U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for July 28, 2023

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COURT DECISIONS

Plaintiff: Steven W. Crowe
Defendant: Christine Wormuth, Secretary of the Army, et al.
Tribunal: U.S. Court of Appeals for the Ninth Circuit
Case Number: 21-15802
Issuance Date: July 25, 2023

Jurisdiction – Mixed Case

Plaintiff Crowe worked a police officer at the Tripler Army Medical Center (TAMC). In February 2016, Crowe complained to his supervisor (Ballesteros) that another officer (Oda) had been calling him by a homophobic slur. Ballesteros conducted an investigation, after which Oda admitted to and apologized for using the derogatory term. A few months later, Ballesteros received a complaint from another TAMC employee (Sewell), who alleged that Crowe had aggressively confronted Sewell about a supposed relationship between Sewell and a female medical assistant (Garcia) who had previously dated Crowe. Ballesteros brought Sewell's complaint to his superiors, who asked him to initiate an investigation, and Ballesteros assigned the investigation to Oda.

Oda interviewed Garcia, Sewell, and two other employees (Tabanguera and Sam), and obtained sworn statements from each. Garcia admitted that for six

months she and Crowe had sex three or four times a week during work hours in a room at the TAMC, during which time Crowe would take off his duty belt that held his service weapon. Garcia subsequently recanted her testimony, but after the Army proposed to remove her for lying, Garcia withdrew her recantation and stood by her original statement. Tabanguera and Sam reported that Crowe spent hours of his shift gossiping with employees and discussing his sex life. Finally, Sewell described the incident in which Crowe confronted him while on duty.

In May 2016, Crowe was relieved of his police powers and reassigned to administrative duties. In August 2016, Crowe filed an EEO complaint alleging that he had been subjected to discrimination based on sexual orientation (bisexual) and race (Caucasian). He alleged that discriminatory animus motivated the Army's decisions to investigate him and place him on administrative detail.

In November 2016, Ballesteros issued Crowe a notice of proposed removal. The notice cited Crowe's confronting Sewell, his on-duty sexual activity with Garcia, and his inappropriate workplace gossiping. Shortly thereafter, Crowe amended his EEO complaint to assert a claim based on his proposed termination, and asserted an additional basis for discrimination, claiming that the Army was investigating him and seeking to terminate him in retaliation for complaining about Oda's offensive comments. In February 2017, the Army removed Crowe, and Crowe amended his EEO complaint again to encompass his formal termination.

In March 2017, after his termination but before any action was taken on his EEO complaint, Crowe attempted to file a mixed case appeal with the Board. The administrative judge initially dismissed the appeal without prejudice because his pending EEO complaint already encompassed his termination, and he could not challenge his termination through a simultaneous EEO mixed case complaint with the agency and a mixed case appeal with the Board. To cure the deficiency, Crowe requested that the portion of his EEO complaint relating to his termination be dismissed, and the EEO granted his request.

Crowe then refiled his mixed case appeal with the Board, limited to the issue of his allegedly wrongful termination. Through this maneuver, Crowe split his claims into separate proceedings before the Board and the Army EEO office. Before the Board, Crowe argued that there was insufficient evidence to support his termination, which he also claimed was motivated by sexual orientation discrimination. Before the Army EEO office, Crowe challenged the pre-termination adverse employment actions—i.e., the investigation, the removal of his police powers, his reassignment to administrative duties, and his

proposed removal—and claimed that these actions were motivated by multiple forms of unlawful discrimination.

Following a hearing, the Board's administrative judge upheld the removal, finding that the Army had proven its charges against Crowe, that the removal was a reasonable penalty, and that Crowe had failed to establish his affirmative defense of sexual orientation discrimination. The EEO office did not rule on Crowe's claims, which meant that after 180 days he could pursue relief in Federal court.

In July 2018, Crowe filed a lawsuit in Federal district court, raising Title VII discrimination claims and challenging the sufficiency of the evidence supporting the Board's decision sustaining his termination. In addition to the sexual orientation discrimination he had raised before the Board, he also raised claims of discrimination based on sex and race and retaliation for protected activity. The latter claims related to the actions taken before his termination, and had not been raised before the Board.

The district court dismissed Crowe's sex discrimination, race discrimination, and retaliation claims for failure to exhaust administrative remedies before the Board. The district court concluded that the Board would have had jurisdiction over Crowe's claims of pre-termination discrimination because they were factually related to the claims concerning his formal termination. Because Crowe had not pursued these pre-termination claims before the Board, the district court held that Crowe had failed to exhaust his administrative remedies for those claims. As to Crowe's Title VII claim of wrongful termination based on sexual orientation discrimination (which he had raised before the Board), the district court reached the merits and granted summary judgment to the Army. Finally, the court concluded that substantial evidence supported the Board's decision sustaining Crowe's removal.

Crowe appealed to the Ninth Circuit. The Board filed an amicus brief disagreeing with the district court's (and Army's) exhaustion analysis, and the court held a second oral argument at which the Board appeared as an amicus in support of Crowe on the exhaustion issue. The Department of Justice represented the Army.

Holding: The plaintiff did not fail to exhaust his discrimination claims before the Board based on pre-termination adverse employment actions because the Board lacked jurisdiction to consider those claims.

