NO. 23-1050

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RAHUL JINDAL,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD

Respondent.

Petition for Review of the Merit Systems Protection Board in
Case No. DC-1221-21-0221-W-2

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*

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, as defined by 5 U.S.C. § 2302(b) of the Civil Service Reform Act of 1978 (CSRA), as amended by the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). OSC regularly investigates and seeks corrective action for whistleblowers who experience retaliation. *See* 5 U.S.C. §§ 1214, 2302(b)(8).

OSC has a particular interest in a legal issue presented by this case. Specifically, after correctly finding that the whistleblower had provided enough information about his disclosures at the jurisdictional stage to deem them protected, the Merit Systems Protection Board (MSPB or Board) Administrative Judge (AJ) denied him a hearing based on a conclusion not supported by the law: namely, that withdrawn disclosures cannot be a contributing factor in later personnel actions. OSC submits that the AJ's decision impermissibly restricts the legal protections that Congress intended for whistleblowers when it adopted the WPA's broad contributing factor standard. OSC has unique expertise in reviewing, investigating, and prosecuting claims of whistleblower retaliation, and

has a strong interest in ensuring the contributing factor standard is as extensive as Congress intended.

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).[1] OSC respectfully submits this *amicus curiae* brief to clarify the scope of the contributing factor standard, 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 MSPB err in finding that withdrawn protected disclosures could not be a contributing factor in the agency's subsequent personnel actions?

INTRODUCTION AND SUMMARY OF ARGUMENT

Rahul Jindal, a professor with the U.S. Department of Defense (DOD or agency), filed an Individual Right of Action (IRA) appeal with the MSPB alleging, in part, that DOD terminated his employment in retaliation for his protected

[1] Congress granted OSC this authority "to ensure the OSC's effectiveness and to protect whistleblowers from judicial interpretations that unduly narrow the WPA's protections, as has occurred in the past." S. Rep. 112-155 (2012), at 14.

disclosures. For jurisdictional purposes, the MSPB found that Jindal made protected disclosures, but that he did not adequately allege that his disclosures were a contributing factor in the agency's personnel actions because he had withdrawn them as part of a Last Chance Agreement (LCA) before those personnel actions occurred.

The MSPB committed reversible error in this case. There is no support in the law for a finding that the negotiated retraction of a disclosure of wrongdoing cannot contribute to later retaliation. In this regard, the law comports with a common sense understanding that resentment may linger past an apology. The CSRA and WPA plainly protect *any* disclosure and congressional intent confirms that the contributing factor standard should be read broadly. The MSPB's analysis here creates an unwarranted gap in whistleblower protections, chills future disclosures, hinders legitimate oversight efforts, and disincentivizes whistleblowers from settling their claims. Accordingly, this case should be remanded to the MSPB for consideration on the merits.

RELEVANT BACKGROUND

Jindal filed an IRA appeal with the MSPB alleging that, among other personnel actions, DOD terminated his employment in retaliation for his protected disclosures to agency officials and the Maryland Board of Physicians, including that his colleagues failed to obtain informed consent and improperly double-

booked their time, by working at a private hospital in Texas, while simultaneously being on call at Walter Reed National Military Medical Center (Walter Reed) in Maryland. *See Jindal v. Dep't of Defense*, DC-1221-21-0221-W-2, 2022 MSPB LEXIS 3337 (September 1, 2022), Appx21-22. The Uniformed Services University Inspector General (USU IG) investigated Jindal's disclosures to the Maryland Board of Physicians. Appx14. A month after the conclusion of the USU IG investigation, DOD and Jindal signed an LCA, which required Jindal to retract and apologize for his disclosures about his colleagues' alleged wrongdoing. Appx17. In exchange, DOD would continue to renew his appointment while Walter Reed conducted an inquiry into Jindal's credentials. Appx17. After Walter Reed completed their inquiry, they declined to renew his privileges and DOD terminated Jindal's appointment. Appx15.

