

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 297

Docket No. AT-0752-05-0844-I-1

**Thomas S. Evans,
Appellant,
v.
Department of Homeland Security,
Agency.**

December 11, 2007

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Bryan A. Bonner, Esquire, Arlington, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Chairman McPhie issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision affirming his removal. For the reasons stated below, we GRANT the appellant's petition for review and REVERSE the initial decision. The appellant's removal is NOT SUSTAINED.

BACKGROUND

¶2 In February 2002, while applying for employment as a federal air marshal, the appellant completed a standard form 93 (SF-93), on which he was asked to list any "current medication" he was taking. Appeal File, Tab 5, Subtab 4D

(SF-93). The appellant listed only one medication, Prilosec. *Id.* After filling out the form, he underwent a medical evaluation, including a drug test, *see* Hearing Transcript (HT) at 183-85; and he later was offered and accepted appointment to a federal air marshal position, *see* Appeal File, Tab 10, Exhibit 15 at 11; Appeal File, Tab 5, Subtab 4H (documenting the appellant's appointment, effective Mar. 31, 2002).

¶3 As a condition of his employment, the appellant was subject to additional, random drug tests. *See* Agency Hearing Exhibit 3 at 2, Appeal File, Tab 26; Appeal File, Tab 10, Exhibit 15 at 11. On May 15, 2004, the agency administered such a test to the appellant and other employees. Appeal File, Tab 10, Exhibit 4 at 3 (appellant's affidavit); *id.*, Exhibit 15 at 1. On the day of the test, or perhaps a day later, the appellant advised his immediate supervisor that he had been taking medication for a medical condition and that his drug test might indicate the presence of that medication. *See* Appeal File, Tab 5, Subtab 4D at 1; *id.* (memorandum from the appellant to D. Strange, June 4, 2004); *id.*, Tab 10, Exhibit 15 at 1; *id.*, Exhibit 17 ("Conduct Incident Report") at 1; HT at 222, 225. The appellant's supervisor was advised a few days later that the appellant in fact had tested positive for amphetamines; and the appellant subsequently disclosed that he had been diagnosed with attention deficit disorder (ADD) during the 1990s, and had been taking Adderall, a drug containing amphetamines, for that condition. *See* Appeal File, Tab 5, Subtab 4D at 1-2; *id.*, Tab 10, Exhibit 17 at 1-2.

¶4 The agency subsequently charged the appellant with making intentional and material false statements on his SF-93, a pre-employment form, when he failed to list Adderall as a drug he was currently taking. Proposal Notice, Appeal File, Tab 5, Subtab 4E. After considering oral and written responses to the proposal, it removed the appellant on that charge. Appeal File, Tab 5, Subtabs 4B, 4C.

¶5 The appellant appealed his removal; and, after holding a hearing, the administrative judge assigned to the appeal issued an initial decision sustaining

the action. Appeal File, Tab 1; Initial Decision, Appeal File, Tab 28. Although the administrative judge acknowledged that the appellant was not taking Adderall at the time that he completed the SF-93, he found that the appellant had taken the drug in the past for his continuing condition of ADD and his nonuse at the time that he completed the SF-93 and for about six weeks thereafter was temporary. Thus, he reasoned that the appellant was still taking Adderall as a current medication when he completed the SF-93 and he sustained the charge on which the removal was based. He also found that the agency had not violated the appellant's due process rights, that the action did not constitute discrimination against the appellant based on disability, that it did not constitute reprisal for the appellant's filing a discrimination complaint, and that the penalty of removal was reasonable. Initial Decision at 2-14.

¶6 The appellant has filed a timely petition for review, arguing that the charge against him should not have been sustained. Petition for Review (PFR), PFR File, Tab 6. The agency has filed a timely response in opposition to the petition, PFR File, Tab 7; and the appellant submitted an additional submission after the record on petition for review closed, *id.*, Tab 8. Because the appellant's most recent submission concerns the effect of an adjudicatory decision, *Hoskins v. Chertoff*, Appeal No. 0120042087, 2007 WL 556795, at **4-5 (EEOC Feb. 15, 2007), issued after the record on petition for review closed, we have considered that submission. *See* 5 C.F.R. § 1201.114(i). For the reasons stated below, we find that the agency's removal action cannot be sustained.

