UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON DC REGIONAL OFFICE

ROBERT WHITMORE **Appellant,**	)	**DOCKET NUMBER** **DC-0752-09-0890-I-1**
v.	)	
DEPARTMENT OF LABOR **Agency.**	)	November 3, 2009
	)	***Appellant's Request for Stay of the Agency's Action***

APPELLANT'S REQUEST FOR STAY OF THE AGENCY'S ACTION

By and through his undersign counsel, Mr. Robert Whitmore ("Appellant") hereby files this request for a stay of the Department of Labor's ("Agency") action terminating his position effective July 31, 2009. On September 25, 2009, Appellant filed an Otherwise Appealable Action ("OAA") appeal challenging the Agency's decision to terminate his employment. *Whitmore v. Dep't of Labor*, MSPB Docket No. DC-0752-09-0890-I-1. His appeal included an allegation that the action was taken in retaliation for his whistleblowing activities. *Id*. An Appellant may request a stay at any time after he becomes eligible to file an appeal of the action at issue with the Board pursuant to 5 C.F.R. § 1209.5, but no later than the deadline for discovery to be completed in the appeal. The stay request is timely filed in this case because Appellant has filed an appeal with the Board and the deadline for discovery has not yet passed.

There is a substantial likelihood that Appellant will prevail on the merits of his appeal, and should therefore be granted a stay, reinstating him to his former position until the Board makes a ruling on the merits of the appeal.

Jurisdiction

Pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a), (c), (e), the Merit Systems Protection Board ("Board") has jurisdiction over this stay because it has jurisdiction over the

underlying Otherwise Appealable Action appeal. *See Kramer v. General Services Administration*, 47 M.S.P.R. 349, 351 (1991)(a stay request derives its jurisdictional basis from the underlying appeal).

Background

At the time of his termination, Appellant Whitmore occupied the position of a Supervisory Economist, GM-0110-15, in the Office of Statistical Analysis ("OSA"), Directorate of Evaluation and Analysis ("DEA"), Occupational Safety and Health Administration ("OSHA"). Prior to taking this office, Appellant served twenty (20) years as head of the Recordkeeping Requirements group, which is presently located within the OSA. Appellant has served his entire career of thirty-seven (37) years with the Department of Labor ("DOL").

In January of 2005, Appellant provided an affidavit in support of the Equal Employment Opportunity ("EEO") complaint of a DOL employee, Kim Nguyen, who alleged discrimination and retaliation against by her managers in the Directorate of Cooperative and State Programs in OSHA. In his affidavit, Appellant reported gross mismanagement and abuse of authority by one of the implicated officials, Bob Pitulej. Ultimately, Ms. Nguyen's case was resolved through a settlement agreement that was favorable to her and that rescinded her removal from DOL. Several weeks after signing Ms. Nguyens' proposed termination letter, Mr. Pitulej took over as the Deputy Director in Appellant's Directorate and came to be in his direct chain of command.

In April of 2005, Appellant provided comments for an article in the Oakland Tribune regarding the questionable worker injury numbers that were being reported by a bridge construction company that had "partnered" with Cal-OSHA. In his comments, Appellant was critical of Cal-OSHA's recordkeeping practices, again alleging gross mismanagement, abuse of authority, and waste of funds.

Following these two incidents, Appellant's superiors began to treat him in a very hostile and discriminatory manner. His supervisors had knowledge of the disclosures he made and were adversely affected by his criticism of the agency in both the EEO complaint and the Oakland Tribune article. This harassment continued over the next two years and escalated after the incidents described below.

Two years later, in February of 2007, Appellant was contacted by reporters from the Charlotte Observer in connection with a series of upcoming articles they were developing

regarding non-recording of injuries in the poultry processing industry. Appellant was quoted in the articles as criticizing the Agency's recordkeeping of worker injuries, alleging gross mismanagement, among other things.

