UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

93 MSPR 195

MICHELLE Y. SPAHN,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
SF-0752-99-0454-I-1

DATE: January 9, 2003

George M. Chuzi, Esquire, Washington, D.C., for the appellant.

Thomas G. Roth, Esquire, Newark, New Jersey, for the appellant.

Alysia Cuilwik, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman
Beth S. Slavet, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision, issued October 7, 1999, that affirmed her removal on misconduct charges. For the reasons discussed below, we GRANT the appellant's petition and AFFIRM the initial decision insofar as it sustained the charges of misconduct against the appellant. We REVERSE the initial decision to find that the appellant proved her affirmative defense of sex discrimination. We therefore DO NOT SUSTAIN the agency's removal action, and SUBSTITUTE a lesser penalty as described below.

BACKGROUND

¶2 The appellant was hired as a Basic Agent Trainee (BAT) with the Drug Enforcement Administration (DEA) in September 1997. She was assigned that month to the agency's Quantico Training Academy for training. On January 15, 1998, Basic Agent Class 118 (which included 46 students, including the appellant) took a final Automated Information Systems (AIS) computer examination. By memorandum dated January 16, 1998, AIS Instructor Anastasia Lohr reported that the appellant and BAT Richard Champion "missed exactly the same questions with the same wrong answers." Initial Appeal File (IAF) Tab 6, Subtab 4Q1. DEA's Office of Professional Responsibility (OPR) initiated an investigation into allegations of cheating by the appellant and Champion. This investigation expanded to include the conduct of other trainees in Class 118. At the time the controversy over the computer test arose, the appellant was about to become the first woman in DEA history to graduate first in her basic training class. IAF, Tab 24, at 56.

¶3 OPR issued a report of investigation on May 15, 1998. IAF, Tab 6, Subtab 4Q. On July 16, 1998, Thomas Kukura, Chairman of DEA's Board of Professional Conduct, issued the following memorandum to the "Deciding Official, Human Resources Division":

> The Board of Professional Conduct has completed the review of the enclosed investigative file. Based upon the information presented in this case, the Board believes there is sufficient evidence that SA [Special Agent] Richard Champion and SA Michelle Spahn failed to follow written instructions by engaging in a sexual relationship at the FBI Academy. Further, there is sufficient evidence that SA Spahn failed to follow written instructions with regard to the OPR confidentiality requirement. Accordingly, copies of the letters of proposed suspension are enclosed.
>
> The Board does not believe the conduct of any of the students during the AIS test constituted cheating and therefore their subsequent statements to OPR regarding this issue did not constitute false statements. The Board recommends that [eight named students,

> including the appellant] be issued letters of clearance regarding these allegations.
>
> The OPR investigation demonstrates that the action and lack of action by Ms. Lohr and the other three contract instructors, along with several other factors, directly contributed to the students' belief that conferring during the AIS test was acceptable. As the investigation indicates, at least 26 students admitted to conversing about aspects of the test, to include verifying answers with one another.
>
> The investigative file indicates that Ms. Lohr informed the students that the AIS test would be administered in a more relaxed manner and that more assistance than usual would be provided because the test was being administered a day early and without the planned review. Ms. Lohr required three additional instructors in order to respond to the number of questions asked by the students. The instructors assisted multiple students simultaneously, provided specific guidance to find correct answers, and provided answers in some instances. In spite of the fact that Ms. Lohr may have stated early on that the students were to work alone, the instructors allowed and encouraged the students to converse directly with each other and work together. Not one of the four instructors during the test ever cautioned any student to refrain from conversing with another student. The investigation clearly demonstrates that the AIS test was not conducted in the same rigid manner as the other academic tests, but rather as a final "practical exercise."

IAF, Tab 17.[1] Mr. Kukura signed a letter the same date, in which he proposed a 10-day suspension for the appellant, and a 7-day suspension for SA Champion,

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[1] In a December 7, 1998 memorandum, Felix Jimenez, the agency's Chief Inspector, reached a similar conclusion:

> I have concluded that during the examination the instructor did not maintain adequate control of the class and that the classroom environment was lax and not a typical testing environment. . . . Throughout the computer course, the class was conducted in a workshop or laboratory environment where working with and assisting fellow students was encouraged. Ms. Lohr's failure to notice that students were talking amongst themselves and to take the appropriate action to assert a proper test environment contributed to the students' perception that the computer examination was not of the same importance as their other academic examinations and that the workshop environment of the regular class was permissible during the final examination.

both based on a charge of failure to follow written instructions. IAF, Tab 6, Subtab 4L; Tab 15, Subtab E1.