ANALYSIS

Violation of 29 C.F.R. Part 1630

¶7 The appellant argues on petition for review, as he did below, that the agency violated regulations of the Equal Employment Opportunity Commission (EEOC) by asking him to list his medications before offering him a job and that

his response to that request, even if false, cannot be used to discipline him. *Id.*¹ Under 42 U.S.C. § 12112(d)(2) and (3), an employer “shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability” unless the employer has made an offer of employment to the applicant.² The offer of employment may be conditioned on the results of a medical examination. *See* 42 U.S.C. § 12112(d)(3). A medical examination or inquiry that falls within the scope of 42 U.S.C. § 12212(d) and that precedes any offer of employment, however, violates 42 U.S.C. § 12112(a), which prohibits discrimination on the basis of disability. 42 U.S.C. § 12112(a), (d)(1). The EEOC has promulgated regulations implementing these statutory provisions. 29 C.F.R. §§ 1630.13, 1630.14. It also has issued guidance on this subject. *See* Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (Oct. 10, 1995) (“1995 Guidance”); EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice No. 915.002 (Mar. 25, 1997) (“1997 Guidance”); Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees

¹ The appellant has not challenged the administrative judge’s findings on the appellant’s affirmative defenses that the agency discriminated against him by failing to accommodate his disability and that it retaliated against him for filing a discrimination complaint concerning that matter. *See* Initial Decision at 10-12.

² Section 12112(d) of title 42 describes the obligations of “a covered entity,” and section 12111(2) of the same title provides that a “covered entity” includes an employer. Although an “employer” is defined in 42 U.S.C. § 12111(5)(B) as excluding “the United States,” 29 U.S.C. § 791(g) (1994) has made the employment discrimination standards of 42 U.S.C. § 12112 applicable to federal agencies. The EEOC regulations and guidance cited and described in this analysis therefore are applicable to federal agencies such as the agency in this case. *See* Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), EEOC No. 915.002 (July 27, 2000), Introduction n.3.

under the Americans with Disabilities Act (ADA), EEOC Notice No. 915.002 (July 27, 2000) (“2000 Guidance”).

¶8 The agency does not allege, and the record does not show, that the agency extended any job offer – conditional or otherwise – to the appellant before he completed the SF-93. The administrative judge found, however, that the appellant had failed to present a persuasive argument that the agency had discriminated against him on the basis of disability. Initial Decision at 9-11. He referred to the appellant’s reliance on the EEOC’s 1995 guidance; he found that the guidance appeared to be inconsistent; he found further that it did not provide that a pre-job-offer inquiry about medications constituted discrimination per se; and he stated that the guidance was “just a notice, not a law, rule or regulation.” *Id.* at 10-11.

¶9 As we have indicated above, disability-related inquiries are the subject not only of EEOC enforcement guidance, but also of statutory and regulatory provisions. Moreover, the Board defers to the EEOC with respect to issues of substantive discrimination law. *Morales v. Department of Justice*, 77 M.S.P.R. 482, 484 (1998). Dismissing EEOC guidelines interpreting discrimination law as “just a notice” therefore is inappropriate.

¶10 In its guidance, the EEOC has emphasized that the inquiries that may be made prior to a job offer are more limited than those that may be made at later stages of hiring and employment. 2000 Guidance, General Principles, § B. It has explained further that, before the restrictions were imposed, information about applicants’ physical or mental conditions “was often used to exclude applicants with disabilities before their ability to perform the job was even evaluated”; that applicants who were rejected after being asked about their medical conditions did not necessarily know whether they were “rejected because of disability, or because of insufficient skills or experience or a bad report from a reference”; and that Congress acted to remedy this problem by “establish[ing] a process . . . to isolate an employer’s consideration of an applicant’s non-medical qualifications

from any consideration of the applicant's medical condition." 1995 Guidance, Background. With this purpose in mind, the EEOC has advised employers, in the 1995 guidance to which the administrative judge referred in his initial decision, that they may not, prior to making a job offer, ask questions that are likely to elicit information about a disability. 1995 Guidance, The Pre-Offer Stage, What is a Disability-Related Question? This guidance is consistent both with the legislative purposes described above and with the language of 42 U.S.C. § 12112(d) and 29 C.F.R. §§ 1630.13, 1630.14.

