NO. 22-1271

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MARK BESANCENEY,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Petition for Review of the Merit Systems Protection Board in
Case No. PH-1221-19-0255-M-1

BRIEF OF *AMICUS CURIAE* U.S. OFFICE OF SPECIAL COUNSEL IN SUPPORT OF PETITIONER AND IN FAVOR OF REVERSING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The U.S. Office of Special Counsel (OSC) is an independent federal agency charged with protecting the merit system by ensuring that federal employees, former federal employees, and applicants for federal employment are not subject to prohibited personnel practices, as defined by 5 U.S.C. § 2302(b) of the Civil Service Reform Act of 1978 (CSRA), and as amended by the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). OSC investigates and seeks corrective action for federal employee whistleblowers and those who experience retaliation for engaging in protected activities, including the disclosure of information to or cooperation with an Office of Inspector General (OIG). *See* 5 U.S.C. §§ 1214, 2302(b)(9)(C).

OSC has a particular interest in one of the legal issues presented by this case: the scope of protection for federal employees under section 2302(b)(9)(C) of the WPEA, which prohibits federal agencies from retaliating against employees for "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel…" OSC has significant expertise in reviewing and investigating claims of reprisal based on protected activity, and has a strong interest in ensuring that there are clearly defined protections in place for employees who, for example, disclose information to their agency's Inspector General.

By statute, OSC is "authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) or (9) … [and is] authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) and the impact court decisions would have on the enforcement of such provisions of law." 5 U.S.C. § 1212(h). OSC respectfully submits this *amicus curiae* brief to address the scope of protection against retaliation for engaging in protected activities, pursuant to its statutory authority under section 1212(h) and as a government entity under Fed. R. App. P. 29(a)(2). OSC takes no stance on any other issues in this case.

STATEMENT OF THE ISSUE

Did the Merit Systems Protection Board (MSPB) err by requiring that employees meet the threshold for a disclosure under section 2302(b)(8), which requires a reasonable belief that a disclosure is evidence of wrongdoing, before they can be protected from reprisal for providing information to an OIG under section 2302(b)(9)(C)?

INTRODUCTION AND SUMMARY OF ARGUMENT

Mark Besanceney, a supervisory criminal investigator at the Transportation Security Administration, U.S. Department of Homeland Security (DHS), filed an Individual Right of Action (IRA) appeal with the MSPB alleging that DHS took various personnel actions against him in retaliation for his whistleblowing and

protected activity. The MSPB found that Mr. Besanceney's disclosures were not protected under 5 U.S.C. § 2302(b)(8) because he did not have a reasonable belief that they evidenced wrongdoing as defined by that section. The MSPB further held that Besanceney did not engage in protected activity under section 2302(b)(9)(C) by contacting his agency's OIG because the information he provided did not meet the standards for whistleblowing under section 2302(b)(8).

The MSPB committed reversible error in this case. Requiring employees to meet the threshold for whistleblowing under section 2302(b)(8) before they can be protected from reprisal for providing information to an OIG under section 2302(b)(9)(C) is contrary to the plain text of the WPEA and ignores Congressional intent to provide separate protections under each provision. This case should be remanded for the MSPB to consider Mr. Besanceney's protected activity claim.

RELEVANT BACKGROUND

Mr. Besanceney filed an individual right of action (IRA) appeal with the MSPB alleging that DHS retaliated against him for engaging in whistleblowing activities. *See Besanceney v. Dep't of Homeland Sec.*, PH-1221-19-0255-M-1, 2021 MSPB LEXIS 3317 (September 27, 2021), Appx1. Mr. Besanceney alleged that he made several disclosures to agency officials, including a disclosure to the DHS OIG on March 7, 2018. Appx7.

The MSPB found that Mr. Besanceney's disclosures were not protected under section 2302(b)(8) because he did not have a reasonable belief that they evidenced wrongdoing as defined by that section. Appx22-23, 27. Mr. Besanceney argued that his contact with the OIG is a protected activity, even if the information he provided did not meet the standards for a protected disclosure under section 2302(b)(8). Appx28. The MSPB held that Mr. Besanceney's activity was not protected because, although section 2302(b)(9)(C) prohibits an agency from retaliating against employees for disclosing information to an OIG, that information "must rise to the level of whistleblowing" to be protected. Appx28.

