ORIGINAL

19-1332

CASE No.

SUPREME COURT OF THE UNITED STATES

TONYA KNOWLES,

PETITIONER,

v.

DEPARTMENT OF VETERAN AFFAIRS,
RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals Federal Circuit

Petition for a Writ of Certiorari

Tonya Knowles
1201 Seminole Blvd
Apartment 474
Largo, Florida 33770
(239)672-5623
Pro Se

Questions Presented

1. When an Employee makes a protected disclosure, regarding a Prohibited Personnel Practice which falls under statue 5 USC 2302 (b)(8)-(9), against an agency official and or staff are the subjects of the protected disclosures allowed to initiate an investigation regarding the complaints made against them?

2. If an employee makes a protected disclosure against an agency official regarding how patient information is safeguarded and the subjects of the disclosure were investigated and placed on a Performance Improvement Plan, The Office of Inspector General (OIG) verified findings of inadequate safeguards, and the Office of Special Counsel (OSC) acknowledged that patient information was not safeguarded according to the Agency's protocol would that give an management official motive to retaliate?

3. If a whistleblower shows that there protected disclosures contributed to adverse actions does the agency bear the burden of showing that it would have acted in the same way even absent any whistleblowing?

PARTIES TO THE PROCEEDING

The names of all parties appear on the caption of the case cover page.

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STATUES

REGULATIONS

Decision Below

The opinion of the United States Court of Appeals is reported as Non-Precedential.

Jurisdictional Statement

On January 10, 2020 the United States Court of Appeals issued a decision denying my request for corrective action under the Whistleblower Protection Act. The Supreme Court of the United States has jurisdiction to review my case in accordance with 28 U.S.C 1254 (1) which states that Cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon petition of any party to any civil and or criminal case, before and after rendition of judgement or decree.

Constitutional & Statutory Provisions

The First Amendment to the United States Constitution provides, in pertinent part, that Congress shall make no law... Abridging the freedom of speech. The U.S. Constitution amend I. Section 1 of the fourteenth amendment to the United States Constitution provides in pertinent part that [n]o State Shall... deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws. "The Whistleblower Protection Act of 1989, 5 U.S.C. 2302 (b)(8)-(9), Pub. L. 101-12 as amended, is a United States Federal Law that protects federal whistleblowers who work for the government and report the possible existence of an

activity constituting a violation of any law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and or safety

Statement of Facts

A. *2017 Suspension*

May 23, 2016, I disclosed to Ms. Rosa Sly (Release of Information, Supervisor) in person that documents were missing (Appx1). June 06, 2016, I disclosed to Rosa Sly (Release of Information, Supervisor) that Ms. Gwendolyn Kemp (Medical Record Technician) called me a little girl and informed me that I would be fired (Appx2-3). June 18, 2016, I reported to Ms. Patricia Bowman (Chief, HIMS) and Ms. Rosa Sly (Release of Information Supervisor) that I had concerns about what Mr. Willie Hubbard (Medical Record Technician) and Ms. Loria Royer (Lead, Medical Record Technician) informed me about my customer service and job performance (Appx4-5). July 06, 2016, I reported that Ms. Gwendolyn Kemp (Medical Record Technician) physically hit me in the face with documents (Appx6). July 18, 2016, I emailed Ms. Rosa Sly (Release of Information, Supervisor) and I requested a group change because I felt as if I was in a hostile work environment (Appx7).

July 26, 2016, I emailed Ms. Rosa Sly (Release of Information, Supervisor) and I informed her about my concerns regarding how patient information was safeguarded within the release of information department and that Mr. Willie Hubbard (Medical Record Technician) informed me that I cannot use the restroom (Appx8). July 27, 2016, I reported to Ms. Rene Wilson (Chief, Health Administration Service) that Mr. Willie Hubbard (Medical Record

Technician) made my work environment hostile and the behaviors he displayed towards me was inappropriate (Appx9-11). August 05, 2016, I reported to Mr. Sidney Odom's (EEO Specialist) and Ms. Rosa Sly (Release of Information Supervisor) that the release of information department was hostile and that my body was negatively reacting to the stress within the department (Appx12-14).

August 10, 2016, I had a meeting with Ms. Rosa Sly (Release of Information Supervisor) and Ms. Donna Griffin Hall (Business Office Service, Chief) regarding my concerns about the release of information department and my inability to safeguard patient information (Appx15). August 18, 2016, I emailed Ms. Rosa Sly (Release of Information, Supervisor) and requested a key to safeguard documents (Appx16). August 31, 2016 Ms. Rosa Sly (Release of Information Supervisor) requested disciplinary action from Human Resources (Appx17). October 12, 2016, I reported to Ms. Rosa Sly (Release of Information, Supervisor) that teamwork within the release of information department is nonexistent and Ms. Loria Royer (Lead, Medical Record Technician) became hypercritical of my customer service (Appx18).

November 02, 2016, I informed Ms. Rosa Sly (Release of Information, Supervisor) that Ms. Loria Royer's (Medical Record Technician, Lead) behavior was inappropriate when she slammed Ms. Rosa Sly's door (Appx19). December 29, 2016, I reported to Donna Griffin Hall (Business Office Service, Chief) that the release of information department is hostile (Appx20). December 30, 2016, I received a proposed

suspension from Ms. Donna Griffin Hall and I was charged with a failure to safeguard confidential information, negligence causing waste and delay and disruptive behavior (Appx21-23). January 05, 2017, I met with Ms. Kristina Brown (Deputy Director) regarding my proposed suspension dated December 30, 2016 and I disclosed to her in person and through my written statement that patient information was not safeguarded with key, there was no tracking system in place to account for first and third party authorization forms, and the release of information department was hostile (Appx24-33). February 01, 2017, I reported to Ms. Devona Hollingsworth (Assistant Chief, HIMS) that Mr. Ronald Perez (Medical Record Technician) released patient information without a proper authorization form signed (Appx34).

