UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, DC

MARGARET M. CONSIDINE, **Appellant,** **v.** **U.S. DEPARTMENT OF THE TREASURY,** **Agency.**	**DOCKET NUMBER** **PH-1221-17-0279-W-1**

BRIEF ON BEHALF OF THE U.S. OFFICE OF SPECIAL COUNSEL AS AMICUS CURIAE

IDENTITY OF THE AMICUS CURIAE

Amicus curiae, the U.S. Office of Special Counsel (OSC), is an independent federal agency charged with protecting federal employees, former federal employees, and applicants for federal employment from "prohibited personnel practices," as defined in 5 U.S.C. § 2302(b). In particular, OSC is responsible for protecting federal employees against whistleblower retaliation when they disclose any information that they reasonably believe evidences a violation of any law, rule, or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8).

This case concerns the scope of protection afforded under the Whistleblower Protection Act of 1989 (WPA)[1] to a federal employee who makes whistleblower disclosures that involve wrongdoing by a third party (i.e., private or non-federal governmental entity). As such, this case

[1] This brief uses WPA as short-hand 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).

has wide-reaching impact on OSC's ability to protect federal employee whistleblowers from retaliation. Accordingly, OSC respectfully requests the opportunity to offer its views to the Merit Systems Protection Board (MSPB or Board) on the scope-of-protection issue raised in this case.[2]

STATEMENT OF THE ISSUE

Does the WPA protect a federal employee whistleblower against retaliation for disclosing wrongdoing by a third party?

RELEVANT BACKGROUND

On August 30, 2018, an MSPB administrative judge held that the U.S. Department of the Treasury terminated Margaret Considine's probationary employment in retaliation for making whistleblower disclosures of improper private banking practices she reviewed as part of her job, as well as other alleged wrongdoing by agency officials. *See Considine v. Dep't of the Treasury*, PH-1221-17-0279-W-1, 2018 WL 4190653 (M.S.P.B. Aug. 30, 2018). As a result, the administrative judge granted Ms. Considine's request for corrective action and ordered her reinstatement. *Id.* at *7.

Despite ordering corrective action, the administrative judge held that two of Ms. Considine's disclosures were not protected: (1) a bank's potential violation of the Dodd-Frank Act; and (2) real estate loans financed without evidence that hazardous environmental conditions had been remediated. *See id.* at *4-5. After broadly finding that "allegations concerning wrongdoing by private, non-governmental individuals or entities are not protected," the

[2] The WPEA authorizes OSC "to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b)(8) or (9), or as otherwise authorized by law." 5 U.S.C. § 1212(h)(l). OSC also may appear as amicus curiae to present its views in MSPB proceedings. *See* 5 C.F.R. § 1201.34(e). Although the parties have already submitted their briefs in this case, they did not object to OSC filing an amicus brief. Moreover, the Board's current lack of quorum suggests that allowing OSC to file an amicus brief will not unduly burden the proceedings.

administrative judge expressly declined to consider these disclosures as part of Ms. Considine's whistleblower retaliation claim. *Id.* at *4. Relying on *Aviles v. Merit Systems Protection Board*, 799 F.3d 457 (5th Cir. 2015), the administrative judge further held that the WPA may protect disclosures of third-party wrongdoing, but "only where there are allegations of government complicity in the private wrongdoing." *Id.* (quoting *Aviles*, 799 F.3d at 466-68).

The Treasury Department filed a timely petition for review of the administrative judge's initial decision on October 4, 2018, and Ms. Considine's cross-petition contests the narrowing of her whistleblower retaliation claim.

OSC respectfully submits that the administrative judge's holding that the WPA does not protect disclosures of third-party wrongdoing is contrary to the plain language of the statute and the relevant legislative history. The statute protects a federal employee whistleblower's disclosure without any limitation based on the entity alleged to have committed the wrongdoing, particularly where—as in this case—the wrongdoing is uncovered as part of the whistleblower's federal employment. If upheld, the administrative judge's holding would weaken whistleblower protections generally and create uncertainty about whether a federal employee tasked with the oversight or reporting of potential wrongdoing by third parties (i.e., private or non-federal governmental entities) is protected from whistleblower retaliation.

