UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JAVANA MOSLEY-DAWSON, Appellant,	)	DOCKET NO.: DC-1221-21-0339-W-1
v.	)	
DEPARTMENT OF THE ARMY, Agency.	)	

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

IDENTITY AND INTEREST OF THE 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 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 investigates prohibited personnel practice (PPP) complaints, including whistleblower retaliation claims under 5 U.S.C. § 2302(b)(8) and (b)(9). *See* 5 U.S.C. § 1214(a)(1). In cases where OSC closes its investigation into a complaint under 5 U.S.C. § 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), employees have an individual right of action to bring their claims to the Merit Systems Protection Board (Board or MSPB) for a *de novo* review. *See* 5 U.S.C. § 1221(a); (f)(2). Employees are required to exhaust 5 U.S.C. § 2302(b)(8) or (b)(9) claims by filing with OSC before they

may bring an individual right of action ("IRA") appeal to the Board unless the personnel action at issue is an otherwise appealable action. *See* 5 U.S.C. § 1214 (a)(3).

Given that framework, OSC has a substantial interest in the Board clarifying two legal issues in this case: (1) the legal doctrine of collateral estoppel does not apply to OSC's review and closure of complaints; and (2) disclosing information to OSC is protected activity under section 2302(b)(9)(C). OSC respectfully requests the opportunity to offer its views to the Board on these issues.[1]

STATEMENT OF THE ISSUES

1. Collateral estoppel does not apply to OSC's complaint review process or determinations.

2. Disclosing information to OSC is protected activity under section 2302(b)(9)(C).

RELEVANT BACKGROUND

In January 2017, the appellant, Javana Mosley-Dawson, filed an OSC complaint alleging retaliation for disclosing to her supervisor that she had not received written performance standards even though the deadline to do so had passed. *Mosley-Dawson v. Dep't of Army*, DC-1221-21-0339-W-1 at 14-15 (July 27, 2021). In or around August 2017, OSC closed Mosley-Dawson's first complaint. *Id.* at 26. In November 2018, Mosley-Dawson filed her second OSC complaint, in which she alleged the agency had subsequently taken additional retaliatory personnel actions. *Id.* at 2. OSC closed the second complaint on February 2, 2021. *Id.* On April 8, 2021, Mosley-Dawson filed an IRA appeal with the Board. *Id.* at 1.

[1] The Whistleblower Protection Enhancement Act of 2012 (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)(1). OSC also may appear as amicus curiae to present its views in MSPB proceedings. *See* 5 C.F.R. § 1201.34(e). The appellant in this case did not object to OSC filing an amicus curiae brief. And the filing will not unduly burden the proceedings.

In an initial decision, the MSPB administrative judge ("AJ") found that Mosley-Dawson's disclosure about her supervisor's failure to issue performance standards, referenced in the decision as "Disclosure No. 2," was protected under 5 U.S.C. § 2302(b)(8)(A)(i), but decided that the Board lacked jurisdiction over Disclosure No. 2 because it was barred by the doctrine of collateral estoppel. *Id.* at 12-13. The AJ reasoned that Mosley-Dawson was precluded from raising Disclosure No. 2 in her IRA appeal from her second OSC complaint because she already had the opportunity to litigate the issue in her first OSC complaint. *Id.* at 15.

The AJ also found that Mosley-Dawson failed to make a nonfrivolous allegation that her January 2017 OSC complaint, referenced as "Disclosure No. 1" in the decision, was a protected disclosure. *Id.* at 25. While the AJ acknowledged that the OSC complaint was a protected activity under section 2302(b)(9), *Id.* at 24, the AJ did not analyze whether Mosley-Dawson's January 2017 OSC complaint might qualify for IRA jurisdiction under 5 U.S.C. § 2302(b)(9)(C).

ARGUMENT

I. COLLATERAL ESTOPPEL DOES NOT PRECLUDE FACTS RAISED IN OSC COMPLAINTS FROM CONSIDERATION IN OTHER PROCEEDINGS.

Mosley-Dawson should not have been precluded from raising Disclosure No. 2 because the doctrine of collateral estoppel is wholly inapplicable to issues raised before OSC, which is an investigative and prosecutorial agency, not a tribunal. Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1978). Like other tribunals, the Board may apply collateral estoppel where: (i) the issue previously adjudicated is identical with that now presented, (ii) that issue was actually litigated

in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action. *Morgan v. Dep't of Energy*, 424 F.3d 1271, 1274-1275 (Fed. Cir. 2005).

In applying this doctrine to bar Mosley-Dawson's claim that she was retaliated against for Disclosure No. 2, the AJ found that "the issue raised in appellant's Disclosure No. 2 *would have been litigated* in the prior 2017 OSC complaint; that the determination on the issue in the prior 2017 complaint was necessary to the resulting *judgment*; and that the appellant had a full and fair opportunity to *litigate* the issue in the prior January 2017 OSC complaint." *See Mosley-Dawson,* at 15 (emphasis added). The AJ's findings that Mosley-Dawson litigated her claims before OSC and that OSC rendered a judgment are inaccurate. OSC is not a forum for litigation and does not issue judgments, in this or any other case. Rather, the AJ's findings appear to stem from a fundamental misunderstanding of OSC's statutory authority, the legal effect of OSC's determinations, and the nature of Mosley-Dawson's claim.

