UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, DC

MARY REESE,	)	
Appellant,	)	**DOCKET NUMBER**
	)	**DC-1221-21-0203-W-1**
v.	)	
	)	
DEPARTMENT OF THE NAVY,	)	
Agency.	)	
	)	

BRIEF ON BEHALF OF
THE UNITED STATES OFFICE OF SPECIAL COUNSEL
AS AMICUS CURIAE

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus, the U.S. Office of Special Counsel (OSC), is an independent federal agency charged with safeguarding the merit system by protecting federal employees, former federal employees, and applicants for federal employment from prohibited personnel practices (PPP), as defined by 5 U.S.C. § 2302(b). OSC regularly investigates and seeks corrective action for whistleblowers who experience retaliation for making disclosures or engaging in protected activities. *See* 5 U.S.C. §§ 1214, 2302(b)(8), (b)(9).

This case concerns the scope of protection afforded under the Whistleblower Protection Act of 1989 (WPA[1]) to federal employees who cooperate in agency investigations—which can be a protected activity under section 2302(b)(9)(C). As the agency responsible for investigating claims of retaliation under that provision, OSC has a substantial interest in the scope of its

[1] This brief uses WPA as shorthand for whistleblower retaliation protections initially adopted in the Civil Service Reform Act of 1978 (CSRA), as amended by subsequent legislation, including but not limited to the Whistleblower Protection Enhancement Act of 2012 (WPEA).

protection and, accordingly, accepts the Merit Systems Protection Board's (MSPB or Board) invitation to present OSC's views. Furthermore, because OSC is one of the investigative components identified in section 2302(b)(9)(C), the scope of that provision directly affects OSC's ability to perform its investigative functions, specifically, to obtain credible witness testimony. As such, this issue has wide-reaching impact on OSC's mission to protect federal employee whistleblowers from retaliation. OSC takes no stance on any other issues in this case.

STATEMENT OF THE ISSUES

To prioritize the issues where OSC's expertise may be most useful and reduce repetition in the argument section, this brief addresses the legal questions presented in the MSPB's invitation for *amicus* briefs in the following order.

A. Whether activity that falls within the protections of Title VII may also be protected by section 2302(b)(9)(C). (MSPB Question 2)

B. Whether section 2302(b)(9)(C) protects (1) informal discussions with someone from an agency component with investigative responsibilities and/or (2) a formal interview with someone appointed by, but not otherwise part of, a formal investigatory office or component within an agency. (MSPB Question 3)

C. Whether an informal complaint to OSC, an agency's Office of Inspector General (OIG), or an agency component responsible for internal investigation or review is protected under section 2302(b)(9)(C) even if it also qualifies for protection under section 2302(b)(9)(A). (MSPB Question 1)

INTRODUCTION

All three of the questions presented in this case pertain to the scope of statutory protection for federal employees who engage in section 2302(b)(9)(C) activities. Section

2302(b)(9)(C) prohibits retaliation 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, in accordance with applicable provisions of law." 5 U.S.C. § 2302(b)(9)(C). This broadly worded provision does not contain any explicit exceptions based on the content, nature, or substance of the employee's cooperation or disclosure.

Despite this, the Board has been obliged to correct or clarify initial decisions that unduly restricted the protections of section 2302(b)(9)(C). *See Fisher v. Dep't of the Interior*, 2023 M.S.P.B. 11, ¶ 8 (admonishing that section 2302(b)(9)(C) protects disclosures to qualifying investigative components regardless of content); *Morales v. Veterans Affairs*, Docket No. CH-1221-21-0420-W-12024, 2024 MSPB LEXIS 1817 (reversing initial decision that incorrectly required voluntary participation and protected disclosures for an employee's cooperation with agency investigators to be protected under 2302(b)(9)(C)); *see also Tao v. MSPB*, 855 Fed. Appx. 716, 718 (Fed. Cir. 2021) (Board requested remand based in part on an AJ's mistaken application of section 2302(b)(9)(C)).

