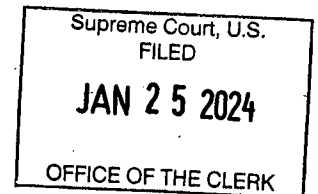


23-7664
No. 23-1713

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Julian R. Ash— PETITIONER

vs.

OPM— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
FORTH CIRCUIT COURT OF APPEALS
PETITION FOR WRIT OF CERTIORARI

Julian R. Ash

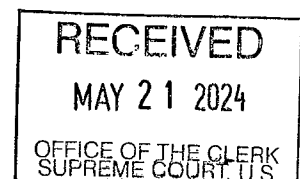
402 E Timonium Rd

Lutherville, Md 21093

580-284-6202

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED
STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT



Ash v OPM
23-1713

QUESTIONS PRESENTED

1. USCA4 Appeal: 23-1713 Doc: 10 Filed: 08/28/2023 Pg: 2 of 2

- a. **Mandamus may not be used as a substitute for appeal or, in this case, a rehearing petition. See In re Lockheed Martin Corp., 503 F.3d 351, 353 (4th Cir. 2007).**

Ash does not satisfy the standard for mandamus relief.

Accordingly, we deny the petition for writ of mandamus. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

PETITION DENIED

- b. IV. PETITION FOR WRIT OF MANDAMUS GRANTED

Because Lockheed is entitled to a jury trial, the district court erred by striking Lockheed's jury demand. We therefore grant Lockheed's petition for the issuance of a writ of mandamus and we direct the district court on remand to try the case before a jury.

In re Lockheed Martin Corp., 503 F.3d 351 | Casetext Search + Citator

2. Why didn't the 4th Circuit Court of Appeals Remand the case back to the District Court of Maryland if the case Cited above was Remanded on the Same Issue of Trial by Jury.
3. If the 4th Circuit Court of Appeals recognized that Pending Motions had not been decided after the Mandamus Appeal on 3/28/23 then Why didn't the 4th Circuit Court of Appeals Specifically State the Deficiencies in its Final Decision on 8/28/23 while Motions were Still Pending so the District Court of Maryland would Act in Accordance with the Law.
4. If the Federal Court of Appeals for the Federal Circuit has Exclusive Jurisdiction of Final Agency Decisions from the MSPB then why did the DOJ request Ash v OPM be transferred to the District Court of Maryland.

LIST OF PARTIES

The Office of Personnel Management *
1900 E Street, N.W. Rm 2H31
Washington, D. C. 20415-3551

&

Merit Systems Protection Board * Ash v OPM
1100 Commerce St., Room 620
Dallas, Tx 75242-9979 Case No. 23-1713

& CIVIL ACTION #1:22-cv-00649-GLR

Federal Aviation Administration *
Office of Chief Counsel
800 Independence Ave S.W.
Washington, DC 20591

&

U.S. Department of Labor Office of *
Worker's Compensation Programs
P.O. Box 8300 District 16 Dal
London, Ky 40742-8300

RELATED CASES

1. Ash v DOT Supreme Court Case #23-7018 Docketed 3/18/24
2. Ash v OPM 4th Circuit Court of Appeals case #23-1992, Appealed 12/20/23
3. Ash v OPM District Court of Maryland Closed 11/21/23
4. Ash v DOT 10th Circuit Court of Appeals Case # 22-6195 Dismissed 9/28/23
5. Ash v Russell District Court of Maryland Case # SAG-23-cv-02873
6. Ash v Rubin Et al, Circuit Court of Maryland Case # C-03-CV-23-004234
7. Ash v Bredar Circuit Court of Maryland Case # C-03-cv-24-000090

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STATUTES AND RULES

1. The Administrative Procedures Act – State and Federal

Md. State Government Code Ann. § 10-222 & 5 U.S.C. §§ 551–559

2. The Declaratory Judgement Act – State and Federal

Md. Code, State Gov't § 10-125 Section 10-125 & 28 U.S. Code § 2201

3. The Tort Claims Act – State and Federal

MARYLAND TORT CLAIMS ACT § 12-107 &

28 U.S.C. 1291, 1346, 1402, 2401, 2402, 2411, 2412, and 2671 through 2680

4. 28 U.S. Code § 1872 - Issues of fact in Supreme Court

In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury.

