

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JO A. BOOKER,
Appellant,

v.

U.S. POSTAL SERVICE,
Agency.

DOCKET NUMBER
DA34439110596

DATE: APR 06 1992

Jo A. Booker, Dallas, Texas, pro se.

Darrell L. Jungman, Dallas, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

For the reasons discussed below, we find that the appellant's petition for review does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appellant's appeal for lack of jurisdiction.

BACKGROUND

The appellant, after she had been restored to duty as an employee partially recovered from a compensable injury, appealed the circumstances of her restoration to duty with the agency. The administrative judge dismissed the appeal for lack of jurisdiction. He found that, with regard to partially recovered employees, the Board had jurisdiction only where there was an allegation that the agency was denying restoration arbitrarily and capriciously.

The administrative judge also found that the Board lacked jurisdiction over the appellant's allegations of handicap discrimination and reprisal for having complained to the agency's Inspector General (IG) prior to her receipt of workers' compensation benefits because allegations of prohibited personnel practices under 5 U.S.C. § 2302(b)(1) and (b)(9) were not an independent source of Board jurisdiction.

In her petition for review, the appellant does not address the jurisdictional issue, but argues the merits of her appeal.

ANALYSIS

The Board agrees with and adopts the administrative judge's finding that the Board lacks jurisdiction over the

appellant's restoration appeal* and her allegations of prohibited personnel practices under 5 U.S.C. § 2302(b)(1) and (b)(9). See *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd sub nom. Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

A claim of reprisal for having complained to the IG may be pursued before the Board in an individual right of action (IRA) appeal under the Whistleblower Protection Act if the complaint to the IG constitutes a disclosure under 5 U.S.C. § 2302(b)(8). If the complaint to the IG is not a disclosure protected under § 2302(b)(8), however, retaliation for the complaint is prohibited under § 2302(b)(9), violations of which are not an independent source of Board jurisdiction. See *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991).

We need not decide whether § 2302(b)(8) or (b)(9) is applicable to the disclosure at issue in this appeal because, in any event, the Board lacks jurisdiction over the appeal. In *Mack v. United States Postal Service*, 48 M.S.P.R. 617, 620-21 (1991), the Board held that Postal Service employees, such

*The Board construes the appellant's references, in her petition for appeal and petition for review, to the agency's failure to restore her in 1984 as an example of the alleged retaliation for her whistleblowing, and not as a late filed appeal of that action. If the appellant was attempting to appeal the 1984 action, she must file a petition for appeal with the regional office accompanied by a statement showing good cause for the delay in filing. See 5 C.F.R. § 1201.22(c).

as the appellant, could not appeal alleged violations of § 2302(b)(8) directly to the Board under the IRA provisions of the Whistleblower Protection Act, 5 U.S.C. § 1221; rather, they may raise whistleblowing only as an affirmative defense to an otherwise appealable action. Since there is no otherwise appealable action here, the Board is without jurisdiction to hear the appellant's affirmative defenses. See *Wren*, 2 M.S.P.R. at 2.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.