

ANNE VISSER NEY v. DEPARTMENT OF COMMERCE
Docket # AT-4324-11-0181-I-1
Response to Agency's Motion to Dismiss/Stay dated 12/03/2010
Summary Page

Case Title : ANNE VISSER NEY v. DEPARTMENT OF COMMERCE

Docket Number : AT-4324-11-0181-I-1

Pleading Title : Response to Agency's Motion to Dismiss/Stay dated 12/03/2010

Filer's Name : Anne Visser Ney

Filer's Pleading Role : Appellant

Details about the supporting documentation

N/A

Table of Contents

Pleading Interview	3
Uploaded Pleading Text Document	4
Certificate of Service	12

ANNE VISSER NEY v. DEPARTMENT OF COMMERCE
Docket # AT-4324-11-0181-I-1
Response to Agency's Motion to Dismiss/Stay dated 12/03/2010
Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

**UNITED STATES OF AMERICA
MERITS SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE**

Anne Visser Ney
Appellant
V.

Administrative Judge Richard W. Vitaris
DOCKET NUMBER AT-4324-11-0181-I-1

DEPARTMENT OF COMMERCE
Agency

DATE: December 6, 2010

**APPELLANT’S RESPONSE TO AGENCY’S MOTION TO DISMISS AND AGENCY’S
REQUEST FOR STAY**

INTRODUCTION

The appellant objects to the Agency’s motion to dismiss or stay the above captioned case.

The Agency’s argument that the Merit Systems Protection Board (MSPB) lacks jurisdiction is not supported in their motion. The establishment of jurisdiction over a Uniformed Services Employment and Reemployment Rights Act (USERRA) discrimination appeal requires that the appellant (1) performed or has an obligation to perform duty in a military service; (2) the Agency denied the appellant initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service.

The Agency further alleges that the appellant has not made a non-frivolous allegation of USERRA violations. The appellant cited USERRA violations in her original appeal (Ney v. Department of Commerce, Docket Number AT-315H 10 0148-B-1), and has cited below additional USERRA violations by the Agency and it’s representatives.

LEGAL ARGUMENT AGAINST MOTION TO DISMISS

Establishment of Jurisdiction of USERRA discrimination –

- (1) The appellant was a Chief Warrant Officer (BOSN4) in the U.S. Coast Guard Selected Reserve before, during and after her employment at the National Marine Fisheries Service (NMFS), Marine Mammal Protection Branch in St Petersburg, FL. The Agency has ample evidence in its records to support this fact based on the appellant's SF-50 dated 10/14/10, showing a 5 - point veterans preference in block 23. The appellant's Statement of Earnings and Leave provided by the Agency to the appellant every pay period, includes an item "Regular Military Leave" code 65. The Agency also has the appellant's employment application, resume and other documents certifying her military service.
- (2) The Agency denied the appellant retention, promotion or any benefit of employment by terminating her 5 days before the end of her one-year trial period. The Agency has repeatedly cited that she was terminated because she did not "demonstrate fitness for continued employment" and her supervisor found the appellant "had difficulties in following directions and retaining information critical to the performance of her job". The appellant has overwhelmingly offered evidence that her termination was not related to performance. The appellant received a very high evaluation from that same supervisor, and was never counseled, disciplined or advised of substandard performance. The Agency has not offered any documents, statements, or specific details of the appellant's lack of "fitness" or "difficulties following directions or retaining information...". The appellant believes that the Agency and its representatives cited her for performance as cause for termination when it was actually because of, marital status, USERRA violations and VEOA violations.
- (3) The appellant cited a limited number of specific USERRA discriminations in the original appeal (Ney v. Department of Commerce Docket Number AT-315H 10 0148-B-1). The appellant believed the marital status discrimination exhibited by her supervisor was most applicable in getting the MSPB to accept jurisdiction of an appeal from a trial period employee. The appellant believed that once the MSPB took jurisdiction of the appeal based on marital status discrimination, then all other forms of prohibited personnel practices, marital discrimination, USERRA violations and VEOA violations would then be included in a MSPB hearing. The appellant encloses in this motion the USERRA violations included in the original appeal and additional violations not included in the original appeal.