February 02, 2017, I disclosed to Ms. Rosa Sly (Release of Information, Supervisor) via email that Ms. Loria Royer (Medical Record Technician, Lead) behavior was inappropriate when she screamed at me in front of patients (Appx35). February 02, 2017, I disclosed to Ms. Devona Hollingsworth (HIM, Assistant Chief) that she went into a meeting with police officials with me without me having proper representation (Appx36). February 03, 2017, I disclosed to Ms. Kristina Brown (Deputy Director) via email that Management was fraternizing with employees to make me look like a problem and I requested that the police monitor the release of information department (Appx37). March 10, 2017 a decision was made to suspend me from April 12, 2017-April 18, 2017 (Appx38). According to 5 USC 2302(b)(8) it is illegal to take or fail to take, or threaten to take, a personnel action with respect to

any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule or regulation and abuse of authority.

B. *2017 Information Security Violation-Gina Rhodes*

January 05, 2017 was my scheduled meeting with Ms. Kristina Brown (Deputy Director) regarding my proposed suspension dated December 30, 2016 where I was charged with a failure to safeguard confidential information, negligence causing waste and delay and disruptive behavior. I disclosed to Ms. Kristina Brown (Deputy Director) during my scheduled meeting the lack of safeguards, the need for a tracking system and the hostile work environment in the release of information department (Appx24-33) and on January 17, 2017 I received a ISO Violation from Ms. Gina Rhodes (Information Security Officer) (Appx39-40).

According to 5 USC 2302(b)(8) it is illegal to take or fail to take, or threaten to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule or regulation and abuse of authority.

C. *2017 information security violation-Devona Hollingsworth*

January 20, 2017, I disclosed to Ms. Rosa Sly (Release of Information, Supervisor) that Ms. Gwendolyn Kemp (Medical Record Technician) used profanity during meetings (Appx41). February 01, 2017, I reported to Ms. Devona Hollingsworth that Mr. Ronald Perez (Medical Record Technician) released patient information without a proper authorization form signed (Appx34). February 02, 2017, I disclosed to Ms. Rosa Sly (Release Of Information, Supervisor) via email that Ms. Loria Royer (Medical Record Technician, Lead) behavior was inappropriate when she screamed at me in front of patients (Appx35).

February 02, 2017, I disclosed to Ms. Devona Hollingsworth (HIM, Assistant Chief) that she went into a meeting with police officials with me without proper representation (Appx36). February 03, 2017, I disclosed to Ms. Kristina Brown (Deputy Director) via email that Management was fraternizing with employees to make me look like a problem and I requested that the police monitor the release of information department (Appx37). February 07, 2017, I received a ISO Violation from Ms. Devona Hollingsworth (HIM, Assistant Chief) (Appx42-43).

According to 5 USC 2302(b)(8) it is illegal to take or fail to take, or threaten to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any

violation of any law, rule or regulation and abuse of authority.

D. *2018 Suspension*

February 09, 2017, I reported to Ms. Devona Hollingsworth (Assistant Chief, HIMS) and Dr. Roma Palcan (Psychologist) that my computer access was taken away in its entirety and I cannot be productive without work assignments (Appx44) February 20, 2017, I informed Mr. Clark Hazley that I believed that I was placed with Dr. Roma Palcan (Psychologist) to be assessed (Appx45). March 06, 2017 Ms. Devona Hollingsworth (Assistant Chief, HIMS) sent an inappropriate email to staff regarding a grievance with Ms. Donna Griffin Hall (Chief, Business Office Service) and she discussed her concerns about her job title and pay via email (Appx46) and I informed Ms. Rosa Sly (Release of Information Supervisor) that the email that I was attached to was inappropriate and the Business Office Service staff in its entirety did not need to be attached to matters regarding Ms. Devona Hollingsworth (Assistant Chief, HIMS) grievance.

April 19, 2017, I disclosed to Ms. Suzanne Klinker (Director), Ms. Donna Griffin Hall (Chief, Business Office Service) and Ms. Kristina Brown (Deputy Director) that Mr. Robert Larson (Assistant Chief, Social Work) fabricated a fact-finding investigation when he stated that Ms. Donna Griffin Hall hit me on the top of my head with documents (Appx47).

June 29, 2017, I disclosed to Ms. Laura Fowkes (Privacy Officer), Ms. Donna Griffin Hall (Chief, Business Office Service) and Ms. Rosa Sly (Release of Information Supervisor) that Mr. Robert Larson (Assistant Chief, Social Work), Ms. Roma Palcan (Psychologist) and Ms. Kathy Green (Nurse) completed a multi-disciplinary psychiatric/psychological assessment without knowledge or consent (Appx48). July 03, 2017, I reported to Ms. Laura Fowkes (Privacy Officer), Ms. Rosa Sly (Release of Information, Supervisor), and Ms. Donna Griffin Hall (Chief, Business Office Service) that Mr. Robert Larson Breached HIPAA Law and Privacy Rule when he documented that I was "disorganized" and "disjointed". (Appx49-50). July 31, 2017, I provided Ms. Rosa Sly (Release of Information Supervisor) Ms. Donna Griffin Hall (Chief Business Office Service), and Ms. Kristina Brown (Deputy Director) with a notice of Harassment (Appx51-52). August 10, 2017, I disclosed to Ms. Suzanne Klinker (Director) that I did not feel safe speaking to management officials alone (Appx53). August 14, 2017, I disclosed that my safety is in imminent danger around Mr. Gregory Burrison (Appx54).

