2022-1271

In The

United States Court of Appeals

For The Federal Circuit

MARK BESANCENEY,

***Petitioner*,**

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

PETITION FOR REVIEW FROM THE MERIT SYSTEMS PROTECTION BOARD IN NO. PH-1221-19-0255-M-1

REPLY BRIEF OF PETITIONER

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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1271

Short Case Caption Besanceney v. DHS

Filing Party/Entity Mark Besanceney (petitioner)

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Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Mark Besanceney		

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SUMMARY OF THE ARGUMENT

The Administrative Judge erred in finding five disclosures made by Besanceney regarding the LGA baggage theft investigation were not protected disclosures under the WPEA. Besanceney had a good faith belief that Williams and Vasey were violating rules, regulations, and the law when they pressured him to obtain federal search warrants, based on probable cause, when no probable cause existed.

Besanceney, as the objectively reasonable officer placed in charge of the investigation, did not believe the available evidence created probable cause sufficient to obtain a search warrant. He believed the evidence never rose above the standard of reasonable suspicion because there was no evidence as to where the stolen items were taken after they were stolen. Moreover, requiring Besanceney to sign an affidavit falsely attesting to his "belief" of probable cause could subject him to both civil and criminal penalties. Besanceney had a reasonable belief that 1) signing a dishonest affidavit to obtain a search warrant was illegal and improper; and 2) even if he were to obtain such a search warrant without an affidavit, executing it could result in constitutional infringements and suppressed evidence.

Determining whether sufficient probable cause for a search warrant in a particular instance exists involves a legal standard created by the Constitution of the United States and further defined by the Supreme Court. A dispute regarding

the appropriate level of evidence necessary to establish probable cause is not a disagreement about a policy or a strategic decision.

Besanceney also reasonably believed Vasey had engaged in off-duty misconduct (constituting an abuse of authority) that Besanceney was required to report—and which he did report. And Besanceney reasonably believed Vasey or Williams recorded a July 2017 meeting without his knowledge or consent; the memo he received following the meeting was much too detailed to have been based on recollection or notes made after the meeting. Besanceney reported his reasonable belief of an illegal audio recording to Bobo—after first discussing it with Vasey and Williams.

Besanceney's sixth protected disclosure occurred during a February 6, 2018, meeting with Vasey and Williams, when he reported the misconduct allegations and the illegal recording; and his seventh disclosure occurred on February 12, 2018, when he reported Vasey's abuse of authority to TSA's Special Investigations Unit (SIU). Besanceney's eighth and final disclosure was on March 7, 2018, when he disclosed Vasey's abuse of authority to TSA's Office of Inspector General (OIG).

The Administrative Judge did not address Besanceney's reasonable belief or even why he believed he was being recorded; there is nothing in the Administrative Judge's decision to indicate the Administrative Judge considered or even

acknowledged the unusually detailed July 2017 memo, nor considered whether a disinterested observer would find this a report of wrongdoing. As the Administrative Judge failed to address certain facts altogether, as well as failed to apply the appropriate test to Besanceney's beliefs, she erred in finding that this disclosure was unprotected.

The Administrative Judge further erred in not considering the prohibited personnel practices taken against Besanceney by TSA or the causal link between those actions and his protected disclosures. Besanceney's protected activities contributed to the adverse personnel actions that escalated over the course of his employment with TSA. The time between each of Besanceney's protected activities and the corresponding personnel action is substantially less than six months, which is "sufficiently proximate" to satisfy the timing prong of the knowledge-timing test. Though unacknowledged by the Administrative Judge, Besanceney established that his protected activities were a contributing factor in the personnel actions taken against him.

Finally, the Administrative Judge erred in not considering or analyzing whether TSA met its heavy burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of Besanceney's disclosures.

ARGUMENT

I. The Administrative Judge erred in finding Besanceney did not make any protected disclosures.

The Administrative Judge erred, as a matter of law, in finding none of Besanceney's disclosures regarding the mishandling of the LGA baggage theft investigation and Vasey's abuse of authority are protected disclosures under the WPEA.