¶11 We have noted above that the administrative judge characterized the EEOC's 1995 guidance as apparently inconsistent. Specifically, he stated that the guidance indicated that questions likely to elicit information about a disability were impermissible, that the same guidance indicated earlier that a question was "not disability-related" if there were "many possible answers . . . and only some of those answers would contain disability-related information"; and that "asking what medications someone is currently taking can lead to answers that both identify and do not identify a disability." Initial Decision at 10-11. He then noted that the appellant responded to the part of the SF-93 at issue here by stating that he took Prilosec, and he stated that "that answer did not identify a disability." Initial Decision at 11.

¶12 We see no basis for finding that the guidelines are inconsistent in any respect material to this case. When read as a whole, they clearly instruct employers that a question may be disability-related, and therefore not permitted at the pre-offer stage, even if it is possible for an applicant to provide an answer to the question that is not disability-related. The sentence immediately preceding the "many possible answers" statement on which the administrative judge relied, for example, states that the prohibition on "questions that are likely to elicit information about a disability . . . means that an employer cannot ask questions that are closely related to a disability." 1995 Guidance, The Pre-Offer Stage, What is a Disability-Related Question? More important, the questions and

answers that immediately follow the sentence to which the administrative judge referred leave no doubt that requests that applicants list all their “current medications” are not permitted at the pre-offer stage. Specifically, the guidelines provide that “questions like, ‘What medications are you currently taking?’ . . . certainly elicit information about whether an applicant has a disability.” *Id.* The EEOC’s 1997 guidelines provide further support for the proposition that, to the extent an employer’s request for information about medications used includes psychiatric medications (such as the medication the appellant in this case was charged with failing to disclose), the request may not be made prior to a job offer. Those guidelines provide that “[q]uestions on job applications about psychiatric disability or mental or emotional illness or about treatment are likely to elicit information about a psychiatric disability and therefore are prohibited before an offer of employment is made.” 1997 Guidance, Disclosure of Disability, § 13.

¶13 We note further that requests that applicants disclose their medications has been found, in court and by the EEOC, to violate statutory and regulatory prohibitions on disability discrimination when those requests are made prior to a job offer meeting the requirements of 42 U.S.C. § 12111(d) and 29 C.F.R. § 1630.14. *See Leonel v. American Airlines, Inc.*, 400 F.3d 702, 705-08 (9th Cir. 2005) (the employer violated the ADA by requiring applicants to list all medications they were taking, and by subjecting them to medical examination, before making a “real” job offer, i.e., an offer not subject to nonmedical conditions); *Serpa v. Potter*, Appeal No. 01993715, 2002 WL 1999167, at **3-4 (EEOC Aug. 21, 2002) (the employer violated the statutory prohibition on disability discrimination when it asked him, prior to a job offer, to list his prescription medications).

¶14 The administrative judge found in his initial decision that “business necessity” justified the agency’s medical inquiry. Initial Decision at 11. He noted that the position for which the appellant applied had medical qualification requirements, and he found that requiring the agency to postpone its medical

inquiry until after it had made an offer of employment would be unreasonable and burdensome, would waste time, and would “slow the process.” *Id.* Although 42 U.S.C. § 12111(d) provides a “business necessity” exception to certain limits on disability-related inquiries, that exception does not apply at the pre-job-offer stage. *See* 42 U.S.C. § 12112(d)(4)(A) (describing “business necessity” consideration as applicable to “employee[s]”); *Dereyna v. Danzig*, Appeal No. 01980077, 2001 WL 65201, at *4 (EEOC Jan. 19, 2001) (“[i]t is clear that an employer may only ask disability-related questions that are consistent with business necessity after conditional offer of employment has been extended.”); 2000 Guidance, Job-Related and Consistent with Business Necessity, § A5 (describing “business necessity” requirement as applicable to employees).