28 U.S. Code § 1872 - Issues of fact in Supreme Court | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu)

5. 28 U.S. Code § 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. Code § 1331 - Federal question | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu)

6. 28 U.S. Code § 1361 - Action to compel an officer of the United States to perform his duty The district courts shall have original jurisdiction of any action in the nature of

mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

7. 28 U.S. Code § 1295 - Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

28 U.S. Code § 1295 - Jurisdiction of the United States Court of Appeals for the Federal Circuit | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu)

8. Civil RICO

A plaintiff may bring a private civil action for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). *See* 18 U.S.C. § 1964(c). The RICO statute prohibits four types of activities: (1) investing in, (2) acquiring, or (3) **conducting or participating in an enterprise with income derived from a pattern of racketeering activity or collection of an unlawful debt**, or (4) **conspiring to commit any of the first three types of activity**. **18 U.S.C. § 1962(a)–(d)**. RICO was "intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992), *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005). However, the statute is to "be liberally construed to effectuate its remedial purposes." *Odom v. Microsoft Corp.*, 486 F.3d 541, 546 (9th Cir. 2007).

As to the element of causation, a plaintiff must prove that the defendant's unlawful conduct was the proximate cause of the plaintiff's injury. *Harmoni International Spice, Inc. v. Hume*, 914 F.3d 648, 651 (9th Cir. 2019)

RICO claims are most commonly brought under 18 U.S.C. § 1962(c) and (d), the conduct and conspiracy prongs of the statute.

18 U.S.C. § 1962(c)

To recover under § 1962(c), a plaintiff must prove (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known as "predicate acts"), (5) causing injury to the plaintiff's "business or property" by the conduct constituting the violation. *See Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005).

Conduct: The conduct element of § 1962(c) requires that the defendant have some part in directing the affairs of the enterprise. Liability is not limited to those with primary responsibility for the enterprise's affairs, nor is a formal position within the enterprise required.

However, the defendant is not liable under § 1962(c) unless the defendant has participated in the operation or management of the enterprise itself. See *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (holding that accountants hired to perform audit of cooperative's records did not participate in "operation or management" of cooperative's affairs by failing to inform cooperative's board of directors that cooperative was arguably insolvent). **In determining whether the conduct element has been satisfied, relevant questions include whether the defendant "occupies a position in the chain of command," "knowingly implements [the enterprise's] decisions," or is "indispensable to achieving the enterprise's goal."** *Walter v. Drayson*, 538 F.3d 1244, 1248-49 (9th Cir. 2008) (holding that attorney's performance of services for alleged associated-in-fact enterprise was not sufficient to satisfy § 1962(c)'s conduct element)

Civil RICO | Model Jury Instructions (uscourts.gov)

1. Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. **On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.**

2. Rule 12. Defenses and Objections: When and How Presented; Motion for

Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

3. Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings
(a) FINDINGS AND CONCLUSIONS.

(1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58

(2) *For an Interlocutory Injunction.* In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a Motion.* The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) *Effect of a Master's Findings.* A master's findings, to the extent adopted by the court, must be considered the court's findings.

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings | Federal Rules of Civil Procedure | US Law | LII / Legal Information Institute (cornell.edu)

4. Rule 56. Summary Judgment

Subdivision (e). The words “answers to interrogatories” are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are “well-pleaded,” and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co.*,

Inc. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.*, 191 F.Supp. 383 (D.Del. 1961); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa. 1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa. 1955).

5 CFR § 732.301 - Due process.

When an agency makes an adjudicative decision under this part based on an OPM investigation, or when an agency, as a result of information in an OPM investigation, changes a tentative favorable placement or clearance decision to an unfavorable decision, the agency must:

(a) Insure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to assure fairness to the individual in any determination.

(b) Comply with all applicable administrative due process requirements, as provided by law, rule, or regulation.

5 CFR § 732.301 - Due process. | Electronic Code of Federal Regulations (e-CFR) | US Law | LII / Legal Information Institute (cornell.edu)

16 CFR § 1025.42 - Powers and duties of Presiding Officer.

§ 1025.42 Powers and duties of Presiding Officer.