On September 1, 2022, an AJ issued an initial decision on Jindal's IRA, which became the final decision of the Board on October 6, 2022. Appx32. The AJ declined to accept jurisdiction over Jindal's claim, concluding that, while Jindal sufficiently alleged that he made protected disclosures, he failed to adequately allege that his protected disclosures were a contributing factor in the challenged personnel actions because he withdrew the disclosures as part of the LCA. Appx29-32.

Jindal 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 concerns a question of the MSPB's jurisdiction over an appeal, this court conducts a *de novo* review. *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1350 (Fed. Cir. 2022) (citing *Hessami v. Merit Sys. Prot. Bd*, 979 F.3d 1362, 1367 (Fed. Cir. 2020)). 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

I. After Finding that Jindal Satisfactorily Alleged Protected Disclosures, the AJ Erred by Concluding that a Retracted Disclosure Could Not Contribute to the Agency's Later Personnel Actions

A. The MSPB Correctly Ignored Jindal's Retraction in Deciding His Allegations Satisfied the Jurisdictional Requirements for Protected Disclosures

The AJ concluded that Jindal's whistleblowing about fellow doctors who failed to obtain informed consent and were on call at one hospital while working at another satisfied his jurisdictional burden regarding protected disclosures. *See* Appx26. Correctly, the AJ did not consider Jindal's negotiated withdrawal of these disclosures when analyzing whether they qualified for protection.

This finding is consistent with the WPA, which prohibits agencies from retaliating against a federal employee "because of … *any* disclosure of information" that the employee reasonably believes evidences certain categories of wrongdoing. 5 U.S.C. § 2302(b)(8) (emphasis added). Congress later re-affirmed that the statute's plain text was meant to be "extremely broad," noting it "intend[ed] to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." S. Rep. 112-155 (2012), at 5.

Importantly, the plain language of the statute makes no exception for disclosures that are later withdrawn or determined to be incorrect. 5 U.S.C. § 2302(b)(8). The Federal Circuit has long recognized that a disclosure need not ultimately be correct to qualify for protection. *Horton v. Dep't of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995) *superseded on other grounds by statute,* WPEA, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

The critical inquiry is whether the employee had a reasonable belief that their disclosure evidenced one of the categories of wrongdoing listed in section 2302(b)(8) "at the time [the employee] made the disclosure[s] … not in light of events or conversations occurring thereafter." *Webb v. Dep't of Interior*, 122 M.S.P.R. 248, 255 (2015). Thus, by extension, the AJ's analysis correctly found, for the purposes of jurisdiction, that Jindal's disclosures were protected, despite his later withdrawal of them.

B. The MSPB Erred by Holding that Recanted or Withdrawn Disclosures Cannot be a Contributing Factor in Subsequent Personnel Actions

The AJ erred, however, in deciding that the withdrawal of the protected disclosures prevented Jindal from adequately alleging that those disclosures contributed to later personnel actions. In doing so, the AJ imposed a jurisdictional hurdle that is not supported by statute or precedent.

Rather, to establish the MSPB's jurisdiction over an IRA appeal a petitioner must make, among other claims, "non-frivolous allegations that [they] made a protected disclosure that was a contributing factor to the personnel action taken or proposed." *Piccolo v. Merit Sys. Prot. Bd.*, 869 F.3d 1369, 1371 (Fed. Cir. 2017) (internal citations omitted). A non-frivolous allegation is one that "if proven, *could* establish the matter at issue." 5 C.F.R. § 1201.4(s) (emphasis added). This court has analogized this standard to the well-pleaded complaint rule. *Hessami*, 979 F.3d at 1367 (citing *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 687-89 (Fed. Cir. 1992)) (internal quotations omitted).

