UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 99

Docket No. CH-4324-11-0500-I-1

Mark Landers,

Appellant,

v.

Department of the Air Force,

Agency.

November 30, 2011

Andrew L. McNamara, Esquire, Albany, New York, for the appellant.

F. Thomas Giambattista, Esquire, Wright-Patterson Air Force Base, Ohio, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the reasons set forth below, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant filed a request for corrective action under USERRA, asserting that between 1980 and 2001 the agency improperly charged him with military leave on nonwork days. Initial Appeal File (IAF), Tab 1. In response, the agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing that, in an August 8, 2006 settlement agreement between the appellant and the agency, the appellant released any and all claims, known or unknown, against the agency based on any cause of action occurring up to and including the date of the agreement.[1] *Id.*, Tab 8 at 1-2; *see id.*, Tab 9, Subtab 2e. The agency submitted the August 8, 2006 settlement agreement into the record, and asserted that the appellant voluntarily and knowingly waived his right to file the instant appeal because the agency's allegedly improper actions in charging him with military leave predated the August 8, 2006 settlement agreement. *Id.*, Tab 8 at 1-2; *id.*, Tab 9, Subtab 2e. In reply, the appellant asserted that the claims and issues involved in the settlement agreement were unrelated to those in the instant appeal filed pursuant to USERRA and that, regardless, he did not have the ability to waive his substantive USERRA rights in a contractual agreement in accordance with 38 U.S.C. § 4302. *Id.*, Tab 11 at 5-6.

¶3 The administrative judge dismissed the appellant's request for corrective action under USERRA. IAF, Tab 13, Initial Decision at 3. The administrative judge rejected the appellant's assertion that his waiver of appeal rights was unenforceable pursuant to 38 U.S.C. § 4302, finding that the legislative history of the statute indicated that Congress only sought to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining

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[1] The August 8, 2006 settlement agreement was entered into the record in the United States District Court for the Southern District of Ohio in resolution of an action between the appellant and the agency, in which the appellant alleged that the agency retaliated against him and discriminated against him based on his gender. IAF, Tab 9, Subtab 2e at 11.

agreements and that the Board has previously held that an appellant may waive his right to appeal from an alleged violation of USERRA. Initial Decision at 2 (citing *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680 (5th Cir. 2006); *Johnson v. U.S. Postal Service*, 85 M.S.P.R. 1, 6-7 (1999)). The administrative judge thus found that, because the settlement agreement meets all the legal requirements necessary for enforcement and, in light of the fact that the appellant did not otherwise argue that the agreement was unenforceable for any reason, the appellant's waiver of his right to appeal from an alleged violation of USERRA was enforceable. Initial Decision at 2.

¶4 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition. *Id.*, Tab 3.

ANALYSIS

¶5 The Board will consider a settlement agreement reached outside of a Board proceeding to determine its effect on an action before the Board and any waiver of Board appeal rights. *Swidecki v. U.S. Postal Service*, 101 M.S.P.R. 110, ¶ 7, *review dismissed*, 182 F. App'x 992 (Fed. Cir. 2006); *Sullivan v. Department of Veterans Affairs*, 79 M.S.P.R. 81, 84 (1998). The appellant may challenge the validity of the settlement agreement if he believes that the agreement was unlawful, involuntary, or resulted from fraud or mutual mistake. *Swidecki*, 101 M.S.P.R. 110, ¶ 13. He may also challenge the enforceability of any waiver of Board appeal rights.

¶6 In his petition for review, the appellant renews his assertion that pursuant to the terms of 38 U.S.C. § 4302, he could not waive his rights under USERRA by way of the August 8, 2006 settlement agreement because the statute supersedes any contract or agreement that reduces, limits, or eliminates any right provided by USERRA. Petition for Review (PFR) File, Tab 1 at 7-8. The appellant is correct that USERRA has a specific provision dealing with its

relation to other laws, plans, and agreements. *See* 38 U.S.C. § 4302. Section 4302(b) states that:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4302(b). The appellant essentially argues that the August 8, 2006 settlement agreement is a contract or agreement that eliminates his rights and benefits under USERRA, and, therefore, that it is automatically superseded by the language of 38 U.S.C. § 4302(b).

