19-418

UNITED STATES SUPREME COURT

Benoit BROOKENS,
Petitioner

v.

Patrick PIZZELLA, Acting, Secretary,
Department of Labor,
Respondent

PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

September 26, 2019
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QUESTIONS PRESENTED

(A) Whether the Federal Circuit has jurisdiction over non-discrimination issues in a mixed appeal filed within 60 days of the decision by the Merit Systems Protection Board pursuant to 5 U.S.C. 7703(b)(1)(A).

(B) Whether the D.C. Circuit erred in summarily affirming that the transferee U.S. District Court under 28 U.S.C. 1631, from the Federal Circuit, "in the interest of just" lacked jurisdiction?

I. PARTIES

Parties to the proceeding are identified in the caption of the case.

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Statutes

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II. OFFICAL REPORTS

the case is reported, *Benoit Brookens v. R. Alexander Acosta, Secretary, Department of Labor*, 297 F. Supp. 3d 40, Dist. Ct. DC 2018)

Benoit Brookens v. Department of Labor, Docket CB-7121-13-0012-V1, _____, MSPB ( ).

III. JURISDICTION

The Petition is filed within 90 days, of the USCA DC Cir. Denial of rehearing in banc, on Feb. 19, 2019

IV. APPLICABLE STATUTES

5 U.S.C. Sec. 7703(b)(1)(A)
28 U.S.C. Sec. 1631

V. APPENDIX

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I. PROCEEDINGS

Benoit Brookens, was hired in 1990[1] as a civil service employee in the Department of Labor's (DOL) Bureau of International Labor Affairs (ILAB) as an International Economist in the Trade Negotiations Division. In 1999, Mr. Brookens was terminated. Mr. Brookens grieved his removal under the Union's Collective Bargaining Agreement (CBA) alleging retaliation for protected union activity. The Arbitrator agreed and in 90 days, Mr. Brookens was reinstated to his Government position. However, the U.S. Department of Labor refused to fully compensate Mr. Brookens for the period of his removal.

In 2007, Mr. Brookens' acting supervisor, Carlos Romero, serving a 120 day "detail", rotational promotion, as required by the CBA, removed duties from Mr. Brookens' portfolio, and downgraded his performance when he failed to "volunteer" for new assignments, among them, serving as the Department of Labor lead person for Anti-Dumping and Countervailing Duties, (Appendix, 35).

The selecting official, Gregory Schoepfly advertised the vacancy and rejected all applicants, including Mr. Brookens.

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[1] Federal Service began in 1973-1980 as a U.S. Department of State, Economic/Commercial Officer with tours in the Department of State, Department of Commerce, and the U.S. Embassy, The Hague, Netherlands. Mr. Brookens served as an Adjunct Professor of Finance, University of Virginia, Northern Virginia Campus, 1986-90 and other experiences prior to joining the U.S. Department of Labor.

The position was then re-advertised to include a new job requirement: "Performance Improvement Plan (PIP) experience". This job experience requirement, "PIP" experience, however, is NOT a "duty skill" acquired by threshold level bargaining unit employees, becoming first time, first line supervisors at the U.S. Department of Labor nor even known as a qualification in any other federal agency.

A new supervisor, Timothy Wedding, hired from outside the U.S. Department of Labor, with the required "PIP experience", expressed dissatisfaction with Mr. Brookens' performance[2] just after eight (8) working days on the job, leading to placing Mr. Brookens on a PIP.

The Union consolidated four (4) of Mr. Brookens' pending fourteen (14) personal grievances for arbitration.

The arbitrator, after a hearing, dismissed Mr. Brookens' grievance and the Union appealed. The Merit Systems Protection Board vacated the arbitration award to "further adjudicate" Mr. Brookens' allegations of discrimination and reprisal. *Brookens v. Department of Labor*, 2014 MSPB 27, April 11, 2014. The Board found the following:

> "As the appellant asserts, the arbitrator failed to provide a legal or factual analysis to support his findings that the agency did not retaliate against the appellant for his union

[2] Mr. Wedding, in violation of Civil Service Rules and the Collective Bargaining Agreement (CBA) "sat in" on Mr. Brookens' personnel evaluation with Mr. Romero. This issue its still pending a hearing under the CBA arbitration procedures.