August 14, 2017, I disclosed to Ms. Kristina Brown (Deputy Director) that EEO Complaints are frowned upon and the behaviors displayed by Management Officials are unethical (Appx55). August 15, 2017, I informed Ms. Donna Griffin Hall (Business Office Service, Chief) that I was having surgery and I was still faced with Harassment (Appx56). October 02, 2017, I reported to Detective Lange that Mr. Gregory Burrison (Medical Record Technician) harassed me; Mr. Gregory Burrison

(Medical Record Technician) bumped into me and then called the police on me (Appx57-58). October 23, 2017, I disclosed to Ms. Rosa Sly (Release of Information, Supervisor) via email that Ms. Loria Royer (Medical Record Technician) altered the time sequence when she copied and paste (Appx59-60). October 24, 2017, Ms. Rosa Sly (Release of Information, Supervisor) requested disciplinary action from Human Resources (Appx61).

January 17, 2018, I disclosed that Osha Law was being violated and Ms. Gwendolyn Kemp (Medical Record Technician) harassed me when I requested to use the restroom (Appx62). January 24, 2018, I received a verbal warning via email from Ms. Rosa Sly (Supervisor, Release of Information) (Appx63). March 26, 2018, I received a proposed suspension from Ms. Donna Griffin Hall (Chief, Business Office Service) (Appx64-66). April 06, 2018, I met with Mr. Jonathan Benoit (Associate Director) regarding my proposed suspension dated March 26, 2018; I disclosed to Mr. Jonathan Benoit (Associate Director) that Ms. Rosa Sly (Supervisor, Release of Information) did not conduct a fact-finding investigation as she suggested, Ms. Loria Royer (Lead, Medical Record Technician) was copying and pasting emails, and management is reprising against me due to my EEO status (Appx67-68). April 12, 2018, I reported to Ms. Suzanne Klinker (Director) that Mr. Ronald Plemmons (Chief of Human Resources) refused to provide me with my employment file and it appears that steps are being taken to keep my record hidden (Appx 69-70). April 09, 2018, I requested that Ms. Suzanne Klinker (Director) provide me with oversight due to my

allegations that Ms. Rosa Sly (Release of Information Supervisor) violated my Weingarten rights (Appx71).

April 17, 2018, I reported to Ms. Suzanne Klinker (Director) and Ms. Tathiska Thomas (President AFGE) that management is demanding that I take on a job responsibility that I was not hired to complete (Appx72-73). April 20, 2018 Mr. Jonathan Benoit (Associate Director) made a determination to suspend me and the dates of my suspension were May 06, 2018- May 19, 2018 (Appx74). According to 5 USC 2302(b)(8) it is illegal to take or fail to take, or threaten to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule or regulation and abuse of authority.

E. *Proposed Removal*

March 30, 2018, I reported to Mr. Marcus Johnson (Human Resources Specialist) that my Weingarten rights were violated, and a fact-finding investigation did not occur as Ms. Rosa Sly (Supervisor, Release of Information) suggested (Appx75). April 18, 2018, I reported to Ms. Laura Fowkes (Privacy Officer) that I had a scheduled meeting on April 19, 2018 in which I was reporting fraud, waste and abuse that occurred by Ms. Rosa Sly (Release of Information Supervisor) and my computer access is deactivated (Appx76). April 19, 2018, I reported to Mr. Jack Roberts, Federal Labor

Relations Authority Attorney, that my Weingarten rights were violated. (Appx77-80).

May 21, 2018, I reported that Ms. Donna Griffin Hall (Chief, Business Office Service) abused her authority to Ms. Suzanne Klinker (Director) and Ms. Tathiska Thomas (AFGE President) via email when she conducted a fact-finding investigation regarding Patient Health Information (PHI) & Personal Identifiable Information (PII)Violations (Appx81-82). May 21, 2018, I disclosed to Suzanne Klinker (Director), Tathiska Thomas (AFGE President), Donna Griffin Hall (Chief, Business Office Service) and Rosa Sly (Release of information, Supervisor) via email that Privacy Officers nor Human Resources redacted veteran information prior to them providing me with an evidence file (Appx81).

May 22, 2018, I disclosed to Ms. Donna Griffin Hall (Chief, Business Office Service) and Ms. Tathiska Thomas (AFGE President) that I was sitting in the education department staring at walls (Appx83). May 22, 2018, I disclosed to Ms. Donna Griffin Hall (Chief, Business Office Service) and Ms. Tathiska Thomas (AFGE President) that Ms. Donna Griffin Hall is trying to have me sign an illegal document and take away my rights to file a grievance (Appx84).

May 30, 2018, Ms. Rosa Sly requested corrective action from the Privacy Office and Human Resources (Appx85). June 29, 2018, Ms. Donna Griffin Hall (Chief, Business Office Service) provided me with a proposed removal citing 38 USC 714

(Appx86-89). July 10, 2018, I reported to Ms. Suzanne Klinker (Director) and Ms. Tathiska Thomas (AFGE President) that my Proposed removal was illegal, and it is based on Prohibited Personnel Practices (Appx90-91). July 10, 2018, I reported to Suzanne Klinker and Tathiska Thomas that my FOIA request was denied with a statement that says it will cause an embarrassment to the agency (Appx91). August 17, 2018, I disclosed to Ms. Rosa Sly (Supervisor, Release of information), Ms. Suzanne Klinker (Director) and Ms. Karen Mulcahy (Attorney) that the unwelcome attention of Ms. Donna Griffin Hall is Harassment (Appx92). November 09, 2018, I reported that Ms. Rosa Sly's behavior is inappropriate. Ms. Rosa Sly contacted Fire & Safety to evaluate a table, and when she discussed safeguards, policies and procedures and follow ups her demeanor was not welcoming (Appx93).

