No. 20-760

In The

Supreme Court of the United States

LIBBY A. DEMERY,

Petitioner,

v.

DEPARTMENT OF ARMY,

Respondent.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF MANDAMUS

LIBBY A. DEMERY
Petitioner, Pro Se
6103 Manor Road
Clinton, MD 20735
(202) 207-5446

QUESTIONS PRESENTED

(1) Whether the Supervisory Power of this Court invoked recall of the mandate of Federal Circuit to vacate an unreviewed, Merits Systems Protection Board (MSPB), Administrative Judge (AJ) decision containing procedural errors, failure to apply the law to facts of case and unsupported by substantial evidence, effecting the Petitioner's rights, under the Whistleblower Protection Act (WPA). 5 C.F.R. Section 1201.111(b).

(2) Whether the MSPB AJ illegally rejected the WPA appeal because it was supported by a preponderance of direct evidence proving the impermissible retaliatory motive played a motivating part in adverse personnel action. McDonnell Douglas framework not applicable.

(3) Whether the MSPB and Federal Circuit erroneous focus on prima facie case caused a failure to decide the ultimate factual issue of whether the agency intentionally retaliated against the appellant.

STATEMENT OF RELATED CASES

- Demery v. Dept of Army, MSPB No. PH-1221-18-0105-W-1, Initial Decision, July 27, 2018, final decision, June 21, 2019.
- Demery v. Dept of Army, No. 19-2282, Court of Appeals for the Federal Circuit, Judgment entered April 9, 2020
- Demery v. Dept of Army, No. 19-2282, Court of Appeals for the Federal Circuit, Petition for panel rehearing and rehearing en banc motion granted, June 1, 2020
- Demery v. Dept of Army, No. 19-2282, Court of Appeals for the Federal Circuit, Petition for panel rehearing and rehearing en banc denial, July 1, 2020. Mandate to issue July 8, 2020.
- Demery v. Dept of Army, No. 19-2282, Court of Appeals for the Federal Circuit, Petition to recall of court mandate, July 7, 2020.
- Demery v. Dept of Army, No. 19-2282, Court of Appeals for the Federal Circuit, Petition to recall court mandate denied, July 16, 2020.

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OPINIONS

Decision of Merit Systems Protection Board (MSPB), June 21, 2019 Final decision United States Court of Appeals for the Federal Circuit (April 9, 2020)

Order Denying Rehearing, Rehearing *en Banc*, United States Court of Appeals for the Federal Circuit (July 1, 2020).

Order, Denial of Recall of mandate, United States Court of Appeals for the Federal Circuit (July 16, 2020)

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on April 9, 2020. App. 1. The court denied a timely petition for rehearing *en banc* on July 1, 2020. App. 44. This Court has jurisdiction under 28 U.S.C. § 1651(a).

RELEVANT PROVISIONS INVOLVED

5 C.F.R. Section 1201.111(b) requiring the Administrative Judge (AJ) initial decision "contain findings of fact and conclusions of law upon all material issues of fact and law presented." See also 5 U.S.C. Section 7703(c) requiring decision be supported by "substantial evidence."

STATUTES INVOLVED **Page**

5 U.S.C. § 2302(b)(8) 9

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STATEMENT OF THE CASE

Libby Demery applied for the competitive announcement #NEHT10457276D, Management Analyst, GS-343-11, located at the National Guard Bureau, Arlington, VA., was rated/ranked, placed on OPM certificate of eligible, referred to a panel of three authorized to interview and select the best qualified for the position.

The panel selected Demery for the position and Mr. Tony Denham contacted Demery on November 3, 2010, informed her of her selection and made an interim tentative job offer (TJO) in compliance with agency policy and informed her Civilian Personnel Advisory Center (CPAC) would contact her with official TJO and final job offer (FJO) and subsequent appointment. CPAC never contacted Demery.

WHISTLEBLOWER PROTECTION ACT (WPA) CLAIM

The appellant filed IRA/WPA appeal with MSPB, after exhausting her administrative remedies with Office of Special Counsel (OS). OSC failed to investigate prohibited personnel practices and WPA claims and directed Demery to file IRA/WPA appeal with MSPB.

Demery alleges, Department of Army retaliated against her, when it refused to comply with the binding federal competitive[1] hiring statute at the "appointment" and hiring stage of the process, take the Ministerial step. Sec 3317 & 3318 and 2302(b)(8). WPA personnel actions are against the whistleblower and applicable law, rule, or regulation.