- (1) In September, 2008, Ms. Engleby and my 2nd line supervisor, David Bernhart, discussed, during my job interview, **the effect of my extensive (military) travel on my spouse;** my family status, **and why I left active military service in 1992** (to be a stay-at-home mom).
- (2) On October 29th, 2008, Ms. Zoodsma questioned me on the phone about my background, including my **military service**, marriage/ family, and science. She asked me if I was now “gainfully unemployed”.
- (3) On November 10th, 2008, three weeks after I started work, Ms. Engleby finally counseled me on a performance plan and her expectations. In the meantime, she kept telling me that I would figure it out. That day, she answered my specific performance plan questions with vague expectations. For example, (Q): “Who are my customers?” (A): “Pretty much anyone who wants something”. **I suspected that I was not her first choice of hire, but probably got the job with my five-point veteran’s preference.** I felt that she was going to make it difficult for me to both understand and to excel in the job.
- (4) On March 25th, I confronted Ms. Engleby about my perceptions of the hostile work environment. I asked her directly about the possibility of discriminatory treatment based on marital status, age, or **my military reserve status.** As part of this discussion that I initiated, I said that I felt I was being set up and purposely kept in the dark about information I needed to get my job done. I cited to her: her inaccessibility by e-mail, phone, and/or presence in the office; her lack of even minor clarifications that were resulting in extra, duplicate and unnecessary work for me; my inaccessibility to data files that were stored on personal, rather than common office drives; and problems she created for me because she had not been approving work (that required her approval) in a timely fashion. Ms. Engleby insisted that she had had no idea that these things were causing problems; she wrote herself a list of things to do, including “answer Anne’s e-mails, review/ approve work in a timely fashion,” etc. She insisted that my work was “good, great” and denied that there was any discrimination problem in the Branch or with her. She said she “appreciated my fresh perspective on problems” and thanked me for my good performance.

Additional USERRA discriminations -

- (1) September 2008. Laura Engleby asked me during my initial interview (which was conducted while I was in uniform) specifically what my status was with respect to the Coast Guard, when I would be released from active duty, what my obligation would be as a drilling reservist, when I would be released from service, and what other periods of service would be required for active duty. I told her the situation, including that I was a key Coast Guard Officer already assigned to planning Coast Guard and other waterborne security operations for the up coming Super Bowl. The duties would require me to be gone occasionally during the week for planning meetings with other federal and state agencies, as well as during a three-week period in January. I believe that the tenor of Laura Engleby's questions were designed to get me to commit to never have my reserve obligation interfere with NMFS duties; and/or to let me know that, if hired, her expectation would be that NFMS would always come first.
- (2) January 2009. Laura Engleby talked to me about the difficulties me being absent for the Super Bowl created for her and the Marine Mammal Branch, during the busy January calving season. I felt that her intention was to tell me that my reserve military duty was interfering with my employment at NOAA. She scheduled me for a meeting, even though she knew it conflicted with my reserve duty, on a day I was already scheduled to attend a Super Bowl pre-planning meeting in. I had to leave the Super Bowl meeting early because of the conflict, although I was under orders and on military leave. I ended up requesting that the Coast Guard cancel my orders for the Super Bowl operation, which they did. This left my Coast Guard colleagues and subordinates without an experienced and senior intelligence officer in the Emergency Operations Center. I was, and continue to be, troubled that I had to choose between my Coast Guard shipmates and keeping my job at NOAA. I was concerned at the time that if I did not placate Laura Engleby's demands to maintain my workload at NOAA, she would find a way to terminate me during my trial period.
- (3) March 2009. The CG ordered me to attend a pre-planning meeting for Operation South East Watch (OSEW), which is a Department of Defense and Department of Homeland Security joint counter drug and alien interdiction operation. Laura Engleby warned me that the meeting would interfere with my regular duties at NOAA. Again, I canceled my attendance at the meeting, basically bargaining with

Laura Engleby to re-schedule another day of reserve duty, so that I could attend the meeting she had scheduled.

- (4) April 2009. I was ordered to three weeks combined Active Duty Training-Annual Training, and Inactive Duty training for duties during for OSEW. Because of Laura Engleby's earlier remarks about reserve duty interfering with NOAA, I felt pressured to:
 - a. Attend conference calls she scheduled that included items germane to my NOAA duties.
 - b. Continue to come to work at NOAA and work on projects assigned, while also on active duty at the nearby Coast Guard Base.
 - c. Attend a marine biology seminar at the University of South Florida on dolphin behavior near fishing boats.
 - d. Continue to work on NOAA-assigned projects at night at home.
- (5) May-July 2009. I was required to take military leave hours for military readiness requirements at times Laura Engleby found inconvenient. For example, annual physicals are now scheduled by a central clearinghouse with little reservist input; the medical provider is in NE Tampa and I was twice ordered to take nearly a full day of military leave to complete physicals, in addition to other shorter medical appointments for shots, x-rays, pap smear, etc. Each time I feared telling her that I had a doctors appointment, because I felt that she was increasingly angry that my time being taken away from her at NOAA.
- (6) August 2009. The Coast Guard asked me to remain in reserve drilling status for another year. The Coast Guard valued my skill set in intelligence gathering and operations planning and they waived the mandatory retirement to keep me on as Chief Warrant Officer. While I never felt comfortable discussing my reserve time with Laura Engleby, I told her that I would be staying on for another year. Her body language and facial expressions suggested that she was extremely displeased. I believe it was the catalyst for her deciding to terminate me during my trial period.
- (7) September 2009. About a week after she found out I was staying on with the Coast Guard. David Bernhart came to my office and asked me if I was sure I still wanted to attend a NOAA training course (Fisheries 101), for which I had been scheduled to travel to Washington, DC. Fisheries 101 is a week long course designed as a fast-track orientation for employees with 1-3 years of service. I said yes, I was looking forward to the scheduled training. He asked again, was I sure? I went to the training

