APPENDICES

APPENDIX A

Not for Publication in West's Federal Reporter

United States Court of Appeals
For the First Circuit

No. 21-1498

LYNETT S. WILSON,

Plaintiff, Appellant,

v.

DENIS RICHARD MCDONOUGH, Secretary, U.S. Department of Veterans Affairs; U.S. DEPARTMENT OF VETERANS AFFAIRS,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, *U.S. District Judge*]

Before

Barron, *Chief Judge*,
Lynch and Thompson, *Circuit Judges*.

Andrew T. Tutt, with whom *Mike Mosher*, *R. Stanton Jones*, and *Arnold & Porter Kaye Scholer LLP* were on brief, for appellant.

John G. Osborn, Assistant United States Attorney, with whom *Darcie N. McElwee*, United States Attorney, was on brief, for appellee.

June 14, 2022

THOMPSON, *Circuit Judge*. This federal-sector employment dispute has ping-ponged between the Federal Circuit and the District of Maine. Ultimately though, a federal judge in the District of Maine granted Defendants' motion to dismiss Plaintiff's case under Civil Rule 12(b)(1) (lack of jurisdiction) and Civil Rule 12(b)(6) (failure to state a claim). *See Wilson v. Dep't of Veterans Affs.*, No. 20-cv-00019, 2021 WL 1840753, at *1 (D. Me. May 7, 2021). Writing just for the parties, we assume their fluency with the facts, the procedural history, and the arguments offered and so mention only what is needed to justify why we — after applying *de novo* review, *see Chiang v. Skeirik*, 582 F.3d 238, 241 (1st Cir. 2009) — affirm the judge's order. *See generally Keach v. Wheeling & Lake Erie Ry.* (*In re Montreal, Me. & Atl. Ry.*), 888 F.3d 1, 8 n.4 (1st Cir. 2018) (explaining that when reviewing a motion-to-dismiss grant, "we are not wed to the lower court's reasoning but may affirm on any ground supported by the record").

A federal employee like Plaintiff can contest certain "serious personnel actions" (terminations or suspensions from service, for instance) via an appeal to the Merit Systems Protection Board ("MSPB"), an administrative agency in the executive branch that decides disputes

between other federal agencies and their employees. *See Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1979 (2017). She can simply claim "the agency had insufficient cause for taking the action under the CSRA," short for the Civil Service Reform Act. *See Kloeckner v. Solis*, 568 U.S. 41, 44 (2012). And she can "also or instead charge the agency with discrimination prohibited by another federal statute," a kind of charge called a "mixed case." *Id.*

Plaintiff's appellate lawyers say hers "is a 'mixed case'" (different attorneys represent her here and so are not responsible for what happened earlier). Generally speaking (and as relevant to our analysis), if the MSPB decides a mixed case, a dissatisfied employee can appeal to the Federal Circuit — but only if she drops her discrimination claim (limiting her appeal to CSRA claims) and files her appeal "within 60 days after the [MSPB] issues notice of the final order or decision of the [MSPB]." *See* 5 U.S.C. § 7703(b)(1)(A)-(B). Also generally speaking (and as likewise pertinent to our opinion), the employee can instead choose to pursue her mixed case in the appropriate district court if she files her complaint "within 30 days" after "receiv[ing] notice of the" MSPB's final order or decision. *See id.* § 7703(b)(2).

The parties spar about whether the District Court in Maine had statutory jurisdiction over the case — a battle centered around complex issues, like whether Plaintiff is judicially estopped from raising a discrimination claim because (as Defendants see it) she previously got the judge to transfer the case to the Federal Circuit by waiving her discrimination claim; and whether, even if she waived her "freestanding discrimination claim," the District of Maine still had jurisdiction because (according to Plaintiff's view of the Federal Circuit's take on Supreme Court precedent) her CSRA claims "involve *allegations* of discrimination that *would* violate the

discrimination laws." Happily for us, we need not resolve these difficult questions. This is because caselaw allows us to assume statutory jurisdiction — as distinct from constitutional jurisdiction — to follow an easier path to decision. *See, e.g.*, *Díaz-Báez v. Alicea-Vasallo*, 22 F.4th 11, 17 n.3 (1st Cir. 2021). And here that path involves the untimeliness of Plaintiff's complaint. *See generally United States v. Cruz-Ramos*, 987 F.3d 27, 39 (1st Cir. 2021) (explaining that often "the simplest" way to decide a case is "the best" way).

Plaintiff (through her original lawyer) opted to participate in "E-filing" with the MSPB, meaning she "consent[ed] to accept service of all pleadings filed by other registered E-Filers and all documents issued by the [MSPB] in electronic form."[1] The MSPB issued its initial decision in her case on May 16, 2019. And a paralegal specialist with the MSPB certified that this "[d]ocument[] was . . . sent" via "[e]lectronic [m]ail" to Plaintiff's lawyer.

The decision said it would "become final on ***June 20, 2019***, unless" Plaintiff or Defendants filed "a petition for review" with the MSPB "by that date." The decision also explained the "general rule" that "an appellant seeking judicial review of a final [MSPB] order must file a petition

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[1] Like district judges, we may — at the motion to dismiss stage and without turning the motion into one for summary judgment — consider "documents the authenticity of which are not disputed by the parties; . . . official public records; . . . documents central to the plaintiff's claim; [and] . . . documents sufficiently referred to in the complaint." *See Newman v. Lehman Bros. Holdings Inc.*, 901 F.3d 19, 25 (1st Cir. 2018) (quoting *Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013)); *see also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55-56 (1st Cir. 2012) (adding that we can also consider "'concessions' in plaintiff's 'response to the motion to dismiss'" (quoting *Arturet-Vélez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 13 n.2 (1st Cir. 2005))).

for review with the U.S. Court of Appeals for the Federal Circuit . . . within **60 calendar days** of *the date this decision becomes final*" — unless her case involves a discrimination claim, in which case she must file a civil suit in "the 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*."

Plaintiff admits the decision became final on June 20, 2019, a date taken straight from her complaint. So she had until July 19, 2019 — 30 days from June 20, 2019 — to file her "mixed case" suit. But she waited 59 days before filing her petition with the Federal Circuit, on August 19, 2019. The bottom line is that she is time-barred from litigating in the district court.

And Plaintiff's arguments to the contrary do not alter this conclusion. We say that because when it comes to her key contentions — for example, her suggestions that the Federal Circuit's sending the case to the District of Maine constituted a legal ruling "that the District of Maine had jurisdiction," entitled to law-of-the-case effect; that "the complaint and record" do not "conclusively establish untimeliness"; that "apparently [she] never received notice through the MSPB's e-filing system that the decision had in fact become final"; and that the record if anything reveals that she is entitled to "equitable tolling" — she waived them by not raising them before the district judge. *See, e.g.*, *Newman*, 901 F.3d at 27; *Cao v. Puerto Rico*, 525 F.3d 112, 115-16 (1st Cir. 2008); *Barrett ex rel.*

Estate of Barrett v. United States, 462 F.3d 28, 40 n.9 (1st Cir. 2006).[2]

***Affirmed*, with the parties to bear their own costs.**

[2] In her memo opposing Defendants' dismissal motion, Plaintiff made passing reference to res judicata, collateral estoppel, and claim preclusion — not only did she not explain or apply the elements of these doctrines, but she never explained whether or how these doctrines relate to law of the case. And passing references like hers are not enough to present and preserve an issue for review. *See, e.g.*, *Iverson v. City of Bos.*, 452 F.3d 94, 102 (1st Cir. 2006); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991). Also, to the extent she implies that we cannot deem an equitable-tolling argument waived in situations like hers, she is wrong. *See, e.g.*, *Chalifoux v. Chalifoux*, 701 F. App'x 17, 22-23 (1st Cir. 2017) (per curiam); *Cao*, 525 F.3d at 115-16; *Barrett*, 462 F.3d at 40 n.9.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LYNETT S. WILSON, Plaintiff, v. DEPARTMENT OF VETERANS AFFAIRS, Defendant.	)	Docket No. 2:20-cv-00019-NT

ORDER ON DEFENDANT'S MOTION TO DISMISS

Before me is the Defendant's motion to dismiss the Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("**Def.'s Mot.**") (ECF No. 33). For the reasons stated below, the motion to dismiss is **GRANTED**.

