

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3295

GREGORY NAKSHIN,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Petition for review of the Merit Systems Protection Board in
NY0731030145-A-1.

ON MOTION

Before GAJARSA, LINN, and PROST, Circuit Judges.

PROST, Circuit Judge.

ORDER

Gregory Nakshin moves to reinstate his petition for review and to stay proceedings pending disposition by the United States District Court for the Southern District of New York in Nakshin v. Mukasey, No. 08-CV-6249. The Department of Justice (DOJ) opposes the motion to reinstate, responds to the motion to stay, and moves for leave to submit two supplemental appendices in support of its submissions.

Nakshin was given a tentative offer of employment as a litigation support specialist in the United States Attorney's Office. The agency subsequently rescinded the employment offer. Nakshin appealed to the Merit Systems Protection Board alleging that the agency made an adverse suitability determination and that the adverse suitability determination was based on national origin discrimination. The administrative

judge (AJ) determined that the agency made a constructive suitability determination. The AJ further determined that the suitability determination did not conform to relevant regulations and thus could not stand. Thus, the AJ reversed the suitability determination. The AJ determined, however, that Nakshin had not proven that the job offer was rescinded based on national origin discrimination. Both parties petitioned the Board for review. The Board denied both petitions. Nakshin filed a complaint in the Southern District of New York seeking review of the Board's determination concerning the suitability determination and his discrimination claim.

Meanwhile, Nakshin sought attorney fees from the Board. The AJ denied the attorney fee motion. Nakshin's petition for review by the full Board was denied. Nakshin then filed a complaint in the Southern District of New York seeking review of the Board's decision denying attorney fees. One day later, Nakshin filed a petition for review in this court seeking review of the Board's attorney fee decision.

Nakshin failed to submit the required Fed. Cir. R. 15(c) statement concerning discrimination and thus the petition for review was dismissed. Nakshin has now filed a Rule 15(c) statement and requests that the court reinstate the petition and stay proceedings pending disposition of his attorney fee complaint by the Southern District of New York. Nakshin states that he believes that the district court, rather than this court, has jurisdiction to review the Board's attorney fee decision, but that he filed a protective petition for review in this court out of an abundance of caution. DOJ argues that this is a mixed case and thus agrees with Nakshin that this court lacks jurisdiction. DOJ requests that the court decline to reinstate or, in the alternative, grant the motion to reinstate and stay proceedings pending a decision by the district court.

The court notes that the district court consolidated Nakshin's two complaints and, on December 16, 2008, entered summary judgment in favor of DOJ. Because the district court has decided the merits of the case, the court determines that reinstatement of the petition is not warranted.

Accordingly,

IT IS ORDERED THAT:

- (1) The motion to reinstate is denied.
- (2) The motion to stay is moot.
- (3) DOJ's motions for leave to file supplemental appendices are granted.

FOR THE COURT

FEB 9 2009

Date

/s/ Jan Horbaly
Jan Horbaly
Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

cc: Dennis L. Friedman, Esq.
Jane W. Vanneman, Esq.

FEB 09 2009

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JAN HORBALY
CLERK