On March, 20, 2007, Appellant submitted a Waste Fraud and Abuse claim to the DOL Office of the Inspector General ("IG") regarding the conduct of an illegal gambling pool for the NCAA Men's Basketball tournament by his supervisor, Joe DuBois, using government equipment, time and supplies. On March 22, 2007, Appellant sent a confidential e-mail to the department's SES director, Keith Goddard, which Goddard read the following day, in which Appellant laid out his concerns and the facts regarding this illegal activity occurring in his Directorate. Mr. Goddard did not respond, nor did he put a stop to the illegal activity, despite having a full week before the final game. Appellant personally met with the IG representatives on April 2, 2007, the day of the championship game, and discussed the materials he provided and case details. The IG subsequently confiscated Mr. DuBois' computer and reported the illegal activity to then-OSHA Administrator Ed Foulke for action. The IG had also been made aware of Appellant's e-mail to Mr. Goddard. On April 23, 2007, Federal News Radio reported the case. On May 20, 2007, Appellant forwarded his e-mail to Mr. Goddard and other material to all Directorate employees, the OSHA Administrator's office, Solicitor's office and the OSHA Personnel Office explaining what illegal activity he reported the to the IG and why.

On July 10, 2007, Appellant went into Mr. DuBois' office to discuss issues related to his leave and schedule. After a heated discussion with Mr. Dubois regarding his ongoing harassment of Appellant, Appellant indicated that he was going to submit a new complaint to the DOL IG regarding his illegally using government time, computers and supplies to produce campaign literature during his wife's prior campaign for election to the Fairfax Board of Supervisors. At that moment, Mr. DuBois shot up out of his chair, walked briskly over to Appellant in his doorway and intentionally spit all over his chest.

One week later, on July 16, 2007, Appellant was placed on paid administrative leave, where he remained for over two years.

On June 19, 2008, Appellant testified before the U.S. House of Representatives Committee on Education and Labor regarding the underreporting of workplace injuries and illnesses. In his testimony, Appellant accused senior OSHA management of intentionally ignoring the fraudulent data. Later that month, on June 27, Appellant appeared on an "Exposé" story aired on Bill Moyers' Journal discussing the same topic.

On February 19, 2009, two years into Appellant's administrative leave, The Federal Diary in the Washington Post published an article concerning Appellant's disclosures, as well as his extended placement on paid leave. Appellant's supervisors had knowledge of these protected disclosures and were negatively implicated in them.

On April 2, 2009, close to one month after the date of the publication of the first Washington Post article, Appellant received a letter regarding his proposed dismissal from the federal service. The proposed removal became effective July 31, 2009.

Argument in Support of Granting Appellant's
Request to Stay the Agency Action

A request to stay an agency's action may be granted where the Appellant shows that (1) the action taken is a "personnel action" defined by 5 C.F.R. § 1209.4 (2) the agency action was based on "whistleblowing" as defined by 5 C.F.R. § 1209.4(b) and (3) there is a substantial likelihood that the Appellant will prevail on the merits of the appeal. *See* 5 U.S.C. § 1221(e)(1); 5 C.F.R. § 1209.9(a)(6)(i)(ii) and (iii). "[A]lthough the burden of persuasion with respect to the stay request is the appellant's, the burden of going forward with evidence shifts to the agency once the appellant shows a substantial likelihood that his disclosure described under 5 U.S.C. § 2302(b)(8) was a "contributing factor" in the threatened personnel action. *See* 5 U.S.C.A. § 1221(e)(1)." *Williams v. Dep't of Defense*, 45 M.S.P.R. 146, 148 (1990), *rev'd on other grounds*, 46 M.S.P.R. 549 (1991). At that point, the stay will be granted unless the agency shows a substantial likelihood that it will prove by clear and convincing evidence that it would have taken the same action even in the absence of the whistleblowing activity or that granting the stay would result in extreme hardship. *See id.*, at 149-50; 5 U.S.C. § 1221(e)(2); 5 C.F.R. § 1209.9(c)(2)(i) and (ii)(1999). "Congressional intent [is] that stays in these types of circumstances be liberally granted because they are temporary and will avoid further harm to those who ultimately have meritorious cases. *See* S. Rep. No. 508, 100th Cong., 2nd Sess. 17 (1988)." *Williams* at 150-51.

I. Personnel Action

The agency's decision in this case to terminate the Appellant's employment constitutes a removal, which is an "adverse action" as defined by 5 U.S.C. § 7512, and therefore a "personnel action" as defined by 5 C.F.R. § 1209.4(a)(3).

II. Protected Disclosures

Pursuant to 5 U.S.C. § 2302(b)(8), a disclosure is protected if the Appellant shows that he reasonably believed that the disclosed information evidenced a violation of law, rule, or regulation; gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. To establish a reasonable belief that the disclosure evidenced one of these things, an Appellant need not prove that the condition disclosed actually established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A). Rather, the Appellant must only show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified in the statute. The test, outlined in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), asks whether a disinterested observer with knowledge of the essential facts readily known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA.

