NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

LIBBY A. DEMERY,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2019-2282

Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0105-W-1.

Decided: April 9, 2020

LIBBY A. DEMERY, Clinton, MD, pro se.

DANIEL S. HERZFELD, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by JOSEPH H. HUNT, ALLISON KIDD-MILLER, ROBERT EDWARD KIRSCHMAN, JR.

Before CHEN, SCHALL, and HUGHES, *Circuit Judges.*

PER CURIAM.

Libby Demery seeks review of a decision of the Merit Systems Protection Board (Board) denying Ms. Demery's request for corrective action under the Whistleblower Protection Act (WPA) as amended by the Whistleblower Protection Enhancement Act (WPEA). The Board concluded that Ms. Demery failed to prove she made any protected disclosure that was a contributing factor in her non-selection for a position vacancy. We *affirm.*

BACKGROUND

On October 26, 2010, Ms. Demery interviewed with a panel of individuals for a Management Analyst position in the National Guard Bureau. The panel's leader, Mr. Tony Denham, recommended Ms. Demery as the "selectee" to the Civilian Personnel Advisory Center (CPAC or Agency). CPAC had the authority to then make a tentative or final job offer to Ms. Demery. On November 19, 2010, in response to an email from Ms. Demery, Mr. Denham informed Ms. Demery that CPAC would be responsible for making the hiring decision and was trying to make sure the right candidate was selected. Appx106.[1] That same day, Ms. Demery called Mr. Denham. During that call, Mr. Denham informed Ms. Demery that CPAC was considering another candidate—a candidate from the Department of Defense's Priority Placement Program (PPP). The PPP gives priority to displaced workers who have been

[1] The appendix submitted by the Department of the Army will be referred to with the prefix "Appx."

adversely affected by certain employment actions, including, among others, reductions in force. Department of Defense Instruction 1400.25, Vol. 1800, DoD Civilian Personnel Management System: DoD Priority Placement Program (PPP) (December 13, 2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/140025/1400.25-V1800.pdf?ver=2019-03-01-100208-893. Ms. Demery responded by telling Mr. Denham that hiring someone from the PPP did not "seem quite right" given that she had already been interviewed. Board Hearing Tr. 109:4–9.

On November 23, 2010, unbeknownst to Ms. Demery, CPAC selected Mr. John Woods, a PPP candidate, for the Management Analyst position and sent him a tentative job offer, which Mr. Woods accepted the next day. Appx61–62. On December 8, 2010, CPAC extended a firm job offer to Mr. Woods, which he accepted later that day. *Id.* at 59.

Following up on their November 19 phone call, Ms. Demery emailed Mr. Denham on December 1, 2010. In that email, Ms. Demery described the limitations of the PPP and suggested that using that process after interviewing Ms. Demery could not "be justified." *Id.* at 87–88.

On January 9, 2017, Ms. Demery filed a complaint with the Office of Special Counsel (OSC) claiming that the Agency hired Mr. Woods instead of her for the Management Analyst position in retaliation for her disclosures (November 19 phone call and December 1 email). *Id.* at 91–105. OSC initiated an inquiry into

her complaint. On October 26, 2017, OSC notified Ms. Demery that it was terminating its inquiry into her allegations and advised her that she could file an individual right of action appeal with the Board. *Id.* at 89. Ms. Demery appealed to the Board.

On June 12, 2018, the administrative judge held a hearing where three witnesses testified: Mr. Denham, Ms. Demery, and Ms. Lydia Langley, the Supervisory Human Resources Specialist at CPAC. *Id.* at 4, 70. The administrative judge determined that the November 19 phone call did not constitute a protected disclosure, but that the December 1 email did. *Id.* at 12–13. However, the Board found two reasons for why Ms. Demery failed to meet her burden of proof that the December 1 email was a contributing factor to her non-selection: (1) the December 1 email occurred after CPAC's personnel decision to hire Mr. Woods, and (2) the email was never forwarded or otherwise communicated to CPAC. *Id.* at 13–14.

On June 21, 2019, the administrative judge's initial decision became the final decision of the Board. Ms. Demery timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our standard of review is limited and requires this court to affirm a decision of the Board unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having

been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Substantial evidence is "such relevant evidence" that "a reasonable mind might accept as adequate to support a conclusion." *McGuffin v. Soc. Sec. Admin.*, 942 F.3d 1099, 1107 (Fed. Cir. 2019).

The WPA prohibits an agency from taking a personnel action because of a whistleblowing "disclosure" or activity. 5 U.S.C. § 2302(b)(8)–(9). An employee who believes he has been subjected to illegal retaliation must prove by a preponderance of the evidence that he made a protected disclosure that contributed to the agency's action against him. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). "If the employee establishes this prima facie case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken 'the same personnel action in the absence of such disclosure.'" *Id.* at 1364 (quoting 5 U.S.C. § 1221(e)).

