UNITED STATES OF AMERICA
MERIT SERVICE PROTECTION BOARD

MARY REESE
Appellant,

v. **Docket No. DC-1221-21-0203-W-1**

DEPARTMENT OF THE NAVY,
Agency.

BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

The American Federation of Government Employees, AFL-CIO, ("AFGE") submits this amicus curiae brief pursuant to the notice published by the United States Merit Systems Protection Board ("Board") in the Federal Register on April 19, 2024. 89 Fed. Reg. 28816.

The Board's notice sought briefing from amici curiae on three issues. First, whether an employee's informal complaints of a climate of sexual harassment made to her supervisors and others (but not through the equal employment opportunity process) on behalf of herself and other employees might constitute "the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation" so as to be covered by 5 U.S.C. § 2302(b)(9)(A), and thus precluding coverage under section 2302(b)(9)(C).

Second, the Board sought briefing on the question of whether activity that falls within the protections of Title VII of the Civil Rights Act of 1964 may also be protected by section 2302(b)(9)(C). Third, the Board asked whether the language of section 2302(b)(9)(C), "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law," encompasses (1) an informal discussion with

someone from the kind of agency component that might conduct investigations or (2) a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component within an agency.

With respect to the first issue, the Board should find that § 2302(b)(9)(A) and § 2302(b)(9)(C) are not mutually exclusive. Conduct protected by § 2302(b)(9)(C) may also be protected by § 2302(b)(9)(A) if, in addition to entailing cooperation with or disclosure to an IG or similar agency component or the special counsel, an employee's conduct also constitutes "the exercise of any appeal, complaint, or grievance right granted by law, rule, or regulation[.]" Nothing in the statute dictates otherwise.

In regard to the second issue, AFGE submits that the Board should find that activity which falls within the protections of Title VII may also be protected by § 2302(b)(9)(C) because § 2302(b)(9)(C) protects against any disclosures to investigative components, distinguishing it from § 2302(b)(8), which protects against disclosures related solely to whistleblowing.

Regarding the third question raised by the Board, AFGE submits that the Board should find that the language of § 2302(b)(9)(C), "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law," encompasses both (1) an informal discussion with someone from the kind of agency component that might conduct investigations and (2) a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component within an agency, in part because such coverage is consistent with the purpose of the statute. The purpose of section 2302(b) is to protect federal employees. Any interpretation should, consequently, be in favor of expanding employee protection and not restricting it.

I. BACKGROUND

A. Case under Review

In *Mary Reese v. Department of the Navy*, the Administrative Judge found that Reese proved by preponderance of the evidence that she engaged in protected activity pursuant to § 2302(b)(9)(C) by filing a complaint with the Agency's Office of the Inspector General ("OIG"), advising her supervisors that she was going to raise issues of sexual harassment with OIG, and meeting with OIG. *Reese, Mary v. Department of the Navy*, No. DC-1221-21-0203-W-1, 2022 WL 1448505 (May 6, 2022). The Judge also found that this protected activity was a contributing factor in her termination by the Department of the Navy (the "Agency"). *Id.* However, the Judge also found that the Agency proved by clear and convincing evidence that it would have terminated Reese even in the absence of her protected activity. *Id.*

B. Statutory Scheme

Section 2302 of Title 5 of the United States Code covers "Prohibited personnel practices" for government organizations and employees, and § 2302(b)(9) prohibits taking, failing to take, or threatening to take or fail to take, personnel action against an employee for certain types of protected activities. 5 U.S.C. § 2302(9). Subsection (A) of § 2302(b)(9) prohibits action against an employee because of the employee's exercise of any appeal, complaint, or grievance right. *Id.* Subsection (C) of § 2302(b)(9) prohibits action against an employee because of cooperation with or disclosures to the Inspector General or any other component responsible for internal investigation or review of an agency or the Special Counsel. *Id.*

II. ARGUMENT

A. An employee's informal complaints of sexual harassment made to their supervisors and others, but not through the EEO process, on behalf of herself and other employees might constitute "the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation" so as to be covered by § 2302(b)(9)(A), but this does not preclude coverage under § 2302(b)(9)(C)

When an employee makes an informal complaint of sexual harassment to their supervisor, even when they do not follow the Equal Employment Opportunity process, the complaint may still constitute the exercise of an appeal, complaint, or grievance right granted by law, rule or regulation, and is therefore covered by § 2302(b)(9)(A) but this does not preclude the activity from coverage under § 2302(b)(9)(C).