ADMINISTRATIVE JUDGE (AJ) DISBELIEF OF DIRECT EVIDENCE

The unreviewed AJ decision was obtained without procedures required by law, rule, or regulation having been followed; and unsupported by substantial evidence. The amount of legal and factual misrepresentations are massive and has complicated the Pro Se case.

The AJ made legal error and exceeded bounds Congress did not intend in his interpretation and application of the federal hiring statute to circumstances of this appeal, denying Demery entitlement and removing agency liability. The decision is not in accordance with law and cannot stand.

The AJ in his general order dated April 19th, three months into pleadings, makes it clear he does not believe the direct evidence presented in the reliable CPAC RPA Tracker and reserves fact-finding until after the hearing. The AJ states as follows:

> "At the outset, I again remind the appellant that she filed an individual right of action (IRA) appeal under the Whistleblower Protection Act. That fact determines what issues are (and are not) relevant, and the hearing will be entirely focused on the relevant issues. I also remind the appellant that no "facts" have been proven before me as of now. Fact-finding occurs after hearing the sworn testimony at the hearing. As to the appellant's discovery concerns, I refer her to the Board's regulations." See MSPB Tab 39.

The AJ general order, denying Demery's objections to prehearing summary, reconsideration of witnesses, request to postpone hearing until all deficiencies were met comes six days prior to the hearing and two days after agency files motion to dismiss for failure to state a claim.

The AJ states;

> "the personnel action at issue is the non-selection/failure to appoint." And "the mechanics of the selection will come into play as one of the *Carr* factors only if the appellant establishes that she made a disclosure and it was a contributing factor to the agency selection." See MSPB Tab 53.

PRE-MATURE HEARING ON THE MERITS

The AJ failed to properly establish jurisdiction on claims at the second prong prior to hearing on the merits: failing to identify the precise personnel action under Section 2302(B)(8); determine whether disclosures were protected under abuse of authority standard; and failure to apply the federal hiring statute to the circumstances of the case prior to the hearing. Sections 3317 & 3318.

The unreviewed initial MSPB AJ decision became the final decision and the decision is in violation of **5 C.F.R. Section 1201.111(b)** requiring the Administrative Judge (AJ) initial decision "contain findings of fact and conclusions of law upon all material issues of fact and law presented." See also 5 U.S.C. Section 7703(c) requiring decision be supported by "substantial evidence." Vacate or Reversable error.

MISTAKEN VIEW OF LAW

As in USPS BD. Of Govs. v. Aikens, 460 U.S. 711 (1983), Because the case has been tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question of whether Demery made out a prima facie case. However, in this case Demery presents direct evidence of retaliation and doesn't require establishment of a prima facie case. Vacate or Reversable error.

AGENCY'S UNCLEAN HANDS

The AJ states, the "agency did not raise a laches defense." The agency did not raise laches defense due to unclean hands.

Specifically, fraudulent concealment of competitive selection, "willful" non-compliance of binding statute, failure to "appoint" after November 10, 2010, OPM authorization and HR Supervisor, termination of entire process without approval from Office of Personnel Management (OPM). 5 U.S.C. Section 3317 & 3318 in violation of the prohibited personnel practice statute, 5 U.S.C. Section 2302(b)(8), abuse of authority.

Fraudulent concealment due to perceiving Demery as a whistleblower on the agency pretextual use of the PPP requisition, in order to grant an unauthorized employment advantage to another former agency employee. 5 U.S.C. Section 2302(b)(6)(prohibited personnel practice).

Under the WPA the agency non-retaliatory reason or explanation for its adverse personnel action must be legally sufficient, therefore, the use of the closed PPP is not supported by substantial evidence, law, rule, or regulation.

CPAC RPA TRACKER DIRECT EVIDENCE

It is undisputed and substantiated that the CPAC Request for Personnel Action (RPA) Tracker is the only reliable record of Civilian Personnel Advisory Center (CPAC) personnel actions.

The RPA Tracker shows the exact sequence of personnel actions:

(1) the Priority Placement Program (PPP) PPP requisition opened first and closed prior to Sept 14, 2010 (2) the merit promotion Closed: Aug 27, 2010 and finally (3) the Delegating Examining Unit (DEU)/competitive job vacancy Closed: Sept 7, 2010.

The RPA Tracker is very important because the responsible officials: HR, vacancy advisor, Ms. Rose Plummer and her HR Supervisor, Ms. Lydia Langley remained anonymous and fraudulently concealed personnel actions. The document confirms Nov 3rd competitive selection of Demery in proper sequence, after closure of the PPP requisition prior to Sept 14th. Also, an important entry, November 10th, OPM DEU authorization of Demery as "Selectee" and to receive a TJO and FJO from vacancy advisor, Ms. Plummer. Ms. Plummer never provided official notification of OPM approval nor did she provide the authorized TJO/FJO and appointment.