OSC encourages the Board to apply the expansive protections of section 2302(b)(9)(C) that are grounded in the statutory language and consistent with the remedial purpose of the WPA. The Board should remand *Reese* to consider whether the appellant's communications with agency investigators were a protected activity under section 2302(b)(9)(C). Additionally, OSC respectfully requests that the Board reconsider its rationale in *McCray v. Dep't of Army*, 2023 M.S.P.B. 10, ¶¶ 26-29, which erroneously held that coverage under section 2302(b)(9)(A) precludes coverage under section 2302(b)(9)(C).

RELEVANT BACKGROUND

In April 2020, Mary Reese, a civilian Public Affairs Specialist for the Department of the Navy (Navy or Agency), filed an OSC complaint alleging that the Navy violated 5 U.S.C. § 2302(b)(8) and (b)(9) when it took various personnel actions against her, including her probationary termination, in reprisal for making protected disclosures and engaging in protected activities. After exhausting her administrative remedies, Reese filed a timely Individual Right of Action (IRA) appeal with the Board alleging the same theories of retaliation that she raised in her OSC complaint.

On May 6, 2022, the MSPB Administrative Judge (AJ) issued an Initial Decision. Docket No. DC-1221-21-0203-W-1, 2022 MSPB LEXIS 1659. The AJ accepted jurisdiction over Reese's retaliation claims but did not address whether her interactions with agency fact-finders may have been protected under section 2302(b)(9)(C). Instead, Reese's disclosures were only analyzed under section 2302(b)(8). On the merits, the AJ concluded that: (1) Reese did not prove that any of her four disclosures were protected; (2) Reese proved that she engaged in activity protected by section 2302(b)(9)(C) when she filed a complaint with the OIG; (3) Reese proved that her protected activity was a contributing factor in her termination; and (4) the Navy proved by clear and convincing evidence that it would have terminated Reese's probationary appointment even in the absence of her protected activity.

On June 30, 2022, Reese filed a Petition for Review (PFR). In her PFR, Reese alleged, *inter alia*, that in addition to filing a complaint with OIG, she engaged in other protected activities under section 2302(b)(9)(C) when she made disclosures about sexual harassment to various individuals who "represented Agency components responsible for internal investigation or review" and when she cooperated with the resulting "authorized internal investigations." PFR, pp. 11& 9.

Reese argued that the AJ erred by failing to consider whether these activities were protected under, *inter alia*, section 2302(b)(9)(C). *Id*. at p. 10.

By letter dated April 19, 2024, the Board invited OSC to file an *amicus* brief about three questions of law.

ARGUMENT

A. PROTECTION UNDER SECTION 2302(B)(9)(C) DOES NOT DEPEND ON THE CONTENT OF ONE'S TESTIMONY.

The Board's *amicus* invitation asks whether providing information about Title VII discrimination excludes employees from protection under section 2302(b)(9)(C). As explained below, imposing such a limitation is inconsistent with the WPA and would be harmful to the work of oversight entities.

In the context of 5 U.S.C. § 2302(b)(8), the U.S. Court of Appeals for the Federal Circuit has held that disclosures of violations of antidiscrimination laws made in equal employment opportunity (EEO) complaints, which are protected under antiretaliation provisions specific to the EEO process, are excluded from WPA protections. *Spruill v. MSPB*, 978 F.2d 679, 692 (Fed. Cir. 1992). The court has also affirmed a Board decision, *Edwards v. Dep't of Labor*, 2022 MSPB 9, which held that verbal complaints of discrimination to supervisors are similarly excluded from the protections of 5 U.S.C. § 2302(b)(8). *Edwards v. MSPB*, 2023 U.S. App. LEXIS 17109 (Fed. Cir. 2023). The question is whether the court's reasoning extends to 5 U.S.C. § 2302(b)(9)(C).

1. The Plain Text of the Statute Protects All Cooperation with or Disclosures to a Covered Investigative Entity.

The Board has long held that "the interpretation of a statute begins with the language of the statute itself." *Bostwick v. Dep't of Agric.*, 122 M.S.P.R. 269, ¶ 8 (2015). If the language is clear, the inquiry ends because the plain meaning of the statute is decisive absent a clearly

expressed legislative intent to the contrary. *Id*.; *Hall v. Office of Pers. Mgmt.*, 102 M.S.P.R. 682, ¶ 9 (2006).

