NO. 20-1834

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DEBRA TAO,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petition for Review of the Merit Systems Protection Board

in Case No. SF-1221-19-0147-W-1

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

Respectfully submitted,

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

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 both the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). In particular, OSC is responsible for investigating and seeking corrective action for federal employee whistleblowers and for those who experience retaliation for engaging in protected activities. *See* 5 U.S.C. § 2302(b)(8)-(9).

OSC has a substantial interest in a legal issue presented in this case—the protection of disclosures to OSC and other activities under section 2302(b)(9). Moreover, as the agency responsible for enforcing these federal laws, OSC has particular expertise interpreting, investigating, and evaluating claims brought pursuant to these statutory provisions.

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); Fed. R.

App. P. 29(a). Therefore, OSC respectfully submits this *amicus curiae* brief to address the protection against retaliation for disclosing information to OSC and engaging in other activities under section 2302(b)(9), pursuant to its statutory authority under section 1212(h) and as a government entity under Fed. R. App. P. 29(a)(2).[1] OSC takes no stance on any other issues in this case.

STATEMENT OF THE ISSUE

Did the Merit Systems Protection Board (MSPB or Board) err by failing to analyze petitioner's allegation of retaliation for disclosing information to OSC and engaging in other protected activities under 5 U.S.C. § 2302(b)(9)?

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal employees, who first administratively exhaust certain complaints of a prohibited personnel practice with OSC, may seek corrective action in *de novo* proceedings before MSPB through an Individual Right of Action (IRA) appeal. Notably, the Board's IRA appeal jurisdiction is limited to non-frivolous allegations of retaliation for making protected disclosures under section 2302(b)(8) or engaging in protected activities under section 2302(b)(9)(A)(i), (B), (C), and (D).

In this matter, Debra Tao, a pharmacist at the U.S. Department of Veterans Affairs (VA), filed a complaint with OSC alleging that VA took personnel actions against her in retaliation for making various protected disclosures, as well as in

[1] OSC informed the parties of its intention to file this brief and no party objected.

retaliation for disclosing information to OSC, filing a complaint with VA's Office of Accountability and Whistleblower Protection (OAWP), filing a claim of an unfair labor practice with the Federal Labor Relations Authority (FLRA), and testifying in coworkers' MSPB and Equal Employment Opportunity (EEO) proceedings. All of these activities are protected under section 2302(b)(9). Nevertheless, the Board failed to address Tao's protected activities under section 2302(b)(9) and instead only analyzed her activities as disclosures under section 2302(b)(8). The Board then dismissed her IRA appeal for lack of jurisdiction because she ostensibly failed to non-frivolously allege that she made any protected disclosures under section 2302(b)(8).

MSPB committed reversible error in this case. The Board's legal analysis contradicts the plain text of federal whistleblower statutes and neglects Congress's purpose and intent to provide broad IRA appeal rights against retaliation both for making whistleblower disclosures as well as for engaging in activities related to whistleblowing. MSPB's analysis also departs from well-established precedent that allegations of retaliation for engaging in protected activities are correctly analyzed under section 2302(b)(9). The Board's improper approach here is not in accordance with law and leaves federal employees uncertain about their IRA appeal rights under civil service laws and vulnerable to retaliation explicitly prohibited by the statute.

RELEVANT BACKGROUND

Tao filed a complaint with OSC alleging that VA subjected her to a proposed adverse action, a lowered performance appraisal, and a significant change in duties, responsibilities, or working conditions in retaliation for both making protected disclosures and engaging in protected activities, including disclosing information to OSC, filing with VA's OAWP, filing with FLRA, and testifying in two coworkers' administrative law proceedings. *See Tao v. Dep't of Veterans Affairs*, SF-1221-19-0147-W-1 (February 11, 2020), Appx2-3. While many of her disclosures were made in the context of her protected activities, Tao separately alleged retaliation both for making protected disclosures under section 2302(b)(8) and for engaging in protected activities under section 2302(b)(9). After OSC closed the complaint, Tao filed a timely IRA appeal with the Board alleging the same theories of retaliation that she raised in her complaint to OSC. Appx2.

On February 11, 2020, an MSPB Administrative Judge (AJ) issued an initial decision, which became the final decision of the Board on March 17, 2020. Appx9. The AJ analyzed Tao's claim under section 2302(b)(8) and found that Tao did not have a reasonable belief that the wrongdoing she disclosed evidenced a violation of law, rule, or regulation. Appx8. The AJ then concluded that the Board did not have IRA appeal jurisdiction because any allegations that Tao made protected disclosures had been found frivolous. *Id.* The AJ, however, failed to

analyze separately whether IRA appeal jurisdiction was appropriate based on Tao's allegations that she engaged in protected activities under section 2302(b)(9). On May 14, 2020, Tao timely filed an appeal with the U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(B).