November 28, 2018, I disclosed to Rosa Sly (Release of Information Supervisor) that I was disabled from VA network illegally (Appx94). February 08, 2019 the Agency Attorney, Ms. Tanya "TB" Burton, called me via work phone and aggressively demanded that I settle my case (Appx95). July 19, 2019, I informed Ms. Rosa Sly (Release of Information, Supervisor) that Ms. Angellette Boyd (Medical Records Technician) brought in a woodwick diffuser into the Release of Information/ Medical Records Department and I requested that she reframe from using the scented Fragrance. Appx96 & Appx97. August 06, 2019, I informed Ms. Rosa Sly (Release of Information, Supervisor) that Ms. Angellette (Medical Records Technician) is wearing a perfume fragrance and I

have to step away from my work area due to me having an allergic reaction. Ms. Rosa Sly (Release of Information, Supervisor) was also informed that Ms. Angellette (Medical Record Technician) is a CNA by trade and she is aware that in patient care areas that diffusers and or perfumes are not acceptable and she continues to wear a fragrance that is impacting my health. Appx96. August 08, 2019, I informed Mr. Paul Russo (Facility Director) that my health was impacted due to Ms. Angellette (Medical Records Technician) bringing into the Release of information/Medical Records department a woodwick diffuser and perfume fragrance. Appx98. August 13, 2019, I asked Ms. Marcia Powell (Chief, Health Information Management) via email to reframe from wearing perfume/fragrance due to my allergies and recent sensitivity to perfume. Appx99.

August 13, 2019, I informed Ms. Rosa Sly (Release of Information, Supervisor) that according to the Memorandum signed by Ms. Donna Griffin Hall (Business Office Service, Chief) Ms. Rosa Sly (Release of Information, Supervisor) is to safeguard my documents and not Mr. Dana Askew (Medical Records, Supervisor). Appx100. Furthermore, I also Informed Ms. Rosa Sly (Release of Information, Supervisor) that I did not need special attention from, Mr. Dana Askew, a male supervisor who is assigned to the Medical Records Department. Appx100. August 20, 2019, I informed Ms. Rosa Sly (Release of Information, Supervisor) via email that I was uncomfortable speaking with Ms. Angellette Boyd due to what I have alleged about Ms. Angellette's inappropriate behavior and I asked Ms. Rosa Sly (Release of Information, Supervisor) if Ms. Angellette can give consideration, and minimize

contact with me, because I have alleged that Ms. Angellette was attempting to impact my health. Appx101. August 24, 2019, I informed Ms. Rosa Sly (Release of Information, Supervisor) that when Ms. Rochelle Hollenquest-Alston (Assistant Chief, HIM) allowed Mr. Dana Askew (Medical Records, Supervisor) to safeguard my documents in a file cabinet in the medical records department it went against May 22, 2018 Memorandum signed by Ms. Donna Griffin Hall (Chief, Business Office Service) that specifically states that my supervisor, Ms. Rosa Sly, is to safeguard my uncompleted work assignment(s) at the end of the day. Appx102. Furthermore, when Mr. Bob Werle (Medical Record Technician) and Ms. Marilyn Jackson (Lead, Medical Record Technician) safeguarded, locked and secured my documents in the medical records file cabinet it went against May 22, 2018 Memorandum signed by Ms. Donna Griffin Hall (Chief, Business Office Service) which states that Ms. Rosa Sly (Release of Information, Supervisor) is assigned to safeguard my documents. Appx103-104.

According to 5 USC 2302(b)(8) it is illegal to take or fail to take, or threaten to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation and abuse of authority.

Reason for Granting the Writ

Prohibited Personnel Practices in the federal government are employment related activities that are banned in the federal workforce because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principle. I made protected disclosures about how the release of information department was not safeguarding, tracking and securing documents and I became the subject of ongoing repeated reprisal and egregious harassment.

In a synopsis, the harassment that I was subjected to for making a disclosure was being physically hit with documents, being a suspect in police investigations on more than one occasion after I reported inappropriate behavior, being involved in an illegal psychological/psychiatric evaluation that was done without knowledge and or consent, I was poisoned with perfume and other fragrances to the point where I had to stuff my nose with Kleenex so I would not smell the fragrance, I am stalked online and followed around Bay Pines CW Bill Young Campus, I am currently the target of inappropriate sexual innuendos, I am only assigned to open, sort, and stamp mail for eight hours a day, and I am disabled from VA Health Care System and I am a current federal employee.

In reviewing the merits of an IRA appeal, the Administrative Judge must examine whether I

proved by preponderant evidence[1] the following four elements: (1) the management official has the authority to take, recommend, or approve any personnel action. (2) the aggrieved employee made a disclosure under 5 U.S.C. 2302(b)(8) or engaged in protected activity under 5 U.S.C. 2302(b)(9); (3) the management official use his authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the protected disclosure was a contributing factor in the agency's personnel action in the absence of the disclosures. Lachance v. White, 174 F. 3d 1378, 1380 (Fed. Cir. 2010); Lachance v. White, 174 F. 3d 1378, 1380 (Fed. Cir. 1999), cert. denied 528 U.S. 1153 (2000). If so, corrective action shall be ordered unless the agency established by clear and convincing evidence[2] that it would have taken the same personnel action in the absence of the disclosures. Schnell v. Department of the Army, 114 M.S.P.R. 83, ¶ 18 (2010); see 5 U.S.C. § 1221(e).

