No. _____

In The

Supreme Court of the United States

GEORGE DUGGAN,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether after a prima facie retaliation for whistleblowing has been found under the Whistleblower Protection Enhancement Act of 2012 does the Agency's burden under the clear and convincing evidence standard in its affirmative defense have to consider the petitioner's rebuttals before substantive evidence can find the agency's personnel actions against the petitioner happened in the absence of his protected disclosures.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 883 F.3d 842. The opinion of the Merit System Protection Board (MSPB) is unpublished.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on May 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Whistleblower Protection Enhancement Act (WPEA) of 2012 prohibits retaliation for federal employees making protected disclosures (whistleblowing). A whistleblower retaliation case under the WPEA takes place within a burden shifting scheme. First, the employee must prove by preponderance of the evidence that he or she made a protected disclosure under 5 U.S.C. § 2302(b)(8):

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not . . . 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 . . . 5 U.S.C. 2302(b)(8)(A).

Second, the employee must also demonstrate that the protected disclosure was a contributing factor to the employee's personnel action. 5 U.S.C. § 1221(e)(1). Finally, once the prima facie case of whistleblower retaliation is established the burden shifts to the agency to show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosures." 5 U.S.C. § 1221(e)(2).

STATEMENT OF THE CASE

On May 1, 2013, Petitioner George Duggan, an employee of 25 years, who in 2010 won a prior case of whistleblower retaliation under the antecedent Whistleblower Protection Act (WPA) of 1989, was suspended for 10 days from his job as GS-12 Senior Auditor for Defense Contract Audit Agency (DCAA). In the prior

case he won in 2010 he was suspended for the same general reasons – disrespectful and disruptive conduct. On August 5, 2013, Petitioner was given a "Minimally Successful" rating on his annual performance appraisal and was denied a superior performance award. On September 3, 2013, management rescinded approval for Petitioner's telework agreement, which resulted in him having to commute over 100 miles per day to work.

In summary, Petitioner filed an Individual Right of Action Appeal with the MSPB which was heard in San Francisco during June of 2015. On September 3, 2016 the MSPB issued its Final Order denying the Petition for Review. A panel of the Ninth Circuit affirmed on the grounds that in its view, "substantial evidence supports the Board's determination that the agency proved, by clear and convincing evidence, that it would have taken the same disciplinary action against Petitioner in the absence of his whistleblowing activities."

This case concerns the highest standard of proof for civil cases, the clear and convincing standard, and whether after a prima facie retaliation for whistleblowing has been found under the Whistleblower Protection Enhancement Act of 2012 does the Agency's burden under the clear and convincing evidence standard in its affirmative defense have to consider the petitioner's rebuttals before substantive evidence can find the agency's personnel actions against the petitioner happened in the absence of his protected disclosures.

If substantive evidence was found without considering the petitioner's rebuttals, has the petitioner been denied procedural due process under the Fifth Amendment of the Constitution?

REASONS FOR GRANTING THE PETITION

This case represents a clear and foreboding conflict between federal circuits for whistleblowers on what constitutes the Agency's burden of proof under the WPEA.

A. The Ninth Circuit's Decision Conflicts With a Landmark Decision of the Federal Circuit

Congress expanded the whistleblower protections under the WPEA by permitting an all circuits review, noticeably contemporaneous with the turning point *Whitmore* decision in the Federal Circuit, because it believed prior decisions in the MSPB and the Federal Circuit were hostile to whistleblowers. *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012). Therefore, this is a dangerous first ruling for whistleblowers under the WPEA in the Ninth Circuit, regarding the agency's burden, of proving by clear and convincing evidence it would have disciplined the whistleblower despite his protected disclosures. And though the panel in this case cited and adopted seven distinctly older Federal Circuit cases in making its decision, it conspicuously and ominously ignored more recent Federal Circuit case law in *Whitmore v.*

Department of Labor, 680 F.3d 1353, 1370 (Fed. Cir. 2012) that, according to Tom Devine, Legal Director at the Government Accountability Project, specifically consolidated and expanded agency burdens within the adopted older *Carr* framework, a formula unique to whistleblower law, to help prevent agency pretext, *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999). The Whistleblower Protection Act Burdens of Proof: Ground Rules for Credible Free Speech Rights. Tom Devine, Labour Studies Vol. 2, No. 3 September – October 2013, P. 13.

Whitmore restored congressional intent that attempted to eliminate the *Carr* factors by rolling back severely diluted agency burdens under those factors, according to Tom Devine.