A. November 19, 2010 phone call

The Board found that the November 19 phone call did not constitute a protected disclosure under the WPA as amended by the WPEA[2] because Ms. Demery's

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[2] The WPEA clarified the definition of a disclosure under the WPA. Under the WPEA, a disclosure will not be excluded from protection for any of these following reasons—simply because it was made to a wrongdoer, was made for personal motives, revealed information that was already known, was not made in writing, was made while off-duty, or was not made within a certain amount of time after the events described in the disclosure.

statements were far too vague to constitute a disclosure of a violation of law or anything else. Appx12. We agree.

Under the WPA,[3] to establish a protected disclosure has been made, a person must establish that: (1) he had a reasonable belief that his disclosure was protected under the WPA; and (2) he identified a "specific law, rule, or regulation that was violated." *Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001) (internal quotations omitted). Vague, conclusory, or facially insufficient allegations of government wrongdoing fail to constitute protected disclosures under the WPA. *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 910 (Fed. Cir. 2008); *see also Herman v. Dep't of Justice*, 193 F.3d 1375, 1380–81 (Fed. Cir. 1999) (holding that the Board had no jurisdiction under the WPA for the disclosure of trivial violations of agency rules).

Substantial evidence supports the Board's finding that Ms. Demery's November 19, 2010 phone conversation lacks the specificity required to constitute a disclosure. Ms. Demery testified that she told Mr. Denham in that call that she thought CPAC's consideration of another candidate "was not correct" and "that this timing doesn't seem quite right." Board Hearing Tr. 109:4–9, 15–20. Although Ms. Demery indicated her general dissatisfaction with the process, she did not allege any

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See Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

[3] This standard is the same under the WPEA. *See Mithen v. Dep't of Veterans Affairs*, 119 M.S.P.R. 215, n. 9 (2013).

violation of a rule, regulation, or law. The Board reasonably found that Ms. Demery's statements in the November 19 phone call were too vague and conclusory and thus do not qualify as a protected disclosure under the WPA as amended by the WPEA.

B. December 1, 2010 email

The Board found that the December 1 email was a protected disclosure but that Ms. Demery did not prove by a preponderance of the evidence that this disclosure was a contributing factor to her non-selection. Appx13. We agree.

"An employee can demonstrate that a disclosure was a contributing factor by adducing evidence that the deciding official was aware of the disclosure and that the length of time between the disclosure and the adverse action was such that a reasonable person could conclude that the disclosure contributed to the agency's decision to take action against him." *Suggs v. Dep't of Veterans Affairs*, 415 F. App'x 240, 242 (Fed. Cir. 2011) (citing 5 U.S.C. § 1221(e)(1)). Here, the Board found "there is no evidence anyone in CPAC (the deciding entity) had knowledge of the appellant's disclosure," crediting Ms. Langley's and Mr. Denham's testimony. Appx14.

Ms. Demery argues that she demonstrated during the hearing that Mr. Denham and Ms. Langley lied during their testimony. Appellant's Br. at 10–12. However, there is no evidence to support this contention. Rather, Ms. Demery seems to disagree with how the

Board assessed the credibility of the witnesses. The Board's assessment of demeanor, contradiction, consistency, or other credibility determinations is given great deference on appeal. *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1299 (Fed. Cir. 2002) ("[G]reat deference must be granted to the trier of fact who has had the opportunity to observe the demeanor of the witnesses, whereas the reviewing body looks only at cold records.") (internal citation and quotations omitted); *King v. Dep't of Health & Human Servs.*, 133 F.3d 1450, 1453 (Fed. Cir. 1998) (stating that the "evaluation of witness credibility is within the discretion of the Board and that, in general, such evaluations are virtually unreviewable on appeal"). Ms. Langley testified that she was unaware of Ms. Demery's December 1 email. Mr. Denham also testified that he did not forward Ms. Demery's December 1 email to Ms. Langley or anyone else. Additionally, the request for personnel action (RPA) tracker, which tracked the candidate selection of the Management Analyst position, does not contradict the testimony by Ms. Langley or Mr. Denham. We therefore do not disturb the Board's credibility-based determination that CPAC had not been informed of the December 1 email and that Mr. Denham did not forward or discuss the December 1 email with anyone.

The Board also found that CPAC's personnel decision to select and hire Mr. Woods occurred before December 1. Substantial evidence supports this finding. Mr. Woods was first sent a tentative job offer on November 23, 2010. Although Mr. Woods's firm offer was not sent until December 8, 2010, he was still selected

for the Management Analyst position prior to Ms. Demery's December 1 email. Therefore, the Board did not err in determining that the December 1 email was not a contributing factor to Ms. Demery's non-selection.

C. Denial of Additional Witnesses

Ms. Demery asserts that the Board erred in denying her the ability to call two additional witnesses. The Board determined it was unnecessary to hear from the two additional witnesses based on the testimony of Ms. Langley and Mr. Denham. Appx71, 73. The Board has broad discretion to exclude witnesses if their testimony would be irrelevant, immaterial, or repetitious. *See* 5 C.F.R. § 1201.41(b)(10); *Curtin v. Office of Pers. Mgmt.*, 846 F.2d 1373, 1378 (Fed. Cir. 1988); *see also Davis v. Dep't of Army*, 710 F. App'x 875, 880 (Fed. Cir. 2017) (finding that the Board did not abuse its discretion where it excluded witnesses).

