U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 18, 2016

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BOARD DECISIONS

Appellant: Lisa Hess
Agency: U.S. Postal Service
Decision Number: 2016 MSPB 40
Docket Number: AT-0752-14-0058-B-1
Issuance Date: November 18, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures
- **Interlocutory Review**
- **Mootness**

Discrimination
- **Compensatory Damages**

The appellant filed an appeal of her removal, raising affirmative defenses of sex and disability discrimination, reprisal for equal employment opportunity (EEO) activity, and whistleblower reprisal. While the appeal was pending in the regional office, the agency rescinded the removal action. The administrative judge dismissed the appeal as moot,

and the appellant petitioned for review. Relying on its recently issued decision in *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015), the full Board remanded the appeal, finding that the administrative judge erred in dismissing the appellant's discrimination and EEO retaliation defenses. *Hess v. U.S. Postal Service*, 123 M.S.P.R. 183 (2016). On remand, the administrative judge again dismissed the appeal as moot, finding that, pursuant to its decision in *Savage*, the Board lacks the authority to order compensatory damages. The administrative judge then certified his ruling to the full Board for interlocutory review.

Holding: The Board reversed the administrative judge's ruling that the Board lacks authority to award compensatory damages, vacated the order that stayed the proceedings below, and returned the appeal to the regional office for further adjudication.

1. In light of the lack of guidance regarding the impact of *Savage* on the Board's authority to award compensatory damages, certification for interlocutory review under 5 C.F.R. § 1201.92 was proper.

2. The Board has authority to award compensatory damages resulting from a discriminatory or retaliatory adverse action.

a. The Civil Rights Act of 1991, which introduced the compensatory damages provision of 42 U.S.C. § 1981a, does not directly address the Board's authority to award such damages. However, the Board's longstanding practice of awarding compensatory damages is consistent with the structure of the Civil Service Reform Act of 1978 (CSRA), which sets out complementary roles for the Board and the Equal Employment Opportunity Commission (EEOC) under the mixed-case procedures of 5 U.S.C. § 7702. The legislative history of the CSRA indicates that the mixed-case procedures were intended to avoid "forum shopping and inconsistent decisions," and that the Board's decision in a mixed-case appeal should "include[] any remedial order the [EEOC] . . . may impose under law."

b. In *West v. Gibson*, 527 U.S. 212 (1999), the Supreme Court held that the EEOC has authority award compensatory damages under the Civil Rights Act of 1991, reasoning that such authority is consistent with a remedial scheme that requires exhaustion of administrative remedies to "encourage[] quicker, less formal, and less expensive resolution of disputes within the Federal Government outside of the court." The reasoning of *West* applies equally well to Board proceedings.

c. The EEOC has expressed the view that the Board is required to adjudicate an appellant's claim for compensatory damages, and the Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support or is so unreasonable that it amounts to

a violation of civil service law. Although the Board stated in *Savage* that mixed case appeals are decided using the Board's appellate procedures, which are a matter of civil service law, the Board has found that the right to compensatory damages under the Civil Rights Act of 1991 is a matter of substantive discrimination law. *Crosby v. U.S. Postal Service*, 78 M.S.P.R. 263 (1998). Consequently, the Board will continue to defer to the EEOC's position, which is not so unreasonable as to amount to a violation of civil service law.

3. In light of the Board's finding that *Savage* does not alter the Board's practice of awarding compensatory damages, the appeal is not moot, because the agency's complete rescission of the removal action did not afford the appellant all of the relief available before the Board.

COURT DECISIONS

Petitioner: John Acha
Respondent: Department of Agriculture
Tribunal: U.S. Court of Appeals for the 10th Circuit
Docket Number: 2015-9581
Issuance Date: November 14, 2016

Whistleblowing Reprisal
- **Exhaustion of Remedies**

In January 2012, Acha filed a report with his supervisor alleging that another employee violated the Federal Acquisition Regulation (FAR) by making an unauthorized deposit on a rental apartment. In April 2012, Acha reported the alleged FAR violation to the agency's Inspector General, and further reported that his supervisor had instructed him to cover up the violation. Following his probationary termination, Acha filed a complaint with the Office of Special Counsel (OSC), alleging that he was terminated because of his April disclosure to the Inspector General.

After OSC terminated its investigation, Acha filed an individual right of action appeal, in which he alleged that he was terminated not only because of his April disclosure to the Inspector General, but also because of the January disclosure to his supervisor. He explained that he did not raise the latter claim before OSC, because at the time he could not have received corrective action based on the January disclosure, which was made in the normal course of duties. That barrier was subsequently removed by the passage of the Whistleblower Protection Enhancement Act of 2012 (WPEA), which clarified that employees may obtain corrective action for disclosures made in the normal course of duties, and the Board's decision in *Day v. Department of Homeland Security*, 119 M.S.P.R.

58 (2013), which held that the protections given to such disclosures apply retroactively to pending cases before the Board. He further argued that, even though he did not allege before OSC that he was terminated because of the January disclosure, he included information about that disclosure that gave OSC sufficient basis to pursue an investigation. The Board agreed with Acha that he had met the exhaustion requirement with respect to the January disclosure, but found on the merits that he was not entitled to corrective action based on either disclosure.

Holding: On appeal, the court ruled sua sponte that the Board lacked jurisdiction over the appellant's claim that he was terminated for the January disclosure. The court vacated the Board's decision insofar as it found on the merits that disclosure was not protected.