Here, Appellant made several disclosures regarding wrongdoing by OSHA's programs and officials between 2005-2009. Each of these disclosures are clearly protected within the meaning of 5 U.S.C. § 2302(b)(8).

Violation of law, rule, or regulation: Appellant had a reasonable belief that he disclosed a violation of law, rule or regulation.

On March, 20, 2007, Appellant submitted a Waste, Fraud and Abuse claim to the Department of Labor, Office of the Inspector General ("IG") regarding an illegal gambling pool for the NCAA Men's Basketball tournament administered by his supervisor, Joe DuBois, using government equipment, time and supplies. General Service Administration ("GSA") regulations prohibit **a**nyone, including Federal employees, from participating in games for money or personal property, or operating gambling devices, lotteries, or pools while on Federal property. 41 C.F.R. § 101-20.306. Moreover, Office of Personnel Management (OPM) Government-wide Standards of Conduct regulations, contained at 5 C.F.R. Part 735, prohibit Federal employees from conducting or participating "in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, a game for money or property, or selling or purchasing a numbers slip or ticket" while on Government-owned or leased property or while on Government duty. 5 C.F.R. § 735.201. Because Mr. Dubois and several other employees were in fact operating an NCAA gambling pool on

Federal property, Appellant had a reasonable belief that he disclosed a violation of law when he reported the activities to the DOL IG.

Gross mismanagement: Appellant had a reasonable belief that he publicly disclosed acts of gross mismanagement within the Agency.

Gross mismanagement includes management action or inaction that creates "a substantial risk of significant adverse impact on an agency's ability to accomplish its mission." *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 615 (2000). "It is not necessary to show that the gross mismanagement is 'blatant.'" Gross mismanagement simply requires that an agency policy "be a matter that is not debatable among reasonable people." *White v. Dep't of the Air Force*, 391 F.3d 1377, 1383 (Fed. Cir. 2004). Furthermore, "the WPA does not contemplate removal of protection when protected subject matter is stated in a blunt manner. . . . When a disclosure is of protected subject matter, it is more likely than not to be critical of management, perhaps highly critical." *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1299-1305 (Fed. Cir. 2006) (Fed. Cir. 2006).

Appellant first disclosed evidence of gross mismanagement within OSHA in April 2005, when he provided comments for an article in the Oakland Tribune regarding the questionable worker injury numbers reported by a bridge construction company that had "partnered" with Cal-OSHA. In his comments, Appellant was highly critical of OSHA's recordkeeping practices and alleged that the Agency was intentionally allowing the underreporting of injuries. Appellant contended that the Agency could not possibly accomplish its mission to track, record, and effectuate improvement in workplace injuries and illnesses if the Agency sided with employers and allowed them to underreport such incidents.

Subsequently, in February 2007, Appellant again criticized the Agency's recordkeeping of worker injuries and disclosed gross mismanagement in an article published by the Charlotte Observer regarding non-recording of injuries in the poultry processing industry. The substance of the disclosures alleged that the Agency again was allowing underreporting of injuries and illnesses in order to give the Agency's numbers and records a favorable appearance.

After being placed on administrative leave, in June 2008, Appellant testified before the U.S. House of Representatives Committee on Education and Labor regarding the underreporting of workplace injuries and illnesses. In his testimony, Appellant accused senior OSHA management of intentionally ignoring the fraudulent data, stating:

> I contend that the current OSHA Injury and Illness information is inaccurate, due in part to wide scale underreporting by employers and OSHA's willingness to accept these falsified numbers. There are many reasons why OSHA would accept these numbers, but one important institutional factor has dramatically affected the Agency since 1992, regardless of the political party in power: steady annual declines in the number of workplace injuries and illnesses makes it appear that OSHA is fulfilling its mission.

See Testimony of Robert Whitmore, U.S. House of Representatives Committee on Education and Labor, June 19. 2008.

On June 27, 2008, Appellant appeared on an "Exposé" story aired on Bill Moyers' Journal discussing the same allegations of fraud, waste, abuse and gross mismanagement. Appellant was quoted as stating "there's a disconnect. The spin in [Washington] D.C. disconnects you from reality. The agency isn't doing what it should be doing because we're not there representing the workers. We're there representing the businesses."

