UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY SALAZAR, Appellant, v. U.S. DEPARTMENT OF VETERANS AFFAIRS, Agency.	Date: February 12, 2021 Docket Number SF-1221-16-0649-W-7

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

IDENTITY 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) of the Whistleblower Protection Act of 1989, as amended (WPA). Among other responsibilities, OSC investigates and seeks corrective action for whistleblowers who experience unlawful retaliation. *See* 5 U.S.C. §§ 1214, 2302(b)(8)-(9).

This case concerns the evidentiary proof necessary to establish the causation element—i.e., "contributing factor"—in whistleblower retaliation cases filed under the WPA. *See* 5 U.S.C. §§ 1214(b)(4)(B); 1221(e)(1). It also serves as a reminder of the relatively modest threshold required in the statute for an employee to make a *prima facie* showing before the burden shifts to the agency. As the agency charged with reviewing and investigating alleged whistleblower retaliation claims, OSC has a substantial interest in ascertaining the appropriate proof elements needed to assess such claims.

Accordingly, OSC respectfully requests the opportunity to offer its views to the Merit Systems Protection Board (MSPB or Board) on this issue.[1]

STATEMENT OF THE ISSUE

Did MSPB err by relying solely on the knowledge-timing test and ignoring other record evidence of causation to assess the contributing factor element in a whistleblower retaliation claim?

RELEVANT BACKGROUND

The appellant, Anthony Salazar, served as a Motor Vehicle Operator Supervisor for the U.S. Department of Veterans Affairs (VA), Greater Los Angeles Healthcare System's Engineering Service. *See Salazar v. Dep't of Veterans Affairs*, SF-1221-16-0649-W-7, 2020 MSPB LEXIS 2750, *2 (M.S.P.B. July 6, 2020) (*Salazar II*). The VA terminated Salazar's employment effective February 4, 2015. *Id.* at *2-*3. On March 9, 2015, the VA confirmed to Salazar that his enrollment in the Federal Employee Health Benefits program (FEHB) had ended. *Id.* at *4. Relying on this representation, Salazar procured alternative health insurance by April 6, 2015, negating any need for FEHB benefits. *Id.*

Shortly after his removal, Salazar filed his first OSC complaint alleging that the VA terminated him in retaliation for making protected disclosures of illegal activity, fraud, and misuse of government property to VA management. *Id.* at *5, *16. On April 27, 2015, OSC requested that the VA stay Salazar's removal from federal service pending its investigation into Salazar's complaint. *Id.* at *4. The VA agreed to stay Salazar's removal until July 25, 2015. *Id.* at *4-*5. During the stay, the VA placed Salazar on Leave Without Pay and "authorized absence" paid administrative leave. *Id.* at *5.

[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). Congressional intent to allow OSC the opportunity to present its views on these issues applies with equal force in MSPB proceedings. The appellant consents to the filing of this brief, and its filing will not unduly burden the proceedings.

To implement the stay of Salazar's removal, Mary Moore, the VA's Chief of Employee and Labor Relations, cancelled the removal and created a remedy request for the Defense Finance and Accounting Service (DFAS) to process the accounting.[2] *Id.* at *3, *5. The VA's remedy request failed to note Salazar's alternative health insurance, failed to instruct DFAS that FEHB premiums should not be deducted from his pay, and failed to include the appropriate form to stop FEHB coverage and refund the premiums. *Id.* at *5, *12. As a result of the VA's failures—all stemming from the stay in Salazar's OSC complaint—he was retroactively reenrolled in FEHB, erroneously charged FEHB premiums (even for periods when he received no salary), and incurred an ongoing debt accruing biweekly for the duration of the stay (FEHB Withholding). *Id.* at *6. By letter dated July 7, 2015, DFAS notified Salazar that, contrary to his wishes, he had been reenrolled in FEHB, and the reenrollment had created a debt that DFAS would deduct from his compensation. *Id.* at *7-*8.

