UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARY REESE,
Appellant,

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

v.

DEPARTMENT OF THE NAVY,
Agency.

Date: May 20, 2024

AMICUS BRIEF OF THE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND
THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

IDENTITIES AND INTERESTS OF THE AMICI

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country focused on empowering workers' rights attorneys. NELA is comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances workers' rights and serves lawyers who advocate for equality and justice in the American workplace, including for federal employees who report waste, fraud, abuse, and other violations of the law. NELA regularly appears as amici in cases of importance to workers and comments on proposed rules, advocating for increased worker protections. NELA members represent federal employees across the United States, and NELA is invested in ensuring that federal employees are protected as Congress intended under the Whistleblower Protection Act (WPA) and other federal statutes.

The Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is a local chapter of NELA. MWELA conducts continuing

legal education programs for its more than 350 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice. Many of MWELA's members represent federal employees before the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel, federal courts, and other tribunals.

Amici have an interest in ensuring that federal employees are provided all the protections that Congress intended to give them in enacting the WPA and then strengthening and expanding its protections. The employees represented by *amici*'s members are understandably fearful of jeopardizing their careers if they disclose information that may embarrass their agencies or place them in a negative light. Unfortunately, all too often those fears materialize after employees make protected disclosures and then feel forced to resign, retire, or search for new employment. Therefore, *amici* are advocating for the Board to allow federal employees all the protections that Congress intended to provide them when they report waste, fraud, abuse, or violations of law, rule, or regulation.

STATEMENT OF THE ISSUES

The Board's Notice of Opportunity to File Amicus Briefs, 89 Fed. Reg. 28,816-28,817 (April 19, 2024), identified the following questions of law posed by the case on appeal:

(1) 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 section 2302(b)(9)(A), and thus precluding coverage under section 2302(b)(9)(C).

(2) Whether activity that falls within the protections of title VII may also be protected by section 2302(b)(9)(C). That is, whether the reasoning of the U.S. Court of Appeals for the Federal Circuit in its decisions holding that disclosures of violations of antidiscrimination laws made in EEO complaints, as well as verbal complaints of discrimination made to supervisors, are excluded from the protections of 5 U.S.C. § 2302(b)(8), extends to 5 U.S.C. § 2302(b)(9)(C).

(3) Whether the language of 5 U.S.C. § 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 Board has recognized that the scope of this statutory language is not defined elsewhere in the statute or in the associated legislative history.

RELEVANT BACKGROUND

In November 2019, the Petitioner filed an Individual Right of Action (IRA) appeal with the Board alleging that the Department of the Navy (Navy or Agency) retaliated against her because she engaged in whistleblowing and protected activities, including, among others, reporting to management her belief that her supervisors failed to follow a Department of Defense policy in the handling of harassment allegations involving her colleagues. On January 27, 2020, Petitioner advised her second line supervisor that she would disclose her concerns to the

Inspector General, and she did so on January 28, 2020. Three days later, the Navy terminated Petitioner during her probationary period.

On May 6, 2022, an Administrative Judge issued an Initial Decision denying Petitioner's request for corrective action. The decision was based, in part, on the AJ's determination that only Petitioner's complaint to the Inspector General was a protected activity. On June 30, 2022, Petitioner filed a Petition for Review with the Board.

ARGUMENT

A. Principles of Statutory Construction Relevant to All Three Legal Issues

The amici's analysis of the three legal issues is grounded on the following principles and understandings:

1. The interpretation of a statute begins with the language of the statute, itself. *Bostwick v. Department of Agriculture*, 2015 M.S.P.B. 21, 122 M.S.P.R. 269, ¶ 8 (2015). If the 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. *Id*.; *Semenov v. Department of Veterans Affairs*, 2023 M.S.P.B. 16, ¶ 16 (2023). A court may not assume, with respect to a "statute's silence" regarding a limitation, that such a limitation must be read into the statute. *Harbison v. Bell*, 556 U.S. 180, 199 (2009) (Thomas, J., concurring in the judgment).

2. The provisions of a statute should be read together to avoid rendering any provision inoperative or superfluous. *McCray v. Department of the Army*, 2023 M.S.P.B. 10, ¶27 (2023).

