate concerns to the [REDACTED] USAO in a prosecutorial team call on October 17, 2022, he and his IRS team were no longer invited to any further prosecutorial team calls and meetings on the case, effectively excluding them from the case. Circumstantial evidence clearly suggests [REDACTED] protected disclosures were a contributing factor in the decision to exclude the IRS team. [REDACTED] had participated in these prosecutorial team calls and meetings since being assigned to the case in January 2020, which may make his exclusion a significant change in duties and responsibilities under 5 U.S.C. § 2302(a)(2)(A)(xii). After October 17, 2022, the IRS would only receive updates on the case when their SAC attended unrelated meetings with the U.S. Attorney for the District of [REDACTED] and inquired about the case's progress.

DOJ also took further retaliatory actions against [REDACTED]. On October 24, 2022, Assistant U.S. Attorney [REDACTED] and DOJ Tax Division attorney [REDACTED] contacted the IRS to request all of [REDACTED] Sensitive Case Reports to supervisors as well as all his emails related to the case, ostensibly under the guise of discovery for the case. Yet unlike the assigned case agent, a supervisor like [REDACTED] would not be expected to testify in the case, and therefore would not typically be subject to discovery. The [REDACTED] USAO made a similar request of the FBI. However, the assigned FBI case agent told [REDACTED] they had never received a discovery request for supervisor communications before and were shocked by it, and the FBI refused to provide the additional requested discovery to the [REDACTED] USAO. [REDACTED] subsequently provided the [REDACTED] USAO with the Sensitive Case Reports he had been authoring and sending up his chain of command, but not his emails related to the case.

Despite the highly unusual nature of the request for all of [REDACTED] emails, the [REDACTED] USAO persisted throughout November and into December in seeking these communications from the IRS. On December 8, 2022, [REDACTED] emailed SAC Darrell Waldon regarding the request: "I think I have continually provided updates about their continued unethical conduct as a matter of course." [REDACTED] followed up with another email to SAC Waldon and DFO Batdorf on December 12, 2022:

The USAO was so eager to get my emails (which they already had 95% of)...then surprise...they "might" have a problem with a few of them that memorialized their conduct. If the content of what I documented, in report or email, is the cause of their consternation I would direct them to consider their actions instead of who documented them.

...
I documented issues, that I would normally have addressed as they occurred, because of the USAO and DOJ Tax's continued visceral reactions to any dissenting opinions or ideas. Every single day was a battle to do our job. I continually reported these issues up to IRS-CI leadership beginning in the summer of 2020. Now, because they realized I documented their conduct they separate me out, cease all communication and are now attempting to salvage their own conduct by attacking mine. This is an attempt by the USAO to tarnish my good standing and position within IRS-CI...and I expect IRS-CI leadership to understand that. As recent as the October 7 meeting, the [REDACTED] USAO had nothing but good things to say about me/us. Then they finally read "discovery" items (provided 6 months previous – that are not discoverable) and they are beginning to defend their own unethical actions.

...

I have called into question the conduct of the USAO and DOJ Tax on this investigation on a recurring basis and am prepared to present these issues.

For over a year I have had trouble sleeping; awake all hours of the night thinking about this. After some time, I realized it was because I subconsciously knew they were not doing the right thing. But I could not fathom concluding that the USAO/DOJ Tax were in the wrong. After I wrapped my mind around the fact that they are not infallible, I started to sleep better. My choice was to turn a blind eye to their malfeasance, and not sleep, or to put myself in the crosshairs by doing the right thing. My conscience chose the latter.

I hope IRS-CI applauds the incredibly difficult position I have been put into instead of entertaining the USAO's attacks. If they bring up something legitimate; I am sure we can address it because it was not intentional. Everything I do is with the goal of furthering IRS-CI's mission, protecting the fairness of our tax system and representing IRS-CI with honor.

The next morning, on December 13, 2022, DFO Batdorf emailed [REDACTED] in response, copying SAC Waldon:

I understand through your emails that you believe the prosecuting team may have not conducted themselves in an ethical or proper manner to include prosecutorial misconduct. I am not the reviewing official, deciding official or expert on such matters. However, there are routes you could take if you truly believe there are violations of ethical conduct or prosecutorial misconduct. Either way you choose, Darrell, Kareem, and I (along with the Chief and Deputy Chief) will continue to work through any potential issues on this investigation.