After OSC closed its investigation of Salazar's first OSC complaint, he filed a timely appeal with the Board. *Id.* at *6. An MSPB administrative judge ruled against him. *See Salazar v. Dep't of Veterans Affairs*, SF-1221-15-0660-W-1, 2016 MSPB Lexis 2698 (M.S.P.B. May 4, 2016) (*Salazar I*); *Salazar II*, 2020 MSPB LEXIS 2750, at *16. Salazar filed a timely petition for review with the Board, which is still pending.

On February 3, 2016, Salazar filed his second OSC complaint alleging that the VA refused to properly process his final compensation—including wrongly charging him for the FEHB Withholding pending the stay of his removal—in retaliation for his first OSC complaint and his role in *Salazar I*. *Salazar II*, 2020 MSPB LEXIS 2750, at *11. OSC terminated its investigation of Salazar's second OSC complaint, and Salazar filed a timely appeal with the Board (*Salazar II*). *Id.* at *11-*12. Salazar's second appeal was repeatedly dismissed without prejudice to await a Board decision in *Salazar I*. *Id.* at *17.

[2] DFAS provides financial and accounting services for the VA and other civilian agencies.

On July 6, 2020, an MSPB administrative judge issued an initial decision in *Salazar II*, denying Salazar's request for a refund of the FEHB Withholding. *Id.* at *25-*26. The administrative judge specifically found that Salazar engaged in protected activity when he filed an OSC complaint, and that the FEHB Withholding was a personnel action under the WPA. *Id.* at *19-*20. But the administrative judge nevertheless concluded that Salazar's whistleblower retaliation claim failed because he could not establish that his OSC complaint was a contributing factor to the erroneous FEHB Withholding *solely because* DFAS officials had no actual or constructive knowledge of his protected activity. *Id.* at *23-*25 (emphasis added). Salazar filed a timely petition for review with the Board.

ARGUMENT

While the knowledge-timing test is a familiar method used to show causation in whistleblower retaliation cases, actual or constructive knowledge is not required under the statute. Preponderant evidence linking an employee's protected activity to the personnel action at issue is sufficient to prove the contributing factor element in such cases. Notably, the WPA and its legislative history confirm that a showing of knowledge, motive, or even negligence on the agency's part is not necessary. Rather, the statute and its broad remedial purpose—along with well-established and common-sense precedent—show that adjudicators can and should consider all record evidence of causation in assessing whether an employee's protected activity played any role in the resulting personnel action. Failing to do so not only contradicts these deep-rooted canons and principles, but also harms whistleblowers by undermining their ability to meet the relatively modest burden in their retaliation claims.

In the instant case, Salazar filed a whistleblower retaliation complaint with OSC. After finding reasonable grounds to believe Salazar's allegations, OSC requested a stay of his removal, to which the VA agreed, triggering the erroneous FEHB Withholding for which he now seeks a refund.

These facts plainly demonstrate a causal link between Salazar's OSC complaint and the FEHB Withholding. Nothing more is required to shift the burden to the VA. By relying solely on the knowledge-timing test and ignoring this record evidence of causation, the MSPB administrative judge erred.

I. BECAUSE THE WPA ALLOWS FOR BROAD CONSIDERATION OF ALL RECORD EVIDENCE TO PROVE CAUSATION IN WHISTLEBLOWER RETALIATION CASES, THE MSPB ADMINISTRATIVE JUDGE ERRED IN MAKING KNOWLEDGE A SPECIFIC REQUIREMENT TO ESTABLISH THAT AN EMPLOYEE'S PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN A PERSONNEL ACTION

Requiring that an agency official have actual or constructive knowledge of an employee's protected activity to prove causation is contrary to the plain language of the WPA, its legislative history and broad remedial purpose, and relevant precedent on whistleblower retaliation. Under the statute and its related authorities, any sequence of causally linked events resulting in a personnel action—where one of the connecting factors is the employee's protected activity—can satisfy the contributing factor element. From there, the analysis properly shifts to the agency's rebuttal burden.[3]

A. The WPA's Plain Language Provides that an Employee's Protected Activity May be a Contributing Factor to a Personnel Action, even if Agency Officials Lacked Knowledge of the Employee's Protected Activity