1. The court first addressed the issue of whether Crowe had properly

exhausted his pre-termination discrimination claims by pursuing them before the Army's EEO office while at the same time appealing his termination to the Board. The Army argued, and the district court agreed, that Crowe failed to exhaust his pre-termination claims before they were factually intertwined with the discrimination claim he raised before the Board, such that Crowe should have challenged all of the Army's adverse employment actions before the Board. Crowe and the Board maintained that this was incorrect because the Board did not have jurisdiction over Crowe's claims of pre-termination discrimination claims.

2. The court described at length the framework of the Civil Service Reform Act (CSRA), including the provisions for mixed cases. The court found that it was clear that, with exceptions not relevant here, the Board's jurisdiction is limited to the five adverse action categories listed under 5 U.S.C. § 7512, i.e., removal, suspension for more than 14 days, a reduction in grade, a reduction in pay, and a furlough of 30 days or less. There is no suggestion that the adverse personnel actions preceding Crowe's termination fall into any of the above categories.
3. The court considered the Army's argument that, because Crowe's termination was an adverse action within the Board's jurisdiction, he was required to exhaust before the Board any pre-termination claims that were *factually related* to his termination. However, the court found that this theory had no basis in the text of the CSRA.
4. The CSRA spells out the Board's jurisdiction over mixed cases at § 7702(a)(1), which provides that "in the case of any employee or applicant for employment who—(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and (B) alleges that a basis for the action was discrimination prohibited by [one of several antidiscrimination statutes] . . . the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures[.]"
5. Nothing in the text of 5 U.S.C. § 7702 states that if the Board has jurisdiction over an adverse action under § 7512, then it has pendent jurisdiction over claims for all other allegedly discriminatory personnel decisions that are factually related to the jurisdiction-enabling adverse action. Rather, subsection (a)(1)(A) provides that for the Board to have jurisdiction, the employee must "ha[ve] been affected by *an action* which the employee or applicant may appeal to the [Board]." The Board in that circumstance may then determine whether "a basis for *the action* was discrimination prohibited by" various listed anti-discrimination laws. The court reasoned that the specific use of the singular—"the action"—is a clear reference to the appealable action

under § 7512, and that the "issue of discrimination" means discrimination in connection with that same action.

6. "In sum," the court concluded, "neither the text nor the structure of the CSRA supports the theory that if the MSPB has jurisdiction over a mixed case, it then has pendent jurisdiction to decide factually related claims of discrimination associated with personnel actions outside the lists of 'particularly serious' actions set forth in 5 U.S.C. § 7512. Such discrimination claims must instead be exhausted through the EEO process."
7. The court noted that the Eighth Circuit had reached a different conclusion in *McAdams v. Reno*, 64 F.3d 1137 (8th Cir. 1995), but it found that *McAdams* was not persuasive given the text of the CSRA. The court instead agreed with (without deferring to) the position set forth in current EEOC guidance and the Board's decision in *Lethridge v. U.S. Postal Service*, 99 M.S.P.R. 675 (2005).
8. The court observed that its interpretation of the statute had some potential practical downsides, as factually related claims may need to be brought before both the EEO offices and the MSPB. However, the court reasoned that the mixed case regime created by Congress had the advantage of creating a clear rule. "The regime may be arbitrary, but if two administrative bodies are to be involved, it is at least apparent which claims may be taken to which forum."
9. Applying its interpretation to the case at hand, the court concluded that Crowe did not fail to exhaust his pre-termination discrimination claims before the Board because the Board lacked jurisdiction to consider them. Crowe did not impermissibly pursue a mixed case complaint and a mixed case appeal on the same matter, but permissibly pursued a mixed case appeal and several non-mixed EEO complaints.
10. The court found, however, that to the extent Crowe was arguing that he was terminated for discriminatory reasons, he failed to exhaust those theories before the Board. The court further agreed with the Board that Crowe had failed to prove that he was terminated based on sexual orientation discrimination. Finally, the court found that substantial evidence supported the Board's findings on the merits of the termination action. In reaching that conclusion, the court gave special deference to the administrative judge's decision to credit Garcia's original statement over her recantation.
11. In sum, the court: (1) vacated the district court's holding that Crowe failed to exhaust his administrative remedies with the Board with respect to his claims of pre-termination adverse employment actions, and remanded those claims for further proceedings; (2) affirmed the district court's determination that Crowe failed to exhaust before the Board any other discriminatory grounds for termination besides sexual

orientation discrimination; (3) affirmed the district court's grant of summary judgment to the Army on Crowe's Title VII claim alleging he was terminated because of his sexual orientation; and (4) affirmed the district court's grant of summary judgment to the Army on Crowe's CSRA claim.

12. In her concurring opinion, Judge Schroeder agreed with the outcome, but noted the "unfortunate situation" that two government entities (Department of Justice and MSPB) were taking opposing positions regarding the district court's jurisdiction to hear Crowe's pre-termination claims. She also emphasized the downsides of the result: "Litigating related claims, stemming from the same facts, in two different forums, is expensive, time consuming, and can yield inconsistent results." Judge Schroeder further noted that the court's decision was creating a circuit split, but expressed her hope that this would permit the Department of Justice to "review this legal disarray and live up to its mission that the government 'speaks with one voice in its view of the law.'"