WPA TRIGGERED

The IRA/WPA, retaliation is triggered at this point in the Competitive[1] hiring process, Demery is denied

[1] "The appointing authority "**shall**" select for appointment to each vacancy from the highest three eligible available for appointment on the certificate furnished under section 3317(a)," 5 U.S.C. § 3318(a). If an appointing authority "proposes to pass over a preference eligible . . . such authority shall file written reasons with Office of Personnel Management (OPM) . . . provide notification

an "appointment," Authorized, November 10, 2010 by OPM DEU and in accordance with 5 U.S.C. Sections 3317 & 3318. TWA v. Thurston, 469 U.S. 111, 121 (1985)

WPA prohibits retaliation against applicants, or former employees who reasonably believes the agency conduct constitutes wrongdoing listed under 5 U.S.C. Section 2302(b)(8), abuse of authority.

KNOWLEDGE/TIMING TEST

Under the WPA if jurisdiction is established via knowledge/timing test, the agency will not be required to make an appointment of Demery if it can prove it would have taken the same action absent the protected activity.

In conjunction with direct evidence, the record will show, Demery also established Board jurisdiction and contributing factors via the knowledge/timing test by making a non-frivolous disclosure on Friday, November 19th to Selection official Mr. Denham who informed her of CPAC's (Plummer) consideration of a PPP to fill the position. Demery made a protected disclosure of her belief that the use of the PPP at this stage (appointment) of the hiring process (competitive), her interview (panel) and interim TJO may be in violation of law, rule, or regulation. Demery believed Mr. Denham passed the disclosure on to CPAC, vacancy advisor,

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to preference eligible . . . sustained by, the OPM for proper and adequate reason under regulations prescribed by the office."

Plummer and as showed on the RPA Tracker, Plummer's note of Monday, November 22, 2010, states:

> "TJO will not be extended to Demery, there is a well-qualified PPP match. Notified the PPP team to extend a TJO."

Demery's testimony on her November 19th disclosure was taken out of context by the AJ and the Circuit, the testimony verbatim in transcript does evidence violation of federal hiring statute:

> "the person he was talking to at CPAC told him that they were considering placing a PPP person in the position. And he said—well, he didn't say PPP, he said priority placement. So whenever, you hear priority placement, you assume that that person has priority over you for some reason. So, I said, well, I think that after the interview and you have offered me the position, that this timing doesn't seem quite right for the PPP, because I thought that is the first thing and would close before DEU announcements are even referred to the selection official. So after we talked about that he said he doesn't know anything about HR,. . . ."

The Federal Circuit has previously held remand when critical element of case is misconstrued. Tudor v. Treasury, 639 F. 3d 1362 (Fed. Cir. 2011)

AGENCY REBUTTAL

The agency put forth, through the introduction of evidence in its motions to dismiss, the reason for

refusing to "appoint/hire" Demery was the agency alleged PPP match of September 7, 2010.

Demery, supported by the CPAC RPA Tracker, rebuts the reason as follows: There evidence on the RPA Tracker shows the PPP closed and cleared prior to September 14, 2010 with no evidence of a PPP September 7, 2010 match. The Tracker shows Demery competitive selection occurred on November 3, 2010 and the OPM DEU approved Demery's selection and authorized TJO/FJO and subsequent appoint, November 10, 2010.

DECISIONMAKER BOMBSHELL TESTIMONY

In support of the direct evidence on the RPA Tracker, Decisionmaker, HR Supervisor, Ms. Lydia Langley testifies to an impermissible motive, that she applied the PPP after it closed in order to provide a unauthorized employment advantage for another former employee, Mr. John Woods. Demery has also shown direct evidence that an impermissible motive played a motivating part in an adverse employment decision.

Ms. Langley states after the following AJ question:

> "Ms. Langley, If Mr. Wood matched this position September 7, 2010, why would he later be placed and have been removed (Oct 22, 2010) from the agency for some reason in the interim? I'm just trying. . . . .we're trying to figure out what the chronology was."