For these reasons, OSC asks the Board to adopt a standard that broadly protects federal employee whistleblowers from retaliation when they disclose third-party wrongdoing. In the alternative, if MSPB declines to adopt this general standard, it should, at a minimum, modify the initial decision and incorporate the standard articulated in its prior precedent—namely, that whistleblower disclosures of wrongdoing by third parties are protected "[w]hen the [federal]

government's interests and good name are implicated."[3] *Arauz v. Dep't of Justice*, 89 M.S.P.R. 529, 533 (2001).

ARGUMENT

I. The WPA's Plain Language Protects Federal Employee Whistleblowers from Retaliation for Disclosing Third-Party Wrongdoing

Generally, the WPA protects federal employee whistleblowers from retaliation by their federal employers when they disclose wrongdoing. Specifically, the plain language broadly protects "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences" certain types of wrongdoing. § 2302(b)(8). While the statute contains various clarifications and qualifications about the specific contours of whistleblower disclosures, it in no way limits the alleged wrongdoing to that committed solely by the federal government.

The WPA expressly spells out several limitations to the statute's expansive protection of whistleblower disclosures. For example, only individuals who meet the definition of an "employee" under 5 U.S.C. § 2105, and work in a "covered position" under section 2302(a)(2)(B), may seek protection under the statute. Moreover, employees of certain intelligence agencies, such as Central Intelligence Agency, are excluded from protection. *See* 5 U.S.C. § 2302(a)(2)(C). Similarly, the specific types of wrongdoing are listed and include "any violation of any law, rule, or regulation" and "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." § 2302(b)(8). But disclosures of mismanagement and waste of funds are protected only if they rise to the level of "gross" mismanagement or waste of funds; disclosures of dangers to public health or safety are protected only if they are "substantial and specific." § 2302(b)(8).

[3] OSC takes no position on any other issue in this case.

Disclosures made in the normal course of an employee's duties are protected only under certain circumstances. § 2302(f)(2). And disclosures of classified information are protected only if they are made within prescribed channels. § 2302(b)(8)(B).

These limiting provisions demonstrate that the WPA, while broad in its scope of protection, does contain some targeted limitations regarding whistleblower disclosures. The statute does not, however, limit disclosures to only government wrongdoing. To be sure, the vast majority of disclosures arising under the WPA will likely involve alleged misconduct at a federal agency, but the statute—at least as it is written—does not exclude from protection disclosures about third-party wrongdoing.[4] Yet the administrative judge would have read that limitation into the definition of disclosure. As the Supreme Court has made clear, adjudicators cannot and should not "read an absent [provision] into the statute[.]" *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *see also Harbison v. Bell*, 556 U.S. 180, 199 (2009) (holding that court may not read a limitation into a "statute's silence").

II. Including Disclosures of Third-Party Wrongdoing in the Protection Against Retaliation Afforded to Federal Employee Whistleblowers is Consistent with the WPA's Purpose and Legislative History

Because there is no ambiguity in the WPA's statutory text, MSPB need not look to legislative history to aid its interpretation in this case. Nevertheless, the sparse legislative history reinforces the conclusion that the statute protects federal employee whistleblowers from retaliation when they make disclosures of wrongdoing by third parties.

[4] It is important to note that the WPA's broad protections do not require OSC or MSPB to intrude on the business of third parties about whom whistleblower disclosures are made. Under the WPA, disclosures are protected if reasonably believed, so investigating or adjudicating whether the disclosure is protected need not entail a detailed examination of the underlying wrongdoing disclosed. Protecting these disclosures merely ensures that federal agencies, often tasked with oversight of those third parties, cannot retaliate against their employees for reporting the wrongdoing they observe. This enforcement of a federal employee's rights against his or her federal employer is entirely consistent with the purpose and scope of the WPA.

