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7400-01-P

MERIT SYSTEMS PROTECTION BOARD

Notice of Opportunity To File Amicus Briefs

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) announces the opportunity to file amicus briefs in the matter of *Mark Abernathy v. Department of the Army*, MSPB Docket No. DC-1221-14-0364-W-1, currently pending before the Board on petition for review. Additional information concerning the question on which the Board invites amicus briefing in *Abernathy* and the required format and length of amicus briefs can be found in the Supplementary Information below.

DATES: All briefs submitted in response to this notice must be received by the Clerk of the Board on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All briefs shall be captioned "*Mark Abernathy v. Department of the Army*" and entitled "Amicus Brief." Only one copy of the brief need be submitted. The Board encourages interested parties to submit amicus briefs as attachments to electronic mail addressed to *mspb@mspb.gov*. An email should contain a subject line indicating that the submission contains an amicus brief in the *Abernathy* case. Any commonly-used word processing format or PDF format is acceptable; text formats are preferable to image formats. Briefs may also be filed with William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; Fax (202) 653-7130.

FOR FURTHER INFORMATION CONTACT: Molly Leckey, Office of the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: The administrative judge in *Abernathy* dismissed the individual right of action (IRA) appeal for lack of jurisdiction, finding that the appellant did not make a protected disclosure because, when he made the disclosure, he was neither an "employee" nor an "applicant," but rather, a Federal contractor. Of particular relevance in *Abernathy* is the jurisdictional question of whether, under the Whistleblower Protection Act of 1989 (WPA), as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA), both the disclosure and the subject matter of the disclosure must have occurred after the individual who is seeking corrective action in an IRA appeal became an applicant or employee.

The Board believes that some ambiguity may exist in the language of the statute regarding who is covered by the WPA and WPEA. A starting point for statutory interpretation is the words of the statute itself, which must be examined to determine Congress's intent and purpose. In construing statutes, their provisions should not be read in isolation; rather, each statute's section should be construed in connection with every other section so as to produce a harmonious whole. *Yee v. Department of the Navy*, 121 M.S.P.R. 686 (2014). Because the WPA and WPEA are remedial legislation, the Board will interpret their provisions liberally to embrace all cases fairly within their scope, so as to effectuate the purpose of the Acts. *See Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4 (2006). We now turn to the two statutory provisions in question.

The Board has jurisdiction over whistleblower claims filed pursuant to 5 U.S.C. § 1221(a), as amended by WPEA § 101(b)(1)(A). Section 1221(a) provides that:

> an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) . . . seek corrective action from [the Board].

5 U.S.C. § 1221(a) (emphasis added).

Section 2302(b)(8) prohibits any employee who has authority to take, direct others to take, recommend, or approve any personnel action to:

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety[.]

5 U.S.C. § 2302(b)(8) (emphasis added).

The Board has held that, in whistleblower retaliation claims, 5 U.S.C. §§ 1221(a) and 2302(b)(8) should be read together. *See Schmittling v. Department of the Army*, 92 M.S.P.R. 572 (2002). In construing section 1221(a) with section 2302(b)(8), it is

possibly unclear if a request for corrective action under the WPA must concern only actions that occurred while the individual was an employee or applicant for employment. In other words, it is possibly uncertain whether, to constitute a disclosure "by an employee or applicant," the disclosure of information described in section 2302(b)(8)(A), as well as the subject matter of the disclosure, must have transpired after—and not before—the individual seeking corrective action became "an employee" or "an applicant for employment."

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) addressed this question in three nonprecedential decisions, all of which were decided before the enactment of the WPEA. *See Nasuti v. Merit Systems Protection Board*, 376 F. App'x 29 (Fed. Cir. 2010) (per curiam) (finding that an individual who was a former employee when the alleged personnel action and disclosure occurred could not bring a claim under the WPA); *Guzman v. Office of Personnel Management*, 53 F. App'x 927 (Fed. Cir. 2002) (per curiam) (construing the language of sections 1221(a) and 2302(b)(8) as permitting a former employee to bring a claim under the WPA "only as to disclosures made . . . during the period that the complainant was an employee or applicant"); *Amarille v. Office of Personnel Management*, 28 F. App'x 931 (Fed. Cir. 2001) (concluding that the Board lacked jurisdiction over an IRA appeal filed by a former employee because, during the relevant time in question, he was neither an employee nor applicant for Federal employment). The Board may follow the Federal Circuit's nonprecedential decisions, to the extent that the Board finds them persuasive.

The Board, prior to the WPEA's enactment, also issued decisions ruling on the question being examined here. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221

(2010) (finding that the appellant, who was working for the Federal Government when he filed his Office of Special Counsel complaint and when the personnel actions in dispute took place, was an "employee" protected by the statute, even though he was working at a different Federal agency than the one that took the personnel actions; alternatively, finding that a whistleblower need not be "an employee, an applicant for employment or a former employee at the time he made his protected disclosures"); *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105 (2008) (concluding that the termination of a former Federal employee by a private sector employer taken in retaliation for his protected disclosures during Federal Government employment did not meet the definition of a "personnel action" under the WPA); *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202 (2007) (determining that the appellant lacked standing to challenge personnel actions taken against her while she was a county employee, but that she later was covered by the WPA after she resigned from her county job and applied, but was not selected, for a Federal position).

In light of the relevant statutory language, it could be argued that 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. *Adkins v. Office of Personnel Management*, 104 M.S.P.R. 233 (2006) (reasoning that, where the language of a statute is clear, it controls, absent an express indication of an intent to the contrary), ***aff'd***, 525 F.3d 1363 (Fed. Cir. 2008).

In analyzing this question, the Board also wishes to receive comments that substantively compare and contrast the statutory language in the WPA and WPEA regarding the standing of individuals who are "employees," "former employees," and

"applicants for employment," with the analogous, yet more expansive, standing requirement language under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) which provides, in relevant part, that "a person may submit a complaint against a Federal executive agency or the Office," 38 U.S.C. § 4324(b) (emphasis added); *see Silva v. Department of Homeland Security*, 112 M.S.P.R. 362 (2009).

Finally, the Board is seeking comments that address what, if any, effect the question presented here might have on other Federal whistleblower and anti-retaliation laws. This would include the Department of Defense Authorization Act of 1987, which specifically bans defense contractors and subcontractors from retaliating against employees in reprisal for disclosing to specified entities information about alleged gross mismanagement or a substantial and specific danger to public health or safety. *See* 10 U.S.C. § 2409(a). Interested individuals or organizations may submit amicus briefs or other comments on the question presented in *Abernathy* no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Amicus briefs must be filed with the Clerk of the Board. Briefs shall not exceed 30 pages in length. The text shall be double-spaced, except for quotations and footnotes, and the briefs shall be on 8 ½ by 11 inch paper with one inch margins on all four sides. All amicus briefs received will be posted on the Board's public website at www.mspb.gov/SignificantCases after [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

William D. Spencer

Clerk of the Board

[Billing Code 7400-01-P]

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