(a) General. A Presiding Officer **shall have the duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order.**

46 CFR § 502.67 - Motion for more definite statement.

The motion must be filed within 15 days of the pleading and must point out the defects

complained of and the details desired.

46 CFR § 502.67 - Motion for more definite statement. | Electronic Code of Federal Regulations (e-CFR) | US Law | LII / Legal Information Institute (cornell.edu)

An action for a writ of mandamus shall be tried by a jury on request of either party.

Maryland Courts and Judicial Proceedings Code Section 3-8B-02 (2022) - Trial by Jury :: 2022

OPINIONS BELOW

1. USCA4 Appeal: 23-1713 Doc: 10 Filed: 08/28/2023 Pg: 2 of 2

Mandamus may not be used as a substitute for appeal or, in this case, a rehearing petition. See In re Lockheed Martin Corp., 503 F.3d 351, 353 (4th Cir. 2007).

a. IV. PETITION FOR WRIT OF MANDAMUS GRANTED

Because Lockheed is entitled to a jury trial, the district court erred by striking Lockheed's jury demand. We therefore grant Lockheed's petition for the issuance of a writ of mandamus and we direct the district court on remand to try the case before a jury.

In re Lockheed Martin Corp., 503 F.3d 351 | Casetext Search + Citator

2. USCA4 Appeal: 23-1332 Doc: 23 Filed: 06/26/2023 Pg: 1 of 2

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:22-cv-00649-GLR) Submitted: June 22, 2023 Decided: June 26, 2023 **Before HARRIS and HEYTENS, Circuit Judges, and TRAXLER, Senior Circuit Judge.** Dismissed by unpublished per curiam opinion.

PER CURIAM: Julian R. Ash seeks to appeal the district court's order entering a briefing schedule related to his petition for review of a Merit Systems Protection Board (MSPB) decision. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949). The order Ash seeks to appeal is neither a final order nor an appealable interlocutory or collateral order.* Accordingly, we grant Appellees' motion to dismiss the appeal for lack of jurisdiction. We deny Ash's motion for a stay pending appeal, but grant his motions to amend his filings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process. DISMISSED

3. Case 1:22-cv-00649-GLR Document 66 Filed 04/28/23 Page 2 of 3

Because the Court finds that OPM's unopposed Motion is meritorious and well-founded, the Motion to Dismiss or for Summary Judgment (ECF No. 61) shall be granted.

Accordingly, it is this 28th day of April, 2023, by the United States District Court for the District of Maryland, hereby: ORDERED that OPM's Motions for Extension of Time are GRANTED (ECF Nos. 56, 58, 60); IT IS FURTHER ORDERED that Ash's Motions for Sanctions (ECF Nos. 34, 38) are DENIED; IT IS FURTHER ORDERED that OPM's Motion to Dismiss or for Summary Judgment (ECF No. 61) is GRANTED; IT IS FURTHER ORDERED that Ash's Motion for Default Judgment (ECF No. 31) is DENIED as MOOT; IT IS FURTHER ORDERED that the Petition (ECF No. 6) is DISMISSED; IT IS FURTHER ORDERED that the Clerk shall PROVIDE a copy of this Order to counsel and to Ash at his address of record; and Case 1:22-cv-

JURISDICTION

1. USCA4 Appeal: 23-1713 Doc: 10 Filed: 08/28/2023 Pg: 2 of 2

Ash does not satisfy the standard for mandamus relief.

Accordingly, we deny the petition for writ of mandamus. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.
PETITION DENIED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, **and to petition the Government for a redress of grievances.**

[First Amendment](#) | [Browse](#) | [Constitution Annotated](#) | [Congress.gov](#) | [Library of Congress](#)

Sixth Amendment

Amdt6.2.7 Reason for Delay and Right to a Speedy Trial . . . do much to determine the outcome of the balancing test **Where the government causes delay on purpose to gain a trial advantage, a long delay will generally amount to a constitutional violation.** Where the government bears no blame for a long delay—not even in the more neutral sense of negligence or crowded dockets—a constitutional violation likely does not exist absent a showing of specific.