> activities and did not discriminate against him because of age and race. The Board may make its own finding when the arbitrator failed to cite any legal standard or employ any analytical framework for his evaluation of the evidence. Id. Here, the arbitrator did not set forth any analytical for his determination on the appellant's claims of discrimination or retaliation for union activity. Therefore, we are vacating the arbitration decision as to the findings of no discrimination and no retaliation. Pursuant to the Board's authority in 5 C.F.R. 1201.155(e) we forward the matter to the Board's Washington Regional Office for assignment to an administrative judge to make recommended findings on the appellant's discrimination and retaliation claims under the appropriate legal standards. See *Sadiq v. Department of Veterans Affairs*, 119 M.S.P.R. 450, 456 (2013).

The MSPB then entered the following order:

> ORDER
>
> For the reasons set forth above, we FORWARD this case to the Washington Regional Office for further adjudication. The administrative judge shall conduct such further proceedings as necessary and make recommended findings to the Board regarding the affirmative defense of discrimination and retaliation claim consistent with this Opinion and Order. After the administrative judge issues the recommendation, the case will be forwarded back to the board. The parties may file exceptions to the administrative judge's recommendation with the Clerk of the Board

within 20 days of the date of the recommendation. The parties may response to any submission by the other party within 15 days of the date of such submission. The Board will subsequently issue a final decision on the merits of the appellant's request for review.

Department of Labor, Computer Failure

At approximately 6 p.m. the day the Union representative was preparing to file her exceptions to the administrative judge's proposed decision, she was unable to "save the document in Microsoft Word."

Attorney Lauderdale in her letter to the Clerk of MSPB on October 20, 2014, stated that "(t)he IT technician visited my office at approximately 6:00 p.m. and through some machinations lost the final version of my brief. Between the two of us, we have worked for over two hours to retrieve the document. This was not possible.

I have tried to recreate all the work I have done, but it is impossible to complete this evening. It is obviously too late in the evening to now contact the Clerk of the Board (not that I can find a number on the web site anyway.) I need to retrieve the document, and at best that cannot occur until tomorrow. Please grant me until then to post the brief. If it cannot be retrieved, I will need additional time to recreate the final version. Please advise me as to how to proceed. (Appendix 37)

"On October 21, 2014", the Board states in its December 16, 2014 decision "after the expiration of the extension of time to file exceptions, the

appellant's representative requested an additional EOT id. Tab 35."

The Board then decided, "[a]bsent exceptions to the administrative judge's Recommended Decision, and based upon our review of his decision, we Adopt the Recommendation. (A-32)

APPEAL TO THE FEDERAL CIRCUIT

Within the required 60 days pursuant to 5 U.S.C. 7703(b)(1)(A), Mr. Brookens filed his appeals to the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit, *sua sponte*, raised the status of Mr. Brookens' discrimination claims, determined that they were not "waived" terminating its jurisdiction and transferred the case to the U.S. District Court for the District of Columbia, under 28 U.S.C. 1631.

Upon motion, FRCP 12(b), by the Department of Labor, the U.S. District Court dismissed Mr. Brookens' transferred case for lack of jurisdiction, in that the appeal to the Federal Circuit was more than 30 days after the MSPB decision on December 16, 2014 decision.

Mr. Brookens appealed the district court's dismissal and the Court of Appeals summarily affirmed. Mr. Brookens request for rehearing en banc was denied and this Certiorari petition was filed regarding the U.S. Court of Appeals for the District of Columbia's summarily overturning the transfer ruling, "in the interest of justice" by the Federal Circuit.

