UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARK ABERNATHY, **Appellant,**	)	
v.	)	**MSPB Docket Number** **DC-1221-14-0364-W-1**
DEPARTMENT OF THE ARMY, **Agency**	)	

***AMICUS* BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION**

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STATEMENT OF INTEREST

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and other federal appellate courts, as well as before the Merit Systems Protection Board (Board),[1] regarding the proper interpretation of federal civil rights and worker protection laws.

Among the employees NELA members represent are whistleblowers (including civil service employees and employees of government contractors) in administrative, state, and federal proceedings, including in matters before the Board. NELA members also represent plaintiffs in cases arising under other federal whistleblower statutes, including the state and local analogues to the federal Whistleblower Protection Act (WPA). As the courts look to the Board's decisions to construe those counterpart statutes,[2] NELA has an interest in the Board's decision in the case at bar that extends beyond the direct scope of matters under Board jurisdiction.

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[1] The most recent NELA *amicus* brief before the Board was in *Day v. Department of Homeland Security,* 119 M.S.P.R. 589 (2013).

[2] *See, e.g., Coleman v. District of Columbia,* 794 F.3d 49, 59 (D.C. Cir. 2015) (*citing Freeman v. District of Columbia,* 60 A.3d 1131, 1141, 1141 n.14 (D.C. 2012)) (construing District of Columbia Whistleblower Protection Act, D.C. CODE §§ 1-615.51 *et seq.*).

STATEMENT OF THE ISSUES AND NELA'S SUMMARY RESPONSES

Issue: Whether an individual seeking protection under the WPA and WPEA must have been either an employee or an applicant at the time of both the disclosure and the subject matter of the disclosure?

NELA's Response: The WPA covers individuals who were employees or applicants at the time of the alleged retaliatory personnel action, irrespective of whether or not they were employees or applicants at the time that they made their whistleblowing disclosure.

Issue: Whether the standing requirements under the WPA and WPEA are coextensive with USERRA?

NELA's Response: As USERRA was not implicated in the fact pattern below, the Board does not need to reach USERRA issues or to give an advisory opinion to decide the case at bar. USERRA's specific statutory language gives it an especially broad coverage definition.

Issue: Whether a finding that a ruling in this case addressing coverage under the WPA (as amended by the WPEA) would impact other federal whistleblower production statutes?

NELA's Response: No negative impact would occur, as many of these federal whistleblower protection statutes overlap (sometimes by design), and such overlaps have proven unproblematic in other areas of the Board's jurisdiction.

SUMMARY

The proper bright-line test for standing under the WPA and WPEA is whether the individual was an employee, a former employee or an applicant for employment at the time the retaliation occurred. The administrative judge erred below in finding otherwise without support from any cited authority. The WPA, as an enforcement mechanism for 5 U.S.C. § 2302(b)(8), is a form of prohibited personnel practice (PPP) claim, with the purpose of ensuring that personnel

actions taken by the federal government are not taken for prohibited reasons. Thus, the crux of the standing analysis is whether or not the federal personnel action at issue was tainted with whistleblower reprisal.

The decision below is contrary to the plain text of the WPA, which explicitly protects "applicants," including those who have never been federal employees. The decision below is also contrary to clear Board precedent in *Greenup* and *Weed,* which unambiguously hold that the WPA covers nonselection claims by individuals who blew the whistle prior to applying. The WPEA does not modify this expansive scope of jurisdiction— to the contrary, the WPEA has the express intent of ensuring a broad interpretation of coverage. To construe the WPA otherwise would cause the perverse result of denying protection to individuals who blew the whistle in the past but were not in federal service at the exact time of their disclosures—effectively reading the word "applicant" out of the statute—and undermining the overall purpose of the whistleblower reprisal protection laws. The decision below is also inconsistent with the Congressional policy underlying the WPA as a remedial statute favoring broad coverage. It further errs in ignoring the Board's precedent on perception theory of whistleblowing, which would provide an employee with protection from a retaliatory nonselection if the reason for the nonselection was that the Agency perceived the employee to be a whistleblower, irrespective of whether the employee's specific disclosures otherwise met the statutory requirements of a WPA protected disclosure.

Recognizing Board jurisdiction over cases such as the one at bar would further be consistent with the Board's existing caselaw for the knowledge-timing test, a contributing factor analysis based on the time delay between the date when the manager became aware of the protected activity and the retaliatory act. The Board has long recognized retaliation claims as viable when managers acted soon after learning of even an old protected disclosure.

Because USERRA was not implicated in the fact pattern below, the Board does not need to address USERRA or give an advisory opinion to resolve this case. While the Board has applied *in pari materia* analysis to USERRA, that interpretation conflicts with both the explicit language of the statute and its implementing regulations. USERRA's specific statutory language (in particular, 38 U.S.C. § 4302) gives it an especially broad coverage definition, and its implementing regulations make clear that the statute should provide coverage to "applicants for employment," "employees," and "former employees."

Federal whistleblower reprisal protections are a mixture of sometimes-overlapping statutes that were enacted piecemeal. For example, 41 U.S.C. § 4712 and 10 U.S.C. § 2409, for government contractors, overlap with the *qui tam* reprisal protections under 31 U.S.C. § 3730(h). This sort of overlap is known to occur in other areas of the Board's jurisdiction, ***e.g.***, coverage of sexual orientation discrimination claims under Title VII (post-*Macy*) and 5 U.S.C. § 2302(b)(1) overlaps with 5 U.S.C. § 2302(b)(10). The Board indicated in its recent joint report with OSC, FLRA and OPM that this overlap was not problematic.

