UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 29

Docket No. DC-1221-10-0351-W-1

Sharon E. Simmons,

Appellant,

v.

Small Business Administration,

Agency.

February 25, 2011

Sharon E. Simmons, Omaha, Nebraska, pro se.

Ramona Powell, Esquire, Denver, Colorado, 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 April 7, 2010 initial decision that dismissed her individual right of action (IRA) appeal in which she also raised a claim of involuntary resignation. For the reasons set forth below, we DENY the appellant's petition, REOPEN the appeal on the Board's own motion, and AFFIRM the initial decision as MODIFIED, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 On December 17, 1996, the appellant and the agency reached a settlement agreement that resolved her Board appeal of a demotion action. Subsequently, on September 24, 1997, the agency removed the appellant from the federal service on a charge of absence without leave. She appealed the removal action to the Board, and on March 10, 1998, the parties reached a settlement agreement, which was entered into the record for enforcement purposes. Pursuant to the agreement, the appellant withdrew her appeal, resigned effective September 24, 1997, and:

> waived, released and forever discharged the Agency, its officials, representatives, employees and agents from any and all appeals, complaints, claims, causes of action, or grievances, however designated, whether known or unknown, pending or not now pending, contingent or fixed arising from the inception of the Appellant's employment with the Agency through the effective date of this agreement.

Simmons v. Small Business Administration, 475 F.3d 1372, 1383 (Fed. Cir. 2007). The administrative judge assigned to the case dismissed the appeal as settled and entered the March 10, 1998 agreement into the record for enforcement purposes. *Simmons v. Small Business Administration*, MSPB Docket No. DC-0752-98-0074-I-1 (Initial Decision, Mar. 10, 1998). That initial decision became final on August 22, 2000, when the Board denied the appellant's petition for review.

¶3 Subsequently, on September 22, 2000, the appellant filed a complaint with the United States District Court for the District of Columbia, alleging, among other things, that she had been wrongfully terminated and that the agency breached the 1996 settlement agreement. The district court concluded that the appellant failed to allege facts sufficient to state a claim that the 1998 settlement agreement should be set aside, and that the waiver provision of the 1998 agreement precluded the appellant from bringing certain of her claims. *Simmons v. Chuzi*, No. 00-02274, slip op. at 56-57 (D.D.C. Sept. 13, 2001). The United States Court of Appeals for the District of Columbia Circuit affirmed. *Simmons v. Frick Co.*, No. 02-5025, slip op. at 1 (D.C. Cir. July 5, 2002).

¶4 On November 23, 2005, the appellant filed another submission with the Board, seeking enforcement of the 1996 settlement agreement and alleging that her resignation in 1998 was involuntary. The administrative judge assigned to that case denied the appellant's petition for enforcement and dismissed her involuntary resignation appeal, finding that the waiver provision of the 1998 settlement agreement precluded both claims and that the doctrine of res judicata barred the appellant from relitigating the validity of the 1998 settlement. *Simmons v. Small Business Administration*, Docket Nos. DC-0752-96-1136-C-1, DC-0752-06-0356-I-1 (Initial Decision, Mar. 22, 2006). That initial decision became final on July 27, 2006, when the Board denied the appellant's petition for review. *Simmons v. Small Business Administration*, 103 M.S.P.R. 235 (2006) (Table). The appellant then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the Board's decision. *Simmons*, 475 F.3d at 1373. The court found that that the Board correctly found that the appellant was barred from asserting the invalidity of the 1998 settlement, although collateral estoppel, not res judicata, was the appropriate basis for dismissal. *Id*. at 1374.

¶5 On August 4, 2008, the appellant filed a second appeal alleging that her September 24, 1997 resignation from the Team Leader position was involuntary. The same administrative judge again dismissed the appeal, finding that the appellant was barred from relitigating the validity of the 1998 settlement, which was the sole and dispositive issue in her appeal of the alleged involuntary resignation. *Simmons v. Small Business Administration*, MSPB Docket No. DC-0752-08-0679-I-1 (Initial Decision, Aug. 21, 2008). That decision became final on December 22, 2008, when the Board denied her petition for review. *Simmons v. Small Business Administration*, 110 M.S.P.R. 497 (2008) (Table).