I provided the Merit System Protection Board Administrative Judge with fifty-one disclosures due to his Order to show cause (Appx105-155). In response to his Order to Show Cause Administrative Judge Morris found that I asserted inter alia, on or about July 26, 2016 protected disclosures to my

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[1] Preponderant of the Evidence is that amount of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more like true than untrue. 5 C.F.R. 1201.4(q)

[2] Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. 1209.4(d)

management chain to the effect that personal identifiable information (PII) was not safeguarded in violation of, inter alia, the Privacy Act and the Health Insurance Portability and Accountability Act of 1996(HIPAA). By Order Dated February 14, 2019, the Merit System Protection Board Administrative Judge found that I had non frivolously alleged that a disinterested observer with knowledge of the essential facts known to and readily ascertainable could reasonably conclude that the agency's actions evidenced wrongdoing as defined by the WPA. The Merit System Protection Board Administrative Judge further found that the disclosure was raised before OSC (Appx156-163).

The agency has not disputed that I made a protected disclosure. A "personnel action" is defined as follows: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. Chapter 75 or other disciplinary or other corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under 5 U.S.C. Chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement and (xii) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. 2302(a)(2)(A); Mattil v. Department of State, 118 M.S.P.R. 662, 14 (2012). Here it is undisputed that the agency twice suspended me (in 2017 and 2018), issued two

information security violation memoranda (in January and February 2017), and proposed my removal (in June 2018). The record reflects that the Merit System Protection Board Administrative Judge found that these actions all qualify as "personnel actions" under the WPA (Appx157-160).

I may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as 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, also known as the "knowledge/timing test." Once the knowledge/timing test has been met, the MSPB Administrative Judge must find that I have established that my protected whistleblowing activity was a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable fact finder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. See, e.g. Schnell v. Department of the Army, 114 M.S.P.R. 83, 21 (2010). To satisfy the "knowledge/timing test, I need only demonstrate that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. See Rubendall v. Department of Health and Human Services, 101 M.S.P.R. 59, 11 (2006). The record reflects that the Merit System Protection Board Administrative Judge Jeffrey S. Morris has stated that all of the agency's actions occurred within approximately one year of my protected disclosures

and I met the burden of proving the contributing factor. (Appx160-161)

Standard of Review

The questions posed by this issue is a mixed case of law and fact. I have not argued that the Merit System Protection Board Administrative Judge failed to get the facts right, just that they misapplied the facts of the law. As such, I am requesting that this Court review this case *de novo*. Szwak v. Earwood, 592 F. 3d 664, 668 (Fed Cir. 2009).

Argument

The agency has not shown by clear and convincing evidence that it would have taken the personnel actions absent my protected disclosures. If the agency does not dispute that whistleblowing contributed to the agency decision to take adverse personnel actions against an employee, the agency must prove it would have taken the same action absent the whistleblowing. See 5 U.S.C. 1221 (e)(2). In determining whether an agency has met its burden of clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing the following factors (the "Carr Factors") should be considered (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. See Whitmore, 680 F. 3d at 1365;

Carr v. Social Security Administration, 185 F. 3d 1313, 1318 (Fed. Cir. 1999).

In respect to the first Carr Factor, The Merit System Protection Board Administrative Judge erred in finding that the strength of the agency's evidence supports its personnel action. I made protected disclosures in which I alleged that the release of information department was not safeguarding and securing patient information according to protocol, there was no tracking system to account for first and third-party authorization forms, and the release of information department was hostile. After, I made a disclosure I was subjected to ongoing egregious reprisal by my co-workers and my direct chain of command to include Ms. Rosa Sly (Release of Information Supervisor), Ms. Donna Griffin Hall (Chief, Business Office Service) and Ms. Kristina Brown (Deputy Director).

The information that I disclosed was what I reasonably believed evidenced a violation of a law, rule, and regulation and once I made a protected disclosure I was investigated, although my co-workers, and management were all subject to investigation due to my protected disclosures. See Russell v. Department of Justice, 76 M.S.P.R. 317 (1997) (investigations of the employee were initiated by the agency because of allegations made by two subjects of the protected disclosures).

Furthermore, the individuals that I made protected disclosures against provided me with adverse personnel actions and requested ongoing investigations. The board has no discretion to affirm

a penalty tainted in illegal reprisal, even if the agency's penalty might otherwise have been reasonable. See 5 U.S.C. 7701(c)(2)(B); Sullivan v. Dep't of the Navy, 720 F. 2d 1266, 1278 (Fed. Cir. 1983) (Nies., J., concurring). In an adverse action proceeding the merits cannot be the determinative factor that there was no reprisal. A meritorious adverse action must be set aside where there is reprisal. If the agency fails to prove that it would have taken the same action absent whistleblowing, the Board must set aside the agency's penalty decision and order corrective action. See 5 USC 7701 (c)(2)(B).

In regard to the second Carr factor the Strength of the agency's motive to retaliate; The Business Office Service leadership team, including Ms. Donna Griffin Hall (Chief, Business Office Service) and Ms. Rosa Sly (Supervisor, Release of information) were placed on a Performance Improvement Plan (PIP) dated March 14, 2016 (Appx164-175). The Performance Improvement Plan focused on areas that the Business Office Service leadership team was underperforming in as follows: For Fiscal Year 2015 the performance improvement plan focused on inadequate staffing, equipment failures, stress and morale amongst staff and reports of a hostile work environment. Fiscal Year 2016 focused on Vacant FTEE/Demand Greater than resources, equipment failures, missing request, improving hiring retention, and stress and morale amongst staff to include reports of hostile work environment. The Performance Improvement Plan also included recommendations as follows: Review and assess ROI practices and procedures, consistent

monitoring and tracking and reconciliation, secure request, and use an electronic tracking system.