Finally, on February 19, 2009, two years into Appellant's administrative leave, The Washington Post Federal Diary published an article concerning Appellant's disclosures, as well as his extended placement on paid leave. The article interviewed Appellant's attorney, who reported that the Agency "want[s] [Appellant} silenced, and this is an easy way to do it… [and] all the awful and illegal things [the previous administration] did in running OSHA would become public." The article referred to the congressional hearing in which Appellant charged that the Agency permitted companies to underreport injuries to workers.

Each of these disclosures concentrated on the Agency's gross mismanagement in allowing employers and industries to underreport employee injuries in order to uphold the appearance that the Agency was fulfilling its mission. In fact, the Agency's actions had a significant negative impact on its ability to fulfill its mission to protected workers' health and safety. A disinterested observer with knowledge of the relevant facts could reasonably conclude that these actions (and inactions) by the Agency evidenced wrongdoing as defined by the WPA. As such, Appellant had a reasonable belief that his disclosures evidenced gross mismanagement and were therefore protected under 5 U.S.C. § 2302(b)(8).

Abuse of authority: Appellant had a reasonable belief that he disclosed behavior by officials in the agency that constituted a clear abuse of authority.

An abuse of authority means an "arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, 241 (2001). Because there is no *de minimis* standard or

threshold applied to disclosures of abuses of authority, they are substantively different from disclosures involving the other types of wrongdoing set forth in 5 U.S.C. 2302(b)(8)(A)(ii), which specify a degree to which the wrongdoing must rise before its disclosure is protected by the WPA. *Wheeler* at 241 n.*; *see also Ramos v. Dep't of the Treasury*, 72 M.S.P.R. 235, 241 (1996).

Moreover, the Board has found that harassment or intimidation of other employees may constitute abuse of authority. *Murphy v.Dep't of the Treasury*, 86 M.S.P.R. 131, 136 (2000); *Special Counsel v. Costello*, 5 M.S.P.R. 562, 580 (1997), *rev'd on other grounds*, 182 F.3d 1372 (Fed. Cir. 1999); *Heining v. General Services Administration*, 61 M.S.P.R. 539, 550-51 (1994).

In January 2005, Appellant submitted a sworn affidavit in an EEO case, disclosing abuse of authority by a DOL officials. In particular, Appellant alleged that he believed that two officials, Bob Pitulej and Paula White, had harassed and treated discriminatorily an employee based on her race and national origin, as well as her disabilities. Appellant disclosed facts evidencing harassment and intimidation of the employee by the officials, including acts of humiliating her in front of other employees, threatening to downgrade her, physical intimidation, denial of requests based on disabilities, and denial of permission to participate in a professional development seminar. Ultimately, the case was resolved through a settlement agreement that was favorable to the employee and that rescinded her removal from DOL, further illustrating that Appellant had a reasonable belief that the acts amounted to abuse of authority, harassment, and discrimination.

Accordingly, Appellant had a reasonable belief that he had reported violations of law, gross mismanagement, and abuse of authority by the Agency and its employees and officials.

III. Contributing Factor

An Appellant who files an appeal with the Board must also make a nonfrivolous claim that the protected disclosures were a "contributing factor" in the personnel action at issue in order to establish Board jurisdiction. Pursuant to Board precedent, reprisal is established by "any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of the decision… [There may be many factors but] only one of which must be a protected disclosure and a contributing factor to the personnel action in order for the WPA's protection to take effect." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). In other words, in order to satisfy the contributing factor criterion, an appellant

need only raise a non-frivolous allegation that the fact of, or content of, the protected disclosure was *one* factor that tended to affect the personnel action in any way. *See Santos v. Dep't of Energy*, 102 M.S.P.R. 370, ¶ 10 (2006).

Appellant in this case has cleared this bar. In the absence of direct evidence, an Appellant can demonstrate through circumstantial evidence that a disclosure was a contributing factor. The most common form of circumstantial evidence, specifically approved by statute, is proof that the acting official (1) had knowledge of the disclosure and (2) took the personnel action within a period of time such that a reasonable person could conclude that disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *see Scott v. Dep't of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996); *see also Rubendall v. Dep't of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006).

Here, Appellant made numerous disclosures about violations of law, mismanagement, fraud and abuse within the Agency. In 2005, Appellant made several reports about abuse of authority and mismanagement. Immediately following these disclosures, Appellant's superiors began to treat him in a hostile and discriminatory manner, denying him sick leave and taking away his responsibilities and duties.