Our court will not overturn the Board's decision to exclude witnesses unless the exclusion is a clear and harmful abuse of discretion. *See Curtin*, 846 F.2d at 1378 ("Procedural matters relative to discovery and evidentiary issues fall within the sound discretion of the board and its officials."). In Ms. Demery's appeal, the Board determined that the testimony of the other two witnesses would not provide any additional relevant information because both of those witnesses worked under Ms. Langley and the Board had already heard testimony from Ms. Langley. Appx71. Ms. Demery did not have any interactions with the two witnesses and

the RPA tracker contained in the record detailed the entries of the two witnesses with respect to the Management Analyst position candidate selection. Appx90. We find under these circumstances the Board did not abuse its discretion in excluding the testimony of the two witnesses.

D. Perceived Whistleblower Claim

We also reject Ms. Demery's contention that CPAC perceived her to be a whistleblower. The Board found that Ms. Demery did not exhaust an allegation for perceived whistleblowing before OSC. Appx8 n.7. The Board further found that, even if she had, there was no evidence that the Agency perceived Ms. Demery as a whistleblower. *Id.* We again agree with the Board.

The perceived whistleblower doctrine prevents a supervisor from taking retaliatory action against an employee, even if the employee's disclosure is later found unprotected, so long as the retaliation was taken in response to the disclosure. *Montgomery v. Merit Sys. Prot. Bd.*, 382 F. App'x 942, 947 (Fed. Cir. 2010). Thus, even if Ms. Demery did not actually engage in a protected activity, she could still have a claim if the agency officials nevertheless perceived her as having engaged in protected activity.

For an employee to establish that the Board has jurisdiction over an individual right of action appeal from OSC regarding a perceived whistleblower claim, he must, in addition to showing that he exhausted remedies before OSC, make a nonfrivolous allegation

that the agency perceived him as a whistleblower and that his perception as a whistleblower was a contributing factor to his non-selection. 5 U.S.C. § 1214(a)(3); *King v. Dep't of Army*, 116 M.S.P.R. 689, 696 (2011). Below, the Board found that Ms. Demery failed to raise this claim to OSC. We review the Board's legal conclusion that Ms. Demery failed to exhaust her administrative remedies de novo.

Ms. Demery did not allege to OSC any perceived whistleblower theory separate from her whistleblower theory. Rather, her contention on appeal essentially is that raising a whistleblower theory also includes a perceived whistleblower theory. We disagree and see no error in the Board's ruling that Ms. Demery failed to exhaust her perceived whistleblower claim before OSC. *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992) ("[T]he employee must inform [OSC] of the precise ground of his charge of whistleblowing.").

In any event, the Board also found no evidence that Ms. Demery was perceived as a whistleblower. Ms. Langley at CPAC was unaware of Ms. Demery's disclosures and Mr. Denham did not forward those disclosures to anyone else at CPAC and therefore it is impossible that CPAC perceived Ms. Demery as a whistleblower and retaliated against her. Thus, the Board's conclusion that Ms. Demery was not perceived as a whistleblower is supported by substantial evidence.

F. Additional Allegations

To the extent Ms. Demery is requesting review of her other allegations, such as her Equal Employment Opportunity complaint containing an age discrimination allegation, we lack jurisdiction over these allegations because they are outside the scope of the Board's final decision. "Section 1295(a)(9) of Title 28 circumscribes our jurisdiction to review the Board's decisions, limiting it to jurisdiction over an appeal from a final order or final decision of the Board." *Haines v. Merit Sys. Prot. Bd.*, 44 F.3d 998, 999 (Fed. Cir. 1995) (internal quotations omitted). For example, we do not have jurisdiction over Ms. Demery's claim regarding Ms. Stoucker because Ms. Demery failed to exhaust this claim in front of OSC. For all of Ms. Demery's additional complaints and allegations we do not have jurisdiction because Ms. Demery failed to exhaust these allegations in front of OSC, she did not appeal or failed to timely appeal decisions from OSC to the Board, or she failed to timely appeal from the Board.

We have considered Ms. Demery's remaining arguments and find them unpersuasive.

CONCLUSION

For the foregoing reasons, the Board's decision is **AFFIRMED**

COSTS

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

LIBBY A. DEMERY,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
PH-1221-18-0105-W-1

DATE: July 27, 2018

Libby A. Demery, Clinton, Maryland, pro se.

Eugene R. Ingrao, Sr., Arlington, Virginia, for the agency.