ARGUMENT

Mr. Brookens' notice of appeal to the Federal Circuit was timely, within the 60 day period prescribed by Federal Statute, 5 U.S.C. 7703(b)(1)(A).

Federal Statute provides for appeals to the Federal Circuit by filing the notice of appeal within 60 days of the final decision of the Merit Systems Protection Board. Mr. Brookens notice was timely filed.

However, the final MSPB decision, as it has in the past, did not specifically state that appeals where the appellant does not seek review of the equal employment claims, are still reviewable by the Federal Circuit. In comparison, *Jacquen Lee, v. Department of Labor*, December 23, 2008, 2008 MSPB 252, [Docket No. CB-7121-08-0020-V-1] the MSPB provides notice of a determination of the non-employment discrimination aspects of the appeal. (A-43)

The MSPB notice states the following:

Other Claims: Judicial Review

> If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:
>
> United States Court of Appeals
> For the Federal Circuit
> 717 Madison Place, N.W.
> Washington, DC 20439

The governing statute, 5 USC 7703 states:

7703(b)(1)(A)

> Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order of final decision of the Board shall be to the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

Mr. Brookens, in support of his seeking review of the MSPB rejecting as untimely his Exceptions to the administrative judges proposed decision, filed MSPB "Form 10. Statement Concerning Discrimination". The form was filed as follows: "AMENDED" March 13, 2015:

Section A:

Check the statements below that apply to your case. Usually, it is one statement, but it may be more. Do not alter or add to any of the statements.

[X] (1) No claim of discrimination by reason of race, age, national origin, handicapped condition has been made or will be made in this case.

In response to the Federal Circuit's order for clarification, Mr. Brookens signed, at the direction of counsel, on April 25, 2016 the following:

[X] The petition seeks review only of the Board's or arbitrator's dismissal of the case for lack of jurisdiction for untimeliness.

At oral argument, counsel for Mr. Brookens indicated that her petition was addressed to the MSPB decision to not provide her the opportunity for her requested one day delay in filing her Excepts to the administrative judges proposed decision. Unfortunately, at approximately 6:00 p.m. the U.S. Department of Labor's commuter system utilized by Mr. Brookens counsel/union representative prevented her from saving her work product on the case.

Ms. Lauderdale stated that she and the Department of Labor computer specialist worked for several hours to solve the problem to enable her to save her document and file the Exceptions to the administrative judges proposed decision.

The Federal Circuit, however, apparently recognizes that even if Mr. Brookens was granted the relief he was seeking—a procedural remand to the MSPB to enable consideration of Mr. Brookens Exceptions prepared by his counsel, and, at best, an evidentiary hearing with the decision rendered on the record based upon the preponderance of the evidence, the case has, at best., been in adjudication five (5) years.

At this point, Mr. Brookens' appeal has been pending going on now twelve (12) years. Mr. Brookens' supervisor[3], who disapproved of Mr. Brookens work only after 8 workings days on the job, vacated his position within 30 days after terminating Mr. Brookens, who at that time had accumulated twenty-five plus years of federal service, with several federal agencies[4].

In the intervening period, this appeal consolidates only four (4) of Mr. Brookens' grievances, pending at the time his termination. Since that time, 2007, twelve years, none of Mr. Brookens' ten (10) of the initial fourteen (14) related arbitrations have been scheduled.[5]

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[3] Timothy Wedding, according to the government watchdog website www.federalpay.org/employees/bureau-of-international-labor-affairs/wedding-timothy-j was awarded a "performance bonus" by the U.S. Department of Labor. His new employer, the Office of the United States Trade Representative, did not recognize Mr. Wedding with a similar performance award.

[4] Mr. Brookens, NOW 71, a Black male residing in Maryland, has a life expectancy of 75.5 years according to en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_life_expectancy .