In February of 2007, Appellant was quoted in the Charlotte Observer as criticizing the Agency's recordkeeping of worker injuries. On March 20, 2007, Appellant reported violations of law regarding an illegal gambling pool organized by his supervisor, Joe Dubois. On March 22, 2007, Appellant sent a confidential e-mail to the SES director, Keith Goddard, concerning the facts regarding the illegal activity occurring in his Directorate, and later forwarded the e-mail to the rest of the department. The IG subsequently came and took Mr. Dubois' computer and reported the illegal activity to then-OSHA Administrator Ed Foulke for action. Subsequently, on July 10, 2007, Appellant went into Mr. Dubois' office to discuss issues related to his leave. After a heated discussion, Appellant told Mr. Dubois he was going to submit a new complaint to the DOL IG regarding Mr. Dubois illegally using government time, computers and supplies to produce campaign literature during his wife's prior election campaign to the Fairfax Board of Supervisors, *i.e.* he threatened to make another protected disclosure. At that moment, Mr. DuBois shot up out of his chair, walked briskly over to the doorway and intentionally spit on Appellant's chest. One week later, on July 16, 2007, Appellant was placed on paid administrative leave.

During the two years Appellant was on administrative leave, he made several more disclosures, including disclosures to the US House of Representatives and The Washington Post, regarding gross mismanagement in the agency. On February 19, 2009, The Federal Diary in the Washington Post published an article concerning Appellant's disclosures, as well as his extended placement on paid leave, in which Appellant's attorney was quoted saying that the Agency "want[s] [Appellant} silenced, and this is an easy way to do it… [and] all the awful and illegal things [the previous administration] did in running OSHA would become public." The article referred to the congressional hearing in which Appellant charged that the Agency permitted companies to underreport injuries to workers.

Slightly over one month later, on April 3, 2009, Appellant was sent a proposed removal letter by Steven Witt, Director of Cooperate and State Programs, which became final on July 31, 2009, and was signed by the Deputy Assistant Secretary, Donald Shalhoub. Both Steven Witt and Donald Shalhoub were aware of the multiple disclosures Appellant made between 2005-2009.

Taken together, these facts demonstrate a substantial likelihood that Appellant will prevail in proving that his disclosures were a contributing factor in his termination. Both acting officials, Mr. Witt and Mr. Shalhoub, knew about Appellant's continuing disclosures. Each protected disclosure by Appellant was followed by an adverse response, including discrimination, placement on administrative leave, and termination. The ultimate personnel action on appeal, Appellant's termination, was taken approximately one month after his disclosures to The Washington Post, a period of time such that a reasonable person could conclude that the disclosures were a contributing factor in the action. Thus, Appellant has met the basic knowledge/timing test to meet the "contributing factor" element of his claim.

Moreover, in further considering whether a nexus can be established between the protected disclosures and the agency action, other relevant factors the Board may take into account include whether the proposing and/or deciding official was implicated in the disclosures; whether there was disparate treatment; whether there was an excessive penalty; and the seriousness of the disclosures. *E.g., Valerino v. HHS*, 7 MSPR 487, 489-90 (1981); *Powers v. Dep't of Navy*, 69 MSPB 150, 156 (1995). Each of these factors strongly favors Appellant in this case.

Here, Mr. Shalhoub was the deciding official, and as Deputy Assistant Secretary of OSHA, his reputation was directly impacted by the disclosures, which were of a serious

nature, questioning OSHA's efforts to obtain accurate reporting by employers and thereby protect workers from workplace injuries and illnesses. Moreover, the reasons given for Appellant's termination included his role in a dispute with his supervisor, Mr. Dubois, as well as a handful of emails exchanged between Appellant and his supervisors, indicating an excessive penalty, even assuming the charges were valid. These facts constitute further circumstantial evidence that Appellant's disclosures were a contributing factor in his removal.

Appellant has met the knowledge/timing test, shown motive by the deciding official for reprisal, disparate treatment, and an excessive penalty for the charges supporting termination. Accordingly, Appellant has shown a substantial likelihood that he would prevail in showing that his disclosures were a contributing factor in the decision to terminate his employment.

