PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 30 | Issue 1 Article 9

3-15-2010

Legal Summaries

Oscar Gutierrez

Pepperdine University School of Law
Legal Summaries *

TABLE OF CASES

---

* Prepared by Oscar Gutierrez, the Legal Summaries Editor for the Journal of the National Association of Administrative Law Judiciary at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

TABLE OF CASES (CONT.)

DISTRICT OF COLUMBIA, COURT OF APPEALS

COURT OF APPEALS OF MINNESOTA

SUPREME JUDICIAL COURT OF MAINE

UNITED STATES COURT OF FEDERAL CLAIMS

Wyo. Sawmills v. United States, 90 Fed. Cl. 148 (Fed. Cl. 2009).

LAW: The National Forest Management Act of 1976, 16 U.S.C. § 472a (NFMA) "sets forth the terms and conditions under which the Forest Service may contract to harvest timber from federal forest resources." Section 472a(c) of the NFMA holds:

> The length and other terms of the contract shall be designed to promote orderly harvesting consistent with the principles set out in section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended [16 U.S.C.A. § 1604]. Unless there is a finding by the Secretary of Agriculture that better utilization of the various forest resources (consistent with the provisions of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531]) will result, sales contracts shall be for a period not to exceed ten years: *Provided*, [t]hat such period may be adjusted at the discretion of the Secretary to provide additional time due to time delays caused by an act of an agent of the United States or by other circumstances beyond the control of the purchaser. The Secretary shall require the purchaser to file as soon as practicable after execution of a contract for any advertised sale with a term of two years or more, a plan of operation, which shall be subject to concurrence by the Secretary. The Secretary shall not extend any contract period with an original term of two years or more unless he finds (A) that the purchaser has diligently performed in accordance with an approved plan of operation or (B) that the substantial overriding public interest justifies the extension.

FACTS: Wyoming Sawmills, Inc. (Plaintiff) operates a lumber mill in Sheridan, Wyoming, where it produces studs to be used in new home construction. On December 10, 1993, Plaintiff entered into a contract with the Forest Service, "Wabash Timber Sale

Contract No. 003876 (Contract)," which allowed Plaintiff to harvest certain timber within the Black Hills National Forest in South Dakota. The Contract listed a termination date of September 30, 1999, and also had a periodic payment schedule which "required Plaintiff to pay the Forest Service one-third of the value of the Contract by September 4, 1997, with a second and final payment of two-thirds of the value of the Contract due on September 4, 1998." Although Plaintiff did harvest some timber and made the first payment, "Plaintiff has not harvested a sufficient amount of timber to make the second and final payment."

However, the Contract has been modified on six separate occasions. First, on January 23, 1996, a Contract Term Adjustment (CTA) extended the Contract termination date from September 30, 1999, to August 31, 2000, thereby, "authorizing Plaintiff to harvest timber in the Bighorn National Forest, instead of the Black Hills National Forest, because of an urgent need of the Forest Service." Second, "on September 16, 1996, the Contract termination date of August 31, 2000 was extended to August 31, 2001, by special authorization of the Chief of the Forest Service." The Chief of the Forest Service personally "authorized this one-year extension and deferral of the periodic payment on 'certain timber sale contracts that were awarded prior to January 1, 1995,' because the Contract had not been previously extended by a Market-Related Contract Term Adjustment (MRCTA)." Third, the Contract termination date of August 31, 2001 was extended to February 28, 2003, on December 23, 1996, "by a CTA again to authorize Plaintiff to harvest timber in the Bighorn National Forest, because of an urgent need of the Forest Service." Fourth, the Contract's MRCTA provision was modified on June 25, 1998. Several provisions were modified, but one such modification stated in pertinent part that the "[t]he revised contract term may not exceed ten years as a result of market-related contract term addition." Fifth, the Contract termination date of February 28, 2003, was extended to December 10, 2003, by a January 6, 1999, MRCTA. This extension was "'due to a drastic reduction in wood product prices in accordance with 36 C.F.R. [§] 223.52.'" Sixth, "[o]n October 26, 2001, the Contract termination date of December 10, 2003 was extended to December 20, 2008, by a third CTA, to provide Plaintiff time to harvest timber in urgent need of removal in a different area of the Black Hills National Forest."

Additionally, "[o]n March 5, 2007, Plaintiff requested another two-year MRCTA extension, from December 20, 2008, because of the Forest Service's 'finding of substantial overriding public interest.'" At the time of Plaintiff's request, the Contract had already been in existence for almost fifteen years. However, on March 12, 2007, "the Forest Service denied Plaintiff's MRCTA extension, because the Contract provided that: '[t]he revised contract term may not exceed 10 years as a result of [a] market-related contract term addition.'" The Forest Service had discovered that "'[t]he [Contract] does not qualify for [another] MRCTA under C8.212-Market-Related Contract Term Addition ... as the contract term exceeds ten years.'" Subsequently, Plaintiff requested a reconsideration of this decision on March 30, 2007. However, Plaintiff's request was denied on April 2, 2007, after the Forest Service determined that the Contract no longer qualified for an MRCTA because the contract term exceeded ten years. On August 9, 2007, Plaintiff then wrote a letter to the Regional Forester of Region 2, requesting a "'finding of substantial overriding public interest[,]'" as the Contract only provided that the term "'may be adjusted when a drastic reduction in wood product prices has occurred in accordance with 36 C.F.R. 223.52.'" This 2007 adjustment would then "extend the termination date of the Contract from December 20, 2008, to March 20, 2011, and defer Plaintiff's obligation to make the payment of $1,066,200 due on November 14, 2007 until November 14, 2010." Last, on September 11, 2007, the Regional Forester of Region 2 "denied Plaintiff's August 9, 2007 request for another adjustment, because: 'by the time the sale terminates in December 2008, the contract will have run for approximately fifteen years, which is clearly beyond any regulatory allowances foreseen in the Code of Federal Regulations that regulate timber sale contracts.'"

On December 20, 2008, the Government officially terminated the Contract, as Plaintiff failed to make the periodic payment of $1,066,200 due November 14, 2007. Next, "[o]n April 24, 2009, Plaintiff filed a Motion for Summary Judgment And Memorandum In Support, together with Proposed Findings Of Uncontroverted Fact." Then, "[o]n June 2, 2009, the Government filed a Cross Motion For Summary Judgment And Opposition To Plaintiff's Motion For Summary Judgment, together with a Response To Plaintiff's Proposed Findings Of Uncontroverted Fact, and Proposed Findings Of Uncontroverted Fact."

ANALYSIS: The United States Court of Federal Claims' jurisdiction "is established by the Tucker Act, 28 U.S.C. § 1491(a)(1)." The Tucker Act allows the court

> 'to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.'

28 U.S.C. § 1491(a)(1) (2006). A "plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, or executive regulation that provides a substantive right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). The Act "authorizes the United States Court of Federal Claims 'to render judgment upon any claim by or against, or dispute with, a contract or arising under ... the Contract Disputes Act of 1978, including a dispute concerning termination of a contract.'" 28 U.S.C. § 1491(a)(2).

The Plaintiff moved for summary judgment on April 24, 2009, contending that "the Forest Service's decision that the Wabash Timber Sale does not qualify for a MRCTA is a breach of contract provision C8.212# and contrary to 36 C.F.R. § 223.42. On the other hand, "[t]he Government insists entitlement to summary judgment, because the Contract did not qualify for a MRCTA, as it was more than ten years old when Plaintiff requested an extension." In Plaintiff's Response, dated June 30, 2009, Plaintiff contends "that the plain language of the Contract, 36 C.F.R. § 223.52, and the NFMA do not support the Government's 'narrow interpretation' that the Contract is not entitled to MRCTA." In the Government's August 14, 2009 reply, the Government contends "that contract provision C8.212#, by its plain and ordinary meaning, prohibits Plaintiff from receiving an extension, if the Contract is more than ten years old."

In the instant case, the Government did "not contest that the Contract could be extended, if the Secretary of Agriculture determined a 'better utilization of ... forest resources will result and if there was a finding of substantial overriding public interest.'" Further, Plaintiff did not petition "the Secretary of Agriculture to obtain a MRCTA extension, although the National Forest

Management Act authorizes the Secretary to extend a contract at his/her 'discretion.'" 16 U.S.C. § 472a(c). As a result, "[b]efore the parties' dispute is ripe for adjudication, Plaintiff is required to petition the Secretary to determine whether at this time 'better utilization of the various forest resources . . . will result,' and whether 'the substantial overriding public interest justifies the extension.'"