Footnotes:

. . . lack of showing of specific prejudice, where defendant did not know of charges against him and therefore could not be blamed for not demanding a speedy trial). Brillon, 556 U.S. at 94 (A defendants deliberate attempt to disrupt proceedings should be weighted heavily against the defendant); id. **(Delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned.** . . .

[Reason for Delay and Right to a Speedy Trial](#) | [Constitution Annotated](#) | [Congress.gov](#) | [Library of Congress](#)

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment grants a right to a jury trial in Suits at common law, which the Supreme Court has long interpreted as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law.¹ The drafters of the Seventh Amendment used the term common law to clarify that the Amendment does not provide a right to a jury in civil suits involving the types of equitable rights and remedies that courts enforced at the time of the **Amendment's framing.**²

Two unanimous decisions, in which the Supreme Court held that civil juries were required, illustrate the Court's treatment of this distinction. In the first suit, a landlord sought to recover, based on District of Columbia statutes, possession of real property from a tenant allegedly behind on rent. The Court reasoned that whether a close equivalent to [the statute in question] existed in England in 1791 [was] irrelevant for Seventh Amendment purposes.³ Instead, the Court stated that its Seventh Amendment precedents require[d] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty.⁴ **The statutory cause of action, the Court found, had several analogs in the common law, all of which involved a right to trial by jury.**⁵

In a second case, the plaintiff sought damages for alleged racial discrimination in the rental of housing in violation of federal law, arguing that the Seventh Amendment was inapplicable to new causes of action Congress created. The Court disagreed: **The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.**⁶

[Seventh Amendment](#) | [Browse](#) | [Constitution Annotated](#) | [Congress.gov](#) | [Library of Congress](#)

Footnotes

¹Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

²Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830); Barton v. Barbour, 104 U.S. 126, 133 (1881). Formerly, the Amendment did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325 (1886); Pease v. Rathbun-Jones Eng'g Co., 243 U.S. 273, 279 (1917). **But see Dairy Queen v. Wood, 369 U.S. 469 (1962) (legal claims must be tried before equitable ones).**

[Identifying Civil Cases Requiring a Jury Trial](#) | [Constitution Annotated](#) | [Congress.gov](#) | [Library of Congress](#)

(a) **Where both legal and equitable issues are presented in a single case, any legal issues for which 'a trial by jury is timely and properly demanded must be submitted to a jury.** Beacon Theatres, Inc., v. Westover, 359 U. S. 500. Pp. 470-473 (b) **Insofar as the complaint in this case requests a money judgment, it presents a claim which is unquestionably legal.** Pp. 473-477.

U.S. Reports: Dairy Queen, Inc., v. Wood, U.S. District Judge, et al., 369 U.S. 469 (1962). (loc.gov)

Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

[Fourteenth Amendment](#) | [Browse](#) | [Constitution Annotated](#) | [Congress.gov](#) | [Library of Congress](#)

In God I Trust

1. Case 5:22-cv-00371-R Document 19 Filed 03/24/22 Page 18 of 24

On 3/24/22 Response to Summary Judgement from Ash v DOT, Defense states:

Because Plaintiff first filed a lawsuit about the denial of his disability retirement due to discrimination in another court, that case (now pending in the District of Maryland) should be permitted to proceed to its conclusion first. Doing so would conserve judicial resources and promote “the orderly administration of justice.”

2. Case 1:22-cv-00649-GLR Document 29 Filed 10/21/22 Page 3 of 6

On 3/17/22, upon Defendants request the Federal Court of Appeals for the Federal Circuit Transferred Ash v OPM to the District Court of Maryland, and on 3/28/22 (Exhibit #17 Doc#24-

1) Defendants sent an email to the Petitioner requesting to send the case back to the Court of Appeals for the Federal Circuit.