¶4 The agency did not follow the recommendation of the Board of Professional Conduct. Instead, on September 10, 1998, it proposed the removal of eight students, seven men plus the appellant, on charges related to the computer test, but did not take any action on these proposed disciplinary actions until May 1999. At that time, the agency issued a decision to remove the appellant from employment. IAF, Tab 6, Subtab 4C.[2] During the period of May-July 1999, the agency entered into settlement agreements with all five men still employed, under which they received 14-day suspensions and entered into last-chance agreements with the agency.[3] IAF, Tab 17.

¶5 The appellant's removal was based on three charges: (1) failure to follow written instructions (for discussing her OPR interview with other BATs despite a confidentiality directive prohibiting such discussion); (2) false statements (for not being truthful with OPR investigators during her first interview when asked about whether she cheated on the final computer exam and whether she had an intimate relationship with another BAT); and (3) conduct unbecoming a DEA employee. The narrative supporting the third charge specified that the appellant was accused of cheating on the computer test. IAF, Tab 6, Subtab 4K. Although the deciding official sustained all three charges, he modified the specification for the third charge because the "atmosphere of the examination and the lack of control of that examination environment by the Instructors obfuscates [sic] a finding of cheating." IAF, Tab 6, Subtab 4C. He found nonetheless that, since the appellant

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IAF, Tab 1, Ex. C.

[2] The appellant's notice stated that it "cancels and supersedes" the proposal for a 10-day suspension. *Id.*

[3] The other two male employees resigned after the notices proposing their removal were issued but before the actions were effected. IAF, Tab 17.

did not work alone on the final computer examination despite her admission that she should have known that she was to work alone, the charge of conduct unbecoming a DEA employee was still sustained. *Id.*

¶6 The appellant timely filed an appeal of her removal to the Board. IAF, Tab 1. She raised the affirmative defense of sex discrimination, alleging that she was disparately treated compared to the male employees who received only 14-day suspensions. *Id.* During the pendency of the appeal, the appellant made two offers of settlement. She first offered to settle on the same terms as the five men who had their proposed removals reduced to 14-day suspensions plus last-chance agreements. IAF, Tab 15. After that offer was rejected, she offered to resign in exchange for expunging her official personnel file of adverse information. *Id.*, Tab 19.[4] That offer was also rejected. *Id.*

¶7 After holding a hearing, the administrative judge (AJ) found that the agency had proved its three charges. IAF, Tab 25. The AJ further found that the appellant failed to prove her claim of sex discrimination, finding that the comparative male employees cited by the appellant were not similarly situated to her because they were not charged with the same offenses as she was. *Id.* The AJ found in the alternative that the agency "reasonably distinguished" the appellant's case from other cases. *Id.* Finally, the AJ found that the removal penalty was within the bounds of reasonableness. *Id.*

¶8 The appellant timely petitioned for review. Petition for Review File (PFRF), Tab 3. The agency timely responded in opposition. PFRF, Tab 4.

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[4] The appellant's attorney proposed this settlement based on his understanding that two employees whose removal for cheating on the exam was proposed were allowed to resign for "personal reasons," and that their SF-50s reflect a resignation for personal reasons. *Id.* In its submissions, the agency did not rebut the appellant’s assertion that the two employees were allowed to resign for personal reasons.

ANALYSIS

¶9 Claims of discriminatory treatment under Title VII are governed by the three-part framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, the employee must establish a prima facie case. *Id.* at 802. If the employee succeeds in proving the prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Id.* If the employer meets that burden, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *Id.* at 804; *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (if the employer produces evidence that its action was taken for some legitimate, non-discriminatory reason, the employee has an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the employer was not the true reason for taking the action, but was in fact a pretext for unlawful discrimination). Although the burden of going forward with the evidence shifts, the burden of persuasion in an employment discrimination case is always on the employee. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981).

¶10 While the necessary elements of a prima facie case vary according to the particular facts and circumstances at issue, a person claiming employment discrimination under Title VII carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on an impermissible criterion. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575-76 (1978). One way to prove a prima facie case of disparate treatment is to establish by preponderant evidence that: (1) the appellant is a member of a protected group; (2) she was similarly situated to an individual who was not a member of the protected group; and (3) she was treated more harshly or disparately than the individual who was not a member of her protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997).

¶11 The first of these elements was undisputed. As noted above, the AJ found that the appellant failed to establish a prima facie case because she did not establish the existence of similarly situated employees.

The similarity of comparative employees is governed by the similarity of their conduct and related circumstances, not by what charges an agency chooses to bring against them.