3. The use of the word "any" in a statutory provision should be given full effect and has an expansive meaning. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see also Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("Read naturally, the word 'any' has an

expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (citation omitted)). "When Congress does not add any language limiting its scope, "any 'must' be read 'as referring to all' of the type to which it refers." *Weed v. Social Security Administration*, 2016 M.S.P.B. 45, 124 M.S.P.R. 71, ¶ 14 (2016) (quoting *Tula-Rubio v. Lynch*, 787 F.3d 288, 293 (5th Cir. 2015) (quoting *Gonzales*, 520 U.S. at 5)).

4. The legislative history of the WPA[1] supports a broad reading of the statute and an intent to strengthen and expand the protections it provides. Since 1989, Congress added the term "any" to various whistleblower protections in 5 U.S.C. § 2302 in order to overrule case law that adopted overly restrictive interpretations of the intended protection.

For example, in *Fiorillo v. Department of Justice*, the U.S. Court of Appeals for Federal Circuit did not consider an employee's disclosures protected because they were motivated by personal reasons. 795 F.2d 1544, 1550 (Fed. Cir. 1986). However. in passing the WPA, Congress rejected this limitation on the protection of disclosures. *See* S. Rep. No. 100-413, at 12-13 (1988). Congress addressed its concerns by amending section 2302(b)(8), subparagraphs (A) and (B), to change the phrase "a disclosure" to "any disclosure." Pub. L. No. 101-12, § 4(a)(3), (5), 103 Stat. 16, 32 (April 10, 1989).

When Congress amended the WPA in 1994, it expressed concerns about what it perceived as the Board's "inability to understand that 'any' means 'any,' and that the "WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct." H.R. Rep. No. 103-769, at 18 (1994).

[1] This brief uses the term WPA as shorthand for whistleblower retaliation protections initially adopted in the Civil Service Reform Act of 1978, as amended by subsequent legislation, including but not limited to the Whistleblower Protection Enhancement Act of 2012 (WPEA).

Then, Congress amended the WPA in the Whistleblower Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465. Its stated purpose in doing so was to "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." S. Rep. 112-155 (2012), at 1. Congress reiterated its "long-held view that the WPA's plain language covers *any* disclosure." *Id*. at 4 (emphasis added). In the WPEA, Congress amended section 2302 to include the term "any" in two places, replacing the term "a violation" to "any violation." *Id*. at 8 ("Moreover, section 101 of the bill underscores the breadth of the WPA's protections by changing the term ''a violation'' to the term ''any violation'' in two places in the WPA.").

5. Before the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018) amended section 2302(b)(9)(C) on December 12, 2017, section 2302(b)(9)(C) protected only covered individuals who cooperated with or disclosed information to an Inspector General or the Office of Special Counsel. The 2017 amendment extends cooperation or disclosure of information to "any other component responsible for internal investigation or review) of an agency." *See* NDAA 2018, Pub. L. No. 115-91, § 1097(c), 131 Stat. 1283, 1618 (2017). The legislative history of NDAA 2018 is silent on the rationale behind the amendment. Therefore, the amendment should be read as having the same purpose that Congress had when it added the term "any" to sections of the statute in the past, that is, to strengthen protections for Federal whistleblowers.

6. It is well established that the WPA is remedial legislation, intended to improve protections for federal employees, and should be construed to effectuate that purpose by being construed liberally. S*ee, e.g.*, *Weed v. Social Security Administration*, 2010 M.S.P.B. 23, 113 M.S.P.R. 221, ¶ 9 (2010) (The definition of "employee" in the WPA should be interpreted to

protect a federal employee who was not an employee of the agency taking the alleged retaliatory action); *Fishbein v. Department of Health and Human Services*, 2006 M.S.P.B. 96, 102 M.S.P.R. 4, ¶ 8 (2006) (Because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 17 (2002) (The term "rule" in section 2302(b)(8), covering disclosures of "any law, rule or regulation," applied to an agency's Procurement Instruction Memorandum 88-35 and its ATF Government Commercial Credit Card Program); *Singleton v. Ohio National Guard*, 77 M.S.P.R. 583, 587 (1998) (the definition of "personnel action" must be interpreted broadly as part of the WPA, a remedial statute).

B. Issue 1 – A Federal Employee's Informal Complaints of a Climate of Sexual Harassment Are Protected by Sections 2302(b)(9)(A) and 2302(b)(9)(C).