[5] Under the Union's Collective Bargain Agreement, employee terminations and adverse actions (and class action) grievances, take

Ms. Klochner, during her tenure at the Department of Labor had just filed several workplace grievances before the Labor Department moved to terminate her employment, compared to the fourteen (14) grievances [6]filed by Mr. Brookens in his individual capacity, and not as a union representative--on behalf of his fellow employees.

The Supreme Court, in its assessment of *Christianson,* 818, recognized that it does not mean that "every borderline case must inevitably culminate in a perpetual game of jurisdictional ping-pong until this Court intervenes to resolve the underlying jurisdictional dispute, or (more likely) until one of the parties surrenders to futility." The Supreme Court then crystallizes its true jurisprudential objective—"Such a state of affairs would undermine public confidence in our judiciary."

Mr. Brookens, after five (5) years of litigation, then now entering the 12 year since Mr. Brookens' termination, was merely asking the Federal Circuit, as relief, to hear his appeal, and if he prevails on the merits, order the MSPB to grant her the one day extension to file her Exceptions to the administrative judge's proposed decision.

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precedence for arbitration, eg. the 2017 $8 million over-time settlement, affecting current and former employees—including Mr. Brookens, now at the center of other litigation over leadership, direction, and priorities of the local and national unions. These proceeding do not include any of Mr. Brookens filings under Title VII of the Civil Rights Act of 1964.

[6] Mr. Brookens' grievances do not include proceeding pursuant to Title VII of the Civil Rights Act of 1964.

The Federal Circuit, when faced itself with a transfer from a coordinate court, the Fifth Circuit, in United States Marine,Inc. at. 1365, notes its disposition of the transfer:

> If we were to disagree with that court's judgment requiring transfer, the case would seemingly be left without a forum, unless the Supreme Court intervened. In these circumstances, under the "law of the case" doctrine as explained in *Christianson*, we think we must affirm the transfer order here unless we conclude that the Fifth Circuit's judgment requiring transfer was "clearly erroneous," i.e. was not even "plausible." See 486 U.S. at 816, 108 S. Ct. 2166.

Summary Affirmance

The Issues of Mr. Brookens' case transfer were not simple and, as such, were not subject to Summary Disposition as the D.C. Circuit has ruled.

Even a cursory reading of the District Court's analysis shows the existence of a divide among the courts as to the proper application of law against the proper standard for review.

The Federal Circuit, in *United States Marine, Inc.* recognized that if it were to look only at the statutory grant of jurisdiction, and start with the statute under which USM brought its claim, transfer here would be hard to support:

> "That is so with regard to both requirements of the Section 1631 transfer: that the district court lack jurisdiction and the Claims Court have jurisdiction. United States Marine, Inc. 1365. However, the Federal Circuit's decision shifts once its examines the analysis of the transferring court. "The basis for the Fifth Circuit's conclusions can be seen if one changes the analysis in two ways. First to begin with the Tucker Act, not the FTCA." The Federal Circuits analysis continues "The second is to give prominence to the essential background principle of sovereign immunity and what it means for jurisdiction over claims against the United States."

In Mr. Brookens' case, Mr. Brookens is exhausting his administrative remedies, in hope of a successful outcome, upon its conclusion[7].

After 12 years of this proceeding, Mr. Brookens still has ten arbitrations patiently awaiting a hearing. In contrast, Ms. Kloechner[8], dropped her pending administrative proceedings and filed, in U.S. District Court, a civil action to address the core grievances she had with the U.S. Department of Labor.

The Department of Labor, in Mr. Brookens' transferred case to the U.S. District Court for the

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[7] Application of the preponderance of the evidence, judicial standard. (Federal Rules of Evidence). Compare Rule 104 (b), 28 USC 2072.

[8] Ms. Kloechner, p. 601, elected the most grievous issues for U.S. District Court. The U.S. Court of Appeals, AFGE et al. v Trump, requires the employee to waive minor contract violations until the result in the employee's termination or "serious suspension" exceeding fourteen days.

District of Columbia, demonstrated no interest in the Federal Circuit's rational for the transfer or its decision that the district court could waive the 30 day civil action filing deadline.

