

United States Court of Appeals for the Federal Circuit

BABATUNDE OGUNTADE,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-1114

Petition for review of the Merit Systems Protection Board in No. DC-1221-23-0169-W-1.

Decided: September 22, 2026

ALEXANDER EDISON HARDING, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, argued for petitioner. Also represented by CHARLES COLLINS-CHASE.

DEANNA SCHABACKER, Office of the General Counsel, United States Merit Systems Protection Board, Washington, DC, argued for respondent. Also represented by ALLISON JANE BOYLE, KATHERINE MICHELLE SMITH.

Before MOORE, *Chief Judge*, LOURIE and CUNNINGHAM,
Circuit Judges.

Opinion for the court filed by *Circuit Judge*
CUNNINGHAM.

Concurring opinion filed by *Circuit Judge* LOURIE.

CUNNINGHAM, *Circuit Judge*.

Babatunde Oguntade petitions for review of a Merit Systems Protection Board (“Board”) final order, which denied his petition for review and affirmed the administrative judge’s initial decision dismissing the appeal for lack of jurisdiction. *Oguntade v. Dep’t of Veterans Affs.*, No. DC-1221-23-0169-W-1 (M.S.P.B. Aug. 23, 2024) (J.A. 1–7) (“*Final Order*”); *Oguntade v. Dep’t of Veterans Affs.*, No. DC-1221-23-0169-W-1, 2023 WL 4551782 (M.S.P.B. July 14, 2023) (J.A. 12–34) (“*Initial Decision*”).¹ For the reasons below, we reverse.

I. BACKGROUND

In October 2020, Dr. Oguntade began serving as a Presidential Innovation Fellow assigned to the Office of the Chief Technology Officer at the Department of Veterans Affairs (“VA”). *Initial Decision* at 2; J.A. 71. Dr. Oguntade’s task was to “help reduce the time it takes Veterans to get a decision on their disability benefits application.” J.A. 71. Specifically, Dr. Oguntade was assigned to update the “Claims Attribute Application Programming Interface” (“CAAPI”), an artificial intelligence (“AI”) tool. *Initial Decision* at 2–5; J.A. 254, 258.

Zachary Goldfine, the Deputy Chief Technology Officer of the VA Office Benefits Team, estimated that, when claims are processed without AI, it takes a veteran approximately 100 days to learn whether the veteran will receive

¹ Citations in this opinion to the Board’s decisions are to the versions included in the Joint Appendix, ECF 23. For example, *Initial Decision* at 1 is found at J.A. 12, and *Final Order* at 1 is found at J.A. 1.

assistance. *Initial Decision* at 3, 10; J.A. 269, 356. Using the CAAPI tool, the agency sought to reduce decision wait-time by three to five days. *Initial Decision* at 10; J.A. 268; see J.A. 71. The VA also touted \$1.5 million in savings in “direct labor cost.” J.A. 357.

Dr. Oguntade sought to verify these assertions and communicated to Mr. Goldfine in January 2021 that CAAPI was “giving wrong predictions” and potentially affecting processing time. *Initial Decision* at 5; J.A. 113. After receiving information about approximately 120,000 claims, Dr. Oguntade “was able to verify on a small but statistically significant dataset” that the assertions about CAAPI “were not tethered to the truth.” J.A. 71–72. Dr. Oguntade communicated these findings to Mr. Goldfine on March 3 and 4, 2021 (“March Disclosures”). J.A. 72. Further statistical analysis on a larger dataset of 716,000 claims provided the same conclusions. J.A. 72. Dr. Oguntade noted his belief that, instead of improving processing time, CAAPI “was slowing down the processing of claims by 5 days on average and 9 weeks in the case of complicated submissions.” J.A. 71; see J.A. 254–59. On April 8, 2021, Dr. Oguntade wrote a blogpost about CAAPI’s behavior (“April Disclosure”), which was approved for publication by the VA and published on May 13, 2021. J.A. 256; J.A. 279–88; see J.A. 72. After authoring the blogpost, Dr. Oguntade was informed that his term at the VA would not be renewed for a second year. J.A. 72.

