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OSC Amicus Briefs Argue Against Additional Burden in Whistleblower Cases

FOR IMMEDIATE RELEASE

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The U.S. Office of Special Counsel (OSC) submitted amicus curiae (“friend of the court”) briefs in two whistleblower retaliation cases arguing that applying a heightened evidentiary burden on those federal employees runs contrary to Congress’s intent in passing the Whistleblower Protection Enhancement Act of 2012 (WPEA) and well-established precedent.

The first case, *John A. Acha v. Department of Agriculture*, involves a Forest Service purchasing agent who disclosed to his supervisor and the agency Inspector General alleged violations of federal acquisition rules. Within months of his disclosures to his supervisor, Mr. Acha was terminated. He appealed the Merit Systems Protection Board’s (MSPB) ruling to the U.S. Court of Appeals for the Tenth Circuit. OSC filed its [brief](#) in this case on April 7, 2016. The second case, *ReDale Benton-Flores v. Department of Defense*, concerns a federal teacher who reported the potential mistreatment of students, among other allegations. After she made several of these student-safety related disclosures to her school’s assistant principal, the Department of Defense fired her. An administrative judge is hearing the case after the MSPB [remanded](#) it. OSC filed its [brief](#) in this case on April 12, 2016.

In both cases, OSC addresses the question of whether the employees’ disclosures were made within the “normal course of duties.” If so, an additional evidentiary burden is applied under 5 U.S.C. § 2302(f)(2) of the WPEA. Historically, [according](#) to OSC, “the touchstone for whether a disclosure was made in the ‘normal course of duties’ was whether the employee was specifically tasked with regularly investigating and reporting wrongdoing as an integral function of his or her job.” Case law has held that general obligations to report wrongdoing or ensure compliance are not sufficient to meet the “normal course of duties” standard.

Mr. Acha was hired to purchase goods and services, and Ms. Benton-Flores was hired to teach students; neither was employed to investigate and report wrongdoing as a core job responsibility. As such, neither employee should be subject to the higher proof standard under section 2302(f)(2).

According to the Senate [report](#) on the WPEA, the purpose of the additional burden was to preserve a supervisor’s ability to manage investigatory employees in carrying out their basic job functions, but still ensure those employees are protected from retaliation. In its brief in *Acha*, OSC argues that “the legislative history of the WPEA makes plain that” section 2302(f)(2) was intended “to overturn case law that had erroneously excluded from protection a narrow category of disclosures from federal employees who regularly investigate and report wrongdoing as principal job functions.” In its brief in *Benton-Flores*, OSC continues “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.” Applying section 2302(f)(2) in these cases would inflict a substantially higher burden on many employees than they would have faced before the enactment of the WPEA. “This result runs directly counter to Congress’s intent in passing the WPEA’s enhanced protections for federal whistleblowers,” adds OSC in *Acha*.

“To add unnecessary burdens to a whistleblower retaliation case would considerably undermine the significant reforms achieved in the WPEA, which were intended to bolster, not weaken, whistleblower protections,” stated Special Counsel Carolyn Lerner.

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC’s primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.