Here, the language of section 2302(b)(9)(C) plainly protects "cooperating with or disclosing information to … *any* other component responsible for internal investigation or review" (emphasis added). There is no exception based on the content of the employee's cooperation or disclosure. By contrast, other sections of the WPA explicitly qualify the types of disclosures or activities that are protected. For example, section 2302(b)(8)(A) requires examination of the content of disclosures because, to qualify for protection, the disclosures must be grounded in reasonable belief, show one of five types of misconduct, and not be prohibited by law or certain Executive Orders. Similarly, activities protected under section 2302(b)(9)(A)(i) must be "with regard to remedying a violation" of section 2302(b)(8), requiring an AJ to examine the content of activities alleged under that provision to determine if they qualify.

The absence of such qualifying language in section 2302(b)(9)(C) requires the Board to give full effect to the phrase "cooperating with or disclosing information" to eligible investigative entities. The Board has ruled that "statutes should be construed to give effect to every provision, and must be construed to be in harmony, if possible." *Ochoa v. Dep't of the Navy*, 65 M.S.P.R. 39, 44 (1994) (citing 2B Singer, *Sutherland Statutory Construction*, § 51.02 (5th ed.)). When Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711, n.9 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, p. 194 (6th rev. ed. 2000)). To exclude cooperation with investigators based on content would impose a limitation on section 2302(b)(9)(C) which is not found in the statutory text. As a remedial statute, the WPA should be construed liberally to advance the

remedy. *See Sutherland Statutory Construction,* § 60.01; *see also Costin v. Dep't. of Health and Human Servs.*, 72 M.S.P.R. 525, 531 (1996); *Wilcox v. Int'l. Boundary and Water Comm.*, 103 M.S.P.R. 73, 77 (2006). Non-textual barriers to protection undermine the remedial nature of the statute.

2. Case Law Confirms that Participation in an Oversight Investigation is Protected Without Regard to Content.

Last year the Board held that "[u]nder the broadly worded provision of 5 U.S.C. § 2302(b)(9)(C), any disclosure of information to OIG or OSC is protected *regardless of its content* as long as such disclosure is made in accordance with applicable provisions of law." *Fisher v. Dep't. of Interior*, 2023 M.S.P.B. 11, ¶ 8 (emphasis added). In a footnote, the Board advised that the content of one's disclosures to OSC or the OIG may be relevant at the merits stage of an IRA appeal to discern whether an appellant meets the contributing factor test or whether the agency can meet their rebuttal burden. *Id*. at n.1. Here, as in *Fisher*, an inquiry into the content of Reese's cooperation is only appropriate at the merits stage to determine if it contributed to her termination or affects the agency's rebuttal burden.

Moreover, the Board has concluded in two non-precedential decisions that section 2302(b)(9)(C) protects cooperation that raises Title VII discrimination concerns. First, in *Tamayo v. Dep't of Homeland Security*, the Board concluded that an appellant's disclosures of discrimination and EEO reprisal were not protected under section 2302(b)(8), but nonetheless modified the initial decision to recognize that repeating these unprotected disclosures to OSC did constitute protected activity under section 2302(b)(9)(C). Docket No. AT-1221-17-0449-W-1, 2023 MSPB LEXIS 3821 (NP). More recently, the Board found that email complaints of discrimination to the OIG were not protected under section 2302(b)(8) but were protected by section 2302(b)(9)(C). *Vaz v. Dep't of Housing and Urban Development*, Docket No. DA-1221-

15-0132-W-1, 2023 MSPB LEXIS 4487 (NP). These decisions underscore that investigative activity must be protected regardless of content, while the underlying disclosures can be analyzed for the requirements of section 2302(b)(8).

3. Denying Section 2302(b)(9)(C) Protection Based on the Content of the Cooperation Makes the Provision Difficult to Apply and Threatens Investigative Efficacy.

Beyond the compelling statutory and case law support for the conclusion that section 2302(b)(9)(C) is content-neutral, there are strong policy reasons for protecting all participation in internal investigative proceedings.

a. Excluding Title VII Concerns Raised Outside the EEO Process Will Result in Unnecessarily Complicated, Fact-Specific Appellate Inquiries.

