UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 188

Docket No. PH-315H-10-0101-I-1

Melia Elizabeth Smirne,

Appellant,

v.

Department of the Army,

Agency.

September 14, 2010

Paul V. Jorgensen, Esquire, Middletown, Maryland, for the appellant.

Karen L. Arnold, Esquire, Tobyhanna, Pennsylvania, 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 from the initial decision that dismissed her appeal of her probationary termination for lack of jurisdiction. For the reasons explained below, we GRANT the petition, VACATE the initial decision, and REMAND the appeal for proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was appointed on October 26, 2008, to a career-conditional position in the competitive service as a GS-0318-04 Secretary. Initial Appeal

File (IAF), Tab 4, Subtab 4f. The appointment was subject to a 1-year probationary period. *Id.* The agency terminated the appellant effective October 19, 2009, on the stated basis of performance deficiencies. IAF, Tab 4, Subtabs 4c, 4d at 1. She filed an appeal, alleging discrimination based on marital status, i.e., because she was a single mother. IAF, Tab 1. She requested a hearing. *Id*.

¶3 The agency filed a motion to dismiss the appeal for lack of jurisdiction. IAF, Tab 4, Subtab 1. The administrative judge issued an Order to Show Cause on jurisdiction setting forth the legal standard for Board jurisdiction over probationary terminations. *Id.*, Tab 3. After receiving a response from the appellant to the Order to Show Cause and an agency reply, *id.*, Tabs 7, 8, the administrative judge issued an initial decision dismissing the appeal. *Id.*, Tab 9. The administrative judge found that the appellant was terminated for unsatisfactory performance and that she failed to show that any other employee, married or single, with or without children, was treated less harshly for similar performance deficiencies. *Id.* at 5. The administrative judge therefore concluded that the appellant failed to make a nonfrivolous allegation of marital status discrimination and, accordingly, dismissed her appeal for lack of Board jurisdiction. *Id.* at 5-6.

¶4 The appellant has filed a petition for review asserting that she made a facially nonfrivolous allegation of marital status discrimination and that the administrative judge inappropriately weighed the evidence and, therefore, erred in dismissing her appeal without a hearing. Petition for Review (PFR) File, Tab 1 at 1, 8-15. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 6.

ANALYSIS

Applicable Legal Standard

¶5 Whether the Board has statutory jurisdiction over a termination or other adverse action depends on whether the appellant is a federal employee as that is

defined by 5 U.S.C. § 7511(a)(1). The statute provides, in pertinent part, that an individual in the competitive service is an "employee" if she (1) is not serving a probationary or trial period under an initial appointment or (2) has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A). The two prongs of the statutory definition are distinct and provide alternatives by which an individual may be found to be an employee with appeal rights. *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002).

¶6 An individual who is terminated during a probationary period, and who is excluded from the definition of an employee with statutory Board appeal rights under 5 U.S.C. § 7511(a)(1)(A), may still appeal a termination on limited grounds under Office of Personnel Management (OPM) regulations at 5 C.F.R. §§ 315.805 and 315.806. The cited regulations permit an appeal where, among other things, the appellant alleges discrimination based on partisan political reasons or marital status. *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 684-85 (Fed. Cir. 1985); *Strausbaugh v. Government Printing Office*, 111 M.S.P.R. 305, ¶ 6 (2009).

¶7 In this appeal, the PS-Form 50s for the appellant's appointment and her termination show that she had no prior federal service. IAF, Tab 4, Subtab 4c, 4f. Further, the appellant stated in her appeal that her length of government service was 11 months. *Id.*, Tab 1 at 2. Therefore, the appellant was not an "employee" with statutory appeal rights to the Board and the administrative judge properly analyzed the appeal using the limited regulatory appeal rights set forth above. We note the appellant has made no claim that her termination was for pre-appointment reasons, so appeal rights pursuant to 5 C.F.R. §§ 315.805 and 315.806(c) are inapplicable here.

