UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 3

Docket No. SF-4324-09-0406-B-1

Patrick K. Harellson,

Appellant,

v.

United States Postal Service,

Agency.

January 5, 2011

Patrick K. Harellson, Waianae, Hawaii, pro se.

Afshin Miraly, Esquire, Long Beach, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This matter is before the Board on an interlocutory appeal certified by the administrative judge following her June 16, 2010 Order. In that Order, the administrative judge found that an appellant does not state a cause of action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA), by alleging that a hiring practice results in a disparate impact upon individuals protected by that statute. For the reasons set forth below, we AFFIRM the administrative judge's ruling and RETURN the case to the Western Regional Office for further adjudication.

BACKGROUND

¶2 This case was previously before the Board on petition for review of the appellant's appeals filed pursuant to the Veterans Employment Opportunities Act (VEOA) and USERRA. *Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534 (2010). In that decision, we fully articulated the facts relevant to this appeal. *Id.*, ¶¶ 2-7. Because the facts as stated in that decision have not changed, we will not restate them here, but rather will only provide a summary of the facts necessary to deciding this interlocutory appeal.

¶3 The appellant is a 10-point preference eligible veteran. *Id.*, ¶ 2. He resigned his position with the agency on May 28, 2000, and later sought reinstatement. *Id.* He subsequently took and passed the examination for Custodian (Laborer). *Id.* Thereafter, the appellant applied for numerous Custodian positions, only two of which are at issue in this appeal, but was not selected. *Harellson*, 113 M.S.P.R. 534, ¶¶ 3-4. The appellant learned that the agency waived the Custodian examination for non-maintenance internal agency candidates, and that the positions at issue were filled internally through reassigning employees whose positions were excessed. *Id.*, ¶¶ 4, 7.

¶4 In the appellant's initial appeal, the Board affirmed the administrative judge's decision finding that the agency did not violate the appellant's right to compete under 5 U.S.C. § 3304(f) when it hired through its internal register after accepting and considering external applicants including the appellant, a preference eligible veteran. *Id.*, ¶¶ 8-11. The Board further found, however, that the administrative judge failed to address two of the appellant's USERRA claims that: (1) the agency's decision to waive the Custodian examination requirement for internal candidates enabled the agency to consider a greater number of internal non-veteran candidates, and not preference eligible external candidates like the appellant; and (2) the agency specifically targeted Custodian positions for the policy change as those positions have been traditionally reserved for veterans.

Id., ¶ 13. Accordingly, the Board remanded this case to address these two outstanding issues.

¶5 On remand, the administrative judge characterized the first argument as raising a disparate impact claim, and issued an order instructing the parties to file briefs on the question of whether the Board has jurisdiction to consider a disparate impact claim under USERRA. Remand Appeal File (RAF), Tab 15 at 1-2; Tabs 6, 10. Both parties responded. RAF, Tabs 12, 14.

¶6 The agency asserted that an appellant does not state a cause of action under USERRA when he claims that a neutral policy or practice has a disparate impact on those protected by USERRA, and therefore the Board does not have jurisdiction over this claim. RAF, Tab 12. Specifically, the agency contended that a USERRA violation must be specific to the individual, and that the action at issue must be motivated by the individual's membership in the class protected by USERRA. In support of its argument, the agency cited 38 U.S.C. §§ 4301 and 4311, and *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619 (2005). RAF, Tab 12 at 4-6. The agency explained that because a disparate impact claim does not require a showing of an intent to discriminate, and USERRA requires such intent to establish a violation, a practice or policy that is not motivated by discrimination against an individual protected by USERRA cannot form the basis of a USERRA violation. *Id.* at 5-7.

¶7 The agency further argued that Congress is aware of how to write legislation that allows for disparate impact claims, and has done so, citing the Americans with Disabilities Act (ADA)[1] and Title VII of the Civil Rights Act. RAF, Tab 12 at 7. In those statutes, Congress drafted statutory language so as to provide protection from both intentional discrimination, and the "effect of

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[1] The ADA has been amended and is now referred to as Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The amendments to the act, however, did not change the point for which it is discussed here.

discrimination," thus including situations where the discriminating party's action may be unintentional but still has a discriminatory effect. *Id.* The agency's final argument is that USERRA is not a remedial statute like Title VII, attempting to provide redress for a history of discrimination, but instead is a proactive statute to encourage military service. *Id*. at 8-10 (contrasting *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the legislative history of USERRA, Ch. 43, Subchapter 1 § 4301, House Committee Report No. 103-65, pt. 1, Apr. 28, 1993).

¶8 The appellant argued that the Board has accepted disparate impact as a valid basis for establishing the Board's jurisdiction under USERRA, citing *McAfee v. Social Security Administration*, 88 M.S.P.R. 4 (2001). RAF, Tab 14 at 4-5. Moreover, the appellant argued that USERRA claims are intended to be broadly and liberally construed. *Id.* at 5-6. Restricting the application of USERRA only to claims under a disparate treatment theory, the appellant asserted, would unduly narrow the interpretation of this statute, which was adopted to protect veterans from discrimination. *Id*. at 6.

