UNITED STATES SUPREME COURT

Benoit BROOKENS,
Petitioner

v.

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

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS,

Plaintiff,

Civil Action No. 16-1390 (TJK)

v.

R. ALEXANDER ACOSTA,

Secretary, Department of Labor,

Defendant.

MEMORANDUM OPINION

Plaintiff Benoit Brookens worked as an economist for the Department of Labor ("DOL," sued in this case through Defendant, the Secretary of Labor, in his official capacity). Brookens claims that DOL unlawfully terminated him, alleging that his firing amounted to age- and racebased discrimination and retaliation for his union activity. He litigated those claims before the Merit Systems Protection Board ("MSPB"), which rejected them. He then sought to appeal the MSPB's decision to the U.S. Court of Appeals for the Federal Circuit. Because Brookens'

discrimination claims deprived the Federal Circuit of jurisdiction, it transferred the case here.

DOL has moved to dismiss, arguing that Brookens' failure to file this lawsuit within 30 days of when he received the MSPB's order deprives this Court of subject matter jurisdiction.

The Court agrees and will dismiss the case.

I. Factual and Procedural Background

Brookens is a former DOL economist with degrees in law and economics. See ECF No. 18-1 ("Fed. Cir. Tr.") at 9:21-10:4. DOL fired him in 2008. ECF No. 7 at 1; Brookens v. Dep't of Labor, 120 M.S.P.R. 678, 680 (2014). He then filed grievances for arbitration, claiming, among other things, that his firing was both the result of unlawful age and race discrimination Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 1 of 17 2 and in retaliation for his participation in protected union activity (such as a grievance he had filed in 1999). Brookens, 120 M.S.P.R. at 680-81. In 2012, an arbitrator disagreed and rejected the claims. See id. Brookens appealed the arbitrator's decision to the MSPB, which referred the case to an administrative law judge ("ALJ"). Id. at 686.

The ALJ recommended ruling against Brookens on the ground that he had not substantiated his claims. Brookens v. Dep't of

Labor, No. CB-7121-13-0012-V-1, 2014 WL 7146454 ¶¶ 3-4 (M.S.P.B. Dec. 16, 2014). After Brookens failed to file timely objections to the ALJ's recommendations, the MSPB adopted those recommendations in an order dated December 16, 2014. See id. ¶¶ 5-7. The MSPB explained that the order was its "final decision." Id. ¶ 8. The order informed Brookens that he could seek further review of his discrimination claims before the Equal Employment Opportunity Commission. Id. Alternatively, Brookens could seek review of all of his claims in federal district court if he did so in a timely manner, as the MSPB's order explained:

> You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Id. (emphasis added). Brookens does not dispute that he received a copy of the order within five days of when it was issued (that is, by December 21, 2014). See ECF No. 23 ("Pl.'s Supp.") at 1-2.

Brookens did not file suit in district court within 30 days. Instead, on February 12, 2015, he

sought to appeal the MSPB's decision to the U.S. Court of Appeals for the Federal Circuit. See ECF No. 1-2 ("Fed. Cir. Dkt.") at 3. The Federal Circuit required Brookens to file a form explaining the status of any discrimination claims by checking one of five boxes. His options Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 2 of 17 3 included: that his case had never included discrimination claims, that he had abandoned any discrimination claims previously before the MSPB, and that the MSPB's ruling was jurisdictional. Brookens, who had been represented by counsel before the MSPB but was proceeding pro se at the time, erroneously selected the first of those three options. See Form 10 Statement Concerning Discrimination, Brookens v. Labor Dep't, No. 15-3084 (Fed. Cir. Mar. 13, 2015), ECF No. 3. The Federal Circuit subsequently asked the parties to clarify whether Brookens had in fact permanently abandoned his earlier discrimination claims. See Fed. Cir. Dkt. at 5 (docket entry 57). The Federal Circuit also asked the parties to address whether the court had jurisdiction in light of Kloeckner v. Solis, 568 U.S. 41 (2012), which held that appeals from MSPB decisions in "mixed cases" (that is, cases before the MSPB that include discrimination claims) must be brought in district court, not the Federal Circuit. See id.; Fed. Cir. Dkt. at 5 (docket entry 57). Having once again retained counsel by that point, Brookens explained that he did intend to preserve his discrimination claims, but asserted that the MSPB's decision was jurisdictional

and thus appealable to the Federal Circuit. See ECF No. 16-5; ECF No. 16-6.

At oral argument, the Federal Circuit panel appeared convinced that it lacked jurisdiction, and suggested that a transfer to this Court might be more appropriate than outright dismissal. See Fed. Cir. Tr. at 4:7-12, 6:1-9. DOL argued against a transfer on the ground that Brookens had not met the 30-day deadline for bringing suit in district court. See id. at 11:5-13. The judges on the panel expressed skepticism, opining that the "30-day deadline is not jurisdictional" and therefore could be "waive[d]" by the transferee district court. Id. at 11:14-17. When pressed at oral argument, DOL agreed that the 30-day deadline was not jurisdictional and could be waived, id. at 11:18-19, but asserted that Brookens could not justify equitable tolling of the 30-day Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 3 of 17 4 deadline because he had been aware of the deadline, had been represented by counsel before the MSPB, and himself had a legal education, see id. at 12:20-13:7. The panel, however, suggested that equitable tolling was "a decision that the District Court should make, not us," and DOL agreed. Id. at 12:15-19. The panel further suggested that Brookens might have an argument in favor of equitable tolling, given that the MSPB's order did not explain that Brookens had a right to an appeal to the Federal Circuit if he gave up his discrimination claims, see id. at 13:8-17, and that Brookens may have been "confused" about where to file, see id. at 12:9-12.

On May 9, 2016, the Federal Circuit issued a per curiam order concluding that Brookens' appeal was timely, but that the court lacked subject matter jurisdiction. See ECF No. 1-1 ("Fed. Cir. Order"). The Federal Circuit transferred the case to this Court pursuant to 28 U.S.C. § 1631. See Fed. Cir. Order.

After this Court received the case, DOL moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). See ECF No. 16 ("DOL Br."). DOL now argues that the 30- day deadline for filing suit is, in fact, jurisdictional under the D.C. Circuit's holding in King v. Dole, 782 F.2d 274 (D.C. Cir. 1986) (per curiam). Therefore, DOL argues, the case must be dismissed for lack of subject matter jurisdiction because Brookens filed the Federal Circuit appeal more than 30 days after he received the MSPB's order. See DOL Br. at 3. DOL argues in the alternative that, even if King is no longer controlling precedent, the case should be dismissed as time-barred under Rule 12(b)(6). See id. at 3 n.1.

Brookens opposes on the ground that the Federal Circuit's order has already resolved DOL's motion by holding that his claims were timely and that this Court has jurisdiction. See ECF No. 18 ("Pl.'s Opp'n") at 3-8. Brookens further argues that the case should not be Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 4 of 17 5 dismissed merely because Brookens erred by filing in the wrong court, especially since he did so within the 60-day

deadline for taking appeals from the MSPB to the Federal Circuit. See id. at 9.

II. Legal Standard

Courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006). Thus, district courts must dismiss any claim over which they lack subject matter jurisdiction, regardless of when the challenge to subject matter jurisdiction arises. See Fed. R. Civ. P. 12(h)(3). When a party moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the person seeking to invoke the jurisdiction of a federal court . . . bears the burden of establishing that the court has jurisdiction." Hamidullah v. Obama, 899 F. Supp. 2d 3, 6 (D.D.C. 2012). "Although a court must accept as true all of the [plaintiff's] factual allegations when reviewing a motion to dismiss pursuant to Rule 12(b)(1), factual allegations will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." Id. (alterations, citations and internal quotation marks omitted).

A motion to dismiss under Rule 12(b)(6) "tests whether a plaintiff has properly stated a claim." BEG Invs., LLC v. Alberti, 85 F. Supp. 3d 13, 24 (D.D.C. 2015). "A court considering such a motion presumes that the complaint's factual allegations

are true and construes them liberally in the plaintiff's favor." Id. Nonetheless, the complaint must set forth enough facts to "state a claim to relief that is plausible on its face." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "If 'no reasonable person could disagree on the date' on which the cause of action accrued, the court may dismiss a claim on statute of limitations grounds." Potts v. Howard Univ. Hosp., 623 F. Supp. 2d 68, 72 (D.D.C. 2009) (quoting Smith v. Brown & Williamson Tobacco Corp., 3 F. Supp. 2d 1473, 1475 (D.D.C. 1998)). "A complaint will be dismissed under Rule 12(b)(6) as 'conclusively time-barred' if 'a trial court determines that the allegation of other facts Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 5 of 17 6 consistent with the challenged pleading could not possibly cure the deficiency.'" Momenian v. Davidson, 878 F.3d 381, 387 (D.C. Cir. 2017) (internal quotation marks omitted) (quoting Firestone v. Firestone, 76 F.3d 1205, 1209 (D.C. Cir. 1996)); see also Tran v. Citibank, N.A., 208 F. Supp. 3d 302, 305 (D.D.C. 2016). "Yet 'courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint' because 'statute of limitations issues often depend on contested questions of fact.'" Momenian, 878 F.3d at 387 (quoting Firestone, 76 F.3d at 1209).

