UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 127

Docket No. DC-0752-09-0851-I-1

Melvin Searcy, Jr.,

Appellant,

v.

Department of Commerce,

Agency.

July 7, 2010

Melvin Searcy, Jr., Dumfries, Virginia, pro se.

Sharyn Danch, Alexandria, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review (PFR) of an initial decision (ID) that dismissed his alleged involuntary resignation appeal for lack of jurisdiction. For the reasons set forth below, we DENY the PFR, REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, and AFFIRM the ID AS MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant was a GS-12 Contract Specialist in the agency's U.S. Patent and Trademark Office (USPTO). On August 11, 2008, he contacted the Office of Civil Rights (OCR) and alleged that the agency had discriminated against him and subjected him to a hostile work environment based on his race, sex, and color when his supervisors discouraged him from applying for a position and his immediate supervisor spoke to him in a disrespectful manner. Initial Appeal File (IAF), Tab 7, Subtab 4d at 329. He subsequently filed a formal equal employment opportunity (EEO) complaint in which he alleged that the agency had subjected him to a hostile work environment from October 2007 to present. *Id.* at 383. On January 28, 2009, shortly after the agency began its formal investigation of the appellant's complaint, he resigned by submitting an e-mail entitled "Constructive Discharge Resignation under Duress" to various USPTO personnel, including his supervisors. *Id.*, Tab 4e at 5-6. He subsequently contacted OCR and alleged that the agency discriminated against and subjected him to a hostile work environment based on his race, sex, and color, and in retaliation for filing the EEO complaint, forcing him to resign. *Id.*, Tab 4b at 24, 136. He also filed a second EEO complaint, *id.* at 22, 128, in which he claimed that the agency constructively discharged him on January 28, 2009, by creating a hostile work environment which included discriminating based on his age, and retaliating against him for his having filed his first EEO complaint, *id.* at 197. The agency issued a Final Agency Decision (FAD) on the appellant's first EEO complaint, finding that he had failed to prove his claims of discrimination or retaliation. *Id.*, Subtab 4c. The agency also issued a FAD on the appellant's second complaint, finding that he failed to prove his claims of age discrimination, hostile work environment, or retaliation for protected EEO activity. *Id.*, Subtab 4a at 16-45.

¶3 After receiving the second FAD, the appellant filed this appeal. IAF, Tab 1. In it, he challenged the manner in which the agency conducted the

investigation of his second EEO complaint, alleging a "Conspiracy Against Rights," and he argued that the agency engaged in numerous federal and civil rights violations. *Id.* He requested a hearing. *Id.* at 4.

¶4 The administrative judge advised the appellant that resignation actions are presumed to be voluntary and therefore are not appealable, and that, unless he amended his appeal to allege that his resignation was the result of duress, coercion, or agency misrepresentation, it would be dismissed. IAF, Tab 2 at 2. The appellant did amend his appeal to claim that his resignation was the result of coercion and misrepresentation or "false allegations" by the agency, and he asserted that management officials violated the merit system principles and committed prohibited personnel practices. *Id.*, Tab 5.

¶5 The agency urged the administrative judge to dismiss the appeal without a hearing on the basis that the appellant had failed to make a nonfrivolous allegation of involuntariness establishing Board jurisdiction. IAF, Tab 7, Subtab 1 at 9-17.

¶6 Without holding a hearing, the administrative judge dismissed the appeal for lack of jurisdiction. ID at 2, 9-10; IAF, Tab 16. She found that the appellant was absent from work on August 7 and 8, 2008, despite the fact that his supervisor had told him that he did not have leave to cover that absence and was expected to report for duty. ID at 4. She further found that, on September 5, 2008, the agency proposed to suspend him for 14 days for improper conduct, specifically, four specifications of being absent without leave (AWOL) totaling 27 hours and six specifications of failing to obey the lawful orders of his supervisor. *Id.* at 5; *see* IAF, Tab 7, Subtab 4g at 17-23. She found that, on September 30, 2008, the agency issued a decision letter on that proposal, finding the charges sustained, suspending the appellant for 14 days, from October 12-25, 2008, and advising him that he was expected to report to work on October 27, 2008. ID at 5; *see* IAF, Tab 7, Subtab 4g at 11-12. The administrative judge then found that the appellant did not report as directed, and that, on October 29, 2008,