The Federal Circuits transfer—in addition to providing "the law of the case" also addressed the "equitable relief" requirement, in the interest of justice.

Without a MSPB decision, balancing –and assessing the evidence on record against the applicable legal standard-- and scrutiny of the (government's) rationale, for placing the initial "PIP" requirement in Mr. Brookens' supervisor's Vacancy Announcement and related issues formally raised by Mr. Brookens in the grievance process, Mr. Brookens, as did Ms. Kloechner, would have had to "abandon her pending administrative proceedings" in favor of her comprehensive civil action in U.S. District Court.

The Supreme Court, in *Christianson*, 818, recognized the high potential for litigant frustration and abandonment of the proceeding. The plaintiff's claims being "fact based" resulting in decisions, as here "providing a state of affairs]that] would undermine public confidence in our judiciary, squander [819*819] private and public resources, and commit far too much of this Court's calendar to the resolution of fact-specific jurisdictional disputes that lack national importance."

As in this case, fact based adjudication, appropriately is assigned to the expert realm of the federal, specialized administrative agencies covering international and national product dumping, anti-

trust and all facets of employment issues age, race discrimination, and work related unfair labor practices.

As the court has indicated, this case fails to embrace national issues, except to the extent millions of federal workers/state workers and counter-parts in the federal sector and affect by its wide reaching implications in the labor force.

Mr. Brookens, like with the interests of the corporate litigants in *Christianson et. al. v. Colt Industries Operating Corp*, 486 U.S. 800 (1988), at, 818, should not be without a judicial forum, due to "lack of jurisdiction" ping-pong. The Federal Circuit, in *United States Marine, Inc. v. United State, et. al.* 722 F.3d 1360, (2013) provides a perspective that should be applicable here:

> The Fifth Circuit ruling that the case transfer must be to the Claims Court is the law of the case. Applying this doctrine, we affirm the resulting transfer order. In doing so we necessarily hold that the Claims Court has jurisdiction over USM's suit with all that entails under the court's precedents about the issues thereby resolved. At this point, this case presents even more than the usual reasons for litigation [1375*1375] to proceed with expedition and the minimization of wasteful duplication.
>
> AFFIRMED.

Counsel for Mr. Brookens, in her request for a hearing on the merits of Mr. Brookens' appeal, is simply seeking to compel the MSPB to acceptance her—Exceptions to the administrative judges proposed decision—she prepared on Mr. Brookens behalf. [A-37].

The District Court, however, deemed this a "flawed" litigation strategy in lieu of a title VII Civil Rights suit in U.S. District Court.

Ms. Kloechner, coincidentally, also a U.S. Department of Labor, employee, as was Mr. Brookens, filed grievances with the Department of Labor on "garden" variety workplace issues litigable under the unions Collective Bargaining Agreement (CBA) or agency Equal Employment Opportunity (EEO) procedures.

As a consequence, the Department of Labor began procedures to terminate Ms. Kloecher's employment. As in the similar case of Mr. Brookens, increased adverse action by Labor Department management, forced Ms. Kloechner, to conserve time and litigation resources opted, to drop her pending administrative proceedings and proceed with her core complaint in U.S. District Court.

Mr. Brookens, on the other hand, opted to proceed before the informal grievance process. Since, Mr. Wedding, Mr. Brookens' new supervisor, left the U.S. Department of Labor within thirty (30) days after Mr. Brookens was terminated from his employment, the procedure may have just as well mooted itself out— in the case of Mr. Brookens, as alleged, being a truly "under-performing" Federal employee. With a

new supervisor, a new PIP may or may not have been initiated or the adverse personnel action against Mr. Brookens, continued.

These are the fact specific issues, Mr. Brookens' attorney raised in her MSPB Exceptions, the "fact" the Supreme Court (or the District Court) had determined not to be of general national importance.

