



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 20, 2019

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COURT DECISIONS

PRECEDENTIAL:

Appellant: Johnnetta Punch

Appellee: Jim Bridinstine

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

Case Number: [18-40580](#)

Issuance Date: December 17, 2019

COURT REVIEW

- MISCELLANEOUS

DISCRIMINATION

- MIXED CASE PROCEDURES

The appellant filed a mixed case Board appeal challenging her removal and alleging discrimination and retaliation for prior equal employment opportunity (EEO) activity. The Board affirmed the removal and denied the appellant's discrimination claims. The appellant filed an appeal of the Board's decision at the U.S. Court of Appeals for the Federal Circuit; in doing so, she certified that she had not and would not claim discrimination in her case.

Shortly after filing her Board appeal, the appellant also filed an EEO complaint

raising a number of alleged acts of discrimination, including her proposed removal. Her employing agency, the National Aeronautics & Space Administration (NASA), investigated several other allegations but declined to investigate the proposed removal because the appellant had already filed a Board appeal challenging her removal. NASA investigated the appellant's other claims and found no discrimination. The appellant then appealed that finding to the Equal Employment Opportunity Commission (EEOC). When EEOC failed to issue a final decision within 180 days, the appellant filed suit in U.S. district court.

After the appellant filed her action in district court, NASA moved to dismiss her appeal before the Federal Circuit. In response, the appellant indicated that she had actually filed an EEOC appeal of the Board's decision before she filed her Federal Circuit appeal. However, the parties later stipulated that no such EEOC appeal was ever formally filed. Nevertheless, the appellant still had both a Federal Circuit appeal challenging her removal in which she said she was not pursuing a discrimination claim and an action in district court in which she was alleging discrimination in connection with matters that preceded her removal. The Federal Circuit determined that the appellant had not really waived her discrimination claims and that it therefore lacked jurisdiction over her appeal. The Federal Circuit transferred the appeal to the district court, where it was consolidated with her discrimination suit.

The district court dismissed the consolidated case in its entirety. The court found that the appellant's Federal Circuit appeal and district court complaint related to the same matter and because the Federal Circuit appeal was filed first, the district court complaint had to be dismissed as a matter of law. The court further found that the claims raised in the Federal Circuit appeal were untimely.

Holding:

The appellant's attempts to simultaneously pursue her claims through multiple procedural paths at the same time require dismissal of her appeals.

- 1) At the beginning of this process, the appellant had the option to file either a Board appeal or an EEO complaint, but not both. Whichever option she pursued first precluded pursuing the other. Here, the appellant filed her Board appeal first. However, she subsequently tried to pursue an EEO complaint on the same matter.
- 2) The court rejected the appellant's argument that NASA was responsible for her pursuit of both procedures at the same time because it accepted at least a portion of her EEO complaint for investigation. Because the

- appellant had already filed a Board appeal on the same matter, her EEO complaint was a legal nullity.
- 3) After MSPB affirmed her removal, the appellant had the option to pursue only the Civil Service Reform Act (CSRA) portion of her case before the Federal Circuit or to continue pursuing a mixed case before the EEOC or in district court. Again, the appellant had to choose one of those options to pursue to the exclusion of the others. Here, the appellant attempted to pursue all three options.
 - 4) The court determined that the appellant timely appealed the Board's decision to the EEOC, despite the parties' later stipulation that the EEOC appeal was a nullity. Because that appeal was pending before the EEOC at the time the appellant filed her Federal Circuit appeal, there was no "judicially reviewable action" for the Federal Circuit to review.
 - 5) Although the appellant certified to the Federal Circuit that she had not and would not pursue any discrimination claims in her case, she had already pursued such claims and continued to do so before both NASA and the EEOC. In the absence of a valid waiver of her discrimination claims, the appellant could not pursue her appeal before the Federal Circuit.
 - 6) By the time the appellant filed her Federal Circuit appeal, the deadline to pursue her mixed case before the EEOC or in district court had passed. The court rejected the appellant's argument that the deadline(s) should be equitably tolled.