III. Analysis

A. Subject Matter Jurisdiction

The Court agrees with DOL that this case should be dismissed for lack of subject matter jurisdiction because Brookens failed to bring suit within 30 days. Under 5 U.S.C. § 7703, district courts have jurisdiction to review MSPB decisions in "mixed cases"—that is, cases involving discrimination claims alongside other employment-related claims. See 5 U.S.C. § 7703(b)(2); Perry v. MSPB, 137 S. Ct. 1975 (2017); Kloeckner v. Solis, 568 U.S. 41 (2012). "Notwithstanding any other provision of law, any such case . . . must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action . . . ." 5 U.S.C. § 7703(b)(2). That 30-day deadline is jurisdictional and may not be extended. See King v. Dole, 782 F.2d 274, 275 (D.C. Cir. 1986) (per curiam) (affirming the district court's dismissal for lack of subject matter jurisdiction); see also Butler v. West, 164 F.3d 634, 638 (D.C. Cir. 1999) (describing King's holding as jurisdictional).

In supplemental submissions on the issue of when Brookens "received notice" of the MSPB's order for purposes of the statute, DOL and Brookens agree that he received a copy of the MSPB's order within five days of when it was issued—that is, no later than December 21, Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 6 of 17 7 2014. See

Pl.'s Supp. at 1-2; ECF No. 21 at 8.[1]1 Nonetheless, he filed this case in the Federal Circuit on February 12, 2015, more than 30 days after he received notice of the MSPB's order. Therefore, the Court lacks jurisdiction over this action, which must be dismissed.

Brookens' primary argument is that this Court is bound to accept jurisdiction because of the Federal Circuit's transfer order, and he cites Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988).[2]2 See Pl.'s Opp'n at 3. In Christianson, the Federal Circuit concluded that it lacked jurisdiction over an appeal and transferred the case to the Seventh Circuit under 28 U.S.C. § 1631. See 486 U.S. at 806. The Seventh Circuit disagreed and transferred the case back. See id. The Federal Circuit, while continuing to believe it lacked jurisdiction, nonetheless proceeded to consider the appeal. See id. at 807. The Supreme Court held that to be error, because courts may not hear cases over which they lack jurisdiction. Id. at 818. Nonetheless,

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[1]1 Brookens asks the Court to disregard any "new argument" raised by DOL in its supplemental submission unless he is given the opportunity to respond. See Pl.'s Supp. at 1. No further briefing is necessary, because the Court has considered the supplemental submissions only insofar as they agree on the fact that Brookens "received notice" by December 21, 2014.

[2]2

the Court expressed concern that "every borderline case" might "culminate in a perpetual game of jurisdictional ping-pong." Id. The Court therefore stated, in dictum, that transferee courts should apply "law-of-the-case principles" to transferor courts' decisions under § 1631. 486 U.S. at 819. That is, the transferee court should reach a different conclusion on jurisdiction only if the decision to transfer was "clearly erroneous" or not "plausible." Id.

In this case, the Federal Circuit concluded that it lacked jurisdiction and transferred the case here pursuant to 28 U.S.C. § 1631. See Fed. Cir. Order. The panel's statements at oral. See, e.g., Ukiah Adventist Hosp. v. FTC, 981 F.2d 543, 546 (D.C. Cir. 1992). Those cases are clearly inapposite because DOL is not seeking appellate review of the Federal Circuit's order. Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 7 of 17 8 argument suggested that it believed this Court to have jurisdiction. See Fed. Cir. Tr. at 11:14-17. Indeed, the panel must have concluded that to be the case, because the statute only authorizes transfer to a "court in which the action or appeal could have been brought at the time it was filed or noticed." 28 U.S.C. § 1631; see Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1347 (Fed. Cir. 2008) ("The plain language of the statute requires that the transferee court have jurisdiction over the claim.").

King, however, compels the Court to conclude that the action could not have been brought here at

the time it was filed, because Brookens' failure to file on time deprives this Court of jurisdiction. See Butler, 164 F.3d at 638; King, 782 F.2d at 275. There is no indication in the record that the King case was ever brought to the Federal Circuit's attention. Its decision was thus clearly erroneous insofar as it found jurisdiction here, because the court overlooked controlling authority. See In re Zermeno-Gomez, 868 F.3d 1048, 1053 (9th Cir. 2017) (holding it is "clear error for a district court to disregard a published opinion" of its court of appeals). The Court also notes that this case will not "culminate in a perpetual game of jurisdictional pingpong," Christianson, 486 U.S. at 818, because the Court agrees with the Federal Circuit's conclusion that it lacked subject matter jurisdiction and will dismiss the case instead of ordering a re-transfer back to the Federal Circuit. And it does not matter that DOL appeared to concede at oral argument that the relevant statute of limitations is nonjurisdictional, see Fed. Cir. Tr. at 11:18-19, because the Court must ensure it has subject matter jurisdiction independent of the parties' wishes.

As DOL acknowledges, legal developments since King—in particular, a number of Supreme Court decisions beginning with Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990)—have drawn the viability of King's holding into question. See DOL Br. at 3 n.1; Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 8 of 17 9 Montoya v. Chao, 296 F.3d 952, 955-57 (10th Cir. 2002). See generally

Fedora v. MSPB, 848 F.3d 1013, 1017-26 (Fed. Cir. 2017) (Plager, J., dissenting) (discussing that line of cases). In Irwin, the Supreme Court held that 42 U.S.C. § 2000e-16(c), which at that time required that an employment discrimination suit against the government be brought within 30 days of receiving notice of final agency action, is not a jurisdictional bar depriving district courts of subject matter jurisdiction, but is instead subject to equitable tolling. 498 U.S. at 91-92, 94-95. Subsequent cases cast further doubt on the propriety of treating statutes of limitations as jurisdictional. See, e.g., Arbaugh v. Y&H Corp., 546 U.S. 500, 510 (2006).

Relying on Irwin, two judges in this District have concluded that King is no longer controlling law. See Williams v. Court Servs. & Offender Supervision Agency for D.C., 772 F. Supp. 2d 186, 188-89 (D.D.C. 2011), vacated on reconsideration, 840 F. Supp. 2d 192 (D.D.C. 2012); Becton v. Pena, 946 F. Supp. 84, 86-87 (D.D.C. 1996). The Court must part ways with those decisions, however, because "district judges, like panels of [the D.C. Circuit], are obligated to follow controlling circuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule[s] it." United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Controlling precedent may be "effectively overruled," but only if a later Supreme Court decision "eviscerates" its reasoning. Perry v. MSPB, 829 F.3d 760, 764 (D.C. Cir. 2016), rev'd on other grounds, 137 S. Ct. 1975 (2017). And "[l]ower courts . . . , out of

respect for the great doctrine of stare decisis, are ordinarily reluctant to conclude that a higher court precedent has been overruled by implication." Levine v. Heffernan, 864 F.2d 457, 461 (7th Cir. 1988); see also Agostini v. Felton, 521 U.S. 203, 207 (1997) ("[L]ower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). [Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 9 of 17 10] This Court cannot conclude that the Supreme Court has so thoroughly "eviscerated" King as to effectively overrule it.

First, a careful comparison of King's reasoning with that of Irwin and subsequent Supreme Court decisions in this area does not compel that conclusion. Irwin announced a general rule that there is a "rebuttable presumption" that statutes of limitations in suits against the United States are not jurisdictional, but rather are subject to equitable tolling. 498 U.S. at 95- 96. 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.

The opinion in King at least arguably undertakes such an analysis. King started with the text, grounding its conclusion in "the clear and emphatic language of the statutory provision at issue." 782 F.2d at 276 (emphasis added). "By providing that '[n]otwithstanding any other provision of law, any such case filed . . . must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action,' Congress left no doubt as to the mandatory nature of the time limit." Id. (alterations in original) (citation omitted). That language is not at all similar to the language construed by the Court in Irwin. See 498 U.S. at 94. Rather, it resembles language that another circuit court has found to be jurisdictional, Irwin and its progeny notwithstanding. See Aloe Vera of Am., Inc. v. United States, 580 F.3d 867, 871-72 (9th Cir. 2009) (holding that the phrase "notwithstanding any other provision of law" showed that "Congress intended statute of limitations to be absolute"). As a result, the King court's Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 10 of 17 11 reasoning is hardly eviscerated by those cases. Indeed, in a case post-dating Irwin, the D.C. Circuit cited King for the proposition that § 7703(b)(2) is a jurisdictional time bar. See Butler, 164 F.3d at 638.

King also looked to the context of § 7703(b)(2), and specifically its relationship to a neighboring subsection, § 7703(b)(1). That subsection, which governs appeals from the MSPB to the Federal Circuit, is similarly worded to § 7703(b)(2). In King,

the D.C. Circuit noted that it had already determined the timeliness provision of § 7703(b)(1) to be jurisdictional. See 782 F.2d at 275-76. Thus, it concluded, that construction should apply equally to § 7703(b)(2) according to traditional canons of statutory interpretation. Id. Courts have not abandoned that reading of § 7703(b)(1) since King. To the contrary, the Federal Circuit recently reaffirmed its pre-Irwin precedent holding that the time limit in § 7703(b)(1) is jurisdictional. See Fedora, 848 F.3d at 1014-16. And another court in this District has cited King for that very proposition. See Abou-Hussein v. Mabus, 953 F. Supp. 2d 251, 262 (D.D.C. 2013).