BACKGROUND

In September 2017, Plaintiff Lynett Wilson was suspended from her position at the Medical Center in Augusta, Maine, run by the U.S. Department of Veterans Affairs. Compl. ¶ 1 (ECF No. 29). Ms. Wilson appealed this suspension to the Merit Systems Protection Board ("MSPB"), which denied her claim. Compl. ¶ 3. And on August 19, 2019, Ms. Wilson appealed this MSPB decision to the U.S. Court of Appeals for the Federal Circuit. Notice of Docketing (ECF No. 1-2).

The Defendant moved to dismiss or transfer the case from the Federal Circuit to this Court, arguing that because Ms. Wilson alleged, in part, a discrimination

claim, her appeal contained "mixed claims" that were properly appealed to a district court rather than the Federal Circuit. Mot. to Dismiss or Transfer for Lack of Jurisdiction 1, 5–7 (ECF No. 1-20). Ms. Wilson opposed the motion, insisting that she had "waive[d] her discrimination claim to the extent required for this Court to exercise jurisdiction and [that] transfer or dismissal [was] inappropriate." Pet'r's Obj. to Resp't's Mot. to Dismiss or Transfer 3 (ECF No. 1-21). The Federal Circuit acknowledged Ms. Wilson's contention that "she only [sought] review of the Board's dismissal for lack of jurisdiction" but found that doing so "would require the court to consider the merits of her discrimination claim, which [was] beyond [its] jurisdiction." *Wilson v. Dep't of Veterans Affs.*, No. 19-2283, slip op. at 2 (Fed. Cir. Jan. 17, 2020). The Federal Circuit thus ordered that the case be transferred to this Court. *Id.*

After some proceedings in this Court that are not germane to this Order, Ms. Wilson filed an unopposed motion to send her case back to the Federal Circuit. Appellant's Unopposed Mot. to Remand to U.S. Court of Appeals for the Federal Circuit (ECF No. 21). I granted this motion, finding that Ms. Wilson had "clearly indicated that [s]he is bringing no claim of discrimination to this court" and that I therefore lacked jurisdiction. Order (ECF No. 22).

Once again before the Federal Circuit, Ms. Wilson informed the court that she believed that her case was "erroneously transferred to the District of Maine to dampen her desire to proceed with this case." Pet'r's Statement of How She Believes this Case Should Proceed, No. 19-2283, at 3 (Fed. Cir. ECF No. 22-1). In light of this filing, the Federal Circuit concluded:

> While a petitioner in a mixed case can ordinarily decide to abandon a discrimination claim to seek review of only the personnel action in this court, here that would leave nothing for this court to review: she would lack any allegation capable of supporting her claim that her absence from work was the result of improper acts by the agency.

Wilson v. Dep't of Veterans Affs., No. 19-2283, slip op. at 2–3 (Fed. Cir. Sept. 25, 2020). The court thus concluded that because the Plaintiff, "who ha[d] been represented by counsel through the entirety of the proceedings, effectively pled herself out of" the district court, the interests of justice warranted outright dismissal rather than transferring the case back to this Court, "given her continued refusal to proceed with the claim in that proper forum." *Id.*

The Plaintiff next sought to have the Federal Circuit vacate its prior order. She acknowledged that she had sought to abandon her discrimination claims, claiming that she thought that if she had done so, then the Federal Circuit would have jurisdiction over her case. Unopposd [sic] Mot. to Vacate, Modify or Otherwise Change the Order Dismissing the Appeal and for Other Relief ("Pl.'s Mot."), No. 19-2283, at 2–3 (Fed. Cir. ECF No. 28). However, the Plaintiff acknowledged that she was incorrect and contended that the interests of justice warranted that the case be transferred back to this Court. Pl.'s Mot. 3–6. The Federal Circuit obliged, vacating its prior order and transferring the case back to this Court. *Wilson v. Dep't of Veterans Affs.*, No. 19-2283, slip op. at 2 (Fed. Cir. Nov. 17, 2020).

With the case now returned to this Court (and with the parties now agreeing that it should stay here), on December 18, 2020, the Plaintiff filed a four-count

Complaint and Administrative Appeal (the "Complaint"), asserting disability discrimination and retaliation claims (Counts One and Two), a whistleblower claim (Count Three), and a claim of procedural error (Count IV). Compl. & Admin. Appeal (ECF No. 29). On February 23, 2021, the Defendant moved to dismiss the Complaint. Def.'s Mot. (ECF No. 33).

ANALYSIS

The Defendant argues that the entire Complaint should be dismissed for two primary reasons: (1) the Court lacks subject matter jurisdiction to decide this case because the Plaintiff waived her discrimination claim (which was the only basis for this Court's jurisdiction), and (2) the Complaint is untimely and equitable tolling is not warranted.[1] Def.'s Mot. 9–15. The Plaintiff only cursorily addresses the argument that she waived her discrimination claim, and she offers no response to the timeliness argument. Pl.'s Obj. & Resp. to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") (ECF No. 37).

As to subject matter jurisdiction, the Defendant argues that this Court lacks subject matter jurisdiction because the Plaintiff "has clearly and repeatedly waived her discrimination claim, both before this Court and in the Federal Circuit." Def.'s Mot. 9. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, [she] may not thereafter, simply because [her] interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken

[1] The Defendant also argues that Count II of the Complaint was not properly exhausted and that Counts II through IV of the Complaint fail to state a claim. Def.'s Mot. to Dismiss 15–20 (ECF No. 33). Because I rely on timeliness and lack of subject matter jurisdiction, I need not address any of the Defendant's remaining arguments.

by [her]." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This includes holding a party to a prior argument that a court lacked jurisdiction to hear her case. *See Valentine-Johnson v. Roche*, 386 F.3d 800, 811–12 (6th Cir. 2004) (finding that the Air Force was judicially estopped from arguing in district court that the plaintiff's case should be heard before the MSPB after previously arguing before the MSPB that her case should be heard in district court).

The Plaintiff responds to the Defendant's jurisdictional argument with a single, confusing sentence: "The Defendant erroneously argues Plaintiff 'pled she [sic] out of court by abandoning her discrimination claims' jurisdiction [sic] as in her Federal Circuit Motion to Remand (MTR) back to the jurisdiction of [sic] District of Maine." Pl.'s Opp'n 5 (footnote omitted). The Plaintiff never explains why the Defendant's argument is erroneous or even whether her disagreement is a factual or a legal one. Stating one's strong disagreement with an argument is insufficient to preserve an argument for resolution. *See González-Bermúdez v. Abbott Lab'ys P.R. Inc.*, 990 F.3d 37, 46–47 (1st Cir. 2021).

As to timeliness, the Defendant points out that the Plaintiff was required to file any appeal of the MSPB decision that involved claims of discrimination in this Court by July 20, 2019, but she did not file her Complaint until December 18, 2020. Def.'s Mot. 10–12. The Defendant also argues that no equitable tolling exception applies, Def.'s Mot. 10–15 ("Notwithstanding any other provision of law, any such case (of discrimination) filed under any such section must be filed within 30 days after the date the individuals filing the case received notice of the judicially reviewable action under such section 7702."

(quoting 5 U.S.C. § 7703(b)(2))). The Plaintiff makes no response to this argument.

When arguing its position, a party must fully develop the argument on which it relies. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *Id.*; *accord Furniture, Mattresses & More LLC v. Tex. Rustic, Inc.*, No. 1:19-CV-00154-NT, 2019 WL 4674307, at *9 (D. Me. Sept. 25, 2019). "Judges are not expected to be mindreaders," so "a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." *Zannino*, 895 F.2d at 17 (quoting *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988)). Accordingly, I conclude that the Plaintiff has waived her right to respond to either of these two arguments and concedes the Defendant's points.