BACKGROUND

Congress' attempt to protect public employees from retaliation for disclosing wrongdoing dates back to the Civil Service Reform Act of 1978 ("CSRA"), which stated in relevant part that a public employer could not:

> take or fail to take a personnel action with respect to an employee or **applicant for employment** as a reprisal for –
>
> (A) a disclosure of information by an employee **or applicant** which the employee or applicant reasonably believes evidences –
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8) (emphasis added). Through the inclusion of this protection for

whistleblowers, Congress intended the CSRA to prohibit "reprisals against employees who divulge information to the press or the public (generally known as 'whistleblowers') regarding violations of law, agency mismanagement, or dangers to the public's health and safety." H.R. REP. NO. 95-1403 at 4 (1978).[3] This protection extended to "*all* employees" and was intended to prevent "discrimination, political coercion or unfair, arbitrary, or illegal actions regarding appointments and advancements within the civil service." *Id*. (emphasis added).

Despite this strong statement of Congressional intent, subsequent rulings by the Board and Federal Circuit within just a few years significantly narrowed the application of the CSRA's whistleblower protection. These decisions created numerous exceptions that denied protection for large swaths of disclosures made by federal employees. For example, in 1981, the Board undermined the intent of the CSRA's whistleblower protections by ignoring the statutory prohibition on retaliation for a protected disclosure, and instead applying the Supreme Court's decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), to find that an agency could take a personnel action that was motivated by retaliation for making a protected disclosure, so long as the action could also be upheld on other, unrelated grounds. *Gerlach v. Federal Trade Commission* 9 M.S.P.R. 268, 276 (1981). In *Fiorello v. Department of Justice,* 795 F.2d 1544, 1550 (Fed. Cir. 1986), the Federal Circuit held that an employee's disclosures were not protected because the employee's "primary motivation" was personal and not for the public good.

In response to these and other cases, Congress passed the Whistleblower Protection Act of 1989 ("WPA"). In passing the WPA, Congress reaffirmed its intent to protect *all* disclosures that a whistleblower reasonably believes evidence a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to

[3] "Mismanagement" was later modified to "gross mismanagement" in the 1989 WPA amendments. *See* Pub. L. 101-12 at § 11 (1989).

public health or safety. Congress specifically declared that it:

> . . . intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue . . .

S. REP. NO. 100-413 at 13 (1988). Congress emphasized its intent to protect all such disclosures by rephrasing the statutory definition of a protected disclosure in 5 U.S.C. § 2302(b)(8)(A) from "a disclosure" to "any disclosure." *See id.* Congress' purpose in making this clarification was "simply to stress that *any* disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential)." *Id.* (emphasis in original).

Congress again expressed its concern with judicial interpretations of the WPA in its 1994 "update" to the WPA. As the House Report noted:

> Perhaps the most troubling precedents involve the [MSPB's] inability to understand that **'any' means 'any.'** The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; **otherwise there are no exceptions**.

H.R. REP. NO. 103-769 at 19 (1994) (emphasis added). The Senate concurred, noting that "the plain language of the Whistleblower Protection Act extends to retaliation for 'any disclosure', regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made." S. REP. NO. 103-358 at 10 (1994).

However, the next seventeen years saw further erosion of the types of disclosures that could receive protection under the WPA, consistently focusing on the circumstances of the disclosure as opposed to the statutory test of whether the whistleblower reasonably believed that the disclosure evidenced wrongdoing. Thus, the courts inappropriately circumscribed the types

of disclosures that were protected. For example, shortly after the 1994 amendments, the Federal Circuit held that disclosures otherwise protected by the WPA were not protected if they were made to the alleged wrongdoer. *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (such disclosures were not "viewable as whistleblowing."). In another case, in deciding that a disclosure was unprotected, the Federal Circuit took into account that the employee had violated agency procedures by making his disclosure after going off duty. *Watson v. Department of Justice*, 64 F.3d 1524, 1530-31 (Fed. Cir. 1995). The court also held that disclosures were unprotected if the disclosed information was already known by the agency. *Meuwissen v. Department of Interior*, 234 F.3d 9, 12 (Fed. Cir. 2000).

In response, Congress passed the WPEA in 2012, "[making] clear, once and for all, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." S. REP. NO. 112-155 at 5 (2012). As discussed below, the WPEA explicitly overruled the aforementioned "exceptions" of prior Board and Federal Circuit decisions, and made clear Congress' intent that "the protection for disclosing wrongdoing [be] extremely broad" and to encourage whistleblowers to come forward by guaranteeing that this protection "will not be narrowed retroactively by future Board or court opinions." *Id*. As the Board recognized in *Day v. Department of Homeland Security*, 2013 MSPB 49 (2013), "The provisions of the WPEA at issue in this appeal clarify, rather than effect substantive changes to, existing law."

ARGUMENT

I. The WPA Covers Applicants Who Made Protected Disclosures Prior to Applying, where the Retaliatory Act Occurred While the Individual Was an Applicant.

It is settled law that the WPA, as for many other federal employment statutes, covers both applicants and employees. The issue presented is whether the WPA forbids an agency from refusing to hire an applicant because the applicant made a protected disclosure *before* applying

for a position, where the retaliatory act occurred while they were an applicant, *i.e.*, retaliation through the agency's refusal to hire the applicant. The Board should hold that applicants are covered under the WPA, regardless of when the protected disclosures were made.

