



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

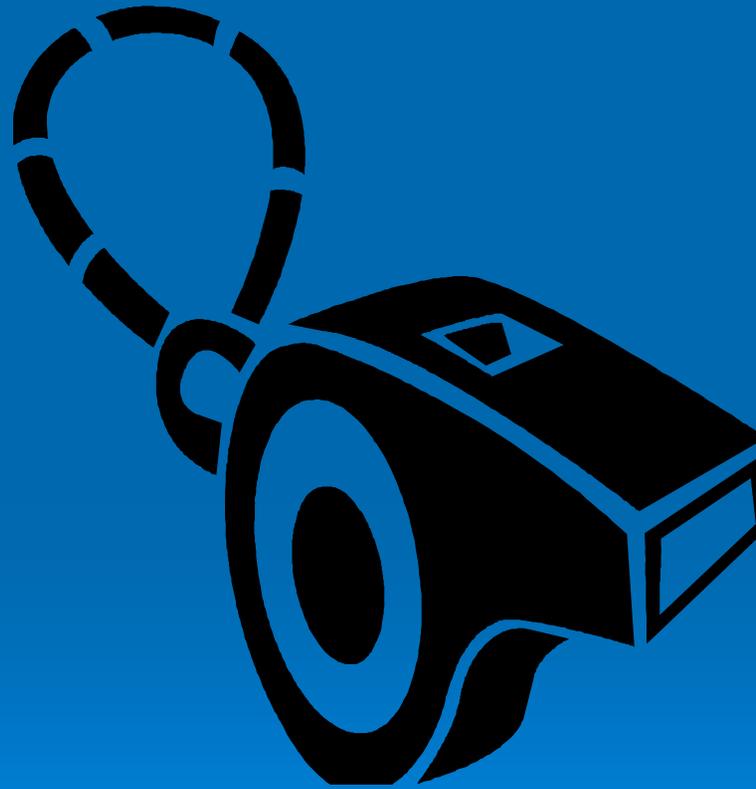
Ward v. U.S. Postal Service,

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)

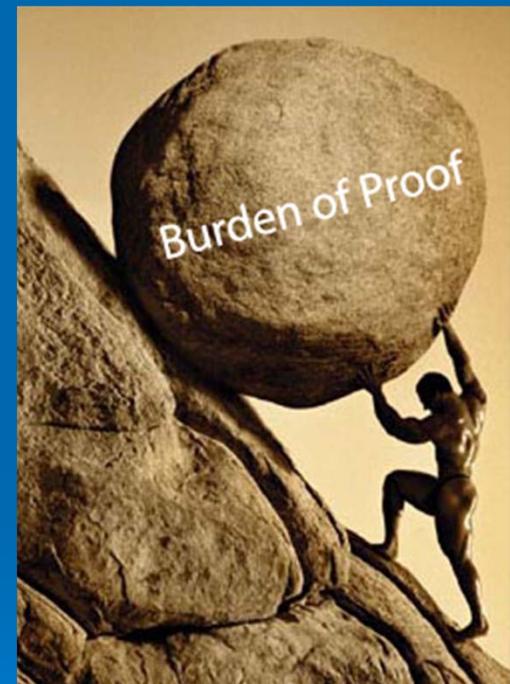
- Physician's disclosures of confidential patient information that would violate HIPAA protected when made to Congress.
- Reasonable belief of substantial and specific danger to patients despite no actual harm and motive to hurt co-workers.
- Even though agency's "primary" motive was valid, its evidence 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.

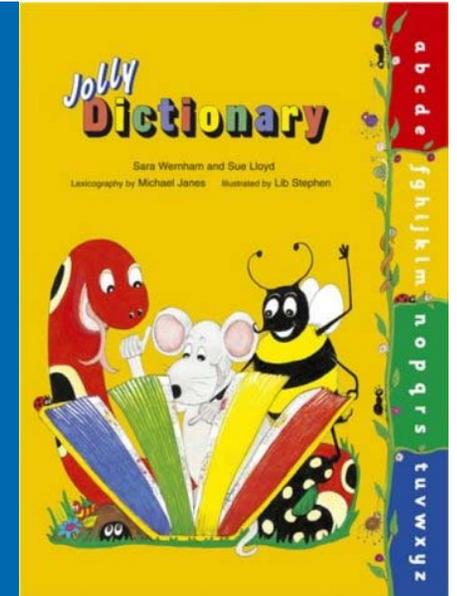
Last Chance Agreements: Settlement & Compliance



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!

