No. 15-9581

In the United States Court of Appeals for the Tenth Circuit

JOHN A. ACHA,
Petitioner-Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Respondent-Appellee.

ON APPEAL FROM THE MERIT SYSTEMS PROTECTION BOARD,
NO. DE-1221-13-0197-W-2,
ADMINISTRATIVE LAW JUDGE GLEN D. WILLIAMS

BRIEF ON BEHALF OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT AND IN FAVOR OF REVERSAL

Respectfully submitted,

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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) of the Whistleblower Protection Act of 1989 (WPA). In particular, OSC is responsible for protecting federal employees against whistleblower 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).

In a comprehensive effort to amend the WPA and bolster overall protections for federal whistleblowers, Congress recently enacted the Whistleblower Protection Enhancement Act of 2012 (WPEA). *See* WPEA, Pub. L. No. 112-199, 126 Stat. 1465 (2012); 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. No. 112-199, 126 Stat. 1465. Among the clarifications that Congress included was 5 U.S.C.

§ 2302(f)(2), which provides that a disclosure is not excluded from protection simply because a particular employee makes it during the "normal course of duties." WPEA, Pub. L. No. 112-199 sec. 101(b)(2)(C), § 2302(f)(2), 126 Stat. 1465, 1466. Rather, section 2302(f)(2) places an additional burden on that 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. 5 U.S.C. § 2302(f)(2);[1] 5 U.S.C. § 2302(b)(8).[2]

OSC has a substantial interest in a legal issue concerning the application of section 2302(f)(2) in this case. OSC files this *amicus curiae* brief because it believes that Congress intended for the additional "normal course of duties" burden prescribed in section 2302(f)(2) to apply only to a subset of cases where courts have found that investigating and reporting wrongdoing is an integral part of a

[1] Section 2302(f)(2) provides that, "[i]f a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee *in reprisal for* the disclosure." 5 U.S.C. § 2302(f)(2) (emphasis added).

[2] Section 2302(b)(8) prohibits any employee with the authority to take, direct others to take, recommend, or approve any personnel action from taking, failing to take, or threatening to take or fail to take, any personnel action *because of* any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes evidences, among other things, a violation of any law, rule, or regulation, or gross mismanagement or gross waste of funds. 5 U.S.C. § 2302(b)(8) (emphasis added).

federal employee's every day job duties. Because the appellant's position in this case did not require investigating and reporting wrongdoing as a principal job function, the result reached by the Merit Systems Protection Board (MSPB or Board) is erroneous and should be reversed. OSC takes no stance on any other issues in this case.

AUTHORITY TO FILE

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) … [and] is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) … and the impact court decisions would have on the enforcement of such provision[] of law." 5 U.S.C. § 1212(h). OSC files this brief as a government entity. *See* Fed. R. App. P. 29(a). In addition, both parties consented to the filing of this brief. *Id.*

STATEMENT OF THE ISSUE

Whether the Board erred in applying the additional "normal course of duties" burden in section 2302(f)(2) to a disclosure made by a federal employee whose core job functions did not require investigating and reporting wrongdoing.

STATEMENT OF FACTS

John A. Acha was a probationary Purchasing Agent for the U.S. Forest Service's White River National Forest in Glenwood Springs, Colorado. *Acha v. Dep't of Agric.*, No. DE-1221-13-0197-W-2, 2015 WL 5047793, 2 (MSPB Aug.

20, 2015) (Initial Decision). In this position, Mr. Acha was responsible for purchasing goods and services for the agency. *July 11, 2014 Initial Decision Hearing Transcript*, at 13-15 (Transcript). On January 10, 2012, Mr. Acha told his first level supervisor that an agency employee made an unauthorized commitment of personal funds in relation to the rental of an apartment for a temporary employee. Initial Decision at 2, 5. On April 3, 2012, Mr. Acha sent an email to the agency's Inspector General (IG) alleging that the Forest Service District Ranger had authorized payment to a corporation whose primary business representative was an agency employee. *Id.* at 2. The email also disclosed the unauthorized commitment of personal funds connected to the apartment rental. *Id.* On May 1, 2012, the Acquisition Management Director issued a notice of termination, effective that same day, to Mr. Acha. *Id.* at 3.