A. The Administrative Judge erred when she found Besanceney's reports regarding the mishandled LGA theft investigation were not protected under the WPEA; and TSA fails to show why the Court should sustain the Administrative Judge's erroneous finding.

TSA argues Besanceney's protected disclosures were mere disagreements with his supervisors regarding investigative strategy. Respondent's Br. at 21. TSA's argument, like the Administrative Judge's findings, is flawed and should be rejected. Besanceney had a reasonable, good faith belief Williams and Vasey were violating rules, regulations, and law when they pressured him to obtain federal search warrants based on probable cause when no probable cause existed.

But Besanceney's disclosures were not about policymaking or discussions regarding various investigatory outcomes; rather, he raised in those disclosures constitutional and legal concerns about asserting probable cause when none existed. Petitioner's Br. at 3. The mere fact that Besanceney's protected disclosures may have involved, to some extent, a discussion of investigative strategy, does not

strip them of their protections under the WPEA. *See, e.g.*, *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1368 (Fed. Cir. 2008). And in enacting the WPEA in 2012, Congress made clear that policy decisions and disclosable misconduct under the WPA are not mutually exclusive. *See* S. REP. NO. 112–155, at 7–8 (2012).

Besanceney's reported concerns that his supervisors had unlawfully directed him to obtain federal search warrants without probable cause implicated much more than a "negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing." *See Chambers*, 515 F.3d at 1368–69. Besanceney had not only a good faith belief, but an objectively reasonable belief, that no probable cause existed to support a search warrant without evidence as to where the stolen objects were taken.

To obtain a warrant to search private property, an officer must typically sign an affidavit attesting to his personal knowledge of the facts and represent that he believes there is sufficient probable cause to search private property. *United States v. Harris*, 403 U.S. 573 (1971). Requiring Besanceney to sign an affidavit falsely attesting to his "belief" of probable cause could subject him to both civil and criminal penalties. *S.H. v. D.C.*, 270 F. Supp. 3d 260, 284 (D.D.C. 2017).

The rules or regulations being violated by Williams and Vasey include, but are not limited to, both the Fourth Amendment and 18 U.S.C. § 1621 ("Whoever . . . in any declaration, certificate, verification, or statement under

penalty of perjury [. . .] willfully subscribes as true any material matter which he does not believe to be true [. . .] is **guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both**.") (emphasis added).

Besanceney had a reasonable belief that 1) signing a dishonest affidavit to obtain a search warrant was illegal and improper; and 2) even if he were to obtain such a search warrant without an affidavit, executing it could result in constitutional infringements and suppressed evidence. The Administrative Judge, in determining that Besanceney's December 5, 2016, conversation with Williams and Vasey was not a protected disclosure, analyzed only whether "strategies" were discussed during this meeting. Appx14-15. But the analysis properly turns on Besanceney's reasonable belief that executing his supervisors' plan would result in overt violations of the law and forcing him to do so (or face retaliatory consequences) is a violation of TSA policy and rules.

The Administrative Judge's conclusion that Besanceney's disclosures did not address violations of regulations, rules, and laws does not reflect the full record as to the consequences of Vasey and Williams's actions. The Administrative Judge accepted without further inquiry or consideration that Besanceney was obligated to sign such an affidavit or generally obtain a warrant, without any mention of the Fourth Amendment or rights afforded to Besanceney.

And the Administrative Judge erred when she explicitly pointed to the fact that Besanceney did not cite a specific rule or regulation. Appx21. This consideration is improper as a matter of law; an appellant need not identify any specific part of the law, such as the title or number of the statute or regulation, when his statements "clearly implicate an identifiable law, rule, or regulation." *Schneider v. Dep't of Homeland Sec.*, 98 M.S.P.R. 377, ¶ 13 (2005).

Gross mismanagement is also evident based on the facts set out above. The Administrative Judge erroneously determined that Williams and Vasey's decision to cancel consent searches was not gross mismanagement. Appx22. As a matter of law, the Administrative Judge's analysis turned on the incorrect issue; the proper consideration is whether their decision to pursue search warrants at that point in the investigation with insufficient probable cause constitutes gross mismanagement, not their rejection of consent searches.