CAAPI was repackaged into a new version and “put in production” in April 2021. J.A. 256–57. Dr. Oguntade described this “CAAPIv2.0” as “unchanged in any way with two additional features” and specifically “without any modification to the classifier that underpins the API.” J.A. 72; J.A. 257. CAAPIv2.0 thus contained the same alleged propensity for error identified in his March Disclosures. See J.A. 256–57. On May 20, 2021, Dr. Oguntade escalated the situation to Mr. Goldfine’s superior and Chief Technology Officer, Charles Worthington (“May Disclosure”). J.A. 73;

J.A. 133. Eventually, CAAPI was deactivated on July 1, 2021, “pending further research and improvements” because “the model underlying the Claims Attributes API likely does not reduce Veteran benefit decision wait times.” J.A. 256–57; J.A. 73. On July 2, 2021, Mr. Worthington recommended that Dr. Oguntade’s contract with the VA be terminated, and he was removed from his position on July 7, 2021, despite a rating of “Fully Successful” on his annual performance review. J.A. 73; J.A. 380.

After filing a complaint with the Office of Special Counsel (“OSC”), *see* J.A. 55; J.A. 71–98, Dr. Oguntade filed an individual right of action (“IRA”) appeal to the Board, arguing that his removal was due to his whistleblower complaint about CAAPI, J.A. 59; *see* J.A. 42–46. The VA moved to dismiss Dr. Oguntade’s appeal, J.A. 391–425, and the Board dismissed for lack of jurisdiction, *Initial Decision* at 1, 15. Specifically, the Board determined that Dr. Oguntade failed to make nonfrivolous allegations that he had a reasonable belief that the contents of his disclosures evidenced any of the following under 5 U.S.C. § 2302(b)(8)(A): a violation of a law, rule, or regulation; gross mismanagement; an abuse of authority; substantial and specific danger to public health or safety; or gross waste of funds. *Id.* at 12–15. The Board denied Dr. Oguntade’s petition for review and affirmed the initial decision, adopting it as the Board’s final decision. *Final Order* at 1–2.

Dr. Oguntade timely petitioned for review in this court. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

II. STANDARD OF REVIEW

We will set aside any action, findings, or conclusions of the Board that are: “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c); *Brenner v. Dep’t*

of *Veterans Affs.*, 990 F.3d 1313, 1322 (Fed. Cir. 2021) (quoting 5 U.S.C. § 7703(c)(1)–(3)). “Whether the Board lacked jurisdiction is a legal question that we decide de novo.” *Mouton-Miller v. Merit Sys. Prot. Bd.*, 985 F.3d 864, 868 (Fed. Cir. 2021).

III. DISCUSSION

The Board has jurisdiction over an IRA appeal under the Whistleblower Protection Act (“WPA”), as amended by the Whistleblower Protection Enhancement Act, if the appellant has exhausted his administrative remedies before the OSC² and makes nonfrivolous allegations that (1) he made a protected disclosure covered by 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in a personnel action prohibited under the statute. 5 U.S.C. § 1221(e)(1); *Hessami v. Merit Sys. Prot. Bd.*, 979 F.3d 1362, 1367 (Fed. Cir. 2020). A protected disclosure under 5 U.S.C. § 2302(b)(8) is “any disclosure of information,” which the employee “reasonably believes evidences . . . (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8); *Hessami*, 979 F.3d at 1367.

In determining Board jurisdiction over a whistleblower action, “the question of whether the appellant has non-frivolously alleged protected disclosures that contributed to a personnel action must be determined based on whether the employee alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” *Hessami*, 979 F.3d at 1369. “Nonfrivolous allegations are allegations that are not vague, conclusory, or facially insufficient, and

² “Neither party disputes that the claims raised before the Board were exhausted before [the] OSC.” Respondent’s Br. 10 n.3; see Petitioner’s Br. 12.

that the petitioner reasonably believes to be true.” *Sadler v. Dep’t of the Army*, 129 F.4th 1339, 1345 (Fed. Cir. 2025) (citing *Piccolo v. Merit Sys. Prot. Bd.*, 869 F.3d 1369, 1371 (Fed. Cir. 2017)); 5 C.F.R. § 1201.4(s) (“A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue” and is “more than conclusory,” “plausible on its face,” and “material to the legal issues in the appeal.”).