1. The WPA allows a federal employee to seek corrective action from the Board for any personnel action, as defined in the Act, that the employee reasonably believes was taken in retaliation for any act of whistleblowing, as defined in section 2302(b)(8) of Title 5, or for any act set forth in section 2302(b)(9)(A)(i), (B), (C), or (D) of Title 5. *Young v. M.S.P.B.*, 961 F.3d 1323, 1329 (Fed. Cir. 2020) (citing 5 U.S.C. § 1221). Section 2302(b)(9)(A)(ii), which is excluded from the list of prohibited personnel practices for which the Board can issue corrective action, covers retaliation for exercising any appeal, complaint, or grievance right other than one seeking to remedy a violation of section 2302(b)(8). Retaliation for filing those excluded complaints is remediable through different mechanisms, and not by an IRA appeal to the Board. *Young*, 961 F.3d at 1329.

2. Section 2302(b)(9)(A)(i) protects an employee or applicant for employment who engages in "the exercise of any appeal, complaint or grievance right granted by any law, rule or regulation" "with regard to remedying a violation of paragraph (8)." Relevant here, the question

is whether a personnel action taken because of an employee's informal complaint to a supervisor about a toxic work environment would be a violation of section 2302(b)(8)(A)(i), which prohibits personnel actions taken in retaliation for "any disclosure of information by an employee or applicant which the employee or applicant reasonably evidences -- (i) any violation of law, rule, or regulation."

It is notable that in section 2302(b)(8(A)(i), the term "any" is used in front of both "disclosure of information" and "violation of law, rule, or regulation." This is a strong indication that both terms should be read inclusively. An employee making an informal complaint that a climate of sexual harassment exists in the workplace would be triggering an agency's anti-harassment rules and regulations. The Board found in *Rusin* that an Agency's internal procurement memorandum and credit card program were "rules" covered by the term "any law, rule, or regulation" in 2302(b)(8)(A)(i). *Rusin*, 92 M.S.P.R. 298, ¶ 17. The Federal Circuit held that violation of the Army's regulations, at Army Reg. 600-20, Personnel-General: Army Command Policy, prohibiting "[i]ntimidating, teasing, name calling, mockery, threats of violence, harassment, [or] taunting," was a violation of law, rule, or regulation. *Smolinski v. M.S.P.B.*, 23 F.4th 1345, 1352 (Fed. Cir. 2022).

Similarly, a disclosure of an environment of sexual harassment in the workplace would be a disclosure of what the employee would reasonably believe to evidence the violation of an agency's anti-harassment rules. An example of what the Board should find to be "any law, rule, or regulation" is the Department of the Navy's anti-harassment rule, SECNAV Instruction

5300.26E – Department of the Navy Policy on Sexual Harassment (May 28, 2020).[2]

The procedures set out in SECNAV Instruction 5300.26E are separate and apart from the Navy's EEO complaint process, which is governed by the EEOC's regulations at 29 C.F.R. Part 1614. *See* Harassment Response Procedures for Commanders and Supervisors of DON Civilians, Section 2.e. ("Civilian employees may be advised of their right to pursue the matter through the federal EEO complaint process by contacting an EEO counselor."); *see generally* EEOC: Promising Practices for Preventing Harassment in the Federal Sector, p. 3 ("EEOC Guidance") ("Under MD-715, federal agency heads and senior leaders must: Ensure the agency has an anti-harassment program that is separate and distinct from the EEO program.").[3]

Section 5.c.5 of SECNAV Instruction 5300.26E requires that "[a]ll reported incidents of sexual harassment must be investigated." These anti-harassment regulations also prohibit retaliation against a person who provides information on an incident of alleged sexual harassment. *See* SECNAV Instruction 5300.26E, *supra* at Section 5.d.1.b.

Therefore, an employee's informal complaint of a climate of sexual harassment made outside of an agency's EEO complaint process would be "with regard to remedying a violation of paragraph (8)." The identical term "any law, rule or regulation" is present both in sections 2302(b)(8)(A)(i) and (b)(9)(A), and thus both should be interpreted to encompass an agency's internal anti-harassment rules. *See Williams v. Department of Defense*, 2023 M.S.P.B. 23, ¶ 11

[2]Available at https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5300.26E.pdf (last checked May 20, 2024)

[3] Available at https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector (last checked May 20, 2024)

(2023) (The same term used in different parts of the WPA should, if possible, be given a consistent meaning throughout the Act).