Mr. Besanceney filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(B).

STANDARD OF REVIEW

Because this appeal turns on a question of statutory interpretation, this court must conduct a *de novo* review. *See Power Integrations, Inc. v. Semiconductor Components Indus., LLC,* 926 F.3d 1306, 1314 (Fed. Cir. 2019). This court may reverse the Board's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law …." 5 U.S.C. § 7703(c).

ARGUMENT

The MSPB erred by finding that employees must meet the threshold for a disclosure under section 2302(b)(8), which requires a reasonable belief that a

disclosure is evidence of wrongdoing, before they can be protected from reprisal for providing information to an OIG under section 2302(b)(9)(C). The plain language of the statute, legislative history, and case law all demonstrate that those who provide information to an OIG or another covered investigative entity are protected from retaliation without regard to the content of the information provided.

A. The MSPB's Analysis Disregards the Plain Language of the Statute

When the language of a statute "is plain, the sole function of the courts…is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (internal citations omitted). The first step in determining the meaning of a statute is to look at its language. *Bank of Am. Corp. v. United States*, 964 F.3d 1099, 1103 (Fed. Cir. 2020). When the "language is clear, and the legislative history does not show that congressional intent was clearly contrary to the section's apparent meaning, th[e] meaning of the statute controls…" *Id*. (internal citations omitted).

Section 2302(b)(8) of the WPEA prohibits an agency from retaliating against an employee or applicant who discloses information that they reasonably believe is evidence of "(i) a violation of law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8). Section

2302(b)(9)(C) broadly prohibits retaliation against an employee or applicant for "cooperating with or disclosing information to the Inspector General…of an agency, or the Special Counsel …" 5 U.S.C. § 2302(b)(9)(C).

Unlike section 2302(b)(8), section 2302(b)(9)(C) contains no terms or categories qualifying the kind of information that must be disclosed to be protected from reprisal. When "Congress includes particular language in one section of a statute but omits it in another section...it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sioux Honey Ass'n v. Hartford Fire Ins. Co*., 672 F.3d 1041, 1052 (Fed. Cir. 2012), citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (internal quotation marks omitted).

Interpreting section 2302(b)(9)(C) to require that an employee meet the standard for whistleblowing under section 2302(b)(8) would make section 2302(b)(9)(C) redundant, because employees are already protected from retaliation for engaging in whistleblowing. Courts should avoid interpreting statutes in a way that would render them "inoperative or superfluous, void or insignificant…" *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004) (internal citations omitted). The only reasonable interpretation of section 2302(b)(9)(C) is that it covers disclosures of information to an OIG or the Special Counsel even when they are not protected under section 2302(b)(8).

B. The MSPB's Decision is Contrary to Congressional Intent and Controlling Precedent

Over the past several decades, Congress has made clear that it intends to protect employees who engage in covered activities, separate from whether they make whistleblower disclosures. In 1989, Congress amended the CSRA to add statutory protections for employees who disclose information to or cooperate with an OIG or OSC. See Pub. L. No. 101-12, 103 Stat. 16 (1989) § 4(b).

In 2012, Congress further expanded the rights of employees who engage in protected activity by passing the WPEA. *See* Pub. L. No. 112-199, 126 Stat. 1475 (2012) § 101(b). Before the WPEA, employees had an individual right of action (IRA) to appeal to the MSPB only in cases of whistleblower retaliation brought under section 2302(b)(8). The WPEA expanded MSPB jurisdiction over IRA appeals alleging violations of section 2302(b)(9)(A)(i), (B), (C), and (D). *See* 5 U.S.C. §1221(a). The decision to create separate protections for employees who engage in protected activities, and grant IRA rights for those activities, demonstrates Congressional intent to allow employees to pursue protected activity claims independently of any whistleblower claims.

