



Hightower v. USPS

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NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit _____

AUBREY J. HIGHTOWER, Petitioner

v.

UNITED STATES POSTAL SERVICE, Respondent _____

2024-1895 _____

Petition for review of the Merit Systems Protection Board in No. DC-0752-17-0687-I-2.

ON MOTION _____

Before PROST, BRYSON, and HUGHES, Circuit Judges. PER CURIAM. ORDER Aubrey J. Hightower petitions this court for review of the Merit Systems Protection Board’s final decision affirming his removal and rejecting his affirmative defenses, including disability discrimination and retaliation for engaging in equal employment opportunity activity. The United States Postal Service (“USPS”) moves to waive

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Federal Circuit Rule 27(f) and dismiss for lack of jurisdiction. Mr. Hightower opposes the motion. Federal district courts, not this court, have jurisdiction over “[c]ases of discrimination subject to the provisions of [5 U.S.C. §] 7702,” 5 U.S.C. § 7703 (b)(2), which involve an allegation of an action appealable to the Board and an allegation that a basis for the action was covered discrimination, including retaliation. *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 437 (2017); *Diggs v. Dep’t of Hous. & Urb. Dev.*, 670 F.3d 1353, 1357 (Fed. Cir. 2011) (holding that the affirmative defense of retaliation for



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prior EEO activity “falls outside [of the court’s] jurisdictional reach”). Here, Mr. Hightower continues to pursue his allegations that his removal was the result of covered discrimination, so jurisdiction to review the Board’s decision lies in district court. Although the USPS urges dismissal over transfer, we deem it appropriate to transfer, pursuant to 28 U.S.C. § 1631 , to the United States District Court for the Western District of Virginia, where the employment action appears to have occurred, and for that court to address any issues concerning timeliness. Accordingly, IT IS ORDERED THAT: The motion is granted to the extent that the matter and all case filings are transferred to the United States District Court for the Western District of Virginia pursuant to 28 U.S.C. § 1631 . FOR THE COURT

November 12, 2024 Date