Less clear, however, is whether an employee making an informal complaint about a climate of sexual harassment that gets investigated under an agency's anti-harassment rules is exercising "any appeal, complaint or grievance right." Under the Board's interpretation of the term in *Von Kelsch v. Department of Labor*, an employee filing a claim under the Federal Employees' Compensation Act (FECA) is not the exercising of "an appeal, complaint or grievance right" because submission of the claim does not constitute "an initial step towards taking legal action against an employer for the perceived violation of an employee's rights." *Von Kelsch v. Department of Labor*, 59 M.S.P.R. 505, 508-509 (1993), *overruled on other grounds by Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 236 n. 9 (1998), *overruled by Ganski v. Department of the Interior*, 85 M.S.P.R. 32 (2000). The Board explained in *Von Kelsch* that in adjudicating a FECA claim, the Office of Workers' Compensation Programs determines whether and how much compensation should be awarded. It is not empowered to grant relief for any underlying personnel practices that may have led to the injury. *Id.* The Board's interpretation in *Von Kelsch* still applies. *See Graves v. Department of Veterans Affairs*, 123 M.S.P.R. 434, ¶ 18 (2016) (finding that nothing in the WPEA altered this interpretation). Applying the *Von Kelsch* definition, the Board found that neither an OWCP claim nor a FMLA leave request constituted protected activity under section 2302(b)(9). *Marcell v. Department of Veterans Affairs*, 2022 M.S.P. B. 33, ¶ 6 (2022).

In contrast, actions that the Board has found to fall within the definition of "an appeal, complaint or grievance right" under section 2302(b)(9)(A) (i) or (ii) include an EEO complaint, a Board appeal, an unfair labor practice complaint, *Graves*, 123 M.S.P.R. 434, ¶ 17, and a formal

administrative grievance. *McCray*, 2023 M.S.P.B. 10, ¶¶ 26-29. An employee's informal (non-EEO) complaint about a climate of sexual harassment more closely resembles an administrative grievance than it does an application for FECA or FMLA benefits. An employee complaining about sexual harassment in the workplace, and then undergoing the agency's anti-harassment process, is not necessarily taking an initial step towards legal action against an employer for the perceived violation of her rights unless that anti-harassment process occurs in conjunction with an EEO complaint. But, that also would be true of administrative grievances under some agencies' administrative grievance procedures.[4] In any event, an employee making a complaint to her supervisor about a climate of sexual harassment would be taking this step, at some risk to her career, with the hope of obtaining relief from what she perceives as an agency's toxic personnel practices; otherwise, there would be no reason for her to speak out.[5] The amici suggest that Congress's statements in the legislative history about its intent that the WPA protections be given broad application demonstrate an intent that this kind of activity be protected.

For these reasons, it is the amici's view that an employee making a disclosure that her supervisors violated the agency's anti-harassment rules would, under section 2302(b)(9)(A)(i), be exercising an appeal, complaint, or grievance right granted by a law, rule, or regulation with regard to remedying a violation of section 2302(b)(8). If the Board agrees, then there would be no need for it to analyze whether the activity is also protected by section 2302(b)(9)(C). *See*

[4] There was insufficient information in the *McCray* decision to ascertain whether the administrative grievance procedure undertaken by the appellant there (who worked at the Army) was actually an initial step towards taking legal action against an employer for the perceived violation of an employee's rights. Because it appeared that the appellant was complaining about the treatment of another employee and not himself, that was unlikely to be the case.

[5] SECNAV Instruction 5300.26E refers to an employee's report of sexual harassment as a "complaint." Responsibilities, Section 3 a., b., e., f., and h.

McCray, 2023 M.S.P.R. 10, ¶ 27 (The provisions of a statute should be read together to avoid rendering any provision inoperative of superfluous).

3. In the alternative, should the Board find that an employee who makes an informal complaint of a climate of sexual harassment is not protected by section 2302(b)(9)(A), then that employee would nonetheless be protected by section 2302(b)(9)(C) if she is making the disclosure to "any other component" that is "responsible for internal investigation or review." If the employee is making the disclosure to her supervisor, that individual would be "responsible" for reporting the information to the entity that conducts the investigation. As such, it could be said that the supervisor has a responsibility for the investigation. *See, e.g*., SECNAV Instruction 5300.26E, Enclosure 4 – Harassment Response Procedures for Commanders and Supervisors of DON Civilians, Section 2.[6]

C. Issue 2 – Activity Falling Within Title VII Is Also Protected by Section 2302(b)(9) if the Employee Has Not Exercised her EEO Rights.

