

The Rules of Engagement: Marital Status Discrimination

By Mathew B. Tully

It seems as though not a day goes by without some new study showing why it is better to be either married, single or in a cohabitating relationship. Just last December, the Pew Research Center reported that only 51 percent of U.S. adults 18 years of age and older were married, compared to 72 percent in 1960. While these statistics fluctuate, some federal employees regularly confront this issue in the workplace.

Although it is a prohibited personnel practice (PPP) to discriminate against a federal employee because of his or her marital status, some agency managers engage in such conduct. According to the latest PPP survey by the Merit Systems Protection Board (MSPB), 1.7 percent of federal employees reported in 2010 experiencing marital status discrimination in the past two years, up from 1.5 percent in 2007. This made perceived marital status discrimination more common in the federal workplace than perceived discrimination based on religion (1.2 percent) and political affiliation (1.1 percent).

Some managers favor single employees, perhaps believing they will be more willing to work later and be less distracted by family obligations. Others may favor married employees, perhaps out of a mutual understanding of the demands of family life. Either way, marital status discrimination complaints are handled very differently from complaints about discrimination covered by other federal laws, such as Title VII of the Civil Rights Act (i.e., race, color, sex, religion, and national origin).

Most discrimination cases are handled by the Equal Employment Opportunity Commission (EEOC). Under 5 C.F.R. Section 1800.1, however, complaints regarding discrimination based on marital status are investigated through the Office of Special Counsel (OSC) by filing a Complaint of Possible Prohibited Personnel Action or Other Prohibited Activity (OSC Form OSC-11). The OSC has the authority to investigate and prosecute claims of marital status discrimination.

Even some probationary employees, such as returning veterans, are able to appeal to the MSPB terminations based on marital status discrimination, under 5 C.F.R. 1201.3. For example, in the 2010 MSPB case *Visser Ney v. Dept. of Commerce*, a fish biologist, appointed to a 13-month term position with the National Oceanic and Atmospheric Administration (NOAA), appealed her termination to the board. While NOAA said the termination was prompted by the employee's poor performance, she claimed it was based on her marital status.

An MSPB administrative judge dismissed the case for lack of jurisdiction. To the judge it appeared that the discrimination was based on the fact that the biologist had a working

spouse, as opposed to a stay-at-home spouse, and, therefore, found the case had no jurisdiction based on “family status.” However, the MSPB vacated this decision and remanded the case, saying she did present evidence of marital status discrimination to support an appeal. Particularly, the appellant established that prior to her termination she had strong performance reviews; her supervisor inquired about her marital status on multiple occasions; she was assigned tedious tasks while single employees were not; single employees received preferential treatment in regard to telework; and married employees were teased.

Federal employees who have been subjected to marital status discrimination should immediately contact a federal employment lawyer who could help them prepare an OSC complaint or an MSPB appeal.

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. To schedule a meeting with one of the firm’s federal employment law attorneys call 202-787-1900. The information in this column is not intended as legal advice.