

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

2011 MSPB 93

Docket No. CH-0752-10-0622-I-1

**Carol A. Moore,
Appellant,**

v.

**United States Postal Service,
Agency.**

November 3, 2011

William Saltsman, North Lima, Ohio, for the appellant.

Arthur S. Kramer, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued December 20, 2010, that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, the Board VACATES the initial decision and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant, an EAS-16 Postmaster in Diamond, Ohio, alleged that the agency placed her on enforced leave due to its failure to reassign her to another post office. Initial Appeal File (IAF), Tab 1 at 1, 5. The administrative judge

gave the appellant notice of the burden to establish jurisdiction over an enforced leave claim in two situations, where an agency places an employee on forced leave to inquire into her ability to perform and where an employee who is absent for medical reasons asks to return. IAF, Tab 2 at 2.

¶3 In response, the appellant alleged that she notified her supervisor on June 29, 2009, that a customer at the Diamond Post Office was stalking her. IAF, Tab 4 at 1, Subtab A. The appellant further alleged that, on August 14, 2009, the customer attempted to get close to her by staring at her and approaching the post office counter without conducting business. *Id.* The appellant claimed that the customer then followed her after work to a Home Depot 15 miles away from the Diamond Post Office and sat in his car, moving it to different parking spaces and staring at her before driving away. *Id.*

¶4 Subsequently, after the appellant was unable to reach her supervisor by telephone, she sent him an August 17, 2009 e-mail message describing that incident. *Id.* The appellant did not return to work at the Diamond Post Office after that incident, claiming that because that location is secluded and she was alone there for a major part of each day, she was in genuine fear for her safety. IAF, Tab 4 at 1.

¶5 In order to avoid the stalking customer, the appellant claimed that she requested a lateral reassignment or detail until such an assignment was available. *Id.* The appellant provided a December 15, 2009 letter from Psychologist Diedre Petrich, Ph.D., stating that the appellant suffered from Post Traumatic Stress Disorder (PTSD) as a result of the stalking, that she would benefit from a lateral reassignment, and should not be returned to the Diamond Post Office. *Id.* at 4, Subtab C. The appellant argued that her supervisor ignored her reasonable accommodation request and that the agency's failure to address the situation forced her to use leave to avoid the resulting hostile work environment. IAF, Tab 4 at 1-2.

¶6 The agency moved to dismiss the appeal for lack of jurisdiction, and challenged the appellant's assertion of enforced leave. IAF, Tab 5. Specifically, the agency cited an unbroken series of prescription notes from "Patsy Buccino, D.O., Inc.," dated between August 16, 2009, and May 21, 2010. *Id.* at 6, 13-23. In her first note, Dr. Buccino wrote that the appellant was unable to return to work until her next scheduled evaluation because of anxiety due to working conditions. *Id.* at 13. Dr. Buccino's second note included a diagnosis of generalized anxiety, panic attacks, and depression. *Id.* at 14. The rest of Dr. Buccino's notes essentially report that the appellant is to remain off work until her next appointment. *Id.* at 15-23.

¶7 The agency also noted that on November 16, 2009, it terminated the offending customer's post office box, moved his box to another post office, and prohibited him from entering the Diamond Post Office or its parking lot under penalty of trespass. *Id.* at 6-8. The agency further asserted that, as early as October 12, 2009, it had offered to reassign the appellant once her doctor released her to full duty, but that it had not yet received that release. *Id.* The appellant challenged the agency's assertion that it had offered to reassign her and argued that the agency's letter to the offending customer threatening prosecution was insufficient to protect her. IAF, Tab 7 at 1-3. She also argued that the agency insisted that she return to the Diamond Post Office or that she remain off work. *Id.* at 3.

¶8 After the administrative judge granted the parties' joint motion to suspend case processing, the agency renewed its motion to dismiss. IAF, Tabs 9-11. Among other things, the agency alleged that it had returned the appellant to duty at another post office as of June 29, 2010. IAF, Tab 11 at 5. In response, the appellant acknowledged her reassignment, but she also argued that the agency could have reassigned her sooner and eliminated the continued enforced leave. IAF, Tab 12 at 2. Specifically, the appellant alleged that she informed the agency "from the first day" that she was "perfectly capable" of performing her duties in

another location away from the offending customer, where she would not be subject to his threats and intimidation. *Id.*

¶9 Without holding the requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 1 at 2, IAF, Tab 13, Initial Decision (ID). The administrative judge found that the appellant's medical evidence regarding her return to work was ambiguous. ID at 6. In this regard, the administrative judge noted evidence that Dr. Petrich had released the appellant to duty on December 15, 2009, contingent on her reassignment from the Diamond Post Office. ID at 6. In contrast, the administrative judge also found that Dr. Buccino had continuously certified that the appellant was under her care and unable to work during the entire time of the alleged constructive suspension. ID at 6-7. Citing Dr. Buccino's certifications that the appellant was under her care and unable to return to work, the administrative judge concluded that the appellant failed to nonfrivolously allege that she was constructively suspended. *Id.*

¶10 In her petition for review, the appellant asserts that the administrative judge erroneously denied her a hearing. Petition for Review File, Tab 1 at 3. Specifically she claims that the administrative judge failed to consider the gravity of the customer's stalking behavior and the agency's minimal intervention, in light of its obligation to protect employees from such threats, in concluding that the appellant did not present a nonfrivolous allegation of jurisdiction. *Id.* at 6.

ANALYSIS

¶11 An appellant is entitled to a jurisdictional hearing in a constructive suspension appeal based upon intolerable working conditions where the appellant sets forth allegations of fact which, if true, would show that her working conditions were so intolerable that a reasonable person in her position would have been compelled to absent herself from the workplace. *Brown v. U.S. Postal Service*, 115 M.S.P.R. 88, ¶ 8 (2010); *Wegener v. Department of the Interior*,

89 M.S.P.R. 644, ¶ 13 (2001); *Peoples v. Department of the Navy*, 83 M.S.P.R. 216, ¶ 5 (1999). Additionally, the appellant must allege facts which, if proven, would demonstrate both that she put the agency on notice of the existence of the objectionable working conditions and that she requested assistance or remediation from the agency. *Peoples*, 83 M.S.P.R. 216, ¶ 5.

¶12 As set forth above, the appellant asserted that she worked alone much of the day at a secluded facility, and that one of her customers stalked her. IAF, Tab 4 at 1. The appellant has also asserted that the stalking caused her so much stress that she was unable to report for duty, and has presented her physician's statement that anxiety caused by her working conditions rendered her unable to work. *Id.*; IAF, Tab 5 at 13. Further, the appellant's psychologist subsequently diagnosed the appellant with PTSD as a result of her working conditions and recommended a transfer away from the Diamond Post Office as a remedy. IAF, Tab 4, Subtab C. The appellant has also alleged that she notified her supervisor of the problem, and told the agency that she could perform any and all of her duties in another location. *Id.*, Subtab A; IAF, Tab 4 at 2. We find that these specific allegations of intolerable working conditions constitute a nonfrivolous allegation of involuntary absence from duty. *See Wegner*, 89 M.S.P.R. 644, ¶ 13; *Peoples*, 83 M.S.P.R. 216, ¶¶ 11-13.

¶13 Thus, we find that the appellant is entitled to a jurisdictional hearing on her constructive suspension claim at which she will have the burden of establishing jurisdiction over her appeal. *Peoples*, 83 M.S.P.R. 216, ¶ 13.

ORDER

¶14 Accordingly, we REMAND the appeal to the regional office for a jurisdictional hearing on the appellant's constructive suspension claim.

FOR THE BOARD:

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