¶12 In her petition for review, the appellant contends that the AJ erred in interpreting Title VII of the Civil Rights Act of 1964 and 5 U.S.C. §§ 7511-13 by finding that several male employees were not similarly situated to her because they were not charged with the same offenses as she was. The appellant argues that the Board should look to the nature of the conduct engaged in, not to the charges brought by an agency. She contends that other employees were guilty of similar misconduct.

¶13 For other employees to be deemed similarly situated, the Board has held that all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparative employees. *Richard v. Department of Defense*, 66 M.S.P.R. 146, 153 (1995), *modified on other grounds by Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 496-97 (1997); *Wilson v. U.S. Postal Service*, 34 M.S.P.R. 393, 397 (1987). The Equal Employment Opportunity Commission (EEOC) has stated the matter in the following way: "To be similarly situated, comparative employees must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to complainant's without differentiating or mitigating circumstances." *Harris v. Henderson*, EEOC No. 01982575 (Aug. 29, 2000).

¶14 We agree with the appellant's contention that it is the similarity of the comparative employee's conduct that is controlling, not what charges the agency chose to bring against the employee. *See Botto v. U.S. Postal Service*,

75 M.S.P.R. 471, 477 (1997) ("comparative employees must have engaged in conduct similar to the appellant's"); *Richard*, 66 M.S.P.R. at 153 (same).[5] To do otherwise would permit an agency to insulate itself from a finding of prohibited discrimination by labeling the same misconduct differently in drafting charges against different employees, or by choosing to charge similarly situated employees with only some of the misconduct.

The fact that the comparative employees' proposed removals were resolved by settlement does not preclude the Board from finding that the appellant was similarly situated to them.

¶15 In support of her assertion that she is the victim of gender discrimination, the appellant contends that she was disparately treated compared to two different groups of employees—two employees who were allowed to resign, allegedly with "clean paper"; and five employees who received 14-day suspensions with last-chance settlement agreements. IAF, Tabs 24 (pp. 34-41), and 19.

¶16 We note at the outset that the Board must defer to the EEOC concerning issues of substantive discrimination law. *Martin v. Department of the Air Force*,

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[5] *See also Smith v. Leggett Wire Co.*, 220 F.3d 752, 762 (6th Cir. 2000) (stating that an exact correlation of conduct is not required to show that employees are similarly situated); *Alexander v. Fulton County*, 207 F.3d 1303, 1333-34 (11th Cir. 2000) (stating that the law only requires similar misconduct by the similarly situated comparator, not the same or nearly identical misconduct); *Hollins v. Atlantic Co.*, 188 F.3d 652, 659 (6th Cir. 1999) (stating that plaintiff has to show that comparators engaged in misconduct of "comparable seriousness"); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352-53 (6th Cir. 1998) (stating that plaintiff need not show an exact correlation with the comparator, otherwise, those employees in unique positions would be removed from the protective reach of the anti-discrimination laws and the remedial purpose of these laws would be undermined); *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997) (stating that the test is whether "a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated"); *Elmore v. Capstan, Inc.*, 58 F.3d 525, 529-30 (10th Cir. 1995) (stating that the comparison of the treatment afforded the appellant versus the comparator need not be based on identical violations of identical work rules; the violations need only be of "comparable seriousness").

73 M.S.P.R. 590, 594 (1997). The EEOC will not generally consider employees to be similarly situated if their employment disputes were resolved by settlement: "The Commission has long held that resolutions of grievances and/or settlement agreements cannot be used as a basis for comparison by an appellant in order to show discrimination." *Tilghman v. Henderson*, EEOC No. 01966704 (June 10, 1998). Although *Tilghman* appears to stand for a rule that allows for no exceptions, the EEOC's statement of the rationale for this rule allows for exceptions: "The Commission, *in general*, refrains from reviewing settlement agreements made through the grievance procedure because of the chilling effect it would have on the parties' inclinations to settle disputes." *Bowie v. Frank*, EEOC No. 01910968 (July 17, 1991) (emphasis added).

¶17 An examination of EEOC decisions confirms that its reluctance to consider employees whose disputes were resolved by settlement as similarly situated is not inflexible; it is a general policy that may be and has been overridden by other considerations. Two distinct lines of EEOC cases emerge from this review. In one line of cases (*Williams/Petty*), the Commission has recognized as a cognizable claim of discrimination the precise kind of disparate treatment claim the appellant has raised in this proceeding—that she was treated less favorably than similarly situated employees in that those employees, unlike the appellant, were offered settlement agreements or were permitted to resign. In a second line of cases (*Gardner, et al.*), the Commission has recognized a "bad faith" exception to the general rule where the discrimination claims of the similarly situated employees were resolved by consent decree.

