**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2012 MSPB 82**

Docket No. SF-315H-11-0601-I-1

**Anita Marynowski,**

**Appellant,**

**v.**

**Department of the Navy,**

**Agency.**

July 12, 2012

Cecile M. Scoon, Esquire, Panama City, Florida, for the appellant.

Ponhara Po, FPO, APO/FPO Pacific, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

## OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed the appeal of her probationary termination for lack of jurisdiction. For the reasons set forth below, we VACATE the initial decision and REMAND the appeal for proceedings consistent with this Opinion and Order.

### BACKGROUND

¶2 The agency appointed the appellant to the competitive service position of Occupational Therapist, effective September 30, 2010. Initial Appeal File (IAF), Tab 7 at 53-58. It is undisputed that the appointment was subject to a 1-year

probationary period, and that the appellant had no prior federal service. *Id*. Effective April 24, 2011, the agency terminated the appellant's employment during her probationary period, citing unacceptable performance. *Id*. at 35-39.

¶3 The appellant subsequently filed an appeal with the Board, seeking to challenge her termination. IAF, Tab 1. She requested a hearing. *Id*. The administrative judge issued an acknowledgment order advising the appellant that she could appeal her termination if she made a nonfrivolous claim that her termination for postappointment reasons was based on partisan political reasons or marital status. IAF, Tab 2. The administrative judge afforded the appellant the opportunity to submit evidence and argument on the jurisdictional issue. *Id*. In response, the appellant alleged that her termination was the result of both partisan political discrimination and marital status discrimination. IAF, Tab 5. Based on the written record, the administrative judge dismissed the appeal, finding that the appellant had failed to make a nonfrivolous allegation of jurisdiction. IAF, Tab 8.

## ANALYSIS

¶4 The Board's jurisdiction is not plenary, but limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). An appellant bears the burden of proving Board jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(i) (2010). A probationary employee in the competitive service who has not completed 1 year of current continuous service has no statutory right of appeal to the Board. *See* 5 U.S.C. § 7511(a)(1)(A); *Niemi v. Department of the Interior*, 114 M.S.P.R. 143, ¶ 9; *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341 (Fed. Cir. 2002). However, a probationary employee in the competitive service may appeal a termination if she alleges that it was based on partisan political reasons or marital status. 5 C.F.R. § 315.806(b).

¶5 In determining whether an appellant has established jurisdiction under 5 C.F.R. § 315.806(b), the Board follows a two-step process. *See Burton v. Department of the Air Force*, 2012 MSPB 73, ¶¶ 10-11 (citing *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006)).[1] First, the appellant must make nonfrivolous claims of jurisdiction, i.e., factual allegations that, if proven, would establish that her termination was based on partisan political reasons or marital status. *See id*. An appellant who makes such nonfrivolous claims is entitled to a jurisdictional hearing at which she must then prove the basis for jurisdiction, i.e., that her termination was based on partisan political reasons or marital status, by a preponderance of the evidence.[2] *See id*.

The appellant did not make a nonfrivolous allegation that her termination was based on partisan political reasons.

¶6 In support of her claim that she had been subjected to partisan political discrimination, the appellant made the following factual allegations:

> 1. Appellant was often forced to endure negative political discussion about President Obama. Two of her coworkers, Wenzell Gadsden and Phillip Murray, would frequently try to engage her in a political discussion about President Obama.
>
> 2. When Mr. Gadsen and Mr. Murray mentioned President Obama, they never said "President Obama," but frequently referred to him as merely "Obama". They would say things like "I believe a lot of the problems with our country relate back to the Obama's decisions pertaining to the Don't Ask Don't Tell policy that Obama is changing.["]

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[1] While *Burton* addressed jurisdiction under 5 C.F.R. § 315.908(b), the jurisdictional standards applicable to that regulation are also applicable to 5 C.F.R. § 315.806(b). *See id.*, ¶ 8 n.1.

[2] The administrative judge incorrectly advised the appellant that nonfrivolous allegations are sufficient to establish jurisdiction. IAF, Tab 2. However, as discussed below, the appellant failed to make even a nonfrivolous allegation that her termination was based on partisan political discrimination, and she will have the opportunity on remand to prove her marital discrimination claim by preponderant evidence. We therefore conclude that she was not harmed by the error.

