



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 13, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Negar Hassami

Respondent: Merit Systems Protection Board

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

Case Number: [2019-2291](#)

Docket Number: PH-1221-17-0271-W-2

Issuance Date: November 9, 2020

WHISTLEBLOWER PROTECTION ACT

- JURISDICTION
- NONFRIVOLOUS ALLEGATIONS
- GROSS MISMANAGEMENT
- GROSS WASTE OF FUNDS
- SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH AND SAFETY
- POLICY DISAGREEMENT

The petitioner was a Chief of Pharmacy for the Department of Veterans Affairs at the Martinsburg, West Virginia Veterans

Administration Medical Center (VAMC). Between November 2014 and February 2015, the petitioner raised concerns about the prescribing practices of another physician. Specifically, she alleged that this physician was prescribing Hepatitis C medication inconsistent with national guidelines. According to the petitioner, the physician was prescribing an older form of medication when the guidelines supported prescribing a newer form of medication instead. Because the older medication was far more expensive than the newer medication, this resulted in the VAMC's Hepatitis C medication budget being rapidly depleted. In addition, she alleged that the physician was prescribing more lengthy courses of medication than recommended. This not only compounded the problem of expense but also presented a health risk to patients who were subjected to the medication regimen for more than the recommended period of time.

Later in 2015, the petitioner was suspended and demoted based charges of conduct unbecoming a supervisor stemming from accusations of misconduct made by a subordinate pharmacy employee.

After exhausting her administrative remedies with the Office of Special Counsel, the petitioner filed an individual right of action (IRA) appeal. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the petitioner failed to make a nonfrivolous allegation that her disclosures were protected. The administrative judge's initial decision became final, and the petitioner petitioned for review before the court.

Holding: The court vacated and remanded for further adjudication of the jurisdictional issue, finding that the petitioner made a nonfrivolous allegation that her disclosures were protected.

1. In finding that the petitioner failed to make a nonfrivolous allegation that her disclosures were protected, the administrative judge considered affidavits and other evidence submitted by the agency. In particular, the administrative judge adopted many of the agency's "essentially undisputed" statements of fact, including that the petitioner raised no concerns over patient safety, the physician's prescription decisions were approved by the relevant VAMC authority, and the physician's treatment decisions, including his occasional deviation from standard practice, were all clinically justified and within the standard of care.

A. The court clarified the law surrounding the IRA jurisdictional standard, including its prior analogies between nonfrivolous allegations and summary judgment. Although there are similarities between the two standards, the Board must assess nonfrivolous allegations solely on information submitted by the petitioner, to the exclusion of evidence submitted by the agency.

B. As in appeals adjudicated under 5 U.S.C. § 7701, in IRA appeals, there is an unconditional right to a hearing on the merits. The respondent agency cannot be allowed to circumvent that right by effectively obtaining summary judgment in the guise of a jurisdictional dismissal.

C. When evaluating the Board's jurisdiction over an IRA appeal, the question of whether the petitioner has nonfrivolously alleged protected disclosures contributing in a personnel action must be determined based on whether she alleged a sufficient factual matter, accepted as true, to state a claim that is plausible on its face. The Board may not deny jurisdiction by crediting the agency's interpretation of the evidence as to whether the alleged disclosures were protected or whether they were a contributing factor in a personnel action.

D. The petitioner's allegations were "nonfrivolous" within the meaning of 5 U.S.C. § 1201.4: They were made under oath, they described a facially plausible series of events, and they were supported by specific facts.

E. The allegations were also material. Assuming they were true, a reasonable person in the petitioner's position could conclude that the disclosures evidenced (i) a gross waste of funds because the prescribed medication was vastly more expensive than the newer alternatives, (ii) gross mismanagement because cost overruns jeopardized the budget that the VAMC uses to accomplish its mission, and (iii) a substantial and specific danger to public health and safety because the lengthy prescription regimens exposed patients to unnecessary risk of side effects.

2. The administrative judge concluded that the disclosures evidenced disagreement about policy and a robust debate about how best to manage treatment of Hepatitis C. However, the Whistleblower Protection Enhancement Act of 2012 makes clear that protected disclosures and policy disagreements are not mutually exclusive.

3. On remand, the Board was to determine whether the petitioner made a nonfrivolous allegation that her disclosures were a contributing factor in her suspension and demotion, and if so, to conduct a hearing on the merits as requested by the petitioner.

NONPRECEDENTIAL:

Page v. Merit Systems Protection Board, No. [2020-1329](#) (Fed. Cir. Nov. 6, 2020) (MSPB Docket No. DA-0714-20-0009-I-1): The court affirmed the administrative judge's decision dismissing the petitioner's removal appeal as untimely filed. Under 38 U.S.C. § 714(c)(4)(B), the petitioner had 10 business days from the date of his removal to file his Board appeal, and under that standard, his appeal was untimely by 15 days. The petitioner failed to show that the agency delayed in delivering its decision letter or that equitable tolling of the filing deadline was otherwise warranted.

Chan v. Equal Employment Opportunity Commission, No. [2020-1239](#) (Fed. Cir. Nov. 10, 2020) (MSPB Docket No. SF-4324-19-0153-I-1): The court affirmed, per Rule 36 judgment, the administrative judge's decision denying the petitioner's request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994.

Hairston v. Department of Defense, No. [2020-1607](#) (Fed. Cir. Nov. 13, 2020) (MSPB Docket No. DC-0752-20-0126-I-1): The court affirmed the administrative judge's initial decision sustaining the petitioner's removal for computer-related misconduct. The petitioner admitted to the charges but raised affirmative defenses of violation of due process and harmful procedural error. There was no due process violation; although the petitioner did not review the evidence against him prior to the removal, he had the opportunity to do so. There was no harmful procedural error either; although the agency erred by treating a union official as the petitioner's representative without a written designation, the petitioner failed to show that the agency would likely have reached a different result in the absence or cure of the error. The petitioner also claimed inadequate representation before the agency, but because he admitted to the misconduct at all stages of the appeal, he failed to show that the quality of his representation likely affected the outcome.

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