



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 24, 2020

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

NONPRECEDENTIAL COURT DECISIONS

Kuriakose v. Department of Veterans Affairs, No. [2019-1274](#) (Fed. Cir. Jan. 17, 2020) (MSPB Docket No. CH-1221-17-0287-W-2): The court affirmed the administrative judge's initial decision denying the appellant's request for corrective action under the Whistleblower Protection Enhancement Act. The appellant made one protected disclosure that was a contributing factor in a personnel action, i.e., reduction in professional development time. However, the agency proved by clear and convincing evidence that it would have taken the same personnel action notwithstanding the disclosure largely because the limit on professional development time applied to all physicians. The appellant alleged other retaliatory personnel actions, including hostile work environment and constructive removal, but she failed to make a prima facie case for these claims. Specifically, the appellant failed to show that her working conditions rose to the level of a hostile work environment, and she failed to show that her resignation was involuntary.

Hernandez v. Department of Defense, [2019-1817](#) (Fed. Cir. Jan. 17, 2020) (MSPB Docket No. SF-0752-19-0053-I-1): The court affirmed the administrative judge's initial decision upholding the appellant's removal for inability to report to duty. The appellant was employed at a Naval base in Japan when he crashed his car in a drunk driving accident. The parties entered into a last

chance agreement in which the agency suspended the appellant for 30 days and the appellant agreed to refrain from further misconduct for 3 years. Subsequently, the appellant was convicted in Japanese court in relation to his drunk driving. Based on the nature of the appellant's conviction and position, the agency ordered his removal from Japan to the United States under agency policy. Because the appellant was unable to report for duty in Japan, the agency removed him. The court found that the appellant was not disciplined twice for the same misconduct; the suspension was for drunk driving, and the removal was for inability to report to duty. Nor did the last chance agreement prevent the agency from removing the appellant because his absence from duty due to the criminal conviction and extradition constituted misconduct subsequent to the drunk driving incident.

Womack v. Merit Systems Protection Board, [2019-1713](#) (Fed. Cir. January 21, 2020) (MSPB Docket No. AT-0752-18-0412-I-1): The court affirmed, per Rule 36 judgment, the administrative judge's initial decision dismissing the appellant's constructive removal appeal for lack of jurisdiction. The appellant retired in the face of a directed reassignment, but the agency proved the legitimacy of the directed reassignment, and the appellant failed to prove that his retirement was otherwise involuntary.

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)