JOHN S. EDWARDS v. DEPARTMENT OF LABOR
Docket # DC-1221-16-0227-W-1
Agency Response to Show Cause Order
Summary Page

Case Title : JOHN S. EDWARDS v. DEPARTMENT OF LABOR

Docket Number : DC-1221-16-0227-W-1

Pleading Title : Agency Response to Show Cause Order

Filer's Name : Rolando Valdez, Esq.

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

Table of Contents

Pleading Interview 3
Uploaded Pleading Text Document 4
Certificate of Service 16

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Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

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2. Does your pleading assert facts that you know from your personal knowledge?

Yes

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3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JOHN S. EDWARDS,	)	
	)	Docket No.:
Appellant	)	DC-1221-16-0227-W-1
	)	
v.	)	
	)	
DEPARTMENT OF LABOR,	)	February 11, 2016
	)	
Agency	)	

AGENCY'S REPLY TO SHOW CAUSE ORDER

The United States Department of Labor (DOL or Agency) submits this Reply to the Merit Systems Protection Board's (Board) December 21, 2015, Acknowledgment Order (Order), which included an Order to Show Cause. Appellant has failed to make non-frivolous allegations that he engaged in whistleblowing activity by making protected disclosures under the Whistleblower Protection Enhancement Act of 2012 (WPEA) and that the disclosures were a contributing factor in the Agency's decision to grant Appellant the reassignment that he himself suggested on September 3, 2015. The Agency does not challenge that Appellant's purported complaints to his supervisor(s) support a finding of jurisdiction or that Appellant has exhausted his administrative remedies with the Office of Special Counsel (OSC). However, jurisdiction should be denied on some of Appellant's claims because he failed to show (1) an abuse of authority by his supervisor; (2) that he lawfully assisted another person who had exercised a right to file an appeal, complaint, or grievance; and (3) that his management team had knowledge of certain disclosures or activity.

Factual Background

Appellant John S. Edwards filed the instant Individual Right of Action (IRA) asserting that management officials in DOL's Employment and Training Administration (ETA), Office of Information Systems and Technology (OIST) retaliated against him for whistleblowing activity by reassigning him from his GS-2210-15 supervisory position as Deputy Director, OIST, to a non-supervisory GS-15 Special Assistant position in the same office.

In September 2013, Appellant was hired by ETA to work as Supervisory Information Technology (IT) Specialist, in OIST, as the Director of the Division of Enterprise Solutions. Response to Show Cause Order (Response) at 4. On September 3, 2015, Appellant sent an e-mail message to Mr. Htein, Acting Administrator Lahrman, and ETA Deputy Assistant Secretary Byron Zuidema, stating that Appellant intended to leave his position in ETA for another position in ETA, a position in another federal agency, retire and he asked for ETA's input on the timing of his departure. See Response at 19-20.

Appellant's Exercise of Appeal Rights

On or about October 13, 2015, Appellant sent an e-mail message to Vanessa Hall, who works in the EEO Office for the Office of the Assistant Secretary for Administration and Management (OASAM) concerning his complaints about the non-promotion of Darryl McDaniel and other allegations of "system discrimination" by ETA management against African-American ETA OIST employees. The EEO Office investigates complaints of harassing conduct under the DOL anti-harassment policy, which is set forth at Department of Labor Manual Series 4-700. On November 17, 2015, Betty Lopez, Program Manager of the EEO Office, wrote

Appellant to inform him that the EEO Office declined to investigate his complaint of harassing conduct filed on behalf of his subordinate employees. Response at 18-21.

On or about October 16, 2015, Appellant filed an informal EEO complaint with DOL's Civil Rights Center (CRC). On page 1, Box 1.b., Appellant marked the box indicating that that he wished to remain anonymous. Response at 11.

On November 12, 2015, Appellant sought relief with the Office of Special Counsel (OSC). Response at 22-24. On November 13, 2015, OSC informed Appellant that it declined to pursue Appellant's claims because his allegations should more appropriately be resolved through the EEO process. Initial Appeal at 9-11. On November 20, 2015, OSC informed Appellant that he had a right to seek corrective action from the Board. Initial Appeal at 7-8. Appellant filed this IRA on December 21, 2015.

