UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 198

Docket No. DC-0752-10-0083-I-1

Carolyn Grant Mosby,

Appellant,

v.

Department of Housing and Urban Development,

Agency.

September 29, 2010

Vaughn M. Mungin, Esquire, Greenbelt, Maryland, for the appellant.

Cheryl Moat Taylor, Esquire, and Javes Myung, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed her removal. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115 and we therefore DENY it. For the reasons set forth below, however, we REOPEN the case on our own motion under 5 C.F.R. § 1201.118, AFFIRM as MODIFIED the portion of the initial decision that sustained the agency's charge, VACATE the portion that affirmed the removal penalty, and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 Prior to her removal, the appellant held the position of Freedom of Information Act (FOIA) Specialist, GS-11, with the agency's Office of the Executive Secretariat. Initial Appeal File (IAF), Tab 7 at 13, 68. On April 16, 2009, the appellant struck her co-worker, (redacted), in the face, causing her to bleed. IAF, Tab 12. The Federal Protective Service reported to the scene and arrested the appellant for simple assault. IAF, Tab 7 at 46-47. Subsequently, on May 5, 2009, the United States Attorney for the District of Columbia formally charged the appellant with assault, in violation of D.C. Code § 22-404. *Id.* at 62. On May 29, 2009, the appellant pled guilty in the Superior Court of the District of Columbia to simple assault, and received a sentence of 180 days incarceration, suspended as to all, and 1 year supervised probation, including community service and anger management classes. *Id.* at 58, 60. On July 9, 2009, the agency proposed to remove the appellant on a charge of Violent Behavior in the Workplace, based on the April 16, 2009 incident. *Id.* at 68-72. The appellant made an oral reply, and by letter dated September 27, 2009, the agency notified the appellant of its decision to remove her effective September 30, 2009. *Id.* at 79, 82-84.

¶3 The appellant filed a timely appeal on October 28, 2009. IAF, Tab 1. She did not deny striking (redacted) but she contended that she acted out of self-defense, that the removal penalty was inconsistent with penalties imposed on other employees for the same or similar offenses, and that there were mitigating factors, including previous provocation and harassment by (redacted) IAF, Tab 10. The appellant also alleged in her prehearing summary that she was "subject to a hostile work environment in direct violation of Title VII." *Id.* at 6. In her summary of the prehearing conference, however, the administrative judge did not include an affirmative defense of discrimination in the list of issues to be decided in the appeal, but indicated that the alleged hostile work environment would instead be considered as a possible mitigating factor under *Douglas v.*

Veterans Administration, 5 M.S.P.R. 280, 306 (1981). IAF, Tab 12 at 4. The administrative judge further advised the parties that the list of issues was exhaustive, and that any objection to the summary must be submitted in writing within 7 days. *Id.* at 4, 6. The appellant did not file an objection. Following a hearing, the administrative judge sustained the charge based on collateral estoppel, and further found that the agency had established nexus and that the penalty was reasonable. IAF, Tab 17 (Initial Decision, Jan. 22, 2010).

¶4 On petition for review, the appellant challenges the administrative judge's credibility findings. Petition for Review (PFR) File, Tab 1 at 85-87. She appears to concede that she will not be reemployed by the agency, but she requests a clean Standard Form (SF) 50. *Id.* The appellant has attached various documents to her petition, including two copies of her December 22, 2009 deposition for the agency and personal notes from April 16 through September 9, 2009. PFR File, Tab 1 at 3-84, 89-176. However, because the appellant has not shown that these documents were unavailable before the close of the record below despite her due diligence, we do not consider them. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). She also submitted on petition for review, without explanation, a copy of her Motion for Limited Discovery, dated January 4, 2010, that she had submitted below and that the administrative judge had denied. PFR File, Tab 3; IAF, Tabs 13-14. We note that the Board's regulations make no provision for discovery during the adjudication of a petition for review. *Fortson v. Department of the Navy*, 60 M.S.P.R. 154, 158 (1993). The agency has filed a response to the appellant's petition.[1] PFR File, Tab 5.

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[1] The agency initially designated its pleading as a cross petition for review. PFR File, Tab 4. However, it is apparent that the agency did so in error and does not intend to challenge the initial decision. Accordingly, we treat the agency's pleading solely as a response to the appellant's petition for review. *See Nixon v. Department of the Navy*, 51 M.S.P.R. 624, 626 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992) (Table).

ANALYSIS

Collateral estoppel applies under the law of the District of Columbia.

¶5 We agree with the administrative judge that the appellant's assault conviction is conclusive proof of the agency's charge. We find, however, that the initial decision did not correctly analyze the doctrine of collateral estoppel as it applies to this case. In applying the doctrine, the administrative judge relied on *Graybill v. U.S. Postal Service*, 782 F.2d 1567 (Fed. Cir. 1986), in which the Federal Circuit upheld the Board's finding that Mr. Graybill was precluded from introducing evidence that he was innocent of charges to which he had pled guilty in a prior criminal proceeding. However, the administrative judge did not observe that in *Graybill*, the Federal Circuit applied Maryland state law on collateral estoppel in determining the preclusive effect of the appellant's conviction in Maryland state court. *Id.* at 1571-73. Here, the appellant was convicted in D.C. court after pleading guilty to a violation of D.C. law. IAF, Tab 7 at 56, 58, 62. Accordingly, we will apply the common law of D.C. on collateral estoppel. *Cf. Raymond v. Department of the Army*, 34 M.S.P.R. 476, 478, 481-82 (1987) (applying federal law on collateral estoppel where the appellant was convicted in U.S. District Court of violating federal law).