Ms. Langley testifies about illegal use of PPP, here are her exact words:

> "Okay, so he matched in September. From what I understand, we may have missed that, and that's why we have to go back and look, because I believe when—I believe what happened was,. . . . .but I was the supervisor, and I believe that it was brought to my attention that a selection was going to be made, but they just saw that they have a. . . . .matched back in September. And if I recall, I remember saying, we need to clear that individual before we can move any further . . . " "Yes, Yes, I would have to say that that- it was missed. It was not done timely, I'll put it that way."

Demery on November 10th. Ms. Langley answer rebutted by RPA Tracker when she states:

> "She (Dixon) will let us know that a TJO can be made, but we would go back to make sure, because she would not know whether PPP is cleared or closed. She would not know that. She would let us know, go ahead, we can make a TJO, then we would go back and make sure the PPP is cleared and closed,. . . . .anything like that before we can move on to make that tentative job offer."

The RPA Tracker alone provides direct evidence that the officials, vacancy advisor, Ms. Plummer in collaboration with her HR supervisor, Ms. Langley upon receipt of Demery's competitive selection were motivated by an impermissible motive to provide the Management Analyst, GS-343-11 position to significantly

younger former employee, Mr. John Woods. (ADEA claim waived for Circuit appeal).

The granting of an unauthorized employment advantage for another former employee, Mr. Woods, under the pretext of the PPP.

The record will show the agency is silent on this allegation and Lack supporting evidence, Woods was removed from the agency rolls and ineligible, October 22, 2010. The agency provided a TJO, November 22, 2010. However, Woods was not placed in the position until January 3, 2010. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The AJ in an abuse of discretion in his absurd construction of an official statutory competitive selection. The AJ's unreasonable interpretation of the statute and erroneous finding of law to facts:

> "I conclude that the appellant's contentions that she was (formally) selected for the position and entitled to be appointed are baseless on this record. There is some bandying of semantics the appellant was "selected" by the panel to be recommended to CPAC, but that selection had no official weight and effect. The appellant was not "selected" by CPAC for a TJO and FJO, and that is the "selection" of consequence. My finding on this issue also moots a good portion of the appellants retaliation claims related to the subsequent litigation—notably that the agency kept fraudulently concealing her "selection.""

The AJ has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the AJ to analyze or apply the law correctly and consider her claim, will constitute an abuse of discretion. The AJ failed to include critical agency testimony, failure to meet clear and convincing evidence, in his decision that warrants corrective action for Demery.

Demery rebutted the PPP as illegitimate and retaliatory due to direct evidence in the RPA Tracker showing the PPP had closed and cleared two-months before Demery's competitive selection and OPM authorization to provide her TJO/FJO and subsequent appointment, in according to the binding statute, her appointment is non-discretionary under binding federal hiring statute.

FEDERAL CIRCUIT FINDING ON SELECTION

The federal circuit legal findings on the competitive selection requires the AJ conclusion on the competitive selection be set aside as clearly erroneous:

> "The panel's leader, Mr. Tony Denham, recommended Ms. Demery as the "selectee" to the CPAC. CPAC had the authority to then make a tentative or final job offer to Ms. Demery."

The Federal Circuit erred in granting deference in the AJ unreasonable interpretation of the federal hiring statute and not supported by the Chevron deference:

> "If the intent of Congress is clear that is the end of the matter; If Congress has spoken for the court as well as the agency, must give effect to the unambiguous and expressed intent of Congress."

MSPB AJ FAILED TO DECIDE ULTIMATE FACTUAL ISSUE

When the agency failed to persuade the AJ to dismiss the action for the agency failure to rebut Demery's direct evidence of retaliatory animus, the AJ was required to decide the ultimate factual issue. Whether the agency intentionally retaliated against Demery. Here the AJ erroneously focused on the question of prima facie case which was not required in case of direct evidence and if it had, it would have already dropped from the appeal. U.S.P.S. BD of Govs. v. Aikens, 460 U.S. 711 (1983). Reversable error.

RULE 20.1 STATEMENT

The Writ of Mandamus must be issued as Petitioner's last resort, exceptional Whistleblower Protection Act (WPA) appeal judgement on the merits (evaded ultimate question, whether the agency intentionally retaliated) denying ministerial action, statutory rights denied by MSPB and affirmed by the Circuit. The writ will prevent a miscarriage of justice.

The writ will invoke Supervisory Power aiding in this Court's jurisdiction, the U.S. Court of Appeals for the Federal Circuits decision conflicts with circuits

application of mixed-motive/direct evidence v. McDonnell Douglas to retaliation claims and the circuit disregards the Supreme Court previous rulings. USPS Bd. Of Governors v. Aikens, 460 U.S. 711 (1983); Price Waterhouse v. Hopkins, 490 U.S. 228 (1988): Trans World Airlines Inc v. Thurston, 469 U.S. 111, 121 (1985).

