UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 119

Docket No. CH-0752-06-0820-I-4

Adrian M. Crump,

Appellant,

v.

Department of Veterans Affairs,

Agency.

June 23, 2010

Adrian M. Crump, Eagan, Minnesota, pro se.

C. Charles Caruso, Minneapolis, Minnesota, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his removal for misconduct. For the reasons set forth below, we find that the petition does not meet the criteria for review under 5 C.F.R. § 1201.115, and we therefore DENY it. However, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118 to consider the appellant's arguments on review, and AFFIRM the initial decision.

BACKGROUND

¶2 The agency removed the appellant from the position of Cemetery Caretaker, effective August 29, 2006, based on three specifications of misrepresentation of material fact. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4f. The agency charged the appellant as follows: (1) on September 9, 2005, he submitted an Employee Education Data Form and a resume that falsely stated that he had earned a master's degree from Bemidji State University; (2) on October 24, 2005, he submitted a memorandum that falsely stated that he had been seen at the Health Partners Riverside Clinic during his absence of October 20-21, 2005; and, (3) on October 11, 2005, he submitted a letter, allegedly signed by a then-retired Navy Admiral, that falsely stated that he was on military duty from October 8-17, 2005. IAF, Tab 6, Subtab 4(f).

¶3 The appellant appealed the agency's action. IAF, Tab 1. The administrative judge dismissed the appeal without prejudice pending resolution of a criminal matter related to specification 3 of the charge, the appellant's alleged misrepresentation of time spent on military duty. IAF, Tab 12. The appellant refiled the appeal twice during the pendency of the criminal matter, and the administrative judge dismissed the appeal each time because of the ongoing criminal proceedings. IAF2, Tab 5; IAF3, Tab 9. At the conclusion of the criminal proceedings, the appellant again refiled his appeal. IAF4, Tab 1.

¶4 Based on the record developed by the parties, including the testimony at the hearing, the administrative judge sustained the agency's charge and specifications, found that the appellant failed to prove that the agency removed him in retaliation for his protected activity, determined that the penalty was within the bounds of reasonableness for the sustained offense, and affirmed the agency's action. IAF4, Tab 33.

¶5 The appellant petitions for review. Petition for Review File (PFR File), Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 3.

ANALYSIS

¶6 In his petition, the appellant asserts that the administrative judge erred in relying on his failure to rebut the agency case to sustain the charges. We do not agree. To sustain a falsification charge, an agency must prove by preponderant evidence that the appellant knowingly supplied incorrect information with the intention of defrauding, deceiving or misleading the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986); *Seas v. U.S. Postal Service*, 73 M.S.P.R. 422, 427 (1997). Intent is a state of mind, which is generally proven by circumstantial evidence. *Riggin v. Department of Health & Human Services*, 13 M.S.P.R. 50, 52 (1982). Thus, the Board may consider plausible explanations for an appellant's provision of incorrect information in determining whether the misrepresentation was intentional. *See Nelson v. U.S. Postal Service*, 79 M.S.P.R. 314, ¶ 7 (1998). Likewise, the absence of a credible explanation for the misrepresentation can constitute circumstantial evidence of intent to deceive. *Id.* Intent may also be inferred when an appellant makes a misrepresentation with a reckless disregard for the truth or with a conscious purpose to avoid learning the truth. *Id.* In sum, the Board will examine the totality of the circumstances to determine whether the agency has proven intent to defraud, deceive, or mislead. *See Delancy v. U.S. Postal Service*, 88 M.S.P.R. 129, ¶ 4 (2001).

¶7 Here, the agency submitted evidence to show that the appellant provided incorrect information. With regard to specification 1 of the charge, the agency submitted evidence to show that the appellant had falsified his educational information. Specifically it introduced evidence that the appellant would have been classified as a freshman at Bemidji State University and did not possess a master's degree from that institution. IAF4, Tab 16, exhibit 1. The appellant failed to rebut this showing either with evidence that he did, in fact, have a master's degree from Bemidji State University or with evidence to explain why he misrepresented that he did. In assessing the totality of the circumstances, the

administrative judge properly determined that the appellant falsified his educational background with intent to deceive. *See Nelson*, 79 M.S.P.R. 314, ¶ 7.

¶8 As to the second specification, the agency provided the testimony of Dorene Krenn, an employee of the Health Partners Riverside Clinic, regarding the memorandum that the appellant supplied stating that a nurse at the clinic had seen him on October 20-21, 2005. IAF4, Oct. 8 Hearing Transcript (HT) at 10-15. Krenn testified that the memorandum is inconsistent with the clinic's documentation procedures for a number of reasons, including that the medical record number on the memorandum looks like a social security number and the clinic does not use social security numbers to identify patients. *Id*. at 13. The appellant could have rebutted this testimony either with evidence showing that the memorandum was a true and accurate medical record or with evidence explaining why he mistakenly thought that it was. He failed to do so. Based on the totality of the evidence, the administrative judge properly found that the appellant falsified this medical record with the intent to deceive. *See Nelson*, 79 M.S.P.R. 314, ¶ 7.