In mid-December 2022, [REDACTED] engaged whistleblower attorney Mark Zaid to assist him in making further protected disclosures outside of the IRS. On December 28, 2022, Mr. Zaid sent an email to both Democrat and Republican staff on the House and Senate Judiciary Committees. Mr. Zaid also had a phone call with Treasury Inspector General for Tax Administration (TIGTA) staff at the end of December to notify them of forthcoming disclosures from his client.

II. Failure to Select

In the midst of [REDACTED] protected disclosures, he submitted an application for a detail as the IR-04 Lead (Supervisory Special Agent) of the Joint Chiefs of Global Tax Enforcement (J5)/Organization for Economic Co-operation and Development (OECD) Section (J5 Lead). The J5 is an international task force of the tax enforcement offices of five countries: the United States, Canada, the United Kingdom, the Netherlands, and Australia.¹ The IRS CI Chief heads the organization.

Because [REDACTED] represented the IRS from 2013-2018 in the Swiss bank program at DOJ Tax, then-IRS CI Chief Don Fort selected [REDACTED] to stand up the J5's operations when it was established in June 2018. After that, the IR-01 position of J5 Lead was developed to work

¹ <https://www.irs.gov/compliance/joint-chiefs-of-global-tax-enforcement>.

hand in hand with the Criminal Investigation Chief in running the organization. [REDACTED] continued to assist the J5 as a collateral duty, at various times overseeing most of the J5's operational decisions and leading most of the J5's operational activities (all while also exceeding expectations in his duties as a Supervisory Special Agent and ASAC). At certain times over the years [REDACTED] had requested to step back from collateral duties on the J5 given the demands of his other work, such as supervising the International Tax and Financial Crimes group at the IRS. [REDACTED] was so integral to the J5's operations that the IRS continued to request his involvement. By late 2022, when the J5 Lead was departing the IRS to return as a contractor, [REDACTED] was one of only three individuals who had worked on the J5 since its establishment.

Christine Mazzella became the J5 Lead in approximately fall of 2021. Ms. Mazzella had been planning to retire at the end of 2022. However, in early 2022 she began pushing to develop a contractor position working with the J5, which Chief Lee assisted her in creating in the summer of 2022. The creation of this position for her to fill after leaving the IRS surprised employees in the office, who discussed that the scope of work the position covered could have been performed by IRS employees, making a contract unnecessary.

When a vacancy announcement was published for the J5 Lead position Ms. Mazzella planned to vacate, it was listed as an IR-04 position, a lower rank than she had been holding as an IR-01 in the position. [REDACTED] subsequently learned from a member of the office responsible for posting the announcement that Ms. Mazzella had edited the position description to make it an IR-04 position. Nevertheless, [REDACTED] had recently received his Leadership Succession Rating on October 21, 2022, where a SAC and DFO outside of his chain of command had rated him "Ready for Senior Management" in every one of the IRS's leadership core qualifications and competencies. Thus, [REDACTED] applied for the J5 Lead position, submitting a Statement of Interest on November 3, 2022.

On November 29, 2022, Scott Goodlin, the Director of International Operations – Branch A within IRS CI, emailed [REDACTED] to arrange an interview for the J5 Lead position. They scheduled the interview for December 14, which happened to be in the midst of use-or-lose leave [REDACTED] was taking from December 13 until January 2. The interview panel on December 14 consisted of Scott Goodlin; Ms. Mazzella, the departing J5 Lead (who would return on January 1, 2023 in the contractor role); and Carolyn Williams, the Deputy Director of Global Operations.

Yet at a senior staff meeting on January 3, 2023, senior leadership announced the selection of Oleg Pobereyko as J5 Lead. The next day, on Wednesday, January 4, Director Goodlin contacted [REDACTED] to tell him he had not been selected for the J5 position.

The J5 Lead position would have constituted a promotion for [REDACTED] under 5 U.S.C. § 2302(a)(2)(A)(ii). [REDACTED] qualifications for the position were clearly superior to those of Mr. Pobereyko. Whereas [REDACTED] served as an IR-01 when he was an ASAC for 16 months in two separate field offices, Mr. Pobereyko had never held an IR-01 position or served as an ASAC. Mr. Pobereyko also worked primarily on cyber-related cases (brought under Title 18) rather than the international tax investigations (brought under Title 26) the J5 focuses on. [REDACTED] has developed, served as case agent for, and supervised countless such tax investigations. Given the IRS's retaliatory failure to select him, [REDACTED] emailed Acting Director of Global Operations Kareem Carter on January 18, 2023, resigning from his collateral duties on the J5. In the four months since, Mr. Pobereyko has requested that [REDACTED] take multiple international trips to make presentations to J5 members Mr. Pobereyko is incapable of giving.

