



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 2, 2017

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Darek J. Kitlinski

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

Case Number: [2016-1498](#)

Docket Number: SF-4324-15-0088-I-1

Issuance Date: May 31, 2017

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

-Jurisdiction

During the relevant time, the appellant was employed by the Department of Justice (DOJ), Drug Enforcement Administration (DEA). He also served as a reservist in the U.S. Coast Guard. In 2011, he was recalled to active duty and served full-time at the Coast Guard headquarters in Washington, DC. During his employment, the appellant filed two USERRA complaints and an equal employment opportunity (EEO) complaint against the agency.

On September 23, 2014, DEA representatives took the appellant's deposition in the EEO case at the DEA headquarters. Following the deposition, the appellant returned to his car, which was parked in a secure DEA parking lot and discovered a Blackberry device bearing a DEA sticker under the hood of the

car, which he suspected had been planted by DEA officials during his deposition to track him and record his conversations. He reported the incident to the Federal Bureau of Investigation and DOJ, who referred it to the DEA Office of Professional Responsibility (OPR). The appellant's wife, who also worked for the DEA, also reported the incident to her supervisors and to OPR. In response, an OPR investigator contacted her and directed her to turn over the Blackberry and to appear at OPR offices for an interview. She alleged that the investigators interrogated her and threatened her with discipline if she did not turn over the Blackberry. Subsequently, two OPR investigators met with the appellant at the Coast Guard headquarters and directed him to turn over the Blackberry and come to the OPR offices the following day for an interview.

The appellant filed a Board appeal alleging that the placement of the Blackberry and the interview of his wife constituted violations of USERRA both as independent acts of discrimination and by creating a hostile work environment. He also alleged that the investigators' actions constituted individual acts of retaliation and created a hostile work environment in retaliation for his exercise of his rights under USERRA.

The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction because the appellant failed to make nonfrivolous allegations that (1) he was subjected to the denial of a benefit of employment under 38 U.S.C. § 4311(a) based on his military service, (2) the DEA took an adverse employment action or otherwise discriminated in employment against him under 38 U.S.C. § 4311(b) in retaliation for engaging in protected USERRA activity, or (3) he was subjected to a hostile work environment under either sections 4311(a) or 4311(b).

On review, the Board affirmed the initial decision as modified regarding the appellant's claim that the agency's actions created an actionable hostile work environment under section 4311(a). First, the Board agreed with the administrative judge that the Blackberry incident did not deny the appellant a benefit of employment and therefore did not constitute discrimination under USERRA. Second, the Board held that the appellant failed to nonfrivolously allege that the DEA's conduct created a hostile work environment under section 4311(a) because the appellant failed to nonfrivolously allege that the measures alleged to have given rise to the hostile work environment were taken based on his military status. Third, the Board held that the appellant failed to make a nonfrivolous allegation that the agency had retaliated against him for previous USERRA activity because such a claim requires proof that the employers' allegedly retaliatory measures constituted "discrimination in employment" or "an adverse employment action." Because the Board concluded that the agency's actions did not constitute either, it held

that it lacked jurisdiction over the retaliation claim.

Holding: The Court affirmed in part, vacated in part, and remanded.

1. The Court affirmed the Board's holding that the appellant failed to make a nonfrivolous allegation of USERRA discrimination under section 4311(a) because the agency's actions did not fit within the categories of actions that section prohibits an agency from taking, i.e., the denial of initial employment, reemployment, retention in employment, promotion, or any benefit of employment.
 - a. The alleged placement of the Blackberry in the appellant's car did not constitute the denial of a benefit of employment within the meaning of section 4311(a).
 - b. The actions taken by the OPR investigators, including meeting the appellant at the Coast Guard headquarters and insisting that he produce the Blackberry and appear for an interview at the DEA headquarters the next day, did not deny the appellant a benefit of employment.
2. The Court affirmed the Board's finding that the appellant failed to nonfrivolously allege that the agency violated section 4311(a) by creating a hostile work environment because he failed to allege that the hostile work environment was based on his military service.
3. The Court affirmed the Board's finding that the appellant failed to nonfrivolously allege that the discrete agency actions violated section 4311(b), USERRA's anti-retaliation provision.
 - a. The anti-retaliation statute is limited to barring acts of discrimination in employment and adverse employment actions.
 - b. The Blackberry incident did not constitute an act of discrimination in employment because it did not deny him a benefit that inures to him by virtue of his employment with the agency. Nor was it an adverse employment action.
 - c. The OPR investigation did not constitute an act of discrimination in employment or an adverse employment action where it did not relate directly to the appellant's employment with the DEA and had no apparent effect on his

employment with the DEA.

4. The Board did not address the appellant's claim that the agency's creation of a hostile work environment was due to retaliation under section 4311(b). The Court granted the Board's request to remand the case to allow the Board to address that issue in the first instance.

NONPRECEDENTIAL:

Swartwoudt v. Department of Homeland Security, [2016-2724](#) (Jun. 1, 2017) (affirming the Board's decision to sustain the appellant's removal for inappropriate conduct and deny his affirmative defense of whistleblower reprisal).

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