STANDARD OF REVIEW

Because this appeal turns on questions of law—i.e., the application of section 2302(b)(9) to the facts of this case—this court conducts a *de novo* review. *See Herman v. Dep't of Justice*, 193 F.3d 1375, 1378 (Fed. Cir. 1999). This court may reverse MSPB'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

MSPB COMMITTED REVERSIBLE ERROR IN FAILING TO ANALYZE TAO'S RETALIATION CLAIM UNDER SECTION 2302(b)(9)

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

The Board's legal analysis contravenes the statute, which explicitly creates 14 distinct prohibited personnel practices, including two separately-defined provisions prohibiting retaliation for making a protected disclosure or engaging in a protected activity. *See* 5 U.S.C. § 2302(b)(8) and (9). These statutory provisions offer protection for "distinctly different" actions. *Williams v. Dep't of Defense*, 46 M.S.P.R. 549, 553 (1991). The essential difference between the protections of sections 2302(b)(8) and (9) is between "reprisal based on disclosure of information

and reprisal based upon exercising a right to complain." *Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1575 (Fed. Cir. 1996) (*citing Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 690 (Fed. Cir. 1992)). Notably, while section 2302(b)(8) prohibits retaliation for making protected disclosures, section 2302(b)(9) prohibits retaliation for, among other things, disclosing information to OSC, exercising certain appeal, complaint, or grievance rights, and testifying or assisting in the exercise of certain appeal, complaint, or grievance rights.

In addition to offering statutory protection against retaliation for distinctly different actions, sections 2302(b)(8) and (9) have different legal standards. Claims under section 2302(b)(8) require complainants to have a reasonable belief that their disclosures evidence a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* S. Rep. No. 112-155 (2012 U.S.C.C.A.N. 589, 598-99; *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). However, the statute imposes no such requirement for claims under section 2302(b)(9). Thus, even when a complainant alleges retaliation for actions that could be protected under both sections 2302(b)(8) and (9), the analysis for a claim under each provision would necessarily be different. Here, given these distinctions, the Board should have separately analyzed whether Tao was retaliated against based on her alleged activities under section 2302(b)(9). Critically, such an

analysis would not have required any "reasonable belief" determination or other substantive review of Tao's disclosures.

In this case, MSPB's approach erroneously blurs the line that Congress purposefully drew between retaliation based on a disclosure of information under section 2302(b)(8) and retaliation based on engaging in a protective activity under section 2302(b)(9). The statute contemplates that individuals may file IRA appeals under *either* statutory provision *or* both. *See* 5 U.S.C. §§ 1214(a)(3), 1221(a) (individuals alleging retaliation for making protected disclosures *or* engaging in certain protected activities have IRA appeal rights and "may seek corrective action from the Board … for a prohibited personnel practice described in section 2302(b)(8) *or* section 2302(b)(9)(A)(i), (B), (C), or (D) ….") (emphases added). By ignoring Tao's section 2302(b)(9) claim after disposing of her section 2302(b)(8) claim, the Board improperly made her section 2302(b)(9) claim redundant. It is axiomatic that a statute should not be interpreted to render one part superfluous. *See Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), *recons. denied*, 52 M.S.P.R. 375 *and aff'd*, 981 F.2d 1237 (Fed. Cir. 1992); *see, e.g.*, *Horner v. Merit Sys. Prot. Bd.*, 815 F.2d 668, 674 (Fed. Cir. 1987). Rather, the Board should have separately analyzed Tao's allegations of retaliation in her IRA appeal under each statutory provision.

In cases similar to the instant matter—where a complainant makes disclosures while engaging in certain protected activities—MSPB has consistently recognized these statutory distinctions and held that such activities are protected under section 2302(b)(9), not section 2302(b)(8). *See, e.g., Miller v. Merit Sys. Prot. Bd.*, 626 F. App'x 261, 265 (Fed. Cir. 2015) (disclosures made during grievance process are allegations of prohibited personnel practices under section 2302(b)(9), not section 2302(b)(8)); *Ruffin v. Dep't of the Army*, 48 M.S.P.R. 74, 78 (1991) (agency is prohibited from retaliating against employee for filing IRA appeal under section 2302(b)(9), not section 2302(b)(8)); *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000) (finding EEO complaints, IRA appeals, and union grievances are section 2302(b)(9) activities, not section 2302(b)(8) disclosures). Here, in dismissing Tao's IRA appeal after considering only her section 2302(b)(8) claim, the Board deprived Tao of a hearing on alleged retaliation for her protected activities.

