UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 33

Docket No. PH-1221-08-0019-W-1

Dom Wadhwa,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 13, 2009

Dom Wadhwa, Moorestown, New Jersey, pro se.

Stacey Conroy, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the June 26, 2008 initial decision (ID) that denied his request for corrective action in his individual right of action (IRA) appeal. For the reasons discussed below, we find that the PFR does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the ID as MODIFIED by this Opinion and Order, still DENYING the request for corrective action.

BACKGROUND

¶2 The appellant, a Physician at the agency's Philadelphia Veterans Administration Medical Center (PVAMC), filed an IRA appeal on October 10, 2007. He enclosed the Office of Special Counsel's (OSC's) September 27, 2007 letter informing him that he had the right to seek corrective action from the Board. Initial Appeal File (IAF), Tab 1. The administrative judge (AJ) found that the Board has jurisdiction over the appeal, but denied the appellant's request for corrective action. *Id.*, Tab 59.

¶3 In denying the appellant's request for corrective action, the AJ first found that the appellant failed to show that he made protected disclosures on July 23, 2006, when he submitted a letter to the agency's Inspector General (VA IG) alleging safety violations at PVAMC, following an incident during which he was threatened by a patient who entered his examination room uninvited. ID at 3, 7-11. The AJ then found that, even if the appellant's disclosures were protected, he did not show that they were a contributing factor in his reassignment from the Primary Care Clinic to the Compensation and Pension (C&P) Section on January 22, 2007. *Id.* at 4, 11-14. Finally, the AJ found that, even if the disclosures were a contributing factor, the agency showed by clear and convincing evidence that it would have reassigned the appellant, anyway. *Id.* at 14-18.

¶4 The appellant has filed a PFR. PFR File, Tab 1. The agency has not responded to the PFR.

ANALYSIS

The AJ erred in finding that the appellant's disclosures were not protected.

¶5 To prevail on a claim under the Whistleblower Protection Act (WPA), an appellant must prove by preponderant evidence that he disclosed information he reasonably believed evidenced, inter alia, a substantial and specific danger to

public health or safety.[*] 5 U.S.C. § 2302(b)(8)(A); *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 12 (2004). The AJ correctly found that the appellant raised a specific threat to public health and safety. ID at 10. The appellant complained of numerous specific alleged security deficiencies, and drew a reasonable causal relationship between them and at least two incidents where he or another medical professional was threatened with serious injury by patients. IAF, Tab 1, Ex. A. The AJ did not determine whether the threat identified by the appellant was substantial. We find, however, that the prospect of bodily injury to hospital staff is sufficiently serious to satisfy that prong of the statutory standard. *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (stating that "the nature of the harm – the potential consequences – affects the substantiality of the danger").

¶6 Notwithstanding her finding that the appellant's alleged safety concerns were sufficiently specific, the AJ nonetheless found that the appellant's July 23, 2006 letter was not a protected disclosure under *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000). ID at 7-11. The AJ relied on *Meuwissen* for the proposition that a disclosure of something that is already publicly known is not a protected disclosure under the WPA. *Id.* at 8-9. In support, the AJ noted that the issues the appellant raised in the letter had been discussed and investigated at PVAMC for several years, culminating in the creation of a task force that made certain recommendations, and that some changes had been made. *Id.* at 8-10. The AJ also found that "many of the safety devices or strategies, or lack thereof, would have been apparent to anyone who

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[*] Although she erred in stating that gross mismanagement requires an "element of blatancy," the AJ correctly concluded that the appellant's July 23, 2006 letter did not disclose gross mismanagement. *See* IAF, Tab 59 at 9; *Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 11 (2008); *Tatsch v. Department of the Army*, 100 M.S.P.R. 460, ¶ 12 (2005) (noting that the U.S. Court of Appeals for the Federal Circuit has abolished the "blatancy" requirement).

walked into the hospital, *e.g.*, guards, cameras, metal detectors, room configurations, etc." *Id.* at 9.