¶9 After considering both parties' arguments, the administrative judge ruled that a disparate impact claim is not cognizable under USERRA because a violation of 38 U.S.C. § 4311 occurs only when the accused party had a "motive to discriminate." The administrative judge certified her ruling for interlocutory appeal. RAF, Tab 15.

ANALYSIS

¶10 Neither the Board nor its reviewing court has ruled on whether USERRA allows for a disparate impact claim. Whether USERRA allows an individual to maintain a claim for disparate impact is an important question of law about which there is substantial ground for difference of opinion. Few courts have addressed the issue of whether disparate impact is a viable claim under USERRA, and those that have, have not issued a holding on the issue, but rather have noted that this is an uncertain area of law. *Miller v. City of Indianapolis*, 281 F.3d 648, 651 (7th

Cir. 2002); *see also Roslyn v. Northwest Airlines, Inc.*, 2005 WL 1529937, at *4, n.3 (D. Minn. 2005) (unpublished) (acknowledging that the complainant may have a disparate impact claim, noting that its reviewing court is uncertain whether a claim under USERRA could go forward under a disparate impact theory, but not ruling on the issue); *Fink v. City of New York*, 129 F. Supp. 2d 511, 522-23 (E.D.N.Y. 2001) (recognizing the lack of case law applying disparate impact analysis in a USERRA case, stating the analytical framework for doing so, but then stating it is unnecessary in this case). Furthermore, an immediate ruling will materially advance the completion of this proceeding because the parties and the administrative judge need to know the scope of discovery and evidence to be presented at the hearing.

¶11 Accordingly, this case is appropriate for interlocutory review. *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4, ¶ 7 (2009); 5 C.F.R. § 1201.92. For the reasons set forth below, we affirm the administrative judge's decision and return the case to the administrative judge for adjudication in accordance with this decision.

USERRA Does Not Provide for a Claim Under a Disparate Impact Theory.

¶12 Disparate treatment and disparate impact are distinct analytical frameworks for establishing discrimination. A disparate treatment claim may succeed only if there is a finding of intent to discriminate by the acting party, while a disparate impact claim may succeed if a facially neutral policy or practice has a disproportionate effect on a protected class of people and is not justified by business necessity. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003). Thus, the appellant was correct when he stated that disparate impact is a method for analyzing a discrimination claim. RAF, Tab 14 at 6. Nevertheless, in *Raytheon*, the Court cautioned that it is impermissible to conflate these two modes of analysis. 540 U.S. at 51.

¶13 Thus, in determining whether USERRA permits a claim under a disparate impact theory, we must decide whether intent is a required element of proof to

establish a violation under USERRA. To do so, we have considered the language of the statute, the legislative history of USERRA, and case law regarding USERRA and other anti-discrimination laws to evaluate whether they provide persuasive analysis for reaching a conclusion regarding the applicability of a disparate impact in a claim brought under USERRA.

¶14 The starting point for every case involving statutory construction is the language of the statute itself. *MacLean*, 112 M.S.P.R. 4, ¶ 9 (citations omitted). Where the statutory language is clear it must control absent clearly expressed legislative intent to the contrary. *Id.* The relevant portion of USERRA provides as follows:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
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> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
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> (c) An employer shall be considered to have engaged in actions prohibited - (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any

> proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

38 U.S.C. § 4311.[2]

¶15 Unlike Title VII, the ADAAA, and the Age Discrimination in Employment Act of 1967 (ADEA), USERRA does not mention finding liability for discrimination based on the adverse effect of an employer's practice. *Compare* 38 U.S.C. § 4311(a) and (c), *with* 29 U.S.C. § 623(a), 42 U.S.C. § 2000e-2(a), and 42 U.S.C. § 12112(b)(6). Rather, USERRA focuses on the employer's motivation in taking the action, stating that an action may not be taken or withheld "on the basis of" the individual's membership in the protected class. 38 U.S.C. § 4311(a). Further, the statute provides that an employer will be found to have violated USERRA if the individual's protected status is a "motivating factor" in the employer's action. 38 U.S.C. § 4311(c). Thus, as explained in *Clavin*, a successful claim of discrimination under USERRA requires a showing that the contested agency action was based on improper motive. 99 M.S.P.R. 619, ¶ 6.

¶16 The Board's decision in *McAfee*, 88 M.S.P.R. 4, does not require a contrary holding. In *McAfee*, the Board vacated an administrative judge's decision dismissing the appellant's USERRA and VEOA appeal for lack of jurisdiction and remanded the USERRA portion for further adjudication.[3] *Id.*, ¶ 1. The Board found that the appellant made both a disparate treatment and a disparate

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[2] USERRA also contains detailed provisions governing the rights of individuals who are absent from civilian employment to perform active military duty, and the right to be reemployed following such duty. 38 U.S.C. §§ 4312-4319. This decision does not concern those rights, but instead relates only to claims asserted under 38 U.S.C. § 4311.