Second, given the highly contextual application of the Supreme Court's "clear statement" requirement, courts have been reluctant to conclude that the Irwin line of cases overturned settled law interpreting whether other statutes are jurisdictional. As another judge in this District has observed, "Irwin does not, as a general matter, overrule prior cases in which the courts have declared a specific statute to be jurisdictional." Coal River Energy, LLC v. U.S. Dep't of the Interior, 931 F. Supp. 2d 64, 68 n.3 (D.D.C. 2013), aff'd, 751 F.3d 659 (D.C. Cir. 2014). For example, Irwin and its progeny did not disturb prior Supreme Court precedent holding that the statute of limitations for actions in the Court of Federal Claims is jurisdictional. See John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136-39 (2008). Nor did

they "call[] into Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 11 of 17 12 question [the Supreme Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." Bowles v. Russell, 551 U.S. 205, 214 (2007).

Third, Irwin left room for a circuit split to develop regarding the interpretation of § 7703(b)(2), providing further evidence that the Supreme Court did not "eviscerate" King and thus effectively overrule it. To be sure, the majority of circuit courts to consider the issue after Irwin have held that the statute of limitations in § 7703(b)(2) is nonjurisdictional. See Oja v. Dep't of Army, 405 F.3d 1349, 1357-58 (Fed. Cir. 2005) (collecting cases). Nonetheless, after Irwin was decided, the Sixth Circuit reaffirmed an earlier case, Hilliard v. USPS, 814 F.2d 325 (6th Cir. 1987), that held the contrary. Dean v. Veteran's Admin. Reg'l Office, 943 F.2d 667, 669-70 (6th Cir. 1991), vacated on other grounds, 503 U.S. 902 (1992); see also Felder v. Runyon, No. 00-1011, 2000 WL 1478145, at *2 (6th Cir. Sept. 26, 2000) (citing Dean favorably). While conceding that it might reach a different outcome if "writing on a clean slate," the Sixth Circuit concluded that "Hilliard is the law in this circuit and it was not overruled by the Supreme Court in Irwin." Dean, 943 F.2d at 670. So too here.

Finally, the Supreme Court's only discussion of the specific time bar at issue, from its unanimous

2012 opinion in Kloeckner, is ambiguous at best. At first glance, the Kloeckner opinion supports a conclusion that King is no longer good law: the Court described the second sentence of § 7703(b)(2) (which contains the time bar) as "nothing more than a filing deadline" and drew a sharp line between it and the first, jurisdictional sentence (which gives district courts authority to hear "mixed cases" arising from MSPB proceedings). 568 U.S. at 52. But the same paragraph of the Court's opinion, when parsed with care, also points in the opposite direction:

> [The second sentence of § 7703(b)(2)] sets the clock running for when a case that belongs in district court must be filed there. What it does not do is to further define which timely-brought cases belong in district court instead of in the Federal Circuit. Describing Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 12 of 17 13 those cases [i.e., the "timely-brought cases" that "belong in district court"] is the first sentence's role.

Id. at 53 (emphases in closing sentence added). This passage arguably reinforces King insofar as it suggests that the jurisdictional component of § 7703(b)(2), by describing which "timely brought cases belong in district court," incorporates the time bar in the second sentence. 568 U.S. at 53 (emphasis added).

At the end of the day, trying to distill a clear lesson from Kloeckner about the jurisdictional

nature of this time bar is difficult, at best. Kloeckner does not speak directly to the issue at hand. The Court's discussion of § 7703(b)(2) responded to an argument that the time bar somehow extended the jurisdiction of the Federal Circuit. See 568 U.S. at 50-54. The Court did not expressly consider whether the time bar limited the jurisdiction of the district courts, and it would be surprising if the Court intended to reach that issue, given that it did not cite any of the cases in the Irwin line of authority. See 568 U.S. at 52-53.

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.

B. Equitable Tolling

Because of the uncertainty over King's jurisdictional holding, the Court will address DOL's alternative argument that the case should be dismissed as time-barred under Rule 12(b)(6). That issue was not decided by the Federal Circuit's order, and therefore is not part of the law of the case. See Fed. Cir. Order. Indeed, at oral argument, the panel

suggested that Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 13 of 17 14 whether to apply the doctrine of equitable tolling was "a decision that the District Court should make, not us." Fed. Cir. Tr. at 12:16-17. The Court would dismiss the case as time-barred even if it had jurisdiction because Brookens has not alleged any facts that would warrant tolling the statute of limitations.

"[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Mizell v. SunTrust Bank, 26 F. Supp. 3d 80, 87 (D.D.C. 2014) (quoting Pace v. DeGuglielmo, 544 U.S. 408, 418 (2005)). The D.C. Circuit has emphasized that equitable tolling is justified "only in extraordinary and carefully circumscribed [in]stances." Norman v. United States, 467 F.3d 773, 776 (D.C. Cir. 2006) (quoting Smith-Haynie v. District of Columbia, 155 F.3d 575, 580 (D.C. Cir. 1998)). For example, such tolling is appropriate where "despite all due diligence [a plaintiff] is unable to obtain vital information bearing on the existence of her claim." Id. (alteration in original) (quoting Smith-Haynie, 155 F.3d at 579). "The circumstance that stood in a litigant's way cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation. When a deadline is missed as a result of a 'garden variety claim of excusable neglect' or a 'simple miscalculation,' equitable tolling is not justified." Menominee Indian Tribe of Wis. v. United

States, 764 F.3d 51, 58 (D.C. Cir. 2014) (quoting Holland v. Florida, 560 U.S. 631, 651 (2010)), aff'd, 136 S. Ct. 750 (2016). Thus, equitable tolling is available "only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control." Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750, 756 (2016) (emphasis in original).

Here, Brookens' only argument for equitable tolling is that he erroneously believed that the Federal Circuit was the right forum for review of the MSPB's order and filed within the time Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 14 of 17 15 limits prescribed for an appeal to that forum. See Pl.'s Opp'n at 9. The sources of his confusion, he suggests, are that the MSPB's order "did not instruct Plaintiff as to the limitations when filing in the Federal Circuit Court of Appeals" and that the "name of the court, standing alone, is reason enough for a non-practitioner in the federal sector"—much less a litigant proceeding pro se, as Brookens was at the time—"to believe that it is the proper forum within which to plead an appeal." Id.

Such misapprehension of the law is facially insufficient to toll the statute of limitations. See Menominee Indian Tribe, 764 F.3d at 58; Miller v. Downtown Bid Servs. Corp., No. 17-cv389 (RBW), 2017 WL 5564550, at *4 (D.D.C. Nov. 17, 2017) (applying the same rule to a pro se litigant). Moreover, the law in 2014 was hardly as confusing

as Brookens implies. While the rules for MSPB proceedings may be complex and at times confusing, "even within the most intricate and complex systems, some things are plain." Kloeckner, 568 U.S. at 49. In 2012, Kloeckner clearly held that federal employees appealing MSPB decisions in "mixed cases" that include discrimination claims must file in district court, not the Federal Circuit. See id. Therefore, when he received the MSPB's order in December 2014, Brookens faced a clear choice: he could abandon his discrimination claims and appeal to the Federal Circuit within 60 days, or he could keep his discrimination claims and bring suit in federal district court within 30 days. He instead chose the path foreclosed by Kloeckner, bringing suit in the Federal Circuit while attempting to preserve his discrimination claims.

Admittedly, jurisdiction over "mixed cases" did not remain clear in every respect after Kloeckner. Both the D.C. and Federal Circuits held that, despite Kloeckner, the Federal Circuit continued to have jurisdiction over "mixed cases" if the MSPB's ruling was itself jurisdictional. See Perry v. MSPB, 829 F.3d 760, 762 (D.C. Cir. 2016), rev'd, 137 S. Ct. 1975 (2017); Conforto Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 15 of 17 16 v. MSPB, 713 F.3d 1111, 1117 (Fed. Cir. 2013), abrogated by Perry v. MSPB, 137 S. Ct. 1975 (2017). (In 2017, the Supreme Court disagreed. See Perry, 137 S. Ct. 1975.) But that nuance has no relevance to this case. The MSPB's order was clearly not decided on

jurisdictional grounds; rather, because Brookens had failed to file timely objections, the MSPB adopted the ALJ's ruling, which had rejected Brookens' claims on the merits. See Brookens, 2014 WL 7146454 ¶ 7.