BEFORE
Mark Syska
Administrative Judge

INITIAL DECISION

The appellant filed this individual right of action (IRA) appeal under the Whistleblower Protection Act (WPA)/Whistleblower Protection Enhancement Act (WPEA). *See* Appeal File (AF), Tab 1. The Board has jurisdiction under 5 U.S.C. §§ 1221, 2302; 5 C.F.R. §§ 1201.3(b)(2); 1209.1 *et seq*. For the reasons that follow, the appellant's request for corrective action is DENIED.

Background

This case is the continuation of the appellant's ongoing litigation against the agency for its failure to select[1] her for a GS-0343-11 Management Analyst position in the National Guard Bureau, Announcement # NEHT10457276D, in Fall of 2010. The appellant (a 30% disabled veteran) challenged her non-selection as a violation of her veteran's preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA) before the Department of Labor, Office of the Secretary for Veterans Employment and Training (DOLVETS). *See* AF, Tab 1, Attachments. The resulting Board appeal was dismissed as untimely on February 4, 2013, with the administrative judge concluding that the delay was due to the appellant's own negligence in failing to follow DOLVETS' express written instructions (on how to appeal) and instead electing to file an EEO complaint and a FOIA request. *See* MSPB Docket No. DC-3330-13-0063-I-1. The appellant's EEO complaints were also unsuccessful. *See* AF, Tab 1, Attachments. Next she challenged the non-selection in a civil action in U.S. District Court, raising the same veterans' preference and EEO discrimination claims. The district court judge dismissed all her claims on September 4, 2014. *See* AF, Tab 15 at 7-19.

Undaunted, the appellant filed a whistleblower complaint with the Office of Special Counsel (OSC),

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[1] The appellant maintains that she was "selected" by the selecting official, but the Civilian Personnel Advisory Center failed to perform the ministerial task of appointing her.

and her close-out letter was issued on October 26, 2017. *See* AF, Tab 1, Attachments. This appeal followed. The overwhelming bulk of the appellant's materials were devoted to showing that the agency made several grievous errors in failing to select/appoint the appellant, including failing to follow pass-over procedures, violating designated examining unit (deu) requirements, and failing to follow the rule of three. *See*, *e.g.*, AF, Tab 1, Tab 8, Tab 19, Tab 33, Tab 42. The actual whistleblower claim was difficult to discern. Ultimately, the case came to a focus on the appellant's interactions with the agency official leading the interview panel. The appellant ultimately alleged the following account in support of her IRA.

The appellant applied for the disputed position, and she was interviewed by a panel on October 26, 2010. The appellant alleges that Tony Denham (who led the panel) called the appellant to tell her she was the panel's selection and to make a tentative offer of the position. The appellant further alleges that she accepted the offer immediately. The appellant then asserts that the panel forwarded the appellant's name and her acceptance of the offer to the Civilian Personnel Advisory Center (CPAC)[2] on November 3, 2010. Having heard nothing for two weeks, the appellant testified that she contacted Denham again by phone and email on November 19, 2010. She further claims that Denham told her that CPAC was considering an individual from the Priority Placement Program (PPP) for

[2] This acronym has varied in some of the materials – sometimes appearing as CPOC or CPAS.

the position. The appellant asserts that she disclosed that any use of the PPP at this point in the hiring process would be illegal, and she further alleges that Denham forwarded her disclosure to CPAC. Because Denham stated he knew nothing about the details of the hiring regulations, the appellant sent him an email outlining her disclosure in greater detail. The appellant alleges that Denham provided this disclosure to CPAC as well.

Despite numerous attempts to contact CPAC by email, the appellant was unsuccessful in getting any further information about her selection. Unbeknownst to the appellant, a PPP candidate, John Woods (also a disabled veteran), received a tentative job offer (TJO) for the position on November 23, 2010, and he accepted the TJO on November 24, 2010. *See* AF, Tab 56 at 8-9. The agency followed up with a Final Job Offer (FJO) on December 8, 2010, which Woods accepted on December 9, 2010. *See* AF, Tab 48 at 26.

The appellant testified that she was never formally notified that she was not selected for the position and that another individual had been selected. However, in April 2011, she received notice that her name had been forwarded to another manager for an identical position. At this point, the appellant realized something was amiss and began her legal process.[3]

The parties submitted prehearing submissions, and I held a prehearing conference. *See* AF, Tab 47, Tab

[3] The appellant is no longer pursuing a claim about a subsequent hiring in 2011 (Stoucker).

48, Tab 49, Tab 56. I issued a prehearing conference summary to which the appellant objected, and I denied her objection.[4] *See* AF, Tab 52, Tab 53.[5] I held the appellant's requested hearing, and three witnesses testified: (1) Mr. Albert "Tony" Denham, Senior Management Analyst, and the chair of the panel that interviewed the appellant; (2) Ms. Lydia Carmen Langley, Supervisory Human Resources Specialist; and (3) Ms. Libby Demery, the appellant. *See* AF, Tab 57 (Hearing CD).

Legal Standards

Because this appeal was filed after the effective date (December 27, 2012) of the WPEA, I have considered the WPA as amended by the WPEA in addressing this appeal. The basic legal standard is essentially the same. *Cf. Mithen v. Department of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 13 n. 9 (2013).

