UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 233

Docket No. SF-0752-09-0234-I-1

Thomas E. Warner,

Appellant,

v.

Department of the Interior,

Agency.

December 6, 2010

Mary Dryovage, Esquire, San Francisco, California, for the appellant.

Karen D. Glasgow, Esquire, Oakland, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his 30-day suspension. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal to the Western Regional Office for adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency suspended the appellant, a Supervisory Forester, for 30 days effective January 12, 2009, based on charges of interference with an official government investigation and carelessness in performing assigned work. Initial

Appeal File (IAF), Tab 3, Subtabs 4a, 4b, 4f. The appellant filed a timely appeal of his suspension with the Board. IAF, Tab 1.

¶3 Following a hearing, the administrative judge affirmed the agency's action, sustaining only the charge of carelessness in performing assigned work. IAF, Tab 25, Initial Decision at 1, 8, 14. He found that the appellant failed to prove his affirmative defenses of reprisal for whistleblowing and retaliation for prior grievance activity. *Id.* at 14-21. The administrative judge also found that the appellant failed to prove his affirmative defense of age discrimination under the theory of disparate treatment as the appellant failed to identify comparable employees and failed to even assert in his own testimony that age was a factor in his suspension. *Id.* at 22-23. Lastly, the administrative judge found that the suspension penalty was reasonable for the sustained charge. *Id.* at 26.

¶4 The appellant has filed a timely petition for review asserting various errors by the administrative judge.[1]

ANALYSIS

¶5 The appellant asserted several affirmative defenses below, including that his 30-day suspension was a result of age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA) under the theories of disparate treatment and disparate impact. *See* IAF, Tab 1 at 7-8; *id.*, Tab 16 at 16-17. Under the theory of disparate impact, the appellant alleged that the agency "has a practice of forcing out older employees by proposing disciplinary action based on pretextual charges of misconduct." IAF, Tab 16 at 17. He

[1] In light of our disposition of this appeal, we need not decide whether the appellant's brief and exhibits in support of his petition for review or the agency's response in opposition to the appellant's petition for review were timely filed. *See* Petition for Review (PFR) File, Tabs 5-8, 13.

asserted that similarly situated younger employees have not been subjected to disciplinary action under similar circumstances.[2] *Id.*

¶6 In the July 2, 2009 prehearing conference summary, the administrative judge recognized that the appellant had raised the affirmative defense of discrimination under the ADEA. *See* IAF, Tab 18 at 3. He set forth the standard of proof for a claim of age discrimination based on disparate treatment under *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009). IAF, Tab 18 at 3. However, the record fails to show that the administrative judge set forth the burden and elements of proof with respect to the appellant's disparate impact claim under the ADEA in the prehearing conference summary or elsewhere. In the initial decision, the administrative judge noted that a claim of age discrimination could be one of disparate treatment or disparate impact and that the appellant "specified" that he was alleging disparate treatment. *See* Initial Decision at 21. The administrative judge failed to indicate when or how the appellant specified that he was raising only a disparate treatment claim or abandoned his disparate impact claim. Our review of the record fails to reveal that the appellant limited his age discrimination claim. In his petition for review, the appellant reiterates his argument that the agency has a practice of forcing out older employees, contends this is a disparate impact claim, and asserts that the administrative judge improperly failed to evaluate this claim. PFR File, Tab 5 at 21.

¶7 The Board has held that an administrative judge must inform an appellant of the burdens and elements of proof on his discrimination claims. *See Sarratt v.*

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[2] Disparate impact cases generally involve a facially neutral employment practice that has a significant adverse effect on a protected group and the evidentiary focus is usually on statistical disparities, rather than specific incidents. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986-87 (1988). Although the appellant's claims in this matter appear to involve pretext, rather than a facially neutral practice, as explained herein, the appellant was not properly advised of the burdens and elements of proof for a disparate impact claim.

U.S. Postal Service, 90 M.S.P.R. 405, ¶ 12 (2001); *Thompson v. Department of the Army*, 80 M.S.P.R. 245, ¶ 6 (1998); *see also Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). As discussed above, the administrative judge in the instant case failed to provide the appellant with the appropriate notice regarding the burden of proof for his disparate impact claim under the ADEA. That was error and necessitates remand of this matter.

¶8 Because the administrative judge failed to provide the required notice regarding the appellant's disparate impact claim, we do so here. To establish a prima facie case of a disparate impact violation of the ADEA, an employee must: (1) identify the specific employment practices that are allegedly responsible for any observed statistical disparities; and (2) offer statistical evidence of a kind and degree showing the practices at issue have caused the disparate impact. *See Smith v. City of Jackson*, 544 U.S. 228, 241 (2005); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994-95 (1988) (setting forth how to establish a prima facie disparate impact claim in a Title VII case); *Stern v. Federal Trade Commission*, 46 M.S.P.R. 328, 333 (1990) (same). Unlike Title VII, the ADEA significantly narrows coverage for disparate impact cases by precluding liability if the adverse impact was attributable to reasonable factors other than age. *Smith*, 544 U.S. at 228, 239. This is treated as an affirmative defense for which the agency bears the burden of production and persuasion. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2404-07 (2008).

ORDER

¶9 For the above-stated reason, we REMAND this appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order. The administrative judge shall afford the parties the opportunity to submit

additional evidence and argument relating to this affirmative defense and issue a new initial decision.

FOR THE BOARD:

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