Thus, having already successfully alleged protected disclosures, Jindal's only remaining jurisdictional burden was to sufficiently allege that those disclosures were a contributing factor in the later personnel actions that he suffered. This is not an onerous requirement. A contributing factor is "any disclosure that affects an agency's decision to threaten, propose, take, or not take a

personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(d). Citing legislative history, the Federal Circuit has held "that '*any*' weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citing 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S.20)) (emphasis added).

Moreover, the statute makes clear that there are multiple ways to satisfy the contributing factor element of a retaliation claim. The "knowledge/timing test" is one example of how an employee may satisfy the contributing factor standard. 5 U.S.C. § 1221(e)(1)(A)-(B); *see, e.g.*, *Miller v. Dep't of Justice*, 842 F.3d 1252, 1256 (Fed. Cir. 2016). The Board has acknowledged, however, that employees may also prove that their disclosure was a contributing factor in the personnel action "through circumstantial evidence" beyond close timing. 5 U.S.C. § 1221(e)(1); *Bradley v. Dep't of Homeland Sec.*, 123 M.S.P.R. 547, 556 (2016) (citing *Powers v. Dep't of the Navy*, 69 M.S.P.R. 150, 156 (1995)).

Here, the AJ concluded that Jindal made his last disclosure outside the traditional timeframe of a knowledge/timing analysis, then considered whether Jindal had alleged other circumstantial evidence sufficient to establish a contributing factor. Appx29-31. In assessing Jindal's other evidence, however, the AJ gave conclusive effect to the fact that "he had withdrawn [his disclosures]"

and, consequently, that "the agency had no reason to believe that [he] had made a protected disclosure." Appx30. Even if the court finds that the knowledge/timing test was not met, the categorical exclusion of a withdrawn *protected* disclosure from the contributing factor analysis has no basis in law and detracts from Jindal's other material circumstantial evidence that more than supports the low threshold for jurisdiction.

Contrary to the law, the AJ's contributing factor analysis turned on the agency's belief as to whether Jindal's disclosures were protected. As discussed above, it is the *employee's* reasonable belief that determines whether a disclosure is protected by section 2302(b)(8). The plain language of the statute makes no exception for protected disclosures that are later withdrawn or retracted, or for disclosures that the agency does not believe to be protected. 5 U.S.C. §§ 1221(e), 2302(b)(8). By the same logic, the agency's view of a disclosure does not affect whether that disclosure contributed to the agency's personnel action. If it did, then whistleblower protections would be illusory every time an agency viewed a disclosure as unworthy.

This is especially true at the jurisdictional stage, where the agency's evidence plays no role. *See Piccolo*, 869 F.3d at 1371; *Hessami*, 979 F.3d at 1369.

Instead, the AJ may only consider the employee's evidence as to whether it meets the jurisdictional pleading standard. *Hessami,* 979 F.3d at 1369. The Federal Circuit made clear that:

> [T]he question of whether the appellant has non-frivolously alleged protected disclosures that contributed to a personnel action must be determined based on whether the employee alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face. The Board may not deny jurisdiction by crediting the agency's interpretation of the evidence as to whether the alleged disclosures fell within the protected categories or whether the disclosures were a contributing factor to an adverse personnel action.

Id.

At the time he made his disclosures, Jindal had a reasonable belief that they evidenced wrongdoing. Critically, the AJ found that Jindal made a non-frivolous allegation that his disclosures were protected and cited to no authority for the assertion that a withdrawn disclosure cannot contribute to an agency's subsequent personnel action. *See* Appx26, Appx30-31. Jindal's withdrawal of his disclosures as part of the LCA did not prevent them from being a factor that affected the personnel actions in any way. *See Marano*, 2 F.3d at 1140.