¶7 The extent to which and the means by which an appellant may waive his rights under USERRA has not been extensively analyzed or considered by the Board or the Federal Circuit, particularly with respect to the applicability of 38 U.S.C. § 4302. On this matter, we find the recent treatment of the question by the federal appeals courts instructive. *See Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39 (although decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board, the decisions of the other circuit courts are persuasive, but not controlling, authority), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

¶8 In *Garrett*, cited by the appellant, Mr. Garrett entered into an arbitration agreement with his employer, which provided that employment-related disputes would be settled by final and binding arbitration under the Federal Arbitration Act (FAA). *Garrett*, 449 F.3d at 674. The U.S. Court of Appeals for the Fifth Circuit held that Mr. Garrett's subsequent USERRA claims against his employer were subject to arbitration under the agreement, even in light of 38 U.S.C. § 4302, because his waiver of a judicial forum did not constitute a reduction in the substantive rights and benefits afforded under USERRA. *Id*. at 676-79. The court also analyzed the legislative history of the statute and found that it did not

show that Congress intended for § 4302(b) to exclude arbitration agreements. *Id*. at 679-80. Rather, the court found, the legislative history "strongly suggests that Congress intended § 4302(b) only to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining agreements, and that Congress did not refer to arbitration agreements between an employer and an individual employee." *Id*. at 679-80 (citing H.R. Rep. No. 103-65 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2453). The court concluded that USERRA claims are subject to arbitration under the FAA, notwithstanding § 4302. *Id*. at 681.

¶9 In *Wysocki v. International Business Machine Corporation*, 607 F.3d 1102, 1107 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 945 (2011), the U.S. Court of Appeals for the Sixth Circuit distinguished *Garrett* from cases, like *Wysocki*, involving a wholesale contractual elimination of all methods to enforce USERRA's rights and benefits. The Sixth Circuit recognized that in *Garrett* the arbitration agreement at issue between Mr. Garrett and his employer was found not to implicate § 4302 because it did not extend to substantive rights and still allowed for a fair opportunity to advance those rights. *Id.*; *see Garrett*, 449 F.3d at 678-81. However, the court found that the contractual agreement at issue in *Wysocki*, which is similar in many ways to the settlement agreement at issue in the instant Board appeal, "squarely implicates § 4302" because it effectively eliminated his substantive rights under USERRA. *Wysocki*, 607 F.3d at 1107.

¶10 On the date of his termination by IBM, following his return from military service in Afghanistan, Mr. Wysocki signed a Release as part of an Individual Separation Allowance Plan he negotiated with IBM. *Id.* at 1104. The Release provided that Mr. Wysocki waived "all claims, demands, actions or liabilities [h]e m[ight] have against IBM of whatever kind," and included within its scope "any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on . . . veteran status . . . ." *Id.* In exchange for his waiver, Mr. Wysocki received $6,023.65 as a gross severance

payment. *Id.* While the court found that the Release, which effectively eliminated all of Mr. Wysocki's procedural and substantive rights under USERRA, implicated § 4302, it also found that it was not automatically superseded by § 4302. *Id.* at 1107.

¶11 Rather, the Sixth Circuit found that the critical inquiry was whether the Release was exempt from the operation of § 4302(b) by § 4302(a) because the rights provided to Mr. Wysocki in the Release were more beneficial than those he waived under USERRA. *Id.* Section 4302(a) provides that:

> Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

38 U.S.C. § 4302(a).

¶12 In *Wysocki*, the court noted that, while USERRA's provisions are to be liberally construed in favor of veterans, the statute's legislative history "clearly envisioned that veterans would be able to waive their individual USERRA rights by clear and unambiguous action." *Wysocki*, 607 F.3d at 1108 (citing H.R. Rep. No. 103-65, at 20 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2453 ("The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct."); S. Rep. 103-158, at 41, *available at* 1993 WL 432576, at *36 (Oct. 18, 1993) ("The rights under chapter 43 belong to the employee and, as such, can only be waived through unambiguous and voluntary action by the employee."). The court found that the Release "used clear and unambiguous language and involved a valuable amount of consideration." *Wysocki*, 607 F.3d at 1108. It further found that Mr. Wysocki understood that the Release eliminated his USERRA rights because it covered claims based on "veteran status" and that it appeared that Mr. Wysocki signed the Release "because he believed that the

rights provided in the Release were more beneficial than his USERRA rights . . . ." *Id.* The court emphasized that there was no evidence of mistake, incapacity, fraud, misrepresentation, unconscionability, or duress in the negotiation of the Release, and that, therefore, it was exempted from the operation of § 4302(b) by § 4302(a). *Id.*; *see* 38 U.S.C. § 4302(a)-(b).

¶13 In the instant case, the administrative judge did not reach the question of whether § 4302(a) exempts the August 8, 2006 settlement agreement from the operation of § 4302(b). Instead, the administrative judge cited *Garrett* for the proposition that the legislative history of 5 U.S.C. § 4302 "strongly suggests that Congress only intended to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining agreements rather than by settlement agreements between an employer and an employee."[2] Initial Decision at 2 (internal quotation marks omitted). This was a misstatement of the holding of *Garrett*. As discussed above, the Fifth Circuit's analysis of § 4302(b) did not turn on the distinction between union contracts and collective bargaining agreements on the one hand, and individual agreements on the other, but rather on the distinction between substantive and procedural rights under USERRA. The court in *Garrett* thus did not consider the question of whether a waiver of both procedural and substantive rights under USERRA may be waived by a contractual agreement between an employee and an employer. Because enforcement of the settlement agreement at issue here would provide the appellant with no opportunity to present or prevail on a USERRA claim stemming from any agency action prior to August 8, 2006, we find, contrary to the initial decision, that the agreement implicates § 4302(b). *See Wysocki*, 607 F.3d at 1107.