Excluding Title VII matters disclosed to investigators from section 2302(b)(9)(C) protection would be confusing and difficult to administer, requiring the Board to determine jurisdiction by parsing the exact nature of employees' cooperation in investigations that may cover both EEO and non-EEO issues.

The Board has long been mindful of Congress' intention to create separate avenues for WPA and Title VII retaliation claims, in part by excluding disclosures about Title VII discrimination from protection under section 2302(b)(8). *See Edwards v. Dep't of Labor*, 2022 MSPB 9, ¶¶ 12-14 (observing that Congress intended to create two distinct processes for retaliation claims covered by the WPA and those covered by Title VII). In the context of section 2302(b)(9)(C), however, it need not conduct complicated, fact-specific inquiries about the nature of a particular witness' investigative testimony to preserve a distinction between the two processes. Most internal investigations (*e.g.,* Internal Affairs inquiry, Administrative Investigation Board, Command Directed Investigation)—like those conducted by OSC and OIGs—are readily distinguishable from EEO investigations, where the reasoning of *Edwards* may apply with greater force. Whereas EEO investigations can *only* investigate and resolve

matters of discrimination and reprisal for engaging in that process, investigations by OSC, the OIG, and internal investigative components often include both discriminatory and non-discriminatory misconduct. Thus, a rule that requires the MSPB to inquire with particularity into the basis for an internal investigation and the exact content of an employee's testimony would create unneeded difficulty given the clear differences between EEO and other types of section 2302(b)(9)(C) investigations.

b. Robust and Unambiguous Protections Would Facilitate Oversight by OSC and Other Investigative Entities.

OSC and other oversight entities need federal employees to have broad protections to obtain complete, candid participation in their investigations, especially because cooperation is required, and witnesses may be reluctant. *See Ashford v. Dep't of Justice*, 6 M.S.P.R. 458, 464-465 (1981) (recognizing that under most circumstances, employees must cooperate with administrative investigations even without the due process right to be represented by counsel). If those protections are vague or vary from one fact-finding to another, witnesses may be hesitant to share all the information at their disposal. In turn, the quality of the investigation suffers, and government oversight becomes less effective.

c. Excluding an Employee's Investigative Participation Based on Content Will Result in Unfair, Inconsistent Results.

Excluding testimony based on its content would be unfair to individual participants and lead to inconsistent results. Witnesses may not know the scope of the investigation or the significance of the questions they are asked. On its face, the law does not put any employee—but especially an unrepresented witness—on notice that their remedies differ based on the content of the testimony or the subject matter of the investigation. For instance, a witness in an EEO investigation would readily infer that they are protected by the EEO process. And a witness in an OSC investigation would reasonably conclude that they are protected under section

2302(b)(9)(C), even if their testimony refers to Title VII discrimination, because that statutory provision explicitly refers to cooperation with OSC investigators.

But content-based limitations on section 2302(b)(9)(C) would leave those employees at risk, struggling to navigate a process where that commonsense reasoning does not apply. Under these circumstances, a witness' right to pursue a retaliation claim should not depend on whether they know enough to choose the right forum, especially where time limits in the EEO process may lapse before the investigation for which they testified is complete. *See* 29 C.F.R. § 1614.105(a)(1). Moreover, limiting section 2302(b)(9)(C) protection based on the content of an employee's communications would protect a witness who provides no relevant testimony, while a witness who provides damning testimony of discrimination in the same fact-finding would be left wondering where to file a claim. The Board should avoid such disparate results.

B. PROVIDING INFORMATION, EVEN INFORMALLY, TO QUALIFYING INVESTIGATORS, INCLUDING AD HOC COMPONENTS, IS BROADLY PROTECTED UNDER SECTION 2302(B)(9)(C).

In its *amicus* invitation, the Board also inquired as to whether section 2302(b)(9)(C) protects cooperation with fact-finders conducting an ad hoc investigation and informal communications with an official from an investigative component. OSC encourages the Board to adopt a broad, straightforward standard in resolving these questions. As explained below, the scope of section 2302(b)(9)(C) protections turns less on the formality of an employee's communication and more on the formality of the investigative entity. Thus, the Board's question is largely dependent on whether the fact-finder is part of a covered investigative component.

