NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

EILEEN ERIN MCCARTHY,
Petitioner

v.

SOCIAL SECURITY ADMINISTRATION,
Respondent

2024-1552

Petition for review of the Merit Systems Protection Board in No. PH-1221-16-0137-W-1.

Decided: June 9, 2025

EILEEN ERIN MCCARTHY, Marion, MA, pro se.

JOSHUA DAVID TULLY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY.

Before MOORE, *Chief Judge*, LOURIE and BRYSON, *Circuit Judges*.

PER CURIAM.

Petitioner Eileen McCarthy seeks review of a decision by the Merit Systems Protection Board ("MSPB" or "Board") affirming her removal from the Social Security Administration ("SSA"). We affirm.

I

A

Ms. McCarthy was a probationary employee with the SSA. In her role as a Disability Processing Specialist, she was responsible for processing claims for disability benefits. On June 4, 2015, Ms. McCarthy received a termination notice, which explained that she was being terminated during her probationary period for failure to follow directions and failure to comply with the agency's leave policy. Supp. App. 120–23.[1] The notice listed three examples of situations in which Ms. McCarthy had failed to follow directions. *Id.* It also listed two examples of situations in which she had failed to comply with SSA leave policy. *Id.*

The first example involved a disability claim made by "Claimant Az." In the course of processing that claim, Ms. McCarthy became concerned that the claim may have been fraudulent. Supp. App. 21. She reported her concerns to her supervisor, David DiPalma. *Id.* Mr. DiPalma instructed Ms. McCarthy to approve the claim but he agreed to refer the case for a fraud investigation if Ms. McCarthy felt strongly about doing so. Supp. App. 22.

Mr. DiPalma and Ms. McCarthy then asked two other colleagues to assess the claim for fraud. Both individuals concluded that referral for a fraud investigation was unwarranted. Supp. App. 22–23. Ms. McCarthy was then told multiple times to approve the case, but she refused to

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[1] References to Supp. App. refer to the Supplemental Appendix filed with the agency's brief.

do so. Supp. App. 23–24. Eventually, the claim was denied based on Ms. McCarthy's insistence that the claim be kept open pending receipt of further information to support a denial. Supp. App. 24.

The second example involved a disability claim made by "Claimant Oet." *Id.* In that case, the psychologist who conducted the psychological evaluation recommended denying the claim. *Id.* Ms. McCarthy, however, believed that the claim should be approved. *Id.* Given the disagreement, Ms. McCarthy emailed Mr. DiPalma requesting that the claim be reviewed by a psychiatrist. Mr. DiPalma responded that both he and Project Supervisor Claire Seamans had reviewed the case and had concluded that the file did not support an affirmative determination of disability. Supp. App. 25. Ms. Seamans subsequently emailed Mr. DiPalma stating that she was "disturbed that [Ms. McCarthy] once again has ignored our direction," as in the case of Claimant Az. *Id.*

The third example involved a disability claim made by "Claimant San." Supp. App. 27. Ms. McCarthy had originally approved the claim, but Mr. DiPalma returned the claim based on his conclusion that there was inadequate medical evidence to support the approval. *Id.* Ms. McCarthy responded by obtaining the additional medical evidence that Mr. DiPalma had requested. *Id.*

B

After unsuccessfully seeking corrective action from the United States Office of Special Counsel ("OSC"), Ms. McCarthy filed an Individual Right of Action appeal with the MSPB in which she alleged that she had been terminated in retaliation for making disclosures protected under

the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8).[2] Specifically, Ms. McCarthy argued that the three examples

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[2] In her Memorandum in Lieu of Oral Argument, Ms. McCarthy objects to the government's discussion of the OSC's analysis of the merits of her whistleblowing claim and its decision to close her complaint, on the ground that "a decision to terminate an investigation under subchapter II may not be invoked in any action or other proceeding under this section," 5 U.S.C. § 1221(f)(2), and that a "determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice," *id.* § 1214(b)(2)(E). In light of those statutory provisions, we have not taken into consideration the OSC's decision or analysis of Ms. McCarthy's complaint other than as necessary to establish that she has exhausted her administrative remedies by seeking corrective action from the OSC before filing her Individual Right of Action appeal with the Board, as required by 5 U.S.C. § 1214(a)(3). *See Costin v. Dep't of Health & Hum. Servs.*, 1994 WL 539322, at *8 (M.S.P.B. Sept. 28, 1994) ("The purpose of this evidentiary rule, though, is to ensure that a whistleblower is not 'penalized' or 'prejudiced' in any way by OSC's decision not to pursue a case. We conclude that Congress would not have intended for us to ignore an OSC termination letter, the contents of which indicate that an appellant failed to exhaust his OSC remedy, given that Congress itself imposed the exhaustion requirement as a jurisdictional prerequisite to an IRA appeal." (footnote and citation omitted)); *see also Lewis v. Dep't of Def.*, 2016 WL 860427, at ¶ 10 (M.S.P.B. Mar. 3, 2016); *Cauldwell v. Fed. Rsrv. Sys.*, 2016 WL 7335243, at ¶ 11 (M.S.P.B. Dec. 2, 2016); *McNamara v. Dep't of State*, 2022 WL 17337885, at *3 n.5 (M.S.P.B. Nov. 29, 2022).

cited in the termination notice involved protected disclosures. Ms. McCarthy also alleged that she had made protected disclosures regarding her division's delay in implementing a required quality assurance review process.