In *Whitmore*, the Federal Circuit required the agency's burden to consider the whistleblower's rebuttal to the agency's personal actions. Whitmore definitively concluded, "Any determination by an AJ that is based on findings made in the abstract and independent of the evidence which fairly detracts from his or her conclusions is unreasonable and, as such, is not supported by substantial evidence." Whitmore's case highlights the prototypical experience for federal employees attempting to right agency wrongs in hostile work environments over their long careers, and in this way mirrors this petitioner's case and so many others.

The following paragraphs are taken from *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012, P. 22):

"The Supreme Court has explained that '[t]he purpose of a standard of proof is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (citations and internal quotation marks omitted). The 'clear and convincing standard' is understood to be 'reserved to protect particularly important interests in a limited number of civil cases.' Id. at 93. When enacting the Whistleblower Protection Act of 1989, Congress explained its reasoning for requiring clear and convincing evidence as follows:

> 'Clear and convincing evidence' is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was 'tainted.' Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In

> these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

135 Cong. Rec. H747-48 (daily ed. Mar. 21, 1989) (explanatory statement on Senate Amendment to S. 20). Against this backdrop, there is no doubt that Congress considered it very important that federal agencies be required to clearly and convincingly rebut a prima facie case of whistleblower retaliation, especially given the evidentiary disadvantages that face removed whistleblowers."

"Whether evidence is sufficiently clear and convincing to carry this burden of proof cannot be evaluated by looking only at the evidence that supports the conclusion reached. Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion. See, e.g., *Li Second Family L.P. v. Toshiba Corp.*, 231 F.3d 1373, 1381 (Fed. Cir. 2000) ('When determining whether [deceptive] intent has been shown by clear and convincing evidence, a court must weigh all evidence, including evidence of good faith.'); *Price v. Symsek*, 988 F.2d 1187, 1196 (Fed. Cir. 1993) (vacating and remanding because the Board failed to consider certain testimony, explaining that under the clear and convincing evidence standard 'all of the evidence put forth by Price, including any of his corroborated testimony, must be considered as a whole, not individually, in

determining whether Price conceived the invention of the count before Symsek') (emphasis in original). It is error for the MSPB to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately."

"The Whistleblower Protection Act makes clear that whistleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation. *Horton v. Dep't 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.'). Yet Congress understood that whistleblowers are at an evidentiary disadvantage in proving their cases. In many instances, our review of whistleblower appeals turns on whether substantial evidence exists to support the judgment of the MSPB. However, we are unable to make such determinations if the MSPB fails to provide an in depth review and full discussion of the facts to explain its reasoning. Such a complete evaluation of the facts is necessary in every case because outside of written opinions and transcribed oral statements, we have no basis to discern the reasoning of the MSPB and decide whether there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Massa v. Dep't of Def.*, 815 F.2d 69, 72 (Fed. Cir. 1987) (internal quotation marks omitted). If

> considerable countervailing evidence is manifestly ignored or disregarded in finding a matter clearly and convincingly proven, the decision must be vacated and remanded for further consideration where all the pertinent evidence is weighed."

Whereas, the Ninth Circuit adopted the Fifth Circuit's older case law in *Greenspan v. Dep't of Veteran Affairs*, 464 F.3d 1297, 1305 (Fed. Cir. 2006) ruling, "wrongful or disruptive conduct is not shielded by the presence of a protected disclosure," *Duggan v. Dept. of Defense*, 883 F.3d 842, P. 10 (9th Cir. 2018), yet ignores more recent *Whitmore*, "The AJ did not consider the possibility that the conduct upon which Whitmore's removal was premised might never had occurred but for the DOL's retaliatory actions creating a hostile work environment for Whitmore." *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370, P. 40 (Fed. Cir. 2012). In *Whitmore*, the Federal Circuit peeled back the onion to appreciate whistleblowers often work in hostile environments, where agency provocations and retaliations can only be ignored by the most saintly employees. Congress surely didn't believe the WPEA should work only for saints.

Indeed, the Ninth Circuit opinion shows a one dimensional approach assessing the *Carr* factors to prove the agency's burden, not even mentioning any of the petitioner's rebuttal evidence in its decision. The Federal Circuit's *Whitmore* opinion could not be more different, considering context evidence, like institutional animus, pretext, hostile work environment, and outside chain of command discipline, and underlying

magnitude of wrongdoing, all applicable to this petitioner's case.

B. The Issues Presented by this Case Are of Exceptional Importance

> "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 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."
>
> Senate Report No. 95-969, at 8 (1978)

Congress, clearly, thinks protecting federal whistleblowers is of exceptional importance because it has amended the Whistleblower Protection Act three times (1989, 1994 and 2012) since its original passage in 1978 to close loopholes in the law to provide greater protection for federal whistleblowers.