The Office of Inspector General (OIG) conducted a health care inspection into the delays in processing Release of Information Requests at Bay Pines VA Health Care System Report No. 16-02864-71 in May 2016 (Appx176-179). The OIG substantiated that under the Business Office Service Chief's direction, ROI Staff did not comply with VHA prioritization policy during the first quarter of FY 2015. During their inspection the OIG also found that the ROI Section workplace culture contributed to the challenges in resolving backlog and sustaining effective processes. These long-standing workplace culture challenges included medical record technicians and manager vacancies and turnover, interpersonal conflicts, lack of trust amongst staff and managers, and performance issues. The OIG recommended that the System Director ensure the: strengthening of procedures for timely processing of ROI requests, capturing and trending of complaints related to ROI requests, evaluating of personnel issues negatively impacting staff retention and hiring in the ROI section and taking appropriate action, monitoring of ROI staff productivity, and tracking and monitoring ROI request processing.

The OIG also substantiated that facility managers were unable to locate 547 hard copy ROI requests logged into ROI Plus from approximately January 2014 through June 2016. The total 547 missing authorizations affected 513 unique patients and resulted in 483 credit monitoring letters and 30 next of kin letters. The missing request led Privacy

Officers to submit 10 Violation Memorandums to PSETS. From March 2015 through February 2016, the Privacy Officers Submitted 9 PSETS memoranda that accounted for 260 Missing authorizations. The OIG also found that staff members were not securing documents according to protocol. In February 2016, managers found a "stack" of requests dating back to the prior year in an employee's desk. Additionally, In May 2016 the Business Office Service (BOS) Chief learned that the supervisors tracking was "sporadic and inconsistent". In May 2017, the Business Office Service (BOS) Chief learned that the facility ROI Supervisor did not arrange ongoing quality audits at the termination of the DMS staff auditors' detail almost a year prior (June 2016).

In addition, I filed a formal complaint with the Office of Special Counsel (OSC) disclosure unit in June 2017. The complaint was filed because the release of information department was not safeguarding, securing and tracking documents according to protocol. The OSC Complaint Number is DI-17-4282 and in that complaint I was informed on September 29, 2017 that Bay Pines VA Healthcare System has begun safeguarding documents containing PHI/PII in compliance with agency regulations (Appx180-181). My effective hire date in the release of information department was April 06, 2016 (Appx182). The Office of Special Counsel (OSC) confirmed that the agency is following protocol one year and five months after my effective hire date in the release of information department.

Also, On August 24, 2019 I disclosed via email to Ms. Rosa Sly that the medical records Supervisor,

Mr. Dana Askew, was safeguarding my documents and his staff, and it went against the Memorandum which states that the Supervisor, Ms. Rosa Sly is to safeguard my documents. Appx100-Appx102. April 06, 2016 was my effective hire date in the release of information department and on August 24, 2019 I made a disclosure to my immediate supervisor regarding safeguards. Three years, four months and two weeks after my effective hire date I still had complaints about how patient information was safeguarded.

I find that the Administrative Judge erred in taking an overly restrictive view of the second Carr factor. Although Ms. Rosa Sly (Release of Information Supervisor), Ms. Donna Griffin Hall (Chief-Business Office), Ms. Gina Rhodes (Information Security Officer), Ms. Devona Hollingsworth (Assistant Chief HIMS), Mr. Jonathan Benoit (Associate Director) and Ms. Kristina Brown (Deputy Director) were not directly implicated or harmed by the disclosures, my criticisms reflected on both of their capacities as management officials and employees, which is sufficient to establish a substantial retaliatory motive.

See Whitmore, 680 F.3d at 1370-71 (the appellant's criticisms cast the agency, and by implication all of the responsible officials, in a highly critical light by calling into question the propriety and honesty of their official conduct); Chambers v. Department of the Interior, 116 M.S.P.R. 17, ¶ 69 (2011) (finding motive to retaliate because the appellant's disclosures reflected on the responsible agency officials as representatives of the general

institutional interests of the agency); Phillips v. Department of Transportation, 113 M.S.P.R. 73, ¶ 23 (2010) (finding that comments generally critical of the agency's leadership would reflect poorly on officials responsible for monitoring the performance of the field staff and making sure that agency regulations are carried out correctly and consistently). Accordingly, I conclude that the second Carr factor weighs significantly against a finding that the agency would have taken personnel actions against me in the absence of my whistleblowing activity.

In respect to the third Carr factor, I contended that the agency did not take similar actions against Dr. Roula Baroudi a non-whistleblower who photographed patient records after she was charged with a failure to safeguard confidential information. Dr. Baroudi photographed patient records and provided them to her attorney in preparation for trial in which she alleged retaliation, retaliatory hostile work environment and discrimination. The Pinellas County, VA Medical Center, "Bay Pines, CW Bill Young, Medical Center", became aware of those photographs which it viewed it as a potential breach of the Privacy Policy. A Privacy Investigation was conducted against Dr. Roula Baroudi in which she was alleged of violating three of the medical center policies. After consulting with Human Resources, Management officials decided to provide Dr. Baroudi with a fourteen-day suspension as penalty, but Director Suzanne Klinker reduced the fourteen-day suspension to a "seven-day suspension with pay". This "paper suspension" as the medical center calls it, was not really a suspension as the term is generally understood; Baroudi was not only paid

during the suspension, she continued to work during it (Appx183-187).

Our reviewing court has held that, under Carr, the requirement that comparator employees be "similarly situated" does not require "virtual identity" and that "[d]differences in kinds and degrees of conduct between otherwise similarly situated persons within an agency can and should be accounted for." See Whitmore, 680 F.3d at 1373. This is particularly true where, as here, there is only a single person in the record for which a comparison can be made. Dr. Baroudi is a non-whistleblower who photographed patient records and I am a whistleblower who made a disclosure regarding how patient information is safeguarded and we are similarly situated because we both were investigated for privacy violations after reporting a failure to safeguard.