Mr. Acha filed a complaint with OSC, challenging his discharge as retaliation for the aforementioned disclosures. *Id.* After receiving a closure letter from OSC, Mr. Acha filed an appeal with the MSPB. *Id.* The MSPB Administrative Judge (AJ) denied Mr. Acha's request for corrective action, finding: (1) that the January 2012 disclosure was not a protected disclosure; and (2) that the officials involved in Mr. Acha's termination were not aware of his April 2012 email to the IG before they issued the termination letter, and thus that the email could not have been a "contributing factor" in the agency's decision to

terminate him.[3] *Id.* at 14, 17. As to the January 2012 disclosure—the only disclosure at issue here—the AJ concluded that the disclosure was made in the "normal course of duties" and, consequently, that section 2302(f)(2) applied. *Id.* at 7 (citing *Benton-Flores v. Dep't of Def.*, 121 M.S.P.R. 428, ¶ 15 (2014)) ("when an appellant has made a protected disclosure in the normal course of [his] duties, [section 2302(f)(2)] now requires [him] to prove that the personnel action taken was in retaliation for the disclosure").[4] The AJ then held that given the strength of the agency's evidence supporting its termination decision and weak evidence of retaliatory motive, Mr. Acha failed to meet the heightened burden. *Id.* at 14.

[3] To prevail on a claim of whistleblower retaliation before the Board, an individual must prove by preponderant evidence that he or she made a protected disclosure under section 2302(b)(8) and that the disclosure was a contributing factor in the personnel action at issue. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). If he or she does so, the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *See id.* The individual may establish that the disclosure was a contributing factor with circumstantial evidence, such as evidence that the official knew of the disclosure and that the personnel action occurred within a time period such that a reasonable person could conclude that the disclosure was a contributing factor. *See Carey v. Dep't of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 11 (2003) (citing 5 U.S.C. § 1221(e)(1)).

[4] In the cited *Benton-Flores* decision, the Board remanded the case and noted that the AJ should consider whether to apply section 2302(f)(2) to a disclosure made by a teacher at the Department of Defense Dependents School. 121 M.S.P.R. ¶ 15. OSC intends to file an *amicus curiae* brief in that case arguing that the additional "normal course of duties" burden should not apply to the teacher's disclosure. The case is still pending before the AJ.

ARGUMENT

I. Disclosures from federal employees whose core job functions do not require investigating and reporting wrongdoing—like Mr. Acha—were historically not considered made in the "normal course of duties" and, thus, were protected under the WPA.

Section 2302(f)(2) has no applicability in this case. Prior to the enactment of the WPEA, 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. In a series of pre-WPEA cases, the Federal Circuit held that disclosures made by such employees did not constitute protected whistleblowing under section 2302(b)(8) of the WPA. *See Willis v. Dep't of Agric.*, 141 F.3d 1139 (Fed. Cir. 1998); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341 (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.

In *Huffman*, the Federal Circuit clarified that the only category of disclosures made in the "normal course of duties" and not entitled to protection under the WPA were those that the employer effectively commissioned an employee to make pursuant to regular investigatory responsibilities and through prescribed reporting channels. 263 F.3d at 1352. The court provided two exemplars: "a law enforcement officer whose duties include the investigation of crime … and reporting the results of an assigned investigation to his immediate

supervisor" (the "quintessential example," according to the *Huffman* court); and employees of an IG's office. *Id.* The court reasoned that extending protection to these types of investigatory positions would undermine the WPA's recognition that a supervisor's basic responsibilities to evaluate performance and to subject employees to normal, non-retaliatory discipline should not be thwarted. *Id.* (citing S. Rep. No. 100-413, at 15 (1988)) ("The Committee does not intend that employees who are poor performers escape sanction by manufacturing a claim of whistleblowing.").

In *Tullis v. Department of the Navy*, 117 M.S.P.R. 236 (2012), another pre-WPEA decision, the Board reinforced the narrowness of the *Huffman* "normal course of duties" category of disclosures. The appellant in *Tullis* was a Financial Management Analyst in charge of travel for his office. *Id.* ¶ 2. Like Mr. Acha in this case, the appellant first questioned, through his management, the travel practices of his command as being in violation of the agency's travel regulations. *Id.* The appellant then reported to the IG that his command violated the travel regulations. *Id.* In his initial decision, the MSPB AJ 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, unless the employee is charged with regularly investigating and reporting wrongdoing as a principal job function, the disclosure is not deemed made in the "normal course of duties."

Here, Mr. Acha was a Purchasing Agent whose very title denotes that his primary job function was to purchase goods and services for the agency. *See also* Transcript at 13-15. Though Mr. Acha was trained to ensure that the agency's purchases complied with relevant laws and regulations, his January 2012 disclosure was not one made pursuant to any core job requirement to regularly investigate and report wrongdoing. As *Tullis* makes clear, a disclosure made outside of Mr. Acha's every day purchasing responsibilities, and as part of a position "without any particular investigatory responsibilities" and which "did not require reporting wrongdoing as one of his regular job duties" was already protected prior to the passage of the WPEA. *Tullis*, 117 M.S.P.R. ¶ 11. And just as in *Tullis*, the fact that Mr. Acha's disclosure regarding an unauthorized commitment of funds for a rental property was related to his daily responsibilities

as a Purchasing Agent does not remove the disclosure from protection under section 2302(b)(8). *Id.*