The AJ's misplaced reliance on the agency's perception of the disclosures was further compounded by their inattention to other material circumstantial evidence that suggested Jindal's disclosures continued to reverberate years after he made them. The record shows that the personnel actions against Jindal all took place against a backdrop where his disclosures were clearly on the minds of agency

officials. For example, DOD's November 2018 LCA followed from an investigation of Jindal's disclosures and explicitly required that he apologize for and retract them to remain employed. Appx14, Appx17. Within a month of the LCA, Walter Reed failed to renew Jindal's privileges. Critically, the same individual to whom Jindal made his disclosures offered the LCA and terminated his appointment 16 months later. While the Board's decision mentions Jindal's allegation that he entered into the LCA under duress, the AJ declined to consider this allegation in the contributing factor analysis. Appx18, Appx29-31.

In short, agency officials had knowledge of Jindal's disclosures, investigated him based on his disclosures, and conditioned his continued employment on a commitment to withdraw and apologize for his disclosures. This circumstantial evidence is sufficient to establish a non-frivolous allegation that Jindal's disclosures were a contributing factor in the agency's personnel actions against him. The fact that the disclosures were later withdrawn cannot be a bar to a finding that those disclosures contributed to the subsequent personnel actions.

II. Barring Retaliation Claims Based on Retracted Disclosures Undermines Whistleblower Protection Laws and the Merit System

As described above, the Board's decision is inconsistent with the statute and congressional intent, creating an unwarranted gap in whistleblower protections for existing whistleblowers who have withdrawn their disclosures. It also chills future

whistleblowing, hinders oversight efforts, and discourages whistleblowers from entering into settlements.

The Board's decision may discourage would-be whistleblowers from making disclosures out of a fear that, if they later withdraw or amend them, they will lose the protections of section 2302(b)(8). This is an unacceptable result. The federal government and the public rely on whistleblowers to expose government misadministration and malfeasance. Indeed, the Federal Circuit has noted that the WPA's purpose was to "create an atmosphere within government agencies favorable to the disclosure and correction of improper illegal acts…." *Caddell v. Dep't of Justice*, 96 F.3d 1367, 1372 (Fed. Cir. 1996) (internal citations omitted). To ensure that this goal is met, the statute only requires that whistleblowers have a reasonable belief that they are disclosing wrongdoing. *See* 5 U.S.C. § 2302(b)(8). A whistleblower may elect to withdraw their protected disclosures, while still reasonably believing their disclosures evidence wrongdoing. Erecting barriers to protection will lead to fewer individuals revealing misconduct and allow wrongdoers to continue their improper actions.

Holding that withdrawn disclosures cannot contribute to future personnel actions hinders legitimate oversight efforts by OSC, Inspectors General, and other investigative entities. These oversight entities rely on whistleblowers to provide additional information and to correct or amend what they have reported if they

later learn that their initial disclosure was incomplete or inaccurate. The Board's decision could discourage employees from providing such corrective information, out of fear that they could lose their legal protection as whistleblowers, thereby hindering fulsome investigations.

Finally, the Board's decision disincentivizes whistleblowers from executing settlement agreements regarding their retaliation claims, despite the strong public policy in favor of such agreements. *See, e.g.*, Fed. R. Evid. 408; 2 Weinstein's Federal Evidence § 408.02 ("[FRE 408] is based on the policy of promoting the compromise and settlement of disputes."). Indeed, global settlements requiring the withdrawal of claims that the employee knew or should have known about at the time of the agreement are common and uncontroversial. But the Board's decision is entirely different. It effectively interpreted Jindal's entering into the LCA as a waiver of whistleblower protections for every future action by agency officials who may recall, and be influenced by, his original disclosures. If allowed to stand, agencies could routinely require whistleblowers to recant their disclosures as a condition of any settlement or last chance agreement so the agency can avoid liability in any subsequent retaliation claim. Whistleblowers would be faced with a difficult choice: recant what they reasonably believed to be wrongdoing or forego correction of the improper personnel actions they have suffered.

CONCLUSION

For the foregoing reasons, the MSPB's holding that a withdrawn or recanted disclosure cannot be a contributing factor in subsequent personnel actions is not in accordance with law. Therefore, OSC respectfully requests that the court reverse the Board's decision and remand the case for consideration on the merits.

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