



# Case Law Update: MSPB & the Federal Circuit

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# Adverse Actions

- Nexus
- Merits Issues
- Penalties
- Ex Parte Communications



## NEXUS:

*Doe v. Department of Justice,*  
113 MSPR 28 (2010)

Removal for videotaping private encounters. Held: Not egregious or contrary to agency mission, but it affected co-workers' performance and management's trust.



## Indefinite Suspension

*Gonzalez v. Dept. of Homeland Security*  
2010 MSPB 132 (2010), 115 M.S.P.R. 318  
(2010)

- Suspension w/out pay while agency conducted an investigation to determine whether grounds existed for adverse action.
- *“If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family anatidae on our hands”.* Douglas Adams

## *Gonzalez v. DHS, Cont'd*

- May impose an indefinite suspension without pay only if:
  1. Committed a crime
  2. Medical condition
  3. Security clearance suspended
  
- Proposal notice: “(T)he action is not being proposed based upon a reasonable cause to believe that you have committed a crime for which a sentence of imprisonment may be imposed.”

# Privileged Communications

*Berkner v. Dept. of Commerce*  
2011 MSPB 27 (2011)



- Board agreed with FLRA: Conversations between employee and representative are privileged
- Exceptions:
  - Told to lie
  - Threatened physical violence
- Board distinguished between threats and venting

*Conyers v. Department of Defense,*  
115 MSPR 572 (2010)

“Denied eligibility to occupy a sensitive (NCS) position.” What is the Board’s scope of review – *Egan*, applicable to security clearances, or 5 USC § 7701? Held: regular review, designation as a national security position and NCS notwithstanding. Dissenting opinion. Reconsideration request denied. *See also Northover v. DOD*, 115 MSPR 451 (2010).

# Penalties



## Disparate Penalties

*Lewis v. Dept. of Veterans Affairs*  
113 M.S.P.R. 657 (2010)



- Old Rule: Working in different units was outcome determinative.
- Present Rule: Agency must explain why different supervisors justify different penalties. *Williams v Social Security Administration*, 586 F3d 1365 (Fed. Cir. 2009)

# Disparate Penalties

*Lewis v. Department of Veterans Affairs*

113 M.S.P.R. 657 (2010)

- Disparate penalties
  - Appellant: removed
    - Trained & previous suspension
  - Comparator: counseling letter
    - New employee & clean record
  - Mitigated to 30-day suspension

# Disparate Penalties

*Woebcke v. Department of Homeland Security* 114 MSPR 100 (2010)

- Fired for soliciting prostitute
- AJ mitigated to 14-day suspension
  - Deciding official incorrectly concluded he had no rehab potential
  - Disparate penalties

# Reasonableness of the Penalty

*Suggs v. Department of Veterans Affairs*  
113 M.S.P.R. 671 (2010)

## Truth is Not a Defense

- Stated that his supervisor was incompetent
  - Truth is not a complete defense - removed
- Agency Position:
  - Table of penalties range : reprimand to removal
  - Previous three-day suspension

## *Suggs v. DVA, Cont'd*

AJ mitigated to 30-day suspension

- Selected (promoted) to another position
- Evaluations: Last – Outstanding; Others-Successful and Fully Successful
- Credited with 16 mos instead of eight years
- Precedent cases: multiple specifications, abusive or obscene language and/or physical action



# Denial of Procedural Due Process

*Ward v. U.S. Postal Service,*

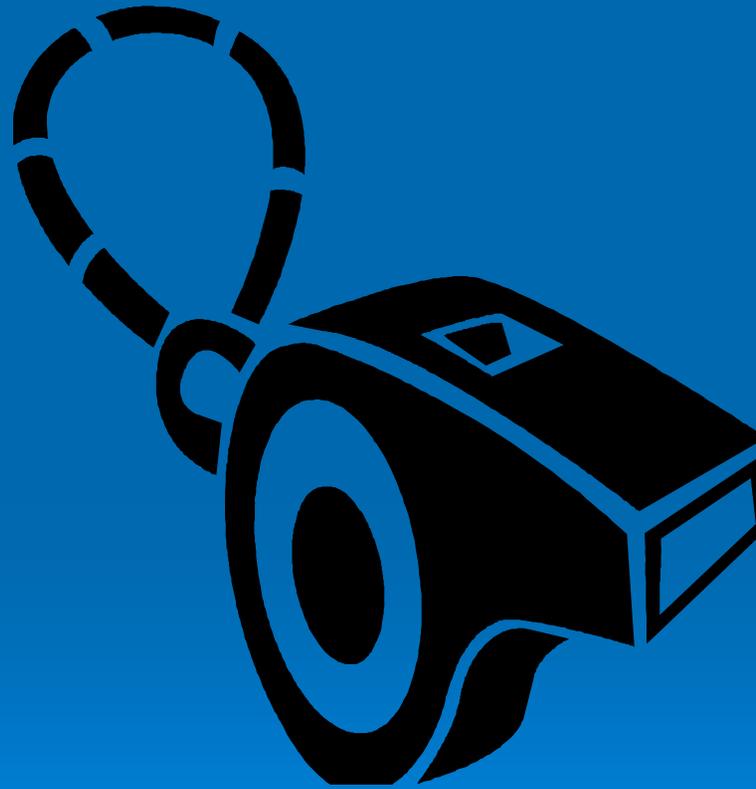
No. 2101-3021 (Fed. Cir. Feb. 17, 2011)