The Plaintiff spends the bulk of her opposition arguing that the Defendant's arguments are precluded by res judicata, claim preclusion, and collateral estoppel because the Defendant previously filed a motion to dismiss before the Federal Circuit that did not raise all of the arguments that the Defendant now makes. Pl's Opp'n 2–3, 5–7. This argument, too, is entirely undeveloped. The Plaintiff cites only one case in support of her definition of res judicata, Pl.'s Opp'n 2 n.6, but she makes no effort to explain how the Defendant's failure to assert its timeliness argument before the Federal Circuit (where her suit was timely) would bar the Defendant from asserting its timeliness argument in her suit in this Court (where her suit is untimely). This argument is also waived as undeveloped.

Finally, the Plaintiff's failure to comply with Local Rule 7(b) also supports granting the Defendant's motion. A party opposing a motion is required to file a written objection within twenty-one days after the filing of the motion. D. Me. Loc. R. 7(b). If an opposing party fails to raise an objection by that deadline, that party "shall be deemed to have waived objection" to the motion. D. Me. Loc. R. 7(b). Local Rule 7(b) also requires any objection to a motion to "include citations and supporting authorities and affidavits and other documents setting forth or evidencing facts on which the objection is based." D. Me. Loc. R. 7(b). The Plaintiff's response to the Defendant's motion was due, pursuant to Local Rule 7(b), no later than March 16, 2021. That deadline was noted on the docket. See ECF No. 33. The Plaintiff filed her response to the Defendant's motion thirty days after this deadline passed (fifty-one days after the Defendant's motion was filed). Because the Plaintiff failed to raise her objections, as required by local rule, she is "deemed to have waived" any objection at all. The Plaintiff's failure to comply with Local Rule 7(b) separately justifies granting the Defendant's motion. *See Pomerleau v. W. Springfield Pub. Sch.*, 362 F.3d 143, 145 (1st Cir. 2004) ("[I]t is within the district court's discretion to dismiss an action based on a party's unexcused failure to respond to a dispositive motion when such response is required by local rule, at least when the result does not clearly offend equity." (quoting *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7 (1st Cir. 2002))).

CONCLUSION

For the reasons stated above, the Court **GRANTS** the Defendant's motion to dismiss and **DISMISSES** the Complaint for lack of jurisdiction.

SO ORDERED.

/s/ Nancy Torreson
United States District Judge

Dated this 7th day of May, 2021.

APPENDIX C

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

LYNETT S. WILSON,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2019-2283

Petition for review of the Merit Systems Protection Board in No. PH-0752-17-0329-I-2.

ON MOTION

Before MOORE, O'MALLEY, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

O R D E R

On September 25, 2020, this court dismissed Lynett Wilson's petition for review after concluding that she effectively pled herself out of court by abandoning her

discrimination claims because, in doing so, she lacked any allegation capable of supporting her claim that her absence from work was the result of improper acts by the agency. Ms. Wilson now files a "motion to vacate, modify or otherwise change" that order, seeking to rescind her prior position and to transfer this case back to the United States District Court for the District of Maine for adjudication of her mixed case. Ms. Wilson indicates that the Department of Veterans Affairs does not oppose the motion.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion is granted. The court's September 25, 2020 order is vacated. Pursuant to 28 U.S.C. § 1631, this matter and all filings are transferred to the United States District Court for the District of Maine.

(2) Any other pending motions are denied as moot.

FOR THE COURT

November 17, 2020
Date

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

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

LYNETT S. WILSON,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2019-2283

Petition for review of the Merit Systems Protection Board in No. PH-0752-17-0329-I-2.

Before MOORE, O'MALLEY, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

O R D E R

This petition for review is before this court again after being retransferred from the United States District Court for the District of Maine. Having considered the parties' responses, we believe dismissal is warranted.

Lynett S. Wilson, represented by counsel, appealed to the Merit Systems Protection Board, alleging that she

had been constructively suspended from her position with the Department of Veterans Affairs when the agency failed to accommodate her disability, forcing her into unpaid status. The Board dismissed for lack of jurisdiction, finding Ms. Wilson had failed to show, by preponderant evidence, that the agency deprived her from continuing to work by wrongfully refusing a reasonable accommodation.

Ms. Wilson petitioned this court for review. Over her objection, we granted the agency's motion to transfer this case to the United States District Court for the District of Maine, explaining that "disposition of the jurisdictional question in this case would require the court to consider the merits of her discrimination claim, which is beyond our jurisdiction." ECF No. 16 at 2. After the case was docketed in the district court, Ms. Wilson moved to transfer the case back to this court, insisting that she was not raising discrimination claims. The district court obliged, finding that it lacked jurisdiction because Ms. Wilson indicated that she "is bringing no claim of discrimination." *Wilson v. Dep't of Veterans Affs.*, No. 2:20-cv-00019-NT (D. Me. June 8, 2020), ECF No. 22.

Ms. Wilson urges the court to set a briefing schedule. But, as we have already found, we lack jurisdiction over a constructive suspension claim when the alleged wrongful agency action is a violation of federal antidiscrimination laws. *See Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1987 (2017) (holding that the district court is the proper forum for judicial review of such "mixed" cases). Indeed, Ms. Wilson continues to classify this matter as a "mixed case," despite telling the district court that she was not pursuing a discrimination claim. ECF No. 22 at 2–3. Though she now suggests that her discharge was in retaliation for protected activity, she does not explain

what her disclosure might have been apart from her internal claim of disability discrimination.

While a petitioner in a mixed case can ordinarily decide to abandon a discrimination claim to seek review of only the personnel action in this court, here that would leave nothing for this court to review: she would lack any allegation capable of supporting her claim that her absence from work was the result of improper acts by the agency. *See Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1329 (Fed. Cir. 2006) (citation omitted) (reciting the elements necessary to establish involuntary coercion).

For its part, the agency argues that we should transfer this case back to the district court for adjudication. But we see no reason to grant this request either. Ms. Wilson, who has been represented by counsel through the entirety of the proceedings, effectively pled herself out of that court as well, and it would not be in the interest of justice to transfer this case back to the district court under 28 U.S.C. § 1631, given her continued refusal to proceed with the claim in that proper forum. We therefore deem it appropriate to dismiss this petition for review.

Accordingly,

IT IS ORDERED THAT:

(1) Ms. Wilson's response, ECF No. 22, is accepted for filing.

(2) The petition is dismissed.

(3) Each party shall bear its own costs.

FOR THE COURT

September 25, 2020	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

APPENDIX E

WILSON v. DEPARTMENT OF VETERANS AFFAIRS (closed 05/07/2021)

Maine District Court

Case no. 2:20-cv-00019-NT (D. Me.)
Filed date: June 08, 2020
Docket entry no.: 22

Docket text:

ORDER - terminating 10 Order to Show Cause; No Action Necessary on 15 Motion to Remand to U.S. Court of Appeals for the Federal Circuit ; granting 21 Unopposed Motion to Remand to U.S. Court of Appeals for the Federal Circuit. The Plaintiff has clearly indicated that he is bringing no claim of discrimination to this court and, therefore, I lack jurisdiction of this case. Without objection of the Department of Veterans Affairs, I hereby retransfer this case to the Federal Circuit. By JUDGE NANCY TORRESEN. (mnd) (Entered: 06/08/2020)

APPENDIX F

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

LYNETT S. WILSON,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2019-2283

Petition for review of the Merit Systems Protection Board in No. PH-0752-17-0329-I-2.

ON MOTION

Before MOORE, O'MALLEY, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

O R D E R

The Department of Veterans Affairs (DVA) moves to dismiss or transfer this case to federal district court. Lynett S. Wilson opposes.

Ms. Wilson filed an appeal at the Merit Systems Protection Board alleging, among other things, that the DVA discriminated against her when she was constructively suspended from work due to the DVA's failure to accommodate her disability. After the Board dismissed her appeal for lack of jurisdiction, Ms. Wilson petitioned this court for review.

