No. 99-629

In the Supreme Court of the United States

JOHN E. WHITE, PETITIONER

v.

JANICE R. LACHANCE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
HAROLD D. LESTER, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that, in evaluating whether a putative whistleblower had an objective "reasonable belief" that his prior disclosures evidenced misconduct prohibited by the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8), the Merit Systems Protection Board may not limit the evidence that it considers to the subjective beliefs of the putative whistleblower and other similarly situated employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 174 F.3d 1378. The opinion and order of the Merit Systems Protection Board is reported at 78 M.S.P.R. 38 (1998).[1]

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. A petition for rehearing was denied on

[1] The opinion and order of the Merit System Protection Board is reproduced in this brief at App., *infra*, 1a-8a.

July 16, 1999 (Pet. App. 10). The petition for a writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Mr. John E. White, was a GM-13 Supervisory Education Services Specialist (ESS) at Nellis Air Force Base, Nevada. His duties included negotiating memoranda of understanding with those colleges and universities providing on-base education services at Nellis. In 1992, the Air Force proposed to implement the Bright Flag Quality Education System (QES), which was intended to establish quality standards for schools contracting with Air Force bases for educational services. Pet. App. 2.

On May 4, 1992, the Air Force conducted a meeting attended by representatives of some of the schools and the Tactical Air Command. During the meeting, petitioner publicly criticized some of the standards that the QES would require, claiming that they were too burdensome and would seriously reduce the education opportunities available on base. Petitioner repeated these concerns in private meetings with Air Force officials. Pet. App. 3.

On June 1, 1992, petitioner's immediate supervisor detailed petitioner for 120 days from his GS-13 ESS position to a GS-12 Administrative Officer position, with no reduction in pay, because his supervisor had lost confidence in his ability to implement and support the QES. Petitioner thereupon filed a complaint with the Office of Special Counsel (OSC), claiming that his complaints regarding the QES were protected by the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 2302(b)(8), and that the 120-day detail violated the WPA. Pet. App. 3. The WPA defines a "prohibited

personnel practice" as the taking or failure to take a personnel action with respect to an employee because of

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences —
>
> (i) a 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 * * * .

5 U.S.C. 2302(b)(8)(A). On July 23, 1992, OSC notified petitioner that he had the right to seek corrective action with the Merit Systems Protection Board (MSPB) under 5 U.S.C. 1221, which he did. Pet. App. 3.

Before the MSPB, petitioner alleged that he had made disclosures that he reasonably believed constituted gross mismanagement and that were therefore protected under the WPA. In an initial decision dated October 26, 1992, an MSPB administrative judge dismissed petitioner's claim, finding that his disclosures at various meetings did not rise to the level of a "reasonable belief" of gross mismanagement protected by the WPA. Pet. App. 3. The full board reversed this decision, finding that an objective "reasonable belief" that agency conduct constitutes gross mismanagement is conclusively established if the putative whistleblower shows (1) that he is familiar with the conduct in question and subjectively believes that it constitutes gross mismanagement and (2) that other similarly situated employees share his belief about the conduct. *White* v. *Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994); Pet. App. 3. In finding that petitioner had established a

"reasonable belief" of gross mismanagement, the MSPB did not rely upon any review or analysis of the QES standards to which petitioner objected, and did not identify the reasons that the proposed QES standards could objectively be deemed to evidence gross mismanagement.

On remand, the MSPB administrative judge, adopting the full board's determination that petitioner's disclosures were protected by the WPA, found that the Air Force had violated the WPA by detailing petitioner, canceled petitioner's detail, and ordered that he be returned to his prior status. Pet. App. 3. The Air Force appealed to the full board, and the Office of Personnel Management (OPM) intervened as a matter of right pursuant to 5 U.S.C. 7701(d)(1) and 5 C.F.R. 1201.114(g) (1994).[2] After considering OPM's arguments, the MSPB affirmed its prior conclusion that petitioner's disclosures evidenced an objective "reasonable belief" of gross mismanagement. Pet. App. 4.

