



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for January 5, 2018**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioners:** Rob Bryant, Brian Ferguson, Andreas Hau

**Respondent:** Merit Systems Protection Board

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

**Case Numbers:** [2017-1241](#), [2017-1243](#), [2017-1245](#)

**MSPB Docket Numbers:** SF-4324-16-0265-I-1, SF-4324-16-0267-I-1, SF-4324-16-0268-I-1

**Issuance Date:** December 29, 2017

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

**Collateral Estoppel (Issue Preclusion)**

While employed by the agency's Customs and Border Protection, each petitioner filed a Board appeal alleging that the agency's actions created a hostile work environment and violated USERRA. The administrative judge consolidated the appeals and held a hearing. At different times prior to the issuance of the initial decision, the petitioners resigned from the agency, claiming that they were forced to do so as a result of the hostile work environment. The administrative judge issued an initial decision denying the petitioners' request for corrective action, finding, among other things, that they failed to establish that the agency

subjected them to a hostile work environment in violation of USERRA. The administrative judge declined to adjudicate the petitioners' constructive discharge claims and advised them that they could pursue those claims by filing separate appeals under 5 U.S.C. chapter 75. The initial decision became the final decision of the Board when none of the parties petitioned for review.

The petitioners thereafter filed a second set of Board appeals alleging that the agency violated USERRA when it created a hostile work environment that forced them to resign. In petitioner Hau's appeal, the administrative judge issued an initial decision dismissing his appeal on the ground that it was barred by res judicata. Among other things, the administrative judge found that, because the petitioner resigned prior to the hearing date in the prior appeal, he could have asserted his constructive discharge claim in his prior appeal but failed to do so. In petitioner Bryant's and petitioner Ferguson's appeals, the administrative judge issued initial decisions dismissing the appeals on the ground that their claims were barred by collateral estoppel. The administrative judge reasoned that, because they did not allege any actions by the agency that contributed to the hostile work environment between the date of the hearing in the prior appeal and their respective dates of resignation, their constructive discharge claims were barred. The petitioners petitioned for review of the initial decisions by the full Board.

In petitioner Hau's appeal, the Board issued a precedential decision that vacated the initial decision dismissing the appeal as barred by res judicata and dismissed the appeal as barred by collateral estoppel instead. The Board found that the petitioner was collaterally estopped because, in the prior appeal, the administrative judge found jurisdiction to hear his USERRA claim, the hostile work environment claim was actually litigated, and the determination on the claim was necessary to the administrative judge's conclusion that there was not a hostile work environment in violation of USERRA. Because the Board found that the hostile work environment claim in his prior appeal was the sole basis for his current constructive discharge claim, it concluded that his constructive discharge claim was collaterally estopped. In reaching this decision, the Board overruled three previous Board decisions in which it held that, although an individual raised identical issues in two separate appeals, an earlier decision that the individual did not prevail on the merits should not preclude a finding that he made a nonfrivolous allegation establishing jurisdiction in a subsequent appeal. The Board reasoned that, to find jurisdiction and allow the matter to proceed to

the merits phase of the case when the individual would be barred by collateral estoppel from presenting any of his merits arguments during such proceedings would defy logic. The Board therefore concluded that dismissal for lack of jurisdiction was appropriate.

In petitioner Bryant's and petitioner Ferguson's appeals, the Board issued nonprecedential final orders affirming the initial decisions. The Board found that, because the petitioners specifically denied that there was any relevant action by the agency after the hearing date in the prior appeal and that there was no additional factual basis beyond what was decided in the prior appeal, they cannot make a nonfrivolous allegation of a USERRA violation. The Board therefore affirmed the dismissals for lack of jurisdiction.

**Holding:** The court affirmed the Board's decisions, finding that the petitioners' current USERRA appeals concerning their constructive discharge claims are barred by collateral estoppel. The court agreed with the Board that an individual cannot make a nonfrivolous allegation of a USERRA violation if its contentions are wholly precluded. The court also agreed with the Board's reasoning in overruling its precedent on this matter, as it found that these appeals illustrate the flaw in the Board's previous decisions; that is, even if the petitioners had been granted a hearing in their second USERRA appeals concerning their constructive discharge claims, they would not have been able to present any content at the hearing because they did not make any additional allegations beyond those presented in their prior appeals. The court therefore concluded that the Board properly dismissed the appeals for lack of jurisdiction.

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