The WPA prohibits an agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation; gross

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[4] Among other things, the appellant wished to add the agency's subsequent retaliation in connection with her VEOA, EEO, and U.S. District Court actions to this action. This appeared to be simply an attempt to re-litigate these cases. Moreover, the agency's actions in litigating these earlier proceedings do not appear to constitute "personnel actions," as defined in 5 U.S.C. § 2302.

[5] At this point, the appellant filed a motion for an interlocutory appeal, which I also denied. *See* AF, Tab 54, Tab 55.

mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Chambers v. Department of the Interior*, 602 F.3d 1370, 1375-76 (Fed. Cir. 2010) (citing 5 U.S.C. § 2302(b)(8)); *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 5 (2013); *see also Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 11 (2014) (the employee need not "label" the disclosure correctly). The disclosure must be specific and detailed, not just vague allegations of wrongdoing. *See Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 6 (2016).

To be entitled to a merits hearing in an IRA appeal, the appellant must set forth nonfrivolous jurisdictional allegations that she engaged in whistleblowing activity by making a protected disclosure (or taking another protected action) and that the disclosure was a contributing factor in the agency's decision to take an action against her. *See Kerrigan v. Department of Labor*, 833 F.3d 1349, 1354 (Fed. Cir. 2015); *see also Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371-1372 (Fed. Cir. 2001); *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 7 (2011). Moreover, in an IRA action, the appellant must also show that she exhausted her remedies with OSC to establish jurisdiction and be entitled to a hearing. *See Yunus*, 242 F.3d at 1371; *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 9 (2014); *Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 6 (2011); 5 C.F.R. § 1209.2 (b).

An appellant has only exhausted her administrative remedies with OSC after OSC has sent her a letter

stating that it was terminating its investigation into her allegations or 120 days have passed since the appellant first sought OSC action. *See Simnitt v. Department of Veterans Affairs*, 113 M.S.P.R. 313, ¶ 8 (2010). To fully satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of her charge of whistleblowing (or other protected activity), giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *See Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992); *see also McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶ 8 (2008) (the Board may consider only those charges that the appellant asserted before OSC, and it may not consider any subsequent recharacterization of those charges put forth by the appellant in his appeal to the Board); *see generally Miller v. Federal Deposit Insurance Corporation*, 122 M.S.P.B. 3, ¶ 6 (2014), *aff'd*, 626 F. App'x 261 (Fed. Cir. 2015) (an appellant may add some further detail to his claims before the Board, but he may not add new claims).

A very broad range of personnel actions fall within the Board's jurisdiction under the WPA, including a significant change in the appellant's duties. *See Herman*, 115 M.S.P.R. 386, ¶ 7; *see also Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 23 (2015) (the creation of a hostile work environment is a personnel action under the WPA); *Ingram v. Department of the Army*, 116 M.S.P.R. 525, ¶ 4 (2011) (the terms significant "change in duties" or "working conditions" should be construed

broadly); *see generally* 5 U.S.C. § 2302(a)(2)(A). The employee must also prove the disclosure was a contributing factor to the personnel action; a "contributing factor" means the disclosure affected the agency's decision to threaten, propose, take, or not take the personnel action regarding the appellant. *See Mudd*, 120 M.S.P.R. 365, ¶ 10.

An employee can show that her disclosure (or other protected action) was a contributing factor to the personnel action via the knowledge/timing test – by presenting evidence that the official taking the personnel action was aware of the disclosure, and the official took the action within a short enough period after the disclosure for a reasonable person to conclude that the disclosure was a contributing factor to the personnel action. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 19 (2008); *see also Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 21 (2013) (a disclosure made 1 to 2 years before an adverse action can suffice under the knowledge-timing test). But timing alone does not suffice – the knowledge component is required and can be determinative to the question of the Board's jurisdiction. *See Kerrigan*, 833 F.3d at 1354. An employee can also prove the disclosure was a contributing factor by showing an official had "constructive knowledge" of the disclosure – that another official with knowledge of the disclosure influenced the official who actually took the retaliatory action – the "cat's paw" theory. *See Bradley v. Department of Homeland Security*, 123 M.S.P.R. 547, ¶ 15 (2016); *Aquino*, 121 M.S.P.R. 35, ¶ 19

At a hearing, the appellant must prove her IRA claim by preponderant evidence. *See Scoggins*, 123 M.S.P.R. 532, ¶ 5. If the appellant proves that she made a disclosure and the disclosure was a contributing factor in an adverse personnel action, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the disclosure. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). Clear and convincing is a high evidentiary standard – the evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, including the evidence that detracts from the conclusion. *Id.* at 1368. Relevant factors under this legal test include: (1) The strength of the evidence in support of the agency's action; (2) the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and (3) any evidence the agency takes similar actions in similar circumstances against non-whistleblowers (the *Carr* factors). *Id.*; *Mithen*, 119 M.S.P.R. 215, ¶ 17. The agency does not have an affirmative burden to produce evidence as to each *Carr* factor, nor must each factor weigh in the agency's favor. *See Miller v. Department of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016).