Based on the foregoing, Appellant has met the burden of showing that he made a protected disclosure and that an adverse "personnel action" was taken against him. Appellant also has overwhelming direct and circumstantial evidence that the termination of his appointment was made on the basis of his protected disclosures, thus meeting the "contributing factor" element of his case. Thus, a stay is mandated unless the agency can come forward and show that it has a substantial likelihood of proving by clear and convincing evidence that it would have taken the same action in the absence of Appellant's protected activity.

IV. Lack of Clear and Convincing Evidence that the Agency Would Have Removed Appellant in the Absence of Whistleblowing

"Clear and convincing evidence" is defined as "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations thought to be established. It is a higher standard of proof than a "preponderance of the evidence." 5 C.F.R. § 1209.4(d).

To determine whether the agency has met its burden of proof by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity, the Board considers the following factors: (A) strength of the evidence in support of the personnel action; (B) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (C) any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. *See Caddell v. Dep't of Justice,* 66 M.S.P.R. 347 (1995), *aff'd*,

96 F.3d 1367 (Fed. Cir. 1996); *Visconti v. EPA*, 78 MSPR 17 (1998); *Carr v. SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Shaw v. Air Force*, 80 MSPR 98 (1998); *Geyer v. Dep't of Justice*, 70 MSPR 682 (1996); *Schmittling v. Dep't of Army*, 81 MSPR 225, 228-38 (1999).

A. Strength of the evidence in support of the personnel action

The agency will not be able to provide clear and convincing evidence that it would have taken the same action in the absence of Appellant's continued protected disclosures because the evidence in support of the personnel action is weak; in fact there were no legitimate non-retaliatory grounds for terminating Appellant's employment. The reasons stated in Appellant's proposed termination letter are not factually supported and are simply pretext for dismissing him as a result of his whistleblowing activities which shed light on the mismanagement of the agency.

Disruptive and intimidating behavior

The first reason given for Appellant's termination, "disruptive and intimidating behavior," was founded upon a single incident that arose between Appellant and his supervisor, Mr. Dubois, on July 10, 2007. While it is undisputed that a disagreement took place on that date, the account of the incident given in the proposed termination letter was distorted and failed to give an impartial description of the event. There is a substantial likelihood that Appellant will be able to prove that the charged conduct did not occur. While the agency relies solely upon Mr. Dubois for its claim that Appellant was the aggressor in this incident, and spit on Mr. DuBois, Appellant's declaration, as well as affidavits from other employees who witnessed the incident, reveal that Appellant was not the aggressor and did not engage in "disruptive and intimidating behavior." Appellant also has proof that he was the one who was spat on from the shirt he retained that day. The removal letter also mentions the coarse language that Appellant used during the verbal disagreement, but fails to mention that Mr. Dubois also cursed at Appellant several times, as confirmed by the affidavit testimony.

Moreover, the fact that Mr. Dubois, Appellant's supervisor, went unpunished for his role in the event (when instead, as Appellant's superior, he should have been penalized and disciplined for conduct unbecoming of a supervisor), is additional evidence of disparate treatment, excessive penalty, and pretext for discriminating against Appellant for his status as a whistleblower. The Agency's inaccurate account of the event, the excessive penalty imposed on Appellant, and disparate treatment towards him all speak loudly to the Agency's motives in retaliating against Appellant for engaging in protected disclosures.

Conduct unbecoming a supervisor

The second reason given for Appellant's proposed removal was a series of e-mails between him and Mr. Dubois regarding Appellant's health status, timesheets, and the scheduling of his staff. The three excerpts provided in the specifications fail to support whatsoever the proposed personnel action. All three e-mails are taken out of context and fail to consider that Appellant attempted on abundant occasions to sit down with Mr. Dubois and his other superiors to resolve the issues addressed in the e-mails. Because Mr. Dubois and higher management persistently refused to discuss the particular issues with Appellant, Appellant felt he was being harassed and discriminated against. The e-mails were a relatively peaceful response to the frustration and pressure he felt as a result of his supervisor's harassment and failure to work through the issues with him.

Again, the fact that Mr. Dubois regularly sent uncongenial e-mails to Appellant and was never even reprimanded for them, speaks loudly to the Agency's motives and use of Appellant's e-mails as pretext for reprisal. In any event, the three emails cannot support a personnel action as serious as removal of a 37 year employee with an otherwise positive record, particularly where the other parties involved engaged in similar behavior and went unpunished.

