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Amici Briefs Sought on the Question of "Whether a Failure to Maintain Fidelity to Federal Whistleblowing Law by the Employing Agency Creates a Significant Change in Work Place Conditions" for Federal Employees

Dan Meyer, Federal Employment and National Security law partner in the Washington D.C. Office of Tully Rinckey, PLLC, is representing Department of Energy (DOE) nuclear safety whistleblower Joseph (Joe) P. Carson, PE, before the U.S. Merit Systems Protection Board (MSPB) on the narrow question of whether the failure of Federal Agency executives to maintain and enforce the whistleblowing and whistleblower protection laws in their respective federal workplaces can be, in and of itself, a personnel action - a significant change in working conditions - under title 5, United States Code Section 2302 (a)(2)(A)(xii).[1]

Special Counsel Henry Kerner, the head of the U.S. Office of Special Counsel (OSC), recently rejected this interpretation in Mr. Carson's complaint to Office of Special Counsel, paving the way for a continued retreat of whistleblower protection programs across the Executive branch, including at DOE, Mr. Carson's employer. The OSC's position on this matter prevents effective government-wide execution of title 5, United States Code Section 4302(b) which mandates that supervisors in federal agencies, as a condition of employment, support and protect whistleblowers in their organizations:

> **(2)** The criteria required under paragraph (1) shall include—
>
> **(A)** principles for the protection of whistleblowers, such as the degree to which supervisory employees—
>
> **(i)** respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);
>
> **(ii)** take responsible actions to resolve the disclosures described in clause (i);
>
> —and—

[1] The website www.merit-principles.org has extensive background material on this issue.

(iii) foster an environment in which employees of the agency feel comfortable making disclosures described in clause (i) to supervisory employees or other appropriate authorities;

—and—

(B) for each supervisory employee—

(i) whether the agency entered into an agreement with an individual who alleged that the supervisory employee committed a prohibited personnel practice;

—and—

(ii) if the agency entered into an agreement described in clause (i), the number of instances in which the agency entered into such an agreement with respect to the supervisory employee.[2]

5 U.S.C. § 4302(b).

Conditions in the work place are becoming ". . . key determinants of recruitment and retention. As will the ability of leadership to create a workplace culture that aligns with the values of the workforce and workplace conditions that align with diverse workforce needs and expectations." Manpower Public Sector, *Change and Challenge in the Public Sector Workplace* (2009) at 3. Diverse workplace needs and expectations includes the expectations of the United States Congress established via title 5, United States Code, Section 4302(b).

[2] **(3)** In this subsection—

(A) the term "agency" means any entity the employees of which are covered under paragraphs (8) and (9) of section 2302(b), without regard to whether any other provision of this section is applicable to the entity;

(B) the term "prohibited personnel practice" has the meaning given the term in section 2302(a)(1);

(C) the term "supervisory employee" means an employee who would be a supervisor, as defined in section 7103(a), if the agency employing the employee was an agency for purposes of chapter 71;

—and—

(D) the term "whistleblower" means an employee who makes a disclosure described in section 2302(b)(8).

Performance standards and their setting are the cornerstone to shaping the conditions of work in the Federal workplace. The Congress requires Agency leadership to "respond constructively" to whistleblowing and "take responsible actions to resolve the disclosures". Both these affirmative requirements – the statute states "shall" – are in addition to fostering "an environment in which employees . . . feel comfortable making disclosures". When these statutory requirements are left unimplemented, a significant change occurs in the workplace, a change making employees uncomfortable making disclosures.

As a leader in the protection of public sector employment, you are invited to submit or join an *amicus curiae* or permissive intervenor brief on this issue to the Atlanta Regional Office of the U.S. Merit Systems Protection Board next month, June 2019.[3] Despite years of Congressional testimony from leaders of OSC and the Merit Systems Protection Board (MSPB), the primary reason concerned Federal employees bystand and do not blow the whistle as is required by Executive Order 12674 is fear of being ignored, the very mischief title 5, United States Code, Section 4302(b) is designed to remedy. So even a 2017 law by which Federal supervisors can be terminated for ignoring a subordinate's whistleblower disclosures—a law that was passed as a result of the Congressional testimony of leaders of OSC and MSPB—has failed to end the current culture of indifference.[4]

Dan Meyer, the first and former head of the Intelligence Community's Whistleblowing & Source Protection (ICWS&P) program, says, "It is time to stop mouthing hypocrisy within the Executive branch. Either we have a whistleblower program or we don't; we either encourage whistleblowing or we shut the meat grinder down. When agency supervisors ignore whistleblowing, they are—by both Supreme Court and MSPB precedent—creating a significant change in the working conditions of the affected employee, due to its chilling effect on concerned colleagues." [5]

Because the Special Counsel refuses to protect Department of Energy nuclear safety engineer, **Joseph P. Carson, PE,** from such a significant change in his working conditions, **Mr. Meyer** will file an Individual Right of Action (IRA) whistleblower appeal and associated stay request at MSPB by early June. He solicits members of Congress, whistleblower advocacy groups, concerned current or former federal agency employees, and other

[3] The relevant MSPB regulation is found at 5 CFR § 1201.34. Because MSPB is an administrative forum, *amici* and intervenors do not need to be represented by an attorney. Current and former federal agency whistleblowers willing to join an *amicus curiae* brief can do so at no cost. The MSPB Docket number will be issued when Mr. Carson files his IRA appeal and/or associated stay request.

[4] *See* 5 U.S.C. §4302(b). This law is also the result of a November 2011 MSPB Special Study, "Barriers to Whistleblowing," that determined the primary reason concerned federal agency employees bystand is not fear of reprisal, but fear of being ignored, *see* https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=662550&version=664522&application=ACROBAT

[5] Burlington North. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2415 (2006); Shivaee v. Dept. of Navy, 74 M.S.P.R. 383, 388 (1997)

stakeholders to a trustworthy federal civil service to file or join amicus curiae or permissive intervener briefs.

To join this effort, contact Dan:

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