the agency issued him a notice directing that he report to work on the next business day. ID at 5; *see* IAF, Tab 7, Subtab 4g at 3. In addition, she found that the appellant entered the worksite on October 31, 2008, and intermittently thereafter over the next few days, and that, on November 5, 2008, he met with his supervisor who gave him an "unacceptable" performance rating. ID at 5; *see* IAF, Tab 7, Subtab 4e at 21; Subtab 4f at 1-14. The administrative judge found that the appellant remained AWOL from November 8, 2008, to January 5, 2009, ID at 5-6; *see* IAF, Tab 7, Subtab 4e at 23, 25, 27, 29; that, on January 13, 2009, the agency proposed his removal for improper conduct for 42 instances of AWOL, totaling 323 hours, ID at 6; *see* IAF, Tab 7, Subtab 4e at 9-19; and that, on January 28, 2009, he submitted his resignation, ID at 6; *see* IAF, Tab 7, Subtab 4e at 3.

¶7 The administrative judge considered the issues the appellant raised in his EEO complaints, specifically, that a co-worker called him a derogatory name and accused him of not providing good customer service, that the deciding official on his 14-day suspension and his first-line supervisor had referred to him as disrespectful, that the latter official denied his request for advanced leave, and that the former official declined to request an education waiver for him that would have allowed him to qualify under two vacancy announcements. ID at 7. She found that these incidents preceded the appellant's resignation by several months and that therefore it was unlikely that they would have constituted coercion that would have compelled a reasonable person to resign. *Id.* at 8. The administrative judge further found that the appellant failed to show that the agency would not have prevailed on the proposed removal in that its file included substantial evidence in support of the action. *Id.* at 8-9. She also found that, despite his complaints about his job concerns and lack of advancement, and the treatment he received from management, the appellant did not establish that the agency engaged in a course of conduct that made his working conditions so difficult or unpleasant that a reasonable person in his position would have felt

compelled to resign. *Id.* at 9. She concluded that the appellant failed to prove that his resignation was involuntary and that therefore the Board lacked jurisdiction over his appeal. *Id.* In the absence of Board jurisdiction, the administrative judge found no basis upon which to consider the appellant's claim of retaliation for protected EEO activity. *Id.*

¶8 In his PFR, the appellant argues that the administrative judge wrongly decided his appeal and did not review the whole record. Petition for Review File, Tab 1 at 1. He further argues that she erred in not convening a hearing, *id.* at 4, and denied him the opportunity to fairly present his case, *id.*, and that the agency has not defended its action or denied that it violated numerous Federal laws which he has listed and which he suggests support a finding of Board jurisdiction over his appeal. *Id.* at 2-3. The appellant argues as well that the administrative judge did not rule on his discovery request. *Id.* at 4. The appellant maintains that he did establish his claim of retaliation for protected EEO activity. *Id.* at 5-12. He has also submitted a "Profile" which purports to be a statement by him about his background and in support of his claim. *Id.* at 13-18.

¶9 The agency has responded in opposition to the appellant's PFR. *Id.*, Tab 3.

ANALYSIS

¶10 An appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an alleged involuntary resignation only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Deines v. Department of Energy*, 98 M.S.P.R. 389, ¶ 11 (2005).

¶11 The administrative judge provided the appellant with the proper jurisdictional notice in her initial order, advising him that, if he was requesting a hearing, he would be granted one only if he made allegations of duress, coercion,

or agency misrepresentation supported by facts which, if proven, would establish that his resignation was involuntary. IAF, Tab 2 at 2. In the ID, the administrative judge opened by finding that, despite his request, the appellant was not entitled to a hearing because he did not raise nonfrivolous allegations of Board jurisdiction. ID at 2. As discussed below, we do not disagree with this initial finding. The administrative judge erred, however, in apparently applying a preponderant evidence standard in analyzing the appellant's assertions and evidence in the remainder of the ID. *See id.* at 8-9. As noted, she found that the appellant did not establish acts of coercion by the agency, or working conditions so difficult or unpleasant, that would have compelled a reasonable person to resign, and that he did not prove involuntariness. *Id.* Such findings were inappropriate in light of her denial of the appellant's request for a hearing. *See Burgess*, 758 F.2d at 643; *Green v. Department of Veterans Affairs*, 112 M.S.P.R. 59, ¶ 7 (2009); *Deines*, 98 M.S.P.R. 389, ¶ 11.

