



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 30, 2019

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Jason Mount

Respondent: U.S. Department of Homeland Security

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

Case Number: [18-1762](#)

MSPB Docket Number: PH-1221-17-0243-W-2

Issuance Date: August 29, 2019

Whistleblower Reprisal

- Perceived whistleblower claim

At the direction of his supervisor, the petitioner delivered an email to one of his colleagues that his supervisor thought could be useful to the colleague in pursuing his whistleblower case against agency officials. The colleague used the email during the deposition of one of the accused agency officials in his whistleblower case. The agency subsequently investigated how the colleague had obtained the email, including interviewing the petitioner. During the investigation, the petitioner was not selected for promotion twice and received a performance appraisal that was lower than those he had received in the

past. The petitioner filed a complaint with the Office of Special Counsel (OSC) alleging that agency officials retaliated against him for providing information to the colleague that was used in the colleague's whistleblower complaint against the agency. OSC did not take action on the complaint, and the petitioner filed a request for corrective action in an individual right of action appeal to the Board.

In an initial decision, the administrative judge denied the petitioner's request for corrective action because he found that the petitioner's conduct had been too miniscule to constitute actual assistance protected under 5 U.S.C. § 2302(b)(9)(B) and that the petitioner had not exhausted before OSC his claim that agency officials perceived him to have provided actual assistance to his colleague. Neither party petitioned the Board to review the administrative judge's initial decision, and it became the final decision of the Board. The petitioner timely petitioned the First Circuit for review.

Holding: The court held that it is unnecessary for an employee to correctly label the cause of action or legal theory behind his claim for it to be deemed exhausted before OSC, as long as he provides a "sufficient [factual] basis" to pursue an investigation regarding that particular claim. The court concluded that the petitioner exhausted his perceived assistance claim before OSC, granted his petition for review, and remanded the case for further proceedings regarding this claim.

- (1) The court declined to address the petitioner's claim that the administrative judge erred by admitting certain evidence, on which the administrative judge relied to find that the petitioner did not actually assist his colleague in his whistleblower complaint, because the petitioner failed to raise objections to the evidence before the administrative judge.
- (2) As to the petitioner's claim that he was perceived to have assisted his colleague in his whistleblower complaint, the court observed that the Board has not adopted a perceived activity analysis in cases brought under 5 U.S.C. § 2302(b)(9)(B), but presumed that such an analysis is applicable for the limited purpose of resolving the instant appeal, as the Board has noted in prior cases that such an analysis is cognizable, and neither party contested this issue.
- (3) The court found that the exhaustion language set forth in the Whistleblower Protection Act, as amended, does not require an

employee to articulate the legal theory behind his claim to OSC, nor does the legislative history of the statute suggest that Congress intended such a legally technical exhaustion requirement.

- (4) The court concluded that, while the petitioner's OSC complaint did not expressly state that his supervisors perceived him to have engaged in protected activity, he alleged to OSC that agency officials appeared to believe that he provided information to his colleague to help him in his whistleblower case. The court found such allegations amount to a claim of retaliation for perceived protected activity. Accordingly, the petitioner's OSC complaint provided a sufficient factual basis to put OSC on notice of a potential perceived assistance claim and satisfied the exhaustion requirement.

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