HOLDING: In sum, "the [C]ourt has decided to defer ruling on Plaintiff's April 24, 2009 Motion For Summary Judgment and the Government's June 2, 2009 Cross Motion For Summary Judgment." The Court chose to stay the case for six months, in order "to afford the Plaintiff the opportunity to petition the Secretary of Agriculture and for the Secretary to decide whether, and how long, to grant any extension of the Contract." 16 U.S.C. § 472a(c).

IMPACT: In the instant case, both Plaintiff and Government recently filed motions for summary judgment. However, the administrative remedies had not been exhausted. Thus, the instant case serves as a case study in how not following proper procedure can delay the decision of an important case.

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT

Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009).

LAW: 8 U.S.C. § 1226(c) holds that the Attorney General shall take into custody any alien who

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether

> the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

FACTS: Houng Saysana is a native and citizen of Laos, who entered the United States as a refugee in 1980. In 1990, he was convicted of indecent assault and battery in Massachusetts state court. He was sentenced to five years' imprisonment. In 2005, Saysana was again arrested, this time for a failure to register as a sex offender as required by Massachusetts state law because of the 1990 offense. The charge was later dismissed. In 2007, Saysana was taken into custody by Immigration and Customs Enforcement (ICE) pursuant to 8 U.S.C. § 1226(c) and held without bond. On the same day, the Department of Homeland Security (DHS) initiated removal proceedings, contending that Saysana's 1990 conviction qualified as an aggravated felony crime of violence and rendered him removable. After agency proceedings in which bond was again denied, Saysana filed this petition for habeas corpus in the district court, challenging the conclusion of the Board of Immigration Appeals (BIA) that he is subject to the mandatory detention provision in 8 U.S.C. § 1226(c). The District Court for the District of Massachusetts concluded that the BIA had misinterpreted the statute, and it granted the writ. The Government timely appealed.

ANALYSIS: At the heart of this appeal is an interpretation of the mandatory detention provision set forth in 8 U.S.C. § 1226(c), which "is part of a provision that addresses the apprehension and detention of aliens." More specifically, the court was to decide whether the mandatory detention provision applies strictly in situations where an alien "is released from a criminal custody the basis for which is one of the offenses listed in section 1226(c)(1)(A)-(D); or alternatively, whether it applies whenever an alien, previously convicted of an offense that falls within § (c)(1)(A)-(D), is released from any criminal custody regardless of the reason for that detention." The issue centers on the "when released" language in section 1226(c).

The court utilized the reasoning in *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). *Chevron* requires that the court focus on the statutory language. A natural reading of the statutory provision from top to bottom "makes clear that the

congressional requirement of mandatory detention is addressed to the situation of an alien who is released from custody for one of the enumerated offenses."

However, the Government submits that "when released" is susceptible to another interpretation. More specifically, the Government maintains that the 'released' language "must embrace a broader meaning than a release from custody for an enumerated offense because the statute requires mandatory detention for individuals who are removable or inadmissible based on the commission of certain offenses, whether or not they were convicted of those offenses." *See* § 1226(c)(1)(A) & (D) (referring to other portions of the Immigration and Nationality Act (INA) not requiring a conviction). In other words, the Government concludes that because § 1226(c)(1)(A)-(D) includes offenses for which aliens "might not be incarcerated, 'when released' must have a broader meaning than the offenses in the statute."

But, the Government's effort to make §1226(c)(1) "ambiguous" is strained. Thus, the Court reasoned that in reading the provision as a whole, it is clear that the "when released" language, relates to the listed offenses in subsection (c)(1)(A)-(D). Overall, the Court found that the text of the statute was clear. As a result, because the "when released" language is not ambiguous, then "there is nothing for the agency to interpret – no gap to fill – and there is no justification for resorting to agency interpretation to address an ambiguity." Therefore, the mandatory detention position "does not reflect a general policy in favor of detention; instead, it outlines specific, serious, circumstances under which the ordinary procedures for release on bond at the discretion of the immigration judge should not apply."

HOLDING: The court held that the mandatory detention provision of the Illegal Immigration Reform and Immigrant Responsibility act (IIRIRA) "applied only when the alien was released from criminal custody for one of the qualifying offenses." The judgment of the district court was affirmed, as the Court concluded that the Government adopted an interpretation contrary to the plain meaning of the statute. The Court also held, in the alternative, that even if the statute were ambiguous, the interpretation of the Government was not reasonable.

IMPACT: The Court maintained that the meaning of the statute was clear - the statute contemplates mandatory detention following release from non-DHS custody for an offense specified in the statute, not merely *any* release from *any* non-DHS custody. The Court stood by the meaning of the law and was not swayed by attempts to interpret the law in favor of the Government. By adhering to the spirit and letter of the law, the court took steps in protecting the rights of immigrants all across the United States.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Haile v. Holder, 591 F.3d 572 (7th Cir. 2010).

LAW: 8 C.F.R. § 208.13(b)(1) holds that an applicant may qualify as a refugee

> on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

FACTS: Temesgen Woldu Haile (Petitioner) was born in 1976 in Addis Ababa, Ethiopia. Petitioner's parents were of Eritrean origin, but at the time, Eritrea was a part of Ethiopia, thus both

Petitioner and his parents were Ethiopian citizens. Petitioner's parents had moved to Enitrea in 1992. In 1993, Eritrea separated from Ethiopia. After Eritrea became independent, Petitioner's parents acquired Eritrean citizenship and also renounced their Ethiopian citizenship. Petitioner was a minor at the time and stayed behind. Later, in 1998, Ethiopia and Eritrea went to war. Consequently, "Ethiopia indiscriminately rounded up and expelled some 75,000 Ethiopian citizens [of Eritrean ethnicity]." Petitioner fled Ethiopia "before he could be expelled, and eventually wound up in the United States and sought asylum, contending that he'd been stripped of his Ethiopian citizenship and that this was persecution." However, the immigration judge denied Petitioner asylum "on the ground that since a country has a right to determine who is a citizen, taking away a person's citizenship is not, without more, persecution." The Board of Immigration Appeals (Board) then affirmed the immigration judge's decision without discussing when or if denationalization amounts to persecution.

ANALYSIS: Petitioner has now turned to the United States Court of Appeals, Seventh Circuit, for relief. A panel of this Court referred to the immigration judge's reasoning as problematic, and then vacated the Board's decision and remanded the case back to the Board. The Court instructed the Board to "consider the relation of denationalization to persecution, and having done so to determine whether the petitioner was still an Ethiopian citizen, which the immigration judge had not bothered to determine since he thought it irrelevant." However, on remand, the Board again denied the application for asylum. The Board based their denial on the observation that not all denationalizations constitute instances of persecution. The Court agreed with this conclusion; in the instant case, Petitioner is stateless – "there is no contention that his Eritrean ethnicity makes him an Eritrean citizen." Simply put, the Board prematurely leapt to the conclusion "that even if a person loses his citizenship because of a 'protected ground' - which is to say a ground on which U.S. law permits a person to seek asylum, such as religion [or nationality]-such a loss of citizenship does not, without more, amount to persecution." The Board's conclusion that Petitioner had to prove "denationalization plus" does not "follow from its premise, and unlike a jury an administrative agency, has to provide a reasoned justification for its rulings." "From the correct premise that change

of citizenship incident to a change in national boundaries is not persecution per se, it does not follow that taking away a person's citizenship because of his religion or ethnicity is not persecution." If Ethiopia did denationalize Petitioner because of his Eritrean ethnicity, "it did so because of hostility to Eritreans . . . and it is enough to suggest that his denationalization was persecution and created a presumption that he has a well-founded fear of being persecuted should he be returned to Ethiopia." 8 C.F.R. § 208.13(b)(1).