2. The court of appeals reversed. Pet. App. 1-9. It found that the MSPB's per se test for establishing an objective reasonable belief—"that [the employee] was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees"—necessarily excluded consideration of other potentially relevant factors, including independent and objective review of the allegedly improper activities themselves. *Id.* at 6-8. The court of appeals recognized that "[a] purely subjective perspective of an employee

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[2] The Board initially denied OPM's notice of intervention on the ground that OPM had not sought to intervene as early as practicable. Pet. App. 3-4. Ultimately, however, the Board conceded that OPM's intervention was timely, and considered OPM's arguments on the merits. *Id.* at 4.

is not sufficient" to establish an objective reasonable belief "even if shared by other employees." *Id.* at 7. It determined, therefore, that a proper test for establishing an objective reasonable belief "is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?" *Ibid.* The court of appeals then remanded this case to the MSPB for reconsideration of the facts of this case in light of all relevant evidence. *Id.* at 9.

ARGUMENT

The decision of the court of appeals is both plainly correct, and consistent with the decisions of this Court and the court of appeals. Accordingly, further review is not warranted (especially given the present interlocutory posture of the case).

1. To maintain a claim under the WPA, a federal employee must establish, among other things, that he engaged in whistleblower activity by making a disclosure protected under the WPA—that is, one that he "reasonably believes" evidences a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.[3] 5 U.S.C. 2302(b)(8); see *King* v. *Department of Health & Human Servs.*, 133 F.3d 1450, 1452 (Fed. Cir. 1998). None of the parties to this case disputes the court of appeals' holding that the test for determining whether a putative whistleblower has a "reasonable belief" that a disclosure evidences prohibited miscon-

[3] The putative whistleblower must also establish that the agency took, or threatened to take, a "personnel action" as defined in the WPA, and that the whistleblower raised his whistleblower reprisal claim with the Office of Special Counsel.

duct is an objective one. If the putative whistleblower's belief is not objectively reasonable, the disclosure is not protected, precluding a claim under the WPA.

However, despite this ostensible recognition that the determination of reasonable belief involves an objective assessment, the MSPB set forth—and the petitioner supports—a per se rule governing whether a putative whistleblower has established a reasonable belief in the occurrence of improper activity based on his, and other similarly situated employees', *subjective* beliefs. Pursuant to this standard, once a putative whistleblower made a showing simply "that he was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees," Pet. App. 6, the MSPB would have been precluded from considering any evidence in the record regarding "reasonable belief" beyond these two factual findings and from evaluating the underlying basis of the alleged belief independently to determine whether such belief was, in fact, objectively reasonable.

The court of appeals correctly recognized that, contrary to the language of the statute, the MSPB decision below improperly substituted a "subjective perspective" standard for one of objective reasonableness.[4]

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[4] *Black's Law Dictionary* 1265 (6th ed. 1990) provides two definitions for the term "reasonable belief." In the criminal context, reasonable belief or probable cause sufficient to make an arrest exists when an officer's knowledge of the facts and circumstances "are sufficient in themselves to justify a man of average caution in belief that a felony has been or is being committed." In the tort context, the existence of a reasonable belief denotes both that the actor actually believes in a fact or circumstance, *and* "that the circumstances which he knows, or should know, are such as to cause a reasonable man so to believe." The objective standard set forth in

Pet. App. 7. The court held that the two factors identified in the MSPB's per se test "may be of some relevance" in determining whether a putative whistleblower's belief is objectively reasonable. *Id.* at 8. It further held, however, that the "board may not limit its inquiry" to those two factors. *Ibid.* Specifically, the court of appeals recognized that, in a case in which the alleged impropriety involves written policy, the board should review and consider the allegedly improper policy itself in evaluating the objective reasonableness of the putative whistleblower's belief that prohibited conduct exists. *Id.* at 7-8. As the court of appeals properly determined, evidence of the putative whistleblower's actual belief, and of the subjective beliefs of other employees, cannot per se establish an objectively "reasonable belief."