As to the witnesses, I had the opportunity to observe each witness, and I carefully considered his/her

demeanor. *See Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 18 (2011).[6]

Analysis & Fact-Finding

The appellant ultimately fails to establish her prima facie case by a preponderance of the evidence. Her purported disclosure of November 2010 was far too vague to constitute a disclosure regarding a violation of law. The December 1, 2010 disclosure is more substantive, and it can be fairly read as a disclosure of a potential violation of law. However, the December disclosure came after the agency offered the position to Wood, so it could not have been a contributing factor to the agency's selection. Further, the evidence establishes that the December statement was never forwarded or discussed with the hiring authorities (CPAC). Thus, corrective action must be denied.[7]

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[6] To resolve any credibility issues, I utilized a *Hillen* analysis. An administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

[7] The appellant belatedly attempted to raise a perceived whistleblower claim, but she never exhausted this claim before OSC. *See* AF, Tab 26 at 31-55. Thus, I cannot consider this claim.

The Selection

The parties agree that the appellant interviewed for the position on October 26, 2010, and that Denham forwarded the appellant's name to CPAC as the panel's "selectee." Hearing CD; *see also* AF, Tab 26 at 18, Tab 27 at 5. The parties also agree that CPAC never contacted the appellant to extend a TJO/FJO or notify her whether she had been selected or not selected. Hearing CD. After that, the accounts diverge significantly.

The appellant testified that Denham called her on November 3, 2010, and he extended her a TJO, which she immediately accepted. Hearing CD. The appellant further testified that he told her to "stop looking for a position" and wait for the official notification from CPAC. *Id.* She further asserts that Denham forwarded the information about his selection and the appellant's acceptance to CPAC. *Id.* The appellant also testified that she could not have called Denham on November 3, 2010 because she did not have his telephone number. *Id.* Thus, the appellant's first contention is that she was "selected" for the position as of November 3, 2010 – she had been offered the position and accepted the offer. *Id.* She also points to J. Dixon's[8] RPA (Request for Personnel Action) tracking system entry for the vacancy on November 10, 2010: "selection (Libby Demery) OK to proceed to extend TJO. Will need DD-214

See Ward, 981 F.2d at 526. Even if the appellant had exhausted this claim, however, there was no evidence that the agency perceived the appellant as a whistleblower.

[8] Dixon is a human resources specialist.

and VA letter to verify eligibility prior to FJO." *See* AF, Tab 48 at 26.

Denham had some problems recalling events, given the significant amount of time that has passed,[9] but he testified effectively based upon his limited recollection, the documentation, his customary practices, and agency procedures. Hearing CD. Notably, he asserted that he did not call the appellant on November 3, 2010. *Id.* He emphasized that such a call would have been pointless because only CPAC could make a TJO or FJO – he simply presented the panel's preference to CPAC, but CPAC made the actual hiring decisions. *Id.* Thus, he could not "offer" the appellant anything. *Id.* He also stated that his making such a call would be a significant departure from his practices – both past and present. *Id.* If the appellant called him, he may have said she was the panel's choice, but he would have emphasized the decision was CPAC's, and he would never have told her to stop looking for other positions. *Id.*

Langley fully corroborated Denham's understanding of the hiring process – that CPAC was the entity empowered to make both TJOs and FJOs. Hearing CD. Denham and Langley also agreed that sometimes a panel's preference got a TJO/FJO from CPAC, and sometimes they did not. *Id.* Denham's account is also supported by his email to the appellant on November 19, 2010, which emphasized that "CPOC" did the hiring, as he only made a "recommendation." *See* AF, Tab

[9] The agency did not raise a laches defense.

26 at 61. The RPA tracking system entries also suggest this is the case. Indeed, the appellant herself pointed to Dixon's RPA tracking system entry suggesting that CPAC was free to make a TJO and FJO to the appellant. *See* AF, Tab 48 at 26; Hearing CD. Langley testified that, while Dixon had cleared the agency to make a TJO/FJO to the appellant, the agency never did so because they were required to fill the position with a PPP individual (Woods). Hearing CD; *see also* AF, Tab 47 at 13. Indeed, R. Plummer[10] made the following entry in the RPA tracking system on November 22, 2010: "TJO will not be extended to Demery, there is a well-qualified PPP match. Notified PPP team to extend TJO." *See* AF, Tab 48 at 26. Further, the copy of Denham's recommendation of the appellant to CPAC does not state that he made a TJO or that the appellant had accepted such an offer. *See* AF, Tab 25 at 5.

