UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 10

Docket No. SF-0752-09-0367-I-1

Kerrie A. Hosozawa,

Appellant,

v.

Department of Veterans Affairs,

Agency.

January 12, 2010

Kerrie A. Hosozawa, Calabasas, California, pro se.

Maureen Ney, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed her alleged involuntary resignation appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition under 5 C.F.R. § 1201.115(d), VACATE the ID, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a GS-9 Information Technology Specialist at the agency's facility in Los Angeles, California, and she had served the agency for

19 years. Initial Appeal File (IAF), Tab 1. In 2008, the appellant received treatment for Panic Disorder and Agoraphobia, and she was frequently absent from work as a consequence of her conditions. IAF, Tab 10, Attachment 1. On November 14, 2008, the agency proposed the appellant's removal on the charge of Absence Without Leave (AWOL). IAF, Tab 5, Subtab 4h. The appellant responded to the notice. *Id*., Subtab 4e. On February 9, 2009, the agency issued a decision removing the appellant, effective February 14, 2009. *Id*., Subtab 4c. On February 13, 2009, the appellant resigned from her position, effective that day, and the agency accepted and processed the resignation. *Id*., Subtabs 4a, 4b.

¶3 The appellant appealed, challenging the agency's removal decision of February 9, 2009. IAF, Tab 1. She requested a hearing. *Id*. The agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 5, Subtab 1. The administrative judge (AJ) issued an order directing the appellant to show that her appeal was within the Board's jurisdiction; the order provided general information regarding how to adequately allege that a resignation was involuntary. IAF, Tab 6. The appellant responded to the order and the agency's motion to dismiss, arguing, among other things, that the agency had failed to accommodate her medical condition. IAF, Tab 10. Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction on the grounds that the appellant failed to nonfrivolusly allege that her resignation was involuntary. IAF, Tab 12. The AJ held that the agency did not coerce the appellant's resignation by bringing unjustifiable charges or creating unreasonably difficult working conditions. *Id*. at 6-10.

¶4 The appellant petitioned for review. Petition for Review File (PFRF), Tab 3. The agency responded in opposition to the PFR. PFRF, Tab 5.

ANALYSIS

¶5 The appellant has the burden of proving the Board's jurisdiction by a preponderance of the evidence. *Parrott v. Merit Systems Protection Board*,

519 F.3d 1328, 1332 (Fed. Cir. 2008); 5 C.F.R. § 1201.56(a)(2). An employee-initiated action, such as a retirement or resignation, is presumed to be voluntary, and thus outside the Board's jurisdiction. *See Vitale v. Department of Veterans Affairs*, 107 M.S.P.R. 501, ¶ 17 (2007). An involuntary resignation, however, is equivalent to a forced removal and therefore is within the Board's jurisdiction. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc). To overcome the presumption that a resignation is voluntary, the employee must show that it was the result of the agency's misinformation or deception or was coerced by the agency. *See Vitale*, 107 M.S.P.R. 501, ¶ 19. To establish involuntariness on the basis of coercion, the appellant must establish that the agency imposed the terms of the resignation, the appellant had no realistic alternative but to resign, and the resignation was the result of improper actions by the agency. *Garcia*, 437 F.3d at 1329. If the employee claims that her resignation was coerced by the agency's creating intolerable working conditions, she must show that a reasonable employee in her position would have found the working conditions so oppressive that she would have felt compelled to resign. *Id*. When an appellant raises an allegation of discrimination in connection with a claim of involuntariness, the allegation may be addressed only insofar as it relates to the issue of voluntariness. *Axsom v. Department of Veterans Affairs*, 110 M.S.P.R. 605, ¶ 12 (2009). Once the appellant presents nonfrivolous allegations of Board jurisdiction - allegations of fact which, if proven, would establish the Board's jurisdiction - she is entitled to a hearing at which she must prove jurisdiction by a preponderance of the evidence. *Parrott*, 519 F.3d at 1332; *Garcia*, 437 F.3d at 1344.

¶6 In her analysis, the AJ focused on the potential coercive impact of the disciplinary proceeding and the appellant's general allegations of suffering harassment and a hostile work environment after her request for the accommodation of telecommuting was denied. IAF, Tab 12 at 6-10. The AJ did not analyze the appellant's claim that her resignation was prompted by the denial

of her request for accommodation. While the AJ did refer to her doctor's most recent letter releasing her to work full-time, *see id*. at 6-7, the AJ did not acknowledge that the appellant's doctor's reports also included the limitation that the appellant should be permitted to work at home (telecommute) due to her mental conditions and ongoing treatment. IAF, Tab 5, Subtab 4e; Tab 10, Attachment 1 at 23, 28-34.

¶7 Pro se filings are to be construed liberally. *Farooq v. Corporation for National & Community Service*, 109 M.S.P.R. 73, ¶ 11 (2008). Here, the appellant adequately alleged that her resignation was involuntary because the agency denied her request for a reasonable accommodation (telecommuting) that, according to her doctor, would have permitted her to continue to work full-time despite her mental conditions. The appellant further alleged that her supervisor encouraged her to apply for telecommuting privileges, that "he and HR did not see any problem" with a telecommuting arrangement, and that another employee had recently been permitted to telecommute. IAF, Tab 10. The agency did not dispute the appellant's allegations or otherwise contend that telecommuting was not feasible in light of the appellant's responsibilities. Thus, under the particular circumstances of this case, we find that the appellant has made a nonfrivolous allegation of the Board's jurisdiction. *See Carey v. Department of Health & Human Services*, 112 M.S.P.R. 106, ¶ 7 (2009) (the appellant's allegations that she was forced to retire because the agency refused to accommodate her disability by allowing her to telecommute were adequate to entitle the appellant to a hearing); *see also Garcia*, 437 F.3d at 1324 (failure to renovate the appellant's workspace to accommodate her medical condition may have forced her to accept a demotion). Therefore, the appellant was entitled to a hearing. *See Carey*, 112 M.S.P.R. 106, ¶ 8.

ORDER

¶8 Accordingly, we vacate the ID and remand this case to the regional office for a hearing on the issue of whether the appellant's resignation was the result of coercion based on intolerable working conditions and therefore an involuntary act within the Board's jurisdiction. If, on remand, the AJ determines that the Board has jurisdiction over this appeal and the appellant's resignation was involuntary, the AJ shall adjudicate the appellant's discrimination claim on the merits under the substantive standards of antidiscrimination law. *See Garcia*, 437 F.3d at 1341; *Carey*, 112 M.S.P.R. 106, ¶ 9.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.