¶18 In *Williams v. Frank*, EEOC No. 05880836 (Jan. 24, 1989), the Commission remanded to the agency the appellant's claim that a comparative employee who committed the same misconduct received a better settlement offer than was extended to her. The Commission found that "[a]lthough the agency explanation for the difference in treatment between the appellant and the comparative male employee would seem valid, this is a merits determination which can only be

made after the complaint is accepted for processing." In *Elifritz v. Garrett*, EEOC No. 01910963 (July 12, 1991), the Commission considered the appellant's claim that she was not offered the same settlement opportunity as another employee who was not selected for the same vacancy. While it found that the appellant had failed to establish that the agency's failure to offer her a similar settlement was discriminatory because she "presented no persuasive evidence demonstrating that the agency's actions in this matter were improper or based on a discriminatory animus," the Commission recognized that such claims stated a cause of action. *Id*. at 6; *see also Carter v. Frank*, EEOC No. 01872206 (July 26, 1989) (appellant alleged that she was disparately treated compared to another employee who committed the same misconduct but whose discipline was reduced in a pre-arbitration settlement).

¶19 Likewise, the Commission has recognized as a cause of action claims of discrimination based on an agency's action of allowing similarly situated employees an opportunity to resign, but not extending the same treatment to the appellant. *Petty v. Runyon*, EEOC No. 01911697 (Aug. 22, 1991) (considering the appellant's allegation that employees who committed same misconduct were allowed to resign); *Smith v. Henderson*, EEOC No. 01980846 (Oct. 23, 1998) (considering the appellant's allegation that another employee who failed to qualify on her scheme was permitted to resign and was then reinstated).[6] On the basis of this controlling precedent, the Board will consider the appellant's claim that she was subjected to disparate treatment because employees whose conduct was comparable to hers (or arguably worse), were not removed, but were instead offered settlement agreements or were allowed to resign.

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[6] In *Williams*, No. 05880836, and *Smith*, No. 01980846, the Commission remanded for further proceedings. In *Petty*, No. 01911697, *Elifritz*, No. 01910963, and *Carter*, No. 01872206, the Commission found that the appellants failed to prove disparate treatment, but not on the basis that they had failed to state a cause of action.

¶20 In a second line of decisions, the Commission has recognized a "bad faith" exception to the general rule that employees whose disputes were resolved by settlement cannot be considered as similarly situated—where those employees' claims of discrimination were resolved by consent decree:

> [The comparative employee's] proposed removal was reduced pursuant to a settlement. Generally, differences between MSPB, grievance, and EEO settlements terms do not provide probative evidence of employment discrimination. The courts have noted that factors leading to such settlements are imprecise, and that public policy generally favors settlements on grounds other than fault. The courts and the EEOC have been reluctant to find discrimination based solely on evidence of differences in settlement of grievances, MSPB matters, or EEO complaints, <u>absent strong proof of bad faith or a pattern of substantial disparity in such settlements</u>. *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1238 (6th Cir. 1980).

Gardner v. Runyon, EEOC No. 03930024 (Apr. 23, 1993) (emphasis added). Other EEOC decisions recognizing the bad faith exception include: *Ellis v. Runyon*, EEOC No. 03930106 (Sept. 9, 1993); *Johnson-Mason v. Runyon*, EEOC No. 01922475 (July 29, 1993); *Belknap v. Runyon*, EEOC No. 03930027 (May 6, 1993); *Green v. Runyon*, EEOC No. 03930034 (Apr. 1, 1993); *Harris v. Frank*, EEOC No. 01900481 (Feb. 23, 1990).

¶21 In setting forth the "bad faith" exception, all of the Commission decisions rely on *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980). There, the EEOC had brought an action on behalf of a group of black male employees who contended that they were denied back seniority benefits because of discrimination while such benefits had been awarded to a group of female employees. The employer in *McCall* defended the action on the ground that its actions were consistent with a prior conciliation agreement that resolved a discrimination suit filed by the female employees and resulted in a consent decree. The court observed that when one employee is given increased seniority rights, this may adversely affect the economic rights of another employee. 633 F.2d at 1237. The court held that:

> conciliation agreements resulting in consent decrees may not be considered independent acts of discrimination, as a matter of law, unless there are allegations of bad faith in making the agreement, that is, allegations that the agreement was not a bona fide attempt to conciliate a claim but rather an attempt to bestow unequal employment benefits under the guise of remedying discrimination.

McCall, 633 F.2d at 1238 (emphasis added).

