UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

REDALE BENTON-FLORES, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	)	DOCKET NUMBER DC-1221-13-0522-B-1

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

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus curiae, the United States 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 protects federal employees against retaliation when they make "any disclosure of information" that they reasonably believe evidences a violation of any 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 and safety under 5 U.S.C. § 2302(b)(8).

OSC has a substantial interest in a legal issue presented by this case concerning the application of 5 U.S.C. § 2302(f)(2). Congress recently enacted this provision as part of the Whistleblower Protection Enhancement Act of 2012 (WPEA), a comprehensive effort to bolster the overall protections for federal employee whistleblowers. S. Rep. No. 112-155, at 1 (2012) ("The [WPEA] will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government."). A

stated purpose of the WPEA was to "clarify the disclosures of information protected from prohibited personnel practices." WPEA, Pub. L. 112-199, 126 Stat. 1465 (2012). Among the clarifications that Congress included was section 2302(f)(2), which provides that a disclosure is not excluded from protection simply because an employee makes it during the "normal course of duties." WPEA, Pub. L. 112-199 sec. 101(b)(2)(C), § 2302(f)(2), 126 Stat. 1465, 1466. However, section 2302(f)(2) also places an additional burden on an employee to demonstrate that a personnel action was taken "in reprisal for" a disclosure that was made during the normal course of duties and not just "because of" that disclosure. *Id.*

OSC submits this *amicus curiae* brief because it believes Congress intended to limit the additional burden prescribed in section 2302(f)(2) to the narrow context where investigating and reporting wrongdoing is an integral part of a federal employee's everyday job duties. Here, because the appellant's disclosures were not made as part of her regular job duties, but rather pursuant to a general obligation on all agency employees to report wrongdoing, OSC believes the Merit Systems Protection Board (MSPB or Board) should not apply section 2302(f)(2).[1]

STATEMENT OF THE ISSUE

Whether the Board should apply the additional burden in section 2302(f)(2) to a federal employee whose disclosures were made pursuant to a general obligation to report wrongdoing even though making such reports is not a part of the employee's normal job duties.

BACKGROUND AND SUMMARY OF ARGUMENT

In this case, ReDale Benton-Flores was a teacher for the Department of Defense Education Activity (DODEA). *Benton-Flores v. Dep't of Def.*, 121 M.S.P.R. 428, ¶ 2 (2014).

[1] Because OSC does not believe that section 2302(f)(2) applies to the disclosures at issue in this case, OSC does not opine on the proper scope of the additional "in reprisal for" burden. If the MSPB concludes otherwise, then OSC would request an opportunity to submit an *amicus curiae* brief on the appropriate legal standard that should apply to the provision.

From October 2011 until January 2012, she made a number of disclosures to her school's Assistant Principal, including that a staff member endangered students by leaving a razor blade on his desk, that some staff were abusive toward students, and that a staff member engaged in threatening behavior towards her. *Id.*, ¶¶ 7, 9. On June 1, 2012, the Assistant Principal issued a notice of removal to Ms. Benton-Flores that was effective June 15, 2012. *Id.*, ¶ 13.

Ms. Benton-Flores filed a complaint with OSC, challenging her removal as retaliation for the aforementioned disclosures. After OSC closed her case, she filed a timely appeal with the Board. *Id.*, ¶ 2. The MSPB Administrative Judge dismissed the case for lack of jurisdiction because she did not demonstrate exhaustion with OSC on her submitted appeal form. *Id.*, ¶ 3. On petition for review, the Board reversed, finding that Ms. Benton-Flores included OSC's closure letter as part of her case and clearly intended to rely on the substance of her OSC complaint in the appeal, even though she did not describe her OSC allegations on the appeal form. *Id.*, ¶ 6. Accordingly, the Board remanded the case for further action. In its remand order, the Board suggested that Ms. Benton-Flores's "disclosures likely were made within the course of her normal duties" and instructed the Administrative Judge to determine the applicability of section 2302(f)(2) to this case. *Id.*, ¶ 15.

It is OSC's strong belief that section 2302(f)(2) is inapposite to the facts of this case. Well-established precedent holds that a general obligation imposed on employees to report wrongdoing, including risking discipline for failing to do so, does not make such a requirement a part of an employee's normal job duties. Consequently, although Ms. Benton-Flores—along with all DODEA employees—was obligated to report potential child abuse, making such a report was not part of her routine job duties as a teacher at DODEA. She was hired to teach, not to

investigate and report wrongdoing. As such, Ms. Benton-Flores's disclosures regarding student safety do not subject her to the additional burden contemplated under section 2302(f)(2).

