



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 21, 2017

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Phyllis E. Banks
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2017-1242](#)
MSPB Docket Number: SF-0752-16-0381-I-1
Issuance Date: April 18, 2017

Jurisdiction
"Employee"
Probationers/5 U.S.C. § 7511(a)(1)(A)

The petitioner was hired in the excepted service subject to a one-year probationary/trial period. Prior to the expiration of this period, the agency notified her that it planned to terminate her. Instead, the petitioner resigned. In an initial decision dismissing the petitioner's involuntary resignation/constructive removal appeal for lack of jurisdiction, the administrative judge found that she was not an "employee" with Board appeal rights because: (1) she was not a preference eligible; (2) there was no evidence that she had prior Federal service; and (3) she resigned within the relevant probationary/trial period. The administrative judge also found that, absent an otherwise appealable action, the Board lacked jurisdiction over the petitioner's hostile work environment and retaliation claims. The Board

upheld the administrative judge's dismissal, but, in doing so, addressed additional evidence that the administrative judge had not considered which demonstrated that, prior to the petitioner's employment, she had been currently and continuously employed by the U.S. Postal Service. The Board found that this employment did not constitute prior Federal service for purposes of determining whether the petitioner was an "employee" with Board appeal rights because the U.S. Postal Service is not an "Executive agency."

Holding: The court dismissed the petition for review for lack of jurisdiction.

1. Because the petitioner did not have one year of service with the agency and her three years with the U.S. Postal Service did not qualify as "current continuous service . . . in an Executive agency," she was not an "employee" with Board appeal rights.
 - a. Pursuant to 5 U.S.C. § 105, an "Executive agency" is defined as "an Executive department, a Government corporation, or an independent establishment.
 - b. The provisions of 5 U.S.C. § 104 displace the general characterization of the U.S. Postal Service as an "independent establishment," and thus it does not constitute an "Executive agency."
2. Absent an otherwise appealable action, the petitioner's claims of retaliation and a hostile work environment lie outside of the Board's jurisdiction.

NONPRECEDENTIAL:

Kasten v. Merit Systems Protection Board, [No. 2016-1321-ag](#), (2nd Cir. Apr. 14, 2017) (MSPB Docket No. PH-1221-16-0006-W-1)(affirming the initial decision's dismissal of the petitioner's whistleblower claim for lack of jurisdiction because the petitioner failed to nonfrivolously allege that her letter to her supervisors constituted a protected disclosure).