¶22 Two other circuits have adopted the rule set forth in *McCall: Marcantel v. Louisiana*, 37 F.3d 197, 201-02 (5th Cir. 1994); *Carey v. U.S. Postal Service*, 812 F.2d 621, 624 (10th Cir. 1987). (For ease of reference, these cases are cited as the *McCall* cases). Although there are differences between the case before us and the *McCall* cases, the major difference—the type of personnel action being challenged—strengthens, rather than undercuts, the conclusion that the Board is required to adjudicate the appellant's allegation that the agency discriminated against her because of her gender when it refused to settle her removal action (or allow her to resign) on the same terms as similarly situated male employees.

¶23 Here, as in nearly all of the EEOC cases cited above, the personnel action in question was a disciplinary action, and the allegation of discrimination was that similarly situated employees were treated more leniently. *See, e.g., Williams*, slip op. at 3 (the Commission remanded to the agency the appellant's claim that a comparative employee who committed the same misconduct received a better settlement offer than was extended to her); *Gardner*, slip op. at 6 (finding that the appellant did not show that the agency's action of settling another employee's disciplinary action but not settling his was a pretext to mask race discrimination). In contrast, in the *McCall* cases, the personnel actions in question were the employer's failure to select or promote the plaintiffs. When an agency fills a vacancy, selecting one applicant *necessarily* means that other applicants will not be selected. However, a disciplinary action against one employee has no necessary effect on any other employee. The concern that looking behind a settlement agreement will lead to the reopening of previously settled claims is not

present in an adverse action case such as this one, where the litigant is seeking to show that similarly situated employees were punished less severely. The absence of this concern in disciplinary cases, such as *Williams*, *Gardner*, and the instant case, strengthens the conclusion that the agency's action of settling with some employees, but not the appellant, is not a bar to considering whether the agency's actions with respect to the settlement process were discriminatory.[7]

¶24 Accordingly, we find that the fact that disciplinary actions against similarly situated male students were reduced by settlement does not preclude the appellant from establishing that she was discriminated against on account of gender.

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[7] In the *McCall* line of cases, the courts relied on the "zero sum game" that is inherently a part of most hiring and promotion decisions, i.e., when there is only one position available, the selection of one employee forecloses the selection of another employee. The courts emphasized this factor in explaining the narrowness of the "bad faith" exception they were recognizing. *See Marcantel*, 37 F.3d at 200-01 (any attempt by an employer to redress valid claims of discrimination would expose the employer to liability to other employees necessarily impacted by the remedy); *Carey*, 812 F.2d at 625 (an employer could face suit by one group of employees if it fails to correct past discrimination, while facing suit by another group of employees if it does correct the past discrimination); *McCall*, 633 F.2d at 1238 (considering the consent decree as an independent act of discrimination could lead to reopening the claims which that decree resolved). This factor is not present in disciplinary actions such as this one.

There is a second distinguishing feature between the *McCall* cases and this case that strengthens the conclusion that the Board is required to consider whether there was discrimination in the settlement process. Specifically, an agency's decision to settle with one employee on particular terms cannot easily be viewed as being part of a decision to discriminate against another employee when the settlement was brokered by an impartial third party. *See Carter v. Frank*, EEOC No. 01872206 (July 26, 1989) ("it is unclear whether the settlement of the comparative employee's case resulted from an arbitrator's intervention in efforts to bring the parties into agreement"); *Bowie v. Frank*, EEOC No. 01910968 (July 17, 1991) ("appellant has alleged that he was discriminated against by the agency, and any settlement agreement reached through the grievance procedure involves the agency and the union").

Here, in contrast, there is no evidence that the agency's settlements with the male employees resolved any discrimination complaints, nor is there any evidence that there was any third-party involvement in the settlement agreements. Rather, the agency's decision to settle the disciplinary actions of five male employees appears to have been a unilateral one, not affected by any third-party involvement.

Although the public policy favoring settlement is strong, the public policy against discrimination is stronger, and the Board cannot allow the settlement process itself to be used to commit prohibited discrimination. The appellant must be allowed the opportunity to prove that the agency discriminated against her on the basis of gender by treating her more harshly than similarly situated male employees, including an opportunity to prove that the agency's settlements were "simply a pretext to hide discriminatory treatment" of the appellant. *See Marcantel*, 37 F.3d at 202.

The appellant established a prima facie case by showing that she was similarly situated to other employees who were punished less severely.