A. OSC is Not a Court of Competent Jurisdiction Before Which Facts and Claims are Litigated or Adjudicated.

The AJ incorrectly concluded that Mosley-Dawson actually litigated her claims before OSC. The "actually litigated" element of collateral estoppel is satisfied when the issue was properly raised by the pleadings, was submitted for determination, and was determined by a tribunal. *Kavaliauskas v. Dep't of Treasury*, 120 M.S.P.R. 509, 513 (2014). OSC is not a tribunal or a court of competent jurisdiction and has no adjudicative authority. *See* 5 U.S.C. § 1212. OSC has the authority to receive and investigate allegations of prohibited personnel practices, but OSC investigations are not litigation. *See id.* To obtain stays of personnel actions or corrective actions based on the findings of its investigations, OSC must petition the Board for

a determination. *See* 5 U.S.C. § 1214(b). Thus, it was clear error to find that Mosley-Dawson had litigated her disclosure before a court of competent jurisdiction.

B. OSC's Investigative Determinations Have No Preclusive Effect.

The initial decision also improperly equated OSC's decision to close Mosley-Dawson's first OSC complaint with a judicial determination. OSC's decisions—whether to close a complaint, seek corrective action from an agency, or petition the Board for relief—are not judgments entitled to preclusive effect. On the contrary, OSC's determination on a PPP complaint and its reasons for making the determination are inadmissible in any other proceeding without the consent of the person submitting the allegation of a PPP. *See* 5 U.S.C. § 1221(f)(2); 5 U.S.C. § 1214(a)(2)(B). Thus, the statute requires that the Board make *de novo* determinations on IRA appeals. Any consideration of the issues brought to OSC, other than to determine that the claims were exhausted before OSC, conflicts with an employee's right to *de novo* review. Accordingly, it was error for the AJ to find that OSC's decision to close Mosley-Dawson's complaint was a judgment with preclusive effect.

C. Collateral Estoppel Does Not Bar Using Disclosures Raised in Previous Litigation to Support Additional Retaliation Claims.

Even if Mosley-Dawson had actually litigated her disclosure before a court, it would still have been error for the AJ to preclude consideration of Disclosure No. 2 to support a claim for subsequent acts of retaliation. A protected disclosure is not a stand-alone claim. It is a factual element necessary to a claim of whistleblower retaliation: a protected disclosure was made, a personnel action was taken, and there was a causal connection between the two. Collateral estoppel does not preclude an employee from using a protected disclosure raised in previous

litigation as a factual predicate to challenge a later personnel action as retaliation.[2] *See Morgan*, 424 F.3d at 1274-1275. Otherwise, whistleblowers would be vulnerable to violators who bide their time, waiting out a first claim before taking another, potentially more serious, personnel action.

II. DISCLOSING INFORMATION TO OSC IS PROTECTED ACTIVITY UNDER SECTION 2302(b)(9)(C).

A. By Applying the Wrong Legal Standard, the AJ Deprived Mosley-Dawson of Her IRA Right for Section 2302(b)(9) Protected Activity.

The AJ erred by narrowly and incorrectly interpreting Mosley-Dawson's claim of retaliation for her protected activity. In her response to the AJ's jurisdictional order, Mosley-Dawson affirmed that she engaged in a protected activity that would normally give rise to an IRA appeal—disclosing information to OSC. And in analyzing Mosley-Dawson's allegations, the AJ correctly acknowledged that Mosley-Dawson's "Disclosure No. 1" claim fell under section 2302(b)(9). Specifically, the AJ characterized her protected activity as follows: "The appellant's Disclosure No. 1 is an allegation under 5 U.S.C. § 2302(b)(9), that she filed a complaint with the OSC in January 2017, alleging that the agency [redacted] failed to issue her performance standards for a 3-month period, and [] took several personnel actions against the appellant because she filed the OSC complaint concerning that matter." *See Mosley-Dawson,* at 24.

Having acknowledged that Mosley-Dawson disclosed alleged wrongdoing to OSC, the AJ nonetheless declined IRA jurisdiction, concluding that the underlying disclosures Mosley-Dawson made in the first OSC complaint were not "protected" under the standards applicable to a 5 U.S.C. § 2302(b)(8) claim. The AJ held that "the appellant failed to make a nonfrivolous

[2] Conceivably, if a judge had ruled in an earlier proceeding that a disclosure was *not* protected, such a legal finding may carry preclusive effect in later proceedings involving the same disclosure. But that is not the case here, because the AJ concluded that the disclosure was protected.

allegation that her *disclosure* to the OSC in 2017 was a 'protected disclosure,' and this *disclosure* will not be considered any further." *Id.* at 25 (emphasis added).