¶8 To show that the Board has jurisdiction because of discrimination based on marital status or partisan political reasons, an appellant must make a nonfrivolous allegation that her termination was based on one of those factors. *See*

Strausbaugh, 111 M.S.P.R. 305, ¶ 6. Nonfrivolous allegations are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). To make a nonfrivolous allegation of marital status discrimination, a person may allege facts to show that she was treated differently because of her marital status or that go to the essence of her status as a married, single or divorced person. *See Qatsha v. Department of Defense*, 86 M.S.P.R. 121, ¶ 7 (2000). An appellant's allegations regarding marital status or partisan political discrimination must be "more than mere conjecture." *Ellis v. Department of the Treasury*, 81 M.S.P.R. 6, ¶ 13 (1999). An appellant must provide supporting facts to show that the allegation is not merely a *pro forma* pleading. *Stokes*, 761 F.2d at 686; *Strausbaugh*, 111 M.S.P.R. 305, ¶ 6; *see Qatsha*, 86 M.S.P.R. 121, ¶ 7. In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling her to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon*, 60 M.S.P.R. at 329. If the appellant makes a nonfrivolous allegation of discrimination based on marital status, she is entitled to a jurisdictional hearing. *See Stokes*, 761 F.2d at 686; *Strausbaugh*, 111 M.S.P.R. 305, ¶ 6.

The appellant made a nonfrivolous allegation that her termination was due to marital status discrimination.

¶9 In response to the administrative judge's Order to Show Cause on jurisdiction, the appellant submitted a sworn statement that: (1) the agency's

assertions of poor performance[1] were untrue; (2) that she was the only one of 10 newly hired secretaries who was unmarried and pregnant during the time she was employed there[2] and that she was the only new secretary terminated; and (3) that her supervisor's failure to counsel her regarding her performance, promptly credit her with donated leave, or congratulate her on the birth of her son are corroboration that her termination was based on her marital status. IAF, Tab 7. The agency submitted an affidavit from the appellant's supervisor that stated the decision to terminate the appellant was based on performance deficiencies and that no other secretary who had worked for him had similar deficiencies. *Id.*, Tab 8, Enclosure 1 at 1. The supervisor also stated that other single parents had worked for him successfully. *Id.*

¶10 Turning first to the appellant's contentions regarding her supervisor's behavior, we do not believe that the conduct she describes falls within the ambit of factual allegations that the Board has found constitute nonfrivolous allegations of marital status discrimination. *Cf. Strausbaugh*, 111 M.S.P.R. 305, ¶ 8 (finding that comments allegedly made by a supervisor that showed a "keen interest in the state of the probationer's marital status" were sufficient to constitute nonfrivolous allegations (citing *Gribben v. Department of Justice*, 55 M.S.P.R. 257, 259 (1992)). The appellant in this appeal has not made allegations about statements or conduct by her supervisor that reflect any animus or concern about her status as an unmarried person or single mother.

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[1] The agency's termination notice stated that the appellant regularly missed the weekly activities report deadline, routinely submitted documents such as travel documents and reports with errors, distributed Privacy Act material improperly and did not keep up with her filing duties. IAF, Tab 4, Subtab 4d at 1. The appellant specifically denied each of these assertions, except the allegation that she did not keep up with her filing duties. *Id.*, Tab 7 at 3-4.

[2] The appellant has stated that she was pregnant during the majority of her probationary period and was terminated 3 weeks after her return from maternity leave. IAF, Tab 7 at 1.

¶11 However, the appellant correctly asserts that the administrative judge improperly weighed the evidence and concluded that she failed to nonfrivolously allege jurisdiction based on marital status discrimination. *Ferdon*, 60 M.S.P.R. at 329. We find the appellant's sworn statement that she did not have the performance problems asserted by the agency, taken together with her statements that she was the only single, pregnant, newly hired secretary and the only new secretary terminated are sufficient to constitute nonfrivolous allegations that her termination was based on her marital status. If proven, these facts could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Id.*; *see also Brown v. Department of Health and Human Services*, 31 M.S.P.R. 451, 453-54 (1986) (an appellant's assertion that she was terminated because she was pregnant and the agency believed her to be "just another unwed mother" conferred jurisdiction, as it constituted a nonfrivolous allegation of marital status discrimination).

¶12 Because she has made a nonfrivolous allegation, the appellant is entitled to a jurisdictional hearing at which she must support her allegation with facts that would, if not controverted, require a finding that marital status discrimination was the basis for her termination. *See Stokes*, 761 F.2d at 686; *Strausbaugh*, 111 M.S.P.R. 305, ¶ 6.

ORDER

¶13 Accordingly, the appellant's petition for review is GRANTED, the initial decision dismissing the appeal for lack of jurisdiction is VACATED, and the

appeal is REMANDED to the Northeastern Regional Office for a jurisdictional hearing consistent with this Opinion and Order.

FOR THE BOARD:

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