UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 84

Docket No. PH-315H-11-0480-I-1

Malaika Green-Brown,
Appellant,
v.
Department of Defense,
Agency.

July 13, 2012

Malaika Green-Brown, Washington, D.C., pro se.

Charles A. Meade, Fort Meade, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

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. As explained below, we VACATE the initial decision and REMAND the appeal for proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The agency terminated the appellant during her probationary period from her Program Analyst position based on "repeated time and attendance problems." Initial Appeal File (IAF), Tab 8 at 17. On appeal, she challenged the merits of

the action and, referring to herself as a "single black mother," argued that her supervisor had violated her rights and treated her unfairly based on her "marital status, race, and parental status." *Id.*, Tab 1 at 5. She requested a hearing. *Id.* at 2. The administrative judge issued an order setting forth the legal standard for establishing Board jurisdiction over probationary terminations. *Id.*, Tab 2. In response, the appellant, among other things, repeated her claim that her supervisor used her status as a single black mother to create limitations, threaten her employment standing, and isolate her in the workplace.[1] *Id.*, Tab 4 at 6, 7. The agency filed a motion to dismiss the appeal for lack of jurisdiction, asserting, inter alia, that the appellant had not alleged any factual assertion to establish an appealable jurisdictional issue. *Id.*, Tab 5.

¶3 In an initial decision based on the written record, the administrative judge dismissed the appeal for lack of jurisdiction. *Id.*, Tab 9, Initial Decision (ID) at 1, 6. She found that, even accepting the appellant's allegations as true, the appellant failed to assert a nonfrivolous allegation of marital status discrimination because she did not provide any description of how married employees were treated more favorably and cited to no specific examples of when she was treated disparately or denied a benefit of employment based on her marital status. *Id.* at 4. The administrative judge further found that the appellant's allegation that she desired to, or was required to, care for her child did not support her claim of marital status discrimination because such allegations do not go to the essence of an individual's marital status. *Id.* at 5.

¶4 In her petition for review, the appellant challenges the administrative judge's findings and argues, inter alia, that she was denied a hearing. Petition for Review (PFR) File, Tab 1 at 5-7, 10-12. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 3.

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[1] The appellant also argued that the agency denied her the procedures set forth at 5 C.F.R. § 315.805, IAF, Tab 4 at 4-5, but these procedures apply to probationary terminations taken for pre-appointment reasons and therefore have no application to this appeal.

ANALYSIS

¶5 In determining whether an appellant has established jurisdiction under 5 C.F.R. § 315.806(b), the Board follows a two-step process. *Marynowski v. Department of the Navy*, 2012 MSPB 82, ¶ 5; *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)). 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. *Marynowski*, 2012 MSPB 82, ¶ 5. 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. *See id.*

¶6 Here, the appellant alleged that on numerous occasions her supervisor threatened her employment standing while referencing her marital and parental status in an effort to get her to switch teams and/or organizations, to return to her previous employer, or to quit. IAF, Tab 1 at 7, Tab 4 at 6. The appellant further asserted that, when those attempts failed, he moved to terminate her employment based "on bogus claims" in order to "cover up" his retaliatory actions. *Id.*, Tab 4 at 6. In this regard, she challenged the incidents on which her termination was based, noting that, after they occurred, she received a performance bonus. *Id.* at 8. In addition, the appellant described an incident that happened when she was working at home. According to the appellant, her supervisor asked where her daughter was, she replied that her uncle was also at home, and her supervisor said that it was only "okay" for her to work at home with her daughter present if someone was there to assist her. According to the appellant, married employees, including some who had minor or disabled dependents, were not subject to this policy. *Id.* at 9.

¶7 We find the appellant's statement challenging as unsupported the time and attendance problems asserted by the agency, taken together with her statements alleging that, by his remarks, her supervisor targeted her as a single mother are

sufficient to constitute nonfrivolous allegations that her termination was based on her marital status.[2] *See Marynowski*, 2012 MSPB 82, ¶ 8 (appellant's allegations that her supervisor showed a keen interest in her marital status, and was jealous that she had a husband, and that her fixation on the appellant's marital status caused her to lose training opportunities, constituted a nonfrivolous allegation of marital status discrimination); *Strausbaugh v. Government Printing Office*, 111 M.S.P.R. 305, ¶ 8 (2009) (appellant's allegations that his supervisor showed a keen interest in the state of his marital status, and that he was terminated for bringing his fiancée to an official agency function in violation of rules which allegedly limited participation to immediate family members, constituted a nonfrivolous allegation of marital status discrimination); *Edem v. Department of Commerce,* 64 M.S.P.R. 501, 504-05 (1994) (appellant's allegations that her supervisor showed a keen interest in the state of her marriage, particularly on how marital difficulties might affect her children, and that she believed her supervisor's disapproval of her separation played a substantial role in her termination, constituted a nonfrivolous allegation of marital status discrimination).

¶8 Because she made a nonfrivolous allegation, the appellant is entitled to a jurisdictional hearing at which she must establish by a preponderance of the evidence that marital status discrimination was the basis for her termination. *Marynowski*, 2012 MSPB 82, ¶ 8.

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[2] We agree with the administrative judge's finding that childcare responsibilities per se are not dependent on an individual's marital status and do not go to the essence of marital status. ID at 5; *see Awa v. Department of the Navy*, 41 M.S.P.R. 318, 322 (1989). However, we also note the appellant's statement in her petition for review that she did not provide any statements in her correspondence to the Board to suggest, as the administrative judge did, that "she desired to or was required to care for her child." PFR File, Tab 1 at 7; ID at 5.

ORDER

¶9 For the reasons discussed above, we REMAND this case to the 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.