## Heard it Through the Grapevine

- Deciding official discussed Ward with four supervisors
- Board: In arriving at its decision, agency will consider only:
  - Proposal's reasons
  - Employee's & representative's answers
  - Medical information see 5 C.F.R. 7502(g)(1)



# Whistleblower Protection Act



*Chambers v. Interior,*  
602 F.3d 1370 (Fed. Cir. 2010)

- Court affirmed most of Board's decision but remanded question of "substantial and specific danger"
- Board improperly blended the concepts of "gross mismanagement" and "public safety"
- Likelihood and imminence of harm determine "specificity" and the potential consequences determine "substantiality"

*See also Chambers,* 515 F.3d 1362 (Fed. Cir. 2008)

## *Chambers v. Interior,* 2011 MSPB 7 (2011)

- Chief of the Park Police removed for disclosures to the press. Only 3 of 6 charges sustained by Board and court. Board's fact-specific and detailed decision concludes that evidence behind the charges was not strong but motive to retaliate was because of fear of embarrassment before Congress. July 2004 removal reversed.



# Parikh v. DVA, 2011 MSPB 1 (2011)

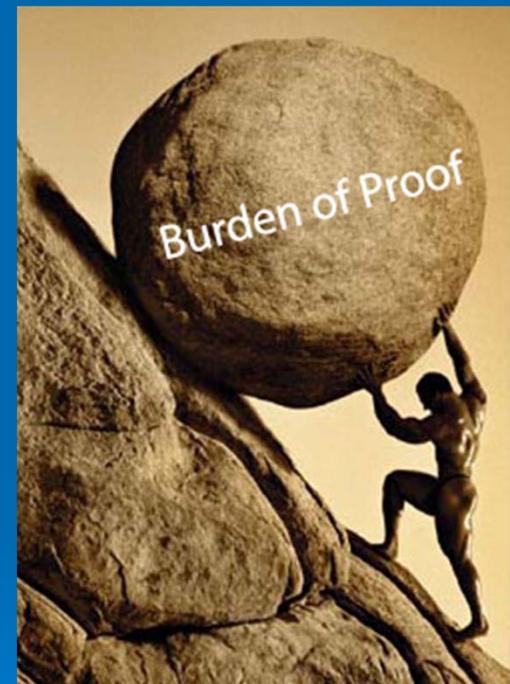
- Physician's disclosures of confidential patient information that would violate HIPAA protected when made to Congress.
- Reasonable belief of substantial and specific danger to patients despite no actual harm and motive to hurt co-workers.
- Even though agency's "primary" motive was valid, its evidence was not strong enough to meet its clear and convincing evidence burden.

## Schnell v. Army, 114 MSPR 83 (2010)

- Disclosures of serious violations of rules concerning \$109 million contract are protected where made by employee overseeing the agency's Quality Assurance Program.
- Satisfies knowledge/timing test where within 1-2 years of personnel actions.
- Agency did not meet its burden where its only response was denial of retaliation.

**ADEA = Title VII - not**  
*Bowman v. Department of Agriculture*  
113 M.S.P.R. 214 (2010)

- **No Shifting Burdens:** Title VII's burden shifting framework does not apply to ADEA claims.
- Employee must prove that “but for” age, not been an adverse action.



# Comparator Plus

*Davis v. Department of the Interior*

114 MSPR 527 (2010)

- AJ's Order:
  - Protected group
  - Adverse employment action
  - That the appellant was treated more harshly than a comparable employee
  
- Pretext under *McDonnell Douglas v. Green*
  - That the unfavorable action gives rise to the inference of discrimination

## *Davis v. Department of the Interior, Cont'd*

### Inferences of discrimination:

- Comparable employee
- Employer lied
- Inconsistent explanation
- Failure to follow established procedures
- General treatment of protected employees
- Employer's incriminating statements

*Gregory v. Army,*  
114 MSPR 607 (2010)

- For a charge of sexual harassment, if the agency invokes Title VII standards, it must prove the definition in Title VII.
- Role of the appellant's credibility is in his description, not his intent.
- As to disparate treatment, "all relevant aspects of the appellant's employment situation must be 'nearly identical' to those of the comparator employees."