This was error. The underlying substance of Mosley-Dawson's *disclosures*— including whether she had a reasonable belief in the alleged wrongdoing—is immaterial to whether she engaged in protected *activities* under section 2302(b)(9) by disclosing information to OSC. *See, e.g., Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991) (section 2302(b)(9) covers disclosures to OSC that do not meet the terms of section 2302(b)(8)), *recons. denied*, 52 M.S.P.R. 375, *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992). When the nature of a complaint is as the AJ framed it—retaliation for having disclosed information to OSC—the activity is protected under 2302(b)(9)(C) regardless of whether the underlying disclosure was protected under section 2302(b)(8), and regardless of whether that disclosure was made to OSC within or outside a complaint. By applying the wrong legal standard, the AJ failed to consider whether the Board had jurisdiction over Mosley-Dawson's section 2302(b)(9)(C) claim.

B. The AJ's Approach Contravenes the Intended Statutory Scheme and Related Caselaw.

The AJ's injection of section 2302(b)(8) standards to dismiss a section 2302(b)(9)(C) claim disregards the plain language of the statute, subverts legislative intent, and is not in accordance with related caselaw. Sections 2302(b)(8) and 2302(b)(9) prohibit, respectively, "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) (citing *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 690 (Fed. Cir. 1992)) (emphasis added). These two distinct actions also have different legal standards. Claims under section 2302(b)(8) require a reasonable belief that disclosures evidence the types of misconduct identified by the statute; the statute imposes no such requirement for section 2302(b)(9) claims. Here, the AJ's failure to consider

Mosely-Dawson's disclosures to OSC in 2017 as a claim of retaliation for protected activity under section 2302(b)(9)(C) improperly collapsed those statutory distinctions.[3]

Moreover, when Congress extended IRA rights to section 2302(b)(9) claims, the purpose was to expand on the protections of section 2302(b)(8), not to duplicate them. To the extent that these protections overlap, section 2302(b)(9) is focused on an employee's activities rather than the underlying disclosures or their reasonableness. Congress has frequently reaffirmed that section 2302(b)(9) is intended to provide robust protection against retaliation for federal employees who engage in covered activities, which is evidenced through the continued expansion of those activities. Since passing the CSRA in 1978, Congress has protected federal employees from retaliation for engaging in certain protected activities. Congress further supplemented the statutory protections in section 2302(b)(9) in the WPA, provided IRA appeal rights for many section 2302(b)(9) claims in the WPEA, and again increased the types of activities covered under section 2302(b)(9) in OSC's 2018 Reauthorization Act, enacted as part of the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA). *See* Pub. L. No. 95-454 (1978) § 101(a); Pub. L. No. 101-12, 103 Stat. 16 (1989) § 4(b); Pub. L. No. 112-199, 126 Stat. 1475 (2012) § 101(b); Pub. L. No. 115-91, § 1097(c), 131 Stat. 1283, 1618 (2017). The AJ's unduly restrictive analysis of Mosley-Dawson's claim of retaliation for engaging in protected activities subverts congressional intent.

Finally, in cases like the instant matter, the Board and federal courts have consistently recognized these statutory distinctions and held that certain activities are protected under section 2302(b)(9) rather than section 2302(b)(8). *See, e.g., Special Counsel v. Hathaway*, 49 M.S.P.R.

[3] OSC submitted another amicus brief in *Tao v. Merit Systems Protection Board* on the issue of improperly conflating a section 2302(b)(8) analysis into section 2302(b)(9) claims, and MSPB's responsive brief acknowledged that it was error not to consider separately the section 2302(b)(9) claims. Brief for Respondent at 11, *Tao v. Merit Sys. Prot. Bd.*, No. 20-1834 (Fed. Cir. filed Oct. 29, 2020).

595, 612 (1991) (section 2302(b)(9) covers disclosures to OSC), *recons. denied*, 52 M.S.P.R. 375, *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992); *Miller v. Merit Sys. Prot. Bd.*, 626 F. App'x 261, 265 (Fed. Cir. 2015) (disclosures made during grievance process are allegations under section 2302(b)(9), not section 2302(b)(8)). And the U.S. Court of Appeals for the Federal Circuit recently rejected the 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). *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, slip op. at *15-16 (Fed. Cir. 2022). By contrast, the AJ's contravention of statutory language, congressional intent, and prevailing caselaw deprived Mosley-Dawson of the full panoply of her rights.

CONCLUSION

Based on the foregoing, OSC respectfully requests that the Board clarify that collateral estoppel does not apply to OSC proceedings, and that disclosing information to OSC is protected activity under section 2302(b)(9)(C), and accordingly, reverse the AJ's decision and remand the case for consideration on the merits.

Respectfully Submitted,

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