AMICUS BRIEF

In the Merit Systems Protection Board

Mary Reese v. Department of the Navy

MSPB Docket No. DC-1221-21-0203-W-1

TABLE OF AUTHORITIES

CASES

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INTEREST OF AMICUS CURIAE

Martin Akerman, the tenured Chief Data Officer of the National Guard Bureau, submits this amicus brief in support of Mary Reese in her appeal before the Merit Systems Protection Board. Mr. Akerman's interest in this matter is twofold: firstly, as a tenured federal employee who is in the process of navigating similar challenges within the federal system, he brings a personal understanding of the complexities involved in protecting employees' rights under federal law. Secondly, his ongoing involvement in related legal proceedings, including significant cases before the U.S. Courts of Appeals and the MSPB, provides him with a unique perspective on the interpretation and application of laws pertinent to federal employment and whistleblower protections.

Mr. Akerman's legal journey encompasses multiple ongoing litigations and unresolved MSPB proceedings, which are critical to understanding the comprehensive legal context of this amicus brief. His experiences shed light on the administrative and legal hurdles that federal employees often encounter, especially in cases involving whistleblower retaliation and procedural delays.

Notably, his involvement in cases identified with "W" in their case numbers, such as DC-1221-22-0257-W-1 and DC-1221-22-0445-W-1 with the Department of the Army, and DC-1221-22-0459-W-1 with the Department of the Air Force, underscores the complex issues surrounding procedural delays and whistleblower retaliation that many federal employees face. These cases, specifically pending before the MSPB, highlight the critical need for vigilant protection against reprisal and underscore the systemic challenges within the mechanisms intended to safeguard employee rights.

This brief aims to assist the Board by offering insights from Mr. Akerman's experiences and the broader implications of its decisions on the federal workforce. Specifically, it addresses the application of 5 U.S.C. § 2302(b)(9)(C), which involves protections against reprisal for cooperating with or disclosing information to an inspector general or other investigative bodies. Mr. Akerman's cases, including a significant FOIA appeal and challenges regarding his rights under habeas corpus, illustrate the vital need for robust protections that ensure federal employees can report misconduct without fear of unjust retaliation.

QUESTIONS PRESENTED

This brief addresses critical questions under 5 U.S.C. § 2302(b)(9) relating to protections afforded to federal employees against reprisals for whistleblowing and other protected activities. The interpretation of these provisions significantly impacts the federal workforce's ability to report wrongdoing without fear of retaliation.

1. Does an informal complaint regarding a climate of sexual harassment to supervisors constitute "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation," thus falling under the protections of section 2302(b)(9)(A) and precluding coverage under section 2302(b)(9)(C)?

2. Are activities protected under Title VII's antidiscrimination statutes also safeguarded under section 2302(b)(9)(C), despite the specific anti-retaliation provisions of Title VII?

3. Does the language of section 2302(b)(9)(C) regarding cooperation or disclosure of information to an Inspector General or similar agency component extend to informal discussions or formal interviews not explicitly part of a formal investigatory office?

ARGUMENT

I. Informal Complaints of Sexual Harassment are Protected Activities Under 2302(b)(9)(A)

An informal complaint regarding a climate of sexual harassment to supervisors can constitute "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation," thus falling under the protections of section 2302(b)(9)(A). This is because such a complaint can be seen as opposing discriminatory employment practices, which is a protected activity, 1 Fed. Equal Employment Opportunity Practice Guide § 15.02 (2024).

An informal complaint of sexual harassment, while not processed through formal EEO channels, should be recognized as "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation" under 5 U.S.C. § 2302(b)(9)(A). This recognition is crucial to ensure employees are protected when they raise concerns about discriminatory practices, even if not through formal grievance mechanisms. As established in Neal v. Director, D.C. Dep't of Corrections, supervisors are required to document such complaints, signifying their formal recognition and the initiation of a grievance process (Neal, 1995 U.S. Dist. LEXIS 11469).