*Thompson v. North American Stainless*  
131 U.S. 863 (2011)

**Marriage proposal: Don't leave home  
without one**

- Fired three weeks after fiancée filed EEO charge
- **Issue One: Did firing constitute unlawful retaliation?**
  - Anti-retaliation provision prohibits actions that dissuade one from participating in EEO process
- Declined to identify relationships for which third-party reprisals are unlawful

*Thompson v. North American Stainless,*  
Cont'd

**Issue Two: Does Title VII grant him a cause of action?**

- NAS argued that only the person who engaged in protected activity has a cause of action
- Held that plaintiff falls within the zone of interest sought to be protected by Title VII

# Veterans Rights: Veteran's Employment Opportunity Act of 1998, Uniformed Services Employment and Reemployment Rights Act



# VEOA: *Dean v. OPM*, 115 MSPR 157 (2010)

- 5 USC § 3302(1) is a “statute \*\*\* relating to veterans preference.”
- Allowing agencies to use FCIP to fill positions in the excepted service avoids giving notice of competitive vacancies.
- FCIP does not require a justification for putting positions in the excepted service.
- As to Dean, he may complain despite not having applied for any of the jobs. As corrective action, OPM must comply with § 3302(1).
- As to fellow-appellant Evans, who applied under the competitive announcement for jobs eventually filled by FCIP, agency must reconstruct.

# USERRA: *Erickson v. USPS*, No. 10-3096 (Fed. Cir. 2011)

- 38 USC § 4312(a)(2), the reemployment provisions of USERRA, apply where cumulative military service does not exceed 5 years.
- Same for § 4311, the anti-discrimination provision.
- Circumstances must show abandonment; it is a factual determination.
- Absence of less than 5 years = no abandonment unless “clear evidence to the contrary,” including “unequivocal expression of intent.”

# USERRA:

## *Staub v. Proctor Hospital*, No. 09-400 (S. Ct. 3/1/11)

- 38 USC § 4311 “motivating factor” test covers innocent decision makers who are influenced by others motivated by anti-military bias.
- Constructive knowledge suffices.
- Analogous to tort law on proximate and superseding cause.
- Independent investigation does not preclude the claim or relieve employer of fault.

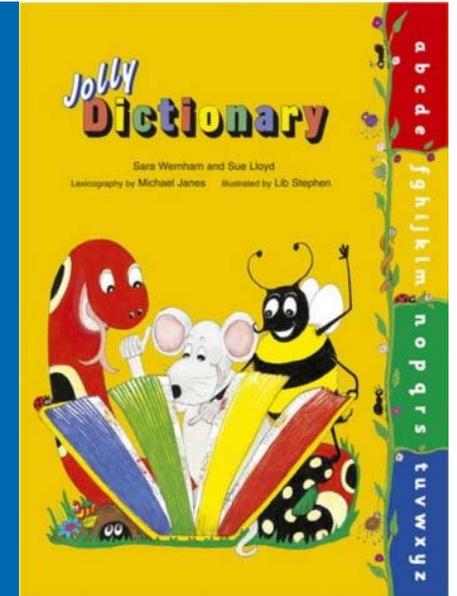
# Last Chance Agreements: Settlement & Compliance



*Smith v. Dept. of the Interior*  
113 M.S.P.R. 592 (2010)

## Words Make a Difference

- LCA: Remove for offense  
“requiring” discipline
- Appellant removed for failure to use seat belt; AJ upheld removal
- Board:
  - Required implies mandatory
  - Appellant complied with the LCA



*Slattery v. Dept. of Justice*  
590 F.3d 1345 (2010)

- NSA: Barred from applying for law enforcement position within INS for one year; 3- year last chance agreement
- Good faith does not require concealing the truth.



**TO**

**RETIREMENT**  
**401K**

**INVEST  
WISELY**

## *Braza v. OPM*

598 F.3d 1315 (Fed. Cir. 2010)

- Signed Consent to Survivor Election without reading it
- “That she regrets having trusted her husband’s decision is unfortunate, but it does not invalidate the waiver of her survivor annuity entitlement.”
- Dissent: Form fails to provide required statutory notice

# Office of Workers Compensation: Restoration



# Restoration to Duty: *Dean v. USPS*, 115 MSPR 56 (2010)

- 20 CFR § 10.508, OWCP's regulation on "suitable work" for an injured or ill employee, does not control in Part 353 restoration actions.
- Restoration must be offered in local commuting area of last duty station, not where employee currently resides.



If still receiving OWCP benefits, then not "fully recovered."

# Suitability



# Suitability: *Aguzie & Barnes v. OPM*, 2011 MSPB 10 (2011)

- OPM direction to agency to remove an “employee” for suitability reasons, 5 CFR Part 731, is subject to the requirements of 5 CFR Part 752.
- Contrary regulations are invalid.
- Nexus must be proven.
- Board does independent penalty analysis, including of debarment and cancellation of eligibilities.
- Employing agency is responsible for back pay where ordered.



# QUESTIONS???



# THANKS FOR YOUR ATTENTION!