A. Job Applicants are Covered by the WPA.

First, Congress and the Executive Branch have consistently recognized that job applicants are covered by the WPA. The plain language of the WPA, as noted *supra*, consistently refers, three times, to "any employee or applicant." *See* 5 U.S.C. § 2302(b)(8) (three references). The other provisions of Section 2302 governing prohibited personnel practices also consistently cover both employees and applicants. *See*, *e.g.*, 5 U.S.C. § 2302(a), 2302(b)(1), 2302(b)(3), 2302(b)(6), 2302(b)(9), 2302(b)(10). The statutory provision creating an Individual Right of Action that can be enforced by the Board similarly refers to "employee, former employee, or applicant for employment" at least eight times. *See* 5 U.S.C. § 1221. Although the 1978 Congressional reports are silent on why applicants were included in the WPA, Congress assuredly had in mind at least two predecessors – Title VII, the federal employment discrimination statute, expressly includes job applicants, *see* 42 U.S.C. § 2000e-16; and the Pendleton Act of 1883, which established the U.S. Civil Service Commission, and was designed to address the "spoils" system in the hiring of federal employees. The WPA has been amended several times since 1978, but Congress has not reduced the protections afforded applicants.

In fact, Congress and the Executive Branch have made clear when to *exclude* job applicants from coverage under federal whistleblower statutes, and have done exactly this in the whistleblower statute that covers the Federal Bureau of Investigation. That statute, in contrast to the WPA, provides that FBI employees cannot "take or fail to take a personnel action with respect to *any employee* of the Bureau as a reprisal for a disclosure of information *by the*

employee …" 5 U.S.C. § 2303(a) (enacted 1978, amended 1989). As Congress recognized when considering the amendments proposed in 2012 to the WPA, the FBI statute expressly excludes job applicants: "the [proposed] provisions are like the protections for FBI employees under 5 U.S.C. § 2303, but unlike the WPA, which does protect applicants as well as employees." *See* S. REP. 112-155, at 34 n.132 (2012).

Similarly, in 2014, when Congress provided for a limited review process for other components of the Intelligence Community, those provisions were limited to employees, and did not expressly include job applicants—although some of the protections could hypothetically extend to applicants for employment as well. *See* 50 U.S.C. § 3234 (enacted by Pub. L. 113-126, § 601(a)); 50 U.S.C. § 3341(j) (enacted by Pub. L. 113-126, § 602(b)).

Further, when the Executive Branch established limited whistleblower retaliation protections for other components of the Intelligence Community, those protections were limited to employees, and did not include applicants:

> A. Prohibition on Retaliation in the Intelligence Community.
>
> Any officer or employee of a Covered Agency who has authority to take, direct others to take, recommend, or approve any Personnel Action, shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, a Personnel Action with respect to **any employee** serving in an Intelligence Community Element as a reprisal for a Protected Disclosure.

See Presidential Policy Directive/PPD-19, "Protecting Whistleblowers with Access to Classified Information," at ¶ A (Oct. 10, 2012) (emphasis added).[4]

The express exclusion of applicants from the FBI and Intelligence Community retaliation statutes confirms that Congress and the Executive Branch know how to demonstrate their intent to exclude applicants – so the express inclusion of applicants in the WPA for all other federal

[4] *Available at* http://www.whitehouse.gov/sites/default/files/image/ppd-19.pdf.

agencies is consistent with the protection of applicants under the federal civil service laws.

Therefore, the WPA expressly includes job applicants within its scope, consistent with over 130 years of regulating the federal hiring process to prohibit improper actions in selecting applicants for the civil service. This furthers the Congressional purpose of the WPA – to ensure that anyone, whether employee or applicant, is free to report their concerns about government misconduct, whether a violation of law, rule or regulation, or a report of gross mismanagement, gross waste of funds, abuse of authority, or a substantial danger to public health or safety.

B. The Board Has Previously Held that Disclosures Are Protected Even If Not Made During the Pendency of Employment or Application for Employment.

The Board has consistently held that the WPA protects disclosures made by applicants, even if their disclosures were not made while the individual was an active employee or had a pending application. Nearly a decade ago, the Board held, in the seminal *Greenup* decision, that an applicant could bring a claim based on disclosures made well *prior* to her application. *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, 2007 MSPB 167 (2007).

In *Greenup*, the applicant was formerly employed by a county committee of the USDA Farm Services Agency,[5] and reported what she believed to be government misconduct relating to the projects that were jointly run with the U.S. Department of Agriculture. *Greenup*, 106 M.S.P.R. 202, ¶ 9 (2007). The Board held that while Ms. Greenup could not challenge her termination by the county government (since as a county employee, she was not covered by the WPA), she could bring a WPA claim based on her allegation "that the USDA did not select her for a secretarial position in the Office of General Counsel for which she applied, after she

[5] County committee employees such as Ms. Greenup are not Title 5 employees, and are deemed not covered by the Civil Service Reform Act for purposes of civil service law. *See United States v. Massey,* 380 F.3d 437, 441 (8th Cir. 2004); *Moore v. Glickman,* 113 F.3d 988 (9th Cir. 1997); *Greenup,* 106 M.S.P.R. 202 at ¶¶ 2, 5-6.

resigned from her County Committee Program Technician position." *Id.* at ¶ 8. The Board held:

> **The statute does not specify that the disclosure must have been made when the individual seeking protection was either an employee or an applicant for employment**. In the case of applicants for employment who were not Federal employees at any time prior to their application, **such a limitation would severely restrict any recourse they might otherwise have, since the disclosure would necessarily have to be made while their application was pending**. We do not believe that Congress intended to grant such a limited right of review, when it determined to protect applicants for employment. *See, e.g., Fishbein v. Department of Health & Human Services*, 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). Thus, we find that the appellant may file an IRA appeal regarding the agency's failure to select her for the secretarial position . . .

Id. (emphasis added). In *Greenup*, the Board went on to hold that the applicant had sufficiently pled "that her alleged disclosures were a contributing factor in the determination not to select her for the Office of General Counsel position," including that she was selected contingent upon a reference check, but that her selection was withdrawn after her former supervisor, who "had actual knowledge of her disclosures . . . influenced [the hiring manager] to withdraw the offer by providing a negative reference." *Id.* at ¶ 11.