Prevailing case law has consistently recognized the framework Congress set forth in providing separate protections under sections 2302(b)(8) and (9). This court has described the difference between section 2302(b)(8) and section

2302(b)(9) as the difference between "reprisal based on disclosure of information and reprisal based upon exercising a right to complain." *Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1575 (Fed. Cir. 1996) (internal citations omitted). Recently, this court reaffirmed that distinction in the context of protected activities under section 2302(b)(9)(C). *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1352-53 (Fed. Cir. 2022) (rejecting MSPB finding that "[e]ngaging in protected activity under section 2302(b)(9) is not sufficient alone" to establish jurisdiction unless the activity is also protected under section 2302(b)(8)).

MSPB case law has also recognized the distinction between the two statutory provisions. The MSPB has held that Section 2302(b)(9)(C) "covers those disclosures to an Inspector General or the Special Counsel which do not meet the precise terms of the actions described in section 2302(b)(8)." *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), *recons. denied*, 52 M.S.P.R. 375 *and aff'd*, 981 F.2d 1237 (Fed. Cir. 1992).

Since the passage of the WPEA, the MSPB has recognized that employees who provide information to an OIG or OSC may have a claim under section 2302(b)(9)(C) even if they do not provide information that meets the standards for whistleblowing under section 2302(b)(8). *See, e.g., Salerno v. Dep't of Interior*, 123 M.S.P.R. 230, 237 (2016) (concluding that employee's disclosures were not protected under section 2302(b)(8), but his action in making a disclosure to OSC

was protected under section 2302(b)(9)(C)); *Corthell v. Dep't of Homeland Sec.*, 123 M.S.P.R. 417, 423-24 (2016) (interpreting section 2302(b)(9)(C) to protect perceived cooperation with an OIG).

The MSPB cited only one case in support of its finding that Besanceney's activity was not protected: *Schlosser v. Department of the Interior*, 75 M.S.P.R. 15 (1997). Its reliance on that case was misplaced. A central issue in *Schlosser* was whether information provided to an OIG constituted a protected disclosure under section 2302(b)(8). However, that issue was only important because Schlosser was decided before 2012, when Congress extended IRA rights to section 2302(b)(9) cases. Thus, the MSPB had to determine whether Schlosser engaged in whistleblowing to determine whether it had jurisdiction over his claim. *Id*. at 20. But *Schlosser* does not stand for the proposition that section 2302(b)(8) standards should be injected into section 2302(b)(9)(C) claims.

Because the MSPB ignored the current state of the law, it erred in failing to consider Mr. Besanceney's IRA claim under section 2302(b)(9). *See* 5 U.S.C. §1221(a).

C. Failure to Protect Mr. Besanceney's OIG Contact Under Section 2302(b)(9)(C) Undermines the Work of Oversight Entities

Protecting employees from reprisal "is necessary to prevent employer intimidation of prospective complainants and witnesses, which would dry up the channels of information and undermine the implementation of the statutory policy

which the administrative process was established to serve." *In re Frazier*, 1 M.S.P.R. 163, 192-193 (1979), citing *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) and *Mitchell v. Robert Demario Jewelry, Inc*., 361 U.S. 288, 292 (1960).

Mr. Besanceney disclosed information to his agency's OIG on March 7, 2018. Appx7. Under section 2302(b)(9)(C), it was the act of disclosing information to his OIG that entitled him to protection, even if the information he provided did not independently qualify as a protected disclosure under section 2302(b)(8). Narrowly reading Section 2302(b)(9)(C) to deny him protection "would defeat the purpose of the statute by discouraging other employees from engaging in activity which Congress has found to be in the public interest." *Corthell v. Dep't of Homeland Sec.*, 123 M.S.P.R. 417, 423 (2016). If allowed to stand, the MSPB's decision threatens to undermine the powers of the oversight entities covered by section 2302(b)(9)(C) by leaving non-whistleblower witnesses vulnerable to retaliation.

CONCLUSION

For the above reasons, the MSPB's finding that an employee must provide information that meets the standard for whistleblowing under section 2302(b)(8) of the WPEA to be protected from reprisal for disclosing information to an OIG under section 2302(b)(9)(C) is not in accordance with law. Therefore, OSC respectfully

requests that the court reverse the Board's decision and remand the case for consideration of Mr. Besanceney's protected activity claim.

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