¶15 We note, in connection with the finding mentioned above, that the administrative judge’s reasoning could be considered relevant to the issue of whether a job offer was “real,” i.e., sufficient to permit the agency to make a disability-related inquiry even if the agency had not yet obtained and evaluated all nonmedical information relevant to a final hiring decision. The EEOC has stated in its 1995 guidance that a “job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer.” *See* 1995 Guidance, The Post-Offer Stage (emphasis added); *see also Downs v. Massachusetts Bay Transportation Authority*, 13 F. Supp. 2d 130, 137-38 (D. Mass. 1998) (citing guidance); *Hoskins v. Chertoff*, Appeal No. 0120042087, 2007 WL 556795, at **4-5 (EEOC Feb. 15, 2007). As we have noted above, however, the agency in this case does not argue that it had made any job offer to the appellant at the time it asked him to complete and submit the SF-93. *Cf. Hoskins*, **5-6 (finding that the case must be remanded for consideration of the agency’s implied claim that it had extended a job offer prior to the inquiry at issue). Moreover, even if it had made such an argument, we do not believe that a need to avoid wasting time and “slow[ing] the process” would be sufficient to show that the agency could not reasonably have

obtained and analyzed all relevant nonmedical information before making its medical inquiry. Arguments regarding the need to speed up the hiring process and avoid wasting time have been found insufficient under such circumstances. *See Leonel*, 400 F.3d at 710; *see also Kelly v. Evans*, Appeal No. 01A30554, 2004 WL 1144659, at **2-4 (EEOC May 11, 2004) (violation found despite evidence that pre-offer inquiry was made “in an effort to speed up the hiring process”).

¶16 For the reasons stated above, we find that the agency in this case violated 42 U.S.C. § 12111(d) and 29 C.F.R. § 1630.13(a) when it asked the appellant to disclose the medications he was taking prior to extending a job offer to him.³ This violation constitutes discrimination based on disability.

Effect of Part 1630 Violation

¶17 In *Downs*, 13 F. Supp. 2d at 140-41, a federal district court in Massachusetts held that an employee’s falsified answers to inquiries prohibited under part 1630 could not serve as a basis for subsequently removing the employee. That court reasoned that an employer “ought not be able to base adverse employment decisions on . . . answers . . . to which it was not entitled in the first place” and that the employee’s false responses “were triggered by [the employer’s] own improper actions.” *Id.* at 140. It also rejected the argument that the employee could have answered honestly and then challenged any adverse

³ We see no need to determine whether the appellant is a “qualified individual with a disability,” as that term is defined for ADA purposes. As the EEOC indicated in its 2000 guidelines, some courts have held that an individual must show that he meets this definition in order to bring a claim alleging a violation of prohibitions on disability-related inquiries. 2000 Guidelines, General Principles, Disability-Related Inquiries and Medical Examinations of Employees n.15. Other courts, however, have held that there is no such requirement. *See id. and cases cited therein; O’Neal v. City of New Albany*, 293 F.3d 998, 2007 (7th Cir. 2002) (citing eighth, ninth, and tenth circuit cases). After considering both of these views, the EEOC has taken the “position that the plain language of the [ADA] explicitly protects individuals with and *without* disabilities from improper disability-related inquiries and medical examinations.” 2000 Guidelines, General Principles, Disability-Related Inquiries and Medical Examinations of Employees n.15. We defer to this interpretation. *See Morales*, 77 M.S.P.R. at 484.

decision that resulted from the answer. *Id.* at 141. In rejecting that argument, the court stated that, with many stages of the hiring process remaining at the time of the inquiry, “it would have been difficult to attack a negative decision as having been based on the medical questions.” *Id.*

¶18 The *Downs* court also indicated that its holding was consistent with the reasoning in other decisions, including *Kraft v. Police Commissioner of Boston*, 410 Mass. 155, 157, 571 N.E.2d 380 (1991), and *Huisenga v. Opus Corp.*, 494 N.W.2d 469, 473-74 (Minn. 1992). *Downs*, 13 F. Supp. 2d at 140-41. In *Kraft*, the court overturned the removal of a police officer for providing false answers to questions seeking information about prior hospitalizations, and in *Huisenga*, the court held that an employer could not avoid its workers’ compensation obligations by relying on an employee’s false answers to impermissible questions about past injuries and workers’ compensation complaints. *Huisenga*, 494 N.W.2d at 473-74; *Kraft*, 410 Mass. at 157; *see Downs*, 13 F. Supp.2d at 140.