In *Dorney v. Department of the Army*, the Board subsequently held that a job applicant, who engaged in protected conduct during a prior period of federal employment, and who several years later re-applied for employment with the same agency, could bring a claim under the WPA based on allegations that she was not selected because of her protected conduct *four years prior* to her job application. *Dorney*, 117 M.S.P.R. 480 (2012). The MSPB held that it was reversible error for the Administrative Judge to reject the applicant's WPA claims, where the she alleged that the hiring manager had knowledge of her prior disclosures through communications with a former supervisor who not only had that knowledge and but also influenced the hiring decision:

> An appellant can show that a disclosure described under 5 U.S.C. § 2302(b)(8) was a contributing factor in a personnel action by proving that the official taking

> the action had constructive knowledge of the protected disclosure. *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, ¶ 11 (2007); *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108 (1994). An appellant may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Greenup*, 106 M.S.P.R. 202, ¶ 11; *Marchese*, 65 M.S.P.R. at 108.

Id. at ¶ 11. The Board further held that the AJ erred in relying on the absence of close temporal proximity between the disclosure and the personnel action, since what mattered was the agency's knowledge of the applicant's protected conduct, not whether the disclosure occurred close in time to the adverse hiring decision, let alone contemporaneous with the application process:

> Here, the administrative judge noted that at least 4 years passed between the appellant's allegedly protected disclosure and the appellant's non-selection, and the Board has found that a personnel action taken within 1 to 2 years of a disclosure meets the knowledge / timing test; she then concluded that the appellant's non-selection occurred substantially outside this period. ID at 8. **However, to the extent that the administrative judge implied that this length of time was dispositive of the issue of whether the appellant could potentially demonstrate that her alleged disclosures contributed to the personnel action in question, she erred.** ID at 8; see *Powers [v. Department of the Navy*], 69 M.S.P.R. [150], 156 [(1995)].

Id. at ¶ 16 (emphasis added).[6]

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[6] The Board's adoption of the analysis in this *Amicus* Brief would not leave the door open to a wide-open category of whistleblowing claims, as application of the Board's extant knowledge/timing test would filter out cases in a readily justiciable manner:

> An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (table). Thus, an appellant's submission of evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, i.e., evidence sufficient to meet the knowledge/timing test, satisfies the contributing factor standard. *See Horton v. Department of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995).

Schneider v. Department of Homeland Security, 98 M.S.P.R. 377, ¶ 16 (2005). The Board

In *Weed*, the Board held that a job applicant could bring a WPA claim for failure to hire at one agency based on protected disclosures he made while employed at *another* agency:

> **Further, contrary to the agency's argument, a whistleblower does not need to be an employee, an applicant for employment or a former employee at the time he made his protected disclosures**. In *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, ¶ 6 (2007), we found that a former Program Technician with a County Agricultural Stabilization and Conservation Committee, who had been a county employee and not a federal employee, could raise an IRA appeal alleging that the agency denied her an appointment to a federal position because of whistleblower protected disclosures that she made while a county employee. In *Greenup*, we determined that the statute does not specify that a disclosure must have been made when the individual seeking protection was either an employee or an applicant for employment. 106 M.S.P.R. 202, ¶ 8. **Indeed, we noted that, in the case of applicants for employment, who are not federal employees at any time prior to their application, such a limitation would severely restrict any recourse they might otherwise have, since the disclosure would necessarily have to be made while their application was pending.** Thus, we found that Congress did not intend to grant such a limited right of review, when it determined to protect applicants for employment. *Id.*

Weed v. Social Security Administration, 113 M.S.P.R. 221, ¶ 12 (2010) (emphasis added). In *Weed*, the applicant alleged that he made protected disclosures while employed with the Air Force, and that those disclosures influenced the Social Security Administration's decision not to hire him, even though the disclosures had nothing to do with the operations of the latter agency.

Thus, under *Greenup* and *Dorney*, the issue is whether the applicant's protected disclosures contributed, in any way, to the personnel action (refusal to hire), not the timing of the protected disclosures. Further, under *Weed*, the applicant need not show that his protected

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instructs that this knowledge/timing analysis looks at the delay from the date the manager learned of the protected activity (or perceived protected activity), not the date of the (perceived) protected activity itself. "[T]he language of 5 U.S.C. § 1221(e)(1)(B) does not prohibit the inference of a causal link in a case such as this, where an agency is alleged to have learned of a disclosure long after the disclosure itself but shortly before taking a personnel action." *Boyd v. Department of Homeland Security,* MSPB Docket No. AT-1221-13-3375-W-1 (Nov. 14, 2014). The expansiveness of the knowledge/timing test is demonstrated by the fact that the Board will find contributing factor even with a delay as long as 18 months. *See Redschlag v. Department of the Army,* 89 M.S.P.R. 589, ¶ 87 (2001); *accord Special Counsel ex rel. Rector v. National Credit Union Administration,* MSPB Docket No. CB-1208-16-0012-U-1, ¶ 9 (January 29, 2016).

disclosures were made while the applicant had any connection with the hiring agency, let alone that the protected disclosures related specifically to operations of the hiring agency. The Board applies *stare decisis* to its decisions. *See*, *e.g.*, *Bell v. Equal Employment Opportunity Commission,* 15 M.S.P.R. 491 (1983). No factors in this case warrant refraining from applying *stare decisis* and disturbing the settled holdings of *Greenup* and its progeny.