¶6 On August 14, 2009, the appellant filed a complaint with the Office of Special Counsel (OSC). Initial Appeal File (IAF), Tab 6, Exhibit A. *Id*. She asserted, among other things, that the agency illegally removed her "without first obtaining the legal authority and approval from the appointing officer" and that

this action constituted a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), (6), (8), (9), and (12), as well as a violation of chapter 75 procedures and due process rights. The appellant further alleged that during the adjudication of her removal appeal that resulted in the settlement agreement, agency officials falsified and illegally backdated the Standard Form (SF) 50 and SF-52 to conceal the fact that it removed her "without first executing a removal action." She contended that her resignation pursuant to the settlement agreement was therefore involuntary due to misrepresentation, fraud, coercion, and duress. In addition, she raised a claim that the agency had failed to "reinstate [her] back into [her] position and the Federal service." *Id*. The appellant later submitted an official OSC complaint form, dated November 23, 2009, with numerous attached exhibits. *Id*., Exhibit B. She specifically alleged that she had made four protected disclosures to various agency officials, including the Assistant Inspector General (IG), in July and August of 1997. *Id*. By letter dated December 7, 2009, the appellant amended her complaint to state that the agency's failure to reinstate her was "due to [her] making the protected whistleblowing disclosures that [she] made to higher level officials including the IG." IAF, Tab 7. By letter dated January 7, 2010, OSC informed the appellant that it was closing its investigation. IAF, Tab 1.

¶7 On March 9, 2010, the appellant filed the instant appeal, alleging that her alleged involuntary resignation and the agency's failure to reinstate her were the result of whistleblowing reprisal. *Id*. The administrative judge now assigned to the case processed the submission as an IRA appeal and did not docket the involuntary resignation claim as a separate appeal. The administrative judge notified the appellant of the requirements for establishing jurisdiction over an IRA appeal and ordered her to submit evidence and argument on the issue. IAF, Tab 3. In response, the appellant provided copies of her original complaint letter, the complaint form, and the letter of December 7, 2009. IAF, Tabs 6, 7. She

identified nine protected disclosures, including the four she alleged before OSC. IAF, Tab 6.

¶8 Subsequently, on April 7, 2010, the administrative judge issued an initial decision dismissing the appeal. IAF, Tab 13. In particular, she concluded that the agency's failure to reinstate the appellant was not a covered personnel action under 5 U.S.C. § 2302(a) and 5 C.F.R. § 1209.4 because the appellant was not entitled to reinstatement. *Id*. at 5-6. The administrative judge further found that the appellant's resignation was voluntary and therefore not a covered personnel action. *Id*. at 6. In addition, she found that the appellant's claims were precluded by the release clause of the 1998 settlement agreement, but she did not explicitly address the appellant's challenge to the validity of that agreement. *Id*. at 6-7.

¶9 On petition for review, the appellant contends that the administrative judge is biased and violated her due process rights by failing to conduct a hearing. Petition For Review File (PFR File), Tab 1. She objects that the Board and the courts have yet to address the merits of the removal action which she contends was "non-existent, illegal, and unconstitutional," or her claim that the 1998 settlement agreement was the result of misrepresentation and fraud. The appellant further argues that, contrary to the initial decision, she is entitled to reinstatement, and the agency's failure to reinstate her is covered under 5 U.S.C. § 2302(a). She also contends that the administrative judge failed to provide adequate jurisdictional notice addressing the waiver of appeal rights in the 1998 settlement agreement. *Id*. The agency has filed a response. PFR File, Tab 3.

ANALYSIS

The appellant has not established that the administrative judge was biased.

¶10 In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). Furthermore, an allegation of bias by an administrative judge

must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist, and must be supported by an affidavit. *Lee v. U.S. Postal Service*, 48 M.S.P.R. 274, 280-82 (1991). Because the appellant has not met these requirements, her claim of bias fails.

The doctrine of collateral estoppel bars the appellant from relitigating the validity of the 1998 agreement, which removes her involuntary resignation claim from the Board's jurisdiction.