Additionally, in 2003, Ethiopia passed a new law "allowing persons who had lost their Ethiopian nationality because of their acquisition of a foreign nationality to regain it by returning to live in Ethiopia, renouncing their foreign citizenship, and applying for readmission to Ethiopian citizenship." However, the record does not indicate if readmission is automatic upon application, as persons who never acquired foreign citizenship cannot actually renounce it. Further, "[i]t's not as if the law simply reinstated the Ethiopian citizenship of all persons who had lost it because of their Eritrean ethnicity; the Board would then have had a stronger ground for denying asylum to the petitioner." Petitioner would then have been forced to show either that he faced persecution as a returning citizen or that the mistreatment of Eritreans during the war "had been so outrageous (like the Nazi treatment of the Jews) that a compelled return to Ethiopia even with citizenship restored and apologies from one's former persecutors would be a cruelty warranting what is termed 'humanitarian' asylum." 8 C.F.R. § 208.13(b)(1)(iii). Technically, the law by its specific terms is only applicable to "a person who was an Ethiopian national *and has acquired foreign nationality*." However, Petitioner is stateless, as he has not acquired foreign nationality. It is possible that despite its language, the readmission law is applicable to Petitioner, but there is no actual discussion of the issue by the Board.

HOLDING: The petition for review was granted. The matter was remanded to the Board in order to determine whether the Ethiopian government's act of stripping Petitioner of his Ethiopian citizenship amounted to persecution.

IMPACT: The instant case is difficult to decide because of the state of flux of Ethiopia as a nation. This problem is not unique, as

several immigrants may also be "stateless" such as those from Palestine. The Court's rationale to remand this case back to the Board is a wise one, as the decision that follows will impact the life of not only the Petitioner, but millions of refugees who have sought protection in the United States from war-torn countries and whom are not "stateless."

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Catholic Health Initiatives v. Sebelius, 658 F. Supp. 2d 113 (D.D.C. 2009).

LAW: The Medicare Act, Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, "creates a federally funded health insurance program for the elderly and disabled." The Centers for Medicare and Medicaid Services ("CMS") "is the component of the Department of Health and Human Services that administers the Medicare program for the Secretary." Part A of the Medicare Act "reimburses hospitals for the operating costs of certain inpatient services." *See* 42 U.S.C. § 1395ww. However, "in order to obtain this reimbursement eligible hospitals file cost reports with their 'fiscal intermediaries,' allocating a portion of those costs to Medicare." *See* 42 C.F.R. § 413.20. Afterwards, the intermediaries "determine the amount owed by the Secretary to the hospitals for the fiscal year at issue." *See* 42 C.F.R. § 405.1803(a). Hospitals may "appeal the payment determination to the Provider Reimbursement Review Board (Board) within 180 days." *See* 42 U.S.C. § 1395oo(a). The Board "may reverse, affirm or modify the intermediary's decision; similarly, the Secretary subsequently may reverse, affirm or modify the Board's decision." *See* 42 U.S.C. §§ 1395oo(d) and (f)(1). Hospitals that are "still dissatisfied with the final decision may seek judicial review by filing suit in the appropriate United States district court." *See* 42 U.S.C. § 1395oo(f). Provider hospitals "receive reimbursement for the 'reasonable cost' of Medicare services provided." 42 U.S.C. § 1395x(v)(1)(A). The Secretary of Health and Human Services "promulgated regulations outlining principles for reasonable cost reimbursement." *See* 42 C.F.R., Part 413. The Secretary also created a manual, referred to as the Provider Reimbursement Manual (PRM), "to provide further detail to fiscal intermediaries to determine

appropriate reimbursement." Premiums "hospitals pay for malpractice insurance allocable to Medicare costs generally are reimbursable." *See* PRM § 2162.2.A. The PRM generally disallows from reimbursement, "however, insurance liability premiums paid to captive insurers (those that are wholly-owned by the provider hospitals) that are domiciled offshore and invest more than ten percent of their assets in equity securities." *See* PRM § 2162.2.A.4.

FACTS: Catholic Health Initiatives (Plaintiffs), a non-profit health care organization based in Denver, Colorado, brought this action seeking judicial review of the Secretary of Health and Human Service's denial of reimbursement under the Medicare statute for certain insurance premium payments made by Plaintiffs. The Plaintiffs are fifty-five Medicare participating hospitals. Plaintiffs paid premiums to First Initiatives Insurance Ltd. (FIIL) for malpractice, other liability, and workers' compensation coverage for the Medicare cost reporting periods from 1997 on through 2002. FIIL is a captive insurer, wholly-owned by Plaintiffs, and domiciled in the Cayman Islands. FIIL invests forty to fifty percent of its assets in equity securities. Based on the Medicare Provider Reimbursement Manual (PRM) § 2161.2.A.4, "[P]laintiffs self-disallowed the premiums they paid to FIIL on their Medicare cost reports." Plaintiffs then requested a hearing challenging the self-disallowance of these insurance premiums, which the Board conducted on November 4, 2004. On January 24, 2007, the Board then issued a decision upholding the disallowance of the insurance premiums paid to FIIL. Then on March 9, 2007, CMS Administrator declined to review the Board decision, essentially upholding it. Plaintiffs filed suit in this Court on March 20, 2007. The question before this court "is whether *the Board's ruling* – which found the reimbursement standard expressed in the PRM to be consistent with both the Medicare statute and the Medicare regulations – was lawful."

ANALYSIS: The instant matter came before this Court after the parties' cross motions for summary judgment. Plaintiffs' first argument calls into question the Secretary's interpretation of the Medicare statute and regulations. Specifically, Plaintiffs "contend that the Board's denial of reimbursement for insurance premiums paid to offshore captive insurers that invest more than ten percent of their assets in equity securities is inconsistent with the plain meaning

and intent of the Medicare statute to reimburse providers for their 'reasonable costs.'" When the action being reviewed "involves an agency's interpretation of a statute that the agency is charged with administering, the court applies the familiar analytical framework set forth in *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." Under *Chevron*, the court must consider whether the Secretary's decision not to reimburse the costs at issue conflicts with the plain language of the statute. Because the Medicare statute, by its terms, does not say whether insurance premiums paid to captive insurers that are domiciled offshore and invest more than ten percent of their assets in equity securities are reimbursable, the court will move to *Chevron* step two, to consider whether the agency's interpretation was permissible. In step two, the Court concluded that the Board's decision, which was adopted by the Secretary, "was within the Secretary's broad discretion under the statute to exclude reimbursement for costs 'found to be unnecessary in the efficient delivery of needed health services.'" 42 U.S.C. § 1395x(v)(1)(A). The Board found that the policy manual's investment restrictions relating to offshore captive insurance companies "were not an inappropriate or unreasonable development of the reasonable costs principle." Further, the Board also noted that the Plaintiffs "did not provide evidence that would have led it to conclude that the investment restrictions were 'inappropriate or unreasonable.'" The Court noted that there was substantial evidence in the record to support the findings of the Board, and that the Board reasonably relied on these findings in support of its own interpretation of the statute.

Plaintiffs also argue "that the Secretary's disallowance of insurance premiums paid to captive insurers that are domiciled offshore and invest more than ten percent of their assets in equity securities conflicts with the Medicare statute's implementing regulations." The Court did not use the *Chevron* test, but rather, decided that the agency's interpretation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Abington Crest Nursing & Rehab Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009). The Medicare statute "expressly gives the Secretary the authority to issue regulations establishing the methods to be used and the items to be included in determining 'reasonable costs' that will be reimbursed," 42 U.S.C. section 1395(v)(1)(A), and it also established that the Secretary has broad

discretion in doing so. *See Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 95-96 (1995). Reasonable cost "includes all necessary and proper costs incurred in furnishing the services, subject to principles relating to specific items of revenue and cost." 42 C.F.R. § 413.9. The regulation enumerates 'necessary and proper costs' as "costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities." 42 C.F.R. § 413.9(b)(2). The Board found that the premiums paid to the offshore captive insurers at issue "were not 'proper' because offshore captives are not 'subject to the same level of industry regulations applied to onshore agencies by State insurance commissions.'" Additionally, the Board found that the denial of reimbursement for this type of insurance premium "was consistent with the statute and with the regulations, there could be no question that it would deny reimbursement to these Plaintiffs. Further, the Board also found that that FIIL was an "offshore captive insurance company, wholly-owned by plaintiffs, and that it invested forty to fifty percent of its assets in diversified equity securities." Given these facts, the Board decided to disallow the costs.