¶6 The District of Columbia Court of Appeals has stated that the doctrine of collateral estoppel bars relitigation of an issue that was (1) actually litigated;[2] (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; and (4) under circumstances where the determination was essential to the judgment, and not merely dictum. *Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999). If an issue has actually been decided in the earlier litigation, and if the other elements of the doctrine of issue preclusion are present, then the doctrine may be invoked by one

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[2] An issue is "actually litigated" when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *Ali Baba Co., Inc. v. WILCO, Inc.*, 482 A.2d 418, 422 (D.C. 1984) (internal citation omitted).

who was not a party to the prior case. *Id.* Furthermore, collateral estoppel applies not only to judicial adjudications, but also to determinations made by agencies other than courts, when such agencies are acting in a judicial capacity. *Id.* The D.C. Court of Appeals also has held that where the required elements are present, criminal conviction bars relitigation of an issue determined in the criminal case in a subsequent civil proceeding. *Ross v. Lawson*, 395 A.2d 54, 56 (D.C. 1978).

¶7 Here, all four criteria are satisfied. The issue of whether the appellant was guilty of assaulting (redacted) was properly raised and submitted for determination by the D.C. Superior Court, which rendered a valid, final judgment on the merits, finding her guilty of the charge in question. Furthermore, as a party to that adjudication, the appellant had a full and fair opportunity to litigate the issue of her guilt or innocence, and the determination of her guilt was of course essential to her conviction. Thus, under D.C. law, the appellant's conviction precludes her from claiming innocence of the assault underlying the agency's charge. *Cf. Davidson v. United States*, 467 A.2d 1282, 1284 & n.2 (D.C. 1983) (finding that the appellant's criminal conviction based on his guilty plea would serve as conclusive evidence of his guilt in any subsequent civil action for damages). This further entails that the appellant may not pursue a claim of self-defense, which the D.C. courts recognize as an affirmative defense to simple assault. *See Guillard v. United States*, 596 A.2d 60, 62 (D.C. 1991). Accordingly, we affirm the portion of the initial decision that sustained the charge.[3]

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[3] We also affirm the portion of the initial decision finding that the agency met its burden of proof on nexus. The Board has long held that a charge of striking a co-worker has a direct effect on the efficiency of the service. *Johnson v. Department of the Air Force*, 10 M.S.P.R. 397, 399 (1982).

The appellant did not make an informed decision to abandon her Title VII claim.

¶8 Ordinarily, an appellant is deemed to have abandoned a discrimination claim if it is not included in the list of issues in a prehearing conference summary and the appellant was afforded an opportunity to object to the conference summary but did not do so. *Clarke v. Office of Personnel Management*, 73 M.S.P.R. 435, 442 (1997); *see Burge v. Department of the Air Force*, 82 M.S.P.R. 75, ¶ 31 (1999). In this case, however, the appellant's failure to preserve a Title VII claim may have been the result of misleading statements by the administrative judge. Specifically, in her summary of the prehearing conference, the administrative judge advised the parties that "[t]he Board reviews allegations of non-sexual hostile work environment under *Douglas*." IAF, Tab 12 at 4; *see also* Initial Decision at 4. While it is true that harassment and unusual job tensions may serve as grounds for mitigation, *see Douglas*, 5 M.S.P.R. at 305, the administrative judge appears to have suggested that an allegation of hostile work environment must be sexual in nature to be adjudicated as a discrimination claim. That is an incorrect statement of law. Title VII makes it unlawful for an employer to subject an employee to a hostile work environment based on any protected class, including not only sex, but also race, color, religion, and national origin.[4] *Asghar v. Paulson*, 580 F. Supp. 2d 30, 38 (D.D.C. 2008) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)); *see, e.g.*, *Richardson v. Chertoff*, EEOC Appeal No. 0120070003, 2008 WL 2264361, at *4 (finding discrimination based on a racially hostile work environment). We cannot discount the possibility that, but for the misleading statement by the administrative judge, the appellant would have pursued a claim that her removal was the result of a hostile work environment based on race, color, religion, or national origin—any of which could constitute a violation of 42 U.S.C. § 2000e-16, a prohibited personnel

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[4] Because the appellant specified that the alleged hostile work environment was in violation of Title VII, we may conclude that she did not raise a claim under another antidiscrimination statute.

practice under 5 U.S.C. § 2302(b)(1)(A), and an affirmative defense under 5 U.S.C. § 7701(c)(2)(B). Moreover, the Board would be obliged to adjudicate such a discrimination claim on the merits, pursuant to 5 U.S.C. § 7702(a)(1), and the appellant would be entitled to appeal our finding on that issue to the Equal Employment Opportunity Commission or the appropriate United States district court. *See* 5 U.S.C. §§ 7702(b)(1), 7703(b)(2). Because the record does not show that the appellant made an informed decision to abandon her Title VII claim, we remand this appeal for further adjudication. *Cf. Nazario v. Department of Justice*, 108 M.S.P.R. 468, ¶¶ 4-6 (2008) (remanding a withdrawn appeal based on evidence that the appellant withdrew his appeal based on erroneous or misleading information he received from the administrative judge).

ORDER

¶9 We REMAND this appeal to the Washington Regional Office for further adjudication. On remand, the administrative judge shall first inform the appellant of her burden of proof on a hostile work environment discrimination claim, and then determine whether the appellant wishes to pursue such a claim.

¶10 Should the appellant indicate that she does wish to pursue a Title VII claim on a theory of hostile work environment, the administrative judge shall adjudicate the discrimination claim and then issue a new initial decision, including notice of mixed-case appeal rights.

FOR THE BOARD:

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