The CSRA created the first protections against retaliation for federal employee whistleblowers in 1978. *See* Pub. L. No. 95-454 (1978) § 101(a). The 1978 Senate Committee Report accompanying the CSRA (CSRA Report) includes a disclosure about third-party wrongdoing as a specific example of whistleblowing that Congress sought to protect. The CSRA Report explains that an amendment to protect disclosures of substantial and specific dangers to public health or safety would include "an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate …." *See* S. Rep. No. 95-969 at *21, 1978 U.S.C.C.A.N. 2723, 2743 (1978). The Nuclear Regulatory Commission regulates commercial nuclear power, and nothing in this example suggests that the disclosure would be protected only if a federal government action were clearly implicated by the disclosure of the inadequate cooling system. Rather, the inclusion of this example indicates that—from the outset—Congress contemplated protecting federal employees from retaliation when making disclosures of third-party wrongdoing. Ms. Considine's disclosures of potential wrongdoing by the private banks she oversaw are comparable to the nuclear engineer's disclosure of concerns uncovered as part of his federal oversight role, as both involve disclosures of third-party wrongdoing.

In an effort to escape this conclusion, the Treasury Department emphasizes language in the 2012 Senate Committee Report accompanying the WPEA (WPEA Report) describing the WPA as protecting whistleblower disclosures of "government" wrongdoing. *See* Agency's Opposition to Appellant's Cross Petition for Review at 4-5. This argument is unpersuasive for at least two reasons. First, although these references accurately describe the typical disclosure, as well as the primary purpose of the statutory protections, none of them are used in a way that suggests they are describing a limitation on the statute's protection. Indeed, the CSRA Report,

which shows an express intention to protect disclosures about a non-federal governmental entity, i.e., the above-mentioned commercial nuclear power plant, includes similar descriptions of protecting disclosures of government wrongdoing. *See, e.g.*, S. Rep. No. 95-969 at *8 (describing the legislation as protecting employees "who disclose government illegality"). However, the section of the CSRA Report that expressly describes the scope of the protections includes no such limitation. *See id.* at *21-22. Perhaps more telling, the WPEA Report itself provides support for protecting disclosures of third-party wrongdoing, especially when such disclosures occur in the normal course of a federal employee's duties. Congress enacted the WPEA to, among other things, overturn *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), which held in part that the WPA did not protect disclosures of wrongdoing by private parties.[5] *See* S. Rep. No. 112-155 at *5, 2012 U.S.C.C.A.N. 589, 593 (2012). Thus, in enacting the WPEA, Congress reinforced its belief that whistleblower protections extend to disclosures of third-party wrongdoing made by federal employees who, like Ms. Considine, are tasked with the oversight or reporting of such wrongdoing.

Second, the conclusion that the WPEA Report's passing references to the protection of whistleblower disclosures of "government" wrongdoing are descriptive and not limiting is reinforced by the overall purpose of the WPEA and review of the sections directly describing the scope of the protection of disclosures. The express purpose of the WPEA was to strengthen whistleblower protections and overrule previous decisions that restricted them. *See* S. Rep. No. 112-155 at *1-2. The WPEA Report states that the WPEA "would, among other things, clarify

[5] In *Willis*, the appellant was a U.S. Department of Agriculture (USDA) employee charged with inspecting privately-owned farms for compliance with USDA's conservation plans. *See* 141 F.3d at 1141. The appellant disclosed that seven farms were not in compliance. *Id.* at 1143. The court rejected the appellant's claim that he made a protected disclosure about the non-compliance because he was merely carrying out his job duties and that the WPA was not intended to protect disclosures of third-party wrongdoing. *Id.* at 1144. In finding that *Willis* was wrongly decided, the WPEA Report specifically cites to the section of the opinion declaring that the WPA did not extend to disclosures of third-party wrongdoing. *See* S. Rep. No. 112-155 at *5.

the broad meaning of 'any' disclosure of wrongdoing that, under the WPA, a covered employee may make with legal protection." *Id.* at *2. In the section entitled, "*Clarification of what constitutes a protected disclosure*," the WPEA Report states:

> Unfortunately, in the years since Congress passed the WPA, the MSPB and the Federal Circuit narrowed the statute's protection of "any disclosure" of certain types of wrongdoing, with the effect of denying coverage to many individuals Congress intended to protect. Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal Circuit limiting the types of disclosures covered by the WPA. Specifically, this Committee explained that the 1994 amendments were intended to reaffirm the Committee's long-held view that the WPA's plain language covers *any* disclosure ....