Although this court reviews certain decisions of the Board, *see* 5 U.S.C. § 7703(b)(1)(A), this court's jurisdiction does not extend to cases in which the petitioner pursues a disability discrimination claim, *see* 5 U.S.C. § 7703(b)(2); *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1985 (2017). While Ms. Wilson claims that she only seeks review of the Board's dismissal for lack of jurisdiction, as the DVA notes, disposition of the jurisdictional question in this case would require the court to consider the merits of her discrimination claim, which is beyond our jurisdiction. Instead, review of such cases must be sought in federal district court. *See Perry*, 137 S. Ct. at 1985. This court may transfer cases to another court in which they could have been brought. Here, that court would be the United States District Court for the District of Maine.

Accordingly,

IT IS ORDERED THAT:

(1) The stay of the briefing schedule is lifted.

(2) The motion is granted to the extent that the petition and all filings are transferred to the United States District Court for the District of Maine pursuant to 28 U.S.C. § 1631.

FOR THE COURT

January 17, 2020	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

s29

ISSUED AS A MANDATE: January 17, 2020

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

LYNETT S. WILSON, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER PH-0752-17-0329-I-2 DATE: May 16, 2019

Robert Fred Stone, Esquire, South Deerfield, MA, Massachusetts, for the appellant.

Joshua R. Carver, Augusta, Maine, for the agency.

BEFORE
Craig A. Berg
Administrative Judge

INITIAL DECISION

INTRODUCTION

On June 28, 2017, the appellant filed a petition for appeal alleging that the agency had constructively suspended her from her position of Radiologic Technologist, GS-10, Togus VA Medical Center, Augusta, Maine, when it failed to accommodate her disability,

forcing her to into unpaid status from September 28, 2016 to June 12, 2017. Initial Appeal File (IAF), Tab 1. I found that the appellant made a nonfrivolous allegation that she had been constructively suspended for more than 14 days, and a hearing was therefore held on November 27, 2018. *Id.*, Tab 11; Hearing Transcript (HT).

For the reasons discussed below, this appeal is DISMISSED for lack of Board jurisdiction.

ANALYSIS AND FINDINGS

Burden of Proof and Applicable Law

The agency did not officially suspend the appellant from duty, in writing, in accordance with applicable law, and argues that it did not take an action that is appealable to the Board. The appellant contends that she was constructively suspended, because the agency's failure to accommodate her known disability caused her to be in unpaid status for an extended period.

The Board lacks jurisdiction over appeals of employees' voluntary actions. *O'Clery v. U.S. Postal Service,* 67 M.S.P.R. 300, 302 (1995), *aff'd,* 95 F.3d 1166 (Fed. Cir. 1996) (Table); 5 C.F.R. § 752.401(b)(9). However, employee-initiated actions that appear voluntary on their face are not always so. *Spiegel v. Department of the Army,* 2 M.S.P.R. 140, 141 (1980). The Board may have jurisdiction over such actions under 5 U.S.C. chapter 75 as "constructive" adverse actions, and involuntary leaves of absence may be appealable to the Board under chapter 75 as constructive suspensions if they exceed 14 days. *Bean v. U.S. Postal Service*, 120 M.S.P.R. 397, ¶¶ 7-8 (2013).

Although various fact patterns may give rise to an appealable constructive suspension, all constructive suspensions have two things in common: (1) the employee

lacked a meaningful choice in the matter; and (2) it was the agency's wrongful actions that deprived him of that choice. Assuming that the jurisdictional requirements of 5 U.S.C. chapter 75 are otherwise met, proof of these two things by preponderant evidence is sufficient to establish Board jurisdiction.[1] *Bean*, 120 M.S.P.R. 397, ¶ 8; 5 C.F.R. § 1201.56(a)(2)(i).

An agency must provide reasonable accommodation to the known limitations of a qualified individual with a disability unless to do so would create an undue hardship. 42 U.S.C. §§ 12112(a), (b)(5)(A); *Paris v. Department of the Treasury,* 104 M.S.P.R. 331, ¶ 11 (2006); 29 C.F.R. § 1630.9.

Pursuant to the Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. § 12101, *et. seq* (2008) (ADAAA), the appellant may prove that he has a disability by showing that he (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(1), 29 C.F.R. § 1630.2(g)(1),(2),(3). The definition of disability is construed in favor of broad coverage. 42 U.S.C. § 12102(4)(A).

A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2(h). The test for whether a disability substantially

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[1] A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The agency does not dispute that the appellant is an "employee" with adverse action appeal rights under 5 U.S.C. § 7511(a)(1)(A).

limits the ability of an individual to perform a major life activity is applied as compared to most people in the general population. 29 C.F.R. § 1630.2(j). Major life activities include but are not limited to activities such as caring for oneself, performing manual tasks, eating, lifting, bending, concentrating, communicating, and working, including the operation of a major bodily function. 42 U.S.C. § 12102(2).

An impairment that substantially limits one major life activity need not limit others. One that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. 42 U.S.C. § 12102(4).

In the second method of proving a disability, an individual "has a record of" a disability if he has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. This may include individuals who were treated for a disease but no longer have it as well as individuals who were misdiagnosed with a substantially limiting impairment even though they did not actually have that impairment. S. Rep. No. 116, 101st Cong., 2d Sess. 23. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. *Id.* Whether an individual has such a record is to be broadly construed. If the individual has such a record, the agency need not have relied on that record for the individual to be covered under this test.

With regard to the third method of proving disability, an individual meets the requirement of being "regarded

as having such an impairment" if he establishes that he has been subjected to a prohibited action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. However, the "regarded as" test shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less. 42 U.S.C. § 12102(3).

A qualified individual with a disability is a person with the skills, training and experience to perform the essential functions of a position, with or without reasonable accommodation. 42 U.S.C. § 12111(8); *Paris,* 104 M.S.P.R. 331, ¶ 11; 29 C.F.R. § 1630.2(m). Reasonable accommodation may entail modifications to the individual's current position or reassignment to a vacant position. 42 U.S.C. § 12111(9); *Aka v. Washington Hospital Center,* 156 F.3d 1284, 1301–05 (D.C.Cir.1998) (en banc); 29 C.F.R. § 1630.2(*o*).

Evidence

The appellant performed the duties of her position in Building 200, Room 146 on the Togus campus. She testified that she was born with asthma but the symptoms of the condition had abated for over 30 years until July 12, 2016. HT at 10. On that day, she began wheezing and was unable to breathe, got hives on her skin, and her mouth was tingling, so she left work and went to the emergency room. She was given breathing treatment and referred to an allergy specialist. *Id.* at 10-11.

On September 12, 2016, the specialist returned the appellant to duty, and she was again assigned to work in Building 200, Room 146, the office where her regular assigned duties were located. HT at 17, 27. She described the room as an old file room without ventilation, with

nearby construction, auto exhaust, and a chemical spill at various times. *Id.* at 27-28. She again suffered the breathing-related symptoms, and was out of work until her physician indicated on a September 19, 2016 Duty Status Report, filled out in support of her Office of Workers' Compensation Programs (OWCP) claim for asthma, that she could return to duty on September 26, 2016, but not in Building 200. *Id.* at 17-18; IAF, Tab 22 (Agency File or AF) at 65.

The appellant returned to duty on September 26, 2016, and was assigned to work in Building 206. HT at 18-19. On September 28, John Gardner, then an Employee Labor Relations (ELR) Specialist in Human Resources (HR), called her to his office and presented her with a letter stating that her OWCP claim had been denied. *Id.* at 19-20. According to the appellant, the letter gave her several options, including returning to Building 200 and taking leave. *Id.* at 20. The record contains a September 27, 2016 letter from Human Resources Officer Jonathan Meserve, which appears to be the letter to which the appellant was referring. AF at 36; HT at 53. The appellant testified that she received this letter on September 28, 2016, and it informed her that, because her OWCP claim was denied, she was to contact her supervisor to coordinate her return to duties in the Radiology Service. It offered her the option to return to full duty status, use sick leave, or request reasonable accommodation. *Id.*

The appellant testified that she returned home after meeting with Gardner, and she then telephoned him to discuss the situation. HT at 20. Gardner responded by emailing her documents to request leave under the Family and Medical Leave Act of 1993 (FMLA) and/or reasonable accommodation. AF at 34. His email provided some additional information regarding reasonable accommodation, including the fact that execution of the

attached VA Form 0857A, Written Confirmation of Request for Accommodation ("RA form") was voluntary, but provides him assistance with the accommodation process. *Id.* at 33-35. The appellant filled out the RA form and returned it to Gardner on September 30, 2016, asking that he pass it on to Dusty Cochran, another ELR Specialist who was the local reasonable accommodation coordinator. HT at 20, 139; AF at 32-33.