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[2] The administrative judge also found that the Board previously held that an appellant may waive his right to appeal from an alleged violation of USERRA in *Johnson*, 85 M.S.P.R. 1. Initial Decision at 2. To the extent that *Johnson* assumed, without finding, that an appellant necessarily may waive his right to file a request for corrective action under USERRA in a contractual agreement, it is hereby modified in accordance with our analysis and holding in the instant case. *See Johnson*, 85 M.S.P.R. 1, ¶ 14.

¶14 However, as in *Wysocki*, we find that the settlement agreement is exempted from the operation of § 4302(b) by § 4302(a). *See Wysocki*, 607 F.3d at 1108. The settlement agreement stated that the appellant "hereby releases, remises, and forever discharges [the agency] . . . from *any and all* claims, causes of action, suits, damages, attorney fees, right to monetary or equitable relief, known or unknown, for anything or any matter occurring up to and including the date of this Agreement . . . ." IAF, Tab 9, Subtab 2e at 5 (emphasis added). It further stated that the appellant agreed "not to initiate any complaint, appeal, grievance or litigation in any manner against the agency . . . under any state, local, or federal law or regulation as regards any issue arising from his employment with the agency . . . ." *Id.* at 5-6. The agreement also stated that the appellant agreed "not to bring and to forever waive his rights to raise claims which include, but are not limited to, discrimination claims or demands [he] may have based on his employment with the agency, including any rights or claims he may have under Title VII of the Civil Rights Act of 1964, the Rehabilitation Act, and any other federal, state, or local laws or regulations prohibiting employment discrimination." *Id.* at 6.

¶15 While the settlement agreement did not explicitly state that it covered claims under USERRA or claims based on "veteran status," we find that the above-quoted language is clear and unambiguous and informed the appellant that he was waiving "all claims" arising under any federal law for any agency action occurring up to and including the date of the agreement. Further, the settlement agreement involved valuable consideration in the form of, inter alia, a within-grade increase, restoration of 931 hours of annual leave, payment of $25,000, and the allowance of liberal use of leave until the appellant's scheduled May 1, 2007 retirement date. *See* IAF, Tab 9, Subtab 2e at 2-3. While the appellant apparently proceeded pro se in his suit against the agency in federal court, from which the settlement agreement resulted, the appellant worked as a GS-15 Attorney (Contract) for the agency. *See id.* at 1-2; *id.*, Subtab 2a. Moreover, the

settlement agreement provided the appellant with 21 days to review and consider the agreement, and the agreement stated that both parties were provided with time to consult with counsel prior to signing. IAF, Tab 9, Subtab 2e at 8-9, 11. Under these circumstances, there is enough evidence in the record to find that the appellant signed the settlement agreement with the belief that the consideration provided by the agreement was more beneficial than the preservation of his rights to bring additional claims against the agency, which necessarily included his right to file a request for corrective action under USERRA.[3] *See Wysocki*, 607 F.3d at 1108. Moreover, as the administrative judge recognized, the appellant did not otherwise argue that the terms of the settlement agreement were unenforceable. Initial Decision at 2. Additionally, there is nothing in the record to suggest that the agreement was the product of misrepresentation, fraud, mistake, or duress. Accordingly, we find that 38 U.S.C. § 4302 does not invalidate the August 8, 2006 settlement agreement and that the appellant waived his right to request corrective action for any alleged violation of USERRA by the agency that occurred up to and including the date of the settlement agreement. We therefore DISMISS the appellant's request for corrective action under USERRA.

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[3] For the first time in his petition for review, the appellant asserts that, even if he could waive his substantive rights under USERRA, he did not knowingly and intentionally do so through the settlement agreement because the agreement did not specifically provide for the waiver of his USERRA rights. PFR File, Tab 1 at 11-12. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant has failed to make such a showing here; rather, he appeared to assume below that the terms of the settlement agreement applied to USERRA claims by way of his assertions that he was unable to waive such claims pursuant to 38 U.S.C. § 4302. Accordingly, we have not explicitly addressed the appellant's claims that he did not knowingly waive his USERRA rights, other than through our analysis as to whether the rights provided by the settlement agreement were more beneficial than his USERRA rights.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.