[REDACTED] clear superiority over Mr. Pobereyko as a candidate for the position provides strong circumstantial evidence that the IRS's failure to select [REDACTED] was improper. As described above, further circumstantial evidence suggests that by downgrading the

position from an IR-01 (which Mr. Pobereyko could not have competed for) and ultimately selecting Mr. Pobereyko for the position, Ms. Mazzella granted him an unauthorized advantage in violation of § 2302(b)(6).

Yet Chief Lee, who worked with Ms. Mazzella to improperly create the contractor position for which she was vacating the J5 Lead position, also had clear awareness of [REDACTED] protected disclosures and was being pressured by the [REDACTED] USAO, which was unhappy with [REDACTED] disclosures and continued to seek all of his emails in the case. [REDACTED] would have been staffing Chief Lee if selected as J5 Lead. Thus, sufficient knowledge-timing nexus exists to provide circumstantial evidence under 5 U.S.C. § 1221(e) that his protected disclosures were a contributing factor in the personnel action, establishing a prima facie case of whistleblower retaliation in violation of 5 U.S.C. § 2302(b)(8).

III. Further Disclosures

In February 2023, [REDACTED] obtained new whistleblower counsel. On February 22, 2023, [REDACTED] and his attorneys met with staff from DOJ OIG to convey his disclosures. DOJ OIG opened an investigation which is ongoing.

On April 19, 2023, my co-counsel Mark Lytle wrote to various committees of Congress to communicate that our client wished to provide them with information pursuant to 26 U.S.C. § 6103(f)(5). The letter received significant public attention.

On April 26, 2023, Chairman Jason Smith of the House Committee on Ways and Means designated Mr. Lytle and me to receive § 6103 information for this purpose. On April 27, 2023, Chairman Ron Wyden of the Senate Committee on Finance designated Mr. Lytle and me for the same purpose. On May 5, 2023, Mr. Lytle and I held separate attorney proffers with each committee, providing the substance of our client's disclosures.

On May 15, 2023, [REDACTED] SAC, now Kareem Carter, called him to communicate that while further effort from the IRS was necessary on the case in question, the [REDACTED] USAO and DOJ had requested [REDACTED] and his entire investigative team be reassigned from the case. This reassignment includes the case agent, who has been working the case since it was first opened in 2018.

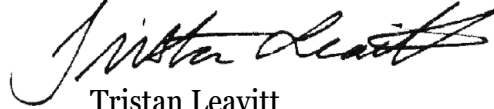
No formal reasoning was given for the [REDACTED] USAO and DOJ's request. However, there is clear circumstantial evidence that [REDACTED] protected disclosures were a contributing factor. Although [REDACTED] and his team had been excluded from discussions about the case since October, it is unclear how much activity there was on the case in that time. To remove them and assign the case to a different team at the IRS clearly constitutes a significant change in their duties and responsibilities, meeting the definition of a personnel action under 5 U.S.C. § 2302(a)(1)(A)(xii). The close nexus in knowledge and timing establishes a strong prima facie case of whistleblower retaliation in violation of 5 U.S.C. § 2302(b)(8).

IV. Summary

[REDACTED] made a host of protected disclosures to his chain of command between spring of 2021 and the end of 2022. This resulted in him and his team being excluded in October 2022 from the prosecutorial discussions regarding the case on which he'd made disclosures. In late 2022, [REDACTED] also began making disclosures to Congress and TIGTA. Shortly thereafter another individual was selected for the J5 Lead position despite [REDACTED] being best qualified for the position. As [REDACTED] efforts to make disclosures to Congress and DOJ OIG in 2023 became public, he has been further retaliated against by being formally removed from the case in question.

As [REDACTED] continues the process of making disclosures to Congress under 26 U.S.C. § 6103(f)(5), it is imperative that he be protected from further reprisal. We look forward to working with the Office of Special Counsel to ensure no additional retaliation occurs and to obtain corrective action.

Regards,

A handwritten signature in black ink, appearing to read "Tristan Leavitt". The signature is written in a cursive, flowing style.

Tristan Leavitt
President
Empower Oversight