> 3. For some reason, perhaps due to her Caucasian race, Appellant's coworkers thought she was a Republican and tried to get her to discuss politics so they could find out her political views. She told them she did not want to discuss politics and that she did not feel the office was the place to discuss politics.
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> 4. Even though Appellant told her coworkers she did not want to discuss politics, they would always mention partisan politics when Appellant was around them. It was very oppressive.
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> 5. Appellant's supervisor said that the office was like a club and they got along well. They were people of color and Appellant needed to understand that. Appellant felt like the office was a political club, but Appellant was not part of the club and she was terminated.
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> 6. Ms. Nwuzor decided to terminate Appellant in part because Ms. Nwuzor thought Appellant did not get along with everyone else that was in the same racial and political club.

IAF, Tab 5 at 1-2.

¶7 The Board and its reviewing court have held that discrimination based on "partisan political reasons" under 5 C.F.R. § 315.806(b) means discrimination based on affiliation with any political party or candidate. *Mastriano v. Federal Aviation Administration*, 714 F.2d 1152, 1155-56 (Fed. Cir. 1983); *Sweeting v. Department of Justice*, 6 M.S.P.R. 715, 719 (1981). We agree with the administrative judge that the appellant's allegations that coworkers would attempt to engage her in political discussions about President Obama, the "Don't Ask Don't Tell" policy, or their political beliefs do not fall within the meaning of partisan political reasons as the phrase is used in the regulation. The appellant's bare assertions that her termination was based on her coworkers' belief that she was a Republican is mere conjecture. Further, we agree with the administrative judge that the appellant's allegation about "people of color" or a "club" referring to African Americans does not indicate discrimination based on affiliation with any political party or candidate. *Cf. Mastriano*, 714 F.2d at 1156 (allegations of discrimination based on union affiliation do not state a cause of action within the Board's jurisdiction under 5 C.F.R. § 315.806(b)). We therefore conclude that

the appellant failed to make a nonfrivolous allegation that her termination was based on partisan political reasons.

The appellant nonfrivolously alleged that her termination was based on marital status.

In support of her claim that her termination was based on marital status discrimination, the appellant made the following factual allegations:

> 7. When Appellant's Supervisor, and Appellant were alone she always commented on how Appellant was dressed and how her clothes and appearance would please Appellant's husband. This was inappropriate and made Appellant very uncomfortable.
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> 8. Before Appellant's husband arrived at the base, Ms. Nwuzor would often say things to Appellant like "when you husband gets here, you need to be sure and dress in something that he will notice or something that you know he will like."
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> 9. After Appellant's husband arrived at the base, Ms. Nwuzor would say to Appellant "do you need to get home to that husband of yours?", or she would say "don't be distracted from work because you are thinking of getting home to your husband."
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> 10. Ms. Nwuzor commented numerous times on the perfume Appellant was wearing and said "I'll bet that husband of yours really likes that perfume."
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> 11. Ms. Nwuzor never said these things to Appellant when someone else was around - it was only when it was the two of them. Her comments made Appellant very uncomfortable, because she felt like she was "coming on to Appellant," particularly before her husband arrived at the base.
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> 12. It appears that Ms. Nwuzor was jealous of Appellant because Appellant had a husband and Ms. Nwuzor was single, as Ms. Nwuzor discussed Appellant's marital status constantly.
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> 13. When Appellant first began work there, Ms. Nwuzor wouldn't take the time to train Appellant, yet when nobody was around except Appellant and [sic] Ms. Nwuzor always took the time away from work to discuss Appellant's clothing, Appellant's jewelry or Appellant['s] perfume, and how it would please her husband.
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> 14. Ms. Nwuzor was focused on Appellant['s] marriage and she was the person who recommended Appellant's termination.

IAF, Tab 5 at 2-3.

