

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

LETHA MARIE PACE,
Appellant,

DOCKET NUMBER
AT-0752-11-0941-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: July 23, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Letha Marie Pace, Clarksdale, Mississippi, pro se.

Sandra W. Bowens, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

DISCUSSION OF ARGUMENTS ON REVIEW

We have considered the appellant's arguments on review and find them unpersuasive. The appellant's vague assertion that the administrative judge failed to consider all of the facts does not provide a basis to disturb the administrative judge's decision. *See Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 92 (1992). Further, the Board need not consider the appellant's argument that she was not directly responsible for audits because the appellant has failed to show that this argument is based on new and material evidence not previously available despite her due diligence. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

Additionally, the appellant fails to show that the administrative judge erred in finding that she did not establish her affirmative defenses of race and gender discrimination. Initial Appeal File, Tab 17, Initial Decision at 3. We agree with the administrative judge that, even if supervisory male employee Steve Cannon had been paid for hours he did not work, such misconduct was not so similar to the appellant's as to make him an appropriate comparator. *Id.* at 3. The Board has held that, to be similarly situated for purposes of an affirmative defense of discrimination based on disparate treatment, comparators must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances. *Gregory v. Department of the Army*, [114 M.S.P.R. 607](#), ¶44 (2010). Here, as noted by the administrative judge, "Cannon's alleged misconduct involved possible time and attendance infractions, while the appellant's misconduct amounted to theft of funds." Initial Decision at 3.

Although comparator evidence is not the only basis upon which to establish a disparate treatment claim, *see Davis v. Department of the Interior*, [114 M.S.P.R. 527](#), ¶¶ 6-8 (2010), the appellant identified only comparator evidence as the basis for her claim of disparate treatment, and her evidence was not persuasive. Thus, because the appellant has failed to meet her ultimate burden of proving that she was similarly situated to Cannon or another comparator, she has not shown that the administrative judge erred in finding that she did not prove her affirmative defenses of race and gender discrimination. Initial Decision at 4; *see Gregory*, [114 M.S.P.R. 607](#), ¶ 44.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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 Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

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. § 2000e-5\(f\)](#) and [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 Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms 5, 6, and 11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.