Additionally, section 2302(b)(9)(C) protects activity that also falls within the protections of Title VII, such as an employee expressing opposition to what she reasonably perceives to be discriminatory actions that violate Title VII. The plain language of section 2302(b)(9)(C) contains no exclusion for such activity. Instead, its coverage of disclosures to "any other component responsible for internal investigation or review" would seem to include an employee's disclosure of what she regards as evidence of conduct in violation of Title VII.

The Federal Circuit and the Board have held that reprisal for having made an informal or formal discrimination complaint alleging violations of Title VII is not protected by 5 U.S.C. §

[6] The EEOC advises that an agency's ant-harassment policy must include a statement requiring managers and supervisors to report harassment to agency anti-harassment programs and officials. EOOC Guidance at 8.

2303(b)(8) because the complaints do not constitute whistleblowing. *See Spruill v. M.S.P.B*., 978 F.2d 679, 692 (Fed. Cir. 1992) (filing of a formal EEO complaint did not constitute whistleblowing within the scope of section 2302(b)(8)); *Young,* 961 F.3d at 1329 (allegations of retaliation for having exercised a Title VII right do not fall within the scope of section 2302(b)(8)); *Edwards v. Department of Labor*, 2022 M.S.P.B. 9, ¶ 16 (2022), *affirmed by Edwards v. M.S.P.B.,* No. 2022-1967, 2023 U.S. App. LEXIS 17109 (Fed, Cir. July 7, 2023) (verbal complaints of race discrimination to a supervisor and the filing of a complaint of systemic race discrimination with the agency's EEO office were not protected by section 2302(b)(8)); *Bishop v. Department of Agriculture*, 2022 M.S.P.B. 28, ¶ 16 (2022) (filing of formal EEO complaint is not whistleblowing and so is not protected by section 2302(b)(9)(A)(i)); *Nogales v. Department of the Treasury*, 63 M.S.P.R. 460, 464 (1994) (disclosures about discrimination are excluded from coverage under section 2302(b)(8) regardless of the channel through which they are made).

In *Edwards*, the Federal Circuit, in affirming the Board, explained that when an employee complains about employment discrimination, whether by a formal complaint, an informal complaint, or verbal disclosures to a supervisor, that employee's disclosures fall under section 2302(b)(9)(A)(ii), *i.e.*, as disclosures "other than with regard to remedying a violation of paragraph (8)." *Edwards*, 2023 U.S. App. 17109, *4. The Court, citing *Spruill*, expressed concerns about appellants maintaining simultaneous Board and EEOC jurisdiction to resolve the same alleged violations. *Id*. at *5. (citing *Spruill*, 978 F.2d at 691-692).

The Board's second legal question in its Notice of Opportunity to File Amicus Briefs is whether the Federal Circuit's reasoning in *Edwards* extends to section 2302(b)(9)(C). We do not believe so. Unlike section 2302(b)(9)(A)(i), section 2302(b)(9)(C) does not limit its protections

to employees who make protected disclosures protected by section 2302(b)(8). In *Smolinski*., 23 F. 4th at 1352-53, the Federal Circuit held that the Board erred when it failed to address an appellant's section 2303(b)(9)(C) claim because he failed to state a plausible claim under section 2302(b)(8). The Federal Circuit rejected the Board's belief that to establish IRA jurisdiction, engaging in protected activity under section 2302(b)(9) is not sufficient. That belief, the Court explained, conflicts with the statute governing the Board's jurisdiction, which allows claims based on sections 2302(b)(9)(A)(i) *and* (B)-(D). *Id*.

Unlike section 2302(b)(8), which requires that an employee make a protected disclosure, as defined by section 2302(a)(2)(D), there is no corresponding requirement in section 2302(b)(9)(C). Administrative Judges of the Board have found that even if a communication does not meet the requirements of a section 2302(b)(8) disclosure, it may still be protected under section 2302(b)(9)(C). *See, e.g., Lowrance v. Department of Veterans Affairs*, 2018 MSPB LEXIS 1659, *13, Docket No. SF-1221-18-0402-W-1 (May 7, 2018) (pursuant to section 2302(b)(9)(C), cooperating with or disclosing information to the Inspector General of an agency is protected activity, without limitation as to the content of the cooperation or disclosure); *Miller v. Department of Commerce*, 2021 MSPB LEXIS 2670, *171 (Aug. 3, 2021) (Appellant's complaint to the Inspector General alleging, among others, hostile work environment and discrimination, found to be protected activity under section 2302(b)(9)(C) even though the allegations were too vague to amount to a protected disclosure.).

