



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 4, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Larry Baca

Respondent: Department of the Army

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

Case Number: No. [19-9536](#)

Docket Numbers: DE-0752-19-0022-I-1

Date Issued: September 2, 2020

Jurisdiction

- All Circuit Review Act

Affirmative Defenses

- Reprisal for whistleblowing disclosures or activity
- Lawful assistance under 5 U.S.C. § 2302(b)(9)(B)

The agency proposed Mr. Baca's removal from his Supervisory Engineer position based on charges of (1) conduct unbecoming a Federal employee, (2) interfering with an agency investigation, (3) abusive, offensive, disgraceful, or inflammatory language, and (4) lack of candor. The agency sustained the removal, and Mr. Baca filed a Board appeal. The administrative judge determined that the agency proved charges 1 and 3 and that Mr. Baca did not

prove any of his affirmative defenses. The administrative judge affirmed the removal based on the two sustained charges. The initial decision became the Board's final decision when neither party filed a petition for review.

Before the court, Mr. Baca explicitly waived his discrimination claim and only appealed his claim of reprisal for whistleblowing disclosures. The Board joined the appeal as an intervenor and provided a brief in support of the court's jurisdiction to review the appeal. The court determined that it has jurisdiction over appeals from final Board decisions on whistleblower claims where the claims arise either directly (as in an individual right of action appeal) or, as here, as an affirmative defense.

The court's discussion of the remaining issues appear to involve the allegations in charge 2, i.e., that Mr. Baca attempted to intimidate his colleague to write a statement that another employee battered a co-worker when she allegedly slammed a door into the co-worker's back as he left her office. Below, the administrative judge credited the testimony of another employee and found that Mr. Baca tried to intimidate the colleague into providing information on behalf of the co-worker. However, the administrative judge did not ultimately sustain this charge because there was insufficient evidence that the attempt to intimidate the colleague interfered with a government investigation.

The court evaluated whether Mr. Baca's conduct of seeking a statement from a colleague to assist a co-worker in exercising the co-worker's right to disclose an alleged assault constituted lawful assistance under 5 U.S.C. § 2302(b)(9)(B), which states that it is a prohibited personnel practice to take an action against an employee for "otherwise lawfully assisting any individual in the exercise of [any appeal, complaint or grievance right described in section 2302(b)(9)(A)(i) or (ii)]." Mr. Baca argued before the court that the administrative judge ignored this "primary theory." The court noted that the Board "must consider all pertinent evidence but it need not discuss each piece of evidence in its decision," and it stated that it would not presume that the administrative judge ignored evidence that was not explicitly referenced in the initial decision. The court noted that the administrative judge credited the testimony of several agency employees, but not Mr. Baca, and it found that trying to intimidate a witness to provide a false statement is not conduct protected by the whistleblower statutes. Even if the court considered Mr. Baca's citations to new legal authority (agency and Department of Defense (DOD) policies) to support his contention that he had a duty to investigate the co-worker's complaint, a different outcome was not warranted because attempting to intimidate a witness violated the DOD policy and did not constitute lawful assistance.

The court also evaluated Mr. Baca's disclosure, i.e., that he told his supervisor

that he witnessed another employee slam her office door into a co-worker's back, which led to an injury. The administrative judge held below that Mr. Baca did not prove that he had a reasonable belief that he made a whistleblowing disclosure. The court noted that the administrative judge made numerous credibility determinations in favor of other agency officials and against Mr. Baca. The court concluded that the administrative judge "provided more than sufficient support for the conclusion that a disinterested observer could not have reasonably concluded" that the employee battered the co-worker. Because the court affirmed the administrative judge's finding that Mr. Baca did not make a protected disclosure under 5 U.S.C. § 2302(b)(8), it stated that it need not address the remainder of Mr. Baca's arguments that he is entitled to relief under the whistleblower protection statutes.

NONPRECEDENTIAL COURT DECISIONS

Aviles-Wynkoop v. Department of Defense, No. [2019-1908](#) (Fed. Cir. September 2, 2020) (MSPB Docket No. DC-315H-16-0327-B-1): The agency terminated the appellant from her Program Analyst position during her first year of employment based on misconduct charges. The administrative judge dismissed the appeal for lack of jurisdiction because Ms. Aviles-Wynkoop was in her probationary period, but the full Board vacated that decision because there was a genuine issue of material fact as to whether her previous Federal service qualified her to skip the probationary period. On remand, the administrative judge found that she qualified as a full employee, and the Board had jurisdiction over the appeal. The administrative judge issued an initial decision that affirmed the removal action. On review, the court considered Ms. Aviles-Wynkoop's arguments that the agency failed to adequately consider the relevant penalty factors, violated her due process rights, and retaliated against her for whistleblowing disclosures. The court rejected each of these arguments and affirmed the removal action.

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