And any evidence obtained from searches based on faulty warrants could have been fruit of the poisonous tree. *United States v. Calandra*, 414 U.S. 338, 354 (1974). Properly obtaining evidence and successfully prosecuting suspects is critical to the success of TSA's mission; here, those efforts were halted when investigators circumvented proper legal procedure. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 231 (1983); *United States v. Leon*, 468 U.S. 897, 926 (1984).

Asking Besanceney to obtain such a warrant also created substantial danger to health or safety. By executing a faulty warrant without probable cause, Vasey and Williams could have endangered both TSA personnel and the individuals unknowingly subject to search. Consideration of TSA staff and law enforcement safety is a hallmark of criminal law and is to be studiously protected. *Riley v. California*, 573 U.S. 373 (2014) (discussing Fourth Amendment exemptions for law enforcement officers resulting from imminent safety concerns).

In addition, Besanceney's rights are not the only rights adversely affected by Williams and Vasey's supervisory decisions; by maintaining that search warrants (without probable cause) were the correct way to proceed, Vasey and Williams ignored the Fourth Amendment rights of the accused. Besanceney's disclosures are thus also protected because they addressed abuses of authority. The Administrative Judge in not acknowledging any of the facts surrounding Vasey and Williams's abuse of authority, and erred by failing to acknowledge the rights of any individuals outside of TSA.

TSA argues Besanceney's concerns about signing a false affidavit to obtain a search warrant involve an invented scenario. Respondent's Br. at 22. But signing a false affidavit is precisely the situation that would have occurred had Besanceney not opposed his supervisors' directives. An affidavit must attest to the belief that there is sufficient probable cause to search. *See United States v. Harris*, 403 U.S.

573 (1971). To obtain a search warrant in any court would have required Besanceney to falsify evidence, lie to the prosecutor, perjure himself to the court, and violate the constitutional rights of U.S. citizens. In sum, the Administrative Judge erred in by failing to consider the full record as to the implications and consequences of Vasey and Williams's actions.

TSA cites to *Johnson v. Dep't of Justice* to state that gross mismanagement requires proof that management action or inaction created a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. Respondent's Br. at 25 (citing 104 M.S.P.R. 624, 16 (2007)). But pursuing a search warrant without probable cause would have created a substantial risk to TSA's ability to accomplish its mission; it would have violated TSA policy and constitutional law and would have resulted in adverse consequences. *See Riley v. California*, 573 U.S. 373 (2014) (discussing safety concerns associated with faulty search warrants). It would have also created a substantial public safety risk due to the violation of constitutional rights.

Any evidence obtained through search warrants obtained without probable cause would be unusable as fruit of the poisonous tree and would create a direct substantial adverse impact to TSA's mission. *United States v. Calandra*, 414 U.S. 338, 354 (1974); https://www.tsa.gov/about/tsa-mission.

B. Besanceney's communications concerning Vasey's abuse of supervisory authority were protected.

Besanceney made three protected disclosures regarding Vasey's abuse of authority as a federal law enforcement officer: (1) Besanceney's February 6, 2018, disclosure of Vasey's abuse of authority to both Williams and Vasey; Besanceney's February 12, 2018, disclosure of Vasey's abuse of authority to the Special Investigations Unit; and Besanceney's March 7, 2018, disclosure of Vasey's abuse of authority to the Office of Inspector General.

The Administrative Judge erred in expecting Besanceney to perform his own investigation as to the full veracity of these claims, rather than applying the proper reasonable belief standard. It is Besanceney's duty to report off-duty misconduct, particularly misconduct committed by managers; it is not his duty to investigate these allegations. Appx1103.

And the Administrative Judge failed to analyze the evidence contributing to Besanceney's reasonable belief of abuse of authority that went well beyond "limited information he obtained from unnamed sources." Appx27. Besanceney had two separate credible sources for his allegations, and even later received an unsigned copy of Vasey's divorce proceedings evidencing Vasey's alleged assault on his ex-wife. Appx1097-1098.