These protections relied on by all federal employees, whose oath to the government requires they

disclose wrongdoing, will be effectively nullified without reversal, if only the agency's evidence is considered under the agency's affirmative defense to prove its personnel actions occurred in the absence of whistleblowing. The government has a powerful advantage over whistleblowers to records and personnel and to create pretext with them giving the appearance its discipline happened independently of whistleblowing. For this reason a whistleblower's rebuttal evidence must be considered and commented on before substantial evidence defeats the protections in the WPEA. It is naïve to assume agencies called out for wrongdoing by an employee will not strike back with invented pretext especially if they know countervailing evidence will not be heard under the WPEA. This Petitioner is just one prime example of the value of federal whistleblowers.

This case is only the penultimate instance of protected disclosures and accompanied retaliations in a chain of protected disclosures and retaliations beginning in 2003 and again in 2008 through 2015 of the Petitioner, working as a Certified Public Accountant and senior auditor, at the DCAA endeavoring to bring about needed reforms to a failed government agency. The Petitioner, who prior to his 2003 whistleblowing, 15 years into his now 30 year career as an auditor at DCAA, was never disciplined nor rated less than above average in his annual performance reviews.

The Petitioner's whistleblowing while in Iraq in 2007 disclosed DCAA abdicated its responsibility to audit the army's billion dollar linguist contracts resulting in substantial numbers of unqualified interpreters stationed all over Iraq, translating in the embassy and

embedded with U.S. troops at all forward operating bases, over a four year time span misinterpreting mission critical communications, alienating the hearts and minds of the Iraqi population, endangering the troops, and, ultimately, extending the war. In addition, his whistleblowing on gross mismanagement in Iraq regarding the auditing of logistic subcontracts elicited these comments from a federal judge in the first Iraq war contract case to proceed to trial in the U.S. Court of Federal Claims: "Of all the witnesses who testified by deposition . . . , Mr. Duggan's resonated with clarity, authority, balance and common sense." *KBR v. U.S.*, 09-351C (U.S. Court of Federal Claims 2012, P. 46), and "Of the auditors that testified, the court found Mr. Duggan to be the most knowledgeable. He stated the obvious: This was a commercial fixed-price subcontract; DCAA [audit management] wanted cost data 'but we were stuck . . . with price data' . . . Mr. Duggan saw that it was necessary to find some other barometer of reasonableness." *KBR v. U.S.*, 09-351C (U.S. Court of Federal Claims 2012, P. 77).

And stateside, his whistleblowing helped bring about a General Accountability Office's (GAO) investigation of DCAA that concluded, in 2009: "A management environment and agency culture that focused on facilitating the award of contracts and an ineffective audit quality assurance structure are at the root of the agency wide audit failures we identified. DCAA's focus on a production-oriented mission led DCAA management to establish policies, procedures, and training that emphasized performing a large quantity of audits to support contracting decisions and gave inadequate

attention to performing quality audits. An ineffective quality assurance structure, whereby DCAA gave passing scores to deficient audits compounded this problem." GAO-09-1009T, May 23, 2009 (DCAA Audits: Widespread Problems with Audit Quality Require Significant Reform).

DCAA focus on production oriented performance metrics created an agency chain of command of dubious merit, promoting employees who, over at least a 15 year period of metric fixation, were willing to lower audit standards and ignore access to records laws to meet or exceed production goals. In his book The Tyranny of Metrics, Jerry Z. Muller, Professor of History at Catholic University of America, warns when much is at stake, employees will inevitably not only game the metrics to their advantage but even outright cheat to obtain the performance metric goal. DCAA's chain of command by year 2009 was full of cheaters, entrenched and determined to follow and order the status quo that led to their individual career successes.

The DCAA, whose job is to conduct contract audits involving billions of annual procurements at DoD and other agencies, completely failed in its very purpose to the nation. On July 24, 2008, U.S. Senator Claire McCaskill made a statement from the Senate floor about the initial corruption GAO confirmed at the DCAA: " . . . They've gotten caught in what could be the biggest auditing scandal in the history of this town, and I'm not exaggerating here. . . ." Senator Claire McCaskill Press Release, dated July 24, 2008 (Floor Statement on DCAA Problems). Unfortunately, DCAA's scandal took a backseat to the financial

meltdown and presidential election in 2008 and was largely forgotten by lawmakers and the public. The fallout from the various investigations by the GAO and DoD IG and two Senate hearings, however, resulted in new leadership at DCAA, audit policies and a mission statement. Additionally, each audit report published by DCAA for a five year period beginning in 2009 to 2013 was qualified for lacking a peer review of its internal control system, meaning that the users of the advisory audit reports, various procurement officers, had no solid grounds to accept DCAA's recommendations as consumer protections in their negotiations with federal contractors. (DCAA Memorandum, dated August 26, 2009.) A more complete mission failure and collapse of a government agency is hard to identify or imagine in recent U.S. history.