I find Denham and Langley's testimony, which was consistent and corroborated by documentation, more credible than the appellant's testimony. I note the appellant had limited credibility, as she contradicted herself in both her written submissions and her testimony. For example, the appellant's own submissions suggest that she was aware that Denham had no authority to make an offer of employment (TJO or FJO). She referred to managers like Denham as having the authority to make an "unofficial interim, tentative job offer," but the managers must also inform the selectee not to give notice to their present employer or make any

[10] Plummer is another human resources specialist.

other changes based on this "unofficial TJO." *See* AF, Tab 26 at 17. Anything as vague as an "unofficial, interim, tentative" offer, accompanied by a warning not to take any action in reliance on this purported offer, cannot create a reasonable belief that one has been actually selected/hired. As to the appellant's assertion that Denham called her because she did not have his phone number, this statement is demonstrably false. The appellant testified that she called Denham on the November 19, 2010 with the phone number he provided in scheduling the interview. Hearing CD. Indeed, Denham's email of October 21, 2010, provides all his contact information. *See* AF, Tab 26 at 60. Thus, the appellant had Denham's telephone number prior to November 3, 2010.

The appellant also testified inconsistently on the whole question of selection. At various times, she testified that the agency concealed her selection and that she did not know she had been selected. *Id.* This seems completely at odds with her thesis – that Denham selected her and she accepted his offer. The appellant's testimony also varied as to the significance of the agency's failure to provide follow-up. On this point, she testified that she had applied for many jobs, and when she heard nothing she presumed they selected someone else. Hearing CD. The appellant also testified that by late December 2010, she had assumed the agency selected someone else here. *Id.*

I conclude that the appellant's contentions that she was (formally) selected for the position and entitled to be appointed are baseless on this record. I find

that the appellant called Denham on November 3, 2010, that Denham never extended a TJO, and that she was never provided a TJO or FJO from CPAC for the position.[11]

The Disclosure

The appellant's first purported disclosure was presented to Denham on November 19, 2010, during a telephone call that followed up on an email. *See* Hearing CD; *see also* AF, Tab 26 at 61. While the appellant had alleged that she informed Denham that refusing to hire her at this point in the process would violate the law, her actual testimony was far more limited. The appellant testified that Denham had told her a PPP individual was being considered for the position by CPAC, and the appellant testified that she told Denham that "did not seem right" or that "didn't sound right." Hearing CD. The appellant further testified that this conversation led her to do extensive research, which resulted in her December 1, 2010 email to Denham. *Id.* The appellant further testified that she believed that Denham passed her disclosures on to CPAC. *Id.*

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[11] There is some bandying of semantics – the appellant was "selected" by the panel to be recommended to CPAC, but that selection had no official weight and effect. The appellant was not "selected" by CPAC for a TJO and FJO, and that is the "selection" of consequence. My finding on this issue also moots a good portion of the appellant's retaliation claims related to the subsequent litigation – notably that the agency kept fraudulently concealing her "selection."

The appellant's November 19, 2010 statements to Denham about the potential action "not seeming right" or "not sounding right" are far too vague to constitute a disclosure of a violation of law (or anything else). *See generally Lewis*, 123 M.S.P.R. 255, ¶ 12; *see, e.g.*, *El v. Department of Commerce*, 123 M.S.P.R. 76, ¶¶ 7-8 (2015) (assertions of delays in reimbursing travel claims only vaguely allege wrongdoing and do not constitute nonfrivolous allegations of a violation of a law, rule, or regulation); *Graves v. Department of Veterans Affairs*, 123 M.S.P.R. 434, ¶ 9 (2016) (conclusory allegations of "gross mismanagement" and a "gross waste of funds," without supporting details, are too vague to suffice); *Lewis*, 123 M.S.P.R. 255, ¶ 12 (allegation of "creating a hostile environment" is inadequate); *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶¶ 20-22, 24 (2005) (other examples of statements too vague to be disclosures include "abuse of authority," "incidents of harassment and discrimination," "managerial irregularities," "wrongdoing," and "doctoring of documents"). Further, the fact the appellant had to research the various regulations after this conversation strongly suggests that she would not have known of any potential violation of law on November 19, 2010.

The appellant's next disclosure is her December 1, 2010 email to Denham, which she sent (in part) because she asserted that Denham said he knew nothing about the hiring process. Hearing CD; *see also* AF, Tab 8 at 24-25, Tab 26 at 62- 63. The document generally describes the appellant's understanding of the

limitations of the PPP process as applied through the Automated Stopper and Referral System (ASAPRS) and the requirement to maintain an audit trail, and it generally asserts that she believed applying the PPP process to the hiring after her interview "cannot be justified." *See* AF, Tab 8 at 24-25. However, she appears to condition this conclusion by stating "only the audit trail report within HRO will indicate the action and dates." *Id.* at 25. She also suggested that her email may have been intended for purely informational purposes – "I hope this will shed some light on the process and perhaps empowers you and your peers to assist in the improvement of the system." *Id.* at 25. These qualifications make the message somewhat vague as to its purpose. However, construing the message generously, I find that it can be reasonably read as a disclosure of a potential violation of law.