Following a hearing, the administrative judge who was assigned to the case denied her request, finding that none of her disclosures were protected. Supp. App. 16–35. The administrative judge found that Ms. McCarthy's disclosure regarding Claimant Az's potential fraud was not protected because she had alleged misconduct by a private individual but had not alleged that the SSA was implicated in that misconduct. Supp. App. 30–33. The administrative judge also found that Ms. McCarthy's concerns over the claims filed by Claimants Oet and San were policy disagreements with management over how to process the claims, and as such those disclosures could not reasonably be interpreted as allegations of government misconduct. Supp. App. 33–34. Finally, the administrative judge found that Ms. McCarthy had failed to prove that she had made a disclosure regarding any impropriety in implementing the quality assurance review process. Supp. App. 34–35.

Ms. McCarthy then sought review by the full Board. The Board affirmed the administrative judge's determination, although it affirmed the decision regarding her alleged quality assurance review process disclosure based on a rationale different from that of the administrative judge. Supp. App. 6–9.

II

Ms. McCarthy contends that the administrative judge and the Board were mistaken in finding that her disclosure of the potential fraud in Claimant Az's claim was not protected under the Whistleblower Protection Act. She also contends that the administrative judge and the Board erred in their assessment of the evidence regarding her disclosure involving the quality assurance review process. Ms. McCarthy does not challenge the conclusions by the

administrative judge and the Board regarding the disclosures involving Claimants Oet and San.[3]

The OSC has filed a brief as amicus curiae in support of Ms. McCarthy. It argues that the Board committed legal error by requiring Ms. McCarthy to allege government complicity in her disclosure regarding wrongdoing by a third-party.

A

Our scope of review of MSPB decisions is narrow. "We will uphold the Board's decision unless it is '(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.'" *Higgins v. Dep't of Veterans Affs.*, 955 F.3d 1347, 1353 (Fed. Cir. 2020) (quoting 5 U.S.C. § 7703(c)). We review the Board's legal determination de novo. *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008).

The Whistleblower Protection Act prohibits retaliation for whistleblowing. It provides:

> 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—

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[3] Because Ms. McCarthy was a probationary employee at the time of her termination, she has not challenged the merits of her termination decision, except through her claim that she was dismissed because of her whistleblowing disclosures.

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
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> (i) any violation of any law, rule, or regulation, or
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> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . .

5 U.S.C. § 2302(b)(8). To establish a violation of the statute, "the former employee must prove by a preponderance of the evidence that he or she made a protected disclosure under § 2302(b)(8) that was a contributing factor to the employee's termination." *Whitmore v. Dep't of Lab.*, 680 F.3d 1353, 1367 (Fed. Cir. 2012).

B

We begin with Ms. McCarthy's disclosures involving Claimant Az. Under 5 U.S.C. § 2302(b)(8)(A), a protected disclosure exists if the employee had a reasonable belief that her disclosure revealed "(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." To meet that requirement, the employee must show that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that one of the situations enumerated in section 2302(b)(8)(A) did occur. *See Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008).

The administrative judge found that Ms. McCarthy had not made such a showing because she had not alleged that any government employee was complicit in either the wrongdoing or a cover up of the wrongdoing. Supp. App. 30–33. The administrative judge based that ruling on *Aviles v. Merit Systems Protection Board*, 799 F.3d 457 (5th Cir. 2015). In *Aviles*, the Fifth Circuit held that "Congress did not intend to protect disclosures of purely private

wrongdoing when it enacted the [Whistleblower Protection Enhancement Act]." *Id.* at 464.

The OSC contends in its amicus brief that the administrative judge erred in relying on *Aviles*. The OSC's first argument is that the court in *Aviles* misinterpreted section 2302(b)(8) and that, correctly interpreted, section 2302(b)(8) protects federal employees against retaliation for disclosing third-party wrongdoing.