Inappropriate conduct in the workplace

The final "reason" given for the personnel action taken against Appellant was "inappropriate conduct in the workplace." The specifications included several e-mails from Appellant to Mr. Dubois, copying Directorate staff members.

Again, it should be noted that the e-mail excerpts relied upon in the letter were taken out of context and failed to illustrate Appellant's persistent efforts to resolve the issues with his supervisor, Mr. Dubois. Appellant also attempted to elicit help from others in the Directorate, including Mr. Zeigler, Mr. Poogach, Mr. Locey, and Mr. Goodell, but none of them were responsive to his pleas. In fact, Appellant later found out that Mr. Zeigler and Mr. Poogash were strong opponents of whistleblowers and believed that speaking out against the agency was the equivalent of declaring war. *See* Finkel Decl. ¶¶ 8-14. Accordingly, their involvement with Appellant's personnel disputes certainly contributed to the reprisal he was experiencing.

Moreover, Appellant copied staff members on the e-mails in an effort to memorialize the harassment and lack of response he was receiving from his supervisors, as well as to efficiently communicate his leave status. Mr. Dubois and Mr. Goddard similarly often

replied to Appellant's e-mails by copying the rest of the staff. Neither were ever reprimanded for this behavior.

Thus, the evidence in the record alleging "inappropriate conduct in the workplace" cannot support the personnel action taken. The e-mails did not amount to inappropriate conduct that would justify Appellant's removal and Appellant was punished in a disparate and discriminatory manner with regard to these correspondences.

Hostile Work Environment "Investigation"

Following the "reasons" given in the proposed termination letter for the personnel action, the Agency discussed the findings of an internal investigation that it commissioned following the July 10, 2007, incident between Appellant and Mr. Dubois. For the reasons stated below, the investigation cannot be relied upon to support the personnel action.

In commissioning and relying upon the "investigation", the Agency committed harmful error in the application of procedures it used to arrive at the decision to terminate Appellant. For one, the Agency chose Dave Morgan, the former OSHA Human Resources Director, to launch the investigation, rather than hiring an impartial and detached contractor that had no associations with the agency. Moreover, the investigation itself was not reasonably objective and instead constituted a witch-hunt, aimed at gathering whatever information possible to arrive at a predetermined conclusion that Appellant created a hostile work environment at OSHA. For example, Mr. Morgan relied solely upon those sources that claimed Appellant was responsible for creating hostility and discredited all of the sources that claimed Appellant's superiors were the cause of the hostile work environment. Moreover, the Mr. Morgan asked those who accused Appellant if they knew of others who had "direct knowledge of Appellant's disruptive behavior," and failed to seek out more information from those who accused Appellant's superiors. One employee even stated that he did not believe there was a hostile work environment, but the investigator did not ask him any further questions- similar to how the Mr. Morgan did not ask those on Appellant's side any further questions. The investigation clearly had an objective that was not reasonably fair and impartial. In addition, the investigation turned a blind eye to the issue of motive for retaliation, and failed to weigh in on the credibility of those interviewees that gave favorable responses (whereas it did weigh in on the credibility of interviewees that gave responses unfavorable to the Agency). The improper techniques used in conducting the investigation purge any credibility the findings might have had, and

therefore the investigation cannot be relied upon to support a finding that Appellant deserved to be terminated.

Performance

It is also worthwhile to note that the Agency failed to consider Appellant's exemplary performance in his employment with OSHA. Appellant routinely earned performance ratings of "outstanding" and "exceeds expectations," annual performance bonuses, quality step increases, several OSHA Assistant Secretary Project Awards, as well as similar recognition from the Federal Railroad Administration. Prior to his termination, Appellant had been employed with the Department of Labor for thirty-seven (37) years. During that time, he served as the head of the Recordkeeping Requirements group, and contributed immeasurably to the mission of the agency, including through his work on investigations of recordkeeping violations, a large number of which resulted in large fines against non-compliant companies. Appellant was never given any criticism of any of his work product, other than disputes with his supervisors in 2005-2007 regarding his sick leave. Appellant had not been subject to any prior discipline, apart from a single warning letter issued on September 25, 2006 regarding his compressed work schedule.

As such, the strength of the evidence in support of Appellant's termination is extremely weak, and demonstrates only pretext for retaliating against Appellant for his protected disclosures. Appellant has shown by a preponderance of the evidence that there is not a substantial likelihood that the Agency will be able to provide clear and convincing evidence that it would have taken the same action in the absence of Appellant's protected disclosures -- because the reasons given for terminating his employment were not legitimate.