¶19 We note further that in *Leonel*, 400 F.3d 702, the U.S. Court of Appeals for the Ninth Circuit addressed a somewhat similar issue, i.e., the issue of whether an employer could refuse to hire applicants based on their false responses to inquiries about their medical conditions, when the inquiries were made before the employer had extended job offers meeting the requirements of 42 U.S.C. § 12112(d) and 29 C.F.R. §§ 1630.13 and 1630.14. The court held that the employer was not entitled to “penalize” the employees in this manner and that the existence of a dispute about facts material to the propriety of the inquiry precluded summary dismissal of the applicants’ claims against the employer. *Leonel*, 400 F.3d at 709-11.

¶20 Holdings of the courts that issued the decisions cited above do not constitute precedent binding on the Board. *See Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39 (1987), *aff’d*, 844 F.2d 775 (Fed. Cir. 1987). We find them persuasive, however. *See id.* Not only do they specifically address matters the same as or very similar to those at issue here, but the reasoning in the

decisions is consistent with the purpose of the part 1630 provisions the agency here violated.

¶21 The stigmas associated with various medical conditions – especially mental or brain-function issues, such as those present here – are a matter of common knowledge. *See* 5 C.F.R. § 1201.64 (the Board may take official notice of matters of common knowledge). As the *Downs* court indicated, preemployment inquiries such as those conducted by the agency in this case not only violate the ADA and 29 C.F.R. part 1630, but they also “set up a situation that is likely to ‘trap’ a disabled applicant into making false statements that a non-disabled applicant has no incentive to make.” *Downs*, 13 F. Supp. 2d at 140-41. Moreover, the EEOC guidelines cited above recognize that, in the absence of the ADA’s restrictions on preemployment inquiries, applicants who are rejected after disclosing medical conditions may not be able either to determine the extent to which the rejections were based on their conditions or to prove that those actions constituted improper discrimination. ADA violations such as those at issue in this case therefore frustrate Congress’s intent in enacting the ADA by undermining the enforceability of that act.

¶22 The Supreme Court decisions on which the dissent relies do not require a different result. Neither *LaChance v. Erickson*, 522 U.S. 262, 265-68 (1998), nor *Bryson v. United States*, 396 U.S. 64, 65-66 (1969), involve the ADA or otherwise address an issue concerning disability discrimination. Indeed, *Bryson*, on which *Erickson* was predicated, was decided long before the ADA was enacted into law. To permit the general principles of these cases to negate the specific statutory mandates and prohibitions of the ADA would effectively thwart the important policies underlying the ADA that Congress sought to promote. *See* H. Rep. No. 101-485(II) at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304 (“The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities. . . .”); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998) (The legislative history of the

ADA indicates that Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment by drafting “a prohibition on pre-offer medical examinations or inquiries[.]”).

¶23 For the reasons stated above, we hold that an agency’s question, prohibited to the extent that it would elicit disability-related information from the applicant on a pre-offer-of-employment form, cannot form the basis of a charge of falsification. For that reason, the agency could not establish a charge of falsification here.⁴ Thus, we find that the agency charge cannot be sustained.

ORDER

¶24 We ORDER the agency to cancel the removal action and to restore the appellant effective July 23, 2005. *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.

¶25 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.

¶26 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 to describe the

⁴ The U.S. Court of Appeals for the Federal Circuit, whose holdings are binding on us, *see Fairall*, 33 M.S.P.R. at 39, does not appear to have addressed this issue; and the EEOC also does not appear to have issued any decisions addressing whether an agency question violating 42 U.S.C. § 12112(d), 29 C.F.R. § 1630.13, and 29 C.F.R. § 1630.14 can ever form the basis of a charge of falsification.

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).

¶27 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 in 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).

¶28 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

¶29 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 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 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 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, <http://fedcir.gov/contents.html>. 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:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Thomas S. Evans v. Department of Homeland Security

MSPB Docket No. AT-0752-05-0844-I-1

¶1 As explained below, I would sustain the appellant’s removal for falsifying his Standard Form 93 (SF-93) by not revealing that he took Adderall, a prescription drug containing amphetamines, when he was asked on that form what medications he was taking at the time he applied for employment as an Air Marshal.