Third, Plaintiffs argue that even if the Secretary's disallowance of the hospital's premium costs is upheld, "the Secretary should reimburse the *actual liability claims* paid during the years at issue." The Court agreed with the Board in finding that the Plaintiffs were "attempting an end run around the disallowed premium costs, and that the plaintiffs [were] not entitled to relief on these grounds." Further the Court noted that "nothing in the Medicare statute or regulations, entitles insurers to reimbursement for paid claims; instead, hospitals are expected to have valid insurance and are reimbursed for premiums they have paid." In sum, hospitals that select insurers whose liability premiums are not reimbursable "are not entitled to have their insurers receive reimbursement for the liability claims actually paid."

HOLDING: The Court granted Sebelius' motion for summary judgment and denied Plaintiffs' motion for summary judgment.

IMPACT: In the instant case, the Plaintiffs basically employed questionable tactics, yet still tried to find a way to profit of off their practices. Fortunately, the Board and Court were quick to point out the misdeeds of the Plaintiffs. As a result, the Board and Court were

able to prevent millions of dollars from being usurped by the Plaintiffs.

Natural Res. Def. Council v. U.S. Dept. of State, 658 F. Supp. 2d 105 (D.D.C. 2009).

LAW: Executive Order 13,337 delegates to the State Department Presidential authority to issue permits for the construction of an oil pipeline across the United States border if it finds that the issuance of the permit to the applicant "would serve the national interest." Exec. Order No. 13,337, § 1(g), 69 Fed. Reg. 25,299 (Apr. 30, 2004). Nevertheless, before issuing the permit, the State Department must consult with various departments and agencies specified in the Order. *Id.* at § 1(b)(ii). But, if any of the departments or agencies disagrees with the proposed decision of the State Department, the State Department must refer the permit application to the President 'for consideration and a final decision. *Id.* at § 1(i). Otherwise, the State Department makes the final decision.

FACTS: The Natural Resources Defense Council and certain local affiliates (collectively NRDC) brought this action seeking declaratory and injunctive relief against the United States Department of State, along with various officers acting in their official capacity (collectively, State Department) "on the ground that the State Department violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, by issuing a presidential 'permit' to defendant-intervenor TransCanada Keystone Pipeline, LP (Keystone) for a cross-border oil pipeline between the Canada and the United States, which was based on an inadequate assessment of environmental impacts." The term "permit" as used here "is the written imprimatur of the President issued through the State Department authorizing the applicant to proceed with the cross-border project." NEPA mandates that "'all agencies of the Federal Government shall ... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement' on environmental impacts." 42 U.S.C. § 4332(2)(C). Specifically, the NRDC claims that the State Department's final Environmental Impact Statement (EIS) "did not comply with NEPA and its

implementing regulations for numerous reasons, the details of which are not relevant now." Thus, the NRDC now seeks a declaration that the failure of the State Department to prepare an adequate EIS violated NEPA and that the decision of the State Department to issue the presidential permit based on that inadequate EIS violated the Administrative Procedure Act (APA). Additionally, the NRDC also seeks an injunction:

> directing the State Department to revoke the permit and to require that Keystone remove the portion of the pipeline subject to the permit and that it cease any further construction or activity until the State Department complies with NEPA and the APA.

On the other hand, the State Department and Keystone (collectively, Defendants) move to dismiss the NRDC's Amended Complaint "on the ground that no legal basis exists to challenge State Department decisions on behalf of the President to issue presidential permits under Executive Order 13,337." Defendants maintain that the NRDC "cannot point to any statutory authority that creates a cause of action by which this Court may review the State Department's conduct in this case." Defendants further contend that "a private right of action is expressly foreclosed by the Executive Order itself." *See* Exec. Order No. 13,337, § 6, 69 Fed. Reg. at 25,299.

ANALYSIS: The NRDC claimed a violation of both NEPA and the APA. Both violations raise a federal question covered by 28 U.S.C. § 1331. The crux of the Defendants' arguments is "not whether the NRDC has presented federal claims, but whether those claims are enforceable against the State Department when it is acting on behalf of the President pursuant to Executive Order 13,337." The NRDC specifically claims that "agency action is not presidential action unless there is some requirement that the President review the agency action before it takes legal effect." However, an act need not be personally carried out by the President in order to "constitute presidential action exempt from judicial review under the APA." In other words, the State Department stands in the shoes of the President by "exercising the President's inherent discretionary power under the Constitution to issue cross-border permits." Thus, in order to

challenge an issuance of a presidential permit, whether it issued by the President or by the State Department, "is to challenge a presidential act, which is not reviewable under the APA. *See Tulare County v. Bush*, 185 F. Supp. 2d 18, 29 (D.D.C. 2001). In the instant case, the President delegated his constitutional authority to a subordinate agency. The President "has complete, unfettered discretion over the permitting process." Further, there is no existing statute that governs or curtails the President's discretion to issue presidential permits, regardless if it is issued by the President, the State Department, or any other department. As a result, the decision to issue a permit whether it was made by the President himself, or the State Department, is a presidential action – one not reviewable for abuse of discretion.

HOLDING: The Court agrees with the Defendants and granted their respective motions to dismiss.

IMPACT: If the Court had accepted the NRDC's position, the Court would have frustrated the President's ability to enact his preferred decision-making process. In essence, the decision of the Court preserved the Congressional power of the President of the United States to issue permits, whether issued by the President himself, or issued by the State Department or other any other department.

Morgan v. Fed. Aviation Admin., 657 F. Supp. 2d 146 (D.D.C. 2009).

LAW: The Fair Labor Standards Act (FLSA) states in pertinent part that, any employer who violates the provisions of either section 206 or section 207 "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

FACTS: Plaintiff Greg Morton, appearing pro se, is a former employee of the Federal Aviation Administration (FAA), one of the agencies housed within the Department of Transportation (DOT). The FAA terminated Plaintiff's employment as an air traffic control

specialist on September 30, 2005. Plaintiff has brought suit against the FAA and Susan Marmet, a former coworker. Plaintiff seeks compensation under the FLSA, 29 U.S.C. §§ 201 et seq., "for the forty-five minutes he spent obtaining information for his medical clearance on February 16, 2005." Plaintiff's second claim under the FLSA "alleges that he was terminated in retaliation for bringing or threatening to bring an FLSA action." Lastly, Plaintiff "challenges his termination under the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12900 et seq., claiming that Marmet violated the FEHA by 'discharging and/or discriminating [against] and or harass[ing]' the [P]laintiff." Plaintiff's third action, alleging similar FLSA claims and involving fifty-two other air traffic control specialists, was brought in the Court of Federal Claims on October 1, 2007. *See Whalen v. United States*, 80 Fed. Cl. 685 (Fed. Cl. 2008). On March 12, 2008, the Court of Federal Claims dismissed Plaintiff from the case because of the pendency of the instant action. Defendants filed the instant motion on February 9, 2009, which sought to dismiss Plaintiff's complaint on the grounds of res judicata, "but because those defenses were not included in the defendants' original answer, the [D]efendants amended their answer to include them." *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997).

Defendants have moved to dismiss, or for summary judgment, on the grounds of res judicata and collateral estoppel. Because Defendants filed this motion post-answer, the Court treats it as one for summary judgment, as opposed to a motion to dismiss.

ANALYSIS: Defendants maintain "that the Federal Court decision and the Merit Systems Protection Board (MSPB) decision from which it was appealed, preclude the instant suit because in the Federal Court action," the Plaintiff litigated the same claims, issues, and facts the he currently seeks to litigate in this Court. Defendants contend that those decisions "preclude both the plaintiff's FLSA claims and his FEHA claim." Additionally, Defendants contend "that the MSPB decision bars the FEHA claim because [P]laintiff could have, but did not, assert harassment by Marmet as a defense to his termination." Finally, Defendants assert that the fact that Plaintiff seeks relief under a different legal theory in the instant case "than he did in the MSPB matter does not diminish the applicability of the affirmative defense of res judicata in this case." Plaintiff responds to

Defendants' motion with several different arguments, several of which have already been rejected by the Court.

Next, Plaintiff contends that even if issue and claim preclusion did apply here, Defendants should still not be permitted to assert those defenses because "[D]efendants failed to raise them in the Court of Federal Claims matter." Additionally, Plaintiff made five assertions, which he maintains are material facts in dispute: (1) the FAA and Marmet are not "the same" as the DOT; (2) the Federal Circuit opinion does not preclude this action; (3) the Federal Circuit cannot make factual findings; (4) the facts in this lawsuit are not the same as those in the MSPB matter; and (5) Marmet was not acting in the scope of her employment with respect to Plaintiff's FEHA claim. However, the Court determined that the "facts" cited by Plaintiff, were in reality, "legal arguments," thus, the Court was not required to accept them as true when ruling upon Defendants' motion for summary judgment. *See Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007). Further, the Court determined that Plaintiff's arguments lacked merit.