Therefore, under this consistent line of cases over the past decade, the Board would not be creating new law if it were to hold that the proper test for job applicants is simply whether their protected disclosures had any role in influencing the hiring agency's decision not to hire them, so that it is immaterial whether the disclosure was made during the pendency of the job application. Instead, the focus must be on the hiring agency's conduct in rejecting a job applicant who had made a protected disclosure. Keeping that focus will serve to ensure the Congressional purpose of encouraging anyone to raise concerns with government misconduct, without fear of reprisal should they later decide to apply for employment (or re-employment) with the federal government.

C. Case Law Involving Former Employees Is Not Relevant to the Application of the WPA to Applicants for Federal Employment.

In its request for *amicus* briefs, the Board noted a separate line of non-precedential Federal Circuit decisions holding that *former* employees could not bring WPA claims based on disclosures made *after* the individual had left federal employment. *See* "Notice of Opportunity to File Amicus Briefs," 81 Fed. Reg. 2913, 2914 (Jan. 19, 2016) (citing *Nasuti v. Merit Systems Protection Board*, 376 F. App'x 29 (Fed. Cir. 2010); *Guzman v. Office of Personnel Management*, 53 F. App'x 927 (Fed. Cir. 2002); and *Amarille v. Office of Personnel Management*, 28 F. App'x 931 (Fed. Cir. 2001)). The Board noted that these nonprecedential decisions "were decided before the enactment of the WPEA" in 2012, and that the Board "may follow the Federal

Circuit's nonprecedential decisions, to the extent the Board finds them persuasive." *Id.*

Here, however, the Board need not consider whether to follow these nonprecedential decisions in this case, because those decisions have no bearing on the issues presented. The statutory text of the WPA is clear: it covers disclosures made by both employees and applicants, but is silent on whether it covers disclosures made by former employees after their separation. Moreover, the WPEA did not change the inclusion of both employees and applicants, as that language in 5 U.S.C. § 2302(b)(8) dates back to the CSRA in 1978 and was not modified by the WPEA. Thus, the WPA, both before and after the enactment of the WPEA, has consistently covered job applicants.

Whether the WPA should cover *former* federal employees for alleged disclosures made *after* their separation from the federal government is not an issue presented by this case and would have no effect on the outcome of Mr. Abernathy's case on remand. Addressing this issue would therefore amount to the Board offering an advisory opinion to other, unnamed parties with unrelated claims. It is settled law that the issuance of advisory opinions is inappropriate, not only because such opinions have no bearing on the parties, but also because the parties have no legitimate reason to advocate regarding issues that would not affect them. The Board itself is prohibited from issuing advisory opinions. 5 U.S.C. § 1204(h); *accord, e.g., Special Counsel v. Smith,* 2011 MSPB 69 at ¶ 9 n.3 (2011).

This statutory restriction is consistent with the Board's adjudicatory role, as the general caselaw prohibits issuance of advisory opinions. The Federal Circuit, in addressing patent and international trade law appeals, has consistently rejected the attempts of parties to seek advisory opinions. *See International Electronic Tech. Corp. v. Hughes Aircraft Co.*, 476 F.3d 1329 (Fed. Cir. 2007) (improper to "be rendering advisory opinions"); *IBM Corp. v. United States*, 58 F.

App'x 851, 853 (Fed. Cir. 2003) ("We decline IBM's invitation to issue an advisory opinion on this question."). The Supreme Court has similarly made clear that it is not the role of a judicial tribunal to issue advisory opinions, since they are not necessary to decide the issues facing the parties: "Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin v. Chafin*, 568 U.S. __, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)); *see also Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (*per curiam*) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.") (citations omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'").

While the issue of whether *former* federal employees should be covered under the WPA for protected disclosures made *after* their separation from the government may be an intellectually interesting issue, and may be presented in the future by another individual against a different agency based upon disclosures unrelated to those in this case, that issue is not presented here. The Board need not, and should not, decide that issue in resolving the specific issues presented by this appeal, particularly where the prior case law and the rationale for protecting job applicants based on disclosures made prior to their application is clear – the WPA protects job applicants for reprisal in the hiring process, regardless of when the protected disclosure was made or even whether the protected disclosure involved the hiring agency itself.

II. The Decision Below Ignores the Perception Theory of Whistleblower Reprisal.

In the decision below, the administrative judge further erred through failure to consider Mr. Abernathy's case under the perception theory of whistleblower reprisal, under which Mr. Abernathy could also be covered. It is settled law that the WPA protects individuals from actions taken by agencies in the mistaken belief that the individual engaged in protected conduct, even if the individual in fact never made any disclosures protected under the WPA. *See, e.g., Reed v. Department of Veterans Affairs,* 122 M.S.P.R. 165, ¶ 26 (2015) (*citing King v. Department of the Army*, 116 M.S.P.R. 689, ¶ 6 (2011) and *Special Counsel v. Department of the Navy,* 46 M.S.P.R. 274, 278-80 (1990)); *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998).

The Board recently spoke to the application of this perceived-whistleblower line of cases to job applicants with nonselection claims in a nonprecedential decision, instructing that administrative judges need to look at both the normal whistleblower reprisal theory and the perception theory of reprisal in deciding whether a nonfrivolous allegation of jurisdiction has been made. *See Boyd v. Department of Homeland Security,* MSPB Docket No. AT-1221-13-3375-W-1 (November 24, 2014).

III. The Decision Below Is Contrary to the Public Policy of Broadly Construing Whistleblower Reprisal Protections as Remedial Statutes.

The WPA makes clear that whistleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation. *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) ("The purpose of the Whistleblower Protection Act is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press."). As the GAO recognized, "In a high-performing workplace, federal employees must be able to pursue the missions of their organizations free from discrimination and should not fear or experience

retaliation or reprisal for reporting—blowing the whistle on—waste, fraud, and abuse." GAO, "The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing," GAO Report No. GAO-01-715T (May 9, 2001), *available at* http://www.gao.gov/assets/110/108818.pdf.

