UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONELL ELLIS, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER DA-0752-11-0496-I-1 DATE: September 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Donell Ellis, Monroe, Louisiana, pro se.

Cynthia J. Estee, Esquire, Dallas, Texas, 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 that was not available for consideration earlier or when the administrative judge

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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).

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).

In finding that the appellant's refusal to perform the duties of his position was not justified, the administrative judge credited Ms. Williams' and Mr. Scott's testimony that the appellant had a modified case for sorting mail and found that it was unlikely that Ms. Williams or Mr. Scott would deliberately mislead the Department of Labor's Office of Workers' Compensation (OWCP) by submitting false information about how the appellant's job was modified. Initial Appeal File (IAF), Tab 26, Initial Decision (ID) at 12. The appellant challenges this finding on review, asserting that "[d]irect evidence is provided showing Scott and Williams did mislead and didn't follow procedures on multiple occasions." Petition for Review (PFR) File, Tab 1 at 3. The appellant does not offer any evidence to support his apparent contention that the agency misled OWCP about modifying his duties so that they were compatible with his medical restrictions, however. Thus, the appellant's argument is essentially mere disagreement with the administrative judge's explained, well-reasoned findings and, as such, provides no basis for disturbing the initial decision. *See Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987).

On review, the appellant also challenges the administrative judge's finding that he failed to prove his affirmative defenses of disability discrimination based on failure to accommodate and disparate treatment, age discrimination, and retaliation for protected activity. PFR File, Tab 1 at 7-15; ID at 14-19. To prove a failure to accommodate disability discrimination claim, an appellant must prove, inter alia, that he is a qualified individual with a disability, i.e., that he is an individual with a disability "who satisfies the requisite skill, experience, education and other job-related requirements of the employment position [he] holds or desires, and who, with or without reasonable accommodation, can

perform the essential functions of such position." *Henson v. U.S. Postal Service*, 110 M.S.P.R. 624, ¶ 7 (2009) (quoting 29 C.F.R. § 1630.2(m)).

In finding that the appellant failed to meet this burden, the administrative judge noted that "[n]either party contends that the appellant could perform the regular, essential duties of his Mail Processing Clerk position without accommodation in light of his restrictions . . . ." ID at 14. In addition, the administrative judge found, "the appellant has identified no accommodation which would have allowed [] him to perform those duties . . . [nor] has he identified an existing, vacant funded position into which he could have been transferred." *Id.*

Our examination of the record likewise does not show that the appellant ever articulated any accommodation. In fact, the appellant acknowledges on review that when agency officials asked him what job duties he could perform in response to his claim that he was unable to perform the duties of the modified job offer, the appellant stated, "it's up to management to find me suitable work." PFR File, Tab 1 at 7, 8. Therefore, the administrative judge correctly found that the appellant failed to meet his burden of proof on the affirmative defense of disability discrimination based on failure to accommodate.

An appellant may establish a discrimination claim based on disparate treatment by showing that: (1) He is a member of a protected group; (2) he was situated similarly to an individual who was not a member of the protected group; and (3) he was treated more harshly than the individual who was not a member of his protected group. *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 33, *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007). 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. *Id.*

Applying this standard, the administrative judge found that the two employees the appellant identified as potential comparators were not proper

comparators because neither of them refused to perform their assigned duties while simultaneously failing to produce requested medical documentation about their impairments. ID at 17. The appellant does not challenge the administrative judge's finding that these employees were not proper comparators, and we see no reason to disturb the administrative judge's finding that the appellant failed to prove disparate treatment discrimination based on comparator evidence.

While showing that the employer treated similarly-situated employees differently is one method of proving discrimination, an appellant may also prevail on a discrimination claim by introducing evidence (1) that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of minority employees or those who engage in protected activities; or (5) of incriminating statements by the employer. *See Scott v. Office of Personnel Management*, 116 M.S.P.R. 356, ¶ 17 (2011), *aff'd as modified on recons.*, 117 M.S.P.R. 467 (2012).

With respect to these methods of proving discrimination, the administrative judge found that the appellant did not proffer any evidence of failure to follow established procedures, the agency lying about why it removed him, or of inconsistency in its explanation for doing so. ID at 18. The administrative judge noted that the appellant introduced some evidence of potentially disabled persons generally being treated unfavorably, as two of the appellant's co-workers who claimed to have work-related injuries testified that Mr. Scott yelled at or was rude to them. *Id.* The administrative judge found, however, that Mr. Scott's behavior toward these employees does not establish that he harbored animus against the disabled and that there is no evidence that Mr. Scott considered persons with disabilities indolent or otherwise undesirable. *Id.* at 18-19. Therefore, the administrative judge found that this evidence does not support a finding that the agency intentionally discriminated against the appellant on the basis of his disability in terminating him. *Id.* at 18.

We agree. As the administrative judge explained, to prevail on a claim of intentional discrimination or retaliation using circumstantial evidence, an employee must present a "convincing mosaic" showing that the true reason for an agency's adverse action was the affected employee's membership in a protected category. ID at 18 (citing *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 20 (2008)). The administrative judge correctly found that the appellant failed to meet this standard.

To prove retaliation for protected activity, an appellant must prove by preponderant evidence that: he engaged in protected activity; that he was subsequently treated in an adverse fashion by the agency; that the deciding official had actual or constructive knowledge of the protected activity; and that there is a causal connection between the protected activity and the adverse action. *See Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 10 (2010). "[T]he question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason for taking the action was not the actual reason and that the agency intentionally discriminated or retaliated against him." *Id.*, ¶ 11.