II. Intersection of Title VII Protections and Section 2302(b)(9)(C)

Activities protected under Title VII's anti-discrimination statutes are also safeguarded under section 2302(b)(9)(c), despite the specific anti-retaliation provisions of Title VII. This is because Title VII protects complainants from harassment based on their sex, regardless of whether the harassment was sexual in nature, 1 Fed. Equal Employment Opportunity Practice Guide § 10.07 (2024). Furthermore, the language of section 2302(b)(9)(c) regarding cooperation or disclosure of information to an inspector general or similar agency component can extend to informal discussions or formal interviews not explicitly part of a formal investigatory office. This is supported by the broad protective intent of the statute, ensuring that employees can engage with any investigatory component of an agency without fear of reprisal Vinh Phan v. HHS, 2023 U.S. App. LEXIS 28936.

The precedent in Spruill v. Merit Systems Protection Board and Edwards v. Department of Labor does not preclude the application of 2302(b)(9)(C) to activities also covered under Title VII, provided these activities involve cooperation or disclosure related to internal investigations or reviews (Spruill, 978 F.2d at 692; Edwards, 2023 WL 4398002).

III. Scope of "Cooperating with or Disclosing Information" Under 2302(b)(9)(C)

The language of section 2302(b)(9)(C) should be interpreted to include both informal discussions and formal interviews as part of protected activities, regardless of their formal status within agency investigatory structures. This interpretation is supported by the broad protective intent of the statute, ensuring that employees can engage with any investigatory component of an agency without fear of reprisal. The 2017 amendment to the statute, adding "or any other component responsible for internal investigation or review," broadens the scope of protected activities to potentially include informal discussions and formal interviews that contribute to an internal investigation or review (Vinh Phan v. HHS, 2023 U.S. App. LEXIS 28936).

CONCLUSION

The questions presented in this brief address critical aspects of 5 U.S.C. § 2302(b)(9), which are vital for safeguarding federal employees against retaliation for engaging in protected activities, including whistleblowing and informal complaints of discrimination. Through a careful examination of the statutory text, relevant case law, and established legal principles, this brief has demonstrated the essential nature of broad interpretations that protect employees' rights to report and oppose unlawful and unethical behaviors without fear of reprisal.

It is clear that informal complaints regarding a climate of sexual harassment should indeed constitute "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." Such recognition is not only consistent with the protective intent of the statute but also essential for a workplace where employees can freely report discrimination and harassment. The case of Neal v. Director, D.C. Dep't of Corrections underscores that even informal complaints must be formally acknowledged and addressed, thus falling under the protections of section 2302(b)(9)(A).

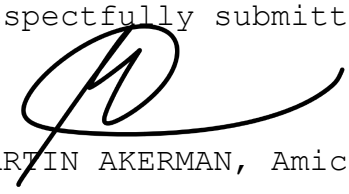
Activities protected under Title VII, including those related to opposing discrimination and harassment, should concurrently be protected under section 2302(b)(9)(C). The precedents set by Spruill v. Merit Systems Protection Board and Edwards v. Department of Labor support the interpretation that section 2302(b)(9)(C)'s protections extend to disclosures and cooperative actions linked to internal investigations, even when these activities also fall under the umbrella of Title VII protections. This dual coverage is crucial to ensure that employees are not left vulnerable in any aspect of their engagement with investigatory processes.

The statutory language, especially following the 2017 amendment, clearly supports a broad interpretation that includes informal discussions and formal interviews within the scope of protected activities under section 2302(b)(9)(C). The ruling in Vinh Phan v. HHS is indicative of a legal understanding that favors expansive employee protections conducive to transparency and accountability in government operations.

In conclusion, this Court should affirm that the protections under 5 U.S.C. § 2302(b)(9) extend comprehensively to include informal complaints of sexual harassment, activities covered under Title VII, and engagements that might not formally be part of an investigatory office but are integral to the investigative process.

Such a ruling would not only align with the legislative intent but also promote a culture of openness and enhanced accountability within the federal service. Upholding these protections is paramount to maintaining the integrity and trustworthiness of the federal workforce, thereby ensuring that all employees have a safe and fair avenue to report misconduct and discrimination.

Respectfully submitted,



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