¶11 An appellant's waiver of appeal rights in a settlement agreement is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and the execution of the waiver was not the result of duress or bad faith on the part of the agency. *Lawrence v. Office of Personnel Management*, 108 M.S.P.R. 325, ¶ 6, *aff'd*, 318 F. App'x 895 (Fed. Cir. 2008). A waiver of appeal rights that meets these criteria divests the Board of jurisdiction over an appeal. *Id*. An appellant may establish that the Board has jurisdiction over an action taken pursuant to the terms of a settlement agreement wherein she agreed to waive her appeal rights if she can establish that the settlement agreement was invalid due to fraud, duress, coercion, or misrepresentation by the agency.[1] *Id*. Here, the appellant seeks to establish that the March 10, 1998 settlement agreement, including its waiver provision, is invalid on account of fraud and misrepresentation.

¶12 The doctrine of collateral estoppel, or issue preclusion, bars relitigation of an issue where (1) the issue is identical to that involved in the prior action, (2)

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[1] The appellant asserts that the administrative judge adversely affected her substantive rights by failing to provide adequate jurisdictional notice on this point. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). However, the lack of notice could not have harmed the appellant because, as discussed below, she is barred from challenging the validity of the settlement in any event. *Cf. Clark v. Department of the Army*, 93 M.S.P.R. 563, ¶ 9 (lack of *Burgess* notice did not require remand of an IRA appeal where the appellant's own allegations established that he occupied a non-appropriated fund position not protected under the Whistleblower Protection Act).

the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party or as one whose interests were otherwise represented in that action. *Metallo v. Department of Defense*, 110 M.S.P.R. 229, ¶ 12 (2008). All four elements are present in this case. The district court in *Chuzi* actually and necessarily decided the identical issue raised by the appellant, i.e., the validity of the 1998 settlement, and the appellant's interests were fully represented in that proceeding. *Simmons*, 475 F.3d at 1374. Here, as in her 2005 appeal, the appellant asserts that the settlement was invalid due to agency misrepresentation, whereas before the district court she alleged that it was invalid due to incapacity and undue influence. *See id*. Nevertheless, collateral estoppel applies because the appellant has not shown or alleged that the evidence she cites in support of her misrepresentation claim was unavailable to her when she filed her action in district court. *See id*. Because the appellant is barred from challenging the validity of the 1998 settlement agreement, and the appellant's involuntary resignation claim is covered by the waiver provision in that agreement, the administrative judge reached the correct result in dismissing the claim.

The Board lacks jurisdiction over the IRA appeal because the appellant did not make a nonfrivolous allegation that a protected disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.

¶13 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC[2] and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a

[2] The record reflects that the appellant satisfied the exhaustion requirement with respect to the four disclosures she alleged before both OSC and the Board. *See Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶¶ 12-15 (2008) (in showing that the exhaustion requirement has been met, the appellant is not limited by the statements in her initial complaint, but may also rely on subsequent correspondence with OSC).

protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action as defined at 5 U.S.C. § 2302(a). *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *see* 5 U.S.C. § 2302(b)(8). If the appellant satisfies each of these jurisdictional requirements, she has the right to a hearing on the merits of her claim. *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 10 (2009).

¶14 We find that the appellant failed to establish jurisdiction over her IRA appeal. The appellant correctly notes that reinstatement is a covered personnel action under 5 U.S.C. § 2302(a)(2)(A)(v). However, she has failed to make any nonfrivolous allegations of a right to reinstatement apart from her failed challenges to her removal action and resulting settlement agreement; she merely reargues the merits of her removal appeal and the validity of her settlement agreement, and suggests reinstatement as a related remedy. Indeed, the appellant has not alleged, and the record does not show, that the agency had any legitimate basis for reinstating the appellant or that it ever made a decision not to reinstate her. The appellant thus has failed to make a nonfrivolous allegation that any of her alleged protected disclosures were a contributing factor in any agency decision to fail to take a personnel action. We therefore dismiss her IRA appeal for lack of jurisdiction. *See Jackson v. Department of Veterans Affairs*, 97 F. App'x 297, 301 (Fed. Cir. 2004) (dismissal appropriate where Board had already determined that the appellant resigned voluntarily and was not entitled to restoration).

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
717 Madison Place, N.W.
Washington, DC 20439

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:

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