Id. at *4 (emphasis in original).

The WPEA Report continues to quote the Senate Committee Report to the 1994 amendments to the WPA: "The Committee ... reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, 'any disclosure' of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *Id.* at *10 (quoting S. Rep. No. 103-358 (1994)). The WPEA Report then quotes the House Committee Report to the 1994 amendments as follows: "Perhaps the most troubling precedents involve the [MSPB's] inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind." *Id.* at *18 (quoting H. Rep. No. 103-769 (1994)). To address these concerns, the WPEA:

> makes clear, once and for all, that Congress intends to protect "any disclosure" of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions.

Id. at *5.

The WPEA Report expressly acknowledges the same limitations on the protection of whistleblower disclosures that are reflected in the statutory text. *See id.* at *4 (disclosures of classified information); *id.* at *5-6 (disclosures made in the normal course of an employee's duties); *id.* at *7-8 (disclosures regarding discretionary policy decisions); *id.* at *7 (disclosures of gross mismanagement, gross waste of funds, and substantial and specific danger to public health or safety); *see also supra* at pages 4-5, discussing these limitations in the statutory text. Each of the limitations discussed in the WPEA Report is directly reflected in the statutory text. The absence of any reference to a limitation to government wrongdoing, in the context of this detailed discussion of the statute's generous protections and the few limitations that appear in the statutory text, indicates that such a limitation was not intended.

The WPEA Report ends its discussion of the expansive protection of whistleblower disclosures and the specific limitations on that protection as follows: "In sum, the intentionally broad scope of protected disclosures should be clear. The Committee emphasizes that the Board and the courts should not create new exceptions to protected disclosures in place of those overturned by [the WPEA]." *Id.* at *9. In the face of this discussion, it is untenable to argue that the four passing references to disclosures of "government" illegality that the Treasury Department picks out of the 84-page WPEA Report demonstrate that Congress intended to limit the scope of protected disclosures to government wrongdoing and to exclude third-party wrongdoing.

Finally, this conclusion is further supported by a commonsense understanding of the WPA's purpose and effect. Since 1978, Congress has repeatedly expressed an unambiguous intent to provide clear and strong protections against whistleblower retaliation upon which federal employees and employers can comfortably rely. Federal agencies across the government

employ individuals charged with the oversight of third parties (i.e., private or non-federal governmental entities) and the federal programs in which they participate. Limiting whistleblower protections to disclosures of wrongdoing committed only by the federal government is inconsistent with the broad protections that Congress has provided.

III. Established MSPB Precedent Supports a Less Restrictive Standard than the Initial Decision for Protecting Federal Employee Whistleblowers from Retaliation for Disclosing Third-Party Wrongdoing

As explained above, the plain language and legislative history show that the WPA protects federal employee whistleblowers from retaliation for making "*any* disclosure" they reasonably believe evidences wrongdoing—even wrongdoing committed by third parties. § 2302(b)(8) (emphasis added). Yet the initial decision in this case held that disclosures of third-party wrongdoing are generally not protected, and may only receive some protection if there is evidence of government complicity in the wrongdoing. This standard—as articulated by the administrative judge—is more restrictive than what is allowed under the statute as well as expressed in prior MSPB precedent, and thus should be rejected. If the Board declines to adopt a standard that broadly protects disclosures of third-party wrongdoing consistent with the statute, OSC requests that it at least modify the initial decision to the extent it interpreted the WPA more narrowly than Board precedent.

In *Arauz v. Department of Justice*, the federal employee whistleblower alleged that she was retaliated against for disclosing that a third party was violating state voter registration laws. 89 M.S.P.R. at 534. The third party in that case was a private, non-governmental organization that performed functions within the employing federal agency's oversight responsibilities. *Id.* at 533. Finding in favor of the whistleblower, MSPB held that disclosures of third-party wrongdoing are protected under the WPA "[w]hen the [federal] government's interests and good

name are implicated." *Id.* and fn.1 (overruling any prior Board decisions that "have held or implied that allegations of wrongdoing by persons not employed by the government can never be protected" under the WPA).

