



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 10, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Noris Babb

Respondent: Robert Wilkie, Secretary of Veterans Affairs (DVA)

Tribunal: Supreme Court of the United States

Case Number: [No. 18-882](#)

Docket Number:

Issuance Date: April 6, 2020

AGE DISCRIMINATION

STATUTORY CONSTRUCTION

REMEDIES

The petitioner is employed by the Department of Veterans Affairs as a Clinical Pharmacist. In 2014, she filed a complaint in district court alleging, inter alia, that the agency subjected her to age discrimination in violation of the Federal-sector provision of the Age Discrimination in Employment Act (ADEA), codified at 29 U.S.C. § 633a(a). The district court granted the agency's motion for summary judgment on the petitioner's ADEA claim, finding that the appellant established a prima facie case of age discrimination, but that the agency proffered legitimate nondiscriminatory reasons justifying its actions and that no jury could reasonably conclude that those reasons were

pretextual.

The petitioner filed an appeal with the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the denial of her ADEA claim. The circuit court explained that, despite its misgivings, it was bound by precedent to apply the but-for causation standard and the *McDonnell-Douglas* framework to the petitioner's age discrimination claim.

Babb petitioned the Supreme Court of the United States, which granted a writ of certiorari and heard the case to resolve a circuit split regarding the interpretation of 29 U.S.C. § 633a(a) and rule on the appropriate causation standard for Federal-sector ADEA claims.

Holding: In an 8-1 decision (written by J. Alito), the Supreme Court held that the Federal-sector provision of the ADEA demands that personnel actions be "untainted by any consideration of age."

1. In relevant part, and absent some exceptions, 29 U.S.C. § 633a(a), provides that "personnel actions" affecting employees or applicants for employment aged 40 and older shall be "made free from any discrimination based on age."
 - a. After scrutinizing the syntax and plain meaning of the operative phase, the Court concluded that the statutory language unambiguously "demands that personnel actions be untainted by any consideration of age."
 - b. In other words, a plaintiff may establish a violation of section 633a(a) by showing that her age was a consideration in the making of a personnel decision; she need not show that her age was a but-for cause of the action.
2. The Court rejected the Government's argument that the "any consideration" standard was inconsistent with its holdings in *Safeco*, *Gross*, and *Nassar*.¹
 - a. The Court determined that *Safeco* was inapposite. Moreover, unlike in *Gross* and *Nassar*, in which the Court determined that the "based on" language mandated the application of a but-for causation standard to prove a violation, "the object of [the but-for] causation [in section 633a(a)] is 'discrimination,' i.e.,

¹ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007).

differential treatment, not the personnel action itself.”

3. The Court recognized that, in applying the expansive “any consideration” standard, the Federal Government would be held to a stricter standard than private employers under the ADEA. It concluded that Congress acted deliberately to hold the Federal Government to this higher standard.

Holding: To obtain “reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of the action,” an individual must show that age was a but-for cause of the personnel action.

1. The Court recognized that, although but-for causation is not necessary to prove a violation of section 633a(a), it is “important in determining the appropriate remedy.”
2. Allowing an appellant to obtain relief related to the end result of the action without showing that it was the but-for cause of the action would unfairly place that individual in a more favorable position than she would have been in absent the discrimination.
3. “[I]njunctive or other forward-looking relief” may be available to individuals who show that age discrimination played a lesser part in the decision.
4. The Court declined to reach a finding as to what the particular remedy should be in this case, leaving it to the district court to decide in the first instance.

The Court reversed the eleventh circuit’s decision and remanded the case for further consideration.

Justice Sotomayor filed a concurring opinion, in which Justice Ginsburg joined, emphasizing that 29 U.S.C. § 633a(a) does not foreclose claims arising from discriminatory processes or consequential damages related to such actions.

Justice Thomas filed a dissenting opinion, arguing that the “default rule” of but-for causation should apply because the “any consideration” standard of liability set forth in the majority opinion was ambiguous and contrary to “settled expectations of federal employers and employees.”

Petitioner: Leonard A. Sistik, Jr.
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [No. 2019-1168](#)
Docket Number: DE-1221-18-0100-W-1
Issuance Date: April 8, 2020

**WHISTLEBLOWER PROTECTION ACT
- PERSONNEL ACTIONS
STATUTORY CONSTRUCTION**

The appellant, now retired, was appointed to a director role in the VA's Chief Business Office Purchased Care in Denver, Colorado. From 2011 to 2014, the appellant disclosed concerns he had about various financial practices to the Office of Inspector General (OIG) and the misappropriation of funds to management officials. In 2014, the agency convened an Administrative Investigation Board (AIB) to investigate separate allegations of misconduct in the organization, including inappropriate relationships between managers and subordinates. The AIB interviewed the appellant and later named him as a subject of the investigation. In April and July 2014, the AIB issued reports substantiating the allegations and concluding that management, including the appellant, had failed to report properly the allegations of an inappropriate relationship. Consistent with the AIB's recommendation, the agency issued him a letter of reprimand, which it later rescinded.