¶12 An employee-initiated action, such as a resignation, is presumed to be voluntary, and thus outside the Board's jurisdiction, unless the employee presents sufficient evidence to establish that the action was obtained through duress or coercion or show that a reasonable person would have been misled by the agency. *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1123-24 (Fed. Cir. 1996); *Neice v. Department of Homeland Security*, 105 M.S.P.R. 211, ¶ 7 (2007). The touchstone of the voluntariness analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him of freedom of choice. *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 22 (2004); *Heining v. General Services Administration*, 68 M.S.P.R. 513, 519-20 (1995). It is well established that the fact than an employee is faced with the unpleasant choice of either resigning or opposing a potential adverse action does not rebut the presumed voluntariness of his ultimate choice. *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987). However, intolerable working conditions may render an action involuntary if the employee

demonstrates that the employer or agency engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person in that employee's position would have felt compelled to resign. *Markon v. Department of State*, 71 M.S.P.R. 574, 577 (1996).

¶13 On appeal, the appellant argued generally that the agency's engaging in prohibited personnel practices, and failing to comply with various laws and policies, resulted in discrimination, a hostile work environment, retaliation, harassment, and intimidation that led to his resignation. IAF, Tab 1. He also argued generally that coercion and misrepresentation by the agency caused him to resign, and that a reasonable person in his position would have been misled by the agency's actions and reckless disregard for the truth. *Id.*, Tab 5. His specific claims are found in his first EEO complaint where he contended that his supervisor denied his request for advanced leave, spoke to him in a disrespectful way, and did not provide him any assistance with his work assignments, and that a higher-level official refused to grant him an education waiver that would have allowed him to apply for certain vacancies. *Id.*, Tab 7 at 395-417; *see also* IAF, Tab 7, Subtab 4c at 1-11. We find that these allegations do not evince working conditions so intolerable that a reasonable person in the appellant's position would have felt compelled to resign. *See, e.g., Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 32 (2000) (dissatisfaction with work assignments, feeling unfairly criticized, or difficult or unpleasant working conditions are generally not so intolerable as to compel as reasonable person to resign). Moreover, we also note, as the administrative judge did, that the appellant initially raised these issues in August 2008, when he filed his first EEO complaint, but that he did not resign until January 28, 2009. *See Terban v. Department of Energy*, 216 F.3d 1021, 1025 (Fed. Cir. 2000) (evidence that a relatively short period of time elapsed between the alleged coercion and the employee's resignation is probative of involuntariness). This five month lapse of time further undercut the

appellant's assertion that his working conditions were so intolerable as to have compelled his resignation.

¶14 Accordingly, because the appellant did not make a nonfrivolous allegation casting doubt on the presumption that his resignation was voluntary, the administrative judge properly denied his request for a hearing and properly dismissed his appeal for lack of Board jurisdiction.* *Green*, 112 M.S.P.R. 59, ¶ 13.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

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* The record reflects that the appellant filed a motion to compel discovery that the regional office received on October 30, 2009, IAF, Tab 13, and a "Request for Deposition and Subpoenas" that the regional office received on November 12, 2009, and that the administrative judge did not rule upon these matters prior to issuance of her ID on November 19, 2009. The administrative judge's failure was harmless error, however, because the appellant has not indicated how the information contained in the discovery sought was relevant and material to the dispositive jurisdictional issue. *See* 5 C.F.R. §§ 1201.73(e)(1), 1201.81(b)-(c); *Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 30 (2007); *Nortz v. Department of Veterans Affairs*, 47 M.S.P.R. 526, 531-32 (1991); *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Moreover, the "Profile" the appellant submitted with his PFR, PFR File, Tab 1 at 13-18, does not constitute new evidence because the information contained in it was not unavailable despite due diligence when the record closed. *Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989).

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The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information 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, and 11.

FOR THE BOARD:

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