# Case Report for July 17, 2020

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## COURT DECISIONS

**PRECEDENTIAL:**

**Petitioner:** Adam Delgado
**Respondent:** Department of Justice
**Tribunal:** U.S. Court of Appeals for the Seventh Circuit
**Case Number:** 19-2239
**Docket Numbers:** CH-1221-14-0737-M-1 & CH-1221-18-0149-W-2
**Issuance Date:** July 16, 2020

**COURT REVIEW**
- MISCELLANEOUS

**WHISTLEBLOWER PROTECTION ACT**
- CLEAR AND CONVINVING EVIDENCE
- CONTRIBUTING FACTOR
- MISCELLANEOUS
- PROOF OF CLAIM, GENERALLY
- PROTECTED DISCLOSURE
- VIOLATION OF LAW

In these individual right of action (IRA) appeals, the petitioner sought

corrective action for retaliation based on alleged protected disclosures. The Board dismissed the first appeal for lack of jurisdiction, finding that the petitioner had not exhausted his administrative remedies. The Seventh Circuit [found](#) that the petitioner had proven exhaustion. The court therefore remanded the appeal to the Board for further adjudication. In remanding the appeal, the court also indicated that the appellant's allegations to the Office of Special Counsel and the Board were sufficient to allege that he made protected disclosures regarding possible perjury by one of his coworkers.

Around the same time the Seventh Circuit remanded the first IRA appeal, the petitioner filed a second IRA appeal alleging additional acts of retaliation for the same or similar disclosures alleged in the first appeal. After holding a consolidated hearing in the two pending appeals, the administrative judge issued separate initial decisions denying the petitioner's requests for corrective action in both cases. The administrative judge found that the petitioner's disclosures were a contributing factor in at least some of the challenged personnel actions. However, she found that the petitioner's disclosures were not protected because he did not have a reasonable belief that the coworker committed perjury. She therefore found that the appellant had not established a prima facie case of whistleblower reprisal. The petitioner sought review of both decisions.

**Holding: The court vacated the Board's decisions in both appeals, found that the petitioner was entitled to corrective action, and remanded the appeal for further proceedings regarding the appropriate remedy.**

1. **The court determined that in light of its prior decision and the evidence submitted on remand, the Board was bound by the law of the case doctrine to find that the petitioner's disclosures of alleged perjury were protected.**
2. **The court agreed with the administrative judge that the petitioner proved that his disclosures were a contributing factor in several non-selections. The court also found that, contrary to the administrative judge's findings, the petitioner also established that his disclosures were a contributing factor in two additional non-selections.**
3. **The administrative judge did not address whether the agency met its burden to prove by clear and convincing evidence that it would have taken the same actions in the absence of the petitioner's disclosures. Normally, the court would remand the case to the Board to consider that issue in the first instance. Here, however, the court determined that the record on that issue was fully developed and the agency failed as a matter of law to meet its burden. Thus, the court determined that remand was not necessary on the merits of the petitioner's claims. The**

court remanded the case to the Board only to calculate damages.
4. The court "strongly urge[d]" the Board to assign a new administrative judge to the appeal on remand.