¶25 The appellant and seven male colleagues had their removals proposed by the same individual as a result of an investigation into alleged cheating on a computer exam during their training to become special agents for the DEA. The appellant was charged with three separate charges: failure to follow written instructions, false statements, and conduct unbecoming. IAF, Tab 6, Subtab 4K. The failure to follow written instructions was based on the appellant's disclosure to other trainees that the DEA's Office of Professional Responsibility interviewed her despite the fact that she had signed a confidentiality directive prohibiting her from discussing her interview or even the fact that OPR was conducting an investigation. *Id.* The false statements charge was based on the appellant's initial statements to the OPR investigators that she had not had an intimate relationship with BAT Champion and that she did not cheat on the computer exam. *Id.* The appellant subsequently admitted that she had in fact had an intimate relationship with BAT Champion and that they had cheated together on the computer exam.[8]

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[8] The agency's charge of false statements was based on the appellant's responses to the investigators' questions during their initial interview on January 16, 1998. This initial interview was not under oath, recorded, or reduced to a written statement by the appellant. IAF, Tab 6, Subtab 4Q(2). The appellant underwent a second interview later the same day, after which she provided a sworn statement in which she admitted that

Id. The charge of conduct unbecoming was based on the appellant's cheating on the computer exam. *Id.*

The appellant was similarly situated to Robert Polimeno.

¶26 Robert Polimeno, one of the eight whose removal was proposed, was only charged with a single charge of conduct unbecoming a DEA employee based on two specifications. IAF, Tab 17. The first specification in the charge is based on Polimeno's cheating on the computer exam. *Id.* The wording of this specification is nearly identical to the wording of the appellant's charge of conduct unbecoming. *Compare* IAF, Tab 6, Subtab 4K *with* IAF, Tab 17. The second specification of Polimeno's charge is based on Polimeno's conspiring with other BATs to tell the OPR investigators that they did not talk to anyone during the exam even though the BATs, including Polimeno, knew this to be a lie. IAF, Tab 17. This specification also involved lying under oath.

¶27 Comparing the conduct *in toto* of the appellant to that of Polimeno, the record shows that Polimeno engaged in conduct that was nearly identical to that of the appellant in all relevant aspects. Looking first at the conduct underlying the appellant's first charge—discussing her OPR interview with other BATs despite signing a confidentiality directive—it is clear from the record that Polimeno engaged in the same conduct. In his third interview with OPR, Polimeno admitted that he discussed his first OPR interview with other BATs despite having signed the same confidentiality directive that the appellant had. IAF, Tab 6, Subtab 4Q(11) & 4Q(37). In addition, Polimeno not only discussed his OPR interview with other BATs, as did the appellant, he also conspired with them to tell the OPR investigators that they did not talk to anyone during the

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she had not been completely honest in her first interview. Specifically, she admitted that she and Champion had had an intimate relationship and that they had worked together on the computer exam. *Id.*, Subtab 4Q(4). The appellant underwent a third interview on January 29, 1998, in which she admitted that she had discussed her January 16 interviews with classmates. *Id.*, Subtab 4Q(24).

exam even though the BATs, including Polimeno, knew this to be a lie. IAF, Tab 17; IAF, Tab 6, Subtab 4Q(37).

¶28 Turning to the agency's second charge against the appellant—providing false statements to the OPR investigators about cheating on the exam and about having an intimate relationship with BAT Champion—we note the record shows that Polimeno engaged in similar conduct. Polimeno also provided false statements to OPR investigators in his second interview on January 22, 1998, when he stated that he did not cheat on the exam and that he did not hear anyone asking for answers in the exam. IAF, Tab 6, Subtab 4Q(11), pp. 57-59.[9]

¶29 The conduct underlying the appellant's third charge—cheating on the computer exam—is identical to the conduct underlying Polimeno's first specification of the conduct unbecoming charge. *Compare* IAF, Tab 6, Subtab 4K ("you [the appellant] admitted that yourself, and BAT Champion collaborated in the completion of the test. . . . This constitutes cheating, and this is conduct which cannot be tolerated") *with* IAF, Tab 17 (Mr. Polimeno admitted that he, and other BATs collaborated in the completion of the test. . . . Cheating constitutes Conduct Unbecoming a DEA Employee, and it is conduct which cannot be tolerated").

¶30 As discussed above, *supra*, ¶¶ 13-14 & note 5, the applicable standard is that the underlying conduct must be similar without differentiating or mitigating circumstances. There are three differences between the appellant's misconduct and that engaged in by Polimeno. First, Polimeno engaged in conduct in which the appellant did not—conspiring to lie to the OPR investigators. Second, Polimeno lied under oath, whereas the appellant did not. Third, the appellant lied

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[9] In his third interview, on February 18, 1998, Polimeno admitted to OPR investigators that he had cheated on the exam and that he had heard another BAT asking for answers during the exam. IAF, Tab 6, Subtab 4Q(37), pp. 12-14, 32. Both interviews were under oath. IAF, Tab 6, Subtab 4Q(11) and (37).

about one subject (the existence of an intimate relationship) that Polimeno did not lie about.

