

GLORIA L. CARMICHAEL
v.
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

DOCKET No.
PH315H8110318

OPINION AND ORDER

Appellant was terminated from the position of Social Insurance Representative during her probationary period for a failure to demonstrate satisfactory knowledge of Social Security Administration procedures and practices during her claim representative training.¹ On appeal to the Board's Philadelphia Regional Office, appellant alleged that the action was discriminatory because she refused to socialize and fraternize with some instructors, and because she was a widow of a deceased veteran.

The presiding official conducted a hearing in order to afford the appellant an opportunity to present evidence to substantiate her allegation that the agency terminated her because of reasons based on her marital status. Relying on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the presiding official found that appellant did not establish a *prima facie* showing of discrimination based on her marital status. The presiding official concluded, therefore, that the appellant had not met her burden of proof as to the Board's jurisdiction over her appeal, and ordered its dismissal.

In her petition for review of the initial decision, dated June 23, 1981, appellant contends that the presiding official improperly discontinued the hearing, and shifted the burden of proof on the issue of jurisdiction. Further, she asserts that she was deprived of presenting additional evidence required for the adjudication of her case. The Board hereby DENIES review for reasons discussed below.

A Federal employee who is serving a probationary period does not meet the statutory definition of "employee" under 5 U.S.C. § 7511(a)(1)(A), and therefore is generally not entitled to the right to appeal an adverse action to the Board under 5 U.S.C. §§ 7512 and 7513. *Perry v. Department of the Air Force*, 6 MSPB 339 (1981). However, under 5 C.F.R. § 315.806, the right of appeal to the Board does exist for an employee terminated during a probationary period when he alleges that the termination was the result of discrimina-

¹The notice of termination of January 7, 1981, stated that appellant's unsatisfactory progress during training strongly indicates that she may not possess the aptitude for successful performance, or that an inordinate amount of on-the-job training and supervisory guidance and assistance would be necessary for her to achieve minimum performance levels.

tion on the basis of marital status or partisan political reasons. See *Gaxiola v. Department of the Air Force*, 6 MSPB 432 (1981). Such an employee, however, has the burden of proof with respect to the Board's jurisdiction. 5 C.F.R. § 1201.56.

Appellant contends that the presiding official discontinued the hearing before she had the opportunity to introduce additional evidence. Under 5 C.F.R. § 1201.41(b), the Board's presiding officials are provided with the authority necessary to conduct a fair and impartial hearing. In this case, appellant testified on her own behalf, as did two other witnesses, on the issue of marital status discrimination. Moreover, appellant's attorney stated that he had ended his presentation of appellant's case with respect to this issue. Hearing Transcript (H.T.) at 58. Although the presiding official indicated that the hearing was to be reconvened, he also stated that he would first have to decide the jurisdiction issue on the basis of testimony given earlier at the hearing. H.T. at 164-67. Both the appellant and the agency submitted briefs on this matter to the presiding official after receiving transcript extracts of the hearing testimony. Subsequently, the initial decision was issued without the hearing being reconvened.

The presiding official found in his initial decision that appellant presented no evidence in support of her allegation of discrimination based on marital status other than the unexplained testimony of a co-worker who had heard that widows were not considered good employees. H.T. at 47. The presiding official concluded therefore that the appellant failed to establish a *prima facie* case of discrimination. Under *McDonnell Douglas, supra*, the employee has the initial burden of establishing a *prima facie* case of discrimination, after which the agency may rebut the employee's case by articulating a legitimate nondiscriminatory reason for the termination. The burden then shifts back to the employee to establish that the legitimate reason was pretextual. See also *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); Initial Decision at 3. In this case, the appellant did not make a *prima facie* showing. Based upon our perusal of the hearing transcript, the appellant had sufficient opportunity to make and amplify an offer of proof of discrimination, and to introduce relevant evidence in support of that allegation. We find, therefore, that the presiding official accurately and properly assessed the burdens on each party. See *Miller v. Federal Deposit Insurance Corporation*, 3 MSPB 416 (1980).

Further, the Board finds no indication of error by the presiding official in not reconvening the hearing under the circumstances. The fact that the presiding official did not accept the assertions of the appellant, or interpret testimony in the manner appellant would prefer, does not constitute a denial of due process, nor warrant the Board's full review of these matters. Cf. *Prime v. U.S. Postal Service*, 5 MSPB 110 (1981). Appellant has not identified anything in the

record that would justify attributing greater credibility to her allegation of marital status discrimination. *See Green v. U.S. Postal Service*, 3 MSPB 403 (1980). In the absence of such evidence, appellant has not established any basis for review. *See Robinson v. Department of Health and Human Services*, 3 MSPB 215 (1980).

Accordingly, the Board finds that appellant's petition for review does not meet the criteria for review under 5 C.F.R. § 1201.115.²

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision will become the Board's final decision five (5) days from the date of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., August 27, 1982

²Because of the presiding official's finding on the discrimination issue, he did not address the timeliness of the appeal. Initial Decision at 4. The Board also makes no determination in this regard.