The appellant testified that she had no income for the next nine months, as the agency would continual deny her request for an accommodation. HT at 21-22. She spoke with Gardner, Cochran, and Meserve, including in-person visits to HR, and they never told her verbally that they had not received the paperwork, only in letters. HT at 22. She could not return to Building 200 because of her asthma, which was potentially life threatening. *Id.* at 38-39.

The appellant testified that her physician submitted CA-17 forms to the agency during that period, though other than the September 19, 2016 form, the appellant did not file any of those Duty Status forms as exhibits in this appeal. HT at 44-45. She further testified that her provider responded to a list of questions from Rick Butler, of HR, and sent the answers to Butler. *Id.* at 45. Again, the record is bereft of the questions or responses. The appellant stated that she believed all communications with HR regarding her health condition pertained to her accommodation request, as well as the OWCP claim. *Id.* at 46-47.

Returning to the chronology of the period the appellant was off duty, she agreed that, on October 21, 2016, Meserve sent her a letter telling her she was being marked AWOL, and he asked for medical documentation in support of her accommodation request, to be received

within 15 days. HT at 49-50; AF at 25. On November 2, 2016, she confirmed to Gardner that she had received the letter that day, and on November 8 she emailed Gardner and asked what documentation the agency required regarding the reasonable accommodation request. HT at 55-56; AF at 24-25. In the email, the appellant stated that she believed her specialist had submitted the documentation that she could not return to building 200 in September, and the documentation was used to place her in building 206 on September 26. HT at 56; AF at 24-25. The following day, November 9, Gardner responded, explaining that she had not submitted a reasonable accommodation request based on air quality, but rather an OWCP claim that had been denied. He contended that she was placed in building 206 in order to find her meaningful work while the OWCP claim was being processed. HT at 57-58; AF at 64.

Later on the same date, November 9, the appellant emailed Gardner and stated that, according to her doctor's office, medical documentation had been faxed to HR on October 20, 2016. HT at 59-60; AF at 64. On November 10, 2016, Cochran emailed the appellant and asked her to have her doctor fill out a Request for Medical Documentation form that he attached, and he requested she return it as soon as possible. HT at 63; AF at 24, 27. The appellant admitted that she was unsure if her provider ever returned that form. HT at 65.

Meserve, the HR Officer at the time, testified that the Workers Compensation group reported to the network office, and were not part of Togus VA. HT at 80-81. Rick Butler did not have an office in HR at Togus. Meserve stated that he was aware in the fall 2016 that the appellant's OWCP claim had been denied, and he explained that she was never approved for a reasonable accommodation for asthma/air quality while the OWCP

claim was pending; rather, the agency found meaningful work for her while the claim was pending, as required under Workers Compensation law. *Id.* at 82-83. After the claim was denied, Meserve sent the appellant the September 27, 2016 "options letter," which offered her, among other things, a chance to request an accommodation. *Id.*; AF at 36. In response, the appellant filled out the form requesting an accommodation. *Id.* at 84; AF at 33.

Meserve testified that, in a case like this, where the disability was not obvious, the information on this form was insufficient to grant the accommodation, as medical documentation was required. HT at 84. On the form, the appellant indicated she was going to send medical information, but he sent the appellant the October 21 letter when no documentation had been received. *Id.* at 84-85; AF at 31. The letter informed the appellant that she was being marked AWOL because, to his memory, she had no FMLA entitlement remaining and no leave. *Id.* at 85.

Meserve never saw the September 19, 2016 Duty Status Report in the record until these proceedings. HT at 86; AF at 65. He explained that it is a DoL form, and is protected from release to the agency by the Privacy Act. HT at 86. He testified that when the agency receives an accommodation request, in any medical documentation submitted they are looking for symptoms of the condition to determine whether the employee is a qualified individual with a disability, frequency/duration of the condition, major life function that is limited, and finally, how the accommodation would help the person perform his/her job. HT at 87-88 (Meserve), 145 (Cochran). The Duty Status form states that the appellant needed to be removed from Building 200, but not much more. *Id.* at 87-

88. So, even with this form, the agency would have sent the same letter seeking more information. *Id.* at 88.

Gardner, the former ELR Specialist, and Cochran, the current ELR Specialist, also testified that they never saw the Duty Status form at the time. HT at 126, 146. All three of the agency witnesses testified that they never received any medical documentation from the appellant in response to their requests. *Id.* at 88-89 (Meserve); 126 (Gardner); 142, 150 (Cochran).

Findings

After careful consideration of the record evidence, for the reasons explained below, I find that the appellant has failed to show, by preponderant evidence, that the agency constructively suspended her during the period at issue. Although she has shown that she had no meaningful choice except to take leave and stay out of the workplace when informed, on September 28, 2016, that her relocation to Building 206 would not continue because her OWCP claim had been denied, she has not shown that the agency's wrongful actions deprived her of that choice.

As noted above, the appellant is alleging that she was constructively suspended when the agency failed to accommodate her known disability-asthma-when it removed her from a previously-granted alternate work location and required her to either return to a her previous "toxic" office or be charged with absence without leave (AWOL), on or about September 28, 2016. IAF, Tab 9; IAF-2, Tab 11. She asserts that the suspension lasted until she began employment at the Phoenix VA Medical Center, on June 12, 2017.

It is well settled, and the agency does not appear to dispute, that a request for accommodation of a disability may be made verbally. *See, e.g., White v. Department of*

Veterans Affairs, 120 M.S.P.R. 405, 414 n.6 (2013) (citing Equal Employment Opportunity Commission (EEOC) Notice No. 915.002, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (2002) (hereafter referred to as "EEOC Enforcement Guidance") (General Principles section and Q & A item 3)). Here, based on the testimonies of the appellant and Gardner, and the September 28, 2016 email Gardner sent the appellant, I find that the appellant requested an accommodation of her asthma condition on September 28, 2016. Moreover, based on the appellant's testimony regarding the severity of her condition and the Duty Status Report she submitted, I find that she has shown that she had a substantial impairment in a major life activity in 2016, and she therefore established that she suffered from a disability.

It is undisputed that Gardner sent the appellant the Written Confirmation of Request for Accommodation form on September 28, 2016, and she returned it to him after filling it out on September 30, 2016 to pass on to Cochran. On the form, the appellant requested the following accommodations:

> Provide High efficiency air filters (HEPA)
>
> Provide air purification
>
> Provide different work environment with HVAC ventilation system
>
> Different workspace with windows
>
> Alternative work arrangement (telework)
>
> Alternative work arrangement while construction is taking place

> Alternative means of communication telephone, email, IM, Fax or memos.
>
> Flexible leave policy.

AF at 33. The appellant explained the reason for her request, and stated that medical documentation was to follow. *Id.*

Once the appellant had made her request for accommodation of her condition, the agency was required to engage in an interactive process to determine an appropriate accommodation. *Paris,* 104 M.S.P.R. 331, ¶ 17; 29 C.F.R. § 1630.2(*o*)(3); EEOC Enforcement Guidance at 6. The appellant, however, was also required to cooperate in the interactive process. "Both parties... have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so." *Collins,* 100 M.S.P.R. 332, ¶ 11 (citing *Taylor v. Phoenixville School District,* 184 F.3d 296, 312 (3rd Cir.1999)).

I find that the agency was within its rights to request additional information from the appellant before making a decision on her accommodation request, especially considering the number of accommodation options she suggested. To the extent the appellant is arguing that the agency was required to accommodate her by allowing her to work in Building 206, the Board has stated that an employee is not entitled to the accommodation of her choice. *See, e.g., Miller v. Department of Army*, 121 M.S.P.R. 189, ¶ 21 (2014). A request for a specific accommodation does not necessarily mean that the employer is required to accede to the request. The request is the first step in an informal, interactive process between the individual and the employer. *Id.* ¶ 15. If more than one accommodation will enable an individual to perform the essential functions of her position, the

preference of the individual with the disability should be given primary consideration, but the employer providing the accommodation has the ultimate discretion to choose between effective accommodations. Appendix to 29 C.F.R. Part 1630, § 1630.9. Thus, here, the agency was within its discretion to seek more information in order to determine which of the accommodations the appellant requested might be most effective.