The administrative judge's findings, should encompass, in any event, whether Mr. Brookens had a meaningful opportunity to improve his job performance[9], as this supervisor sought to result in more effective work of U.S. trade negotiators, including, on the U.S. Delegation, Labor Department representatives. The work of the federal trade negotiations would have improved –and by review of Mr. Brookens publications[10], would have had an impact on his assigned industrial sectors, autos,

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[9] The performance component is being litigated in American Federation of Government Employees, et. al. v. President Trump, D.C. Court of Appeals, case 18-5289, June 2019. p.18. The FLRA's familiar with labor-management relations is this more than "helpful background knowledge, it is the expertise that goes to issues of the case." AFGE, 381 F. Supp. 3d. at 408.

[10] Child Labor Report for Mozambique, 2006 Report, 2005 Findings on the Worst Forms of Child Labor, U.S. Department of Labor, Government Printing Office, 2006;

Book Review "North American Free Trade: Issues and Recommendations"; Journal of Inter-American Studies and World Affair, Volume 34, Number 2, Summer 1992; p. 189

Book Review "North America Without Borders? Integrating Canada, the United States, and Mexico;" Journal of Inter-American Studies and World Affairs, Volume 35, Number 1, 1993; p.153

"Diplomatic Protection of Foreign Economic Interests in the New International Economic Order" Journal of Inter-American Studies and World Affairs, Spring 1978; p. 37.

chemicals, satellites and developing countries for which Mr. Brookens would have been assigned, if any new supervisor's performance improvement efforts were successful.

If Mr. Brookens' performance was so inadequate, the inquiry is why were Mr. Brookens' supervisors so adamant to require him to serve as the Labor Department LEAD for "AD-CVD", Anti-Dumping, Countervailing Duty on the Federal Government, Inter-agency Coordinating Committee?

The bottom line analysis, the D.C. Circuit's – en banc—determination encompassing Mr. Brookens' decision to file an appeal with the Federal Circuit—on the MSPB acceptance of his Exceptions to the administrative judges proposed decisions is not as clear as the D.C. Circuit's Summary Affirmance appears.

The District Court, in its decision, recognizes:

> that it may well be that the D.C. Circuit will conclude at some point that King is no longer good law. But that day has not come. In the absence of clear Supreme Court precedent overruling King, this Court will "follow the case which directly controls, leaving to [the D.C. Circuit] the prerogative of overruling its own decisions." Agostini, 521 U.S. at 207. The Court thus concludes that King's jurisdictional holding remains binding on district courts in this Circuit and compels dismissal of this case

for lack of subject matter jurisdiction. (Brookens at 49)

REASONS FOR ACCEPTING THE PETITION

In context, the D.C. Circuit's summarily affirming the lack of jurisdiction by the District Court and that the 30 day filing deadline is not tolled by the transfer from the Federal Circuit, is in error.

> As the Court subsequently explained in greater detail, courts had often mislabeled statutes of limitations as "jurisdictional" and should be more "meticulous" in applying that term. Kontrick v. Ryan, 540 U.S. 443, 454-55 (2004). In fact, "most time bars are nonjurisdictional." *United States v. Kwai Fun Wong,* 135 S. Ct. 1625, 1632 (2015). But not all of them. A statute of limitations is jurisdictional if a "clear statement" to that effect can be drawn from the statute's text, context, and legislative history. Id (Brookens U.S.D.C. _____.

For these reasons, Mr. Brookens' case has a conflict between the rulings of law between the Federal Circuit and the Court of Appeals for the D.C. Circuit.

In this instance, the conflict, between the circuits is in the same case.

On this ground alone, this petition for certiorari should be accepted. This case is "of national importance" to the millions of federal workers and

their compatriots in state and municipal government (as well as affected workers in the private sector), who believe that the evidentiary standard, that tips our global scale of justice, is the applicable standard of justice, not just in America, but advocated in our work around the world.

Respectfully submitted,
This September 26, 2019

_____

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