Any confusion about where to file this case was thus subjective and personal to Brookens, whose only real excuse is that he was proceeding pro se. Brookens' "inability to retain an attorney is not an extraordinary circumstance" sufficient to toll the statute of limitations. Miller, 2017 WL 5564550, at *5. But even if it could be, it would not be here. Brookens has a law degree. See Fed. Cir. Tr. at 9:21-10:2. He is also a frequent litigator who by 2014 had filed several pro se lawsuits and appeals in this Circuit. See, e.g., Brookens v. Solis, 616 F. Supp. 2d 81 (D.D.C.), reconsideration denied, 635 F. Supp. 2d 1 (D.D.C. 2009), aff'd, No. 09-5249, 2009 WL 5125192 (D.C. Cir. Dec. 9, 2009), reh'g en banc denied, No. 09-5249 (D.C. Cir. Mar. 31, 2010), cert. denied, 562 U.S. 890 (2010). Most importantly, Brookens should have known to file in district court within 30 days. That is because the MSPB told him so in unambiguous language, along with a warning to "be very careful to file on time." Brookens, 2014 WL 7146454. When Brookens disregarded that clear directive and filed in the Federal Circuit, he did so at his own peril. Moreover, if Brookens was confused about where to file suit, he could have filed in the Federal Circuit within 30 days, thereby safeguarding the possibility of a transfer to this Court by ensuring that the case would be timely regardless of which statute of

limitations was ultimately determined to apply. Inexplicably, he waited. Case 1:16-cv-01390-TJK Document 25 Filed 03/02/18 Page 16 of 17 17

Finally, even after filing in the wrong court at the wrong time, Brookens had one last chance to save at least part of his case. After discovering the jurisdictional problem posed by Brookens' appeal, the Federal Circuit asked him whether he had abandoned his discrimination claims. Fed. Cir. Dkt. at 5 (docket entry 57). Had Brookens said "yes," he could have preserved the Federal Circuit's jurisdiction over the rest of his case. Instead, acting through counsel (which he had retained by that point), he continued to press his discrimination claims and advanced the meritless theory that the MSPB's ruling was jurisdictional. See ECF No. 16-5. Brookens thereby argued his way out of federal court entirely.

In sum, Brookens' failure to file on time and in the right court was entirely the result of his "misunderstanding of the law" and "tactical mistakes in litigation." Menominee Indian Tribe, 764 F.3d at 58. Therefore, even if the statute of limitations in 5 U.S.C. § 7703(b)(2) were subject to equitable tolling, the Court would find no basis for such tolling and dismiss the case as timebarred under Rule 12(b)(6).

IV. Conclusion

For the reasons set forth above, the Court GRANTS DOL's motion and DISMISSES

the action for lack of subject matter jurisdiction, in a separate order.

/s/ Timothy J. Kelly TIMOTHY J. KELLY

United States District Judge

Date: March 2, 2018

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 18-5129 September Term, 2018
1:16-cv-01390-T JK

Filed On: September 19, 2018

Benoit Otis Brookens, II,)
Appellant
v.)
Department of Labor,
Appellee)

BEFORE: Henderson, Millett, and Wilkins, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted.

The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellant alleged that he was removed from his position based on race and age discrimination and in retaliation for protected union activity. After an administrative judge with the Merit Systems Protection Board ("MSPB") concluded that appellant had failed to prove discrimination or retaliation, the I\IISPB adopted the administrative

judge's recommended decision in a final order, and informed appellant that any civil action must be filed in district court within 30 days of receiving the order. See 5 U.S.C. § 7703(b)(2); Kloeckner v. Solis, 568 U.S. 41,49-50 (2012). Appellant conceded that he did not file his civil suit within 30 clays of receiving the MSPB's final order. Assuming that the 30-day time limit is subject to equitable tolling, appellant failed to offer a valid basis to toll that deadline. See !2yson v..Q~, 710 F.3d 415, 42'1 (D.C. Cir. 2013) (The court will "toll a filing deadline 'only in extraordinary and carefully circumscribed instances."').

Pursuant to D.C. Circuit Rule 36, this disposition will not be published,

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearinq or petition for rehearing en banc. See Fed. R. App, P. 41(b); D.C. Cir. Rule 41.

Per Curiam

USCA Case #18-5129 Document # 1773848 Filed 02/19/2019 Page 1 of 1

United States Court of Appeals
For the District of Columbia

No. 18-5129 September Term 2018

1:16-CV-01390-TJK
Filed on: Feb. 19, 2019

Benoit Otis Brookens, II
Appellant

v.

Department of Labor
Appellee

BEFORE: Garland, Chief Judge; and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, and Katsas, Circuit Judges

ORDER

Upon consideration of the petition for rehearing in banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer,
Clerk

BY: /s/
Ken Meadows
Deputy Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BENOIT BROOKENS, DOCKET NUMBERS
Appellant CB-7121-13-0012-V-1

v.

DEPARTMENT OF LABOR DATE: December 16, 2014
Agency

THIS FINAL ORDER IS NONPRECEDENTIAL

Eleanor J. Lauderdale, Esquire, Washington, DC for the Appellant

Rolando Valdez, Esquire, Washington, DC for the Agency

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

Pursuant to the Board's instructions, the administrative judge recommendation on the appellant's allegations of discrimination based on age and race and the appellant's allegations of retaliation for engaging in union activity. For the reasons set

forth below, we adopt the administrative judge's findings.

[p. A-3] After he issued the Recommended Decision, the administrative judge informed the parties that the Recommendation would be forwarded back to the Board and that the parties could file exceptions to the Recommendations with the Clerk of the Board within 20 days of the issuance of the Recommendations, or by September 25, 2014. Brookens v. Department of Labor, MSPB Docket No. CB-7121-13-0012-H-1, Tab 13. On September 26, 2014, the appellant's representative requested an extension of time (EOT) to file exceptions to the administrative judge's Recommended Decision. Brookens v. Department of Labor, MSPB Docket CB-7121713-0012-V-1, Tab. 32. The Board granted the request, giving the appellant until October 20, 2104, to file the exceptions. Id. Tab 33. The Board denied the request for an additional EOT because it was filed after the due date for the filing of exceptions. Id. The appellant's representative has filed three responses to the denial, claiming that she lost the exceptions that she had drawn up because of computer problems. Id. Tabs. 36-38.

The Board's regulations provide that requests for an EOT must be filed on or before the date that the pleading is due and that the motion must be accompanied by an affidavit or sworn statement. See 5 C.F.R. Art. 1201.114(f). Here, as noted, the appellant's EOT request was filed after the date that the pleading was due and was not accompanied by an affidavit or a sworn statement. Further, even if the appellant's representative's alleged computer problems interfered with her preparation of

exceptions, there is no assertion that they interfered with her ability to timely file an EOT request. Accordingly, we find that the appellant's representative's objections to the denial of her EOT request are unavailing.

Absent exceptions to the administrative judge's Recommended Decision, and based upon our review of the decisions, we adopt the Recommendation. The appellant failed to prove his affirmative defense of discrimination on the basis of age or race and failed to establish that the agency's action constituted retaliation for his union activity in violation of 5 U.S.C. art. 2302(b)(9). As a result, we deny the appellant's request for review of the arbitrator's decision affirming the agency's removal action. This is the final decisions of the Merit Systems Protection Board on the appellant's request for arbitration review. Title 5 of the Code of Federal Regulations, section 1201.113(c) 5 C.F.R. Art. 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FUTHER REVIEW RIGHTS

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). See Title 5 of the United States Code, section 7702(b)(5. U.S.C. Art. 7702(b)(1). If you submit your request by regular U.S. mail, the address to the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G

Washington, DC 20507

You should send your request to the EEOC no later than 30 calendar days after receipt of this order. If you have a representative is this case, and your representative receives this order before you do, then you must file with the EEOC no later than 30 days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination and your other claims in an appropriate United States district court. See 5 USC Art. 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file

with the district court no later than 30 days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or disabling condition, you may be entitled to representation by a court –appointed lawyer and to waive any requirement of prepayment of fees, costs, and other security. See 42 U.S.S Art. 2000e5(f) and 29 U.S.C. Art. 794a.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, DC

Case: 15-3084 Document: 11 Page: 46
Filed:06/04/2015

Brookens, Benoit-ILAB

From: Romero, Carlos-ILAB /Union Exhibit /22 /
Date: Tuesday, May 1, 2007 12:31 PM
To: Brookens, Benoit-ILAB
Subject: RE: Assignments

Benoit,

As discussed in our meeting today, your assignments are as follows:

Primary; GSP Products

Back-up; AD-CVD

Please let me know if you like to be considered for Primary responsibilities AD-CVD. Mercosur has enough coverage with other division staff, so you are no longer assignged to this topic. Developing countries/small economies is not active, so please let me know if there are any work assignments (and relevant to ILAB/DOL goals) on this topic and I will assess whether it should be put back on your list.

Thank you,
Carlos

Carlos H. Romero
Deputy Director, Office of Trade and Labor Affairs
Bureau of International Labor Affairs

U.S. Department of Labor
(202)693-4886, (202)693-4851 fax
Romero.carlos@dol.gov

From: Brookens, Benoit-ILAB
Sent: Friday, April 20, 2006 5:38 p.m.
To: Romero, Carlos-ILAB
Cc: Pettis, Maureen-ILAB; Hahn, Sueryun-ILAB; Valdes, Ana-ILAB; Zollner, Anne-ILAB; von Reyn, Jacob-ILAB

Subject: Assignments

My portfolio is attached.

<< File: Per-assignments-4-20-07.doc>>

Case 15-3084 Document: 16-2 Page: 19 Filed: 07/31/2015

American Federation of Government Employees
Local 12, AFL-CIO

October 20, 2014

U.s. Merit Systems Protection Board
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, DC 20419

Re: Benoit Brookens v. U.S. Department of Labor
Docket No. CB-7121-13-0012-V-1

Dear Clerk of the Board:

As I was preparing to file my Exceptions to the Administrative Judge's Recommendation in the above referenced case I sought assistance from our IT department because I was having some problems saving the document in Microsoft Word. The 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 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 sest that cannot occur until tomorros. Please grant me until them 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.