Even assuming the HR/ELR employees who considered the appellant's accommodation request should have known about and considered the September 19, 2016 Duty Status Report as medical evidence in making a decision, I agree with the agency that the Report provided insufficient information.[2] In this regard, other than identifying the appellant's condition and certain restrictions, the Report stated only that the appellant "needs to be removed from building 200." I find that, even with this document, it would have been reasonable for the agency to request further medical documentation, if nothing else in order to determine whether some of the other accommodations the appellant requested might have allowed her to work in Building 200, where she would

[2] The appellant cites case law for the proposition that the Duty Status Report can "constitute compelling prima facie evidence that the employee in question has a disability as defined by the Rehabilitation Act." IAF-2 at 11 (citing *Velva B. v Brennan*, 2017 WL 4466898, at *13). I agree with her argument on this point, but, the above holding does not state that an agency may not request additional medical documentation once a Duty Status Report has been received. As explained herein, the Duty Status Report at issue in the instant case contained insufficient information to allow the agency to assess the appellant's accommodation request. Therefore even if the HR/ELR employees involved in considering the request had seen and taken the Report into consideration, I would find that the agency was entitled to continue the interactive process to determine a proper accommodation.

normally have performed the essential functions of her position.[3]

Despite a number of communications from the agency to the appellant reiterating the need for medical documentation in support of the accommodation request, the appellant admitted, HT at 60-62, 65-66, 68, and I find, that the record contains no evidence that additional documentation was provided. All of the agency witnesses testified that they received no documentation from the appellant in response to their messages/letters, and while the appellant asserted variously that she or her provider submitted further medical documentation, she failed to file copies of such documentation in this appeal, nor did she submit any evidence from her medical provider(s) that the documentation had ever been sent. Further weighing against a finding that appellant's doctor sent more documentation after appellant submitted the Written Confirmation of Request for Accommodation on September 30, 2016 is her November 8, 2016 email asserting that the specialist had sent the information requested stating that she was unable to return to

[3] If, as the appellant argues, the September 19 Duty Status Report is considered to be a request for a reasonable accommodation, instead of just an update that pertained to the appellant's OWCP claim or medical evidence that should have been used to assess her later accommodation request, I would still find it reasonable for the agency to have requested additional information to process the request. The physician who filled out the Report did not release the appellant to return to duty at a work location other than Building 200 until September 26, 2016, and the agency began to engage in the interactive process within days of that date. Accordingly, I would still find that the agency was within its rights to ask for information that would allow it to determine the most effective way to accommodate the appellant that would allow her to perform the essential functions of her position; thus, my holding that wrongful actions by the agency did not cause the appellant's absence from duty would remain unchanged.

Building 200 "back in September." AF at 24. The email continues, declaring that the information to which the appellant is referring was used to place her in Building 206 on September 26. I find that it is highly likely the appellant was referring to the September 19 Duty Status Report in this email, rather than other medical documentation she claims was later submitted that might have been responsive to the agency's requirements.

For the reasons stated above, I find that the agency engaged in the required interactive process in good faith in order to assess the appellant's medical condition and determine an appropriate accommodation, but the appellant has not shown she was sufficiently responsive to the agency's requests for medical information.[4] *See Simpson v. U.S. Postal Service*, 113 M.S.P.R. 346, ¶ 18 (2010). As such, I find that the appellant has not shown that it was the agency's wrongful actions that prevented her from continuing to work. *Id.*; *see also Taylor,* 184 F.3d at 317 ("an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs"); *Beck v. University of Wisconsin, Board of Regents,* 75 F.3d 1130, 1137 (7th Cir.1996) ("where, as here, the employer makes multiple attempts

[4] I did not find credible the appellant's testimony that she went in-person and spoke with the HR/ELR employees about her accommodation request and they never mentioned that the medical evidence she had provided was insufficient. There is no reference in any of the written communications to any in-person meetings, and the appellant has provided no other corroboration for her testimony on this point. Moreover, I found the agency witnesses to be credible, as their testimony was consistent, both internally with each other's testimony, and with the documentary evidence, and none of them testified that the appellant met with them in-person after she was out of the workplace in late September 2016. In fact, appellant's counsel made no attempt to elicit testimony on this issue.

to acquire the needed information, it is the employee who appears not to have made reasonable efforts"); *Conaway v. U.S. Postal Service,* 93 M.S.P.R. 6, ¶ 37 (2002) (the agency was not liable for failure to provide a reasonable accommodation where it participated in good faith in the interactive process andthe appellant did not respond to the agency's repeated requests for clear and objective medical evidence), *review dismissed,* 55 Fed.Appx. 565 (Fed. Cir. 2003).

In conclusion, the appellant has not proven that she was constructively suspended during the period at issue, and as a result, her appeal must be dismissed for lack of Board jurisdiction.[5]

DECISION

The appeal is DISMISSED for lack of Board jurisdiction.

FOR THE BOARD: _____

Craig A Berg
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 20, 2019**, 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

[5] In light of this disposition, I need not make a finding as to the timeliness of the appeal. And, the Board lacks authority to adjudicate the appellant's disability discrimination defense. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

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 there are no members 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 two members are 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 each of the 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).

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial 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

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.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

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

APPENDIX H

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

LYNETT S. WILSON,
Appellant,
v.
DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
PH-0752-17-0329-I-1
DATE: July 26, 2018

Robert Fred Stone, Esquire, South Deerfield, Massachusetts, for the appellant.

Joshua R. Carver, Augusta, Maine, for the agency.

BEFORE
Craig A. Berg
Administrative Judge

INITIAL DECISION

On June 28, 2017, the appellant filed an appeal alleging that the agency had constructively suspended her from the position of Radiologic Technologist at the agency's Department of Veterans Affairs, Maine Healthcare System in Augusta, Maine. Initial Appeal File (IAF), Tab 1. I found that she has made a nonfrivolous allegation of Board jurisdiction and is therefore entitled

to the hearing she requested. For the reasons discussed below, this appeal is DISMISSED WITHOUT PREJUDICE to refiling, under the terms set forth herein.

DISMISSAL WITHOUT PREJUDICE

On June 29, 2018, I issued a hearing order in this appeal. Subsequently, the agency filed a motion to continue the hearing due to the unavailability of a witness. In the motion, the agency notified me that the appellant also planned to request a postponement.

On this date, I held a conference call with the parties, and after discussing schedules and other issues it became apparent that it will not be possible to hold a hearing for an extended period. Accordingly, it was agreed that I would reschedule the hearing and stay action on the appeal by dismissal without prejudice, subject to automatic refiling.

Board regulations and precedent state that a dismissal without prejudice to refile is left to the sound discretion of the Administrative Judge and such a dismissal is appropriate where it is in the interests of fairness, due process, and conservation of the resources of the parties. *See* 5 C.F.R. § 1201.29(b); *Gidwani v. Department of Veterans Affairs*, 74 M.S.P.R. 509, 511 (1997). Further, a dismissal without prejudice is appropriate in order to avoid a lengthy or indefinite continuance. *See Milner v. Department of Justice*, 87 M.S.P.R. 660, ¶ 13 (2001).

I find that dismissal of this appeal without prejudice is appropriate to avoid a lengthy delay while the appeal is on my active docket and to conserve the resources of the parties. The appeal will be automatically refiled on September 4, 2018.

Decision

The appeal is DISMISSED WITHOUT PREJUDICE.

FOR THE BOARD: _____

Craig A Berg
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **August 30, 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 eAppeal website (https://eappeal.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 each of the three 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).

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

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 courtappointed 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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive

your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial 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

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.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

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

APPENDIX I

United States Court of Appeals
For the First Circuit

No. 21-1498

LYNETT S. WILSON,

Plaintiff - Appellant,

v.