1. Section 2302(b)(9)(C) Includes Ad Hoc Bodies that are Formally Empowered to Conduct Agency Investigations.

The definition of "component" is broad, meaning a "constituent part." *See* "Component." *Merriam-Webster Dictionary,* https://www.merriam-webster.com/dictionary/component (last

visited May 7, 2024). The WPA goes a step further, coupling "component" with an even more expansive term—"any"—which should be given full effect. *See U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) (finding that when "[r]ead naturally, the word 'any' has an expansive meaning"). "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." 2A *Sutherland Statutory Construction,* § 46:6.

While "any component" is expansive, section 2302(b)(9)(C) is nonetheless limited to those constituent parts "with responsibility for internal investigation or review." Thus, an agency component should have some formalized procedures for reviewing or investigating potential misconduct, deficiencies, or risks. That creates a parallel to OSC and OIGs—the two other entities identified in section 2302(b)(9)(C). The formality of the procedures, however, may vary between or within agencies depending on the purposes of the component. Some components may be permanent offices with dedicated staff, while others may be convened as temporary boards comprised of agency officials selected for a specific inquiry. The touchstone for determining statutory protection is that the agency component, whether permanent or temporary, is empowered to use formalized procedures for internal investigation or review.[2] A modest formality requirement serves as a fair and meaningful safety valve to ensure that an agency's

[2] Consistent with the WPA's remedial purpose, MSPB initial decisions interpreting section 2302(b)(9)(C) have protected communications with agency components employing a wide range of formalized procedures for investigation or review. *See, e.g., Sparks v. Dep't of Army*, Docket No. DA-1221-21-0206-W-1, 2022 MSPB LEXIS 2198 (protecting complaints under a Workplace Violence Prevention Program, which outlined "responsibilities, training, reporting procedures, critical incident reaction, and processing of workplace violence incidents"); *Mathai v. Veterans Affairs*, Docket No. DA-1221-22-0151-W-2, 2023 MSPB LEXIS 898 (finding Joint Patient Safety Report process qualifies as an investigative component based on business rules requiring assignment of investigator and root cause analysis); *Bailey v. Dep't of Commerce*, Docket No. DA-1221-21-0307-W-1, 2022 MSPB LEXIS 3539 (protecting communication with Computer Incident Response Team because it is "undisputed" that the component investigates mishandling of personally identifiable information).

informal inquiries—such as a supervisor speaking with subordinates about perceived wrongdoing—are not extended the same protection.[3]

Agencies routinely convene ad hoc bodies to conduct such internal investigations or reviews. Indeed, several agencies have created formalized procedures for such temporary management directed investigations, such as VA's Directive 0700 for Administrative Investigations, Army Regulation 15-6, Navy and Marine Corps Manual of the Judge Advocate General, Air Force Instruction 90-301, and Coast Guard Administrative Investigations Manual. These ad hoc entities are empowered to investigate by taking testimony, collecting evidence, and making findings and recommendations. *See, e.g.,* VA Directive 0700 for Administrative Investigations. In constructing these ad hoc investigative bodies, agencies frequently appoint employees to conduct the investigations as a collateral duty even though those employees are not necessarily permanent members of the component. *See Id.* at Ch. 3, ¶ 2. Thus, to give full effect to the "any component" language, disclosures of information to ad hoc investigative entities and individuals appointed by an investigative component, but who are not permanently assigned to that component, are protected.

This simple and fair benchmark ensures that employees understand the specific circumstances under which their activities will be protected and thus feel more comfortable disclosing information to and cooperating with investigative components that possess formal investigative authority. It would also serve as clear guidance to agencies that employees have the same protection for communications with an internal investigation or review as they would for the same interactions with OSC or an Inspector General.

[3] In this example, the employees' responses to supervisory questions may be protected disclosures under section 2302(b)(8).

2. Informal Communications with Investigative Entities Should be Evaluated in Context to Determine Whether they Qualify for Protection.