¶7 We find that the AJ erred in relying on *Meuwissen* to find that the appellant's July 23, 2006 disclosures were not protected because PVAMC's staff and management were aware of the safety issues. An employee's decision to go outside the chain of command to correct a problem that local management has failed to address is a form of protected disclosure under the WPA, notwithstanding that local employees and management were aware of the problem. *See Grubb*, 96 M.S.P.R. 377, ¶¶ 27-28 (holding that an employee's complaint to the agency IG that local agency management violated the law was a protected disclosure); *Johnson v. Department of Health & Human Services*, 93 M.S.P.R. 38, ¶¶ 13-14 (2002) (holding that an employee who went to the agency IG after making numerous complaints to his supervisors that he believed were ignored made a protected disclosure under the rule that where an employee "goes outside the chain of command because he feels that those officials are 'unresponsive,' his disclosures are protected"); *Askew v. Department of the Army*, 88 M.S.P.R. 674, ¶¶ 7-9 (2001) (holding that an appellant's statements to the agency IG were protected disclosures, notwithstanding that the facility's management had previously detected the same problem identified by the appellant, but failed to act to the appellant's satisfaction).

¶8 We also find that the AJ erred on the facts in relying on *Meuwissen* to find that the appellant's July 23, 2006 disclosures were not protected under the "publicly known" exception. As previously noted, the AJ stated that issues that the appellant raised in his letter were publicly known because "many of the safety devices or strategies, or lack thereof, would have been apparent to anyone who walked into the hospital, *e.g.*, guards, cameras, metal detectors, room configurations, etc." ID at 9. However, there was no evidence that members of the public generally, as opposed to the potentially dangerous patients from whom the appellant sought protection, had access to examination rooms. In addition,

many of the other alleged safety deficiencies raised by the appellant would not have been visible to the public, such as the failure to provide panic buttons in examination rooms, patient criminal background information to treating physicians, special VA Police Officer protection in cases where a patient who was known to be potentially violent arrived for treatment, and warnings on the charts of potentially violent patients. IAF, Tab 1, Ex. A.

¶9 Therefore, the appellant here did more than merely restate observable facts. Rather, as a physician practicing at the facility, he provided a perspective not discernable to members of the visiting public by recognizing the potential threat to medical providers' safety that the lack of security caused. For instance, the appellant complained that the examination rooms' furniture was arranged such that a doctor could be pinned against the wall by a patient, that the absence of a second exit door in the rooms could trap a doctor, and that the rooms lacked panic buttons. IAF, Tab 1, Ex. A. A member of the public would not necessarily recognize the potential danger posed by these factors. Consequently, even assuming that all of the safety issues raised by the appellant were discernable by the public, the public would not have had the additional information necessary to recognize the threat to the health and safety of the medical staff posed thereby, and therefore could not effectuate the WPA's remedial purpose of encouraging that the threat be disclosed to someone in a position to correct it.

¶10 In that regard, we further find that the AJ erred in interpreting the "publicly known" test too restrictively. In *Meuwissen*, the appellant, an administrative judge, first complained about, and then issued an opinion inconsistent with, an agency's statutory interpretation that had been articulated in published decisions. 234 F.3d at 11. The court explained that the WPA's purpose to "correct" abuses is not served by "encourag[ing] employees to disclose the illegality of such decisions, which are known and readily redressable by appeal." *Id.* at 13-14. In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1347-50 (Fed. Cir. 2001), as in *Meuwissen*, the court explained the requirement that a disclosure be

"unknown" in the context of the legislative intent to encourage employees to make disclosures so that wrongdoing can be remedied. Thus, the court opined that the statutory purpose of encouraging disclosures that are likely to remedy a wrong is not served by making a "disclosure" to the wrongdoer himself. 263 F.3d at 1350. Similarly, in *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996), the court held that an employee's criticism directed to the wrongdoers themselves was not whistleblowing because such disclosures do not serve the WPA's purpose of remedying wrongs. But in *Horton*, the court did not even address whether the information conveyed by the employee was unknown or known. *See also Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶¶ 18-20 (2004) (analyzing the "disclosure" requirement based on whether the complaints were made to an individual other than the policy maker, without considering whether the recipient might also already have been aware of the allegedly dangerous policy).

¶11 In sum, the U.S. Court of Appeals for the Federal Circuit in *Meuwissen*, *Huffman*, and *Horton* examined whether the statutory purpose of affording a remedy for alleged government wrongdoing would be served in determining that the subject statements were not "disclosures" within the meaning of the WPA. In contrast, the remedial purpose of the WPA is furthered by encouraging employees to bring to the attention of agency IGs alleged threats to safety that are ignored by local management, and based upon facts which, even if known to the public, do not necessarily indicate a safety threat without also considering additional information not publicly known.