DENIS RICHARD MCDONOUGH, Secretary, U.S. Department of Veterans Affairs; DEPARTMENT OF VETERANS AFFAIRS,

Defendants - Appellees.

Before

Barron, *Chief Judge*,
Lynch, Thompson, Kayatta, and Gelpí, *Circuit Judges*.

ORDER OF COURT

Entered: August 24, 2022

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted

to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Bruce M. Merrill, Robert Fred Stone, Michael B. Mosher, Andrew Tutt, Rebecca Caruso, John G. Osborn, Benjamin M. Block

APPENDIX J

Federal Rule of Civil Procedure 8

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials--Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading--including the jurisdictional grounds--may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation--other than one relating to the amount of damages--is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;

- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

APPENDIX K

Federal Rule of Civil Procedure 12

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General*. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity*. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity*. A United States officer or employee sued in an individual capacity for an act or

omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LYNETT S. WILSON, Appellant, v. ROBERT WILKIE, SECRETARY, U.S. DEPARTMENT OF VETERANS AFFAIRS, Defendant.	)	CIVIL ACTION NO: 2:20-cv-00019-NT **COMPLAINT AND ADMINISTRATIVE APPEAL AND JURY DEMAND**

I. PRELIMINARY STATEMENT

1. Plaintiff/Appellant Lynett S. Wilson (hereinafter "Ms. Wilson") is a former employee of the U.S. Department of Veterans Affairs, Veterans Affairs Medical Center located in Augusta, Maine (hereinafter "VAMC-Augusta" or "VAMC") from November 2013 until she was involuntarily suspended on or about September 17, 2017 and forced to relocate elsewhere without due process.

2. Ms. Wilson remained suspended until June 2017 when she was able to obtain compatible work at a Veterans Administration Medical Center in an Arizona ("VAMC-Arizona").

3. Ms. Wilson timely appealed her suspension from the VAMC-Augusta and forced relocation to the and forced relocation to the VAMC-Arizona through various administrative processes, resulting in an unfavorable

Initial Decision from an Administrative Law Judge with the Merit Systems Protection Board ("MSPB") whose decision became final on June 20, 2019.

4. Ms. Wilson filed a timely appeal of the MSPB Final Order with the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) which was ultimately transferred to the U.S. District Court for the District of Maine.

5. This is a "mixed case" of discrimination and non-discrimination based claims, all of which are submitted to the District Court for judicial review pursuant to 5 U.S.C. § 7703.[1]

6. Ms. Wilson now seeks review of the MSPB Final Decision by this Honorable Court, pursuant to 5 U.S.C. § 7703 and *Perry v. Merit Sys. Prot. Bd.,* 137 S. CT 1975, 1987 (2017).

II. JURISDICTION

7. This action arises under Title VII, 42 U.S.C. § 2000e-16; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.;* 5 U.S.C. § 2302 *et seq.;* the Administrative Procedures Act, 5 U.S.C. § 702 *et seq.;* 5 U.S.C. § 7703, and the Civil Service Reform Act, 5 U.S.C. § 7511 *et seq.,* and regulations adopted thereunder.

8. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

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[1] *See Sloan v. West*, CIVIL NO. 95-00942 ACK, 1996 U.S. Dist. LEXIS 22072, at *11-12 (D. Haw. Sep. 6, 1996) ("Indeed, the district court should address both claims, rather than just the discrimination claim, because the policy underlying the statute disfavors bifurcation. The district court should apply a *de novo* standard of review to the discrimination claims and an abuse of discretion standard to the MSPB decision on the adverse personnel action.") (citing 5 U.S.C. § 7703(c); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir.1993)).

9. The amount in controversy exceeds $75,000.

III. VENUE

10. Venue is proper pursuant to 28 U.S.C. §§ 1391(b) and (e), because the acts occurred or failed to occur in the District of Maine.

11. Ms. Wilson resided and worked in the District of Maine at the time of the alleged actions.

12. Ms. Wilson is a qualified individual with a disability and former employee of the VAMC-Augusta who was placed on forced leave without pay ("LWOP") without her constitutionally protected due process right of notice and right to respond.[2]

IV. PARTIES

13. Defendant Robert Wilkie is the Secretary of the U.S. Department of Veterans Affairs and as such is responsible for administering all programs and services provided by the Department of Veterans Affairs including the application and administration of all laws, regulations, and polices related to the employees of the Department of Veterans Affairs.

14. Defendant U.S. Department of Veterans Affairs is a unit of the United States government which provides services to veterans and approximately 400,000 employees throughout the United States, including VAMC-Augusta.

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[2] *McGriff v. Dep't of the Navy*, 118 M.S.P.R. 89, ¶ 28 (2012) ("explaining how the Board analyzed Supreme Court decisions to conclude that Federal employees have due process rights.") and ***Rodgers v. Department of the Navy*, CITE** ("stating that, in addition to the protections afforded by the Constitution, public employees are also entitled to 'whatever other procedural protections are afforded them by statute, regulation or agency procedure'")).

15. The Defendants are collectively referred to as the "VA", "Agency", or the "Defendants" and are federal entities and receive federal funding.

IV. FACTS

16. When Ms. Wilson applied for the open Lead Radiologic Diagnostic Technician (hereinafter "LRD Tech.") position at the VAMC-Augusta she informed Defendant she was a qualified individual with disabilities.

17. Ms. Wilson holds a Bachelor of Science Degree (BS) in Healthcare Administration as well as an Associate of Science Degree in Radiology. She is also licensed in several states (including Maine) in radiology and is a technical expert in X-ray software, and other related programs, with over16 years of employ.

18. The Defendant promised to accommodate Ms. Wilson's disabilities if she accepted the LRD Tech. position at the VAMC-Augusta.

19. The Defendant agreed to accommodate Ms. Wilson's Attention Deficit Hyperactivity Disorder (ADHD) with an office properly partitioned and other required accommodations.

20. Ms. Wilson began work at the VAMC-Augusta in June 2015 which failed to provide her with the agreed upon accommodations.

21. By failing to provide Ms. Wilson with the required reasonable accommodations the VA failed in its duty to be "a model employer of individuals with disabilities" in accordance with 29 C.F.R. 1614.203(c).

22. The VA regularly called upon Ms. Wilson, a subject matter expert in VA medical Radiology, to teach and train physicians, new hires, co-workers, seniors, nurses, and subordinates.

23. Employees often called upon Ms. Wilson to assist with complex medical encounters and resolve technical X-Ray issues which could not be solved by her teammates.

24. Ms. Wilson was required to record the time worked by approximately 20-5 employees under her supervision and submit time cards on a biweekly basis.

25. Upon her initial employment at the VAMC-Augusta Ms. Wilson began to advocate for the reasonable accommodations she had been promised and continued to do so until she was forced to remove herself from the hostile work environment at the VAMC-Augusta and seek employment elsewhere.

26. In addition to her ongoing participation in the protected activity of the Equal Employment Opportunity (EEO) process, Ms. Wilson also reported to VAMC-Augusta management placement of employees in unsafe workspaces, violations of rules, regulations, and law concerning fraud, waste and abuse such as falsification of time cards to circumvent government record keeping requirements for travel and possibly overpay favored employees.

27. Ms. Wilson routinely lobbied for the required reasonable accommodations without success.

28. In addition to compliance with federal law, the United States Code and the Code of Federal Regulations, the VA must also comply with its own regulations and procedures, and it failed to do so.

29. On September 12, 2016, Ms. Wilson suffered a severe asthma attack in her unaccommodated workspace and filed the required workers' compensation claim.

30. After a medical examination of Ms. Wilson her treating physician he determined she was unable to work

in her assigned office as the poor air quality aggravated her asthma, and reasonable accommodations were again requested to include asthma.

31. The VA accommodated Ms. Wilson's asthma and placed her in an office in Building 206 which had a recently placed HVAC system?

32. Ms. Wilson's attending physician informed the VA she could not safely work in her Building 200 workspace with the required Duty Status Report (Form CA-17).