While section 2302(b)(9)(C) contemplates entities—whether ad hoc or permanent—that employ formalized investigative processes, this does not exclude from protection all informal cooperation with or disclosures of information to such entities. For example, employees must be encouraged to confer with investigators even before formal proceedings begin. *See Johnson v. Dep't of the Army*, 37 M.S.P.R. 95, 97 (1988) ("approaching" an EEO counselor qualified as protected activity). Employees may, in planning to file a formal complaint with an investigative component, engage in informal preparatory communications that should enjoy the same protections as formal witness testimony provided under oath. *Compare Page v. Dep't of the Navy*, 101 M.S.P.R. 513, 516 (2006) (preparing for a grievance is protected under section 2302(b)(9)). Furthermore, employees cannot always control the formality of their communications with investigators, who may solicit information through informal email exchanges or phone calls.

Given the various permutations that informal communications with an investigative component may take, a blanket exclusion of protection would have a chilling effect. Instead, the Board should assess the totality of the circumstances, including the timing and context for such informal communications, before deciding whether they qualify for protection under the statute.

C. AN INFORMAL COMPLAINT TO OSC, OIG, OR AN AGENCY COMPONENT RESPONSIBLE FOR INVESTIGATION OR REVIEW IS PROTECTED UNDER SECTION 2302(B)(9)(C) WHETHER OR NOT IT ALSO QUALIFIES FOR PROTECTION UNDER SECTION 2302(B)(9)(A).

The Board's *amicus* invitation also solicited views on protections for certain types of complaints under 5 U.S.C. § 2302(b)(9)(A) and (C). This question raised two distinct issues: (1) whether informal complaints to supervisors and others about a climate of sexual harassment, made outside the EEO complaint process, qualify for protection under section 2302(b)(9)(A);

and (2) if yes, whether protection under section 2302(b)(9)(A) precludes overlapping protection under section 2302(b)(9)(C).

As to the first issue, whether section 2302(b)(9)(A) applies to an informal complaint will depend on the facts of the case. Some of the formalized adjudicative proceedings that exist within government agencies may allow for or even contemplate informal complaints or communications. Thus, protection under that section should be determined by an application of the Board's long-standing standards to the unique facts of a case. *See, e.g., Marcell v. Dep't of Veterans Affairs*, 2022 MSPB 33, ¶¶ 6-7 (holding that section 2302(b)(9)(A) prohibits retaliation for any appeal, complaint, or grievance that constitutes "an initial step toward taking legal action against an employer for the perceived violation of an employee's rights"); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 627 (1994) ("The types of activities that we have held to constitute (b)(9) allegations ... all involve formalized adjudicative proceedings.").

As to the second issue, the Board suggested that protection under section 2302(b)(9)(A) precludes protection under section 2302(b)(9)(C), citing *McCray v. Dep't of the Army* for this proposition. 2023 M.S.P.B. 10. In *McCray*, the Board held that section 2302(b)(9)(C) protections did not apply to appellant's administrative grievances because the grievances were already covered by section 2302(b)(9)(A)(ii). *Id*. at p. 27. OSC agrees with the Board's holding in *McCray*, but disagrees with its rationale.[4] Reading section 2302(b)(9)(A) to preclude coverage under section 2302(b)(9)(C) contradicts the plain language and structure of the statute, is

[4] In *McCray*, the appellant filed two administrative grievances, but did not cooperate with or disclose information to the IG, OSC, or any other agency component responsible for internal investigation or review. On its face, section 2302(b)(9)(C) does not apply to the administrative grievance process.

inconsistent with accepted principles of statutory construction, and contravenes Congress' clear legislative purpose and intent.

1. The Plain Language and Structure of Section 2302(b)(9) Demonstrate that Section 2302(b)(9)(A) and 2302(b)(9)(C) Protect Different Interests and Should Not Be Read to Limit or Preclude One Another.

The structure of section 2302(b)(9), and the plain language of section 2302(b)(9)(A) and 2302(b)(9)(C), indicate that these subsections serve distinct functions and target different kinds of protected activity. Section 2302(b)(9)(A) prohibits retaliation for the exercise of any appeal, complaint or grievance right. The employee who exercises this option seeks vindication for the perceived violation of their rights. *Marcell*, 2022 M.S.P.B. at ¶ 6.