But the disclosure has a more fundamental flaw – it was made after the agency offered the position to Woods and after Woods accepted it. As a matter of law and common sense, a protected disclosure cannot be a contributing factor to a personnel action if the personnel action is initiated before the disclosure is made. *See Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995); *see also Sherman v. Department of Homeland Security*, 122 M.S.P.R. 644, ¶ 8 (2015).

In addition, Denham testified that he did not construe the message as anything but the griping of an unsuccessful applicant – a familiar phenomenon that he had experienced (and ignored) many times. Hearing CD. He also took umbrage at the appellant's

suggestion that he knew nothing about PPP and hiring practices in general, and that he would seek guidance on these topics from an applicant. *Id.* He also testified that he never forwarded or discussed the appellant's email with CPAC or anyone else.[12] *Id.* Indeed, he testified that he had never forwarded an email questioning or complaining about the hiring process to CPAC – once his role in the process was over, he trusted CPAC to do what was required. *Id.* I note that Denham was somewhat chastened by this experience. He testified that, after being called to testify at this hearing, he might be more likely to forward a future message (like the appellant's) to his supervisor, just to be safe. *Id.* He emphasized, however, that did not happen this time. *Id.*

Langley's testimony fully corroborated Denham's. Langley testified that her office had never been forwarded a message claiming that a given hiring action may be illegal, and that, as supervisor, the employees in the unit would undoubtedly bring such a matter to her attention. Hearing CD. Thus, even if the appellant's disclosure had been timely (before Woods acceptance), her claim would fail because she could not establish her disclosure was a contributing factor to the agency action – there is no evidence anyone in CPAC (the deciding entity) had knowledge of the appellant's disclosure. *See Kerrigan*, 833 F.3d at 1354.

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[12] Indeed, the appellant asserts that Denham refused to even provide her with the name of a contact person at CPAC. Hearing CD.

In light of these findings, my analysis of the appellant's IRA appeal ceases here. I need not address whether the agency would have taken the same action by clear and convincing evidence, utilizing the *Carr* factors to assess the agency's underlying action.[13] I do note parenthetically that the agency's process was sloppy. At the outset, Langley's testimony suggests the external vacancy announcement should never have issued, given Woods "matched" the position on September 7, 2010. Hearing CD; *see also* AF, Tab 26 at 79-80; Tab 56, Exhibit 2. Langley testified that someone appears to have simply "missed" the match. *Id.* Obviously this entire situation could have been avoided, but for that mistake. In addition, the agency only stoked the fires by failing to respond (or responding erroneously) to the appellant's multiple email requests about the status of her application.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

Mark Syska
Administrative Judge

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[13] The appellant had spent the bulk of her efforts showing the agency's selection was in error and utterly unsupported by the regulations. As noted by the agency, the appellant appeared to be trying to use an IRA appeal to attack the 2010 selection on the merits – a role more appropriate for a hiring practices appeal or her VEOA and EEO actions. Hearing CD.

NOTICE TO APPELLANT

This initial decision will become final on **August 31, 2018**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30- day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by

references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum

limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how

you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the

applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully the two main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) **Judicial review in general**. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).[14]

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

[14] A provision of the Whistleblower Protection Enhancement Act (WPEA) of 2012 provided for judicial review of MSPB decisions in whistleblower reprisal cases in circuit courts of appeal other than the United States Court of Appeals for the Federal Circuit. That authority expired on December 27, 2017, which means that requests for judicial review of MSPB decisions in whistleblower reprisal cases filed after that date must now be filed with the Federal Circuit.

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) **Judicial or EEOC review of cases involving a claim of discrimination**. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ___, 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race,

color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

LIBBY A. DEMERY,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2019-2282

Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0105-W-1.

ON MOTION

Before CHEN, SCHALL, and HUGHES, *Circuit Judges.*

PER CURIAM.

ORDER

(Filed Jul. 16, 2020)

Before the court is Libby A. Demery's motion to "petition to recall of court decision and/or issue a stay [of] the mandate," which the court construes as a motion to recall the July 8, 2020 mandate and vacate the April 9, 2020 decision affirming the judgment of the

Merit Systems Protection Board. *Demery v. Dep't of Army*, 809 F. App'x 892 (Fed. Cir. 2020).

The law governing the recall of a mandate in these circumstances is well settled. Although we have inherent authority to recall our mandate, that power "can be exercised only in extraordinary circumstances," and only as a "last resort, to be held in reserve against grave unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (citation omitted). Under this standard, Ms. Demery has not shown that recall of the mandate is appropriate here.

Because this case is now over in this court, any future filing by Ms. Demery in this case will not be acted upon by the court.

Accordingly,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

July 16, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

LIBBY A. DEMERY,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2019-2282

Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0105-W-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Filed July 1, 2020

Before PROST, *Chief Judge*, NEWMAN, LOURIE, SCHALL*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges.*

PER CURIAM.

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* Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

ORDER

Petitioner Libby A. Demery filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on July 8, 2020.

FOR THE COURT

July 1, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court