The starting point for interpreting a statute is the statutory text, and "where … the words of the statute are unambiguous, the judicial inquiry is complete." *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (internal quotations omitted); *accord Bostwick v. Dep't of Agric.*, 122 M.S.P.R. 269, 272 (2015). If the statutory language provides a clear answer, the inquiry ends, and the plain meaning of the statute is regarded as conclusive absent a clearly expressed legislative intent to the contrary. *See*

[3] Once an employee shows by a preponderance of the evidence that a protected activity was a contributing factor to a personnel action, the employee establishes a *prima facie* case of whistleblower retaliation. Making this showing, however, does not immediately result in a right to corrective action. MSPB only orders corrective action if the agency also fails to "demonstrate[] by clear and convincing evidence that it would have taken the same personnel action in the absence" of the employee's protected activity. 5 U.S.C. § 1221(e)(2). Because the MSPB administrative judge in *Salazar II* did not reach the agency's burden, OSC limits its analysis to the contributing factor element of the employee's *prima facie* case.

Bostwick, 122 M.S.P.R. at 272; *Hall v. Office of Pers. Mgmt.*, 102 M.S.P.R. 682, 686 (2006). Notably, "remedial statutes should be liberally construed" to effectuate their remedial purpose. *Sec. & Exch. Comm. v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943).

The WPA prohibits agency officials from taking "any personnel action … *because of*" an employee's protected activity. 5 U.S.C. § 2302(b)(9) (emphasis added). To determine whether a personnel action was because of an employee's protected activity, the WPA examines whether the "protected activity … was a *contributing factor* in the personnel action …." 5 U.S.C. § 1221(e)(1) (emphasis added). The Federal Circuit has long held that evidence that the employee's protected activity "*played a role in* … the personnel action" meets the contributing factor element in the WPA. *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (emphasis added).[4] In other words, causation under the WPA is established if the personnel action is taken because of many different factors, and one of them is the employee's protected activity. *Id.* Even a basic dictionary definition confirms the plain meaning of the WPA's statutory text, stating that "contributing factor" means "something that helps cause a result." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/contributing%20factor (accessed Jan. 8, 2021).

Thus, the WPA states that an employee's protected activity is a contributing factor to an agency's personnel action under the statute if the employee's protected activity played a role in or helped cause the personnel action. The text neither requires that agency officials have knowledge of the employee's protected activity or retaliatory animus, nor does it otherwise limit the contributing factor element. As such, evidence sufficient to establish a causal nexus between the employee's protected activity and the agency's personnel action is evidence sufficient to establish a *prima facie* case of whistleblower retaliation.

[4] While *Marano* is a binding and seminal whistleblower retaliation case involving an employee's protected disclosures under 5 U.S.C. § 2302(b)(8), the legal analysis has been properly extended and applied to similar cases involving an employee's protected activities under § 2302(b)(9) of the WPA.

To the extent that the WPA suggests that a knowledge component is part of the contributing factor element, it exists only in the permissive and illustrative knowledge-timing test:

> The employee *may* demonstrate that [a] disclosure or protected activity was a contributing factor … through circumstantial evidence, *such as* evidence that … the official taking the personnel action knew of the disclosure or protected activity; and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

5 U.S.C. § 1221(e)(1) (emphases added). The text considers the knowledge-timing test an example of how one may demonstrate that an employee's protected activity is a contributing factor to an agency's personnel action. Because the knowledge-timing test is but an example, it necessarily follows that Congress knew of or intended for other evidentiary avenues to exist. *See, e.g., Marano*, 2 F.3d at 1143 (finding that WPA protects employees from personnel actions flowing from uncontested, causal sequence of events); *accord Salazar II*, 2020 MSPB LEXIS 2750, at *23 (noting that contributing factor may be proven by methods "including, but not limited to" the knowledge-timing test). And because the knowledge component exists in only one example, it is counter-textual to impose it as a prerequisite on every evidentiary approach to demonstrate causation. Such an interpretation would transform the knowledge-timing test from an example into a minimum requirement, contrary to the WPA's plain text.