The decision to grant summary judgment "requires a determination of whether there is a genuine issue of fact as to whether prior judgment exists and precludes this action."

Plaintiff's prior claim was "actually litigated," as the administrative judge made factual findings based upon documents submitted by both Plaintiff and the DOT, after Plaintiff waived a hearing before the MSPB. *See Pupis v. U.S. Postal Service*, 105 M.S.P.R. 1 (MSPB 2007). Additionally, issues that were critical in determining this action were "actually and necessarily determined by a court of competent jurisdiction" in the previous action. *Id.* at 273. The MSPB entered a decision against Plaintiff, which the Federal Circuit subsequently affirmed. Lastly, if the court were to apply the doctrine of collateral estoppel, it would not be unfair to Plaintiff because he had great incentive to have litigated these claims in the MSPB when his employment was at stake. *See King v. Dep't of Veterans Affairs*, 105 M.S.P.R. 21 (MSPB 2007). Thus, the three elements of issue preclusion are satisfied. Additionally, despite the plaintiff's claim to the contrary, issue preclusion is appropriate even though the plaintiff seeks different relief in this action than in the MSPB action. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998)

Further, the doctrine of issue preclusion renders meritless "[P]laintiff's argument that he should be allowed to litigate his FLSA claim here because he could not have asserted this claim in the MSPB action," as the MSPB had already decided the issues of fact that were necessary to determine the outcome here. As a result, despite the jurisdictional bar preventing Plaintiff from bringing his FLSA claim in the MSPB action, the Court declined to allow Plaintiff "to relitigate the facts necessary to decide his FLSA claims."

Next, the Court turned to Plaintiff's FEHA claim. The instant action, as well as the MSPB action, "arose from a common 'nucleus of facts, i.e., the plaintiff's termination from his employment.'" Additionally, Plaintiff could have "raised retaliation and harassment as defenses to his termination in his MSPB action." Further, Plaintiff failed to challenge Defendants' assertion "that he pursued an identical action through the MSPB." As a result, the Court held that claim preclusion bars Plaintiff's FEHA claim.

Last, Plaintiff requested leave to file an amended complaint. Plaintiff's proposed amended complaint would have supplemented the allegations in the original complaint and would have substituted the Administrator of the FAA for Marmet. Defendants opposed the motion, "asserting that amendment would be futile." The Court found that although the proposed amended complaint would add to and alter the original complaint, it would not substantively alter the allegations in the complaint. In other words, the proposed amended complaint "would be subject to dismissal for the same reasons the Court has concluded the original complaint is properly dismissed." Thus, the Court held that the amended complaint would be futile. As such, Plaintiff's motion to file an amended complaint was denied.

HOLDING: Since there was no genuine issue of material fact as to whether res judicata barred this action, the Court concluded that Defendants were entitled to judgment as a matter of law. Plaintiff's FLSA claims were barred by collateral estoppel, while the FEHA claims were barred by claim preclusion.

IMPACT: Res judicata serves to prevent the waste of court time and resources and to prevent frivolous law suits. In the instant case, the Plaintiff was prevented from arguing his case in front of the District Court for the District of Columbia when the Honorable Ricardo M. Urbina found that Plaintiff's FLSA claims were barred

by collateral estoppel, and the FEHA claims were barred by claim preclusion. Judge Urbina's decision served to save the resources of the judicial system for those cases that actually involve genuine issues of material fact.

Peavey v. Holder, 657 F. Supp. 2d 180 (D.D.C. 2009).

LAW: 38 U.S.C. § 511(a) limits judicial review of decisions made by the Veterans Affairs Secretary. The statute states that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." Further, "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise."

FACTS: Pro se plaintiff Morris J. Peavey, Jr. (Plaintiff) is an African-American, Orthodox Muslim Army veteran. Plaintiff has brought the instant claim against the "United States Attorney General, the Secretary of Veterans Affairs, the Archivist of the United States, the Director of the National Personnel Records Center (NPRC), the Secretary of the Treasury, and the Secretary of the Army in their official capacities, the Equal Employment Opportunity Commission (EEOC), and the United States Postal Service (USPS)" challenging numerous decisions of the Department of Veteran's Affairs (VA) involving Plaintiff's potential entitlement to benefits after his 1967 discharge from the Army. Plaintiff has also sought to compel the release of several records under the Freedom of Information Act (FOIA). 5 U.S.C. § 552. Plaintiff has challenged several VA decisions which determined "his entitlement to certain veteran's benefits at various times since his discharge." Plaintiff specifically alleged that the "VA incorrectly determined his disability rating on several occasions and improperly discontinued his benefits for a period of several months in 2001 and in May and June of 2003." Defendants have moved to dismiss Plaintiff's complaint or, in the alternative, for summary judgment.

ANALYSIS: First, Plaintiff has brought claims challenging various benefits made by the VA since Plaintiff's 1967 discharge from the Army. Plaintiff also challenged the constitutionality of 38 U.S.C. § 511, which limits judicial review of the VA's benefits decisions. Defendants countered by alleging that Plaintiff's claims, including those alleging that the acts of the VA violated his constitutional rights, "should be dismissed under 12(b)(1) for lack of subject matter jurisdiction" and that Plaintiff's facial challenge to §511, "should be dismissed under Rule 12(b)(6) for failure to state a claim." The Court found that Plaintiff failed in supporting his vague argument that §511 is facially unconstitutional. As a result, the Court dismissed Plaintiff's facial challenge to §511 for failure to state a claim for relief. Additionally, the Court dismissed Plaintiff's challenges to the VA's decisions on his benefit claims for lack of jurisdiction.

Second, Plaintiff also brought FOIA claims against the Director of the NPRC, as well as the VA Secretary, to compel release of records requested. Plaintiff specifically alleged that VA, the VA Hospital Center in Brooklyn, New York, as well as the NPRC, the designated repository for Official Military Personnel Files, failed to completely respond to his FOIA requests for documents. Plaintiff contends that he requested copies of his own military records and early VA medical records, but, that his requests were "consistently" refused. Defendants have moved to dismiss the FOIA claims as moot, or in the alternative, for summary judgment. Defendants allege that the agencies produced all the documents that they possessed, in response to Plaintiff's requests. The Court found that the NPRC took reasonable steps to respond to Plaintiff's FOIA request, including a search of the relevant system of records that could potentially contain the documents in question, including Plaintiff's OMPF. Thus, Plaintiff failed to create a material dispute regarding the adequacy of the NPRC's search efforts. As a result, the Court granted summary judgment for the Defendants regarding Plaintiff's FOIA claim seeking the release of records from the NPRC.

Plaintiff also filed a FOIA request with the VA seeking his military records relating a car accident he was involved in, "findings and impressions from an 'intravenous pyelogram,'" records from a 1968 hospitalization in a Brooklyn VA hospital, and documents relating to his employment at a restaurant. Plaintiff contends that the VA's response to his FOIA requests was insufficient, claiming that

the VA "did not find and produce copies of certain medical testing performed at an Army hospital in 1966, or any copies of clinical and laboratory records or doctors' reports from his 1968 Brooklyn VA hospital stay." In response, the VA "submitted undisputed evidence that the VA regional office provided [Plaintiff] with a copy of his entire claims and the VA hospital searched both its on-site and archived records, producing records relating to [Plaintiff] it retrieved from a Missouri storage facility." Despite Plaintiff's claims, the Court cited "undisputed evidence that the VA regional office and Brooklyn VA hospital conducted reasonable searches in response to [Plaintiff's] FOIA requests and produced all responsive documents located in their searches." Thus, the Court granted summary judgment in favor of the Defendants.