¶31 Taking the last difference first—the only one which might support a conclusion that the appellant committed the more serious misconduct—we find no indication in the record that the agency considered the appellant's original false statement about an intimate relationship as especially serious or egregious. Moreover, while the agency's deciding official did testify that breaching the confidentiality instruction was especially serious and would have warranted removal by itself, because such action could compromise the integrity of the agency's internal investigations, Hearing Transcript at 42-44, Polimeno was also guilty of violating the confidentiality instruction. But in terms of compromising the integrity of an agency investigation, Polimeno's additional misconduct of conspiring to provide false information to agency investigators can be viewed as more destructive to the integrity of the investigative process than any misconduct that the appellant engaged in.

¶32 Accordingly, we conclude that, while the misconduct committed by the appellant and Polimeno is not identical, it is both similar and comparable.

The appellant was similarly situated to Snyder and Hayes.

¶33 Two other employees whose removals were mitigated to suspensions appear to have been guilty of misconduct that was both similar in nature and of comparable seriousness—Scott Snyder and Matthew Hayes. Although Snyder was only charged with one offense, conduct unbecoming for "cheating" on the computer test, he appears to have been guilty of conspiring with classmates to lie to OPR investigators about the matter, of then lying under oath to the OPR investigators, and of breaching the instruction to keep confidential his interviews with the OPR investigators. As to "cheating," Snyder said in his January 22, 1998 interview that he and Hayes talked to one another during the test about how they were approaching a particular problem, but that neither he nor Hayes

provided answers to one another. IAF, Tab 6, Subtab 4(Q)(9), at 46, 51, 54-58. In his subsequent interview, on February 19, 1998, Snyder admitted that he copied Hayes' answer verbatim in one instance, and on several other instances verified answers with Hayes before he marked his own answer. *Id.*, Subtab 4(Q)(38), at 38-45, 53-56. Snyder admitted, and others confirmed, that he was one of the employees who agreed that they would give false testimony to OPR investigators if questioned. *Id.* at 77-78; Subtab 4Q(37), at 67 (OPR interview with Polimeno). And Snyder admitted in his February 19 interview that he had discussed his earlier interviews with OPR investigators, in violation of the confidentiality agreement he had signed. *Id.*, Subtab 4(Q)(38), at 74.

¶34 Although we find no indication in the record that Hayes either joined in a conspiracy with other classmates to lie to OPR investigators, or that he violated a confidentiality agreement, the evidence indicates both that he collaborated with others during the test and that he lied about the test to OPR investigators. As related above, Snyder stated under oath that he and Hayes collaborated extensively on the exam. Hayes nevertheless swore that he did not collaborate with Snyder or anyone else during the computer exam, said he completed every answer himself, and that it was so quiet during the exam that "you could hear a pin drop." When asked how his and Snyder's answers to one question could be the same (wrong answer), he responded that he and Snyder "probably think alike." *Id.*, Subtab 4(Q)(42), at 30. Unlike the appellant, Polimeno, and Snyder, Hayes never corrected his false statements.

¶35 We conclude that, although not identical, Snyder and Hayes were guilty of misconduct that was both similar in nature and comparable in seriousness. And, having concluded that the appellant established she was treated more harshly than were three similarly situated employees, we find that she established a prima facie case of sex discrimination.

The appellant proved by a preponderance of the evidence that the agency's asserted reasons for removing her were a pretext for sex discrimination.

¶36 Because the AJ found that the appellant failed to establish a prima facie case of sex discrimination, she did not address the second two parts of the *McDonnell Douglas* framework. We do so now.[10] The agency addressed the second part of the *McDonnell Douglas* framework—to articulate a legitimate, nondiscriminatory reason for treating the appellant more harshly than Polimeno and the other male employees—when it asserted that she committed more serious misconduct than these other employees.