B. The existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision

The officials involved in the decision to remove Appellant, Mr. Witt and Mr. Shalhoub, both had enormous motivation to retaliate because they were implicated in and negatively affected by many of Appellant's disclosures about abuse of authority and gross mismanagement within the agency. These officials had an interest in silencing Appellant from making additional reports and comments about the agency and its failures and setbacks.

Moreover, in examining retaliatory motive for an agency action, officials "involved" in the action may encompass more than just the proposing or deciding officials, and may

include other officials upon whom the proposing or deciding official relied for information. *Mangano v. Department of Veterans Affairs,* 2008 MSPB 202 (2008), citing *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶¶ 65-67 (2001), *review dismissed,* 32 F. App'x 543 (Fed. Cir. 2002). There can be little doubt that Mr. Dubois had some involvement in the decision to terminate Appellant. The investigation was launched against Appellant following the incident with Mr. Dubois on July 10, 2007, after Appellant specifically told Mr. Dubois he would make another report to the IG about his illegal activities. Mr. Dubois was directly incriminated by the initial report to the IG regarding gambling on federal government property and therefore had undeniably strong motives to retaliate against Appellant.

It is clear that there is strong evidence to support an allegation of motive to retaliate on the part of the agency officials involved in the decision to remove Appellant subsequent to his protected disclosures.

C. Evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated

The agency did not take any similar actions against non-whistleblowing employees who engaged in the exact type of conduct Appellant was charged with for his termination. Mr. Dubois engaged in often confrontational and quarrelsome communications and behavior with Appellant, yet he did not suffer the slightest discipline for it. In fact, even worse, Mr. Dubois was caught having committed an illegal activity on government property during in the course of his employment, and no action was taken against him. Appellant never engaged in illegal, or even dishonest, activities, yet he was terminated for the few occasions on which he acted toward his supervisor the same way his supervisor had been acting toward him for years.

If engaging in inappropriate conduct of the sort described in this case were indeed grounds for any disciplinary action, let alone dismissal, it would long ago have been the basis for removing Mr. Dubois, as other employees have attested to his hostile and abusive conduct. There is evidence that Mr. Dubois openly expressed his hostility at every opportunity, for example by persistently and intentionally misreporting Appellant's time sheets, refusing to grant Appellant sick leave, refusing to meet with Appellant to work out any of the scheduling issues, taking away Appellant's supervisory duties without any cause, and regularly taking argumentative and demeaning tones with Appellant, yet he has never been disciplined in the slightest.

As such, there is evidence that the Agency has not taken similar actions against other non-whistleblowing employees for engaging in conduct similar to that which Appellant was charged with for termination – in fact the evidence shows the opposite. For these reasons, the Agency cannot show by clear and convincing evidence that it would have removed Appellant in the absence of his protected disclosures.

V. Extreme Hardship

The Agency cannot claim that it would be unable to comply with the stay request due to extreme hardship. Up until he was dismissed, Appellant was on paid administrative leave for nearly 2 years, and the agency was paying him not to work. Appellant seeks now to continue to make the kind of contributions he made to the agency in the prior 37 years, when, as noted above, he received positive performance evaluations, awards and other recognition. Moreover, Mr. Dubois is no longer employed with the Agency, so Appellant's return to work would not lead to any further difficulties with him. Appellant's return to the agency could only benefit the mission of OSHA.

Conclusion

Appellant Robert Whitmore has specifically identified his protected disclosures, and indicated how the disclosures are covered by 5 U.S.C. § 2302 (b)(8). The evidence supports a conclusion that Appellant made protected disclosures, the acting officials involved in the termination action were aware of Appellant's disclosures, and the disclosures were a contributing factor in the decision to terminate Appellant. All of Appellant's disclosures were based on allegations of violations of law, gross mismanagement, and/or abuse of authority. Moreover, Appellant has shown that the Agency will not be able to demonstrate by clear and convincing evidence that it would have terminated him in the absence of his whistleblowing, and the Agency cannot make a valid argument for extreme hardship. Accordingly, at the least there is a substantial likelihood that the Appellant will prevail on the merits of the appeal. Appellant therefore requests a stay of the Agency's action terminating his employment until the resolution of the MSPB appeal process.

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