Third, Plaintiff alleged that the NPRC, VA, and Army "acted together to conceal, alter, or destroy government records in an attempt to obstruct justice in violation of several criminal statutes, including 18 U.S.C. §§ 1001, 1503, 1505, 1512, and 1519." The Court granted Defendants' motion to dismiss Plaintiff's claims under 18 U.S.C. §§ 1001, 1503, 1505, 1512, and 1519. Additionally, Plaintiff alleged the actions of the NPRC, VA, and Army also "violated his Fifth Amendment due process rights by interfering with his ability to obtain benefits and correct his military records." However, Plaintiff failed to provide facts "in support of his conclusory allegation that, if proven, would entitle him to relief." Because Plaintiff failed to allege facts, "that, if proven, demonstrate that he did not have a meaningful opportunity to be heard on his benefits claims or record correction request, his due process claim will be dismissed for failure to state a claim."

Fourth, Plaintiff sought damages for the numerous alleged wrongs he has suffered since 1967. Plaintiff brought both constitutional and common law tort claims. Since Plaintiff's claims have been brought against federal agencies and officials in their official capacities, the claims "must be construed as claims against the United States." Further, Plaintiff's allegation that he will bring "tort" claims suggests that he will bring his tort claims under the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2671-2680. It is worth noting that the "United States has waived its immunity from suit for certain torts under the FTCA." 28 U.S.C. § 1346(b). But, the FTCA's waiver of sovereign immunity is not applicable to constitutional tort claims. Additionally, before a plaintiff can even

file suit under the FTCA, the claim must "'first [be] presented to... the appropriate Federal agency.'" 28 U.S.C. § 2675(a). Moreover, the "exhaustion of administrative remedies is a mandatory prerequisite to filing such a lawsuit in federal court." In the instant case, Plaintiff failed to provide any evidence to show that "he properly exhausted his administrative remedies with respect to any potential FTCA claim against any of the defendant agencies." As a result, the Court dismissed Plaintiff's tort claims for damages against the United States.

Fifth, Plaintiff has brought claims under civil rights statutes, 42 U.S.C. §§ 1981-1983 and 1985. However, the statutes do not apply to actions against the United States. Because Plaintiff brings these claims solely against the federal defendants in their official capacities, "he has not stated claims under these civil rights statutes and these claims will be dismissed."

Sixth, Plaintiff alleged that he will bring a *Bivens* suit against the Defendants. A *Bivens* suit is brought against federal officers, serving in their individual capacity and the "complaint must at least allege that the defendant federal official was personally involved in the illegal conduct." However, Plaintiff "neither sued nor served the named defendants in the individual capacities, nor alleged any facts suggesting that the agency heads named in the complaint ... were personally involved in the alleged conduct underlying his claims." Given the fact that the Plaintiff failed to state *Bivens* claims against the named Defendants, the Court dismissed the *Bivens* claims with prejudice.

Seventh, Plaintiff claimed harassment by the EEOC, IRS, and USPS. However, Plaintiff "failed to allege any facts stating a plausible claim that these agencies unlawfully infringed upon any of his fundamental rights." Thus, the Court dismissed all claims against these Defendants.

Eighth, Plaintiff alleged "that he was injured by the Department of Justice's (DOJ) failure to investigate and bring charges based upon a complaint he filed with the DOJ accusing the VA or its agents of unlawfully concealing, altering, or destroying federal records." The Court found "no colorable argument that Congress intended for judicial review of the DOJ's decision not to investigate or bring charges based upon [Plaintiff's] complaint against the VA." Thus, the Court dismissed this claim.

Ninth, Plaintiff sought judicial review of an Army Board for Corrections of Military Records (ABCMR) decision that refused to correct his army records. Plaintiff alleges that he had submitted a claim to the ABCMR when he released from service, but that the ABCMR "did not properly investigate his claim to correct his military records and denied him relief. Specifically, Plaintiff sought "an order directing the ABCMR to overturn a January 23, 1967 court martial judgment and correct his records to reflect the rank he would have obtained but for the judgment." The district court does have jurisdiction to review an ABCMR decision, but the claim must be brought within six years of the decision. 28 U.S.C. § 2401(a). As a result, the Court dismissed the claim because Plaintiff's claim was untimely on its face and barred by the statute of limitations.

HOLDING: The Court found no material factual dispute, and decided that Defendants were entitled to judgment as a matter of law on Plaintiff's FOIA claims. Also, the Court granted Defendant's motion, "now treated as a motion for summary judgment – with respect to the FOIA claims only." Last, because Plaintiff "failed to state any other claim entitling him to relief over which the district court has jurisdiction, the remainder of the complaint will be dismissed."

IMPACT: Though Plaintiff's claims were numerous, the Court effectively dissected the half-dozen or so arguments and correctly ruled in favor of the Defendants. Plaintiff employed an "everything but the kitchen sink" type argument, as he sued numerous government entities, employers, and individuals under several diverse claims. However, the Court's ability to sift through the maze of arguments should be commended, as granting summary judgment and dismissing the claims not only allowed Plaintiff to plead his case, but also prevented court resources from being wasted by a Plaintiff with weak arguments and little facts to back them up.

DISTRICT OF COLUMBIA, COURT OF APPEALS

Odeniran v. Hanley Wood, LLC, 985 A.2d 421 (D.C. 2009).

LAW: Under District of Columbia law, "a person who is fired from his job for 'gross misconduct' is not eligible to receive unemployment compensation benefits until after the passage of a substantial waiting period, during which he must earn a prescribed level of wages with another employer." *See* 7 DCMR § 312.3.

FACTS: Henry Oderniran (Plaintiff) worked at Hanley Wood, LLC, (Defendant) a real estate market research firm, from June 11, 2007, until March 17, 2008. Plaintiff joined Defendant after he was told during an interview "that the company expected a consulting position to 'open up' in the near future." Thus, Plaintiff took a pay cut from the job that he held previously in order to join Defendant as a Research Associate. Unfortunately, because of the economic downturn, Defendant "disbanded its consulting business, so a promotion to [a consulting position] was no longer an option" for Plaintiff. Further, Plaintiff also felt that his responsibilities as a Research Associate increased several times without a corresponding raise in pay. Moreover, Plaintiff was convinced that Defendant's parking reimbursement procedures failed to adequately "take into account the travel expenses that he incurred as part of his duties." In an attempt to avoid the parking costs, Plaintiff asked permission to work from home.

On Wednesday, March 12, 2008, according to the Regional Manager (Manager) for Defendant, Plaintiff said that "'needed to make more money and be able to work from home, or he would have to find another job.'" The Manager informed Plaintiff that a pay raise was not likely because of the market conditions. Also, although Defendant did allow some employees to work from home, the Manager felt that Plaintiff's performance "did not merit the telecommuting privilege." Two days later, on Friday, March 14, 2008, Plaintiff informed the Manager via e-mail that he was taking a sick day. The Manager testified that he responded "responded right away," informing Plaintiff of the two looming deadlines that Plaintiff had that day. Per the Manager, Plaintiff never responded to his e-mails, and Plaintiff missed both deadlines.

On Monday March, 17, the Manager observed Plaintiff on the Internet, not doing any kind of work related to Defendant, and not making any work-related phone calls. Plaintiff claimed he was "busy with other stuff," but did not provide any details. This caused the Manager to believe that Plaintiff was lying. The Manager became concerned about Plaintiff's apparent failure to perform his job-related activities, so he contacted the Human Resources Director (Director). The Director phoned Plaintiff to ask about his activities for the day and Plaintiff informed the Director that he "preferred not to answer [those] questions." Plaintiff was fired at the end of the day. Defendant ultimately fired Plaintiff not for the ultimatum or missed deadlines, but because of his failure to perform his duties on March 17.

The Administrative Law Judge (ALJ) credited Defendant's version of the facts, noting that Defendant's witnesses provided "detailed and consistent testimony," regarding Plaintiff's termination; whereas Plaintiff provided "vague and incomplete responses to that testimony." Ultimately, the ALJ found that Plaintiff "was fired for gross misconduct, and thus was ineligible to receive unemployment compensation benefits at the time of his termination."

ANALYSIS: The issue on appeal is whether 7 DCMR § 312.3 applies to Plaintiff. Gross misconduct has been defined "as an act 'which deliberately or willfully violates the employer's rules, deliberately or willfully threatens or violates the employer's interests, shows a repeated disregard for the employee's obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.'" 7 DCMR § 312.3. On the other hand, simple misconduct includes the "acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct." 7 DCMR § 312.5. Simple misconduct also refers to "'an act or omission by an employee which constitutes a breach of the employee's duties or obligations to the employer, a breach of the employment agreement or contract, or which adversely affects a material employer interest.'" *Id.*

The Court in the instant case accepted the ALJ's factual findings that on the day of his termination, Plaintiff was not performing his assigned work. However the Court found that the "'ALJ committed legal error in holding that these facts establish that [Plaintiff] engaged in 'gross misconduct.'" Though the Court noted that Plaintiff did fail

to carry out his work-related duties, his actions did "not constitute gross misconduct within the meaning of the unemployment benefits statute." Moreover, Defendant, which bore the burden of proof, failed to "present evidence that [Plaintiff's] willful non-performance on March 17th was other than an isolated incident." Nor did Defendant "contend that its business had suffered serious consequences as a result."