The WPEA's purpose and legislative history further support OSC's position. Congress intended section 2302(f)(2) to apply only where investigating and reporting wrongdoing are an essential part of an employee's everyday job duties. Nothing in the legislative history reveals any desire to disturb earlier case law that already protected disclosures, like those at issue in this case, that are made pursuant to a general obligation on employees to report misconduct. Here, imposing an additional burden on Ms. Benton-Flores that she would not have faced before the WPEA undermines the Act's central purpose of strengthening protections for whistleblowers.

ARGUMENT

I. Disclosures made pursuant to a general obligation to report wrongdoing were protected long before enactment of section 2302(f)(2) of the WPEA.

Before the WPEA, the type of disclosure at issue in this case was plainly protected—where an employee incidentally learns of wrongdoing while performing normal job duties and reports it pursuant to a generally applicable regulatory or ethical obligation. *See Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) *superseded by statute*, WPEA, Pub. L. No. 112–199, sec. 101(b)(2)(C), § 2302(f)(2), 126 Stat. 1465, 1465-66 (2012). In *Huffman*, the Federal Circuit distinguished three categories of disclosures that relate to a whistleblower's job and held that only one such category was not protected under the Whistleblower Protection Act (WPA), while the other two, including the type at issue here, were protected. First, the court withheld protection from disclosures that the employer effectively commissioned the employee to make pursuant to assigned investigatory responsibilities and through prescribed reporting channels. *Id.* at 1352. Relying on *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), the *Huffman* court reasoned that protecting such disclosures undermined a supervisor's

basic responsibilities to evaluate the performance of assigned duties and subject "employees to normal, non-retaliatory discipline."[2] *Id.* Thus, under *Huffman*, investigatory positions such as compliance investigators, law enforcement officers, and inspector generals were denied protection for reports of wrongdoing made while performing their core job duties. *Id.*

Second, the *Huffman* court articulated that the aforementioned unprotected disclosures would qualify for protection if "an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels." *Id.* at 1354. Thus, a law enforcement officer who reports a crime to the news media because he or she believes the "normal chain of command is unresponsive" would be protected. *Id.* The theory is that such an employee is not merely performing an assigned task, but rather going "above and beyond the call of duty [to] report infractions of law that are hidden" while putting their job at risk by doing so. *Id.* at 1353.

Finally, and most relevant here, the court identified "the situation in which the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties." *Id.* at 1354. *Huffman* confirmed that such disclosures were protected by the WPA. *Id.* In explaining this third category, the court noted that all federal employees have a regulatory obligation "to disclose waste, fraud, abuse, and corruption to appropriate authorities." *Id.* at 1354, n.6 (citing 5 C.F.R. § 2635.101(b)(11)). A disclosure of this sort was protected by the WPA even though an employee would have otherwise risked discipline for failing to comply with a regulatory obligation to report the wrongdoing. *Id.; see also Watson v. Dep't of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995).

---

[2] In *Willis*, the appellant's job duties included inspecting farms to ensure compliance with Department of Agriculture conservation plans and to file reports of his determinations. 141 F.3d at 1141. The appellant alleged that his disclosures that certain farms were noncompliant were protected. *Id.* at 1143. The Federal Circuit rejected the assertion that these were protected disclosures because "[d]etermining whether or not farms were out of compliance was part of his job performance." *Id.* at 1144.

Another pre-WPEA decision by the MSPB reinforces *Huffman*'s recognition that the WPA already protected disclosures made by employees who incidentally learn of wrongdoing while performing their jobs and are generally obligated to report it. In *Tullis v. Department of the Navy*, the appellant was a Financial Management Analyst in charge of travel for his office. 117 M.S.P.R. 236, ¶ 2 (2012). During an Office of Inspector General (IG) investigation, the appellant reported that his command violated travel regulations. *Id.* In the initial decision, the MSPB Administrative Judge held that the disclosures to the IG were unprotected because they were made as part of the employee's normal job duties. *Id.*, ¶ 10. In reversing, the Board explained that, although the appellant "was obligated to cooperate with the IG and report wrongdoing to the same extent as any other employee…he did not occupy a position with any particular investigatory responsibilities…[and that] the appellant's position did not require reporting wrongdoing as one of his regular job duties." *Id.*, ¶ 11. The Board found that the fact that the disclosure "is closely related to the employee's day-to-day responsibilities does not remove the disclosure of that information from protection under section 2302(b)(8)." *Id.* In short, *Tullis* confirms that, under pre-WPEA precedent, the touchstone for whether a disclosure was made in the normal course of duties, and thus unprotected, was whether the employee was specifically tasked with investigating and reporting wrongdoing as a core job function.

Here, Ms. Benton-Flores was a teacher; the agency hired her to teach students. Like all employees of the DODEA, she also had a regulatory obligation to report potential child abuse. DODEA Regulation No. 2050.9. As *Huffman* and *Tullis* make clear, this type of disclosure—premised on a general obligation imposed on all DODEA employees, and not specifically assigned to her as an integral part of her teaching position—was already protected prior to the passage of the WPEA. *See Huffman*, 263 F.3d at 1354, n.6; *Tullis*, 117 M.S.P.R. 236, ¶ 11.