Sincerely,

_____/S/_____
Eleanor J. Lauderdale, Esq.
Esxecutive Vice President

cc: Roland Valdez

200 Constitution Avenue, NW N-1503, Washington, DC 20210, 202/693-6430, 693-6431 (fax)

United States Court of Appeals for the District of Columbia

No. 18-5129 September Term, 2018
1:16-cv-01390-T JK
Filed On: September 19, 2018

Benoit Otis Brookens, II,
Appellant
v.
Department of Labor,
Appellee

BEFORE: Henderson, Millett, and Wilkins, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987)

(per curiam).

Appellant alleged that he was removed from his position based on race and age discrimination and in retaliation for protected union activity. After an administrative judge with the Merit Systems Protection Board ("MSPB") concluded that appellant had failed to prove discrimination or retaliation, the MSPB adopted the administrative judge's

recommended decision in a final order, and informed appellant that any civil action must be filed in district court within 30 days of receiving the order. See 5 U.S.C. § 7703(b)(2); *Kloeckner v. Solis*, 568 U.S. 41,49-50 (2012). Appellant conceded that he did not file his civil suit within 30 clays of receiving the MSPB's final order. Assuming that the 30-day time limit is subject to equitable tolling, appellant failed to offer a valid basis to toll that deadline. See !2yson v..Q~, 710 F.3d 415, 42'1 (D.C. Cir. 2013) (The court will "toll a filing deadline 'only in extraordinary and carefully circumscribed instances.'").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published,

The Clerk

P-R-O-C-E-E-D-I-N-G-S

THE COURT: No. 15-15-68, Brookens against Department of Labor.
Ms. Jenkins?
MS. JENKINS: Yes. Good morning. This is probably going to be the simplest case you're going to have today because there's nothing technical in it. This is about a brief that we tried to file with the MSPB that was rejected by the MSPB as being late.
THE COURT: Ms. Jenkins, can you start where we are obliged to start, and that is this

MS. JENKINS: Oh, exactly. I believe
it should be here because I'm looking at your
decision in Conforto that came after Kloeckner.
Now if you don't agree that it was a jurisdictional
dismissal, which we believe it was a jurisdictional
dismissal --
THE COURT: How was it a jurisdictional
dismissal? Because it was that you filed late
objections to the, I guess the EEO
recommendation,
and they said, "We're not going to hear it. We're

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 252

Docket No. CB-7121-08-0022-V-1
Jacquen Lee,
Appellant,
v.
Department of Labor,
Agency.

December 23, 2008

Eleanor J. Lauderdale, Esquire, Washington, D.C., for the appellant.
Jamila B. Minnicks, Esquire, Washington, D.C., for the agency.

BEFORE
Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this request for review. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)). NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS You have the right to request further review of this final decision. Discrimination Claims: Administrative Review You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your

discrimination claims. See Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address: Equal Employment Opportunity Commission Office of Federal Operations P.O. Box 19848 Washington, DC 20036 You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. Discrimination and Other Claims: Judicial Action If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any

requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a. 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 court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir 1991). If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other

related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. FOR THE BOARD:

_____

William D. Spencer

Clerk of the Board Washington, D.C.

related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. FOR THE BOARD:

_____

William D. Spencer

Clerk of the Board Washington, D.C.

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

BENOIT BROOKENS,
Petitioner
v.
DEPARTMENT OF LABOR,
Respondent

2015-3084

Petition for review of the Merit Systems Protection Board in No. CB-7121-13-0012-V-1.

Before TARANTO, SCHALL, and HUGHES, *Circuit Judges.*
PER CURIAM.

O R D E R

The Merit Systems Protection Board exercised jurisdiction over Mr. Brookens's appeal and adopted the administrative judge's recommendation that he failed to prove that his removal from an economist position at the Department of Labor was in retaliation for his engaging in union activity or was motivated by age or race discrimination.

Mr. Brookens timely appealed to this court, but did not abandon his age or race discrimination claims.

Under the statutory provisions that govern judicial review

BROOKENS 2 v. LABOR
of Board decisions, federal district courts, not this court,
have jurisdiction over "[c]ases of discrimination" under 5
U.S.C. §§ 7702, 7703(b). *See Kloeckner v. Solis*, 133 S. Ct.
596, 607 (2012). Therefore, we exercise our authority under 28 U.S.C. § 1631 and transfer the petition to the
United States District Court for the District of Columbia.
Accordingly,

IT IS ORDERED THAT:
The petition is transferred to the United States District
Court for the District of Columbia pursuant to 28 U.S.C. § 1631.

FOR THE COURT
May 9, 2016 /s/ Peter R. Marksteiner
Date Peter R. Marksteiner
Clerk of Court

BEFORE THE MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, D.C.

Benoit Brookens, Appellant	)	
	)	
v.		Docket No. CB-7121-13-0012-H-1
	)	
U.S. Department of Labor, Appellee	)	

APPELLANT'S EXCEPTIONS TO THE RECOMMENDATION OF THE ADMINISTRATIVE JUDGE
INTRODUCTION

Pursuant to the Board's order of April 11, 2014, Appellant is availing himself of the opportunity to challenge the recommendation issued by Judge David A. Thayer on September 5, 2014. As demonstrated herein, Judge Thayer's findings and ultimate recommendation *(cited herein as* "Rec. at p._") are not supported by the record evidence. The judge appears to present an overview of his general impression of the allegations made by either side, but he does not rely upon an independent assessment of the record evidence. This is demonstrated by the fact that the only references to the record noted by Judge Thayer are those noted in the briefs of either Appellant or Appellee.

Additionally, it is noted that although the Board remanded this case ordering that the administrative

judge "afford the parties the opportunity to submit evidence and argument
under the proper standards ... ," the administrative law judge declined to allow another hearing or the introduction of evidence. [3]This clearly deprived Appellant of his right to
establish the affirmative defenses ignored by the arbitrator.

Despite not hearing from any witness on the subject of the affirmative defenses, and having no opportunity to assess the witness's demeanor, Judge Thayer made credibility determinations as to the testimony of the proposing and deciding officials offered before the arbitrator. Further, he interpreted the testimony of Appellant's chief witness, Maureen Pettis, to make it appear as though her testimony supported the position of the Agency, when it clearly did not. Judge Thayer's recommendation should be

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[3]Following a May 1,2014 teleconference between Judge Thayer and the parties, Appellant's counsel wrote
to Judge Thayer inquiring as to why there would be no additional hearing in line with the case, *(Sadiq* v. *Department of Veterans Affairs,* 119 MSPR 450 (2013)), cited by the Board in its decision remanding the case. Judge Thayer did not respond to this specific inquiry but on May 2nd issued an order spelling out the legal framework of the appeal, which would be by the submission of briefs. On June 12th Appellant's counsel again wrote to Judge Thayer inquiring as to whether documentary evidence could be augmented, and if so, how it would functionally be done. Again, Judge Thayer offered no response to the inquiry.

rejected because it is contrary to the Board's recent finding in *Ellis* v. *Us. Postal Service, 2014* MSPB 73 (Sept. 9,2014), which the Board stated the following:

> The Board must give deference to an administrative judge's *credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing,* and can overturn such determinations only when it has "sufficiently sound" reasons for doing so. (Citing *Haebe* v. *Department of Justice,* 288 F.3d 1288, 1301 (Fed. Cir. 2002»; *(Emphasis added.*[4]

As noted, in the instant case, Judge Thayer would not conduct an evidentiary hearing; he did not observe the demeanor of the witnesses. Therefore, the Board cannot give deference to his credibility determinations. Further, inasmuch as his recommendation relies heavily upon his findings that the proposing and deciding officials were credible witnesses, and given that the judge did not analyze the documentary evidence of record, his recommendation must be rejected by the Board.

---

[4] *See Chavez* v. *Small Business Administration,* 121 MSPR 168, ~12 (2014) (Wherein the Board rejected the administrative judge's recommendation because he failed to "offer any demeanor-based assessments in support of his conclusion that the deciding official considered the appellant's length of service."); *Conner* v. *Office of Personnel Management,* 120 MSPR 670,~13 (2014)(Where appellant declined a hearing administrative law judge could not be assailed for having not made credibility determinations.)

I. THE ADMINISTRATIVE JUDGE'S RECOMMENDATION SHOULD BE REJECTED BECAUSE THE JUDGE ERRED IN STATING THAT THE BOARD FOUND THE REMOVAL PROPER.

In addressing appellant's Petition for Review, the Board found that –

> the arbitrator's findings that the appellant's supervisor observed the appellant's deficiencies and gave him an opportunity to improve under valid performance standards ... are entitled to deference. There is no showing that these findings constituted errors of law.

Bd. Dec. at p. 7. Inasmuch as the Board found that the arbitrator erred in failing to address appellant's affirmative defenses, it refrained from making a final determination as to the legitimacy or illegitimacy of Mr. Brookens's removal. Instead, the Board remanded the case for further adjudication of allegations in the grievance that the arbitrator had failed to consider. Thus, the Board's April 11, 2014, Opinion and Order was not definitive as to the removal. Despite this, on remand, Judge Thayer stated that he accepted "the Board's ruling finding no error in the arbitrator's decision that the removal was proper and based on inadequate performance under Chapter 43." Rec. at p. 2. This conclusion, which is plainly wrong, served as the basis for Judge

Thayer's finding.[5] Inasmuch as the Board made no ruling as to the propriety of the removal, Judge Thayer's entire decision is tainted by his mistaken premise.[6]Thus, his recommendation should be rejected.