Disclosures of fraud and waste increase transparency and prompt official investigations. Empirical analyses of whistleblower cases note the importance of employee disclosures in prosecuting fraud. A study conducted at the Booth School at the University of Chicago noted that 19.2% of corporate fraud is detected by the employees, compared to 14.1% detected by auditors. Alexander Dyck, Adair Morse & Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?," *The Journal of Finance*, Vol. 65, Issue 6 (Dec. 20, 2010), at 54, Table 2.[7] The Association of Certified Fraud Examiners ("ACFE") has conducted biennial reports on occupational fraud since 2002. ACFE's *2014 Report to the Nations*, at 21, 23, finds that employee tips detected 49% of reported frauds, compared to only 1.9% detected by law enforcement (in large organizations). In addition, another 14.6% of frauds are reported anonymously – indicating that "there is often a risk of backlash for whistleblowers[.]" *Id*. at 21.[8] By forcing potential whistleblowers to choose between their careers and the truth, denying protection to whistleblowers risks losing the 65% of fraud cases disclosed by employees.

The public benefit of providing a remedy to whistleblowers suffering retaliation was recognized by Congress even in the earliest legislative history for federal whistleblower protections:

> Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.

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[7] *Available at* http://www.nber.org/papers/w12882.pdf.

[8] *Available at* http://www.acfe.com/rttn/docs/2014-report-tonations.pdf.

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.
>
> [...] For the first time, and by statute, the Federal Government is given the mandate--through [...] the Merit Systems Protection Board--to protect whistleblowers from improper reprisals.

S. REP. NO. 95-969 at 8 (1978). That same remedial purpose, squarely grounded in strong public policy considerations, continues to the present. As the Board has taught, "[i]t is well established that the Whistleblower Protection Act of 1989, which authorized the filing of IRA appeals, is remedial legislation. Remedial statutes are to be 'interpreted liberally, to embrace all cases fairly within their scope, so as to effectuate the purpose of the statute[s].'" *See Glover v. Department of the Army,* 94 M.S.P.R. 534, at ¶ 8 (2003); *accord Pastor v. Department of Veterans Affairs,* 87 M.S.P.R. 609, at ¶ 13 (2001). "[T]he remedial intent of the law favors inclusion, not exclusion." *Morrison v. Department of the Army,* 77 M.S.P.R. 655 (1998). Further, as the Board teaches:

> It is well established that the WPA is a remedial statute, and we are required to construe its terms liberally to embrace all cases fairly within its scope so as to effectuate its purpose. *See, e.g., Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 9 (2010); *Fishbein*, 102 M.S.P.R. 4, ¶ 8. Further, our reviewing court has found that the language used in 5 U.S.C. § 2302(b)(8) indicates that Congress's intent was to legislate in "broad terms" and that, "absent some exclusionary language, a cramped reading of the statute . . . would be counter to that intent." *Weed*, 113 M.S.P.R. 221, ¶ 9 (quoting *Reid v. Merit Systems Protection Board*, 508 F.3d 674, 677 (Fed. Cir. 2007)).

Usharauli v. Department of Health and Human Services, 116 M.S.P.R. 383, ¶10 (2011).

Accordingly, the Board should give the WPEA its broadest reading as a remedial statute, and apply Congress' clarifications to the preexisting WPA definition of protected disclosures to cases presently pending before the Board and OSC.

The WPA plays a prominent role in the web of whistleblower protections enacted by Congress. Its enhanced standards of causation in 5 U.S.C. § 1221(e)(1) are now included in over a dozen other federal whistleblower protection statutes.[9] The Department of Labor enforces 22 whistleblower laws that cover private and federal sector employees. Its Administrative Review Board (ARB) has observed that the burdens of proof provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) and Energy Reorganization Act (ERA) are ultimately modeled after the WPA's burden of proof provisions. *See Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 24, n.124 (ARB Sept. 30, 2011); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 7, n.15 (ARB Sept. 30, 2003). In *Kester*, the ARB observed that Congress adopted the less onerous "contributing factor" standard "in order to facilitate relief for employees who have been retaliated against for exercising their [whistleblower rights]." *Kester* (quoting 138 Cong. Rec. No. 142 (Oct. 5, 1992)).

The Department of Labor has recognized whistleblower protections for applicants even

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[9] Affordable Care Act (ACA), 29 U.S.C. § 218C; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Energy Reorganization Act (ERA), 42 U.S.C. § 5851; FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A; Seaman's Protection Act (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, 46 U.S.C. § 2114; Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (Public Law No. 110-053), 49 U.S.C. § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121.

under laws that protect "employees" and do not explicitly cover "applicants." *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 13-001, ALJ No. 2008-ERA-3, Decision and Order of Remand (ARB Aug. 29, 2014) (ERA case). In *Flanagan v. Bechtel Power Corp*., 81-ERA-7 (Sec'y June 27, 1986), the Secretary of Labor held that the ERA definition of "employee" may include former employees applying for reemployment. The ALJ had analyzed the purpose of the Act, the Senate Report, the fact that the regulation refers to blacklisting, and analogous NLRB authority. In doing so, the Secretary noted the following from *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941):

> To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance, but in defiance of that against which the prohibition of discrimination is directed.