Had the AJ applied the appropriate "contributing factor" test in this case, Mr. Acha would need only prove by preponderant evidence that his disclosure was a contributing factor in his termination. *See Whitmore*, 680 F.3d at 1364. The burden would then shift to the agency to establish by clear and convincing evidence that it would have terminated him in the absence of the disclosure. *See id.* Under this correct standard, Mr. Acha could easily make his initial showing through circumstantial evidence that the agency knew about his disclosure and then terminated him shortly thereafter. *See Carey*, 93 M.S.P.R. ¶ 11. But perhaps most important, under this standard, Mr. Acha would not need to prove retaliatory motive. Unfortunately, the contrary result reached by the AJ risks imposing the additional, more onerous "normal course of duties" burden in section 2302(f)(2) any time a federal employee makes a disclosure to a supervisor or other entity that is at all related to his or her day-to-day responsibilities: a doctor reporting patient care abuses; a facilities operator disclosing dangerous maintenance practices; or an information technology specialist reporting a manager's unauthorized use of a government computer. Surely this cannot be the case.

II. The WPEA's purpose and legislative history confirm that the additional "normal course of duties" burden in section 2302(f)(2) applies only to disclosures made by federal employees whose core job functions require investigating and reporting wrongdoing.

Section 101 of the WPEA, which includes section 2302(f)(2), was intended to clarify the definition of a protected disclosure; the very title of section 101 is "Clarification of Disclosures Covered." WPEA, Pub. L. No. 112-199, sec. 101, 126 Stat. 1465. Recognizing that purpose, the MSPB in *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶ 22 (2013), held that section 101 did not effect a substantive change in the law, but rather clarified the definition of a protected disclosure. Section 2302(f)(2) was included specifically to make clear that disclosures made during the "normal course of duties" should have been entitled to protection under the WPA. *Id.* ¶ 18 ("The WPEA plainly resolves this ambiguity and explicitly provides that these types of disclosures are covered under the WPA.").

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 from protection a narrow category of disclosures from federal employees who regularly investigate and report wrongdoing as principal job functions. In explaining the addition of section 2302(f)(2), the Senate Report expressly rejected cases such as *Willis* and *Huffman* 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 … [and] 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 only to correct the erroneous exclusion of disclosures made by employees in investigatory positions.

After rejecting *Huffman* and the other pre-WPEA cases that excluded from protection disclosures made in the normal course of duties, the Senate Report explained that the purpose of the additional "in reprisal for" language was to balance management's ability to supervise and evaluate 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.

Id. (emphasis added). Thus, Congress added the language "in reprisal for the disclosures" simply to ensure that, for those employees who must regularly investigate and report wrongdoing as a part of their job, whistleblower claims are only actionable when the disclosures provoke a retaliatory response. *Id.*

In this case, Mr. Acha's January 2012 disclosure of an unauthorized commitment of funds regarding a rental property was not made in the "normal course of duties" in the sense contemplated by *Huffman*, or as intended by Congress when it included section 2302(f)(2) in the WPEA. Mr. Acha's job as a Purchasing Agent did not resemble *Huffman's* "quintessential example" of the investigating law enforcement officer or the IG employee. *Huffman*, 263 F.3d at 1352. Neither was Mr. Acha an auditor or an investigator. And given that the purpose of section 2302(f)(2) was to clarify that disclosures previously excluded by *Huffman* and other pre-WPEA cases could be protected, subject to the additional "in reprisal for" language, it would be perverse to impose this heightened standard on disclosures—like the one at issue here—that were already entitled to full protection prior to the WPEA. Indeed, applying section 2302(f)(2) in this case would inflict a substantially higher burden on Mr. Acha than he 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.

Finally, none of Congress's concerns about protecting management's ability to impose non-retaliatory discipline attends to the facts of this case. Management could have continued to evaluate and, if appropriate, discipline Mr. Acha during

his probationary period based on the performance of his core purchasing job duties without running afoul of the WPEA.

CONCLUSION

Based on the foregoing, OSC requests that the Court find that the Board erred in applying section 2302(f)(2) to the disclosure in this case. Mr. Acha's disclosure was not made during the "normal course of duties" and thus the MSPB's decision should be reversed and remanded back to the Board for it to apply the "contributing factor" test applicable to this case.

Dated: April 7, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection, version 12.1.6, last updated on April 5, 2016, and according to the program are free of viruses.

Dated: April 7, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

In accordance with Tenth Circuit Rules and Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that, according to the word count provided in Microsoft Word version 14, the foregoing brief contains 3,149 words from the Identity and Interest section through the Conclusion. The text of the brief is composed in 14-point Times New Roman typeface, which is a proportionally spaced typeface.

Dated: April 7, 2016

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CERTIFICATE OF SERVICE

I certify that on April 7, 2016, I electronically filed a copy of the foregoing document using the CM/ECF system, and that a true and correct copy of such filing was served by electronic filing or by email on the following counsel of record at the listed email addresses:

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