Argument

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before the Office of Special Counsel (OSC) and makes non-frivolous allegations that he engaged in whistleblowing activity by making a protected disclosure and that the protected disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. Yunis v. Dep't of Veterans Affairs, 242 F.2d 1367, 1371 (Fed. Cir. 2001); Rusin v. Dep't of the Treasury, 92 M.S.P.R. 298 ¶ 12 (2002).

The Whistleblower Protection Enhancement Act (WPEA) of 2012 expanded the types of covered protected disclosures. Prior to the enactment of the WPEA, an appellant was limited to the filing an IRA appeal based on allegations of whistleblower reprisal under 5 U.S.C. § 2302(b)(8). Carney v. Dep't of Veterans Affairs, 121 M.S.P.R. 446 ¶ 5 (2014). Following the enactment of the WPEA, an appellant can also file an IRA appeal alleging other types of

protected activity identified in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), and (D). See 5 U.S.C. § 1221(a). The law, under 5 U.S.C. § 2302(b)(9)(A)(i) prohibits reprisal for a personal exercise of any appeal, complaint, or grievance granted by law, rule, or regulation concerning an alleged violation of 5 U.S.C. § 2302(b)(8). Id. at ¶ 6, fn. 3.

I. Appellant Failed To Make Non-Frivolous Allegations That He Engaged in Whistleblowing Activity By Making a Protected Disclosure That He Reasonably Believed Evidenced An Abuse of Authority.

An appellant is entitled to a jurisdictional hearing only where he makes a non-frivolous allegation that the MSPB has jurisdiction over his appeal. See Smirne v. Dep't of the Army, 115 M.S.P.R. 51 ¶ 8 (2010). Non-frivolous allegations are allegations of fact that, if proven, could establish that the MSPB has jurisdiction over the appeal; *pro forma* allegations are insufficient to satisfy this non-frivolous standard. *Id.* The Administrative Judge may only consider the particular disclosures and personnel actions that the appellant raised before OSC. Further, a disclosure is defined as "a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences (i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(a)(2)(D).

Based on the contents of the Initial Appeal and Appellant's Response to the Order to Show Cause, it appears that Appellant is alleging that his allegations of systemic discrimination against African-Americans made to his supervisors on or about September 17, 2015 constitute protected disclosures under 2308(b)(8). The Agency does not challenge that Appellant has exhausted his administrative remedies before OSC and the Agency does not contest that for

purposes of jurisdiction, Appellant's purported complaints to his supervisors could qualify as disclosures. However, in order to be a *protected* disclosure, Appellant must make non-frivolous allegations such that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by him could reasonably conclude that the actions of the government evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial danger to public health or safety. Order to Show Cause at 4; see Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

Appellant alleges that Acting Administrator Lahrman abused her authority when she canceled the promotion opportunity that Appellant had planned for Darryl McDaniel. Response at 25. The Board has previously held that an abuse of authority occurs where an agency official engages in an arbitrary or capricious exercise of power that adversely affects the rights of another person or that results in advantage or personal gain to him/herself or to other preferred persons. Linder v. Dep't of Justice, 122 M.S.P.R. 14 (Nov. 7, 2014). The jurisdictional record does not contain preponderant evidence to support Appellant's assertions that his September 2015 conversations with his supervisors alleged his ETA management team had abused their authority concerning either the July 2015 cancellation of a GS-14 promotion for Mr. McDaniel or any other personnel action alleging that an ETA OIST staff person had been the victim of disparate treatment based on race. Appellant offers only vague generalizations about prejudice in the areas of assignments, opportunities, and promotions.[1] Response at 5. But, in fact, record evidence shows that Appellant knew that Acting Administrator Lahrman could not allow OIST

[1] Considering that Appellant had continuous and routine oversight of OIST staff, their assignments, and personnel actions, it is peculiar that he now alleges that Lahrman, his second-level supervisor who did not work in his office on a daily basis, was responsible for the alleged disparate treatment that his staff experienced when it came to assignments, opportunities, and promotions. After all, Appellant avers that in his Deputy Director of OIST position, he had responsibility for "review[ing] all personnel actions in the office and all actions required my approval." Response at 5.