Therefore, the holding of *Edwards* that a verbal or written complaint of employment discrimination is not a protected disclosure under section 2302(b)(8) would not preclude a finding by the Board that such a complaint is, nonetheless, protected by section 2302(b)(9)(C). The Board should not assume, with respect to the statute's silence regarding a limitation on EEO

complaints, that such a limitation should be read into the statute. See *Harbison v. Bell*, 556 U.S. at 199. Although the legislative history of the NDAA 2018 amendment to section 2302(b)(9)(C) is silent on the rationale behind the amendment, the preceding legislative history of the WPA contains multiple statements from Congress about its intent to expand, rather than contract, the WPA's protections.

A rationale behind the decisions by the Federal Circuit in both *Edwards* and *Spruill* was that appellants should not be allowed to maintain both Board and EEOC jurisdiction over the same alleged violations to avoid duplication, wasted Government resources, and potentially conflicting outcomes. *Edwards*, 2023 U.S. App. LEXIS 17109, *5 (citing *Spruill*, 978 F.2d at 691-692). While acknowledging that these are legitimate concerns, the amici note that they would arise only if an appellant filing an IRA appeal with the Board also actually exercises her Title VII rights by initiating the EEO process at her agency over the same activities. These concerns would not arise if the employee verbally complains to a supervisor about a Title VII violation but chooses not to pursue an EEO complaint and be subject to the internal EEO process of an agency she may no longer trust.[7] In future decisions, the Board may wish to draw a clear line between appellants who use the EEO process and those who have claims eligible for the EEO process but who do not use it. A reading of section 2302(b)(9)(C) that gives an employee a choice between filing an IRA and exercising her Title VII rights would be consistent with the

[7] In addition, the employee potentially would be subjecting herself to a lengthy process. In FY 2020, the average time for federal sector case closure by the EEOC was 612 days. See EEOC Annual Report on the Federal Workforce, Part 1: EEO Complaint Processing Activity, at page 6. Available at https://www.eeoc.gov/sites/default/files/2023-03/FY2020%20Annual%20Report%20Workforce_Part%20I.pdf (last checked May 20, 2024)

WPA's text and legislative history while resolving the Federal Circuit's concerns about duplicative Board and EEO proceedings.

D. Issue 3 – The WPA's Plain Language and Remedial Congressional Intent Support a Broad Reading of the Term "any other components" in Section 2302 (b)(9)(C)

Regarding the third legal question, of how the Board should interpret and implement the term "or any other component responsible for internal investigation or review," the amici respectfully refer the Board to the amicus brief filed by the Office of Special Counsel in *Mohler v. Department of Homeland Security*, Docket Number CH-1221-18-0119-W-2 (MSPB Jan. 29, 2020).[8] The amici share the concern of the Office of Special Counsel that the Board not interpret section 2302(b)(9)(C) in an unduly restrictive matter that is supported nether by the text of the WPA nor the Congressional intent behind the statute. Instead, the amici suggest that the term be interpreted broadly, consistent with the WPA's plain language, legislative history, and remedial purpose.

[8]Available at https://osc.gov/Documents/PPP/Amicus%20Curiae%20Briefs/OSC%20Amicus%20Curiae%20Brief%20in%20Mohler%20v.%20Department%20of%20Homeland%20Security%20(MSPB)%20filed%20January%2029,%202020.pdf (last checked on May 20, 2024)

In the Initial Decision issued in *Mohler*, the Administrative Judge held that the appellant did not engage in activity protected by section 2302(b)(9)(C) when he made disclosures to the Computer Security Incident Response Center (CSIRC), at the Customs and Border Patrol, U.S. Department of Homeland Security, *See Mohler v. Department of Homeland Security*, Docket No.CH-1221-18-0119-W-2, 2019 WL 1242609, *2 (Mar. 13, 2019). The AJ explained that "CSIRC does not investigate the agency; it investigates internal complaints and issues." *See id*. at *4. However, on July 18, 2022, the Board modified the Initial Decision in part, finding that it did not need to determine if the activity was protected by section 2302(b)(9)(C) because all the events relevant to the appeal had occurred before December 12, 2017, the effective date of the 2018 NDAA. *Mohler v. Department of Homeland Security*, Docket No.CH-1221-18-0119-W-2, 2022 MSPB LEXIS 2627, **16-17 (July 18, 2022).

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