In 2013, Congress explicitly adopted the "legal burdens of proof specified in section 1221(e) of title 5" for whistleblower claims by the employees of federal contractors. 10 U.S.C. § 2409(c)(6); Pub. L. 112–239, § 827(c)(5); *see also* National Defense Authorization Act of 2013 (NDAA FY13), 41 U.S.C. § 4712(c)(6). Congress enacted 10 U.S.C. § 2409 because it:

> . . . would protect employees of defense contractors from reprisals for going to appropriate government officials with information of wrongdoing. The committee recognizes that employees of defense contractors are frequently the first to know about illegal contract padding or hidden defects in weapon systems. These employees should not lose their jobs or suffer other reprisals because they do their patriotic duty in reporting wrongdoing to appropriate government officials. [The Act] would define "reprisal" the same way that term would be defined under ...section 2302 of title 5, United States Code (relating to Federal civil servants).

H.R. REP. No. 99-718, at 266 (1986).

The federal appellate courts have held that there is a presumption that statutes sharing the common purpose of promoting citizen enforcement of important federal policies should be interpreted similarly. *Board of Trustees of the Hotel & Restaurant Employees Local 25 v. JPR, Inc.*, 136 F.3d 794, 802 (D.C. Cir. 1998) (citing *Pennsylvania v. Del. Valley Citizens' Council for*

Clean Air, 478 U.S. 546, 558-60 (1986)). Whistleblower protections are such laws. All of them are enacted to further law enforcement by encouraging individuals to come forward with concerns and information. Consequently, there is a need for "broad construction" of the statutes to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). "Narrow" or "hypertechnical" interpretations to these laws, are to be avoided as undermining Congressional purposes. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). In evaluating protected activity, the Fourth Circuit recently emphasized the importance of a "holistic approach" that "is also consistent with the broad remedial purpose" of the statute. *DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015) (The court "must examine the course of a plaintiff's conduct through a panoramic lens, viewing the individual scenes in their broader context and judging the picture as a whole.").

In *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997), the Supreme Court held that post-employment retaliation violates Title VII which must have the broadest possible reading to "[m]aintain[] unfettered access to statutory remedial mechanisms."[10] Employees of federal contractors must similarly be protected even as they leave the employ of the contractors and apply for direct federal employment. To deny them protection would hinder access to the statutory remedies and discourage others from coming forward.

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[10] Analogously, the EEOC has held that, in federal sector EEO cases, retaliation coverage applies even for former employees and applicants. *See, e.g., Mares v. Department of the Army*, EEOC Appeal No. 01960499 (January 29, 1998); *Sternberg v. Department of State,* EEOC Request No. 05890976 (January 8, 1990); EEOC Compliance Manual, Ch. 8, §§ 8-1.B, 8-11.B.3.d, 8-II.C.4. While the Board recently clarified that its adjudication of the EEO aspects of mixed cases take their *procedural* cues from civil service law (recognizing that the claims sound in 5 U.S.C. §§ 2302(b)(1), 7702(a)(1)(B)), the *substance* of whether or not a particular action is an EEO violation is still an issue of discrimination law in which the Board defers to the EEOC. *See Savage v. Department of the Army,* 122 M.S.P.R. 612, ¶ 45 (2015).

USERRA was not implicated in the fact pattern below; at no point does the Initial Decision indicate any possible uniformed service for Mr. Abernathy, and there is no indication of an attempt to raise a USERRA claim at the Board, OSC or DOL/VETS. Accordingly, the Board does not need to reach USERRA issues to decide the instant case, and there is a risk that any such opinion on USERRA issues would venture, as discussed *supra,* into prohibited advisory opinion territory.

In the alternative, the Board has applied *in pari materia* analysis to construe certain of USERRA's provisions. *See Whittacre v. Office of Personnel Management,* 120 M.S.P.R. 114 (2013). However, *in pari materia* is a tool for statutory interpretation, but cannot overbear the plain text of the statute itself. As the Board instructs, "Where, as here, there is specific statutory language delineating who may file a Board appeal under USERRA, we will not look to more general language in other statutes to determine USERRA's standing requirements." *Silva v. Department of Homeland Security* 112 M.S.P.R. 362, ¶ 7 (2009).

USERRA contains an express provision (38 U.S.C. § 4302) which specifies that, in the event of a conflict between USERRA and some other legal protection, whichever law gives better protections to the veterans controls. As a result, any comparative textual analysis involving USERRA must ensure maximum protection for veterans. USERRA's terminology does not use the terms "applicant," "employee," and "former employee" in the same sense that they are used in the WPA. References to "applicants" typically mean applicants to join the uniformed services, while coverage for applicants for employment in the WPA sense is described as: "A person […] shall not be denied initial employment […]." *See* 38 U.S.C. § 4311(a).[11] USERRA provides reprisal protection to applicants. *See* 38 U.S.C. § 4303(4)(A)(v), § 4311; 20

[11] Similarly, 50 U.S.C. § 3341(j) deals with applicants for security clearances rather than applicants for employment. *See generally* 50 U.S.C. § 3341.

C.F.R. § 1002.40.[12] USERRA also covers protection from retaliation to former employees. *See* 20 C.F.R. § 1002.5(c); *cf.* 38 U.S.C. § 4303(b) (definition of benefit includes "severance pay, supplemental unemployment benefits").

The Initial Decision below unjustifiably tears a gaping hole in the web of federal whistleblower protections. While the employees of federal contractors are protected by 10 U.S.C. § 2409 and 41 U.S.C. § 4712, and applicants for federal employment are protected by 5 U.S.C. § 2302, the Initial Decision denies WPA protection for the employees of federal contractors when they become applicants for federal employment—or for that matter, any individuals who engage in whistleblowing up to the minute before they file their application for federal employment. This holding is inconsistent with the remedial purposes of both laws and would discourage both federal and private sector employees from coming forward with valuable information. In the WPA, Congress explicitly included "applicants," thereby ensuring seamless protection between the applicant's prior employment and a subsequent application. Reading applicant coverage out of the WPA now with a judicially-narrowed definition of who constitutes a protected "applicant" would improperly weaken the Congressionally-erected structure for expansive whistleblower reprisal protections.