1. To satisfy the exhaustion requirement under 5 U.S.C. § 1214(a)(3), an employee must give OSC a sufficient basis to pursue an investigation which might lead to corrective action. The court disagreed with the Board that Acha raised his January disclosure with OSC in a way that would allow OSC to sufficiently pursue an investigation. Citing the Federal Circuit's decision in *McCarthy v. Merit Systems Protection Board*, 809 F.3d 1365 (Fed. Cir. 2016), the court found that even though Acha had provided information about the January disclosure in his complaint, his failure to explicitly allege that he was terminated due to this disclosure was fatal to the exhaustion issue and thus to the MSPB's jurisdiction.

2. The court further found that, while it would have been futile for Acha to seek corrective action with OSC concerning the January disclosure, the futility doctrine could not be applied to permit an exception to the exhaustion requirement mandated by Congress. He was strictly required to present the claim to OSC first.

Petitioners: Federal Education Association – Stateside Region, Karen Graviss
Respondent: Department of Defense, Domestic Dependents Elementary and Secondary School
Tribunal: U.S. Court of Appeals for the Federal Circuit
Docket Number: 2015-3173
Issuance Date: November 18, 2016

Due Process

- **Ex Parte Communications**

Following an incident in which Ms. Graviss, an elementary school special education teacher, physically restrained a student, the school principal, Ms. McClain, filed a Serious Incident Report which she forwarded to the community superintendent, Mr. Curkendall,

and his supervisor, Dr. Calvano. In a March 26, 2010 email to McClain and Curkendall, Calvano stated that "we need to try and terminate [Graviss] for repeated use of corporeal [sic] punishment and for insubordination." By notice dated April 12, 2010, McClain proposed to remove Graviss on a single charge of "inappropriate physical contact with a student." Neither Graviss nor her union representative was informed the time of the March 26 email. After considering Graviss's responses, Curkendall issued a decision letter removing her from her position.

The union filed a grievance, which proceeded to arbitration. During discovery proceedings, Graviss learned for the first time of the March 26 email. In his final decision, the arbitrator sustained the removal action and rejected Graviss's argument that the agency violated her due process rights by failing to disclose the March 26 email at an earlier stage of the proceedings. Graviss petitioned for review with the Federal Circuit.

Holding: In a 2-1 panel decision, the court reversed the arbitrator's decision, finding that Graviss's due process rights were violated by an impermissible ex parte communication.

1. In *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), the court identified three factors that are relevant in determine whether an ex parte contact is constitutionally impermissible: (1) whether the ex parte communication merely introduces "cumulative" information or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner.

2. The court rejected the agency's argument that the *Stone* factors do not apply because the communication occurred before removal proceedings had been brought against Graviss. The court found no basis for a distinction between pre- and post-initiation communications when the ex parte communications occurred at a time when an adjudicatory proceeding was contemplated. The risk of creating undue pressure in such circumstances is just as great when ex parte contact occurs before the proceeding begins as when it occurs after the proceeding begins.

3. The court found that all three *Stone* factors were satisfied, and that Graviss's due process rights were violated.

- **a. The March 26 email clearly introduced new information to deciding official Curkendall, because it informed him for the first time that his supervisor wanted Graviss removed for insubordination and repeated use of corporal punishment.**
- **b. As to the second factor, it is undisputed that Graviss did not learn of the March 26 email until long after her opportunity to respond to the proposed removal had passed. Her opportunity to address the email during arbitration did not cure the defective pretermination process.**

c. The court clarified that the third *Stone* factor, whether the communications were "*of the type likely to* result in undue pressure upon the deciding official to rule in a particular manner," does not require proof of actual subjective influence. Although the arbitrator found that Curkendall believed he was not unduly influenced by the March 26 email from his supervisor, the communication was nonetheless of the type likely to result in undue pressure.

4. In his dissent, Judge Plager argued that the *Stone* factors did not support a finding of a due process violation, and expressed concern that the majority opinion "has the potential to chill important discussions regarding personnel matters among responsible supervisors, discussions that are essential to well-functioning agency administration."

The U.S. Court of Appeals for the Federal Circuit issued nonprecedential decisions in the following cases:

Jones v. Armed Forces Retirement Home, No. 2016-2265 (Nov. 10, 2016) (MSPB Docket No. DE-4324-15-0275-I-1) (affirming the Board's decision, which denied Jones's request for relief under the Uniformed Services Employment and Reemployment Rights Act (USERRA) because he did not show that his military service or prior USERRA litigation was a motivating factor in his non-selection).

Oplinger v. Department of Homeland Security, No. 2016-1076 (Nov. 10, 2016) (Rule 36 affirmance of arbitrator's decision).

Parkinson v. Department of Justice, No. 2016-1667 (Nov. 8, 2016) (MSPB Docket No. SF-0752-13-0032-I-2) (scheduling oral argument en banc).

Jefferson v. Merit Systems Protection Board, No. 2015-3190 (Nov. 8, 2016) (MSPB Docket No. CB-7121-15-0010-V-1) (Rule 36 affirmance).

Jimenez Department of Veterans Affairs, No. 2016-1832 (Nov. 7, 2016) (MSPB Docket No. DA-1221-13-0323-W-2) (affirming the Board's decision, which denied Jimenez's individual right of action appeal because the agency proved by clear and convincing evidence it would have taken employment action in the absence of the appellant's protected disclosure).