Similarly, in *Miller v. Department of Homeland Security*, the federal employee whistleblower alleged that he was retaliated against for disclosing that state government officials violated a person's constitutional and civil rights by using excessive force while executing a search warrant at the person's residence. 99 M.S.P.R. 175, 182-83 (2005). The MSPB administrative judge initially found that although the whistleblower's disclosure involved a joint federal/state enforcement operation, the disclosure implicated state government officials only in the alleged wrongdoing, and thus was not protected under the WPA. *Id.* The Board overruled the initial decision and held that the disclosure of third-party wrongdoing in fact "implicated the [federal] government's interests and good name" and therefore was protected. *Id.*; *see also Johnson v. Dep't of Health & Human Servs.*, 93 M.S.P.R. 38, 43-44 (2002) (federal government interests justify finding of protected disclosure where agency officials ignored contract violations and illegal activity by private contractors); *Quinlan v. Dep't of Def.*, PH-1221-17-0247-W-1, 2018 WL 494997, *8 (M.S.P.B. Jan. 18, 2018) (nonprecedential) (federal government interests justify finding of protected disclosure where agency officials disregarded contract improprieties by private contractors).

Here, the initial decision held that Ms. Considine's whistleblower disclosures of third-party wrongdoing would merit protection under the WPA "only where there are allegations of government complicity in the private wrongdoing." *See Considine*, 2018 WL 4190653, *4 (citing *Aviles*, 799 F.3d at 466). As discussed earlier, this restrictive standard is without any basis in the whistleblower protection statutes, legislative history, or MSPB precedent. Although

the *Aviles* decision, relied on by the administrative judge in this case, purports to follow the Board's decision in *Arauz*, its reasoning is narrower than and inconsistent with that Board precedent.[6] Similar to the disclosures at issue in *Arauz*, Ms. Considine's disclosures involved potential wrongdoing by non-governmental entities directly within the oversight responsibilities of the employing federal agency. Even more significant, MSPB's decisions finding that the disclosures in both *Arauz* and *Miller* were protected gave no indication of a "government complicity" requirement in the third-party wrongdoing at issue in each case. The Board should not now impose this onerous burden on whistleblowers.

OSC respectfully submits that if the Board declines to hold that the WPA broadly protects whistleblower disclosures concerning third-party wrongdoing, the reasoning in *Arauz* is more consistent with the statute's plain language and legislative history than the standard adopted by the administrative judge in this case and should be applied here.

CONCLUSION

The plain language and legislative history of the WPA demonstrate that Congress intended to protect, broadly, federal employee whistleblowers from retaliation for making disclosures of third-party wrongdoing. Therefore, OSC urges the Board to clarify the scope of the WPA's protection afforded to such disclosures and modify the administrative judge's initial decision to reflect the more appropriate standard.

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[6] In *Aviles*, an Internal Revenue Service (IRS) agent—after conducting an audit of a private company—disclosed that (1) the company engaged in corporate tax fraud in violation of federal tax laws; and (2) IRS officials were complicit in the alleged tax fraud. Relying primarily on its interpretation of the statute, the Fifth Circuit held that the WPA did not protect the first disclosure because it involved "purely private wrongdoing." 799 F.3d at 464-65. With respect to the second disclosure, the court recognized that disclosures that include allegations of "government complicity in the private wrongdoing" may be protected, but declined to extend the protections in this case because the court found the allegations about government complicity were too vague and conclusory. *Id.* at 466-67. Notably, the Fifth Circuit's decision did not overturn any MSPB decisions, including *Arauz*, *Miller*, and their progeny. Thus, the *Aviles* decision stands at odds with the Board's long-standing and less-restrictive standard for protecting disclosures of third-party wrongdoing when the government's interests and good name are implicated in the wrongdoing.

Respectfully submitted,

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