

Leave Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [medical center]
Department of the Army
[installation & State]

Claim: Reinstatement to Position and Other
Compensatory Measures Due to
Violation of the Family and Medical
Leave Act

Agency decision: N/A

OPM decision: Denied; Lack of Jurisdiction and Barred
by Res Judicata

OPM file number: 07-0040

/s/ for

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

9/28/2007

Date

The claimant's request for redress was forwarded by his Member of Congress in a May 4, 2007, letter and was received by the U.S. Office of Personnel Management (OPM) on May 22, 2007. The letter states the claimant was removed from his position:

...when he failed to come into work while he was under the protection of the Family [and] Medical Leave Act [FMLA]. [Claimant] is requesting that he be reinstated in his position at the [medical center] in addition to other compensatory measures.

We received additional information from his former employing activity on August 14, 2007. For the reasons discussed herein, the claim is denied for lack of jurisdiction and is barred by res judicata.

The record shows the claimant was removed from his Respiratory Therapist, GS-651-7, position at the [medical center] effective May 14, 2005. The claimant seeks to have OPM overturn his removal based on his assertion that his agency violated FMLA.

Part 178 of title 5, Code of Federal Regulations (CFR), concerns the adjudication and settlement of claims for compensation and leave performed by OPM under the provisions of section 3702(a)(2) of title 31, United States Code (U.S.C.). Section 178.102(a)(3) of title 5 CFR requires that an employing agency already has reviewed and issued an initial decision on a claim before it is submitted to OPM for adjudication. Based on the information submitted, we find no record of the claimant having filed a claim with his former employing agency or having received a written agency-level; i.e., Department of the Army-level, denial of claim on the FMLA matter at issue in his request. Instead, the information provided by the claimant includes emails from activity-level personnel on leave requests and scheduling matters raised by the claimant. However, we may render a decision on this matter based on jurisdictional grounds.

OPM cannot take jurisdiction over the compensation or leave claims of Federal employees who are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA) between the employee's agency and labor union for any time during the claim period, unless that matter is or was specifically excluded from the agreement's NGP. The Federal courts have found Congress intended such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452, 1454-55 (Fed. Cir. 1990) (en banc), cert. denied, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121 (a)(1) of title 5, U.S.C., mandates that the grievance procedures in negotiated CBAs be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

Information provided by the claimant's former servicing human resources office at our request shows the claimant was in a bargaining unit position during the period of his claim. The CBA between the [medical center] (and other Department of the Army components at [installation]) and the American Federation of Government Employees, Local [number], does not specifically exclude compensation and leave issues from the NGP (Article 34) covering the claimant. Therefore, the claimant's FMLA claim, and any potential remedy to that claim, must be construed as covered by the NGP the claimant was subject to during the claim period.

Accordingly, OPM has no jurisdiction to adjudicate the claimant's assertion that his FMLA rights were violated.

Information in the file shows the claimant's removal was upheld by the Merit System Protection Board (MSPB) (2006 MSPB 207, [docket number]). As discussed in *Stearn v. Department of the Navy*, 280 F.3d 1376 (Fed. Cir 2002):

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2423 (1981) . . . The doctrine serves to "relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and . . . encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94, 66 L.Ed. 2d308, 101 S.Ct. 411 (1980).

Since MSPB rendered a judgment on the merits of the claimant's removal and the claimant, represented by counsel, had an opportunity to raise this perceived FMLA violation as an affirmative defense, the claim before us is also barred by res judicata, which precludes relitigation of issues that have already been decided by an administrative body of competent jurisdiction.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States court.