NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 28, 2025*
Decided April 3, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 24-2058

JANEL N. SMITH,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Petition for Review of a Decision of the Merit Systems Protection Board.

No. CH-1221-22-0137-W-1

O R D E R

Janel Smith, an analyst for the Bureau of Alcohol, Tobacco, Firearms and Explosives, petitions this court to review a final order of the Merit Systems Protection

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Board dismissing her whistleblower appeal. Because the Board correctly concluded that Smith was not entitled to a hearing on her claims, we deny Smith's petition.

I.

Smith's earliest whistleblower activities date back to 2010, when she filed a report with the Bureau's Inspector General alleging that her supervisor had been reporting inflated inspection numbers. She later filed a complaint with the Office of Special Counsel alleging that the Bureau negatively commented upon her performance in retaliation for her report about her supervisor. The Office refused to take corrective action, and in 2013, Smith appealed to the Merit Systems Protection Board. Two years later, Smith participated in a hearing for her appeal. In 2016, the Board denied her appeal, concluding that she failed to allege that her whistleblowing activity contributed to the negative comments about her job performance. Smith's supervisor was reassigned soon thereafter and no longer directly managed her.

Throughout her employment, Smith has taken several other legal actions against the Bureau. In 2010, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging harassment by her supervisor. In 2014, she filed a Federal Torts Claims Act complaint in federal court concerning a workplace assault. Both actions were ultimately unsuccessful. And in 2016, Smith requested—and in 2020 received—documentation from the Bureau under the Freedom of Information Act.

In 2021, Smith applied for the position of Industry Operations Investigator within the Bureau, but she was not selected. She then filed a complaint with the Office of Special Counsel, alleging that she was not selected for the position and was denied training because she had engaged in whistleblowing activities. The Office closed her complaint without seeking corrective action; the closure letter stated that Smith failed to identify when the allegedly retaliatory actions occurred and that, in any event, the Bureau has significant discretion in making selection decisions and her nonselection did not appear to have been influenced by her whistleblowing activities. She appealed to the Merit Systems Protection Board.

An administrative judge for the Board dismissed Smith's appeal. The judge explained that Smith failed to meet her burden to demonstrate her entitlement to a hearing by "nonfrivolously" pleading that she engaged in whistleblowing activity, and that this activity contributed to the Bureau's decision to act against her. *See* 5 U.S.C. § 1221(a); *id.* § 2302.

Smith petitioned for review of the judge's decision, and the Board affirmed. The Board determined that although Smith had nonfrivolously alleged that she had engaged in some whistleblowing activity (her 2010 disclosure to the Inspector General and her subsequent appeal to the Board in 2013) and that the Bureau had taken a personnel action against her (her 2021 nonselection), she did not adequately plead that her activity contributed to the adverse action. The Board further concluded that she failed to allege that her federal lawsuit concerning her alleged assault was protected activity because she did not provide sufficient detail about the incident. Nor did her complaint with the EEOC qualify, the Board reasoned, because such complaints are not considered protected activities under the Whistleblower Protection Act, 5 U.S.C. § 2302, which shields federal employees who report a legal or regulatory violation, gross mismanagement, abuse of authority, or danger to public safety. *See id.* § 2302(a)(2)(D). And, in the Board's view, Smith's claim that she was denied training did not qualify as a personnel action because she did not provide any specific allegations about her lack of training. Smith then petitioned this court for review.

II.

Our review of the Board's decision is deferential: We will not set aside the Board's decision unless its findings or conclusions are "arbitrary, capricious, an abuse of discretion, not in accordance with law, obtained without proper procedures, or unsupported by substantial evidence." *Delgado v. Merit Sys. Prot. Bd.*, 880 F.3d 913, 916 (7th Cir. 2018) (citing 5 U.S.C. § 7703(c)).

Under the Whistleblower Protection Act, the Board may hear employee appeals of federal personnel actions that are alleged to be retaliation for the employee's protected activity. *See* 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.6(b). To establish entitlement to a hearing, the employee bears the burden of proving—by a preponderance of the evidence—that she exhausted her claims before the Office of Special Counsel and nonfrivolously alleged that: (1) she made a protected disclosure, *id.* § 2302(b)(8), or otherwise engaged in protected activity, *id.* § 2302(b)(9)(A)(i), (B), (C), (D); and (2) the protected activity served as a contributing factor in the employer's decision to take a personnel action against her, *id.* § 2302(a)(2)(A). *See also Yunus v. Dep't of Veterans Affs.*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1320 (Fed. Cir. 2016). An allegation is considered nonfrivolous when it: "(1) is more than conclusory; (2) is plausible on its face; and (3) is material to the legal issues in the appeal." 5 C.F.R. § 1201.4(s).