Consequently, OSC concludes that Ms. Benton-Flores's disclosures regarding student safety should not subject her to the additional burden prescribed in section 2302(f)(2). Reaching a contrary result would risk imposing a heightened standard on any disclosure by every federal employee, given that all such employees have a regulatory obligation to disclose government waste, fraud, abuse, and corruption. Surely this cannot be the case.

II. The WPEA's purpose and legislative history confirm that section 2302(f)(2) does not apply to disclosures made pursuant to a general obligation to report wrongdoing.

Section 101 of the WPEA, which includes section 2302(f)(2), by its own terms was intended to clarify the definition of a protected disclosure. The section's very title is "Clarification of Disclosures Covered." WPEA, Pub. L. 112-199, sec. 101, 126 Stat. 1465. Thus, the WPEA effectively clarified that disclosures made during the normal course of duties were already protected under the WPA. *See Day v. Dep't of Homeland Sec.*, 119 M.S.P.R. 589, ¶ 18 (2013) ("The WPEA plainly resolves this ambiguity and explicitly provides that these types of disclosures are covered under the WPA."). Recognizing that purpose, the Board in *Day* held that Section 101 did not substantively change the law. *Id.*, ¶ 22. And as discussed *supra*, the well-established precedent—as articulated in *Huffman* and *Tullis*—already protected disclosures made pursuant to a general obligation to report wrongdoing.

The legislative history of the WPEA makes plain that, to the extent a clarification was required, it was to overturn case law that had erroneously excluded certain disclosures from protection—including disclosures from employees who regularly investigate and report wrongdoing as a core job function. In explaining the addition of section 2302(f)(2), the Senate Report expressly rejected *Willis* [the first *Huffman* category] as wrongly decided and contrary to the WPA. S. Rep. No. 112-155 at 5 ("Section 101 of [the WPEA] overturns several court decisions that narrowed the scope of protected disclosures…In *Willis v. Department of*

Agriculture, the court stated that a disclosure made as part of an employee's normal job duties is not protected. [This] holding[] [is] contrary to congressional intent for the WPA."). Thus, the new provision was intended to correct the erroneous exclusion of disclosures made by employees in investigatory positions.

After rejecting *Willis*, the Senate Report explained that the purpose of the additional "in reprisal for" burden was to balance a supervisor's ability to manage employees who must regularly investigate and report wrongdoing in carrying out their basic job functions while still ensuring those employees are protected from retaliation:

> This extra proof requirement when an employee makes a disclosure in the normal course of duties is intended to facilitate adequate supervision of employees, such as auditors and investigators, ***whose job is to regularly report wrongdoing***. Personnel actions affecting auditors, for example, would ordinarily be based on the auditor's track-record with respect to disclosure of wrongdoing; and therefore a provision forbidding any personnel action taken because of a disclosure of wrongdoing would sweep too broadly.

S. Rep. No. 112-155 at 5 (emphasis added). In short, Congress included section 2302(f)(2) to clarify that *Willis* (and, consequently, *Huffman*) wrongly excluded disclosures made as part of the performance of an investigatory and reporting duty, while also preserving a supervisor's ability to evaluate and manage the performance of those employees who are required to make such disclosures in the carrying out their routine job duties. *Id.*

In this case, Ms. Benton-Flores's disclosures regarding student safety were made pursuant to a general obligation on all DODEA employees to report child abuse. Her teaching position is not the sort of investigatory job identified in *Willis* and *Huffman* that requires such reporting of wrongdoing as part of her normal job duties. And given that Congress intended for section 2302(f)(2) to clarify that disclosures previously excluded by *Willis* and *Huffman* could be protected, subject to the additional "in reprisal for" burden, it would be perverse to impose this

heightened standard on disclosures—like those at issue here—that were recognized as protected long before the WPEA. Indeed, applying section 2302(f)(2) in this case would impose a higher burden on Ms. Benton-Flores than she would have faced prior to the WPEA. Such a result would run counter to the WPEA's purpose to strengthen protection for federal whistleblowers.

CONCLUSION

Based on the foregoing, OSC requests that the Board decline to apply section 2302(f)(2) in this case because Ms. Benton-Flores's disclosures were not made during the normal course of duties, but rather pursuant to a general obligation to report wrongdoing.

Dated: April 12, 2016

Respectfully submitted,

Carolyn N. Lerner
Special Counsel

Louis Lopez
Associate Special Counsel

Elisabeth R. Brown*
Attorney

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
Fax: (202) 653-5151

U.S. Office of Special Counsel*
S.F. Bay Area Field Office
1301 Clay Street, Suite 1220N
Oakland, CA 94612
(510) 637-3464
Fax: (510) 637-3474
Lbrown@osc.gov