The WPA's text contains no basis to create a knowledge requirement, and neither the Board nor the courts should create one in its absence. If Congress intended to impose a particular evidentiary burden for whistleblower retaliation claims in the statute, it "could have made that intent clear by including language to that effect." *Cf. Desert Palace*, 539 U.S. at 99; *Bostwick*, 122 M.S.P.R. at 272.

B. The WPA's Legislative History and Purpose Confirm That Knowledge is Not Required to Establish the Contributing Factor Element in a Whistleblower Retaliation Case

Even if MSPB finds that the WPA's plain language does not provide a clear answer to the question presented in this whistleblower retaliation case, the statute's legislative history confirms that an employee's protected activity may be a contributing factor to an agency's personnel action, even if the agency officials lacked actual or constructive knowledge of the employee's protected activity. This approach aligns with the overarching purpose of the statute, which is to encourage employees to come forward without fear of consequences—whether intended or otherwise—flowing from their protected disclosures or activities.

Prior to the WPA, the Civil Service Reform Act of 1978 (CSRA) defined various prohibited personnel practices. Under the CSRA, Congress prohibited agency officials from "taking or failing to take a personnel action … *as a reprisal for*" an employee's protected disclosure or activity. 95 P.L. 454, § 101(a), 92 Stat. 1111, 1114 (emphasis added); 5 U.S.C. § 2302(b)(8)-(9) (1978). Courts interpreted this causation standard as requiring a showing that the employee's protected disclosure or activity constituted a "significant or predominant" factor in the agency's personnel action. *See, e.g.*, *Clark v. Dep't of the Army*, 997 F.2d 1466, 1469 (Fed. Cir. 1993), *superseded by statute on other grounds as stated in Horton v. Dep't of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995).

The "as a reprisal for" causation standard for whistleblower retaliation cases also served as the statutory basis to require that an agency official have knowledge of the employee's underlying protected disclosure or activity. Courts reasoned that an official could not retaliate for disclosures or activities unknown to that official. Thus, an employee needed to show that the official had actual or constructive knowledge of the disclosures or activities. *See Sullivan v. Dep't of the Army*, 720 F.2d 1266, 1275 (Fed. Cir. 1983) (requiring accused official have knowledge of protected disclosure at issue);

accord Hagmeyer v. Dep't of the Treas., 757 F.2d 1281, 1284 (Fed. Cir. 1985); *Marano*, 2 F.3d at 1142 (noting that constructive knowledge could be used to meet knowledge-timing test).

In 1989, Congress determined that the "as a reprisal for" causation standard imposed an "excessively heavy burden" on employees, resulting in "dismal" protection of whistleblowers. 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989); *see* 135 Cong. Rec. 564 (1989) (remarks of Sen. Levin) (congressional surveys reveal bleak effectiveness of CSRA's encouragement and protection of whistleblowers). To bolster whistleblower protections, Congress jettisoned the "as a reprisal for" standard, replaced it with the less stringent "because of" paradigm, and removed any requirement to demonstrate retaliatory animus. 101 P.L. 12, 103 Stat. 16 (1989). Subsequently, "[r]egardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities …." *Marano*, 2 F.3d at 1141 (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)) (bracketed "simply" in original). "[A] whistleblower need not demonstrate … retaliatory motive on the part of the employee taking the alleged prohibited personnel action … to establish that [her] disclosure was a contributing factor to the personnel action." *Id.* at 1141; *accord Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998) (bracketed "her" in original).

To further explain the less onerous "because of" causation standard for whistleblower retaliation cases, Congress created the contributing factor element in the WPA. Congress defined a contributing factor as follows:

> The words "a contributing factor" … mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20); *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 682 (Fed. Cir. 1992), *superseded by statute on other grounds*, WPEA, 112 P.L. 199, 126 Stat. 1465 (2012). Notably, the contributing factor element encompasses all detrimental personnel actions resulting from an employee's protected disclosure or activity, in line with the congressional and policy goals of the WPA.