A disinterested observer, upon review of two credible sources of information provided by someone with forty years of law enforcement experience, would

reasonably conclude that this amounts to a report of wrongdoing (thus constituting protected activity under the WPA). Instead, the Administrative Judge erroneously determined there are no facts "known to and readily ascertainable to Besanceney," improperly dismissing both his sources and credibility as an officer. Appx27.

Besanceney's final protected disclosure addressed his belief that Williams and Vasey had surreptitiously and unlawfully audio recorded personnel meetings between Williams, Vasey, and Besanceney. Appx582, Appx621. Given Williams and Vasey's observed failure to take notes during their personnel meetings with him, and the unusual level of detail captured in the memo prepared by his supervisors regarding Besanceney's July 2017 meeting with them, Besanceney had a reasonable belief that either Williams or Vasey had surreptitiously recorded the personnel meetings.

The Administrative Judge did not address Besanceney's reasonable belief or even why he believed he was being recorded; there is no evidence the Administrative Judge considered or even acknowledged the abnormally detailed July 2017 memo, nor considered whether a disinterested observer would consider this a report of wrongdoing. Because the Administrative Judge failed to address certain facts and failed to apply the appropriate test to Besanceney's beliefs, she erred in finding that this disclosure was unprotected.

TSA's brief does little to demonstrate why the Court should affirm the Administrative Judge's finding that Besanceney's disclosures regarding Vasey's abuse of authority were unprotected. Besanceney argued Vasey engaged in domestic abuse and stalking. Additionally, Besanceney argued Vasey and Williams secretly recorded a meeting with him. While TSA attempts to discredit Besanceney's sources of information as unsubstantiated, TSA actually admits Besanceney had multiple sources to corroborate his allegations about Vasey's abuse. Respondent's Br. at 29. The divorce transcript Besanceney later received is further proof of his reasonable belief regarding the abuse allegations against Vasey. Appx1097-1098.

The Administrative Judge wrongly expected Besanceney to perform his own investigation when it is simply his duty to report misconduct. The Administrative Judge compared Besanceney's allegations to rumors; however, they involved more than rumors. Petitioner's Br. at 38-39. With Besanceney's forty years of law enforcement experience, two separate credible sources, and an unsigned transcript of Vasey's divorce proceedings, Besanceney reasonably believed Vasey engaged in abuse.

As Besanceney noted in his brief, nowhere in the WPA did Congress require an appellant to provide "irrefragable proof to rebut a presumption" that agency officials performed their duties according to law. *White v. Dep't of Air Force*, No.

DE-1221-92-0491-M-4, 2003 WL 22175176 (M.S.P.B. Sept. 11, 2003). Only a reasonable belief is necessary. *Id.* A reasonable observer could conclude that Williams and Vasey unlawfully recorded Besanceney in his personnel meeting with them.

II. The Administrative Judge erred in finding Besanceney's OIG complaint was not protected.

The Office of Special Counsel correctly argued in its *Amicus Curiae* brief that the Administrative Judge erred in finding Besanceney's OIG complaint was not protected. The Administrative Judge erroneously found Besanceney's disclosures were not protected under section 2302(b)(8) because he did not have a reasonable belief that they evidenced wrongdoing as defined by that section. Appx22-23, Appx27. Besanceney correctly argued that his contact with the OIG is a protected activity, even if the information he provided did not meet the standards for a protected disclosure under section 2302(b)(8). Appx28.

As the OSC argued, the plain language of the WPEA, legislative history, and case law demonstrate that those who provide information to the OIG are protected from retaliation without regard to the content of the information provided. Besanceney disclosed information to his agency's OIG on March 7, 2018. Appx7. Under section 2302(b)(9)(C), it was the act of disclosing information to his OIG that entitled him to protection, even if the information he provided did not independently qualify as a protected disclosure under section 2302(b)(8).