2. Contrary to petitioner's claim (Pet. 8), the court of appeals has not "initiate[d] a new standard for the reasonableness of an employee's or applicant's belief." The court has repeatedly held that a finding of reasonable belief within the meaning of the WPA must be supported by substantial evidence, and that courts must consider the contradictory evidence in the record. See, *e.g.*, *Frederick* v. *Department of Justice*, 73 F.3d 349, 352-353 (Fed. Cir. 1996); *Horton* v. *Department of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995) (finding, after examination of the entire record, that the whistleblower's "reasonable belief of wrongdoing was not supported by substantial evidence"), cert. denied, 516 U.S. 1176 (1996). Pursuant to this inquiry, the court considers whether the record establishes "that a reasonable person would conclude" that the disclosure revealed

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the opinion of the court of appeals is consistent with both of these formulations.

wrongdoing under the WPA. *Herman* v. *Department of Justice*, 193 F.3d 1375, 1379-1380 (Fed. Cir. 1999); see also *Frederick*, 73 F.3d at 353 ("no reasonable fact-finder could conclude" that the disclosure was protected under the statute); *Haley* v. *Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992) (holding, after considering the background statutory scheme and "[p]etitioner's extensive experience" in his job, that petitioner's belief that a violation of FIRREA and its implementing regulations had occurred was not reasonable).

Furthermore, in a host of other contexts, it is well settled that subjective belief alone is not sufficient to establish reasonableness under an objective standard, and that application of a reasonableness standard requires an independent evaluation of the totality of the circumstances. For example, in the employment discrimination context both this Court and the court of appeals have held that, when determining whether an "environment would reasonably be perceived" as hostile or abusive, courts must look at "all the circumstances," *Harris* v. *Forklift Sys. Inc.*, 510 U.S. 17, 22-23 (1993) (Title VII); actual psychological harm constitutes only one relevant factor that "may be taken into account," *ibid.*; accord *King* v. *Hillen*, 21 F.3d 1572, 1580 (Fed. Cir. 1994) (approving the Equal Employment Opportunity Commission Guidelines objective reasonableness standard, which states that "[i]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances"). Similarly, reasonableness requirements in the National Labor Relations Act are measured "by objective standards, under all the circumstances of the case." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 257 n.5 (1975)

(quoting *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198 n.3 (1972)). Likewise, under patent law, the "reasonable apprehension of suit" test, applied in determining whether an alleged infringer can bring declaratory judgment action against the patentee, "requires more than the nervous state of mind of a possible infringer; it requires that the objective circumstances support such an apprehension." *Phillips Plastics Corp.* v. *Kato Hatsujou Kabushiki Kaisha*, 57 F.3d 1051, 1053-1054 (Fed. Cir. 1995).

This Court has most frequently assessed reasonableness in the Fourth Amendment context, considering whether officers have "a reasonable belief based on specific and articulable facts" that a certain intrusion is warranted. *Maryland* v. *Buie*, 494 U.S. 325, 337 (1990) (allowing protective sweep of a house during arrest where the officers have "reasonable belief" that the area harbors an individual posing a danger to those on the arrest scene). In such cases, reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) (internal quotation marks omitted); see also, *e.g.*, *Alabama* v. *White*, 496 U.S. 325, 328 (1990) (totality of circumstances must be considered in determining whether objectively reasonable suspicion existed). The "totality of the circumstances" that the court must evaluate in determining whether a suspicion was reasonable refers to "the whole picture," from which the court must be able to identify a "particularized and objective basis" for the reasonable suspicion. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). And to support a magistrate's warrant determination, "[s]ufficient information must be presented" to "allow that official to determine probable cause; his action cannot be a mere

ratification of the bare conclusions of others." *Illinois* v. *Gates*, 462 U.S. 213, 239 (1983).