In *McCray v. Department of the Army*, the Board found that disclosures made in the course of an administrative grievance were not covered by § 2302(b)(9)(C), as such activity was already protected under § 2302(b)(9)(A) and extending § 2302(b)(9)(C)'s coverage to these disclosures would "effectively subsume" § 2302(b)(9)(A). *McCray v. Department of the Army*, No. AT-1221-20-0134-W-1, 2023 WL 2397403, 7 (M.S.P.B. Mar. 7, 2023). However, this decision was limited to formal administrative grievances, not informal disclosures. *See id.*

The Board, however, has examined some limits for coverage of § 2302(b)(9)(A). For example, in *Marcell v. Department of Veterans Affairs*, the Board found that an Office of Workers' Compensation Program ("OWCP") claim and request for leave under the Family and Medical Leave Act ("FMLA") were not protected activities that prohibit personnel action under § 2302(b)(9)(A) because neither an OWCP claim nor an FMLA leave request "constitute an initial step toward taking legal action against an employer for the perceived violation of an employee's rights." *Marcell v. Department of Veterans Affairs*, No. DE-0752-13-1551-I-1, 2022 WL 4397581, 3 (M.S.P.B. Sept. 23, 2022). This logic can be extended to informal disclosures of

sexual harassment, as such informal disclosures likewise do not "constitute an initial step toward taking legal action against an employer."

Further, nothing in the texts of § 2302(b)(9)(A) or § 2302(b)(9)(C) precludes coverage by the other. *See* § 2302(b)(9). § 2302(b)(9)(A) concerns protections for an employee exercising a formal grievance procedure, while § 2302(b)(9)(C) concerns disclosures to investigative components, which are not mutually exclusive, and the same incident may give rise to both types of protected activity. *See id.* For example, the exercise of a grievance right protected by § 2302(b)(9)(A) may lead to an investigation that results in a disclosure protected by § 2302(b)(9)(C) or, alternatively, an investigation that results in cooperation protected by § 2302(b)(9)(C) may lead to a formal complaint protected by § 2302(b)(9)(A). There is clearly no statutory requirement that coverage by one precludes coverage by the other.

B. Activity that falls within the protections of Title VII may also be protected by § 2302(b)(9)(C).

Activity that falls within the protections of Title VII may also be protected by § 2302(b)(9)(C). While the Board has found that activity which is protected by Title VII is not protected by § 2302(b)(8), the differences between § 2302(b)(8) and § 2302(b)(9)(C) regarding what activities they protect mean that a distinction is necessary and that § 2302(b)(9)(C) protections should extend to activity that is simultaneously protected by Title VII.

In *Spruill v. Merit Systems Protection Board*, the United States Court of Appeals for the Federal Circuit found that Congress intended subdivisions (8) and (9) of § 2302(b) to differentiate between reprisals based on disclosure of information and those based on exercising a right to complain. *See Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 690 (Fed. Cir. 1992). Specifically, the Federal Circuit found that Congress had crafted the Individual Right of

Action ("IRA") of the Whistleblower Protection Act of 1989 ("WPA") to allegations falling within § 2302(b)(8), not § 2302(b)(9). *See id.* at 690-691. Further, the Federal Circuit found that a complaint to the Equal Opportunity Commission ("EEOC") was did not warrant protections under § 2302(b)(8) because the legislative history of the WPA showed that Congress intended that EEOC complaints were to fall exclusively within § 2302(b)(9)(A), and that extending § 2302(b)(8) protections to EEOC complaints would render § 2302(b)(9)(A) largely irrelevant. *Id.* at 691-692. Additionally, in *Edwards v. Merit Systems Protection Board*, following the logic of *Spruill*, the Federal Circuit upheld a Board decision that informal complaints to an agency's Equal Employment Opportunity ("EEO") Office also are not protected disclosures under § 2302(b)(8) because whether a complaint is formal or informal does not alter the substance of the complaint as an exercise of a Title VII right. *Edwards v. Merit Systems Protection Board*, No. 2022-1967, 2023 WL 4398002, 1-2 (Fed. Cir. July 7, 2023).