STATEMENT OF THE CASE

1. Case 1:22-cv-00649-GLR Document 43 Filed 01/02/23 Page 3 of 5

Item #9. **On December 1, 2022, Defendant filed a Response to Plaintiff's Motion for Default, and Motion for a More Definite Statement (ECF 32).** Defendant's motion asks that the Court order Plaintiff to file an Amended Complaint that complies with FRCP 8 and 10 and the Court's Order (at ECF 27), or file a single document he wishes to have treated as his Complaint within 14 days, after which, **in order to avoid further confusion, Defendant would file a response to whatever Plaintiff files, within 14 days of that filing. The Court has not yet ruled on the Motion for a More Definite Statement.**

2. Case 1:22-cv-00649-JKB Document 98 Filed 11/01/23 Page 1 of 19

- a. Exhibit #1011 Demonstrates that Doc #32 filed 12/1/22 was in Fact Filed 40 days after Plaintiff's Amended Complaint Doc #28 filed 10/21/22.

3. 46 CFR § 502.67 only allows 15 days.

REASONS FOR GRANTING THE WRIT

1. PREPARATION OF APPELLATE BRIEFS

This standard requires that for appeals handled by USAOs, an AUSA or Special AUSA be responsible for preparing the appellate brief, and that he or she be familiar with all pertinent facts, law, and arguments. **The appellate brief is the central focus of an appeal.** Delegating its preparation to agency counsel, a paralegal, or a law student, without adequate guidance and supervision, may jeopardize the quality of the brief. **Without appropriate guidance and supervision, delegation also shifts the initial burden of accuracy to someone who may not be licensed to practice law, who has not taken the government attorney's oath, who will not be able to argue the appeal, and who cannot sign the brief as required by Federal Rule of Appellate Procedure 32(d).** This standard does not prohibit all use of agency counsel, paralegals, or law students, but in making judgments about the proper use of agency counsel, paralegals, and law students, the office must consider the competence and experience of the individuals involved, as well as the importance of the case. **Any part of a brief that has been drafted by someone who is not an AUSA should be identified for the AUSA supervising appellate matters, another appellate AUSA, or an AUSA with significant appellate experience who will review the brief (the "brief reviewer"), even though the AUSA or Special AUSA who will be signing the brief is fully responsible for the draft that is submitted to the brief reviewer.**

United States Attorneys and their supervisory AUSAs may request that an appeal be assigned to an appellate attorney in one of the Department's litigating divisions.

2. USCA4 Appeal: 23-1332 Doc: 6 Filed: 04/20/2023 Pg: 1 of 7

FACTUAL BACKGROUND

Appellant originally filed a Petition for Review with the Court of Appeals for the Federal Circuit seeking judicial review of a decision of the U.S. Merit Systems Protection Board (“MSPB”) affirming OPM’s decision to deny his application for disability retirement benefits. (ECF 6, 7).

1 Based on information submitted to the USCA4 Appeal: 23-1332 Doc: 6 Filed: 04/20/2023 Pg: 1 of 7 Federal Circuit by Appellant in required docketing forms, the Federal Circuit transferred the case to the U.S. District Court for the District of Maryland.

The Administrative Record was filed with the District Court on December 15, 2022. (ECF 35, 36). On January 19, 2023, the MSPB Hearing Transcript was filed with the District Court. (ECF 47).

On March 28, 2023, Defendant OPM filed a Motion to Dismiss or for Summary Judgment. (ECF 61). A Rule 12/56 Letter was sent to Plaintiff on March 28, 2023, providing him notice that he should respond to the Motion within 28 days, or the case may be dismissed. (ECF 62).

On March 28, 2023, Appellant filed an “Informal Brief” with the District Court using a Fourth Circuit form, which was treated by the District Court as a Notice of Appeal. (ECF 63). In his Notice of Appeal, Appellant seeks to appeal: (a) the MSPB decision dated April 27, 2021, and (b) the District Court’s January 9, 2023 Order, setting a briefing schedule. *Id.* The appeal seeks relief in the form of: (1) an order deciding the District Court case in his favor; (2) an order requiring Defendant OPM to file a 12(e) response, and (3) an order enforcing Rule 21 on “the District Court of Maryland, the DOJ, and the Defendants.” (ECF 63 at 3).

3. In Doc #6 filed 4/20/23 the Defendants Intentionally Avoided Citing Doc #32 filed

12/1/22 because of the Rule 12e Violation by Starting their Factual Background on

12/15/22 instead of 3/17/22 for the Sole Purpose of Deceiving the Court.