II. THE ADMINISTRATIVE JUDGE'S RECOMMENDATION SHOULD BE REJECTED BECAUSE IT IGNORES THE REQUIREMENTS OF 5 C.F.R. §430.207 AS WELL AS CBA ARTICLE 14, SECTION 6.

For the purpose of preserving the issue, we once again challenge the notion that management was in compliance with the CBA when it offered appellant a mid-year

---

[5] Judge Thayer stated specifically that he used as his "baseline" the affirmed finding that "the agency has shown a legitimate, nondiscriminatory reason for the personnel action at issue." Rec. at p. 3. Thus, Judge Thayer's reference point for consideration of the affirmative defenses was that the affirmative defenses were meritless. He then worked backwards to fill in the spaces above his ultimate conclusion.

[6] Furthermore, this illustrates how unreasoned Judge Thayer's recommendation is. Had the Board concluded that the removal was legally justifiable, it would not have remanded the case for further adjudication. The fact that the adjudicator would even think tills to be a fact in this case indicates either prejudging of the case or an inability to properly analyze it.

review one day after placing him on a PIP. Although the CBA was entered into evidence, and its applicable CBA provision has been cited in both the Post-Hearing Brief as well as in the Petition for Review to the Board, it appears that no adjudicator has read the provision. The parties' CBA states specifically that-

> The objectives of the Performance Management System are met through regular feedback. As part of this feedback, a progress review *must* be held at least once *during* the appraisal period no later than 120 days before the end of the rating period.

CBA Art. 14, Sec. 6 *(Emphases added).* It is undisputed that appellant was not given a mid-year review *during* the appraisal period. The arbitrator failed to address this matter, but the Board made a ruling based on conjecture as to what the arbitrator meant, given his ruling on another issue. The Board noted that the arbitrator's finding that "appellant's supervisor complied with the provisions of the CBA when he placed the appellant on a PIP .... " was *"tantamount* to a finding that the agency did not violate the CBA by giving the appellant a mid-year review 1 day after placing him on a PIP." Board's Opinion and Order at 8. *(Emphases added).* Here, the Board side-stepped a critical aspect of this case, substantive due process, and decided the matter based on what it assumed the arbitrator's ruling to have been. Thus, the Board engaged in impermissible fact finding, based on assumption. This issue is far too important to be decided on conjecture. The fact is that Arbitrator Javits declined

to address management's failure to provide appellant the mid-year review mandated by the CBA.

The mid-year review spelled out in the CBA and the informal corrective processes articulated under 5 C.F.R. Part 430 are not discretionary. They are mandatory. Pursuant .to 5 C.F.R. §430.207, when a supervisor deems an employee's performance to be marginal he/she is obliged to provide "assistance" and "progress reviews *during* each appraisal period." This was not done with respect to Mr. Brookes. It is undisputed that he was never given a mid-year appraisal, but was instead presented with a PIP at the very time the mid-year evaluation should have taken place. Management violated 5 C.F.R.§430.207 as well as the CBA when it offered Mr. Brookens a mid-year review after having issued the PIP. *See* CBA Art. 14, Sec. 6. The mid-year assessment is intended to assist the employee in improving performance *before* any deficiencies rise to the level of needing formal redress, such as implementation of a PIP. Appellant's right to his federal position cannot be obliterated where management has clearly violated the laws intended to protect employees. Further, the Board's statement that "appellant has provided no basis for disregarding the deference due to the arbitrator's interpretation of the CBA" is meritless, given that the arbitrator failed to apply and give any analysis to Article 14, Section 6 of the CBA. In this case the Board can stand on the law and the undisputed fact that appellant was not given a mid-year review, as mandated by the CBA as well as by the FSLMRS.

Ill. THE ADMINISTRATIVE JUDGE'S RECOMMENDATION SHOULD BE

REJECTED BECAUSE THE JUDGE HELD APPELLANT TO THE WRONG LEGAL STANDARDS OF PROOF.

a. Similarly Situated Employees-Judge Thayer misapplied this standard in making his determination as to whether appellant's comparators were similarly situated.

Judge Thayer's finding that the comparative treatment between Mr. Brookens and his colleagues is of no significance because they were not "similarly situated comparators" is without merit. To the extent that Judge Thayer uses the removal action against the appellant to find that his colleagues are not comparators, the judge has stepped beyond what is legally permissible.

The standard Judge Thayer applied for determining whether comparison employees were "similarly situated" was based on three cases - *Spahn* v. *Department of Justice, 93* M.S.P.R. 195 (2003); *Bell* v. *Department of the Treasury,* 54 M.S.P.R 619 (1992); and *Doe* v. *Postal Service,* 95 M.S.P.R. 493 (2004). Rec. at p. 4. Of these three cases, *Doe* is the only one pertaining to a performance-based adverse action. The other two cases arose out of disciplinary actions. They are difficult to extrapolate to a non-disciplinary case. For example, in *Spahn* cannot readily be applied to a performance-based action, as Judge Thayer has done in the instant action. In *Spahn* the Board discussed at length comparators in a disciplinary context, as follows:

The similarity of comparative employees is governed by the similarity of their conduct and related circumstances, not by what charges an agency chooses to bring against them. ~11.

For other employees to be deemed similarly situated, the Board has held that all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparative employees. [Citations omitted.] The Equal Employment Opportunity Commission (EEOC) has stated the matter in the following way: "To be similarly situated, comparative employees must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to complainant's without differentiating or mitigating circumstances." *Harris* v. *Henderson,* EEOC No. 01982575 (Aug. 29, 2000).

We agree with the appellant's contention that it is the similarity of the comparative employee's conduct that is controlling, not what charges the agency chose to bring against the employee. *See Botto* v. *Us. Postal Service, 875* M.S.P.R. 471, 477 (1997) ("comparative employees must have engaged in conduct similar to the appellant's"); *Richard,* 66 M.S.P.R. at 153 (same) .:~~ 13-15.

Clearly, this case is distinguishable from the instant case and should not have been cited by Judge Thayer in his attempt to show that Mr. Brookens was not similarly situated to his colleagues.

However, the case of *Bell, supra,* another disciplinary case, is of some limited utility. It stands

for the proposition that employees in "different work units and who work for different supervisors are not similarly situated. At p. 15. This is not the circumstance of the instant matter. ILAB is a very small agency within the Department of Labor. As the deciding official noted there are only 25 to 26 International Economists within his unit. Tr. *4/20112,* p. 2337. Mr. Brookens and his colleagues all shared the same job title - "International Economist," - and they all worked under Mr. Schoepfle. Tr. III, pp. 35, 37, 41, 47. Thus, the facts of this case are distinguishable from those in the *Doe* case.

In *Doe* the Board clarified that the "nearly identical in all relevant aspects" standard pertained to duties of the employees, not actions initiated against them by the agency.
The Board stated that "in order to be considered similarly situated, the appellant's employment situation must be nearly identical to that of the comparison employee in all relevant aspects." At ~ 10. The Board added that the appellant, Doe, was not similarly situated to his comparator because he and the comparator had different duties. It undisputed that other than support staff, all of the ILAB employees under Mr.Schoepfle's supervision were International Economists. Most importantly, in their capacity as "International Economists", the duties for which Mr. Brookens and his colleagues were responsible were similar and interchangeable. At the arbitral hearing, in an exchange on direct examination, Mr. Schoepfle explained the similarity of the job functions:

> Q Describe your (sic- "the") responsibilities of international economists on your staff, in the

Office of Trade and Labor Affairs, Trade and Policy Division.

A Interactional economists usually have a mix of responsibilities, providing policy advice on various issues that come up, regarding trade policy, sometimes even domestic policy, that would have implications intentionally.

This requires analysis of different positions, impact, assessments, doing some literature search of studies that have been done, perhaps either gathering information and data to make informed recommendations for policy position. So, it really, I think, depends on the specific issues that comes up, but as I say, it's a mix of analysis and policy, briefs, papers, writing.

Also involved is, at times, representing the department in inter-agency meetings and putting forth positions of the Department of Labor. It also, sometimes, requires engagement and negotiation with differing views, to try to reconcile and reach a consensus and recommendation for the economic policy.

Tr. III, p. 37-38. Despite the similarly of job functions noted by the deciding official, Judge Thayer erroneously relied on Mr. Brookens's status as the only GS-12 International Economist in the division to justify his finding that Mr. Brookens was not

similarly situated to his colleagues.[7]Rec. at p. 6. This baseless conclusion ignores the Board's recognition that discriminatory motives can result in an employee's promotional opportunities being obstructed. *See Fitzgerald* v. *Department of Homeland Security,* 107 M.S.P.R. 666, ,- r22(2008)(finding that the agency discriminated against the employee by "failing to select her to a series of detail and promotional opportunities and otherwise acting against her in those opportunities, limiting her advancement thereby.") Mr. Brookens's lower grade, arguably the result of discrimination, cannot be used against him
to find that he was not comparable to the colleagues with whom he shared the sameduties.6[8]
Clearly, Judge Thayer misapplied the "similarly situated" standard and inappropriately held Mr. Brookens to the "identical" standard in a disciplinary case. The judge stated that "[t] he appellant has produced no evidence of any other similarly situated employee not in his protected class *who was found to have unacceptable performance and failed a 120 day*

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[7] The judge noted that Mr. Brookens was "the only GS-12 international economist in the division confirms
that he was not similarly situated because he was in a lower grade than all the other economists .... " Rec. at p.6.

