



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for October 16, 2020

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#### COURT DECISIONS

##### PRECEDENTIAL:

**Petitioner:** Angela D. Fuerst

**Respondent:** Secretary of the Air Force

**Tribunal:** U.S. Court of Appeals for the Sixth Circuit

**Case Number:** [19-4139](#)

**Docket Number:** CH-0353-15-0193-C-1

**Date Issued:** October 14, 2020

##### Subject Matter Jurisdiction

- Mixed case
- Petition for Enforcement

Ms. Fuerst was removed from Federal service after the agency determined that her ability to only work part-time was affecting the agency's mission. The Department of Labor subsequently determined that Ms. Fuerst was no longer disabled, and she applied to participate in a fast-track reemployment program for civil service employees who were removed from service because of a disability but have since recovered. Ms. Fuerst asked the agency to place her on the appropriate priority reemployment list, but the agency did not act on her request. Ms. Fuerst filed a Board appeal challenging her removal, arguing that the

removal was based on disability discrimination and claiming that she had a right to be placed on the priority reemployment list. The Board disagreed that her removal was improper or motivated by disability discrimination, but it found that Ms. Fuerst should have been placed on the reemployment list retroactively. The Board therefore ordered the agency to place Ms. Fuerst on that list retroactively and to hire her for any job she would have been given had she been on the list in the first place. The agency offered Ms. Fuerst two jobs at her pay grade.

Ms. Fuerst believed that the agency negotiated in bad faith and failed to comply with the Board's order, and she filed a petition for enforcement. The Board denied the petition for enforcement, finding that the agency complied by offering her two suitable jobs. Ms. Fuerst appealed that decision to a district court. The agency moved to dismiss the appeal for lack of subject matter jurisdiction because the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over the appeal. The district court agreed with the agency and dismissed the appeal. Ms. Fuerst sought judicial review of that decision.

The court explained that a mixed case has to be based on an action that is (1) appealable to the Board and (2) motivated in part by discrimination. The court noted that Ms. Fuerst's original appeal was a mixed case because she challenged the removal and the agency's failure to place her on the priority reemployment list and she raised a discrimination claim regarding the removal. By contrast, the petition for enforcement was not a mixed case because it was not an appeal of an agency action, even though Ms. Fuerst petitioned the Board to enforce an order issued in a mixed case. Because the petition for enforcement was not a mixed case, it was not within the district court's jurisdiction, and the court affirmed the district court's dismissal for lack of jurisdiction. The court noted that the U.S. Court of Appeals for the Federal Circuit was the only proper avenue for judicial review of the Board's final decision in the petition for enforcement matter.

#### NONPRECEDENTIAL COURT DECISIONS

*Foster v. Department of the Army*, No. [2020-1691](#) (Fed. Cir. Oct. 15, 2020): In this petition for enforcement matter, the court found that there was substantial evidence to support the Board's finding that the agency complied with its cancellation order as to back pay but not as to uniform allowance. The court therefore remanded the appeal so the parties could present additional evidence and the Board could conduct additional fact-finding on the uniform allowance necessary to place Mr. Foster in status quo ante.

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