By contrast, section 2302(b)(9)(C) prohibits retaliation 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, in accordance with applicable provisions of law." This section pertains to a different type of activity that is not necessarily based on a personal grievance. The primary purpose of this provision is to protect the government's interest in ensuring the integrity of investigations and encouraging full cooperation with authorized investigative bodies.

These two provisions are sufficiently distinct that they do not—either explicitly or implicitly—incorporate language from the other provision. Given this deliberate distinction, it is error to suggest that Congress intended one provision to preclude coverage under the other. Additionally, given the broad language of section 2302(b)(9)(C), which Congress has *expanded* over time, it is unreasonable to assume that Congress intended section 2302(b)(9)(C) to cover only a subset of participation activities that are not also covered by section 2302(b)(9)(A).

Simply put, the structure and plain language of section 2302(b)(9) do not support the conclusion that section 2302(b)(9)(A) cabins the scope of section 2302(b)(9)(C).

2. Sections 2302(b)(9)(A) and 2302(b)(9)(C) Do Not Always Overlap, but When They Do, Employees Must Be Given the Broader Protection of Section 2302(b)(9)(C) that Encompasses IRA Appeal Rights.

Despite protecting distinct activities, the protections of section 2302(b)(9)(A) and section 2302(b)(9)(C) do overlap on occasion. For example, when an employee files a PPP complaint with OSC alleging an unauthorized preference in violation of section 2302(b)(6), this activity is protected under section 2302(b)(9)(A) because filing a PPP complaint is a right granted by law. *See, e.g.,* 5 U.S.C. § 1214; *Moghadam v. VA*, 2021 MSPB LEXIS 1714, *35 (finding appellant's OSC complaint is protected activity under section 2302(b)(9)(A)(i)). The complaint also constitutes a disclosure of information to OSC and is protected under section 2302(b)(9)(C) because it serves the additional statutory purpose of facilitating OSC's oversight work. When this kind of overlap occurs, employees must be given the broader protection of section 2302(b)(9)(C), with attendant IRA appeal rights.[5]

The fact that two statutory provisions partially overlap does not automatically render one of them superfluous. Nor does it mean that the provisions should be read as covering mutually exclusive conduct. Instead, overlap may simply reveal Congress' intent to provide a comprehensive remedial scheme. Indeed, the Board has long acknowledged that "the various provisions of section 2302(b) overlap to some extent." *Williams v. DOD*, 46 M.S.P.R. 549, 553, n. 4 (1991) (citing *In re Frazier*, 1 M.S.P.R. 163, 190-92 & n. 36 (1979).

It is axiomatic that the Board must give effect to the unambiguously expressed intent of Congress. *Smith v. Dep't of the Army*, 2012 M.S.P.B. 24, ¶ 8 ("If we find that Congress had an

[5] Unlike section 2302(b)(9)(C), not all section 2302(b)(9)(a) claims give employees an IRA appeal right. *See* 5 U.S.C. § 1221(a) (excluding section 2302(b)(9)(a)(ii) claims from the IRA process).

intention on the precise question at issue, that intention must be given effect."). By creating and later expanding section 2302(b)(9)(C) to protect all cooperation with or disclosures of information to the OIG, OSC, or any other agency component responsible for internal investigation or review, Congress clearly expressed its intent to protect the integrity of investigations and to encourage full cooperation with authorized investigative bodies. The only way to give effect to this unambiguous legislative intent is give employees the broader protection of section 2302(b)(9)(C) that encompasses the IRA right when their activity is also covered by section 2302(b)(9)(A). For the reasons detailed above, OSC therefore respectfully requests that the Board reconsider its rationale in *McCray* and affirm that coverage under section 2303(b)(9)(A) does *not* preclude coverage under section 2302(b)(9)(C).

CONCLUSION

Based on the foregoing, OSC urges the Board to remand this case to the AJ with instructions to reconsider Reese's IRA appeal under the proper standard.

Respectfully submitted,

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