Applying this standard, the administrative judge found that the appellant engaged in protected activity by seeking an accommodation and by complaining to Ms. Williams and the Postal Inspection Service about Mr. Scott, that Mr. Scott (the proposing official) and Ms. Williams (the deciding official) were aware of this activity; and the appellant's removal occurred after they became aware of this activity. ID at 19. With respect to the issue of nexus, the administrative judge noted that Mr. Jenkins testified that Mr. Scott's "harassment" of the appellant "increased tremendously" after the appellant complained to the Postal Inspection Service about Mr. Scott; however, Mr. Jenkins offered no specifics on what he meant by this. *Id.* The administrative judge found that the appellant failed to establish that the appellant not performing his duties without providing

substantiating medical documentation was not the true reason for his removal and that retaliation for his protected activity was. *Id.*

Based on our review of the record, we see no reason to disturb the administrative judge's finding that the appellant failed to establish that the agency removed him in retaliation for his protected activity. The agency had a legitimate basis for removing the appellant from his position, i.e., his refusal to perform the duties of his position, and the appellant failed to show that the agency removed him for his protected activity rather than for the reasons underlying its sustained charge. Therefore, the administrative judge correctly found that the appellant failed to establish his retaliation claim.

With respect to the appellant's age discrimination claim, the administrative judge found that the only evidence the appellant presented to support this affirmative defense was his speculation that his age was a motivating factor in his removal. ID at 19. As the administrative judge explained, simply being a member of the protected age group when subject to an adverse action is insufficient to show that the agency was motivated, even in part, by age when it acted to remove the appellant. *Id.* Therefore, the administrative judge correctly found that the appellant failed to prove this affirmative defense.

In addition to reiterating the affirmative defenses he raised during the proceedings below, the appellant raises a claim of whistleblower reprisal for the first time on review. PFR File, Tab 1 at 6. An issue is not properly before the Board under the following circumstances: it is not included in the administrative judge's memorandum summarizing the prehearing conference; the prehearing conference summary states that no other issues will be considered unless a party objects to the summary; and neither party objects to the exclusion of the issue in question from the summary. *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶ 26 (2011).

In the prehearing conference summary, the administrative judge identified the issues approved for adjudication and stated that no other issues would be

adjudicated. IAF, Tab 24 at 1-2. He also stated that any exception to the summary must be filed before the start of the hearing or it would be deemed waived. *Id.* at 3. The appellant did not object to the summary, and the issue he now attempts to raise was not mentioned in the prehearing conference summary. The appellant's whistleblower reprisal claim is, therefore, not properly before the Board.

For the first time on review, the appellant alleges that the agency failed to follow established procedures. PFR File, Tab 1 at 6-15. In particular, he alleges that the agency failed to follow its policy of zero tolerance regarding violent and/or threatening behavior because it did not discipline Mr. Scott after the appellant claimed that Mr. Scott had been threatening toward him. *Id.* at 6, 7, 10, 11, 12. He also contends that the agency's November 2009 modified job offer did not contain the level of detail required by Section 545.32(a) of the agency's Employee and Labor Relations Manual, which states that a job offer must include a description of the duties of the position to be considered suitable by OWCP. *Id.* at 9, 14. In addition, he claims that the agency acted with "complete disregard to procedure" by issuing the notice of proposed removal before he began serving a 14-day suspension for improper conduct. *Id.* at 11.

The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant has made no such showing.

In any event, we find these arguments unpersuasive. Whether the agency acted properly by not disciplining Mr. Scott in response to the appellant's complaints about him is immaterial to the appellant's removal. Further, the appellant's assertion that the agency's description of the duties of the position in the agency's November 2009 modified job offer did not contain the level of detail necessary for OWCP to find the job offer suitable is belied by the fact that OWCP

did, indeed, find the agency's November 2009 job offer suitable. Also, the appellant does not identify any authority in support of his contention that the agency was precluded from proposing the appellant's removal before he served his suspension for improper conduct, nor do we know of any.

Lastly, we note that the appellant submits several documents with his petition for review. PFR File, Tab 1 at 16-46. Under 5 C.F.R. § 1201.115(d), the Board will not consider evidence submitted for the first time with a petition for review absent a showing that it is both new and material. Most of the documents the appellant submits on review are already part of the record and thus are not new. *See Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980) (evidence that is already part of the record is not new). Also, with the exception of four signed statements dated January 16, 2012, PFR File, Tab 1 at 17-20, all of the documents that the appellant submits on review are either undated or significantly predate the close of the record below, and the appellant has not shown that they were unavailable before the close of the record despite his due diligence. IAF, Tab 7 at 53, 61, 139-140, 143-145, 148, 151; Tab 18, Subtab 1, Subtab 3 at 13-14; *see Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with a petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence). Further, these documents are not material to the outcome of this appeal because they fail to show that any of the administrative judge's findings are erroneous or that a different outcome is warranted. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

As for the four statements dated January 16, 2012, each statement pertains to events that occurred before the appellant's removal, and the appellant has not shown that the information contained in these statements was unavailable before

the record closed below despite his due diligence. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989) (to constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed). Further, the appellant has not shown that these statements are of sufficient weight to warrant an outcome different from that of the initial decision. *See Russo*, 3 M.S.P.R. at 349.

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, D.C. 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, D.C. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.