**¶8** To make a nonfrivolous allegation of marital status discrimination, an appellant must allege facts which, taken as true, would show that she was treated differently because of her marital status or facts that go to the essence of her status as married, single, or divorced. *See Qatsha v. Department of Defense*, 86 M.S.P.R. 121, ¶ 7 (2000). The appellant's allegations, taken as true, indicate that Ms. Nwuzor took a keen interest in the state of the probationer's marital status. *See Strausbaugh v. Government Printing Office*, 111 M.S.P.R. 305, ¶ 8 (2009); *Edem v. Department of Commerce*, 64 M.S.P.R. 501, 504 (1994). Furthermore, by alleging that Ms. Nwuzor, who recommended the appellant's termination, was jealous that the appellant had a husband, and that her fixation on the appellant's marital status caused her to lose training opportunities, the appellant stated a basis for her belief that there was a causal connection between her marital status and her termination. *See Strausbaugh*, 111 M.S.P.R. 304, ¶ 8 (appellant alleged he was terminated for bringing his fiancée to an official agency function in violation of rules which allegedly limited participation to immediate family members); *Edem*, 64 M.S.P.R. at 505 (appellant alleged that she believed her supervisor's disapproval of her separation and living arrangements played a substantial role in her termination). Accordingly, we conclude that the appellant has made a nonfrivolous allegation of jurisdiction, and is therefore entitled to a jurisdictional hearing at which she must prove her claim of marital status discrimination by a preponderance of the evidence. *See Burton*, 2012 MSPB 73, ¶¶ 10-11.

## ORDER

¶9 We REMAND the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

*Anita Marynowski v. Department of the Navy*

MSPB Docket No. SF-315H-11-0601-I-1

¶1 I agree with my colleagues' discussion and application of *Burton v. Department of the Air Force*, 2012 MSPB 73. I also agree that the appellant did not non-frivolously allege that the termination of her appointment during her probationary period constituted discrimination for partisan political reasons. I do not agree, however, that the appellant has non-frivolously alleged marital status discrimination.

¶2 The agency terminated the appellant's appointment during her probationary period on the ground that she had: Missed seven scheduled meetings that she was expected to attend; recommended discharging a "severely handicapped student" without following proper procedures; wanted to discharge another student who was "in great need" of her services; was tardy in completing her "CAF file"; failed to complete her "sponsorship" and her "HIPPA training"; and had been the subject of "complaints from schools regarding lack of communication, lack of seeing [her] students and the quality of [her occupational therapy] services." Initial Appeal File (IAF), Tab 7 at 35-37. As noted by the administrative judge, the appellant does not deny the allegations in the termination notice. IAF, Tab 8 at 8. She also does not contend that the agency has retained non-married probationers with performance deficiencies similar to hers, nor does she make any other allegation that, if proven, would permit an inference that the agency's reasons for terminating her appointment were a pretext for marital status discrimination. Although the appellant alleges generally that she performed well and that the families she worked with liked her, these are conclusory statements that do not contradict any of the legitimate non-discriminatory reasons in the termination notice. Petition for Review File, Tab 1 at 5. Likewise, the

appellant's allegation that her supervisor did not observe enough of her work to criticize her performance, *id.*, does not contradict the legitimate non-discriminatory reasons in the termination notice.

¶3 The appellant's supervisor's alleged comments about the appellant's husband were inappropriate. Nevertheless, such comments are at best weak circumstantial evidence of a discriminatory attitude, and standing alone they do not support an inference that the agency's numerous, unrebutted non-discriminatory reasons for terminating the appellant's appointment were a pretext for marital status discrimination. *See McClintock v. Veterans Administration*, 6 M.S.P.R. 475, 478 (1981) (a probationer's appeal was properly dismissed because she did not present sufficient evidence from which it could be inferred that the agency's legitimate non-discriminatory reasons for terminating her appointment were a pretext for marital status discrimination). The appellant's supervisor's alleged comments are not direct evidence of discrimination making this a mixed motive case, as the alleged comments do not "bear directly on the contested employment decision." *George v. U.S. Postal Service*, 74 M.S.P.R. 71, 80 (1997).

¶4 Accordingly, I would not remand this appeal for further proceedings but instead would affirm the administrative judge's dismissal for lack of jurisdiction.

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Mark A. Robbins
Member