



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 9, 2016

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Troy w. Miller

Respondent: Department of Justice

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

Case Number: [2015-3149](#)

Issuance Date: December 2, 2016

Individual right of action (IRA) appeals

Substantial evidence

Clear and convincing evidence

The petitioner was Superintendent of a Federal prison factory that manufactured ballistic helmets. In October 2009, the petitioner reported some suspected financial improprieties. In December 2009, the agency's Office of Inspector General (OIG) made an on-site visit to investigate these reports. The day after the OIG's visit, the petitioner reported that someone had engaged in industrial sabotage by placing faulty Kevlar on the production line. He urged that production be halted pending an investigation. Several hours later, the petitioner's supervisor reassigned him away from the factory, purportedly at

the behest of the OIG. Over the following 4 ½ years, the petitioner was placed in various lower-level assignments, culminating in an assignment in which he was without any duties whatsoever for 8 months. After seeking corrective action from the Office of Special Counsel, the petitioner filed an IRA appeal with the Board.

The Board found that the petitioner's disclosures about financial improprieties and industrial sabotage were protected, and that, by virtue of the knowledge/timing test, they were a contributing factor in his reassignment. However, the Board also found that the agency showed by clear and convincing evidence that it would have reassigned the appellant notwithstanding his disclosures, and thus denied the appellant's request for corrective action. The petitioner appealed to the court.

Holding: The court reversed the Board's decision because it was not supported by substantial evidence, and it remanded for determination of an appropriate remedy.

1. Once an employee makes a prima facie case of whistleblower retaliation, the burden shifts to the Government to show by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. Clear and convincing evidence "produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'" It is a higher burden than preponderant evidence, but somewhat less than beyond a reasonable doubt.

2. In determining whether an agency has met its burden, it is appropriate to consider, among other things: (1) the strength of the agency's evidence in support of its personnel action; (2) the strength of any motive to retaliate by the relevant officials; and (3) any evidence that the agency takes similar actions against similarly-situated non-whistleblowers. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

3. The court reviews the Board's factual findings for substantial evidence, i.e., such evidence as a reasonable mind might accept as adequate to support a conclusion. However, the court's standard of review takes into account the underlying evidentiary standard for the factual findings at issue - in this case clear and convincing evidence.

4. Regarding the *Carr* factors:

(a) A reasonable fact finder could not conclude that the government

introduced strong evidence in support of the reassignment. The only evidence of the basis for the reassignment was the supervisor's testimony that OIG directed it out of fear that the petitioner might interfere with the investigation. There was no explanation as to why or how it was feared that the petitioner might interfere, and there was no evidence as to what individual at OIG the petitioner's supervisor spoke with. This explanation is further undermined by the petitioner's outstanding character and reputation. Moreover, there is no documentation of any of the petitioner's multiple reassignments or the reasons therefor.

(b) Substantial evidence supported the Board's finding that the petitioner's supervisor's retaliatory motive was slight at best. However, the Board should also have examined OIG's motive to retaliate because it was purportedly the office that directed the petitioner's reassignment. Nevertheless, substantial evidence supported the Board's finding that this factor tips in the Government's favor.

(c) Although the Board correctly found that there was no evidence as to how the agency treats similarly-situated non-whistleblowers, the court disagreed that this factor was thereby irrelevant. The Government bears the burden of proof on this issue, and it could and should have introduced evidence on whether it often reassigns employees pending OIG investigations. This factor cuts slightly against the Government.

5. Weighing these factors together, the court concluded that substantial evidence did not support the Board's finding that the agency carried its burden to prove independent causation by clear and convincing evidence.

Judge Reyna issued a concurring opinion, emphasizing the importance of OIG's role in the reassignment and stressing that the Board should have considered this matter in its decision.

Judge Hughes issued a dissenting opinion, contending that the court overstepped its authority in reviewing the Board's findings of fact, improperly made credibility determinations about the petitioner's supervisor, and imposed a requirement that a deciding official's testimony in an IRA appeal be corroborated by other evidence in order to meet the clear and convincing threshold.

Petitioner: Nicholas Jay Wilson
Respondent: Department of the Navy
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3225](#)
Issuance Date: December 7, 2016

**Uniformed Services Employment and Reemployment Rights Act of
1994 (USERRA)**

**Adverse actions - Removal
Security clearances**

The petitioner was a civilian Resource Analyst for the Nuclear Propulsion Directorate - a position requiring a security clearance. On July 25, 2014, the Department of Energy revoked the petitioner's security clearance based on several instances of alleged misconduct. On September 12, 2014, the Department of the Navy removed the petitioner for failure to maintain a security clearance.

The petitioner appealed his removal to the Board, arguing that the security clearance determination, and therefore resultant removal, was based on his uniformed service. The Board affirmed the removal, finding that the agency had provided the petitioner the procedural protections of 5 U.S.C. § 7513(b), there was no requirement for the agency to reassign the petitioner to a position that did not require a security clearance, and the Board was precluded from determining whether the security clearance determination was based on the petitioner's uniformed service. The petitioner appealed to the court

Holding: The court affirmed.

1. Although the petitioner argued that USERRA authorizes review of security clearance determinations, the court found that, under well-settled Supreme Court precedent, neither the court nor the Board has the authority to determine whether discrimination was the reason for a security clearance revocation.
2. The petitioner argued that the Board may review the reasons for *initiating* a security clearance action without reaching the merits of the action. The court, however, found this to be a distinction without a difference.
3. The petitioner argued that USERRA entitles him to reemployment, but the Court found that this entitlement pertains only to reemployment after an absence related to uniformed service. If an employee is removed

due to antimilitary animus, he has no reemployment claim under USERRA, even if a USERRA discrimination claim might otherwise be available.

NONPRECEDENTIAL:

Sutton v. Department of Veterans Affairs, No. [2016-2205](#) (Dec. 8, 2016) (MSPB No. DC-300A-14-0641-I-1) (affirming the Board's decision that dismissed the petitioner's employment practice claim for lack of jurisdiction and denied his VEOA claim; the petitioner failed to identify any employment practice that he was challenging, and his VEOA claim was disposed of in a prior Board decision for which the time for seeking judicial review had already elapsed).

Ahuruonye v. Department of the Interior, No. [2016-2493](#) (Dec. 8, 2016) (MSPB No. CH-1221-15-1172-W-1) (affirming the Board's decision denying the petitioner's IRA appeal on the merits because the petitioner failed to establish that his disclosure was a contributing factor in the personnel action).

Carpenter v. Navy, No. [2016-2180](#) (Dec. 7, 2016) (MSPB No. DC-0752-13-2215-B-1) (affirming the Board's decision that upheld the petitioner's 6-day furlough; the Board did not abuse its discretion in limiting the petitioner's discovery to information pertaining to similarly-situated employees, and substantial evidence supported the Board's finding that the furlough was taken for such cause as to promote the efficiency of the service).

Lundberg v. Merit Systems Protection Board, No. [2016-2536](#) (Dec. 6, 2016) (MSPB No. CH-3443-15-0448-I-1) (affirming the Board's decision finding that the petitioner was collaterally estopped from establishing jurisdiction over his appeal concerning improper charge of annual leave).

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