to hire Mr. McDaniel under the advertised GS-14 vacancy because a reorganization plan had not been finalized and ETA had not bargained with the union about that reorganization. Response at 8. Thus, Appellant is correct that the GS-14 vacancy for Mr. McDaniel was cancelled while other hiring opportunities continued. Id. The legitimate business reason for this difference is that OIST was not authorized to hire staff for a proposed yet unapproved new division in OIST whereas positions in other existing divisions of OIST did not need reorganizational approval and union bargaining before positions could be filled. Id.

Based on the limited facts presented by Appellant, it may appear as though Acting Administrator Lahrman canceled the GS-14 vacancy for no reason at all. However, when considering the entire picture, it is readily apparent that the Appellant knew that a reorganization and union bargaining needed to take place *before* Darryl McDaniel could be hired into the new division of OIST. Based on the totality of facts known to Appellant and readily ascertainable to him, a reasonable person would not leap to the conclusion that Darryl McDaniel's race was the reason that the GS-14 vacancy announcement had to be canceled.[2] Similarly, a reasonable person would not conclude that Lahrman engaged in an abuse of authority when she decided not to allow OIST to hire for a GS-14 position that was part of a proposed, but unapproved, reorganization.

In summary, Appellant has provided the MSPB with a very narrow set of facts concerning why the GS-14 vacancy announcement was canceled. Appellant professes to have held high-level managerial and supervisory positions for over 30 years (Response at 5). Based on his past experience and the fact that he encumbered a Deputy Director position in July 2015,

[2] There is no evidence in the record to show that Darryl McDaniel believed that the cancellation of the GS-14 vacancy occurred due to his race or any other prohibited basis. Appellant has also failed to produce any evidence to show that Darryl McDaniel either filed a complaint of discrimination on his own or that McDaniel asked Appellant to speak to higher-level management or anyone else at DOL to complain on his behalf about any actual or perceived race discrimination in OIST.

he either knew or should have known that the failure to secure approval from Lahrman concerning the reorganization package and union bargaining was a necessary prerequisite to hiring Darryl McDaniel in a new division of OIST. Response at 8. Because the record shows that Lahrman had a legitimate reason for canceling the vacancy, Appellant has failed to show that her actions were either arbitrary or capricious. Therefore, he has failed to show provide non-frivolous allegations that Lahrman engaged in an abuse of authority.

II. Appellant's Alleged Statement(s) To His Supervisors And To The EEO Office and The Civil Rights Center Concerning Systemic Discrimination Were Not a Protected Disclosure Under The Lawful Assistance Provision of 5 U.S.C. § 2302(b)(9)(B).

Appellant alleges that his complaints to his managers as well as his October 13, 2015 complaint to an EEO Manager under DOL's harassing conduct policy as well as his October 16, 2015 EEO complaint to DOL's Civil Rights Center (CRC) alleging reprisal as well as systemic discrimination on behalf of his African-American subordinate employees constitute protected activity under 5 U.S.C. § 2302(b)(9). The Agency does not dispute that, for purposes of jurisdiction, the alleged complaints Appellant made to his supervisor(s) may constitute disclosures. However, neither the statements to his supervisors nor the harassing conduct and EEO complaints made on behalf of other employees constitute protected disclosures under 2302(b)(9)(B).

As a preliminary matter, as noted in the Order to Show Cause, p. 3, fn. 1, allegations of reprisal for filing a prior EEO complaint is not included among the listing of prohibited personnel practices which can form the basis of an IRA appeal; rather, this prohibition is contained with 5 U.S.C. § 2302(b)(9)(A)(ii), and it does not provide a basis for establishing the Board's jurisdiction over an IRA appeal. See Mudd v. Dep't of Veterans Affairs, 120 M.S.P.R. 365, ¶ 7 (Nov. 19, 2013); Order to Show Cause, p. 3. Therefore, Appellant's allegations of being

reassigned to a GS-15 Special Assistant position in reprisal for his October 13, 2015 complaint of harassing conduct of his subordinate African-American employees to the DOL EEO Program Manager on October 13, 2015 and his November 15, 2015 formal EEO complaint to CRC do not constitute an independent basis for jurisdiction.