Though Plaintiff's acts did not constitute gross misconduct, "the record does make clear," that Plaintiff was terminated for simple misconduct. Simple misconduct describes "'an act or omission by an employee which constitutes a breach of the employee's duties or obligations to the employer ... or which adversely affects a material employer interest.'" 7 DCMR § 312.5. Moreover, 7 DCMR § 312.6 "explicitly states that '[c]onducting unauthorized personal activities during business hours' may constitute simple misconduct. These regulations fit like a glove [Plaintiff's] conscious decision to spend the day on the Internet instead of doing his job despite being chided more than once.'"

HOLDING: In the instant case, "[t]he ALJ erred as a matter of law in concluding that [Plaintiff] was fired for gross misconduct." However, Plaintiff's intentional refusal to do his work on the day of his termination did constitute simple misconduct. The Court remanded the instant case to OAH "for further proceedings consistent with this opinion."

IMPACT: The Court examined the facts in the record and correctly reversed the decision of the lower court. Though Plaintiff did not carry out his work-related obligations, his actions hardly constituted "gross misconduct." This Court reassessed the available information and correctly decided that while Plaintiff's actions were not admirable, they constituted simple misconduct, and not gross misconduct. As a result, Plaintiff is entitled to the compensation benefits he rightfully deserved.

COURT OF APPEALS OF MINNESOTA

Minneapolis P.D. v. Kelly, 776 N.W.2d 760 (Minn. Ct. App. 2010).

LAW: The Minnesota Rules of Criminal Procedure provide that,

> rather than arresting and detaining a misdemeanor offender, officers are to give citations unless: it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation. The citation may be issued in lieu of an arrest, or if an arrest has been made, in lieu of continued detention. Minn. R. Crim. P. 6.01, subd. 1(1)(a) (2008).

FACTS: At about noon on January 8, 2004, Phillip Kelly (Respondent), "a middle-aged, African-American resident of Minneapolis, was walking to a convenience store to purchase bread and cigarettes." A Minneapolis park police officer was driving in the area at the same time and "heard a dispatch reporting an armed robbery at a nearby business." The suspect involved in the robbery "was described as an African-American male wearing a black jacket and jeans." Respondent was similarly dressed, as he "was wearing blue jeans, and his jacket and hood were black." The park officer, suspecting that Respondent could potentially be the reported robber, "radioed for backup, approached [Respondent] from behind, and told him to stop." Respondent did not see or hear the officer because he had headphones on, as he was listening to a music device, so he did not hear the command to stop. The park officer then "grabbed [Respondent] from behind, placed a handcuff on one of his wrists, and wrestled him to the ground." Respondent resisted because he was startled and did not know why he had been taken down. Minneapolis Police Department (MPD) officers Villamor and Dubay then arrived to assist the arresting park officer. Because Respondent did not know why he was seized, he "continued to resist being handcuffed and refused to enter the squad car." Officer Villamor then applied pain-compliance holds and knee strikes in order to force Respondent into the squad car. The officers involved "testified that

[Respondent] appealed to bystanders for help in what he perceived to be a baseless, racist seizure." Once in the squad car, Respondent still "remained angry and the officers testified that they could not communicate with him." After he was subdued, the MPD officers then took Respondent into the store that was robbed. The MPD officers then arranged for the store employees to actually view Respondent. The store employees informed the officers that Respondent was not the robber. Though Respondent asked to be released, the officers "informed [Respondent] that he was under arrest for his pre-show-up conduct and brought him to the Hennepin County jail, charging him with the misdemeanors of disorderly conduct, Minneapolis, Minn., Code of Ordinances § 385.90 (2004), and obstruction of legal process, Minn. Stat. § 609.50 (2004)." The record contains a form that the officers completed, that had boxes checked off "indicating that [Respondent] was detained because of the risk that he would commit further crimes and would not respond to a citation." Respondent was officially "jailed at 1:23 p.m. and released from jail at about 6:30 p.m." In the end, the charges against Respondent were dropped.

Based on this series of events, Respondent filed a complaint against the MPD with the Minneapolis Department of Civil Rights. Respondent "claimed he was assaulted and wrongfully jailed, and that race wrongfully played a role in those actions. An investigator concluded that there was probable cause that racial discrimination had occurred and referred the complaint to the [Minneapolis Commission on Civil Rights (Commission)]." The Commission had a panel of three members consider the matter. *See* Minneapolis, Minn., Code of Ordinances § 141.50(i) (2008) (Ordinance). The hearing "followed a jury-trial format with two commissioners acting as jurors and the third commissioner as the presiding officer." Based on the hearing, the panel "concluded: (1) the officers did not use excessive force when they apprehended [Respondent] and took him to the show-up; (2) the MPD unreasonably detained [Respondent] after he was cleared of the robbery; and (3) 'race was a discernible, discriminatory and causative factor in [Respondent] adverse treatment.'" The panel "awarded Kelly $5,000 for mental suffering, $382.50 in actual damages, and $8,500 in punitive damages, and ordered payment of an additional $8,500 in civil penalties to the City of Minneapolis." MPD, by writ of certiorari, "seeks reversal of the

decision by the Commission that MPD officers unfairly discriminated against [R]espondent."

ANALYSIS: The Court broke the instant case down into two separate issues. The first issue asks the question of "whether the record adequately supports the discrimination decision by the commission." The Court used the test laid out in *City of Minneapolis v. Richardson*, 239 N.W. 2d 197, 201-02 (Minn. 1976), which required that the claimant "introduce evidence showing that (1) the claimant is a member of a protected class; (2) the claimant was subjected to adverse and unreasonable treatment; and (3) the treatment was caused by a discriminatory consideration of race." *Richardson* holds that the third element of the prima facie - discrimination – "may be established by either direct or indirect evidence." *Id.* at 202. The Commission found that Respondent "is a member of a protected class because of his race, was subjected to adverse action by the MPD, and race was a discernable factor under the so-at-variance test." In the instant case, the role of the Court was "to determine whether there is substantial evidence to support the Commission's conclusion that the MPD's conduct was so at variance with reasonable expectations that discrimination is the probable explanation." The officers, citing Respondent's earlier behavior, where he had been "angry and resistant," feared that Respondent would fail to respond to a citation by appearing in court, so they arrested him. However, "[t]he [C]ommission, based on its review of the record and credibility of witnesses, determined that there was no valid or legal reason to arrest and detain [Respondent]." Thus, the Court found "that there was adequate indirect evidence in the record to provide substantial evidence supporting the [C]ommission's determination of racial discrimination in the continued arrest and jailing of [Respondent] by the MPD."

The second issue is "whether the damages are supported by the record?" The MPD has maintained "that even if the finding of racial discrimination is warranted, the asserted damages were unsupported by the evidence." On the other hand, Petitioner contends "that the award should be greater." With respect to the $5,000 awarded to Respondent for mental anguish, "the MPD argues that there is no evidence of mental injury." In the instant case, Petitioner specifically "described the emotional anguish caused by the MPD's alleged discrimination," as "[h]e testified that he felt powerless and that he

'had no rights.'" Respondent's own testimony "established humiliation and distress suffered incident to his wrongful arrest and jailing." Because Respondent's testimony was sufficient to establish mental anguish, the Court "conclude[d] that the [C]omission did not abuse its discretion in awarding [Respondent] $5,000 for mental anguish." The MPD has also challenged "the civil penalty payable to the City of Minneapolis and punitive-damage award." Since these two types of damages are "interrelated," the Court considered them together. In the instant case, despite the MPD's contentions, "the [C]ommission panel awarded punitive damages as a part of the special-verdict award in response to jury instructions that set forth the requisite statutory factors, finding that 'by clear and convincing evidence' the MPD 'acted with deliberate disregard for the rights of [Respondent].'" In regard to the civil penalties, "the [C]omission concluded that the harm [inflicted by MPD] was intentional, serious, and detrimental to the public." Overall, the Court found "that the award of damages based on a finding of racial discrimination [was] supported by substantial evidence and [was] not arbitrary and capricious."