Although Besanceney did not specifically raise this issue in his opening brief, the Court should consider this additional error by the Administrative Judge in analyzing the other errors she made regarding Besanceney's other protected disclosures.

III. The 2018 Letter of Counseling issued to Besanceney was a personnel action.

TSA incorrectly argues the Letter of Counseling it issued to him was not a personnel action because it did not propose or threaten any disciplinary actions. Respondent's Br. at 16. An agency is prohibited from retaliating against a whistleblower by threatening to take a personnel action, and whether the threatened action is ever initiated is irrelevant in determining the Board's jurisdiction in an IRA appeal. *See Campo v. Dep't of the Army*, 93 M.S.P.R. 1, 3 (2002).

For that reason, a counseling letter can constitute a personnel action within the meaning of the WPA. *Bradley v. Dep't of Homeland Sec.*, 2015 WL 505969 at 3-4; *see also Bradley v. Department of Homeland Sec.*, 123 M.S.P.R. 547, 550 (2016) (referring to a counseling letter as a "personnel action"); *Herman v. Dep't of Justice*, 119 M.S.P.R. 642, 645–46 (MSPB 2013) (referring to letters of counseling as "personnel actions"). Regardless of the specific label by which it is described, a document threatening to initiate one of the enumerated actions in

5 U.S.C. § 2302(a)(2)(A) will constitute a personnel action within the meaning of the WPA. *Bradley v. Dep't of Homeland Sec*., 2015 WL 505969 at 3-4.

The February 7, 2018, Letter of Counseling issued to Besanceney threatened to take a personnel action and was thus prohibited retaliation under the WPA. Appx75-76 ("Please be advised that any future incidents of misconduct may result in disciplinary action, up to and including removal from Federal service."). Additionally, Besanceney received two letters of counseling, adding weight to the notion that the letter was intended as corrective action. Petitioner's Br. at 13; Appx25.

TSA cites to *Mohammed v. Dep't of the Army*, 780 F. App'x 870, 876 (Fed. Cir. 2019) to support its argument. Respondent's Br. at 16. But Besanceney's Letter differs in that it was his second letter of counseling, coupled with a remediation training plan, and was the result of multiple protected disclosures. Appx25. The Letter was also only one of several adverse actions taken against Besanceney that included an improvement plan, increased workload, arbitrary refusals to approve reports, and a notice of proposed removal. Petitioner's Br. at 13-14. Personnel actions include "a decision concerning . . . training if it may reasonably be expected to lead to performance evaluation or other action." 5 U.S.C. § 2302(a)(2)(A)(iii).

CONCLUSION

Besanceney had a good faith belief that Williams and Vasey were violating rules, regulations, and the law when they pressured him to obtain federal search warrants, based on probable cause, when no probable cause existed. Besanceney did not believe the available evidence created probable cause sufficient to obtain a search warrant; and signing an affidavit falsely attesting to his “belief” of probable cause could have subjected him to both civil and criminal penalties.

Besanceney also reasonably believed Vasey had engaged in off-duty misconduct (constituting an abuse of authority) that Besanceney was required to report—and which he did report. And Besanceney reasonably believed Vasey or Williams recorded a July 2017 meeting without his knowledge or consent.

The Administrative Judge erred in not considering the adverse actions taken against Besanceney by TSA or the causal link between those actions and his protected disclosures. Though unacknowledged by the Board, Besanceney established that his protected activities were a contributing factor in the personnel actions taken against him. Finally, the Board erred in not considering or analyzing whether TSA met its heavy burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of Besanceney’s disclosures.

Besanceney respectfully requests this Court reverse and vacate the Board's Final Order and find Besanceney engaged in one or more protected disclosures; find that he established one or more of his protected disclosures were a contributing factor in the adverse actions taken against him by TSA; find TSA failed to prove by clear and convincing evidence it would have taken the same actions in the absence of Besanceney's protected whistleblowing; and remand this matter to the Board for judgment in Besanceney's favor and all appropriate remedies, including compensatory damages for the emotional distress and reputational harm caused by TSA.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of December, 2022, I caused this Reply Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Dated: December 7, 2022

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