In this Individual Right of Action (IRA) appeal, the appellant alleged, *inter alia*, that the agency investigated him in reprisal for his whistleblowing, which led to the letter of reprimand. In an initial decision, the administrative judge denied the appellant's request for corrective action. In relevant part, the administrative judge found that the alleged retaliatory investigation, in and of itself, did not constitute a personnel action under the Whistleblower Protection Act (WPA), as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA). The administrative judge's decision became the final decision of the Board when neither party filed a petition for review. The appellant filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit.

Holding: A retaliatory investigation, in and of itself, is not a qualifying personnel action under the WPA, as amended by the WPEA.

1. The court reviewed *de novo* the Board's interpretation of the statute and agreed that the plain meaning of the statute and the legislative history supported the Board's finding that an allegedly retaliatory investigation, in and of itself, is not a qualifying personnel action. The

court recognized in particular that although the WPEA authorized damages relating to retaliatory investigations when raised in conjunction with a qualifying personnel action, Congress did not add retaliatory investigations to the list of personnel actions under 5 U.S.C. § 2302(a)(2)(A).

2. The appellant argued that, notwithstanding the plain language of the statute and the legislative history, the allegedly retaliatory investigation in this case constituted a covered personnel action because it constituted a significant change in working conditions under 5 U.S.C. § 2302(a)(2)(A)(xii) (the "catch-all" provision).
3. The court found that, while a retaliatory investigation could qualify as a personnel action under the WPA's catch-all provision if it constituted a significant change in working conditions, the investigation here did not rise to the level of a "significant change." The court reasoned that the catch-all provision could not be satisfied by conduct, as occurred here, that would apply to almost any routine investigation that results in a letter of reprimand.

Holding: The administrative judge erred when she did not consider the allegedly retaliatory investigation in conjunction with the propriety of the letter of reprimand; however, that error was harmless.

1. The appellant further argued that the administrative judge erred by failing to find that a retaliatory investigation was independently actionable under the Board's decision in *Russell v. Department of Justice*, 76 M.S.P.R. 317 (1997).
2. The court rejected the appellant's argument. The court explained, with approval, that *Russell* establishes that, in the WPA context, the Board should consider evidence regarding the conduct of an agency investigation when the investigation was so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate for whistleblowing.
3. Although the administrative judge did not properly consider the retaliatory investigation as part of her evaluation of the letter of reprimand consistent with *Russell*, the court found that such error was harmless because there was no evidence that the official who initiated the allegedly retaliatory investigation had knowledge of any of the appellant's protected disclosures.

Accordingly, the court affirmed the Board's denial of corrective action.

NONPRECEDENTIAL:

Demery v. Department of the Army, [No. 2019-2282](#) (Apr. 9, 2020) (MSPB Docket No. PH-1221-18-0105-W-1): The court affirmed the administrative judge's decision denying the appellant's request for corrective action under the WPA, as amended by the WPEA. It agreed that one of her two disclosures was too vague to constitute a protected disclosure. As to the other, protected disclosure, the court agreed with the administrative judge's finding that the deciding officials had no knowledge of the disclosure and the appellant made her disclosure after the agency selected another candidate for the position. The court also rejected the appellant's challenges that the administrative judge improperly denied her additional witnesses and her perceived whistleblower claim.

Kammunkun v. Department of Defense, [No. 2019-1374](#), (Apr. 6, 2020) (MSPB Docket Nos. SF-0752-17-0667-I-1, SF-1221-17-0675-W-1): The court affirmed the administrative judge's denial of corrective action in the appellant's IRA appeal. However, the court vacated the administrative judge's dismissal of the appellant's removal appeal based on his finding that the appellant's filing of a complaint with OSC and the election requirement of 5 C.F.R. § 1209.2(d) prevented her from subsequently challenging her removal as a chapter 75 action before the Board. The Federal Circuit held that the Board's election of remedies regulation, like the statute from which it is derived, 5 U.S.C. § 7121(g)(3), does not apply to supervisors, such as the appellant. The court remanded the appellant's chapter 75 appeal for further proceedings.

Noffke v. Department of Defense, [No. 2019-2183](#) (Apr. 8, 2020) (MSPB Docket No. CH-0752-18-0540-I-1): The court affirmed the administrative judge's decision affirming the appellant's removal based on charges of absence without leave, falsification, and conduct unbecoming an employee. The court discerned no error in the administrative judge's finding that the appellant received adequate notice of the charges and rejected the appellant's challenges to the sufficiency of the evidence supporting the charges.

Willingham v. Department of the Navy, [No. 2019-2031](#) (Apr. 8, 2020) (MSPB Docket No. DC-0752-18-0850-I-1): The court affirmed the administrative judge's decision affirming the appellant's indefinite suspension based on the suspension of his security clearance. In particular, the court agreed with the administrative judge's finding that the agency met the notice requirement under 5 U.S.C. § 7513(b)(1). The court reasoned that, even though the notice

of proposed suspension was vague, the information contained in the evidence file provided to the appellant with the proposal notice sufficiently apprised him of the reason his access to classified information was suspended.

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