B. MSPB's Approach Here Contravenes Congressional Purpose and Intent

The Board's failure to separately analyze Tao's allegations of retaliation under section 2302(b)(9), after it determined that her section 2302(b)(8) claim failed, directly contravenes clear legislative purpose and intent. Throughout the past 40 years, Congress has made clear that section 2302(b)(9) protects certain

activities separate and apart from the protection for disclosures under section 2302(b)(8). To the extent that the scope of these protections against retaliation may overlap, section 2302(b)(9)'s protection is aimed at the complainant's *activities*, not at the underlying disclosures or their reasonableness.

Since passing the CSRA in the late 1970s, Congress has protected federal employees from retaliation for engaging in a particular activity—exercising appeal rights. *See* Pub. L. No. 95-454 (1978) § 101(a). In 1989, with the passage of the WPA, Congress added statutory protections to section 2302(b)(9) for other activities, namely disclosing information to or cooperating with OSC or an Office of Inspector General, exercising complaint and grievance rights, testifying for or assisting an individual in the exercise of appeal, complaint, or grievance rights, and refusing to obey an order that violates a law.[2] *See* Pub. L. No. 101-12, 103 Stat. 16 (1989) § 4(b).

When Congress passed the WPEA in 2012, it further strengthened the protections against retaliation in section 2302(b)(9). Significantly, the WPEA provided complainants with IRA appeal rights to the Board for many section 2302(b)(9) claims. *See* Pub. L. No. 112-199, 126 Stat. 1475 (2012) § 101(b). The expansion of these protections and the introduction of IRA appeal rights for certain

[2] In 2017, Congress amended section 2302(b)(9) to include protections for employees who refuse to obey an order that would require that employee to violate a "rule, or regulation" in addition to a law.

section 2302(b)(9) claims, such as those at issue in this case, indicate that Congress intended for complainants, like Tao, to be able to bring IRA appeals for section 2302(b)(9) claims along with and independent from any related section 2302(b)(8) claims.

In more recent years, Congress has continued to expand on the important protections against retaliation in section 2302(b)(9), even in the face of more restrictive decisions by MSPB. For example, in OSC's 2018 Reauthorization Act (enacted as section 1097 of the FY 2018 National Defense Authorization Act, Pub. L. No. 115-91, on December 12, 2017), Congress amended section 2302(b)(9) to cover participation in agency fact-finding investigations, with attendant IRA appeal rights, after the Board concluded that participation in an administrative investigation board (AIB) is not a protected activity under section 2302(b)(9). *See Graves v. Dep't of Veterans Affairs*, 123 M.S.P.R. 434 (2016) (finding that participation in AIB is not protected activity because it does not "constitute an initial step toward taking legal action against the agency for a perceived violation of employment rights").

Through its multiple amendments over the last 40 years, Congress has reaffirmed time and time again that section 2302(b)(9) is intended to provide robust protection against retaliation for federal employees who engage in certain activities. While related to section 2302(b)(8), this protection is separate and

distinct from the protections for employees who make whistleblower disclosures. Congress strengthened the statutory protections by extending to federal employees the same IRA appeal rights for certain 2302(b)(9) claims that are afforded to whistleblowers under section 2302(b)(8). Here, the Board's failure to separately address Tao's allegations of retaliation for engaging in protected activities under section 2302(b)(9) seriously undermines that intention, grievously deprives Tao of her statutory rights, and is not in accordance with law.

C. Tao Clearly Engaged in Protected Activities under Section 2302(b)(9)

It is undisputed that Tao made disclosures to OSC, filed with VA's OAWP, filed with FLRA, and testified in support of two coworkers in EEO and MSPB proceedings. All of these activities have long been held to be protected under section 2302(b)(9). *See* 5 U.S.C. § 2302(b)(9); *see also Viens-Koretko v. Dep't of Veterans Affairs*, 53 M.S.P.R. 160, 163 (1992) ("appellant's act of testifying for another employee at an EEO hearing constitutes an activity that is specifically protected under 5 U.S.C. § 2302(b)(9)(B)"); *Special Counsel v. Brown*, 28 M.S.P.R. 133, 139 (1985) (testimony at MSPB hearing constitutes protected activity under section 2302(b)(9)); *see In Re Frazier*, 1 MSPB 159, 1 M.S.P.R. 163, 192 (1979) (retaliation for participating in EEO proceeding is covered under section 2302(b)(9)).

In analyzing Tao's retaliation allegations, MSPB stated that Tao failed to allege facts to show that her disclosures to OSC, VA's OAWP, FLRA, and in two administrative law proceedings were ones that a person would reasonably believe evidenced a violation of law, rule, or regulation under section 2302(b)(8). However, as explained above, the underlying substance of Tao'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). *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). By failing or refusing to analyze Tao's allegations of retaliation for engaging in protected activities under section 2302(b)(9), the Board committed reversible error.

CONCLUSION

For the foregoing reasons, MSPB's holding that it lacked IRA appeal jurisdiction over Tao's case—without specifically analyzing her allegations of retaliation for engaging in protected activities under section 2302(b)(9)—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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