Furthermore, the record reflects that the Merit System Protection Board Administrative Judge Initial Decision states that neither party presented meaningful evidence regarding the extent to which the agency may take similar action against employees who did not engage in protected activity but who are otherwise similarly situated. The Merit System Protection Board Administrative Judge erred in finding that the third Carr favored the agency because once a whistleblower shows that their protected disclosures contributed to adverse actions, the agency bears the burden of showing that it would have acted in the same way even absent any whistleblowing. 5 U.S.C. 1221 (e)(2); Miller, 842 F. 3d at 1257 (burdening the agency to prove

independent causation by clear and convincing evidence). Though an agency need not introduce evidence of every Carr factor to prove its case, the "risk associated with having no evidence on the record" for a particular factor falls on the government. See Miller, 842 F. 3d 1262.

A. The Questions Presented raises Important Issues of Constitutional and Statutory Law

At issue, is whether the whistleblower protection act places any limits on the authority of an agency official when an employee makes a protected disclosure or is an agency official allowed to disregard every aspect of the description whistleblower and then engage in ongoing and repeated reprisal and egregious harassment by targeting the whistleblower who is a member in a protected status which is a prohibited personnel practice solely because a whistleblower reported a violation of a law, rule, and or regulation. 5 U.S.C. 2302 (b)(8)-(9).

When the United States Court of Appeals dismissed my complaint of whistleblower reprisal, they effectively ruled that whistleblower reprisal is invisible under the Whistleblower protection act of 1989, 5 U.S.C. 2302-, Pub.L. 101-12 as amended. There is a burgeoning controversy about whistleblower reprisal after an employee makes a disclosure and the practices of how agency officials have responded to whistleblower complaints.

June 2018, The United States Government Accountability Office (GAO) Report number GAO-18-400, Report to Congressional Committees, Office Of Special Counsel, Actions needed to improve processing of prohibited personnel practices and whistleblower disclosure complaint. Appx188-191, reports in detail that the position that the OSC occupies in the defense of merit system principles in the federal government carries great weight, but it also presents many challenges. OSC's increased caseload has led to a continuing backlog of unresolved cases, both in absolute numbers and in terms of their proportion of total caseload. Alongside this trend has been an increase in the time OSC takes to close individual PPP and whistleblower disclosure cases, with a particularly significant increase for whistleblower disclosure cases that OSC refers to other agencies. OSC's strategic plan for fiscal years 2017 to 2022 includes objectives for OSC to ensure agencies provide timely and appropriate outcomes for referred whistleblower disclosures. However, as cases linger in OSC, there is a greater chance that the individual making the allegations and officials in question may have changed positions, moved jobs, or given up seeking a remedy altogether.

OSC has not undertaken a review of its practice of approving multiple extensions at the request of agencies conducting investigations. These extensions have resulted in longer processing times, which have not been transparently communicated to

whistleblowers. Furthermore, OSC's lack of a fully independent internal complaints filing process has reduced the confidence some Office of Special Counsel (OSC) employees have in its process for reviewing PPP and Whistleblower disclosure allegations. Whistleblowers therefore have limited understanding of OSC's review process and cannot adequately plan for the complete disclosure case process. The Government Accountability Office (GAO) provided the office of special counsel with seven recommendations as follows: The Special Counsel should review and revise as appropriate, its policy for agency extension requests. (Recommendation 1) The Special Counsel should communicate expected processing timelines to whistleblowers. (Recommendation 2) The Special Counsel should develop, document, and implement case processing procedures for OSC's Complaints Examining Unit, including procedures for how cases are prioritized, how to take favorable actions, how to balance obtaining favorable actions with meeting staff productivity expectations, and how cases should be reviewed by supervisors. (Recommendation 3) The Special Counsel should identify and implement additional controls and tools needed to ensure closed case files can be tracked and located efficiently. (Recommendation 4) The Special Counsel should develop, document, and implement a standardized training program for entry-level employees, across units. (Recommendation 5) The Special Counsel should finalize a time frame for completing work with CIGIE and agency Inspectors

General to obtain a fully independent review process for internal OSC allegations. (Recommendation 6) The Special Counsel should increase and clarify ongoing outreach to OSC employees regarding OSC's process for handling internal PPP claims or whistleblower disclosure allegations. (Recommendation 7).

Furthermore, The Office of Inspector General Investigated the Office of Accountability and Whistleblower Protection regarding Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017, Report number 18-04968-249, Appx192-202, and the Office Of Inspector General found that the OAWP misinterpreted its statutory mandate, Resulting in failures to act within its investigative authority, The OAWP Did Not Consistently Conduct Procedurally Sound, Accurate, Thorough, and Unbiased Investigations and Related Activities Written policies and procedures are crucial to effective operations. During the tenures of Executive Directors O'Rourke and Nicholas, the OAWP did not adopt comprehensive written policies and procedures on any topic.

As of July 2019, it still lacked OAWP-specific written policies and procedures. The office also did not have a quality assurance process for identifying and preventing errors in its work. VA Has Struggled with Implementing the Act's Enhanced Authority to Hold Covered Executives Accountable A critical purpose of the Act was to facilitate holding Covered

Executives accountable for misconduct and poor performance. However, as of May 22, 2019, VA had removed only one Covered Executive from federal service pursuant to the authority provided by the Act. The OIG found that officials tasked with proposing and deciding disciplinary action had insufficient direction for how to determine the appropriate level of discipline that would ensure consistency and fairness for specific acts of misconduct and poor performance.