¶2 The appellant does not claim that his removal for falsification amounted to a failure to accommodate his disability, or that it amounted to disparate treatment on account of that disability. Instead, he contends that the agency cannot lawfully discipline him for falsification because the inaccurate information that he provided to the agency was provided in response to a question that violated the prohibitions in the Americans with Disabilities Act (ADA) against certain kinds of preemployment inquiries. The majority finds his argument persuasive and reverses his removal. I disagree.¹

¶3 I note first that the agency did not violate the plain language of 42 U.S.C. § 12112(d) or 29 C.F.R. § 1630.13 when it asked what medications the appellant was taking. Section 12112(d) of title 42, U.S. Code, provides in relevant part that, before an offer of employment has been made, “a covered entity shall not

¹ The appellant is not raising the ADA claim as a true affirmative defense to his removal. Instead of arguing that the removal constitutes discrimination even if the agency proved the charge against him, *see* 5 U.S.C. § 7701(c)(2)(B), the appellant is arguing that the falsification charge itself cannot be sustained because it is based on a question that violated the ADA. *Cf. Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 71-78 (1997) (addressing the appellant’s argument that a charge of absence without leave could not be sustained because the agency violated the Family and Medical Leave Act when it failed to grant her leave for the period in question).

conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.” 42 U.S.C. § 12112(d)(2)(A), (d)(3). It provides further that such an entity “may make preemployment inquiries into the ability of an applicant to perform job-related functions.” 42 U.S.C. § 12112(d)(2)(B). Similarly, 29 C.F.R. § 1630.13 provides in relevant part that “a covered entity [may not] conduct a medical examination of an applicant or . . . make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.” 29 C.F.R. § 1630.13(a). The agency did not ask the appellant, in the SF-93, whether he was an individual with a disability, and it did not ask him for information about the nature or severity of any such disability. Moreover, the record indicates, and the appellant does not deny, that the Adderall medication the appellant was taking contained amphetamines, and that agency medical standards prohibit federal Air Marshals from flying while taking certain medications, including amphetamines. *See, e.g.*, Appeal File, Tab 5, Subtab 4D at 1 (memorandum from appellant to D. Strange, June 4, 2004); *id.*, Tab 10, Exhibit 11 at 3 (affidavit of L. Harrison).

¶4 As the majority opinion indicates, however, the Equal Employment Opportunity Commission (EEOC) issued guidance in 1995 governing preemployment inquiries under the ADA. *1995 Guidance, The Pre-Offer Stage: What is a Disability-Related Question?* That guidance provides that before a job offer is made, an employer is prohibited from asking applicants questions that are “likely to elicit” information about a disability or that are “closely related” to a disability. I assume for purposes of analysis that the agency violated the EEOC guidance, as the majority finds.

¶5 The ultimate issue in this case is whether disciplining an employee for falsifying a response to a question that violates the EEOC’s 1995 guidance promotes the efficiency of the service under 5 U.S.C. § 7513. The policies underlying the EEOC guidance – and underlying the ADA restrictions that are the

subject of that guidance – are important. If a prospective employer were permitted to make medical inquiries of all applicants before making job offers, it could engage in hard-to-detect discrimination based on unfounded assumptions and stereotypes about the disabled.

¶6 Nevertheless, the Supreme Court held in *Lachance v. Erickson*, 522 U.S. 262, 265-68 (1998), that a federal agency could discipline an employee for lying during an investigation into the employee’s possible misconduct. The Court indicated that this rule applied even though the employee might have a right, under the Fifth Amendment to the U.S. Constitution, to decline to answer the agency’s questions, and even though the agency might draw an adverse inference based on the employee’s silence. *See id.* at 267-68. Moreover, the Court specifically addressed 5 U.S.C. § 7513, and found “no hint” in the “carefully delineated rights” under that section that an individual is entitled to make false responses to the agency’s questions. *Id.* at 265-66.

