



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 12, 2020

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COURT DECISIONS

PRECEDENTIAL:

Appellant: Teresa Young

Appellee: Merit Systems Protection Board

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

Case Number: [2019-2268](#)

Issuance Date: June 11, 2020

MSPB Docket Number: AT-1221-19-0574-W-1

WHISTLEBLOWER PROTECTION ACT

- **JURISDICTION, GENERALLY**
- **PROTECTED “DISCLOSURE”**

The Internal Revenue Service removed the appellant before the end of her probationary period. The appellant filed a complaint with the Office of Special Counsel (OSC), alleging that her removal was the product of whistleblower retaliation. After OSC closed the matter, the appellant filed an individual right of action (IRA) appeal with the Board.

In her IRA appeal, the appellant identified a number of alleged disclosures,

ranging from attendance violations to a failure to accommodate her disabilities, but those allegations lacked specificity. The administrative judge issued an order explaining the appellant's jurisdictional burden and instructing her to meet that burden. She ordered the appellant to provide additional argument and evidence about her alleged disclosures. The appellant did not respond.

The administrative judge dismissed the appeal, finding that the appellant failed to present nonfrivolous allegations of a protected disclosure.

Holding: The appellant's petition was properly before the court, and the Board correctly dismissed the appellant's IRA appeal for lack of jurisdiction.

The court first addressed the Supreme Court's decision in *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017), which held that a Board dismissal of a "mixed case" for lack of jurisdiction is appealable to a United States district court. After describing the relevant statutory schemes, the court concluded that *Perry* had no impact on IRA appeals, because IRA appeals never constitute "mixed case" appeals. Therefore, the appellant's IRA appeal was rightly before the Federal Circuit, rather than a district court.

Turning to the merits, the court agreed with the administrative judge's conclusions. First, the appellant's allegations of time and attendance violations were conclusory in nature, without identifying particular instances of the violations. Second, although the appellant asserted that the agency subjected her to EEO reprisal, those allegations are covered by 5 U.S.C. § 2302(b)(9)(A)(ii) and, therefore, fall outside the Board's jurisdiction in an IRA appeal. Third, the appellant's alleged disclosures concerning the agency's failure to accommodate her disabilities did not reflect a "substantial and specific danger to public health and safety." Lastly, to the extent that the appellant identified disclosures that were not exhausted before OSC, those matters are outside the court's purview.

NONPRECEDENTIAL:

Cerulli v. Department of Defense, No. [2019-2022](#) (Fed. Cir. June 9, 2020) (MSPB Docket No. SF-1221-18-0624-W-1): The court affirmed the administrative judge's decision, which denied the appellant's request for corrective action in an individual right of action appeal. Although the appellant presented a prima facie case of reprisal concerning a single protected disclosure and two personnel actions, the agency proved that it would have taken the same personnel actions in the absence of the protected disclosure. The court was not persuaded by the appellant's various arguments regarding additional alleged

disclosures, the administrative judge's credibility findings, or her analysis of the agency's burden.

Bussey v. Esper, No. [19-2116](#) (10th Cir. June 5, 2020) (MSPB Docket No. DE-0752-16-0165-I-1): The court upheld the district court's decision, which affirmed a decision by an administrative judge for the Board, sustaining the appellant's removal and denying claims of discrimination and whistleblower reprisal. On review, the appellant raised new allegations of protected disclosures but the court declined to consider them. The court also rejected the appellant's assertion that the administrative judge somehow erred by identifying the disputed issues, allowing the parties to identify any others, then limiting the scope of the appeal to those matters.

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