The teaching of all of these cases—that reasonableness requires an objective evaluation of the totality of the circumstances—refutes petitioner's attempt to equate "an objective evaluation of the employee's beliefs" with a mandatory acceptance, and reliance upon, his and others' subjective beliefs, to the exclusion of any other evidence. It would be inappropriate for a court to find probable cause to search based solely upon the shared views of several police officers, without discussing the basis for that belief. "Because probable cause," like the WPA "reasonable belief" standard, "is an objective test, [the court must] examine the facts within the knowledge of arresting officers to determine whether they provide a probability on which reasonable and prudent persons would act; [the court] do[es] not examine the subjective beliefs of the arresting officers to determine whether *they* thought that the facts constituted probable cause." *United States* v. *Gray*, 137 F.3d 765, 769 (4th Cir.) (citing *Ornelas* v. *United States*, 517 U.S. 690, 695-696 (1996)), cert. denied, 119 S. Ct. 157 (1998). Similarly, the court of appeals correctly found that reasonable belief in gross mismanagement is not established merely by the shared views of several employees, without an analysis of the basis for their views.

Because the objective reasonableness standard set forth by the court of appeals comports both with the language of the statute, and with precedent from this Court and the court of appeals, no further review is warranted.

3. Petitioner suggests that the decision below fails to provide federal employees with the protection Congress intended for disclosing "governmental mis-

management and/or wrongdoing" (Pet. 12), but he is mistaken. Disclosures made by federal employees are protected by the WPA only if they are reasonably believed to evidence either "a violation of any law, rule, or regulation" (5 U.S.C. 2302(b)(8)(A)(i)), or "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)(A)(ii)). Conspicuously excluded from statutory protection are statements of disagreement with agency policy—as the court of appeals recognized, "[t]he WPA is not a weapon in arguments over policy or a shield for insubordinate conduct." Pet. App. 7. Also excluded from statutory protection are allegations of mismanagement that is not serious enough to constitute *gross* mismanagement. Finally, allegations of gross mismanagement are protected only if they are objectively reasonable. These limitations, which appear on the face of the statute, were not created by the decision below but by Congress itself. It is petitioner's proposed standard, and not the decision below, that would undermine the purpose of the WPA, by extending the protection of the statute to any allegation of mismanagement believed by the employee and others, whether or not their belief is objectively reasonable.

4. Petitioner claims that the court below imposed an insurmountable obstacle to claims under the WPA, by requiring the employee to rebut with "irrefragable proof" a mandatory presumption that public officers perform their duties correctly, fairly, in good faith, and according to law. Pet. i, 12. The court, however, imposed no such requirement. Instead, the court merely noted that the presumption would govern the *ultimate* determination whether gross mismanagement had actually occurred, and therefore it was *relevant* to the

determination whether the employee could reasonably believe that it had occurred. It made this observation in the course of holding that the MSPB had erroneously limited its consideration to the subjective beliefs of the employees, and should instead have considered all available evidence as to the reasonableness of those beliefs. Pet. App. 8. The presumption itself is well established, see *Alaska Airlines, Inc.* v. *Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926), as is the principle that "this presumption stands unless there is 'irrefragable proof' to the contrary." *Alaska Airlines*, 8 F.3d at 795 (quoting *Torncello* v. *United States*, 681 F.2d 756, 770 (Ct. Cl. 1982)); see *Gonzales* v. *Defense Logistics Agency*, 772 F.2d 887, 892 (Fed. Cir. 1985). Petitioner has provided no basis for seeking to overturn this long-established precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
HAROLD D. LESTER, JR.
Attorneys

JANUARY 2000

APPENDIX

MERIT SYSTEMS PROTECTION BOARD

DE-1221-92-0491-M-I

JOHN E. WHITE, APPELLANT

v.

DEPARTMENT OF THE AIR FORCE, AGENCY

AND

OFFICE OF PERSONNEL MANAGEMENT, INTERVENOR

[Filed: Mar. 10, 1998]

OPINION AND ORDER

Before ERDREICH, Chairman, SLAVET, Vice Chair, and MARSHALL, Member.

This appeal is before the Board to consider the Office of Personnel Management's (OPM) arguments on intervention, on behalf of the agency. For the reasons set forth below, we AFFIRM our prior decisions and conclusions in this appeal.

