

SONJA SPAIN, Appellant, v. DEPARTMENT OF HOMELAND SECURITY, Agency.

DOCKET NUMBER PH-0353-04-0361-I-1

MERIT SYSTEMS PROTECTION BOARD

99 M.S.P.R. 529; 2005 MSPB LEXIS 6637

June 9, 2005

COUNSEL:

[**1]

Martin J. Clancy, Esquire, Pittsburgh, Pennsylvania, for the appellant.

Heather Sigrist Book, Esquire, Arlington, Virginia, for the agency.

OPINION BY: ROBERTS, JR.

OPINION:

BEFORE

Neil A. G. McPhie, Chairman

Barbara J. Sapin, Member

OPINION AND ORDER

[*P1] The appellant has petitioned for review of an initial decision that dismissed for failure to state a claim upon which relief can be granted her appeal of the agency's alleged failure to reemploy her following the completion of her military service with the United States Air Force Reserve. For the reasons set forth below, we DENY the appellant's petition for review, REOPEN the appeal on our own motion, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

[*P2] The appellant was a Supervisory Transportation Screener with the Transportation Security Administration (TSA) serving in an excepted service appointment subject to the completion of what the agency characterized as a one-year probationary period. Initial Appeal File, MSPB Docket No. PH-0752-03-0298-I-1 (IAF 1), Tab 7, Subtab 4e. On or about April 13, 2003, the appellant was called up to active military duty. *Id.*, Subtab 4b. On May 24, 2003, [**2] during the putative probationary period, the agency terminated her for alleged misconduct that occurred prior to her active duty. *Id.*, Subtab 4a. While the appellant was still performing active military duty, she filed an appeal contending that the termination constituted retaliation for whistleblowing, as well as a de facto denial of her reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). IAF 1, Tab 1.

[*P3] After holding a hearing, the AJ found that the Board lacked jurisdiction over the appellant's appeal. Initial Decision, MSPB Docket No. PH-0752-03-0298-I-1. The appellant petitioned for review of that initial decision, and the Board denied her petition for review by Final Order dated August 10, 2004. *Spain v. Department of Homeland Security*, 96 M.S.P.R. 647 (2004) (Table).

[*P4] Meanwhile, on or about April 22, 2004, the appellant completed her military service and thereafter requested reemployment in her former position. Initial Appeal File, MSPB Docket No. PH-0353-04-0361-I-1 (IAF 2), Tab 1 at 1; *see also* IAF 2, Tab 4 at 18. The agency denied her request on the basis that she [**3] had been terminated for cause and that there was no obligation to reemploy her. * *Id.* The appellant then filed the instant appeal, contending that the agency's failure to reemploy her in her former position violated USERRA, specifically, 38 U.S.C. § 4312, relating to reemployment rights. *Id.*, Tabs 1, 5.

* Although neither party proffered any evidence to support the facts as stated in this paragraph of our Opinion and Order, representatives for both parties appear to agree that these facts are not disputed.

[*P5] Without holding a hearing, the AJ dismissed the appeal for failure to state a claim upon which relief can be granted. The AJ found that the appellant did not have an absolute right to reemployment under USERRA because regulations promulgated by the Office of Personnel Management permit agencies to remove Federal employees "for cause" while they are performing military service. Initial Decision, MSPB Docket No. PH-0353-04-0361-I-1 (I.D. 2) at 2; *see* 5 C.F.R. § 353.209(a). The AJ found that the appellant's termination based on alleged misconduct constituted a separation "for cause" and that the agency's action was reasonable [**4] under the circumstances. I.D. 2 at 2-3.

[*P6] The appellant petitions for review of the initial decision, contending that the AJ erred by finding that she was separated for cause, and that she is entitled to reemployment under section 4312. Petition For Review File (PFRF), Tab 1. The agency has filed a response in opposition to the petition for review in which it does not address the appellant's section 4312 claim, but instead argues that the appellant has failed to state a proper claim under USERRA's anti-discrimination provision, 38 U.S.C. § 4311. PFRF, Tab 4.

[*P7] Following receipt of the parties' submissions, the Board, citing the recent decision of the United States Court of Appeals for the Federal Circuit in *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380, 1382-83 (*Fed. Cir.* 2004), issued a show-cause order directing the appellant to submit evidence and argument to show why her appeal should not be dismissed for lack of jurisdiction. PFRF, Tab 5. In her response to the show-cause order, the appellant argues that the Board has jurisdiction over her appeal because the *Conyers* decision does [**5] not prohibit the Board from hearing appeals of a non-frivolous USERRA violation. PFRF, Tab 6. The agency has filed a response to the show-cause order in which it argues that, pursuant to *Conyers*, the Board lacks jurisdiction over the appellant's appeal. PFRF, Tab 7.

ANALYSIS

[*P8] Subsequent to the issuance of the initial decision in this case, and subsequent to the filing of the petition for review and the agency's response to the petition for review, the Federal Circuit issued its decision in *Conyers*, 388 F.3d at 1380. In *Conyers*, the court held that the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71 (2001), excluded TSA screeners from coverage under USERRA and certain other provisions of law applicable to other Federal employees and other employees of TSA. *See Conyers*, 388 F.3d at 1382-83. Specifically, section 111(d) of the ATSA provides:

Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals [**6] as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under [49 U.S.C. § 44901]. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

49 U.S.C. § 44935 note. The court found that the "notwithstanding" clause "signals that this screener-specific provision is to override more general conflicting statutory provisions to the extent that they would apply to screeners." *Conyers*, 388 F.3d at 1382. The court concluded that the "notwithstanding" clause divested the Board of jurisdiction to hear appeals from TSA screeners alleging violations of laws that otherwise would apply to screener positions, such as, in the *Conyers* case, USERRA, the Whistleblower Protection Act, the Veterans' Employment Opportunities Act of 1998, suitability determinations under 5 C.F.R. part 731, employment practices appeals under 5 C.F.R. part 300, and the Board's review of agency regulations under 5 C.F.R. part 1203. *Conyers*, 388 F.3d at 1382-83.

[*P9] It is well [**7] settled that decisions of the Federal Circuit constitute precedent that is binding on the Board. *See, e.g., Pitsker v. Office of Personnel Management*, 89 M.S.P.R. 252, P4 (2001); *Swentek v. Office of Personnel Management*, 76 M.S.P.R. 605, 615 (1997). Although the relevant position in this case is a supervisory screener position, the "notwithstanding" clause of the ATSA is equally applicable to supervisory screeners as to screeners. *Conyers*, 388 F.3d at 1382. Because USERRA appeals by screeners are excluded from the Board's jurisdiction under the ATSA, the Board lacks jurisdiction over the instant appeal regardless of whether the appellant was separated for cause. *Id.* at 1382-83.

ORDER

[*P10] 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 [**8] 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>. [**9] Additional information is available at the court's website, <http://fedcir.gov/contents.html>. 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:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.