The government argues that Dr. Oguntade did not preserve his claim based on the April and May Disclosures, Respondent’s Br. 11–13, and otherwise failed to allege a nonfrivolous disclosure, *id.* at 13–31. Dr. Oguntade argues that he sufficiently pled the April and May Disclosures, Petitioner’s Reply Br. 6–13; *see* Petitioner’s Opening Br. 19–22, and that the Board erred in dismissing for lack of jurisdiction because he made protected disclosures sufficient to establish jurisdiction, Petitioner’s Br. 16–36. We agree with Dr. Oguntade on both counts.

A.

Before addressing the substance of Dr. Oguntade’s disclosures, we determine which of his disclosures we may properly consider. The government argues that we should only consider Dr. Oguntade’s March Disclosures because his April and May Disclosures were not preserved before the Board and are “outside the scope” of this petition for review.³ Respondent’s Br. 11–13. We disagree.

Dr. Oguntade pled the April and May Disclosures sufficiently to preserve the arguments before this court. Petitioners challenging “an administrative agency decision may not raise claims for the first time on appeal.” *Conant v. Off. of Pers. Mgmt.*, 255 F.3d 1371, 1375 (Fed. Cir. 2001);

³ Proceeding pro se before the OSC and the Board, Dr. Oguntade explicitly identified his March Disclosures as alleged protected disclosures at issue. J.A. 71; J.A. 254.

see also id. (“[T]he issue must be raised with sufficient specificity and clarity that the tribunal is aware that it must decide the issue, and in sufficient time that the agency can do so.” (quoting *Wallace v. Dep’t of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989))). However, we hold the pleadings of pro se litigants to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

As the government concedes, Dr. Oguntade mentioned the April blogpost and May communication with Mr. Worthington in his response to the administrative judge’s order on jurisdiction, even if “he did not characterize them as disclosures.” Respondent’s Br. 11–12; J.A. 256–57 (discussing April blogpost and pushback from Mr. Goldfine); J.A. 258 (“I was told that my term at the VA would not be renewed for another year because I did not change the results of my findings to fit the prevailing narrative in my blog.”); J.A. 257 (discussing meeting with Mr. Worthington). Dr. Oguntade also previously mentioned these April and May Disclosures in his forms submitted to the OSC. J.A. 72, 97 (discussing blog); J.A. 73, 98 (“It became apparent that the old product branded as CAAPiv2.0 was going to remain in production no matter what so I had to escalate the problem to Charles Worthington[.]”). Accordingly, Dr. Oguntade raised the issue of his April and May Disclosures with “sufficient specificity and clarity” to make the Board aware that it must decide the issue, and the April and May Disclosures are within the scope of this petition for review. *Conant*, 255 F.3d at 1375.

B.

Next, we turn to the substance of Dr. Oguntade’s disclosures. First, Dr. Oguntade argues that he nonfrivolously alleged a reasonable belief that his disclosures evidenced gross mismanagement by the VA. Petitioner’s Br. 16–22. Second, he argues that he nonfrivolously alleged a reasonable belief that his disclosures evidenced a

gross waste of funds by the VA. *Id.* at 22–27. We address each argument in turn.

i.

Dr. Oguntade argues that he nonfrivolously alleged a reasonable belief that his disclosures evidenced gross mismanagement by the VA. We agree.