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[12] The statutory standing provisions for federal sector USERRA cases are not found in 38 U.S.C. § 4324 (a procedural provision that discusses the procedural aspects of adjudication of USERRA claims before the Board), but instead in the definitional provisions (*e.g.* 38 U.S.C. § 4303) and the provisions which establish the acts which give rise to a USERRA cause of action (*e.g.* 38 U.S.C. § 4311). The term "person" in this context is really defined more by those who have rights protected under USERRA, and so takes the parameters of the nature and limits of the rights violated. *See, e.g.*, 38 U.S.C. § 4322(a). The use of the term "person" as it appears in USERRA is an artifact of its predecessor statutes which provided reemployment rights for World War II veterans. *See, e.g.*, *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 269 n.1 (1958) (quoting Sec. 9(d) of the Universal Military Training and Service Act); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 278 n.1 (1946) (quoting Sec. 8(a) of the Selective Training and Service Act of 1940).

IV. Whistleblower Reprisal Statutes Often Overlap, with Potentially Concurrent Coverage and Standing.

Federal whistleblower reprisal protections are not based on any single statute and were not concurrently enacted. Instead, whistleblower reprisal protections are often a mixture of individual statutes, each with their own filing deadlines, remedial provisions, and scopes of coverage. This reflects the earnest policy of Congress, which has consistently passed new laws in order to protect whistleblowers from reprisal.

As such, coextensive coverage and overlap between statutory whistleblower reprisal protections for government employees, applicants, and contractors is not unusual.

For example, consider the hypothetical of a former civil service employee who is working as a government contractor for the Department of Defense, who blows the whistle on fraudulent overbilling of the government by their employing contracting company, with a kickback arrangement for the contracting officer's representative (COR), and then suffers reprisal when a Department of Defense employee orders the government contracting company to fire the employee. This individual potentially would be covered by four overlapping whistleblower protection statutes: the WPA (covering the employee as a "former employee"), 10 U.S.C. § 2409 (covering the employee as an employee of a contractor blowing the whistle on misconduct in a Department of Defense contract), 41 U.S.C. § 4712 (covering the employee as an employee of a contractor blowing the whistle on misconduct in a federal contract during the pilot program) and 31 U.S.C. § 3730(h) (protecting the employee from *qui tam* reprisal for reporting on a false claim against the government).

This sort of overlap is known to occur in other areas of the Board's jurisdiction. For example, coverage of sexual orientation discrimination claims under Title VII, in light of the

EEOC's recent decisions in *Macy, Veretto* and *Couch*,[13] and 5 U.S.C. § 2302(b)(1) overlap with 5 U.S.C. § 2302(b)(10), a situation which the Board indicated was not problematic in its recent joint report with OSC, FLRA and OPM.[14] As a result, there is no reason that USERRA—which is not explicitly codified as a PPP in 5 U.S.C. § 2302(b)—necessarily would have the same standing requirements as the WPA.

The overlap is perhaps also helpful in ensuring more comprehensive protection for whistleblowers. The Board has historically rejected application of joint employer analysis to WPA cases,[15] even though the Board recognizes the joint employer analysis for USERRA claims[16] and the EEOC accepts the joint employer analysis in its federal sector discrimination caselaw.[17] Absent the benefit of joint employer principles, the existence of overlapping whistleblower reprisal statutes increases the chance that a given act of whistleblower reprisal does not fall through the cracks between different statutes.

The Department of Labor has recognized that whistleblower laws can overlap and whistleblowers may assert claims under more than one at the same time. *See, e.g*., *Trueblood v. Von Roll Am., Inc*., ALJ Nos. 2002-WPC-003 to 006, 2003-WPC-001, at 25 (ALJ Mar. 26, 2003),

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13 *See Couch v. Department of Energy,* EEOC Appeal No. 0120131136 (Aug. 13, 2013); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); *Veretto v. United States Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011).

14 OPM, "Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment" (June 2015), *available at* https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf.

15 *See, e.g., Special Counsel ex rel. Hardy v. Department of Health & Human Services*, 117 M.S.P.R. 174 (2011).

16 *See Silva,* 112 M.S.P.R. 362, ¶¶ 11-15.

17 *See Ma v. Department of Health and Human Services,* EEOC Appeal Nos. 01962389, 01962390 (May 29, 1998); *accord Makuch v. Department of Defense*, EEOC Appeal No. 0120114324 (December 12, 2012); *Makovsky v. Department of the Navy*, EEOC Appeal No. 01A60197 (April 7, 2006).

(citing *Jayko v. Ohio EPA*, 1999-CAA-5 ALJ Oct. 2, 2000)) ("[A] complainant can assert jurisdiction under all of these statutes in the same proceeding, if the complainant has participated in activities in furtherance of the objectives of all the statues."); *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y, May 18, 1994); *Minnard v. Nerco Delamar Co*., Case No. 92-SWD-1 (Sec'y, Jan. 25, 1994).

NELA urges the Board to do the same, by recognizing that the WPA is part of a web of whistleblower protections Congress stitched together to accomplish the purpose of encouraging employees to speak up whenever remaining silence can cause serious problems for the government and the public. The Board's application of the explicit language of the WPA will strengthen this web, and will reaffirm its clear precedent on this issue. The Initial Decision, if undisturbed, would punch a wide hole in this web, and return this Board to the type of judicial undercutting of WPA coverage that the WPEA sought to end forever.

CONCLUSION

NELA urges the Board to reverse the decision below, find that job applicants are covered by the WPA, even if the protected disclosure was made prior to their filing of their relevant job applications, and remand for a hearing on the merits.

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