However, despite some important reforms and the appearance of other dramatic reforms, major corruption still existed at DCAA forcing the Petitioner to continue his whistleblowing in a very hostile work environment. In December of 2008, the Petitioner went to the Associated Press about DCAA's access to records problems, which led to a widely published story in November of 2008 on DCAA going easy on contractors. AP Report, dated November 9, 2008 (Inside Washington: Auditors go easy on contractors). The DCAA management was so embarrassed by the AP report it immediately reissued its access to records policy to all auditors and gave them training on the subject. (DCAA Memorandum, dated December 19, 2008.) The Petitioner was retaliated against by DCAA management for his protected disclosures to the AP with the pretext of

disrespect, as in this current case, and he prevailed in the MSPB in 2010, essentially because a document found in discovery contained a key manager's admission of retaliation. *Duggan v. Department of Defense*, MSPB Opinion SF-1221-10-0159-W-1, 2010. The WPEA/WPA does not require a direct admission from agency management about its retaliation for the whistleblower to prevail, yet that is what it took in the petitioner's earlier WPA case. The AJ's discovery ruling denied the same key manager as a witness in this current case though he was at the center of the wrongdoing disclosed.

The appellant also disclosed in a 2009 website article that Agency managers were routinely rejecting auditor fraud referrals to investigative agencies to increase audit report output. The Center for Public Integrity Report, dated February 10, 2009 (DEFENSE: Pentagon Contract Fraud Policy May Not Match Reality). DCAA management immediately revised its policy on fraud referrals eliminating management approvals. (DCAA Memorandum, dated February 9, 2009.) The effectiveness of his whistleblowing is evidenced by the fact that during the years after his protected disclosures, fraud referrals from DCAA more than doubled from 68 to 156. (DCAA FOIA Ltr CM 502.4, I-13086-H).

However, a routine cycle had developed: the Petitioner would seek internal reform, he was ignored and then he would make specific protected disclosures followed closely by management retaliations, under the pretext of disrespectful conduct, involving

suspensions, lower evaluations, lost promotion scores and forced workplace transfers. Even after winning his first WPA case pro se in the MSPB in 2010, the cycle continued unabated, and, because there was no management accountability, his work environment became more hostile. He was a marked man at DCAA, called "George listed."

This case represents the penultimate whistleblower filed WPEA case for the Petitioner and begins with a forced transfer in late 2012 to government contractor Environmental Chemical Company (ECC) for the Petitioner's prior whistleblowing at another defense contractor. The Petitioner found himself in another intolerable situation where managers were violating public access to records laws and audit standards to expedite audits involving close to a billion dollars in high risk Iraq war contract claims (earlier GAO reports cited this same type of audit failure) with the aim of cheating on their audit efficiency metrics and promotion potentials. The situation at ECC was so bad that DCAA was completely re-doing the overall fiscal year 2005 audit because the first audit had to be rescinded for flagrant professional violations, including not auditing of hundreds of millions of dollars in risky Iraq subcontracts. Even this professional error did not embarrass or give DCAA management pause to control their conduct.

ECC's subcontracts were particularly risky because of poor record-keeping and widespread fraud in Iraq. In fact, Petitioner discovered that an ECC subcontract manager had pleaded guilty to taking a bribe

in Iraq, which fact ECC had concealed from DCAA, potentially polluting the legitimacy of hundreds of millions of dollars in ECC Iraq subcontract costs from years 2005 to 2010. Moreover, a report from the Special Inspector for Iraq Reconstruction (SIGIR) who was onsite to audit ECC government contracts in Iraq disclosed numerous ECC cost overruns and subcontractor irregularities and even pointed out critical contemporaneous audits of ECC internal controls systems from DCAA stateside were not completed. Special Inspector for Iraq Reconstruction (SIGIR) Audit 10-001, dated October 22, 2009.

Petitioner testified in detail on ECC's tactics to avoid granting access to records, facilitated by DCAA managers. He ultimately made several protected disclosures, including a very public one to an internet publication calling out DCAA's senior executive staff for continued wrongdoing for which he received this current retaliation. Government Executive Report, dated May 8, 2013 (Longtime Whistleblower at the Defense Contract Audit Agency Keeps Discontent Alive).

CONCLUSION

In summary, the Ninth Circuit's decision opens up a foreboding conflict between federal circuits and potentially endangers the critical protections under the WPEA for all covered federal employees on this important question: Whether after a prima facie retaliation for whistleblowing has been found under the WPEA of 2012 does the Agency's burden under the clear and convincing evidence standard in its affirmative defense have to consider the petitioner's rebuttals before substantive evidence can find the agency's personnel actions against the petitioner happened in the absence of his protected disclosures. For the reasons above, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

August 14, 2018

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