In the remaining part of this jurisdictional argument, it appears that Appellant is attempting to expand the scope of 5 U.S.C. § 2303(b)(9)(B), which provides protection to those who engaged in "otherwise lawfully assisting any individual in the exercise of any right referred to" in subparagraph 2302(b)(9)(A)(i) or (ii). The Agency agrees with Appellant that there is at least one MSPB case precedent on point. In Carney v. Dep't of Veterans Affairs, the MSPB determined that that AJ properly determined the MSPB has jurisdiction of WPEA retaliation claims where an appellant alleged that he had represented an agency employee during an informal grievance meeting. Carney v. Dep't of Veterans Affairs, 121 M.S.P.R. 446, 450-451, ¶ 6 (Aug. 6, 2014).

Appellant's argument in favor of jurisdiction is distinguishable from the result in Carney because here the jurisdictional record does not contain any arguments or evidence to show that (a) Darryl McDaniel had exercised his right to file an appeal, complaint, or grievance under 2302(b)(9)(A) related to McDaniel's non-selection for the cancelled GS-14 vacancy or (b) McDaniel had asked Appellant to exercise an appeal, complaint, or grievance on his behalf. In Carney, the record showed that there was an existing informal grievance in which Mr. Carney aided his co-worker. Id. There are also no facts to show that Mr. McDaniel requested any assistance from Appellant to challenge the cancellation of the GS-14 vacancy. The distinction is that in Carney, the employee was providing assistance as a representative in a situation where another employee had asked Mr. Carney for assistance. This record however, is devoid of any

evidence to show that other African-American staff person in ETA OIST requested that Appellant assist him or her to remedy any past allegations of discrimination. It seems that Appellant is suggesting that his activity should be deemed protected activity, despite the fact that no one asked for his assistance in exercising an appeal, complaint, or grievance. To the extent this is what Appellant is arguing, there does not appear to be any legal authority on point to show that this type of activity is protected activity within the meaning of the WPEA. Therefore, Appellant has failed to non-frivolously allege that he made a protected disclosure or engaged in protected activity when he spoke to Acting Administrator Lahrman on September 17, 2015 or when he filed a harassing conduct complaint with the OASAM EEO Program Manager under DLMS 4-700 or an EEO complaint with DOL's Civil Rights Center.

III. Appellant Has Failed To Demonstrate That His Whistleblowing Disclosures And Activity Contributed To the Alleged Retaliatory Activity.

Appellant has not made a non-frivolous allegation that his statements to his supervisor and his harassing conduct complaint or his EEO complaint were contributing factors to his reassignment because Appellant has not made any plausible allegations about how or when ETA management officials learned of his disclosures or activity. As such, there is no record evidence to show that these actions were a contributing factor to the personnel actions at issue. Order to Show Cause at 5. Barring that, the MSPB will consider any relevant evidence, including the strength or weakness of the Agency's reasons for taking the personnel action, whether the whistleblowing was directed at the proposing or deciding official, and whether those responsible management officials had a desire to retaliate against Appellant. Id. Order to Show Cause, at 5.

On September 3, 2015, Appellant informed his supervisors that he intended to leave DOL employment, that he was amenable to exploring alternate options in ETA, or that he might decide to retire once again. Response at 19-20. The reason that Lahrman engaged Appellant in

such discussions and ultimately decided to reassign Appellant, including the two-month window, was based on Appellant's September 3, 2015 email message. Id. It was Appellant who made it clear to his management team that he did not wish to continue as Deputy Director of OIST and his management team needed to promptly develop a succession plan. Id.