[8] 6 Following his reinstatement, Mr. Brookens was continuously denied promotions; the agency denied his
numerous requests for desk audits. The agency even constricted his work space, and complained about the

PIP and was not removed." Rec. at p.ll. Even in *Spahn,* the board specifically noted that the charges the agency chooses to bring against an employee has no bearing in the "similarly situated" determination. *Spahn* at 202. It concluded that "to do otherwise would permit an agency to insulate itself from a finding of prohibited discrimination." *Id* at 202-203. Had the appropriate standard been applied, Judge Thayer could not conceivably have reached the conclusion that he did. Had Judge Thayer applied the appropriate legal standard, he would have found Mr. Brookens to be similarly situated to his colleagues,
and thus, could not have so readily dismissed a key piece of evidence-the deciding official's admission that he declined to remove from the Federal Service employees who may have been performing below the level of Mr. Brookens.

b. The Crediting of Testimony - This was beyond the scope of the administrative judge's authority.

Mr. Schoepfle testified that he placed the appellant in the "lower tier" of the people in office. Tr. *2125/2010,* p. 176-177. If higher graded employees landed in the same lower strata as Mr. Brookens, and given that greater performance is expected from higher graded workers, it is inexplicable as to why these underperforming higher graded employees were retained by Mr. Schoepfle.

Even if, *arguendo,* Mr. Brookens was in the "lower tier," it does not explain the agency's decision to remove Mr. Brookens and simultaneously take no action against his lesser performing coworkers. It is

essential to reiterate here, that all of Mr. Brookens's coworkers were white; he was the only African-American International Economist. Judge Thayer failed to satisfactorily address why he placed so little weight on Mr. Schoefle's admission that lesser performing white International Economists were retained, while the one African-American International Economist was removed. The only things that distinguished Mr. Brookens from his comparators were his race, age, and union activism. official time he utilized. Thus, at the time of hearing, Mr. Brookens had fourteen (14) pending grievances against ILAB. Tr.. *4/20112,* at p. 2254. The Agency's failure to promote Mr. Brookens cannot be used as leverage against him as he is charging the Agency with discrimination.

The judge credited Mr. Schoepfle's statement that he had no improper motive in making his decision to remove the appellant. Rec. at p. 11. Instead of explaining how Mr. Scheopfle's statement that there may have been lesser performing employees whom he elected not to remove could reflect anything other than preferential treatment for white workers, Judge Thayer decided to credit the self-exculpatory statement he never heard uttered by Mr. Schoepfle. Judge Thayer has provided no reason as to why he credited the self-serving testimony of Mr. Schoepfle. Further, as noted above, the crediting of hearing testimony is beyond this judge's scope of review because he declined to hold a hearing. *See Ellis* v. *Us. Postal Service,* 2014 MSPB 73 (Sept. 9,2014). This clearly constitutes legal error, providing yet another reason for the Board to reject Judge Thayer's recommendation.

c. Direct Evidence/Circumstantial Evidence··· Judge Thayer inappropriately held appellant to a heightened evidentiary standard by requiring direct evidence of discrimination.

Judge Thayer held that Mr. Brookens failed to present "any direct evidence of [race or age] discrimination." Rec. at p. 4. In adjudicating this matter based on the premise that appellant must present "direct evidence" of discrimination, Judge Thayer inappropriately held Mr. Brookens to a heightened standard of evidentiary proof. This constitutes legal error.

The courts have repeatedly and consistently held that discrimination may be established by either direct or circumstantial evidence, with the understanding that direct evidence of discrimination is rarely available. *See Us. Postal Service Board of Governors* v. *Aikens, 460 U.S.* 711, 714, n.3 (1983) (holding that "[t]here will seldom be 'eyewitness testimony as to the employer's mental processes.") The Supreme Court has stated that it will rely on the conventional rule of proving discrimination under Title VII of the Civil Rights act. The conventional rule –

> requires a plaintiff to prove his case "by a pereponderance of the evidence," *[citation omitted]* using "direct or circumstantial evidence," *Postal Service Bd. of Governors* v. *Aikens,* 460 U.S. 711, 714, n.3 (1983). We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves* v. *Sanderson Plumbing Products, Inc.,* 530 U..S. 133

(2000), we recognized that evidence that a defendant's explanation for an employment

> practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." *Id.,* at 147 (emphasis added). The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers* v. *Missouri Pacific R.* Co. 352 U.S. 508 n. 17 (1957) .
> *Desert Palace, Inc.* v. *Costa,* 539 U.S. 90, 99-100 (2003). Thus, the stricter standard of proof ordered by Judge Thayer is contrary to the Supreme Court's dictate. Therefore, his evaluation of the record evidence under this heightened standard of proof must be rejected. [9]

d. Mosaic Standard-Judge Thayer erroneously assessed each piece of evidence on its

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[9] 7 Further, in *Desert,* the Court noted that even in criminal cases, where there is a higher burden of proof,
"juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given
to either direct or circumstantial evidence.' IA K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal §12.04 (5th ed. 2000); see also 4 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, Modem Federal Jury instructions 74.01 (2002) (model instruction 74-2)." At p. 100.

> individual merit, rather than properly the elements
> of the mosaic as a whole.

By evaluating each piece of evidence on its individual merit, rather than weighing them in their aggregate as required under the mosaic standard, Judge Thayer misapplied the mosaic standard. The Board has recognized that a mosaic of circumstantial evidence may evince unlawful discrimination; that the mosaic of evidence standard used in retaliation cases may also be utilized in discrimination cases. The mosaic of evidence standard was articulated succinctly by the Board in *FitzGerald v. Department of Homeland Security,* 107 MSPR 666 (2008). The Board stated that—

> to show retaliation using circumstantial evidence, an appellant must provide evidence showing a "convincing mosaic" of retaliation against her. *Troupe v. May Dept. Stores Co.,* 20 F.3d 734, 737 (7th Cir. 1994). A mosaic is a work of visual art composed of a large number of tiny tiles that fit smoothly with each other, a little like a crossword puzzle. A case of discrimination can likewise be made by assembling a number of pieces of evidence non meaningful in itself, consistent with the proposition of statistical theory that a number of observations, each of which support a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: 'a number of weak proofs can add up to a strong proof. '

Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900, 903 (7th Cir. 20(6) (quoting *Mataya* v. *Kingston,* 371 F.3d 353,358 (7th Cir. 2004)). At ~20. This ruling by
the Board is in line with the principle generally adhered to in the federal courts that –

> [a] case of discrimination can ... be made by assembling a number of pieces of evidence non meaningful in itself, consistent with the proposition of statistical theory that a number of observations, each of which support a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: 'a number of weak proofs can add up to a strong proof.

Mataya v. *Kingston,* 371 F.3d 3:53, 358 (7th Cir. 2004). Judge Thayer's statement that he could "place little, if any weight on appellant's first or second points in his 'mosaic' ," Rec. at p. 6, aptly sums up what was his entire approach to the evidence presented by Mr. Brookens. He erroneously addressed each piece of the mosaic individually, as opposed to as part of the mosaic; he failed to assess the collective weight of the various pieces. In so doing, Judge Thayer misapplied the "mosaic" standard and perpetuated the erroneous assessment of the circumstantial evidence the standard was created to preclude.

As a general rule, this mosaic has been defined to include three general types of evidence, all of which Judge Thayer dispelled: (1) evidence of suspicious timing, ambiguous oral or

written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Troupe,* 20 F.3d at 736-37. Evidence of all three were presented to the arbitrator and were part of the record *reviewed* by Judge Thayer, to wit:

(1) Evidence of suspicious hiring and departure of the proposing official-

The timeframe of Mr. Wedding's tenure at ILAB and the immediacy with which he placed Mr. Brookens on a PIP is suspicious. It was undisputed that the Agency specifically sought to hire a supervisor with PIP experience, who, upon his retention, almost immediately placed Mr. Brookens on a PIP. He then left the position within thirty (30) days of Mr. Brookens's removal from the Federal Sector.8[10]

The significance of the vacancy announcement for the supervisor who became the proposing official (Timothy Wedding) was grossly underestimated in Judge Thayer's recommendation. The vacancy announcement included a solicitation for someone with PIP experience. As the deciding official explained, "this question, about using a PIP, was added along with other additional questions to a

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[10] 8 It was undisputed at all levels of this litigation that after Mr. Wedding effectuated Mr. Brookens's removal on November 19, 2008, he left his employment with DOL in December of 2008.

second vacancy announcement after the first one [vacancy announcement] failed to attract a sufficient pool of qualified applicants." Rec. at p. 7. Judge Thayer mischaracterized this fact as proof that the Agency was not searching for a new supervisor to issue a PIP targeted at Mr. Brookens, musing that if that was the Agency's intent, he "would have expected that question to be part of the first vacancy announcement." Rec. at pp. 7-8. However, just the opposite is true.

Upon the failure of the first vacancy announcement, which was silent on the necessity of prior PIP experience, "to attract a sufficient pool of qualified candidates," Rec. at p. 7, the Agency tailored and reissued the vacancy announcement to attract "more qualified", candidates. *Union Exhibit* #16. The Agency's need to highlight the qualification of "prior PIP experience," indicates just how important a consideration it was to its assessment of a qualified candidate. This is particularly relevant in light of the suspicious timeframe of the supervisor's tenure in ILAB.