BACKGROUND

A complete discussion of the factual and procedural history of this case may be found in *White v. Department of the Air Force*, 71 M.S.P.R. 607 (1996) [hereinafter *White II*], and *White v. Department of the Air Force*, 63 M.S.P.R. 90 (1994) [hereinafter *White I*]. The following discussion sets forth the relevant facts necessary to address OPM's arguments on intervention.

On June 1, 1992, the agency detailed the appellant from his Education Services Officer (ESO) position to an Administrative Officer position without reducing his pay. The agency ordered the detail because it lost confidence in the appellant's ability to support the Bright Flag Quality Education System (QES). *White I*, 63 M.S.P.R. at 92-93. The QES contained various quality standards that applied to colleges and universities contracting with Air Force bases throughout the nation to provide on-base educational services ranging from specific classes to degree-granting programs. *Id.* at 93 n. 2.

The appellant alleged that the agency ordered his detail in retaliation for his criticism of the agency's implementation of the QES, and of the standards required under the QES, during meetings with agency officials. The appellant first pursued this matter with the Office of the Special Counsel, and then in an individual right of action (IRA) appeal with the Board, claiming that his disclosures evidenced gross mismanagement and abuse of authority, and were, therefore, protected under the Whistleblower Protection Act (WPA). The administrative judge declined to hold the hearing the appellant had requested, and dismissed the appellant's IRA appeal for lack of jurisdiction, concluding that the appellant's disclosures were not protected under the WPA. *Id.* at 92-94.

In *White I*, however, the Board found that the appellant's disclosures were protected under the WPA because the appellant reasonably believed that he disclosed information that evidenced gross mismanagement. *Id.* at 94. The Board based this conclusion on the appellant's description of his disclosures and on

documentary evidence showing that there was widespread sharing of his views. *Id.* at 95-97. The Board, therefore, remanded the appeal for the administrative judge to determine whether the appellant's whistleblowing was a contributing factor in the action taken against him, and if so, whether the agency had shown by clear and convincing evidence that it would have taken the same action in the absence of the retaliatory factor. *Id.* at 98-99.

On remand, the administrative judge found that the agency had retaliated against the appellant because of his whistleblowing activities and ordered the appellant reinstated to his position. 71 M.S.P.R. at 610. The agency filed a petition for review, the appellant filed a cross petition for review, and OPM sought to intervene, arguing on behalf of the agency that the Board had erred in determining that the appellant's disclosures were protected by the WPA. In *White II*, the Board denied the agency's petition and the appellant's cross petition. *Id.* at 611-16. The Board also found that OPM did not meet the statutory requirements for intervention because it did not seek to intervene as early in the proceeding as practicable, as required under 5 U.S.C. § 7701(d)(1) and 5 C.F.R. § 1201.114(g)(1), and thus did not address the merits of OPM's arguments. *Id.* at 616-18. The Board, therefore, affirmed the initial decision, and ordered corrective action. *Id.* at 618.

OPM then filed a petition for review of the Board's final decision with the U.S. Court of Appeals for the Federal Circuit, arguing that the Board erred in finding that it had not timely intervened. While this matter was pending, the Board requested that the court remand the case to it for the purpose of deeming OPM's

intervention timely, and considering its arguments on the jurisdictional issue of whether the appellant's disclosures were protected whistleblowing. The court has granted this motion, and we, therefore, now address the merits of OPM's assertions.

OPM contends that the Board used an incorrect legal standard in *White I*, to conclude that the appellant's disclosures were protected under the WPA because he reasonably believed that he disclosed information that evidenced gross mismanagement. OPM asserts that, although the Board correctly stated that the test for whether a putative whistleblower has a reasonable belief in the disclosure is an objective one, it improperly applied a subjective test in concluding that the appellant met the requirements of the statute. OPM argues that the Board improperly made the appellant's subjective "fear" of a substantial loss of educational services the "touchstone" of its analysis, and that the emotion of "fear" cannot constitute a rational ground or motive, or a logical defense for the appellant's actions. OPM also asserts that the Board improperly relied upon the widespread sharing of the appellant's belief by educational institutions and other ESOs to support its conclusion that the appellant reasonably believed he was disclosing gross mismanagement. OPM argues that a shared belief, by itself, is insufficient to determine reasonableness because the others' beliefs may also be unreasonable, and the proper analysis must, therefore, examine whether there was a rational basis for the shared belief.