REASONS FOR GRANTING THE WRIT OF MANDAMUS

The judicial system exists to resolve disputes, to bring them to an end so that the litigants can return to their normal affairs. To say that courts exist to resolve disputes tells only half the story, for courts exist to resolve disputes correctly.

A motion to recall the mandate, finds its support in the desire to reach a just result. "The recall of an appellate mandate to avoid injustice is a continuation, in the appellate sphere, of a deeply rooted equity jurisprudence."

Judges must be held accountable for decisions that are clearly contrary to law, that were reached without following the procedures that confer legitimacy and credence upon judicial actions that represent an exercise of discretion motivated by bad faith, or that reflect repeated legal error that cannot be attributed to an honest mistake.

Procedural rules should prevent the adversaries from manipulating the rules in order to obtain private

advantages and ensure parties have a fair opportunity to present their own case and consideration is made on the presented case. Resolving cases "on the merits" requires a resolution exercise of reason, by the tier of fact.

The MSPB AJ and the Circuit has erected barriers to proving the agency's violation of the WPA and prohibited personnel practice violations by failing to apply appeal and appellant review procedures required by law, rule, and regulations and vacant, reverse and/or remand the MSPB AJ decision based on the absence of substantial evidence, abuse of discretion, and not in accordance with the binding federal hiring statute.

Demery request this Court grant the writs in the aid of jurisdiction under this Court's Supervisory power and in the interest of justice, and avoidance of a miscarriage of justice. The case addresses circuit splits on application of direct evidence or mixed motive to whistleblower/retaliation cases before the Merit Systems Protection Board.

This is a case of first impression, containing direct evidence rejected by the Administrative Judge (AJ) who failed to also apply the burden shifting framework or mixed motive framework. Subsequently, the pleading which the agency set forth, its reason for failure to appoint were rebutted by Demery's direct evidence were not addressed by the AJ prior to the pre-mature or on the hearing on the merits.

As in the case of USPS BD of Governors v. Aikens, 460 U.S. 711 (1983), in order to avoid a miscarriage of

justice, this Court must vacate and remand. The MSPB AJ and Federal Circuit have unnecessarily evaded the ultimate question of retaliation vel non.

Demery's IRA/WPA evidence provides the reason to grant the writ of mandamus, is based on the failure of the agency to take ministerial action, make "an appointment" to Demery. The "appointment" is supported by evidence in the record, the Office of Personnel Management (OPM), November 10, 2010, authorization and directive to CPAC officials; Ms. Rose Plummer and HR supervisor, Ms. Lydia Langley to provide Demery a TJO/FJO and appointment.

Demery has a clear right, under non-discretionary binding statutes 5 U.S.C. sections 3317 and 3318 to her OPM authorized appointment (ministerial). The Department of the Army owes her a duty, and the only relief available is via the writ of mandamus. See the Administrative Procedure Act (APA).

The OPM directive is based on the most adjudicated and regulated binding federal hiring statute and supported by federal common law precedent. "If the intent of Congress is clear that is the end of the matter, if Congress has spoken for the Court as well as the agency, must give effect to the unambiguous and expressed intent of Congress."

Testimony by HR, Supervisor of her impermissible motive, is fatal to the agency defense of its application of the closed PPP to the OPM approved, statutory competitive selection. The agency failed and is silenced, in its rebuttal of the direct evidence requiring the MSPB

and the Federal Circuit to grant corrective action or judgement as a matter of law.

To deny Demery, a meritorious litigant relief is unfair and a miscarriage of justice especially when the denial stems from a court made policy to finality rather than from substantive law. Allowing manifestly unjust results to stand uncorrected also erodes public faith in the judicial process.

This Court's prior decisions demonstrate that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive.

Here, the MSPB, AJ and the Federal Circuit evaded the ultimate question of retaliation, by its findings of fact in favor of the Department of the Army. The AJ and the Federal Circuit focused on the question of prima facie case, rather than directly on the question of retaliation.

Thus, the findings were influenced by its mistaken view of the law; accordingly, the record is complete and should be remanded so that the MSPB may decide appropriate corrective action based on the direct evidence before it that the Department of Army retaliated against Demery and denied ministerial action.

CONCLUSION

Request the Court recall the mandate and grant the writ of mandamus.

Respectfully submitted,

LIBBY A. DEMERY
Pro Se
6103 Manor Road
Clinton, Maryland 20735