Mr. Wedding maintained his supervisory position at ILAB for a mere 15 months, from September of 2007 to December of 2008. Just eight (8) workdays after assuming the
position as Mr. Brookens's supervisor, Mr. Wedding purportedly perceived deficiencies in Mr. Brookens's performance.f[11] Yet, at the time Mr. Wedding issued

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[11] 9 Judge Thayer surmised, without any evidence, that there was nothing to show that Mr. Wedding had not observed Mr. Brookens's performance from his coming on board in September of 2007 to the end

the PIP, Mr. Wedding was still going through on-the-job training for his new supervisory position. As noted above, one month after Mr. Brookens removal was effectuated, Mr. Wedding left ILAB.

Judge Thayer neglected to address all of the unusual events surrounding Mr. Wedding's selection and all of the events that occurred during his very short tenure at ILAB. Viewing in isolation the events -- the vacancy announcement, Mr. Wedding's immediate dissatisfaction with Mr. Brookens's performance, Mr. Wedding's failure to provide Mr. Brookens's with a mid-year assessment, the speed with which he placed Mr. Brookens on a PIP, the proposal to remove an employee with whom there was little familiarity, Mr. Brookens's actual removal, and finally Mr. Wedding's then rapid departure from ILAB --all individually may appear to be innocuous events. However, when pieced together, they create a mosaic of discriminatory actions designed to assure Mr. Brookens's removal.

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of ovember of 2007. However, the uncontested evidence of record shows that Mr. Wedding became Mr. Brookens supervisor on November 13, 2007, when he placed Mr. Brookens on Performance standards. It has been uncontested throughout this litigation that on December 8, 2007 Mr. Wedding met with Mr. Brookens to express his displeasure with his performance. It has also been uncontested that because both men took leave during the 3-week period, they worked together for only eight days. Tr. 4110112, pp.2305-2306. Judge Thayer has no basis upon which to reject the undisputed evidence of record.

(2) Similarly situated-Judge -- Thayer ignored record evidence showing that similarly situated employees were better treated, receiving more promotional opportunities and leniency with regard to perceived performance deficiencies.

As previously discussed, Judge Thayer misapplied the "similarly situated" standard, and instead held Mr. Brookens to a higher standard. This was an error. Applying the appropriate standard, the testimony of the deciding official himself, Mr. Scheotle, confirmed that he took no action against similarly situated whom he deemed to be lesser performing employees. Judge Thayer drew various unsubstantiated inferences from the record but failed to view Mr. Scheofle's statement as a tacit admission of discrimination. Judge Thayer's selective analysis of the record should be rejected by the Board. Mr. Brookens was also victim to the Agency's deliberate obstruction of his promotional opportunities. Rec. at. p. 10. Mr. Brookens's colleague, and fellow Interactional Economist, Maureen Pettis, offered uncontested testimony that the Agency declined to announce promotional opportunities because appellant would have been eligible to apply. *Tr. 4120112, pp.* 2341-2342. Judge Thayer erroneously dismissed the significance of this testimony as a legitimate management decision, stating "[w]hether right or wrong it shows that management was trying to avoid grievances and avoid opportunities where grievances could be filed." *Rec. at p. 10.* What Judge Thayer has termed as a "legitimate management decision" amounts to an unlawful discriminatory practice, a practice meant to thwart the exercise of

employees' rights to seek redress of what they deem prohibited personnel practices. *See generally, FitzGerald v. Department of Homeland Security,* 107 M.S.P.R. 666, ~25 (2008)(where the Board overturned a removal based on the employee's exercise of her protected rights). The judge's logic here is askew; the Board cannot adopt a recommendation that gives an agency the right to mount obstacles to redressing prohibited personnel practices.

> *(3) Pretext of the Agency-Judge* Thayer ignored record evidence showing that the Agency's actions were motivated by prohibited considerations.

Here the totality of the evidence demonstrates that discriminatory motives were a factor in Mr. Brookens' removal action. The deciding official's admission that no adverse action was taken against lesser performing, similarly situated employees; the Agency's obstruction of his promotional opportunities; the suspicious timeframe of Mr. Wedding's tenure at ILAB, ending one month after Mr. Brookens' removal; all establish that Mr. Brookens was treated differently from his similarly situated co-workers. The only characteristics distinguishing Mr. Brookens from his similarly situated comparators are his race, age, and union activity. The record demonstrates that unlawful discriminatory factors such as race, age, and union activity was a motivating factor in the Agency's decision to remove Mr. Brookens.

At the very least, Mr. Brookens history of exercising his rights as an employee played a pivotal role in the

Agency's treatment of him. Judge Thayer himself acknowledged that the record demonstrates Mr. Brookens' filing of grievances played a role in the Agency's decision to interfere with Mr. Brookens' promotional opportunity by declining to openly announce higher-graded positions within ILAB. Disparate treatment of Mr. Brookens, motivated by his exercise of legal rights, equals unlawful discrimination. *See generally, FitzGerald, supra.*

Under the mosaic standard, the aggregate of the various incidents of disparate treatment against Mr. Brookens creates a total picture of discrimination.

IV. JUDGE THAYER ERRED IN HIS ASSESSMENT OF THE RECORD EVIDENCE PERTAINING TO THE CHARGE OF RETALIATION FOR UNION ACTIVITIES.

Judge Thayer held that "[t]he appellant failed to provide any evidence of union activity against the proposing or deciding officials that might create motivation to retaliate." Rec. at p. 15. Again, Judge Thayer is holding Mr. Brookens to a heightened standard of proof created by the judge, not by the prevailing applicable law. The Board has rejected the standard employed by Judge Thayer in *FitzGerald, supra,* expressing that:

> EEOC Compliance Manual states as follows:
>
> There is no requirement that the entity charged with retaliation be the same as the entity whose allegedly discriminatory practices were opposed by the charging

> party. For example, a violation would be found if a respondent refused to hire the charging party because it was aware that she opposed the previous employer's allegedly discriminatory practices. EEOC Compliance Manual, No. 915.003 at 8- 9 (May 20, 1998). *The arbitrator thus erred when he limited the appellant to introducing evidence of retaliation only where such evidence "could be connected to any of the management officials who played a role in the decision to terminate" the appellant.*

At Para. 25 *(Emphasis added).* Clearly, Judge Thayer erred in reviewing the issue of union retaliation because he applied a standard that is not viable. Therefore, the Board must reject all of his findings and recommendations as they pertain to retaliation for union activities.

CONCLUSION

Judge Thayer's Recommendation is replete with applications of improper legal standards. Further, his findings are, in many instances, based on credibility determinations, which are impermissible given his refusal to hold an evidentiary hearing. Further, it is clear that the administrative law judge failed to do an in-depth analysis of the record evidence.

For all of the reasons noted herein, appellant respectfully requests that the Board reject Judge Thayer's Recommendation.

Respectfully submitted,
Eleanor J. Lauderdale, Esq.
Counsel for Appellant

_____

MikaDewitz
Legal Intern

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BENOIT BROOKENS v. DEPARTMENT OF LABOR
No. 2015-3084
PETITIONER'S FED. CIR. R. 15(c) STATEMENT CONCERNING DISCRIMINATION
Please complete sections A, B. and C.

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.

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

[ ](2) Any claim of discrimination by reason of race, sex, age, national origin, or handicapped condition raised before and decided by the Merit Systems Protection Board or arbitrator has been abandoned or will not be raised or continued in this or any other court.

[X](3) The petition seeks review only of the Board's or arbitrator's dismissal of the case for lack of jurisdiction or for untimeliness.

[ ](4) The case involves an application to the Office of Personnel Management for benefits.

[ ](5) The case was transferred to this court from a district court and I continue to contest the transfer.
Section B:

Answer the following: Have you filed a discrimination case in a United States district court from
the Board's or arbitrator's decision? [ ] Yes [X] No If yes, identify any case.

[Stamp] [RECEIVED
MAY 2, 2016
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT]

Section C:
Answer the following: Have you filed a discrimination case in the Equal Opportunity Commission from the Board's or arbitrator's decision? [ ] Yes [X] No If yes, identify any case.
APRIL 25,2016 [Signature]
Date Petitioner's signature
Mail this form with the petition for review or within 14 days of the date of docketing of the petition for review to:
Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

cc: Alexis J. Echols, Esq., USDOJ

[UNION EXHIBIT # 16]

Page 1 of 12
Department of Labor
Agency: Bureau of International Labor Affairs
Sub Agency: U.S. Department of Labor

Job Announcement Number:
ILAB 07-157DE

SUPERVISORY INTERNATIONAL ECONOMIST

Salary Range: 110,363.00-143,471.00 USD

Open Period: Tuesday, July 10, 2007
to Tuesday, July 24, 2007

Series& Grade: GS-0110-15/15
Promotion Potential: 15

This position is also being advertised as
Vacancy Announcement ILAB-07-157M for
Status applicans and, to be considered for both
status
and non-status you must apply to each.

[Page 108 of 151]

18. Have you ever designed and used a performance
improvement plan (PIP) for
a poorly-performing employee?

Yes No

[Page 115 of 151]