An agency may not retaliate against an employee for making a disclosure of information that he “reasonably believes evidences . . . gross mismanagement.” 5 U.S.C. § 2302(b)(8)(A)(ii). “A belief is reasonable if a disinterested observer with knowledge of the essential facts could reach the same conclusion.” *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1350 (Fed. Cir. 2022). “Mere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem or the most appropriate course of action do not rise to the level of gross mismanagement.” *White v. Dep’t of Air Force*, 391 F.3d 1377, 1381 (Fed. Cir. 2004). “Rather, for a lawful agency policy to constitute ‘gross mismanagement,’ an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people. The matter must also be significant.” *Id.* at 1382 (footnote omitted). “[W]here a dispute is in the nature of a policy dispute, ‘gross mismanagement’ requires that a claimed agency error in the adoption of, or continued adherence to, a policy be a matter that is not debatable among reasonable people.” *Id.* at 1383. At the jurisdictional stage, however, whether a petitioner has nonfrivolously alleged a protected disclosure “must be determined based on whether the employee alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” *Hessami*, 979 F.3d at 1369. “The Board may not deny jurisdiction by crediting the agency’s interpretation of the evidence as to whether the alleged disclosures fell within the protected categories[.]” *Id.*

Dr. Oguntade plausibly alleged that he reasonably believed that the VA’s continued use of CAAPI on live claims⁴ without modifying the error-prone “classifier,” J.A. 257, despite his repeated warnings, was slowing down claims processing and evidenced a serious error by the agency not debatable among reasonable people. In March 2021, Dr. Oguntade performed statistical analyses and disclosed to Mr. Goldfine that, based on these tests, CAAPI was slowing claims processing. J.A. 254; *see* J.A. 264–65; *Initial Decision* at 3, 6. Dr. Oguntade’s April Disclosure, the blogpost, further supported this contention. *See* J.A. 283 (“It took 5–7 days longer for AI established claims to be fully developed in comparison to claims established through the manual method.”). Additionally, Dr. Oguntade’s follow-up on benchmarking metrics could have led to a reasonable belief that the agency was not sufficiently evaluating CAAPI and its efficacy. *See* J.A. 271 (Mr. Goldfine’s answer in March 2021 that the metric touting days of time saved relied on comparison to an average in a 2018 analysis by the Office of Business Integration, not a calculation or continuous evaluation); J.A. 76 (alleging “[n]o benchmarks were set” after 2019 rollout of CAAPIv1.0 and “the product was used by two vendors for about 18 months without stopping to check if it was conferring benefits on Veterans”); *see also Initial Decision* at 6. Despite Dr. Oguntade’s March and April Disclosures and accompanying data and analyses, as of June 2021, Dr. Oguntade still believed that the VA had not changed the “main machine learning model” in CAAPI, despite later giving it a new name. J.A. 366; J.A. 257 (“CAAPIv2.0 was put in

⁴ The government does not dispute that it was proper for the Board to accept as true Dr. Oguntade’s claim that CAAPI was being used on live claims. Respondent’s Br. 17; *Initial Decision* at 10.

production on the 9th of April 2021 without any modification to the classifier that underpins the API.”).

In May 2021, Dr. Oguntade again disclosed his concerns, this time to Mr. Worthington via email, sharing that his analysis “revealed that [CAAPI] increased the time for Veterans to get a decision on average by 5–7 days” due to the “classifier,” which had been “rechristened and put in production without any modification.” J.A. 133 (emphases removed); see *Initial Decision* at 7. Dr. Oguntade expressed that “[t]his [was] troubling” because “the consequences of errors emanating from our product affects real people.” J.A. 133. He concluded his email: “It is not right to put a suboptimal product in production – the consequences are real.” *Id.* As the VA processes over 1.5 million claims per year, J.A. 269; see *Initial Decision* at 10, it is plausible that his belief was reasonable that the effect of delays caused by implementing CAAPI without modification was, or would be, “significant.” *White*, 391 F.3d at 1382. In sum, Dr. Oguntade plausibly alleged that he disclosed what he reasonably believed to be serious error by the VA not debatable among reasonable people. The total “number of claims processed by the agency” and “difference in processing times as estimated,” *Initial Decision* at 13, do not render Dr. Oguntade’s allegations frivolous.