Smith raises a three-part challenge to the Board's conclusion that certain of her actions did not qualify as protected activities. First, in response to the Board's finding that she presented insufficient information about her federal suit alleging assault, she contends that the Board's electronic filing process contained a character limit preventing her from adequately detailing how her federal suit qualified. But none of the supplemental documents that she submitted to the Office of Special Counsel and the Board elaborated on her federal suit. Her allegations about the underlying assault are vague and conclusory—failing to mention, for instance, her assailant, the nature of the assault, its timing, or how the assault was reported—and insufficient to meet the standard for nonfrivolous pleading. *See Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323, 1328–29 (Fed. Cir. 2020). Second, she argues that her EEOC complaint was mislabeled as a discrimination claim (and not a claim that the Bureau retaliated against her for engaging in whistleblowing activity). But the filing of an EEOC complaint is not considered protected activity under the Whistleblower Protection Act—regardless of how the underlying claim is characterized. *See Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 689–92 (Fed. Cir. 1992). Third, she asserts for the first time that her request for documentation under the Freedom of Information Act also counts as protected activity, because the documents she ultimately received substantiated her concerns that the Bureau had destroyed and concealed evidence pertaining to her legal actions against the Bureau. But she waived this claim by not presenting it first to the Board. *See Sistek v. Dep't of Veterans Affs.*, 955 F.3d 948, 953 n.1 (Fed. Cir. 2020) (citing *Bosley v. Merit Sys. Prot. Bd.*, 162 F.3d 665, 668 (Fed. Cir. 1998)).

Smith next challenges the Board's determination that she failed to nonfrivolously allege that her lack of training qualified as a personnel action.[†] She maintains that the Bureau's refusal to train her resulted in lost job opportunities. In her view, other analysts in her office received training that she did not receive, and these analysts were later selected for jobs within the Bureau. But in order for training (or a lack thereof) to constitute a personnel action, it must "reasonably be expected to lead to an appointment, promotion, performance evaluation, or other [personnel] action." 5 U.S.C. § 2302(a)(2)(A)(ix). Smith's scant and conclusory allegations about lack of training do not identify the kind of training she missed or how such training would be expected to

[†] In her opening brief, Smith did not challenge the Board's conclusion that she failed to exhaust other personnel actions before the Office of Special Counsel. She raises the issue in her reply, but arguments made for the first time in a reply brief are waived. *See White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021).

lead to promotion or another positive personnel action. Further, she does not allege that she sought the jobs obtained by the analysts who received training or that those jobs required special training and therefore has failed to nonfrivolously allege that her lack of training qualified as a personnel action. *See Young*, 961 F.3d at 1328–29.

Finally, Smith argues that the Board wrongly concluded that she had not shown that her protected activities were a contributing factor in the Bureau's personnel actions. An employee can make this showing by means of circumstantial evidence (the "knowledge/timing" test), such as evidence that (1) the official who took the personnel action knew about her protected activities, and (2) the personnel action "occurred within a period of time such that a reasonable person could conclude that" the protected activities were a contributing factor in the action. *Delgado v. U.S. Dep't of Just.*, 979 F.3d 550, 554 (7th Cir. 2020) (quoting 5 U.S.C. § 1221(e)(1)). Smith contends that her protected activities (including her Freedom of Information Act requests) were not too attenuated in time from the personnel actions taken against her (including the Bureau's ongoing refusal to train her) for a reasonable person to conclude that they played a contributing role.

Smith has failed to demonstrate that the knowledge/timing test is met. The only protected activities that Smith nonfrivolously alleged are her 2010 disclosure to the Inspector General and her 2013 appeal to the Board (which was dismissed in 2016), and the sole personnel action that she nonfrivolously alleged is her 2021 nonselection for the Investigator position. Because her protected activities preceded her nonselection by (at least) five years, they cannot reasonably be considered a contributing factor. *See, e.g.*, *Salinas v. Dep't of Army*, 94 M.S.P.R. 54, 59 (2003) (citing *Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372, 1377 (Fed. Cir. 1999)) (two-and-a-half-year gap between protected disclosure and personnel action was too remote in time for a reasonable person to conclude that the disclosure was a contributing factor). In any event, Smith does not allege who the selecting official for the Investigator role was, much less that the official had knowledge of Smith's protected activities. *See Delgado v. U.S. Dep't of Just.*, 979 F.3d at 554.

Moreover, Smith presents no other allegations that support a connection between her protected activities and her nonselection. If—as here—the knowledge/timing test is not met, the Board must consider other evidence, including the "strength or weakness" of the Bureau's reasons for not selecting Smith, whether Smith's protected activities were "personally directed" at the selecting individuals, and whether "those individuals had a desire or motive to retaliate against" Smith. *Rumsey v. Dep't of Just.*, 120 M.S.P.R.

259, 273 (2013). To that end, Smith invokes the "cat's paw" theory, which applies when an official, "acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action." *See Aquino v. Dep't of Homeland Sec.*, 121 M.S.P.R. 35, 45 (2014) (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 415–16 (2011)). But all that Smith alleges in support of this theory is that the official who served as the "Attorney for the Day" for the Bureau's Inspector General office when she made her 2010 disclosure also served as the Deputy Chief of the Bureau's Human Resources department when she was not selected for the Investigator role, and that this official is friends with Smith's former supervisor. These claims, standing alone, are insufficient to plausibly allege that this individual was involved in the selection of the Investigator position or that he improperly influenced another official not to select Smith for the role.

For the foregoing reasons, we DENY Smith's petition for review.