33. On or about September 27, 2016, the VA was notified Ms. Wilson's claim for compensation was denied notified on or around 9/28/16 ordered to return to her workspace in Building 200 without accommodations.

34. In an October 21, 2016 letter Jonathan Meserve, Defendant's Human Resources (HR) Manager, notified Ms. Wilson that she was absent without leave (AWOL) apparently from September 23, 2016 (her date of injury) and that the VA would not accommodate her asthma and continued to provide her with the promised ADHD accommodations.

35. Ms. Wilson was not given the required notice she was going to be placed in an involuntary AWOL status or right to respond.

36. Mr. Meserve' s October 21, 2016 letter was the first time Ms. Wilson was notified she was placed in a forced AWOL status without pay.

37. Ms. Wilson had not been given the required notice or the right to meaningfully response before she was marked involuntarily placed in an AWOL status without reasonable accommodations.

38. When the VA placed Ms. Wilson in an AWOL her constitutional due process rights were violated when she

was placed on involuntary forced LWOP without notice and the rights to a meaningful responce due to her Asthma and other non-accommodate disabilities such as ADHD her constitutionally protected due process rights were violated.

39. The VA must adhere to the merit principles of 5 U.S.C. § 2301.

40. The Defendant's actions described herein are in violation of § 2301.

41. Mr. Meserve knew discontinuing Ms. Wilson's asthma accommodation would expose her to air contaminates such as mold, exhaust fumes, and other unidentified pollutants present in her non-accommodated prior workspace and would endanger Ms. Wilson's health.

42. The Defendant knew Ms. Wilson objected to returning to her prior work space in the lower level of Building 200 because of her disabilities.

43. The VA had been notified of the danger to Ms. Wilson's health if she was forced to return to her Building 200 workspace with proper accommodations.

44. Mr. Meserve knew Ms. Wilson's prior work space was not properly ventilated.

45. Mr. Meserve knew Ms. Wilson's disabilities, that included her disabilities such as asthma and ADHD, were not accommodated in Building 200.

46. The Defendant knew that without reasonable accommodations Ms. Wilson was unable to properly and safely perform her duties in her Building 200 workspace.

47. In opposition to the AWOL suspension and forced relocation (constructive discharge) Ms. Wilson filed an appeal with the MSPB. Her appeal asserted affirmative defenses to the Defendant's actions to include disability

discrimination, whistleblower reprisal, EEOC reprisal, and harmful procedural error.

48. Pursuant to 29 U.S.C.§ 791, the VA is required to adopt and implement a plan that provides sufficient assurances, procedures, and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities at all levels of federal employment.

49. The VA is required to refrain from harassment of disabled employees pursuant to 29 CFR § 614.203(d)(2) (2020).

50. When the facts and circumstances known to the VA make it reasonably likely that an individual is entitled to a reasonable accommodation, but the accommodation cannot be provided immediately, "the agency shall provide an interim accommodation that allows the individual to perform some or all of the essential functions of her job, if it is possible to do so without imposing undue hardship on the agency," 29 CFR 1614.203(d)(3)(i)(Q) (2020).

51. During such "interim period," the VA may not target, suspend, or remove an employee to force her to relocate or resign as the Defendant did to Ms. Wilson.

52. The VA failed to accommodate Ms. Wilson's after she accepted the LRT Tech. position then removed the October 2016 accommodation it had given her for her asthma by using the denial of her workers' compensation claim as a pretext for discrimination.

COUNT ONE

The VA's Disability Discrimination, Violations of the Rehabilitation Act of 1973 (29 USC 791) and Failure to Accommodate

53. Ms. Wilson incorporates by reference all other paragraphs of this Complaint as though fully stated herein.

54. The Defendants receive federal financial assistance.

55. The Defendants are subject to the Rehabilitation Act of 1973 and Americans with Disabilities Act.

56. Ms. Wilson was disabled qualified person for her job at the VAMC-Augusta.

57. Ms. Wilson provided medical evidence to her employer from her physician who substantiated her disabilities and limitations, and requests for reasonable accommodations.

57. Ms. Wilson notified the VA of her disabilities but the VA dismissed and ignored such notice and medical evidence.

58. Ms. Wilson could have performed all the essential job functions with reasonable accommodations.

59. The Defendant refused to make such accommodations and discriminated against Ms. Wilson based on her disabilities.

60. The VA failed to timely grant a reasonable accommodation to Ms. Wilson.

61. The VA failed to meaningfully engage in the reasonable accommodation interactive process and dialogue intended to provide reasonable accommodations.

62. Ms. Wilson was treated disparately and less favorably than comparator employees in nearly identical circumstances.

63. The Defendants subjected Ms. Wilson to adverse actions based on her disabilities including, but not limited to forced suspension and removal.

64. The VA violated the merit principles located at 5 USC 2301.

65. As a direct and proximate cause thereof, Ms. Wilson has suffered damages.

COUNT TWO

The VA's EEO Discrimination and Retaliation and Violations of Title VII (42 U.S.C. § 2000e-16)

66. Ms. Wilson incorporates by reference all other paragraphs of this Complaint as though fully stated herein.

67. In the prior MSBP action, the VA and its employees have acknowledged that Ms. Wilson participated in the EEO process and opposed practices made unlawful by Title VII of the Civil Rights Act of 1964.

68. As described more fully herein, the Defendant took materially adverse actions against Ms. Wilson including, but not limited to, involuntary suspension without notice due to her opposition to the Defendants' employment practices.

69. As a direct and proximate cause thereof, Ms. Wilson has suffered damages.

COUNT THREE

The Defendant Committed Unlawful Whistleblower Reprisal (5 U.S.C. § 2302)

70. Ms. Wilson incorporates by reference all other paragraphs of this Complaint as though fully stated herein.

71. The MSPB Final Decision violated the Administrative Procedures Act, 5 U.S.C. §§ 702, *et seq*.

72. The MSPB Final Decision was MSPB arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

73. The MSPB Final Decision was obtained without following procedures required by law, rule, and regulation.

74. The MSPB Final Decision was unsupported by substantial evidence.

75. As a direct and proximate cause of the Defendant's actions Ms. Wilson has suffered damages.

COUNT FOUR

Harmful Procedural Error (5 U.S.C. § 4303)

76. Ms. Wilson incorporates by reference all other paragraphs of this Complaint as though fully stated herein.

77. The MSPB Final Decision violated the Administrative Procedures Act, 5 U.S.C. §§ 702, *et seq*.

78. The MSPB Final Decision was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

79. The MSPB Final Decision was obtained without procedures required by law, rule, and regulation having been followed and unsupported by substantial evidence.

80. As a direct and proximate cause thereof, Ms. Wilson has suffered damages.

PRAYER FOR RELIEF

81. WHEREFORE, Ms. Wilson respectfully requests that this Honorable Court enter judgment in her favor against the VA, and respectfully requests:

a. That this Court overturn and vacate the final decision of the MSPB;

b. That this Court declare that the VA improperly discriminated against Ms. Wilson based on her disability in violation of applicable laws, regulations, and policies;

c. That the Court vacate Ms. Wilson's termination;

d. That the Court award Ms. Wilson back wages and benefits from the date of her forced suspension removal in relocation (removal) in June 2017;

e. That the Court award Ms. Wilson That the Court award Ms. Tejeda, from the Defendants, compensatory, general and special damages including punitive damages in an amount to be proved at trial;

f. That the Court award Ms. Wilson her costs, expenses, reasonable attorney's fees,

g. Interest on all sums awarded and awards and any other further relief this Court deems appropriate.

JURY DEMAND

Ms. Wilson by and through her attorneys, Robert F. Stone, Esq., *(pro hac vice)* and Bruce Merrill, Esq., demands a trial by jury on all counts so triable.

Date: December 18, 2020

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CERTIFICATE OF SERVICE

I, Robert F. Stone, hereby certify that this document is filed through the ECF system on the 18th day of December 2020 and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as nonregistered participant.

Asst. U.S. Attorney John Osborn
U, S. Department of Justice
Civil Division
100 Middle Street, East Tower
6th Floor
Portland, ME 04101

Dated: December 18, 2020 Signed /Robert F. Stone/