HOLDING: The Court affirmed "[C]ommission's finding that MPD unfairly discriminated against Petitioner in the decision to arrest and jail him for misdemeanor violations." The Court "also affirm[ed] the [C]ommission's award for emotional and punitive damages and the imposition of a civil penalty on realtor."

IMPACT: The decision of the Court in the instant case is noteworthy because it acknowledges the harsh truth that racism and racial profiling still exist in the 21st century. Even though Respondent was a middle-aged man walking to the convenience store in broad daylight to purchase bread and cigarettes, he was arrested for being an African-American man that vaguely met the description given to the MPD officers. The Court's decision is important because it will serve as a reminder to law enforcement officials to follow proper procedure when arresting suspects accused of wrongdoing in order to avoid paying damages–whether they be emotional, physical, punitive, or civil.

SUPREME JUDICIAL COURT OF MAINE

Anderson v. Me. Pub. Employees Ret. Sys., 985 A.2d 501 (Me. 2009).

LAW: Title 5 M.R.S. § 17921(1) (2008) states in relevant part that

> "disabled" means a member is mentally or physically incapacitated under the following conditions: A. The incapacity is expected to be permanent; B. That it is impossible to perform the duties of the member's employment position; C. After the incapacity has continued for two years, the incapacity must render the member unable to engage in any substantially gainful activity for which the member is qualified by training, education or experience; and D. The incapacity may be revealed by examinations or tests conducted in accordance with section 17926.

FACTS: Bethany C. Anderson (Plaintiff) was an art teacher in the Caribou School District of Maine from 1991 until February 2006. Beginning in approximately 1995, Plaintiff developed progressive pain all over her body. Plaintiff suffered from pain and numbness in her feet that would at times, cause her to fall. This pain was such that it would often cause Plaintiff to not sleep and she was "constantly fatigued." Plaintiff was frequently absent from her work because of the pain. In 2005, Plaintiff began receiving treatment from her primary-care physician, David Connor, M.D., because "her joint pain caused her to leave work and go to the emergency room." It was shortly after this that Plaintiff "filed an application for disability retirement benefits, pursuant to 5 M.R.S. § 17925. On February 9, 2006, after Plaintiff left work early to see Dr. Connor after her limbs were too weak to perform her duties at school, "Dr. Connor noted that in addition to her physical ailments, [Plaintiff] was emotionally unstable, which he thought was primarily caused by stress from work." Dr. Connor removed Plaintiff from her teaching position, thinking that she was headed toward a psychological breakdown. Later that month, "Dr. Connor diagnosed [Plaintiff] with chronic fatigue syndrome, fibromyalgia, and Charcot-Marie-Tooth disease,

the latter being the cause of [Plaintiff's] falls. Dr. Connor advised that at this point, Plaintiff "could work for about twenty hours a week with some modifications," which included not having to carry heavy equipment between classrooms. Further, Dr. Connor prescribed Plaintiff an anti-depressant and referred her to a neurosurgeon and psychiatrist.

In March 2006, the executive director of Maine Public Employees Retirement System (MPERS) received reports from six medical consultants, each of whom "had been asked to review one of the bases for [Plaintiff's] claim of disability." On April 10, 2006, after examining the reports, the executive director denied Plaintiff's application for disability benefits after determining that Plaintiff's "degenerative cervical spine disease did not make it impossible for her to do her job, and that there was no objective medical data to prove that she had fibromyalgia, Charcot-Marie-Tooth disease, or depression." Plaintiff then appealed the executive director's decision to the MPERS Board of Trustees (Board), pursuant to 5 M.R.S. § 17451(1).

In September 2006, after reviewing all of the records and information submitted by Plaintiff, the medical board found that the diagnosis of fibromyalgia was warranted, "but also noted that it was premature to determine whether those functional limitations would be permanent." After a hearing on Plaintiff's appeal was held in October 2006, both parties were allowed to submit additional evidence and arguments. In February 2007, the MPERS hearing officer "issued an opinion regarding [Plaintiff's] appeal, finding that [Plaintiff's] impairments from her major depression, fibromyalgia, and degenerative cervical spine disease did make it impossible for her to perform the duties of her teaching position." However, the hearing officer also decided "that the matter needed to be remanded to the executive director to determine whether these impairments were expected to be permanent." In May 2007, after reviewing the evidence presented, "the medical board advised the executive director that the functional limitations described by [Plaintiff] would not likely be permanent." Later that month, on May 17, 2007, MPERS concluded, partly based on the recommendation of the medical board, that Plaintiff's "depression, fibromyalgia, and degenerative cervical spine disease did not result in an incapacity that was expected to be permanent." In response, Plaintiff "again

requested leave to appeal to appeal and submit updated medical information, which was granted."

Months later, "[i]n August 2007, the medical board again advised the executive director that [Plaintiff's] impairments were not likely to be permanent." The executive director of MPERS "upheld the May 17, 2007, decision denying benefits, a decision that was affirmed by the Board on January 3, 2008." Plaintiff then appealed the decision of the Board to the superior court. The superior court reviewed the evidence in the record, as related to permanency, and found that Plaintiff "met her burden of proof to the exclusion of any other inferences." The superior court "vacated the decision of the Board and remanded the matter to the Board for an award of disability benefits to [Plaintiff]."

MPERS appealed the "judgment entered in the [s]uperior [c]ourt which vacated a decision of the Board denying disability retirement benefits to [Plaintiff]." MPERS argued "that although Anderson has shown that her impairments make it impossible for her to carry out her employment duties as an art teacher, she failed to prove that her incapacity is expected to be permanent, and therefore the Board properly denied her disability benefits, pursuant to 5 M.R.S. § 17921(1) (2008)."

ANALYSIS: Five days prior to the court issuing the order denying MPERS' motion for reconsideration, the Court decided *Kelley v. Me. Pub. Employees Ret. Sys.*, 967 A.2d 676 (Me. 2009). In *Kelly*, the Court decided that MPERS, when deciding disability claims, "could consider reports from its medical board, as authorized by statute, and that consideration of the information in such reports in reaching decisions that did not amount to a due process violation or violation of any rights confrontation or cross-examination." *Id.* at 684. Thus, "the trial court erred in holding that the Board should not have considered the medical board reports in the Board's decision-making process." In the instant case, "the report of the medical board constitutes an evaluation questioning Plaintiff's evidence of permanency." Given that this information can be considered part of the record, "the record does not compel a conclusion contrary to the findings of the Board that [Plaintiff] had failed to meet her burden of proof to demonstrate that her incapacity was expected to be permanent." However, "[e]ven if the medical board report is put aside, the record includes other evidence that demonstrates that the

Board was compelled to conclude that [Plaintiff] had met her burden of proof." The record not only included "evidence that the Board was not compelled to conclude that [Plaintiff] had met her burden of proof," but also, Plaintiff's "medical evidence included indications that she was making some improvement." Further, the record also contained evidence that Plaintiff could engage, and was "engaging in, activities that were inconsistent with a condition of permanent disability." A short time after Plaintiff left the Caribou School Department, she took up a three-year term on the Caribou Zoning Board of Appeals. Further, though Plaintiff claimed to be permanently disabled, she pursued a master's degree, won awards for academic performance, completed recertification courses for her teaching certificate, produced and sold art calendars for sale on the Internet, and even wrote and published children's books.

HOLDING: After gathering facts and analyzing the medical reports, "neither the superior court, nor this [C]ourt could conclude that the Board was compelled to find that [Plaintiff's] incapacity was expected to be permanent such that she was entitled to receive permanent disability benefits." The Court vacated the judgment of the superior court and remanded the matter to the superior court with the direction to affirm the Board's decision.

IMPACT: Though Plaintiff alleged both physical pain and depression, amongst a list of other ailments, the validity of her claim for disability is tenuous. Resources for the impoverished, physically impaired, and mentally ill are extremely limited. By taking the extra step to examine the validity of Plaintiff's claims, and poring over her medical records, the court is effectively ensuring that these limited resources will be reserved for the truly impoverished, impaired, or ill, and not those who illicitly attempt to tap into these funds.