and in hindsight, I believe that the news of my additional year of reserve obligation and Laura Engleby's discrimination of me based on marital status finalized their decision to terminate me. Otherwise, why would they schedule me to go to Fisheries 101 and then fire me two weeks later?

- (8) 01 October 2009. My new drill obligation started with the new Fiscal Year.

Note: All military leave was routed and approved through NMFS prior to drill periods, including explanations about the type of duty being performed, the reason for duty and the dates/times of absence; to include USERRA notification to employer prior to my annual Active Duty Training (two week) period in April, 2009.

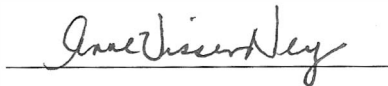
ARGUMENT AGAINST MOTION TO STAY

In the interest of meeting the MSPB's goals of expedience, the appellant respectfully requests the Agency's motion to stay be denied.

- (1) The Agency has been aware of the appellant's allegations of prohibited personnel practices, marital status discrimination, USERRA violations and VEOA violations for over one year. The original Agency Representative informed the appellant that the Agency would litigate appeals as long as it took. The appellant has filed requests for discovery, as directed by the Administrative Judge, on all three appeals, starting in November of 2009.
- (2) The appellant has attempted to resolve this personnel action with the Agency since October 8, 2009 beginning at the lowest level possible with Laura Engleby and David Bernhart when she was terminated. On October 19th 2009, the appellant requested, in writing, a meeting with Agency management in St. Petersburg, FL, requesting an explanation of performance deficiencies cited in the memo of termination and on the SF-52. That request was not answered until November 20th 2009, when Frederick Sutter denied the request. The appellant attempted to resolve the original appeal through the Agencies Equal Opportunity Office. The appellant has attempted to settle with the Agencies representatives, who would not reply to settlement offers.

- (3) The appellant has suffered extreme damage to her professional and personal reputation in this community. The appellant's employment potential within the federal and state agencies in the local area has been damaged beyond repair. The appellant was a highly respected member of the military, law enforcement, and homeland security community. The appellant spent years developing deeply trusting and credible relationships within the regional inter-agency and joint intelligence community. Since the appellant was abruptly terminated by NMFS, and the issues at hand have not been resolved, she has been excluded by other federal and state law enforcement agencies that rely heavily on cooperative relationships with NMFS; particularly the U.S. Coast Guard which acts as NMFS primary maritime law enforcement arm. The appellant was also a respected member of the environmental and scientific community in the Tampa Bay and St Petersburg, Fl area. Again, the appellant is shunned by personal and professional contacts unsure of the circumstances surrounding her sudden termination from NMFS.
- (4) The Agency's prolonged unwillingness to resolve this appeal has resulted in tangible financial and intangible personal hardships. Since the Agency continues to consequentially harm the appellant's career and reputation, a stay of this appeal would only exacerbate an already measurable impact on her reputation, employability and cause her continued financial hardship.

Respectfully submitted,



Anne Visser Ney
Appellant

5300 27th Ave N
ST Petersburg, FL 33710
(727) 374-5732

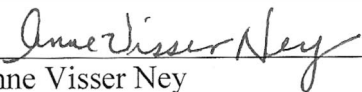
CERTIFICATE OF SERVICE

I, Anne Visser Ney hereby certify that a copy of the foregoing submission was served on December 6, 2010, as follows:

Via E-Appeal

Richard W. Vitaris
Administrative Judges
MSPB, Atlanta Regional Office
401 W. Peach Tree Street
Suite 1050
Atlanta, GA 303308

Monique Cioffalo, Esq.
Agency Representative
U.S. Department of Commerce
1315 east West Highway, Room 5106
Office of general Counsel/ELLD
Silver Spring, Maryland 20910



Anne Visser Ney

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Atlanta Regional office	Response to Agency's Motion to Dismiss/Stay dated 12/03/2010	e-Appeal / e-Mail
Monique Cioffalo Agency Representative	Response to Agency's Motion to Dismiss/Stay dated 12/03/2010	e-Appeal / e-Mail