[3] The Board did affirm the administrative judge's ruling on the appellant's VEOA claim. *McAfee*, 88 M.S.P.R. 4, ¶ 11.

impact claim. *Id.*, ¶ 14. In remanding the case for further adjudication, the Board did not determine whether a disparate impact claim was viable under USERRA, but rather found that the appellant's disparate treatment claim may have been sufficient to establish the Board's jurisdiction and therefore remanded the case for development of the record. *Id.*, ¶¶ 16-18. The Board did not make any finding about the appellant's disparate impact claim, but rather merely stated that the appellant made such a claim. *Id.*, ¶ 14.

¶17 Moreover, Congress knows how to express a desire to include a disparate impact cause of action to establish discrimination, as it did when it passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1074-75 (1991). There, Congress clearly indicated its intent to include a disparate impact basis for finding discrimination both in the statute and in the legislative history. *Id.*; H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 570. Congress's intent, in part, in passing the amendments to Title VII was to codify the right to pursue a disparate impact claim under the standards as outlined in *Griggs*. H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 570.[4] USERRA was passed only three years later, and Congress did not demonstrate a similar intent, but rather it retained the motive requirement in the statute. Pub. L. No. 103-353, 108 Stat. 3149 (1994); 38 U.S.C. §§ 4301(a)(3) and 4311(a), (c)(1). Further, while the legislative history does state that the USERRA legislation

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[4] In its original version, Title VII did not explicitly prohibit employment practices that resulted in a disparate impact. Rather, Title VII stated that it was unlawful for an employer to, among other things, "limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise *adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis supplied). In *Griggs*, the Supreme Court interpreted this provision to conclude that Title VII prohibits "practices that are fair in form, but discretionary in operation," and it thus recognized a disparate impact claim under Title VII. Congress codified this disparate impact theory of liability under Title VII in the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(k).

should be liberally construed and states that it is a remedial statute, Congress did not provide for or even discuss an action under this statute absent discriminatory intent. H.R. Rep. No. 103-65(I) (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452-53.

¶18 In finding that a disparate impact analysis may be applied in an ADEA claim, the Supreme Court found that the text of the legislation in both Title VII and the ADEA "prohibits such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee because of such individual's race or age." *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 235 (2005) (emphasis in original). The Court determined that the text of the ADEA "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Id.* at 236 (emphasis in original). The Court in *Smith* also relied on the reasoning set forth in *Griggs*, 401 U.S. 424. In *Griggs*, the Court stated that facially neutral practices, procedures, or tests are impermissible if they perpetuate prior discriminatory practices. *Id*. at 429-30. In *Griggs*, this analysis was particularly relevant because there the employer instituted a non-business related impediment, although neutral on its face, which had a disparate impact on African Americans. *Id.* at 429-33. This type of racial discrimination, which was not necessarily based on intent, went to the heart of the type of discrimination Title VII was enacted to fight. *Id*. at 431. The Court in *Smith* stated that, similar to the bastions of discrimination that gave rise to disparities between white and African Americans in American history, there were similar obstacles for older workers, such as inferior educational opportunities in the past. *Smith*, 544 U.S. at 235, n.5.

¶19 The stated purposes for USERRA are: (1) to encourage noncareer uniformed service by eliminating or minimizing disadvantages to civilian employment that can result from such service; (2) to minimize the disruption to the lives of those performing uniformed service and their employers, fellow employees, and communities, by providing for the prompt reemployment of such

persons; and (3) to prohibit discrimination against individuals due to their uniformed service. 38 U.S.C. § 4301(a). USERRA, unlike Title VII, therefore, was not enacted because of a long history of discrimination unrelated to employment. Rather, USERRA was enacted to directly address the potential effects of military service on an individual's civilian job. In the legislative history, Congress explained that the revisions to the law, as codified in USERRA, were made to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103-65(I) (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451. These changes were perceived as necessary due to the changing role of reservists and the often confusing terminology used in this area of the law, and not because of any overarching societal discrimination against those who provide military service. *Id.* at 2451-52.

¶20 Denying an appellant's ability to pursue a claim under a disparate impact theory does not preclude an appellant from using evidence of a disparate impact of an agency's policies or practices as circumstantial evidence of intentional discrimination in violation of 38 U.S.C. § 4311. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). A policy that does not further a legitimate business interest and has a known disparate impact may indeed serve as a persuasive basis for supporting a claim that the agency's action was motivated by discriminatory animus and is therefore prohibited under USERRA.[5]

¶21 Thus, while a known disparate impact of an agency policy or practice may be some evidence of discriminatory intent, USERRA does not provide for a cause

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[5] This should not be confused with the facts of *Raytheon*, as our analysis still requires that the employer know of the disparate impact of the policy and choose to go forward with it anyway, thus providing evidence of intent and not merely a disparity in effect. *Raytheon*, 540 U.S. at 54.

of action under a disparate impact theory. Therefore, the appellant may not proceed on this theory before the Board.

ORDER

¶22 Accordingly, we affirm the administrative judge's ruling, which properly excluded the appellant's disparate impact claim from consideration, and return the case to the administrative judge for further adjudication on the remainder of the appellant's appeal. This is the final order of the Merit Systems Protection Board in this interlocutory appeal. 5 C.F.R. § 1201.91.

FOR THE BOARD:

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