Citing the WPA, the Federal Circuit agreed, stating: "As long as employees fear being subjected to adverse actions for having disclosed improper governmental practice, an obvious disincentive exists to discourage such disclosures [or activities]." *Marano*, 2 F.3d at 1142, *citing* WPA, § 2, 103 Stat. 16, 5 U.S.C. § 1201, note. Thus, "'any' weight given to the protected disclosure [or activity], either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Id.* at 1140. For example, if an employee engages in protected activity such as filing an OSC complaint, and suffers a personnel action by agency officials in connection with the probe of that OSC complaint, the contributing factor element is met. In other words, even though there is no retaliatory motive and other factors may have come into play, the employee's protected activity nevertheless played a role or helped cause the personnel action. Under this analysis, it is irrelevant whether the agency officials had actual or constructive knowledge of the employee's protected activity. *Cf. Marano*, 2 F.3d at 1137.

Finally, the legislative history surrounding the knowledge-timing test itself confirms that knowledge is not required to prove causation in whistleblower retaliation cases. Even after the WPA lowered the causation standard to strengthen whistleblower protections in 1989, courts continued to erect barriers. *See, e.g., Horton*, 66 F.3d at 284. So in 1994, Congress stepped in again and codified the knowledge-timing test to overrule countervailing case law limiting whistleblower protections and clarify that such circumstantial evidence may be used to satisfy the contributing factor element. It would be perverse, and conflict with Congress's remedial intent, to wield the knowledge component

of this test now to limit all other available methods of demonstrating causation in whistleblower retaliation cases.

II. THE MSPB ADMINISTRATIVE JUDGE FAILED TO FULLY ANALYZE WHETHER THE RECORD EVIDENCE—BEYOND THE KNOWLEDGE-TIMING TEST—SHOWED THAT SALAZAR'S PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR TO THE FEHB WITHHOLDING IN THIS CASE

The initial decision prematurely held that Salazar failed to make a *prima facie* case of whistleblower retaliation because he could not show that his protected activity was a contributing factor to the personnel action. The *Marano* case is instructive.

In *Marano*, the issue before the court was whether the employee's protected disclosure was a contributing factor in his involuntary reassignment. *See* 2 F.3d at 1138. Marano, an investigator, had submitted a memorandum alleging that his office's supervisory agents engaged in misconduct. *Id.* The memorandum prompted an investigation, which produced an investigative report that convinced the agency to do a "clean sweep" of the office, including reassigning Marano, despite no wrongdoing on Marano's part. *Id.* at 1138-39. The Federal Circuit found, on its own, that the "uncontested sequence of events demonstrates that the initial, protected disclosure, 'in connection with' the investigative report, satisfies the 'contributing factor' requirement" of the WPA. *Id.* at 1143. The court's holding did not depend on an agency official's knowledge or motive. Rather, the court focused its analysis on the "whistleblower who has done no wrong" and the "tension … when the government's corrective action would ensnare the whistleblower allegedly for reasons independent of the simple fact that the employee was the initial source of the information." *Id.* at 1142.

Here, the administrative judge found that Salazar failed to meet the knowledge-timing test because agency officials lacked actual or constructive knowledge of Salazar's protected activity. The administrative judge then ended the analysis, functionally finding that lack of knowledge is a complete bar to establishing the contributing factor element in a whistleblower retaliation case. Like in *Marano*, though, the administrative judge still needs to consider whether there is other record

evidence that could causally link Salazar's protected activity to the personnel action. The facts clearly support such a connection. Salazar's protected activity—filing an OSC complaint—caused OSC to request a stay of his removal, which the VA agreed to, triggering a pay request and the erroneous FEHB Withholding by DFAS. The initial decision, however, fails to analyze this causal sequence of events or the fact that Salazar is simply getting caught up in the agency's failures related to effectuating the valid, agreed-upon stay in his OSC complaint. As the court held in *Marano*, "[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action." *Marano*, 2 F.3d at 1143. Without this type of analysis, the initial decision is materially incomplete.

CONCLUSION

Based on the foregoing, OSC requests that the Board reverse and remand this case to the administrative judge for further adjudication and application of the correct legal standard for the contributing factor element of Salazar's whistleblower retaliation claim.

Respectfully submitted,

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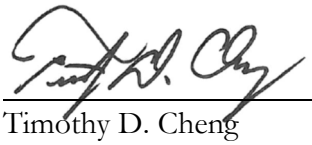

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