¶37 When, as here, an employee has established a prima facie case of discrimination, and the employer has met its burden of production, the *McDonnell Douglas* framework of presumptions and burdens disappears; the sole remaining issue is the ultimate one of intentional discrimination, and the employee must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but a pretext for discrimination. *Reeves*, 530 U.S. at 142-43. Although the presumptions and burdens disappear at this final stage, the employee's prima facie case is still pertinent. In fact, the employee's prima facie case, combined with sufficient evidence to find that the employer's asserted justification for its difference in treatment is false, permits the trier of fact to conclude that the employer has engaged in unlawful discrimination. *Id.* at 146-48. Proof that the employer's explanation is unworthy of belief is "simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* at 147. In appropriate circumstances, the falsity of the employer's explanation

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[10] A remand to the regional office for further adjudication of the discrimination claim is unnecessary because the factual record relating to this claim is fully developed, and because we need not base our findings on the witnesses' demeanor. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995).

allows the trier of fact to infer that the employer is "dissembling to cover up a discriminatory purpose." *Id.*

¶38 This case fits squarely within the circumstance described in *Reeves*. The agency's assertion that it punished the appellant more severely because she committed different or more serious misconduct has been shown to be false with respect to three similarly situated male employees. The appellant's strong prima facie case, coupled with the falsity of the agency's asserted justification, is sufficient to allow us to infer that the appellant's gender was the real reason for imposing the removal penalty. Adding weight to this inference is the agency's apparent unwillingness to consider settlement with the appellant on any terms. The appellant made two offers of settlement, first offering to settle on the same terms as the five men who had their removals reduced to 14-day suspensions and, after that offer was rejected, offering to resign in exchange for expunging her official personnel file of adverse information. IAF, Tabs 15, 19. In rejecting the second offer, the agency stated that the "Principal Settlement Authority will not, under any circumstances, consider any settlement involving 'clean paper' for Ms. Spahn." IAF, Tab 19. The agency's adamant refusal to consider mitigating the penalty against the only woman involved in the "cheating" incident, despite the similarity of her misconduct to that of her male colleagues, is strong evidence that her gender was the reason for the agency's harsher penalty.

¶39 Based on all the evidence, we find that the agency discriminated against the appellant because of sex when it decided to impose the removal penalty against her.

<u>The make-whole remedy for the agency's unlawful sex discrimination is to impose the same punishment given similarly situated male employees.</u>

¶40 The final issue we must consider is the appropriate remedy for the agency's sex discrimination. Under Title VII, if an appellant proves that sex was a motivating factor in the agency's personnel action and, as here, the agency fails to

prove by clear and convincing evidence that it would have taken the same personnel action in the absence of this impermissible motivation, the employee is entitled to "such affirmative action as may be appropriate," including, but not limited to, reinstatement and back pay. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g); 29 C.F.R. § 1614.501(c).

¶41 The purpose of a Title VII remedy is to make the aggrieved party whole, i.e., "persons aggrieved by the consequences and effects of the unlawful employment practice [should] be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting legislative history). Where the evidence shows that an employee has engaged in misconduct that would have resulted in some discipline, but that the agency would not have imposed as serious a penalty but for the unlawful discrimination, the EEOC has held that the make-whole remedy is to substitute a lesser penalty, because reversing the personnel action in its entirety would place the appellant in a better position than she would have been absent discrimination. *Wynne v. Frank*, EEOC No. 01890712 (June 29, 1989); *Monroe v. Frank*, EEOC No. 01880283 (May 6, 1988); *Spranger v. U.S. Postal Service*, EEOC No. 01872213 (Mar. 9, 1988). The Board has followed this principle in several cases. *See generally Caronia v. Department of Justice*, 78 M.S.P.R. 201, 214-16 (1998), *overruled on other grounds*, *Carter v. Department of Justice*, 88 M.S.P.R. 641, ¶ 25 & n.5 (2001); *Esparza v. Department of the Air Force*, 32 M.S.P.R. 517, 520 (1987).

¶42 It is undisputed that the appellant committed misconduct that merited discipline. The way to restore her to the same position she would occupy but for the unlawful discrimination is to punish her to no greater extent than similarly situated male employees: by reinstating her to employment with no more than a 14-day suspension, subject to the condition that any serious violation of DEA Standards of Conduct during the two years following her return to a duty status

will result in removal without a right to appeal in any administrative forum.[11] IAF, Tab 17.

ORDER

¶43 We ORDER the agency to cancel the appellant's removal effective May 25, 1999, and to substitute, at its discretion, for that action a penalty no greater than a 14-day suspension, and the condition that any serious violation of DEA Standards of Conduct during the two years following her return to a duty status (as distinguished from the effective date of her reinstatement under this Order) will result in removal without a right to appeal in any administrative forum. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶44 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶45 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

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[11] We note that the appellant requested "reinstatement under the same terms as her male colleagues." PFR File, Tab 3, at 33.

¶46 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶47 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at

42 U.S.C. § 1981a. The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.204. If you believe you meet these requirements, you must file a motion for compensatory damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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

5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.