However, the differences between § 2302(b)(8) and § 2302(b)(9)(C) warrant a distinction regarding whether activities protected under Title VII are also protected under these provisions, respectively. § 2302(b)(8) deals specifically with protecting whistleblower disclosures, defined as"(i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety", while § 2302(b)(9)(C) protects cooperating with or disclosing information generally to Inspectors General, other components responsible for internal investigation of an agency, or the Special Counsel, whether that disclosure relates to whistleblowing or not. 5 U.S.C. § 2302(b). Further, in *Bartel v FAA*, the Board found that an employee's participation in an agency's internal administrative EEO complaint process constituted the exercise of an "appeal right" within the ambit of § 2302(b)(9), while also finding that such activity was not protected by the

whistleblower protections of § 2302(b)(8) – this highlights the distinction between whistleblowing disclosures under § 2302(b)(8) and protected activity under § 2302(b)(9). *Bartel v. F. A. A.*, 14 M.S.P.R. 24, 33-34 (1982), aff'd as modified, 30 M.S.P.R. 451 (1986). Clearly, while whistleblowing activity protected by Title VII is precluded from being protected by § 2302(b)(8), disclosures to investigative components generally that are protected by Title VII can also fall under the remit of § 2302(b)(9)(C).

C. The language of § 2302(b)(9)(C), "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law," encompasses (1) an informal discussion with someone from the kind of agency component that might conduct investigations or (2) a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component within an agency.

The language of § 2302(b)(9)(C) certainly encompasses an informal discussion with someone from the kind of agency component that might conduct investigations and a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component. As the Board noted in *McCray*, this language is not defined in the statute or in the associated legislative history. *McCray* at 27. Given that Congress intended this statute to expand protections for whistleblowers, the statutes' protections must extend to these types of activities in which a whistleblower may sensibly engage in pursuit of their exposure of illegal, corrupt, or inept activity on the part of a government official.

Regarding an informal discussion with someone from the kind of agency component that might conduct investigations, the language of the statute makes no distinction between formal and informal activity. 5 U.S.C. § 2302(b)(9)(C). The statute merely says "disclosing information" to an agency component that might conduct an investigation, and an informal discussion with someone from that component can certainly disclose the type of information

which the statute is designed to protect. *Id.* Therefore, such an informal discussion is covered by § 2302(b)(9)(C).

With respect to a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component, the statute's language includes the broad term "any other component responsible for internal investigation or review." *Id.* A "fact finder" is an impartial expert that is authorized "to investigate or evaluate the matter presented and file a report establishing the facts in the matter." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/federal-sector/fact-finding (last visited May 20, 2024). Consequentially, a fact finder is part of a "component responsible for internal investigation or review", so a formal interview with a fact finder is covered by § 2302(b)(9)(C).

Overall, both an informal discussion with someone from the kind of agency component that might conduct investigations and a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component are covered under § 2302(b)(9)(C)'s broad protections for disclosures to investigative bodies.

III. CONCLUSION

With respect to the issues raised in the Authority's notice, AFGE respectfully submits that the Board find that, with regards to the first issue, an employee's informal complaints of sexual harassment on behalf of herself and other employees may be covered by § 2302(b)(9)(A), but such coverage does not preclude coverage under § 2302(b)(9)(C). As to the second issue, AFGE submits that the Board find activity that falls within the protections of Title VII may also be protected by § 2302(b)(9)(C), distinguishing it from § 2302(b)(8). Regarding the third issue, AFGE submits that the Board find that the language of § 2302(b)(9)(C) regarding disclosures to investigative actors encompasses both (1) an informal discussion with someone from the kind of

agency component that might conduct investigations and (2) a formal interview with someone who is appointed as a fact finder but is not otherwise part of a formal investigatory office or component within an agency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

***Mary Reese v. Department of the Navy,* Docket No. DC-1221-21-0203-W-1**

I hereby certify and affirm that on this day, May 20, 2024, I caused the amicus curiae brief of the American Federation of Government Employees to be filed with the U.S. Merit Systems Protection Board and to be served on the following:

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