4. **Discriminatory intent can be proved directly or circumstantially.** See *SECSYS, LLC v. Vigil*, 666 F.3d 678, 686 (10th Cir. 2012) (opinion of Gorsuch, J., with Brorby, J., and Murphy, J., concurring in the result). Direct proof is showing that “a distinction between groups of persons appears on the face of a state law or action.” *Id.* at 685. Circumstantial proof is showing that the plaintiff was treated differently from similarly situated persons who are “alike in all relevant respects.” *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th

Cir. 2018) (quotations omitted). As the Supreme Court said in Washington v. Davis, “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts.” 426 U.S. at 242. 10TH Circuit Decision Pattern 2.pdf

5. In a recent decision, EEOC upheld an administrative judge’s (AJ) decision to sanction the Social Security Administration for failing to develop a factual record before hearing and for not following the AJ’s specific orders. See Fox v. Social Security Administration, EEOC Appeal No. 0720050055 (December 24, 2009).

The agency filed its response to the show cause order and did not contest that it failed to develop the record, but instead, the agency Blamed the outside contracting service that conducted the EEO investigation. The AJ rejected the agency’s claim that it did not control the EEO investigation and held that the agency failed to adequately develop the record prior to hearing, failed to respond to the employee’s discovery requests, failed to comply with the AJ’s order to comply with the deposition schedule and failed to timely respond to the AJ’s order to show cause. Accordingly, the AJ ordered all relief requested by the employee, including placement into the supervisory attorney position with back pay, compensatory damages, correction of leave records and attorney fees. A second AJ was appointed to determine the amount of attorney fees and compensatory damages. The agency appealed both the default judgment and damages decisions to the Commission.

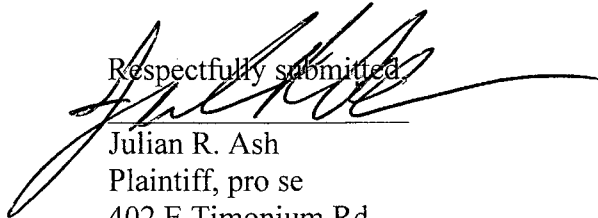
6. Based on the DOJ’s Preparation of Appellate Briefs above more than one person Knew that Doc #6 filed 4/20/23 was Fraudulent because the Factual Background was Woefully Inept and Inaccurate which meets the Standards for Sanctions stated in Fox v SSA above as well as the Criteria for RICO cited on Pg. (vi).
7. The Mandamus Appeal was filed on 3/28/23 to Compel the Court to Force Trial by Jury Based on the Rule 12e Violation Doc #32 filed 12/1/22.
8. Case 1:22-cv-00649-JKB Document 25 Filed 10/14/22 Page 1 of 1
 - a. The Court was Forced to Issue Defendants a Show Cause Order on 10/14/22.
9. Since the Court Never made a Decision on the Motion for a More Definitive Statement as of 12/1/22 the Motion is Still Pending because the Court Couldn’t Justify the Request.
10. In re Lockheed Martin Corp., 503 F.3d 351 the 4th Circuit Cited Trial by Jury to Grant Mandamus, Petitioner made the same Demand for Trial by Jury, Consistency or Conflict?

CONCLUSION

1. The DOJ says that Ash v OPM and Ash v DOT are similar cases but didn't seek to Consolidate the cases IAW FRCP 42 in order to create Trial Advantages through Delays.
2. The Court's Can't Cite Anything in the Record to Address the Allegations of Doc #39 filed 12/19/22 IAW FRCP 1,8,11,12, 52, or 56.
3. According to 28 U.S. Code § 1295 the Federal Court of Appeals for the Federal Circuit has Exclusive Jurisdiction over MSPB cases.
4. Bottom Pg. ix, the Common Law of Maryland says that cases of Mandamus Appeals Shall be Trial by Jury at the request of Either Party, the Demand for Trial by Jury was Clearly Stated in Doc #39 filed 12/19/22 and almost Every Document since that time.
5. The Appearance of Justice is just as Important as Justice.

Dated: May 16, 2024

Respectfully submitted,



Julian R. Ash
Plaintiff, pro se
402 E Timonium Rd
Lutherville, Md 21093
580-284-6202
jrthequietstorm@yahoo.com