¶7 Another Supreme Court decision provides further support for the proposition that an employee’s false responses to questions may be actionable despite the improper nature of the questions. In *Bryson v. United States*, 396 U.S. 64, 65-66 (1969), the Court declined to vacate a perjury conviction that was based on a falsified affidavit, i.e., an affidavit in which the petitioner in the case denied that he was a member of the Communist Party. *Bryson* is similar to the present case in that the affidavit at issue there, like the SF-93 in the present case, apparently was submitted in an effort to enable the petitioner to obtain something of value to him. That is, the labor organization of which the petitioner was an officer could “draw upon the jurisdiction of the National Labor Relations Board” only if each officer of the organization submitted an affidavit denying membership in the Communist Party. *See id.* at 66 n.2. The Court nevertheless rejected the proposition “that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked.” *Id.* at 72. It stated further that “[o]ur legal system provides methods for

challenging the Government's right to ask questions – lying is not one of them,” and it added that a “citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.” *Id.*

¶8 Significantly, in *Bryson*, the Court noted that the inquiry to which the petitioner was responding in his affidavit – i.e., the inquiry as to whether he was a member of the Communist Party – had been found to violate the Constitution. *Bryson*, 396 U.S. at 66. Likewise, in this case, even if the portion of the SF-93 concerning medications that an applicant is taking violated the EEOC's 1995 guidance, this case is not distinguishable from *Bryson* on that basis. Furthermore, I see nothing in *Erickson* that indicates that the Court relied on the absence of evidence that the agency in that case violated a law prior to any false denials in that case. Instead, the *Erickson* Court relied on *Bryson* and on other decisions indicating the absence of any right to make false statements in similarly difficult circumstances. *See Erickson*, 522 U.S. at 265-68.

¶9 Section 12112 of title 42 was not intended to create a right to lie. It was instead intended to provide rights that may be enforced through other means. If the appellant in this case believed the agency acted improperly in asking him about medications he was taking, he could have answered the agency's inquiry truthfully or he could have refused to respond to the inquiry. If he was not subsequently hired, he could have filed a discrimination complaint concerning the matter, as other individuals who objected to preemployment inquiries have done. *See, e.g., Griffin v. Steeltek, Inc.*, 160 F.3d 591, 592-95 (10th Cir. 1998) (even in the absence of a showing that the applicant had a “disability” under the ADA, the applicant could challenge his nonselection for employment following an allegedly improper inquiry about his medical condition); *see also Hoskins v. Chertoff*, Appeal No. 0120042087, 2007 WL 556795, at **4-5 (EEOC Feb. 15, 2007); *Darcangelo v. Potter*, Appeal No. 01A50399, 2005 WL 3452129 (EEOC Dec. 2, 2005); *Kelly v. Evans*, Appeal No. 01A30554, 2004 WL 1144659 (EEOC May 11,

2004); *Edwards v. Principi*, Appeal No. 01A30010, 2004 WL 321121 (EEOC Feb. 11, 2004); *Serpa v. Potter*, Appeal No. 01993715, 2002 WL 1999167 (EEOC Aug. 21, 2002); *Dopun v. Potter*, Appeal No. 01992295, 2002 WL 265437, at **5-9 (EEOC Feb. 13, 2002); *Kelly v. Evans*, Appeal No. 01A01247, 2001 WL 953622 (EEOC June 26, 2001); *Nolan v. Caldera*, Appeal No. 01975113, 2000 WL 1687279 (EEOC Nov. 1, 2000).

¶10 Instead of using the means of redress available to him, the appellant chose to make a false statement on his SF-93. Under *Erickson* and *Bryson*, the agency was entitled to discipline him for this action.²

¶11 I would sustain the charge against the appellant. Moreover, I see no error in the administrative judge's finding that the penalty of removal was reasonable. Accordingly, I would affirm the initial decision as modified by the above analysis, and I would sustain the appellant's removal.

Neil A. G. McPhie
Chairman

² The court decisions on which the majority relies in finding to the contrary do not constitute precedent binding on the Board. Moreover, two of those decisions, *Huisenga v. Opus Corp.*, 494 N.W.2d 469, 473-74 (Minn. 1992), and *Kraft v. Police Commissioner of Boston*, 410 Mass. 155, 157, 571 N.E.2d 380 (1991), were issued prior to *Erickson*. The other decisions cited in this part of the majority opinion make no attempt to distinguish *Erickson*, and none of those decisions make any attempt to distinguish *Bryson*. For this reason, and for the other reasons described above, I do not find the decisions relied upon by the majority to be persuasive.