Although we determine that the Board erred in dismissing at the jurisdictional stage regarding Dr. Oguntade’s gross mismanagement claim, we do not pass on whether he will be ultimately victorious. “There is a fundamental distinction between the requirements necessary to prevail on the merits of a WPA claim and those sufficient to establish [B]oard jurisdiction.” *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 909 (Fed. Cir. 2008). Dr. Oguntade’s disclosures were not “the sort of vague, conclusory or facially insufficient allegations of government wrongdoing that fail to provide an adequate jurisdictional predicate under the WPA.” *Id.* at 910. Rather, they were “detailed and facially well-supported” with explanations and statistical

analyses. *See id.* Moreover, the government concedes that “reasonable minds could disagree about whether moderate claims processing delays during the agency’s development and implementation of a new system intended to improve claims processing times amounted to an error, negligence, or wrongdoing, versus temporary inefficiencies.” Respondent’s Br. 25. To establish jurisdiction, Dr. Oguntade needed only to plausibly allege a *reasonable belief* that he was disclosing serious agency error “not debatable among reasonable people.” *White*, 391 F.3d at 1382. Through his allegations of gross mismanagement, he has cleared that bar.

ii.

Because we hold that Dr. Oguntade has nonfrivolously alleged a reasonable belief that his March, April, and May Disclosures were protected disclosures of “gross mismanagement” under 5 U.S.C. § 2302(b)(8), this determination suffices to establish that the Board erred in dismissing for lack of jurisdiction. We do not reach the issue of whether he also nonfrivolously alleged a reasonable belief that his disclosures evidence a gross waste of funds by the VA.

* * *

Accordingly, the Board erred in concluding that Dr. Oguntade had “not made a nonfrivolous allegation that he made a protected disclosure” and thus “fail[ed] to meet his burden of nonfrivolously alleging Board jurisdiction.” *Initial Decision* at 15.

IV. CONCLUSION

We have considered the government’s remaining arguments and find them unpersuasive. For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

12

OGUNTADE v. MSPB

COSTS

Costs to petitioner.

United States Court of Appeals for the Federal Circuit

BABATUNDE OGUNTADE,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-1114

Petition for review of the Merit Systems Protection Board in No. DC-1221-23-0169-W-1.

LOURIE, *Circuit Judge*, concurring.

I join the panel's thorough and well-written opinion in full. I write separately to emphasize that, while precedential, the opinion should not be overread. Like all decisions, it is based on its particular facts. The opinion thoroughly documents Board jurisdiction over Dr. Oguntade's claim of gross mismanagement. I write separately to emphasize that the opinion should not be read to discourage experimentation to solve the VA claims backlog.

Under the whistleblower statute, jurisdiction over an IRA appeal requires that an employee make non-frivolous allegations that the employee reasonably believed evidenced gross mismanagement or gross waste of funds. The tests for adequately pleading gross mismanagement and

gross waste of funds require allegations that the government acted in an *undebatably* improper manner. To be deemed “gross mismanagement,” the employee must disclose “such serious errors by the agency that a conclusion the agency erred is *not debatable* among reasonable people” and the matter that is the subject of the disclosure must be “significant.” *White v. Dep’t of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004) (emphasis added). To be deemed a gross waste of funds, the employee must disclose that the government undertook “*more than debatable expenditure* that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *Chambers v. Dep’t of the Interior*, 515 F.3d 1362, 1366 (Fed. Cir. 2008) (emphasis added) (citing the Board’s test for gross waste of funds with approval).

From our vantage point at this court, hearing appeal after appeal from veterans for benefits, it is clear that a large claims backlog has existed and that there has been a need for the VA to experiment and devise solutions to this problem. Today’s holding—that necessary experimental testing might be subject to claims of gross mismanagement or gross waste of funds—should not discourage such attempts. That would be regrettable. Under a different set of facts, it may be at least debatable that such a failure is to be expected in implementing new strategies to reduce the claims backlog. Veterans who are owed benefits under the law for serving the country need solutions.

But, as the opinion demonstrates, the agency appears to have been unresponsive to reasonable attempts by Dr. Oguntade to point out the flaws in its management of the CAAPI program. Moreover, that his temporary appointment was not renewed and hence that he was removed may not be justified under the whistleblower laws. But the legality of those alleged acts of retaliation is not before us. What is before us is whether such disclosures of problems with an experimental program *can* evidence gross mismanagement or gross waste of funds, and I consider that, under

OGUNTADE v. MSPB

3

the present facts and as ably laid out by the panel opinion, they can. I therefore join.