Appellant has failed to make non-frivolous allegations that show Lahrman (or any other ETA management official) knew anything about Appellant's harassing conduct complaint to the EEO Program Manager; an EEO complaint under 29 C.F.R. Part 1614 to DOL's Civil Rights Center alleging retaliation against himself and race discrimination against his subordinate staff; or his complaint to OSC. Regarding Appellant's October 13, 2015 harassing conduct complaint, the matter was not accepted for investigation by Betty Lopez, the EEO Program Manager and Ms. Lopez informed Appellant of her decision in a memorandum dated November 17, 2015. Response at 18-20. Appellant has failed to produce any evidence to show that ETA management knew that he filed a harassing conduct complaint on behalf of his subordinate staff members.

With regard to Appellant's EEO complaint, in his October 16, 2015 informal complaint of discrimination, he requested anonymity in filing his complaint. Response at 11 (Box 1.b.). The jurisdictional record does not contain any evidence to show that Appellant's request for anonymity was violated by the Civil Rights Center or that ETA management officials otherwise learned that he had made contact with an EEO counselor.[3] Apart from Appellant's conclusory allegations, there is no evidence that Ms. Lahrman or any other ETA agency official knew of

[3] While Appellant seems to be under the impression that Vanessa Hall was an EEO counselor associated with the Civil Rights Center EEO complaint process under 29 C.F.R. Part 1614, Response at 11 (Boxes 8, 9, and 10), Ms. Hall is actually employed in the EEO Program Manager's Office, which investigates harassing conduct complaints under Department of Labor Manual Series 4-700. The record does show that Ms. Hall provided Appellant with information about how to exercise EEO rights with the Civil Rights Center. Response at 20. Additionally, on pages 31-35 of Appellant's Response, two different headers have been added to DOL's DLMS 4-700 indicating that the harassing conduct policy belongs to the Civil Rights Center. It does not; in fact, it is a Department-wide policy that is distinct from the 29 C.F.R. Part 1614 EEO process administered by the Civil Rights Center. Ms. Hall does not work for the Civil Rights Center. Therefore, Appellant's communications with Ms. Hall did not commence the initiation of his EEO complaint of discrimination.

Appellant's informal or formal EEO complaint when Lahrman decided to grant Appellant's request for another position in ETA.

Lastly, concerning the OSC complaint, the record documentation shows that Appellant appears to have filed his electronic complaint with OSC on November 2, 2015. Initial Appeal, pp. 20-48. OSC declined to take action on Appellant's OSC complaint and closed his whistleblowing retaliation complaint on November 12, 2015. Response at 9. Here again, there is not one shred of evidence showing that Acting Administrator Lahrman or any other ETA official knew about Appellant's OSC complaint.

Appellant has failed to show that these three instances of disclosures or activity were contributing factors in Lahrman's decision to reassign him because there is no evidence that anyone in ETA had knowledge of Appellant's complaints or actions.

Conclusion

Appellant sent a message to his managerial leaders on September 3, 2015, in which he advised them that he intended to leave Federal service, retire, or that he wished to be considered for other opportunities in ETA. Appellant's management team promptly considered his request and looked for opportunities for him to remain employed within ETA. Unbeknownst to any ETA management official, however, Complainant filed three separate complaints of discrimination and reprisal. Jurisdiction of parts of this appeal should be denied because (1) Appellant failed to show an abuse of authority by Acting Administrator Lahrman when she cancelled a GS-14 vacancy in the Grants Management Division that had not been approved for a reorganization; (2) existing Board law does not support Appellant's expanded definition of "lawful assistance" to include complaints made on behalf of a subordinate employee where the subordinate does not have any active appeal, complaint, or grievance; and (3) the jurisdictional

record is lacking of any evidence showing that ETA officials had any knowledge about Appellant's EEO complaints to the EEO Program Manager, to CRC, or to OSC. The Agency respectfully requests that the MSPB dismiss these portions of this IRA appeal for lack of jurisdiction.

Respectfully submitted,

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Dated: February 11, 2016

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties. Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Washington Regional Office	Agency Response to Show Cause Order	e-Appeal / e-Mail
John S. Edwards Appellant	Agency Response to Show Cause Order	e-Appeal / e-Mail
Peter Broida, Esq. Appellant Representative	Agency Response to Show Cause Order	e-Appeal / e-Mail