ANALYSIS

We disagree with OPM's claim that we made the subjective emotion of "fear" the "touchstone" of our conclusion in *White I* that the appellant's disclosures were protected under the WPA, and we instead find that OPM has taken out of context the isolated use of the word "fear." As OPM avers, our decision in *White I* includes the statement that the "appellant's 'fears' that there might be a substantial loss of educational services and that the standards might be unworkable" supported the conclusion that he reasonably believed he was disclosing gross mismanagement. 63 M.S.P.R. at 96. We further recognize that the word "fear" generally means a distressing emotion aroused by impending pain, danger or peril. Random House College Dictionary 482-83 (Revised ed.1975).

A fair reading of *White I*, however, reveals that the Board's use of the word "fear" was meant in the context of the appellant's "beliefs" and "concerns" and of the underlying reasons for his opinion. Indeed that decision is replete with references to the appellant's "belief" and "concern" that the QES would cause loss of educational services on a nationwide basis. The Board stated that the "record contains evidence of substantial support for the appellant's 'concerns' regarding the agency's actions in implementing QES and its requirements that colleges and universities adhere to what the appellant 'believed' were unworkable and untenable quality education standards," and noted that the appellant expressed his "concerns" in two meetings. 63 M.S.P.R. at 95-96. Indeed, the very paragraph mentioning the appellant's "fear," also states that the appellant's "concerns" were shared by a wide variety of education

institutions and other ESOs. *Id.* at 96. Thus, contrary to OPM's claim, a complete review of *White I* establishes that the Board's conclusion was based upon the appellant's "belief," which is an opinion or conviction, and "concern," which is a matter that engages a person's attention, interest, or care, and not upon the subjective emotion of "fear." Random House College Dictionary 123, 278 (Revised ed. 1975). Moreover, to the extent that our use of the word "fear" encompasses the emotional context of that word, our decision makes clear that the appellant's "fear" was reasonable, as required under the WPA, based upon his knowledge of the QES, and the shared beliefs of other ESOs and educational institutions. 63 M.S.P.R. at 95-96.

OPM's argument that the objective test for determining whether an appellant has a reasonable belief that his disclosure evidences a matter covered by the WPA cannot be satisfied merely because others share the belief, is also without merit. Since *White I*, the Board has reiterated the manner in which an employee may establish that his belief was reasonable. The Board has stated that an appellant may meet this test by showing that he was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees. *See Schlosser v. Department of the Interior*, 75 M.S.P.R. 15, 20-21 (1997); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 237-38 (1995), *aff'd* 99 F.3d 1160 (Fed.Cir. 1996) (Table).

Again, a review of *White I* shows that the Board properly applied this standard. There was no question regarding the appellant's familiarity with QES because he was an ESO and the agency initiated the appellant's detail because it lost confidence in his ability to support

that program. 63 M.S.P.R. at 93. The Board also recognized that other ESOs shared the appellant's opinion, and cited specific evidence supporting this conclusion. *Id.* at 96. Thus, the Board correctly based its determination on the appellant's description of his disclosures, including his familiarity with QES, and on documentary evidence showing that there was widespread sharing of his views, including similar views by similarly situated ESO employees. *Id.* at 95-96. We, therefore, conclude that OPM's arguments, including its assertion that the Board failed to consider alleged bias against the QES by colleges and universities, improperly focus on isolated aspects of our decision while overlooking the cumulative effect of the basis for our decision. As such, OPM's arguments do not provide a basis for disturbing our prior decisions in this appeal.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board:
ROBERT E. TAYLOR,
WASHINGTON, D.C.