



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 28, 2015

BOARD DECISIONS

Appellant: Douglas A. Alarid
Agency: Department of the Army
Decision Number: [2015 MSPB 50](#)
MSPB Docket No.: SF-0752-14-0256-I-1
Issuance Date: August 21, 2015
Appeal Type: Adverse Action
Action Type: Removal

AJ Requirement to Acknowledge Affirmative Defenses
AJ Requirement to Inform Parties of Burdens of Proof
Prehearing Conference Summary
Applicable Standard for Union Activity Reprisal Claims
Waiver of Affirmative Defenses

The appellant was removed from the position of Police Officer for misconduct. In his appeal, the appellant alleged that his removal was based on reprisal for his participation in union activity. In a prehearing submission, the appellant alleged affirmative defenses of reprisal for whistleblowing and a due process violation. In the first prehearing conference summary, the administrative judge (AJ) noted that the appellant was raising affirmative defenses of reprisal for protected whistleblowing and union activity, but the AJ did not provide the applicable burdens of proof. The AJ further did not mention the appellant's affirmative defense of a due process violation. The AJ later issued a second order suspending case processing, and in this order stated that the appellant had raised affirmative defenses of protected EEO activity and whistleblowing activity, and cited to *Warren v. Department of the Army*,

804 F.2d 654 (Fed. Cir. 1986) for the applicable burden of proof for retaliation claims. In the AJ's third preconference summary and order, the AJ stated that he determined that the appellant's originally asserted whistleblowing reprisal claim was actually a claim of reprisal for protected EEO activity, but did not provide any explanation for this determination. He also again cited to *Warren* for the standard for the appellant's affirmative defense, and failed to mention the appellant's other affirmative defenses of reprisal for participation in union activity or a due process violation. Finally, he did not provide an explanation of the effects of withdrawing or abandoning an affirmative defense. Neither party objected to any of the AJ's prehearing orders. The AJ then conducted a hearing, and in an initial decision, sustained the charged misconduct, found that removal was an appropriate penalty, and concluded that the appellant failed to prove that his removal was based on reprisal for EEO activity. The AJ alluded to the appellant's other affirmative defenses presented in closing briefs, but declined to address those issues because neither party objected to his prehearing conference summary within the requisite timeframe, and because the appellant only presented evidence of his claim of reprisal for EEO activity. The appellant asserted in his petition for review (PFR) to the Board that the AJ erred in denying his affirmative defense of reprisal for union activity.

Holding: The Board granted the appellant's PFR, vacated the initial decision, and remanded the case to the AJ for further adjudication.

- 1. The Board found that the AJ erred by failing to fully identify the appellant's affirmative defenses, failing to apprise the appellant of his burdens of proof on these affirmative defenses, and failing to properly document whether the appellant had abandoned these affirmative defenses. As a result, the Board remanded the case for adjudication of the appellant's affirmative defenses of reprisal for whistleblowing and union activity, and a due process violation.**
- 2. The Board found the AJ should have construed the appellant's claim of reprisal based on union activity as a claim of reprisal under 5 U.S.C. § 2302(b)(9)(B), rather than a claim of reprisal for EEO activity, because reprisal for union activity and reprisal for EEO activity are two separate types of claims.**
- 3. The Board found that under the Whistleblower Protection Enhancement Act, claims of reprisal based on union activity should be analyzed under the burden shifting standard set forth in 5 U.S.C. § 1221(e), and not the *Warren* standard.**

4. The Board found that the appellant's failure to file an exception to a prehearing conference summary was not fatal to establishing his affirmative defenses inasmuch as the record did not reflect any intent by the appellant to abandon any of those affirmative defenses.

The U.S. Court of Appeals for the Fifth Circuit issued the following precedential decision this week:

Petitioner: Jorge A. Aviles

Respondent: Merit Systems Protection Board

Intervenor: Department of the Treasury

Tribunal: U.S. Court of Appeals for the Fifth Circuit

Case Number: [2014-60645](#)

MSPB Docket No. DA-1221-13-0518-W1

Issuance Date: August 24, 2015

Protected Whistleblower Disclosures

Nonfrivolous Allegations

Evidentiary Standard for IRA Jurisdiction

Applicable Standard for Nonfrivolous Allegation

Federal Circuit Review of MSPB Jurisdictional Determinations

In September 2010, the petitioner was removed from his position as an International Examiner for the Internal Revenue Service ("IRS") for misconduct. In 2013, the petitioner filed a complaint with the Office of Special Counsel, alleging that he was removed because on February 2, 2010, he disclosed to his supervisor income tax fraud committed by ExxonMobil and "the involvement by [the] IRS management team in helping to cover it up[,]" and because on February 16, 2010, he disclosed income tax fraud by ExxonMobil in excess of 500 million dollars to IRS Management. Following this complaint, the petitioner filed an Individual Right of Action ("IRA") appeal with MSPB, asserting that he was removed as reprisal for protected whistleblowing activity. The administrative judge (AJ) dismissed the petitioner's appeal for lack of jurisdiction, holding that 5 U.S.C. § 2302(b)(8) protects whistleblowers against retaliation for disclosure of government wrongdoing, and that the petitioner's complaint only alleged tax fraud by a private entity. The AJ further found that the petitioner's allegations of government involvement were too vague and speculative to constitute a nonfrivolous allegation of whistleblowing activity. Upon review, in a 2-1 decision, the Board affirmed

the AJ's initial decision, with a dissent issued by the Vice Chairman.

Holding: The Court affirmed.

1. Disclosures of purely private misconduct are not protected disclosures covered by 5 U.S.C. § 2302(b)(8). The Whistleblower Protection Act, and Whistleblower Protection Enhancement Act, protects only disclosures of government wrongdoing.
2. The petitioner's allegation of a "government cover up" was too vague and speculative to constitute a nonfrivolous allegation of government wrongdoing.
3. The Fifth Circuit held that the preponderance of the evidence standard for jurisdictional determinations contained in 5 C.F.R. § 1201.56 applies only to the merits of constructive adverse action appeals, and does not apply to jurisdictional determinations for Whistleblower Protection Act appeals.
4. The Fifth Circuit declined to follow the Federal Circuit's approach to determinations of nonfrivolous allegations, which applies a summary judgment standard that allows the Board to consider the government's evidence in deciding jurisdiction. The Court instead applied a motion-to-dismiss standard, in which all well-pleaded facts are accepted as true and viewed in the light most favorable to the petitioner.
5. The Fifth Circuit noted, without deciding the issue, that the Supreme Court's decision in *City of Arlington, Texas v. FCC*, 133 S.Ct. 1863 (2013) may call into question whether the Federal Circuit should review MSPB jurisdictional determinations *de novo*.

- **The U.S. Court of Appeals for the Federal Circuit did not issue any MSPB decisions this week.**