We have previously cited *Aviles* with approval, albeit in a nonprecedential opinion. In *Oram v. Merit Systems Protection Board*, we explained that "[t]he purpose of the [Whistleblower Protection Act] is to encourage government personnel to disclose government wrongdoing." 2022 WL 866327, at *2 (Fed. Cir. Mar. 23, 2022) (alternations in original) (citing *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998)). We then held that "the amendments that Congress made in the Whistleblower Protection Enhancement Act do not 'extend whistleblower protection to claims involving purely private conduct.'" *Id.* In support of that holding, we relied on *Aviles*. *Id.* (quoting *Aviles*, 799 F.3d at 464). We acknowledged, however, that "a disclosure of wrongdoing committed by a non-government entity can be protected in some circumstances," such as when "the government's interests and good name are implicated in the alleged wrongdoing." *Id.* (citing *Miller v. Dep't of Homeland Sec.*, 99 MSPR 175, 182 (2005)). For the reasons discussed in *Oram*, we reject the OSC's first argument.

The OSC's second argument is that even if the disclosure of purely private misconduct does not qualify as a disclosure for purposes of the Whistleblower Protection Act, the Board erred by applying the more restrictive standard from *Aviles*, which requires alleging that the government was complicit in the wrongdoing. The OSC argues that the correct standard to apply is the more lenient standard from the Board's decision in *Miller*, under which the disclosure of private misconduct can qualify as a whistleblower

disclosure if the wrongdoing implicated the government's interests and good name. We need not resolve which standard to apply in this case, because Ms. McCarthy's disclosures would not qualify as whistleblowing disclosures even under the more lenient *Miller* standard. However, we note that our statement in *Oram* that a disclosure of wrongdoing by a third party could be protected if the government's interests and good name were implicated is similar to the standard for which the OSC has advocated in Part III of its brief as amicus curiae.

Ms. McCarthy argues that she had a reasonable belief that not referring the claim for a fraud investigation, as she had been instructed to do, would violate a regulation. *See* Reply Br. 11–12. She also suggests that the inconsistency in how the SSA's management handled Claimant Az's case as compared to Claimant Oet's case demonstrates gross mismanagement. *See id.* The problem with those arguments is that Ms. McCarthy has not alleged that she made whistleblower disclosures either that she was improperly instructed not to refer Claimant Az's claim for a fraud investigation or that the SSA was inconsistent in its handling of the cases. Instead, the allegation of whistleblowing that Ms. McCarthy made to the MSPB was that she disclosed Claimant Az's potential fraud to her supervisors. Supp. App. 30. Therefore, only her disclosure of Claimant Az's potential fraud is at issue in this case. Claimant Az is a private citizen. Ms. McCarthy did not allege that the government was complicit in Claimant Az's potential fraud or that Claimant Az's potential fraud would implicate the government's interests and good name. Therefore, disclosure of Claimant Az's potential fraud does not qualify for protection under either *Oram* or *Miller*.

C

We next turn to Ms. McCarthy's disclosures involving the quality assurance review process. Ms. McCarthy challenges the findings of fact by the administrative judge and

the full Board. Namely, Ms. McCarthy argues that there are multiple reasons that her supervisors' testimony should not be credited, such as that they are biased and that their testimony conflicts with other record evidence.

As an initial matter, the Board agreed with Ms. McCarthy that the administrative judge's credibility determinations were incomplete. Supp. App. 7. The Board noted that the administrative judge had failed to explain why he found Ms. McCarthy's supervisor's testimony to be more credible than Ms. McCarthy's testimony, and thus determined that the administrative judge's credibility conclusions were not entitled to deference. Supp. App. 8. The Board then conducted its own review of the record. It analyzed Ms. McCarthy's various statements and testimony and concluded that they were too vague and conclusory to establish that she had made a protected disclosure. Supp. App. 8–9. Given that conclusion, the Board determined that it did not need to address whether her supervisor's testimony was credible. Supp. App. 8 n.2.

Vague, conclusory or facially insufficient allegations of government wrongdoing do not constitute protected disclosures. *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 910 (Fed. Cir. 2008). We find that substantial evidence supports the Board's finding that Ms. McCarthy's allegations lacked the requisite specificity to qualify as protected disclosures. *E.g.*, Supp. App. 59 ("I made disclosures to Fred Gilbert, Claire Seamans and David DiPalma during the discussions about the [Oet] case. I presented POMS: DE/MC Adjudicative Role, Federal QA Review Policy, Vocational Policies related to age as a factor and subsidized work. This material was presented in a meeting held in Mr. Gilbert's office in mid-April. The meeting included discussion of 'determinations without QA oversight.'"). Moreover, Ms. McCarthy does not identify any specific allegations that she made that were overlooked by the Board.

For the foregoing reasons, we conclude that the Board did not commit legal error and that there is substantial evidence to support its findings. Accordingly, we uphold the Board's decision. We have considered Ms. McCarthy's remaining arguments and find them unpersuasive.

AFFIRMED

COSTS

No costs.