



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for October 17, 2014

BOARD DECISIONS

Appellant: Frederick J. Colbert
Agency: Department of Veterans Affairs
Decision Number: [2014 MSPB 80](#)
MSPB Docket Number: DA-1221-13-0382-W-1
Issuance Date: October 16, 2014
Appeal Type: IRA
Action Type: Involuntary Resignation

Retroactivity of WPEA
Protected Disclosure Analysis under WPA
Knowledge-Timing Test Application
Definition of Personnel Action Under WPEA

The appellant filed a complaint with OSC alleging activity at his agency that he believed to be a violation of a law, rule, or regulation. He claimed that, as reprisal for his complaint, he was subjected to car vandalism, patient complaints, a hostile work environment, a poor performance evaluation, and a “double bind” proficiency review and summary review notice. The appellant then resigned from his position, and claimed on appeal that the resignation was involuntary due to his intolerable working conditions. The administrative judge found that the appellant did not make a nonfrivolous allegation of a protected disclosure under 5 U.S.C. § 2302(b)(9)(A)(i), and that the appellant failed to make a nonfrivolous allegation of involuntary resignation.

Holding: The Board affirmed the initial decision with respect to the finding that the appellant exhausted his administrative remedies, but vacated the finding that the appellant did not make a nonfrivolous allegation of a protected disclosure. The Board found that the

appellant did make a nonfrivolous allegation of a protected disclosure, and remanded the appeal for further adjudication.

1. The Board vacated the administrative judge's analysis of the protected disclosure issue. Pursuant to *Hooker v. Dep't of Veterans Affairs*, 120 M.S.P.R. 629 (2014), Section 101(b)(1)(A) of the Whistleblower Protection Enhancement Act (WPEA) does not have retroactive effect as applied to the prohibited personnel practices described in 5 U.S.C. § 2302(b)(9)(A)(i) and (b)(9)(C).

2. In its new analysis, the Board held that the appellant's complaint to OSC should have been considered a protected disclosure under the version of 5 U.S.C. § 2302(b)(8)(B)(i) in existence prior to the passage of the WPEA.

3. The appellant nonfrivolously alleged that his OSC complaint was a contributing factor in his personnel actions. The Board applied the "knowledge-timing" test, and found that because the appellant informed two officials who participated in the complained about personnel actions, and because all of the complained about personnel actions took place within 8 months of his disclosures, he satisfied both prongs of the test.

4. The appellant's claim of a hostile work environment, a poor performance evaluation, and his supervisor's request for a summary review board all constituted potential retaliatory personnel actions.

5. In light of its decisions regarding the appellant's protected disclosure and his allegations that his disclosures were contributing factors in his personnel actions, the Board remanded the matter for further adjudication of how these allegations affect his involuntary resignation claim.

6. The Board overruled *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583 (2010), to the extent it conflicts with the Board's decision that an involuntary resignation claim is cognizable in an IRA appeal.

The U.S. Court of Appeals for the Federal Circuit issued nonprecedential decisions in the following case:

Petitioner: Brenda Woods

Respondent: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3098](#)

MSPB Docket No.: AT-0353-12-0684-I-1

Issuance Date: October 14, 2014

Jurisdiction - Partial Restoration

In 1989, the appellant left her position with the U.S. Postal Service (USPS) due to stress stemming from alleged harassment and discrimination. In 1991, the Office of Workers Compensation Program (OWCP) declared her totally disabled for any employment with the USPS, but still capable of employment with a new employer. In 1992, she was offered a new position with the U.S. Army Corps of Engineers (USACE), which OWCP stated was within her work restrictions. However, she refused to accept the position because she considered the offer defective. Five months later, she attempted to accept the offer, but USACE refused to allow her to commence work based on her prior failure to accept the position. In 2012, the appellant filed an appeal with the Board, claiming that USPS failed to restore her to employment following her partial recovery from a compensable injury. The administrative judge dismissed her appeal for lack of jurisdiction because she did not provide evidence sufficient to prove she had partially recovered for purposes of Board jurisdiction. The Board affirmed the administrative judge's decision.

Holding: The Court affirmed.

1. To establish Board jurisdiction over a partial recovery claim, an employee must prove that she had partially recovered from a compensable injury. Here, the appellant failed to provide sufficient evidence that she had partially recovered.