The AJ erred in finding that the appellant's disclosures were not a contributing factor in his reassignment.

¶12 To prevail on a claim under the WPA, an appellant must also prove by preponderant evidence that his disclosure was a contributing factor in a personnel action. 5 U.S.C. § 2302(b)(8)(A); *Grubb*, 96 M.S.P.R. 377, ¶ 12. As the AJ found, the appellant's reassignment was a personnel action. 5 U.S.C.

§ 2302(a)(2)(A)(iv); ID at 7. The most common way of proving the contributing factor element is the "knowledge/timing test." Under that test, an appellant can prove the contributing factor element through evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 19 (2008). "Once an appellant has satisfied the knowledge/timing test, he has demonstrated that a protected disclosure was a contributing factor in a personnel action. *Id.*, ¶ 20.

¶13 Here, the AJ erred in concluding that the appellant's disclosures were not a contributing factor in the agency's decision to reassign him, based on an analysis of all of the relevant evidence, despite finding that the managers who reassigned him were aware of his disclosure and that he was reassigned only 6 months after submitting the July 23, 2006 letter to the VA IG. ID at 11-14. Six months is well within the range of time between a disclosure and a personnel action from which an inference of causation arises. *See Gonzalez*, 109 M.S.P.R. 250, ¶ 20 (finding that a time period of slightly more than 1 year satisfied the timing test, and citing cases that also so held); *Cosgrove v. Department of the Navy*, 59 M.S.P.R. 618, 623 n.5 (1993) (citing legislative history stating that a 1-year period normally would support an inference of reprisal). Because the appellant satisfied the knowledge/timing test, the AJ should not have considered any further evidence on the issue. *Gonzalez*, 109 M.S.P.R. 250, ¶ 20. Any contrary evidence may be considered in the context of the agency's burden to show by clear and convincing evidence that it would have taken the adverse action notwithstanding the appellant's protected disclosures. An AJ's consideration of all of the relevant evidence when determining whether the whistleblowing was a contributing factor in the personnel action has the effect of shifting to the appellant a burden that the Board has held should be borne by the agency.

The AJ correctly found that the agency presented clear and convincing evidence that it would have reassigned the appellant even absent any protected disclosure.

¶14 The Board will order corrective action in an IRA appeal where an appellant shows by preponderant evidence that he engaged in whistleblowing and that the whistleblowing was a contributing factor in the decision to take a personnel action, unless the agency shows by clear and convincing evidence that it would have taken the personnel action even absent the whistleblowing. *Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 19 (2008). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board considers the strength of the agency's evidence in support of its action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, and any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. *Id.*

¶15 The AJ correctly concluded that the agency presented clear and convincing evidence that it would have reassigned the appellant even absent any protected disclosures. In that regard, the AJ relied on the credibility of the agency's witnesses, as demonstrated by the straighforwardness and consistency of their statements, their calm and assured demeanor, and the absence of any motivation for them to prevaricate or of any bias against the appellant for any improper reason. ID at 15-16. The AJ was satisfied that the unrebutted testimony of these witnesses established that the appellant was reassigned (1) to address a backlog in the department to which he was assigned that had developed during his absence from the PVAMC; (2) in response to the appellant's own request that he not be returned to work for the Director of the Primary Care Clinic; (3) in light of the large number of patient complaints the appellant had received while working in his original department; and (4) to prevent the communication and collaboration problems that had arisen between the appellant and the nurses and other staff at

his original department. *Id.* Significantly, there was evidence that agency management believed that the appellant had performance problems before he sent his letter to the VA IG. *Id.* at 17.

¶16 Thus, notwithstanding the AJ's errors in the first two prongs of the WPA analysis, she correctly found, based on a detailed discussion of the evidence and a thorough and persuasively reasoned analysis, that the agency would have reassigned the appellant notwithstanding his protected disclosures. Therefore, she correctly denied his request for corrective action under the WPA.

ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. 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 the United States Court of Appeals for the Federal Circuit to review this final decision. 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:

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William D. Spencer
Clerk of the Board
Washington, D.C.