¶9 With regard to specification 3 of the charge, the appellant conceded that he was not an active naval reservist in the period of October 8-17, 2005, but nonetheless requested military leave for that period. IAF4, Oct. 22 HT at 171-76. The appellant failed to provide any plausible explanation or justification for his request for military leave in October 2005. *Id.* Accordingly, the administrative judge properly concluded that the appellant knowingly supplied false information to substantiate his military leave request with the intent to deceive or mislead.

¶10 In his petition, the appellant also asserts that the administrative judge erred in failing to take into consideration the injury that resulted in his OWCP claim. He contends that the administrative judge erred in failing to find that the agency removed him in retaliation for filing this claim. PFR File, Tab 1 at 4-5. Title 5 U.S.C. § 2302(b)(9) prohibits any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, to take any

personnel action against any employee "because of[] (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation; [or] (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A) . . . ." To establish a prima facie violation of subsection (b)(9), the appellant must demonstrate that he engaged in an activity protected by the section; that he was subsequently treated in an adverse fashion by the employer; that the deciding official had actual or constructive knowledge of the protected activity; and that there is a causal connection between the protected activity and the adverse action. *Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984). Where, as here, the agency has already articulated a non-discriminatory reason for its action, i.e., the charged misconduct, it has done everything that would be required of it if the appellant had made out a prima facie case. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Thus, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal retaliation. *Id.*

¶11 Specifically, the question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason for taking the action was not the actual reason and that the agency intentionally discriminated or retaliated against him. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993); *Aikens*, 460 U.S. at 714-16; *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc).

¶12 The Board may consider circumstantial evidence in determining whether an appellant has met his burden. *Wildeman*, 23 M.S.P.R. at 320. To show retaliation using circumstantial evidence, the appellant must show that the accused official knew of the protected activity, *cf. Warren v. Department of the Army*, 804 F.2d 654, 656 (Fed. Cir. 1986), and provide evidence showing a "'convincing mosaic'" of retaliation against him, by which a number of pieces of evidence, "'each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction….'" *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 20 (2008) (quoting *Sylvester v. SOS Children's Villages Illinois, Inc.* 453 F.3d 900, 903 (7th Cir. 2006)). This mosaic generally includes three types of evidence: (1) evidence from which an inference of retaliatory intent might be drawn, such as suspicious timing or similar behavior and comments directed at other employees in the protected groups; (2) evidence that similarly situated employees received more favorable treatment than the appellant; and (3) evidence that the reason asserted by the employer for its actions is pretextual. *Id*.

¶13 Here, the record shows that the agency proposed the appellant's removal on July 24, 2006, the day that he returned to a light-duty assignment following an on-the-job injury. IAF4, Tab 30, exhibit A. At first blush, this evidence suggests possibly suspicious timing between his OWCP claim and his removal. However, as the administrative judge noted, the appellant resigned from his position after the on-the-job injury occurred in November, 2005. IAF4, Tab 33 at 10. The Cemetery Director, Arthur Smith, testified that the agency proposed to remove the appellant upon his return to duty because, prior to that, he was not an employee of the agency and, therefore, not subject to disciplinary action by it. IAF4, Oct. 22 HT at 108, 121-23. Additionally, the record shows that, in October 2005, prior to the appellant's on-the-job injury, Smith had initiated an investigation into whether the appellant was posing as a Navy Officer in order to receive and use military leave to which the appellant was not entitled. IAF4, Tab

16, exhibit 4. Thus, the timing between the appellant's OWCP claim and the agency's adverse action does not give rise to an inference of discrimination. The appellant presented no evidence that similarly-situated employees were treated better and no evidence that the agency's stated reason for its action was pretextual. Thus, the administrative judge correctly found that the appellant failed to show that the agency removed him in retaliation for his protected activity.

¶14 Finally, in his petition, the appellant appears to claim that the administrative judge did not permit him to address his alleged post-traumatic stress disorder (PTSD) and its role in his misconduct. PFR, Tab 1 at 3. The record, however, does not support the appellant's assertion. On the contrary, the appellant alluded to a diagnosis of PTSD "or mental health issues" during his testimony. *See* IAF4, Oct. 22 HT at 167-89. The record reflects that the administrative judge did not limit the appellant's testimony about his PTSD. Conversely, the appellant did not produce any other evidence that he was diagnosed with PTSD; nor did he demonstrate how this condition played a part in his misconduct. Therefore, the appellant has not shown that his mental condition should have been taken into consideration in this case.

¶15 Accordingly, the appellant has failed to show on review that the administrative judge made any error in law or regulation in adjudicating this appeal. Therefore, we AFFIRM the initial decision.

ORDER

¶16 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 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. Additional information is available at the court's website, www.cafc.uscourts.gov. 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:

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