In many cases, a disciplinary official mitigated the discipline recommended by OAWP as too severe or based on advice from the VA's Office of General Counsel. The Office of Inspector General provided the OAWP with twenty-two recommendations:1.The Assistant Secretary for Accountability and Whistleblower Protection directs a review of the Office of Accountability and Whistleblower Protection's compliance with the VA Accountability and Whistleblower Protection Act of 2017 requirements in order to ensure proper implementation and eliminate any activities not within its authorized scope. 2. The VA Secretary rescinds the February 2018 Delegation of Authority and consults with the Assistant Secretary for Accountability and Whistleblower Protection, the VA Office of General Counsel, and other appropriate parties to determine whether a revised delegation is necessary, and if so, ensures compliance with statutory requirements.

3. The Assistant Secretary for Accountability and Whistleblower Protection, in consultation with the Office of General Counsel, Office of Inspector General, Office of the Medical Inspector, and the Office of Resolution Management establishes comprehensive processes for evaluating and documenting whether allegations, in whole or in part, should be handled within the Office of Accountability and Whistleblower Protection or referred to other VA entities for potential action or referred to independent offices such as the Office of Inspector General. 4. The Assistant Secretary for Accountability and Whistleblower Protection makes certain that policies and processes are developed, in consultation with the VA Office of General Counsel and Office of Resolution Management, to consistently and promptly advise complainants of their right to bring allegations of discrimination through the Equal Employment Opportunity process.

5. The Assistant Secretary for Accountability and Whistleblower Protection ensures that the divisions of the Office of Accountability and Whistleblower Protection adopt standard operating procedures and related detailed guidance to make certain they are fair, unbiased, thorough, and objective in their work. 6. The VA General Counsel updates VA Directive 0700 and VA Handbook 0700 with revisions clarifying the extent to which VA Directive 0700 and VA Handbook 0700 apply to the Office of Accountability and Whistleblower Protection, if at all.7. The Assistant Secretary for Accountability and Whistleblower

Protection assigns a quality assurance function to an entity positioned to review Office of Accountability and Whistleblower Protection divisions' work for accuracy, thoroughness, timeliness, fairness, and other improvement metrics. 8. The Assistant Secretary for Accountability and Whistleblower Protection directs the establishment of a training program for all relevant personnel on appropriate investigative techniques, case management, and disciplinary actions. 9.The VA Secretary, in consultation with the VA Office of General Counsel, provides comprehensive guidance and training reasonably designed to instill consistency in penalties for actions taken pursuant to 38 U.S.C. §§ 713 and 714.

10.The VA Secretary ensures the provision of comprehensive guidance and training to relevant disciplinary officials to maintain compliance with the mandatory adverse action criteria outlined in 38 U.S.C. § 731. 11. The Assistant Secretary for Accountability and Whistleblower Protection makes certain that in any disciplinary action recommended by the Office of Accountability and Whistleblower Protection, all relevant evidence is provided to the VA Secretary (or the disciplinary officials designated to act on the Secretary's behalf). 12. The Assistant Secretary for Accountability and Whistleblower Protection implements safeguards consistent with statutory mandates to maintain the confidentiality of employees that make submissions, including guidelines for communications with other VA components. 13

The Assistant Secretary for Accountability and Whistleblower Protection leverages available resources, such as VA's National Center for Organizational Development and the Office of Resolution Management, to conduct an organizational assessment of Office of Accountability and Whistleblower Protection employee concerns and develop an appropriate action plan to strengthen Office of Accountability and Whistleblower Protection workforce engagement and satisfaction.
14.The Assistant Secretary for Accountability and Whistleblower Protection develops a process and training for the Triage Division staff to identify and address potential retaliatory investigations.

15. The Assistant Secretary for Accountability and Whistleblower Protection collaborates with the Assistant Secretary for Human Resources and Administration, and the VA Secretary to develop performance plan requirements as required by 38 U.S.C. § 732. 16. The Assistant Secretary for Accountability and Whistleblower Protection ensures the implementation of whistleblower disclosure training to all VA employees as required under 38 U.S.C. § 733. 17. The VA Secretary makes certain supervisors' training is implemented as required under § 209 of the VA Accountability and Whistleblower Protection Act of 2017. 18. The Assistant Secretary for Accountability and Whistleblower Protection confers with the VA Office of General Counsel to develop processes for collecting and tracking justification information related to proposed disciplinary

action modifications consistent with 38 U.S.C. § 323(f)(2).
19. The VA Secretary in consultation with the Office of General Counsel and the Assistant Secretary for Accountability and Whistleblower Protection ensures compliance with the 60-day reporting requirement in 38 U.S.C. § 323(f)(2) consistent with congressional intent.

20. The Assistant Secretary for Accountability and Whistleblower Protection develops or enhances database systems to provide the capability to track all data required by the VA Accountability and Whistleblower Protection Act of 2017. 21. In consultation with the VA Office of General Counsel, the Assistant Secretary for Accountability and Whistleblower Protection completes the publication of Systems of Records Notices for all systems of records maintained by the Office of Accountability and Whistleblower Protection, and adopts procedures reasonably designed to ensure that the Office of Accountability and Whistleblower Protection does not create additional systems of records without complying with the requirements of the Privacy Act of 1974. 22.The Assistant Secretary for Accountability and Whistleblower Protection consults with the VA Chief Freedom of Information Act Officer to ensure adequate training and staffing of the Office of Accountability and Whistleblower Protection's Freedom of Information Act Office and establishes procedures to comply with FOIA requirements including timeliness.

Conclusion

For the foregoing reason, Ms. Tonya Knowles, respectfully request that this Court issue a writ of Certiorari to review the judgment of the US Court of Appeals.

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Tonya Knowles
1201 Seminole Blvd
Apt 474
Largo, Fl 33770
Pro Se