UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 46

Docket No. SF-0752-09-0864-B-1
SF-0752-10-0111-B-1

Robert Southerland,

Appellant,

v.

Department of Defense,

Agency.

June 18, 2013

Cindi Fox, Esquire, San Francisco, California, for the appellant.

Christine J. Kim, Stockton, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

OPINION AND ORDER

¶1 This matter comes before the Board upon the appellant's petition for review of a remand initial decision, which (1) sustained the charges of insubordination, absence without leave (AWOL), and failure to request leave in accordance with established procedures, (2) found that the appellant did not prove his affirmative defense of disability discrimination, and (3) affirmed the 30-day suspension and subsequent removal penalties. For the following reasons, we MODIFY the administrative judge's analysis of the disability discrimination

defense, but we still AFFIRM the administrative judge's decision to sustain the charges. We OVERRULE our prior finding in *Southerland v. Department of Defense*, 117 M.S.P.R. 56 (2011), that a mixed-motive analysis does not apply in disability discrimination cases arising under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). We find that the agency's actions were motivated by discrimination but that the agency had a legitimate reason for the actions in question; thus, a mixed-motive analysis is appropriate. We further find that the agency met its burden to prove that it would have taken the same action absent the discriminatory motive and that the appellant is not entitled to any additional relief. Finally, we AFFIRM the suspension and removal actions.[1]

BACKGROUND

¶2 The appellant, who has been employed by the federal government for over 22 years, worked as a Distribution Process Worker. MSPB Docket No. SF-0752-09-0864-I-1, Suspension File (SF), Tab 5, Subtab 4B; Hearing Transcript (HT) at 141. In July 2008, the appellant suffered a work-related injury. SF, Tab 5, Subtab 4I at 1. Upon his return to work in late September 2008, the appellant was assigned to perform administrative duties as a Transportation Assistant because his medical restrictions prohibited him from lifting more than 10 pounds. *Id.*; MSPB Docket No. SF-0752-10-0111-1, Removal Appeal File (RAF), Tab 4, Subtab 4I; MSPB Docket No. SF-0752-09-0864-I-2, Refiled Suspension File (RSF), Tab 10, Subtab A at 4. On January 22, 2009, the agency requested additional medical information seeking clinical findings, a diagnosis, and a prognosis, including whether the appellant's condition was permanent, whether there was an estimated date of full recovery,

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

and an explanation of the impact of the condition on the activities of the appellant's job. SF, Tab 5, Subtab 4J.

¶3 The appellant met with his physician, Dr. Kulendu Vasavda, on January 27, 2009, showed the January 22, 2009 letter to Dr. Vasavda, and asked him to provide the requested information. RSF, Tab 14 at 7; HT at 16-17, 146. Dr. Vasavda told the appellant that he could not provide the requested information without further tests and instead provided the appellant with a prescription slip stating that the appellant should continue light duty and lift no more than 10 pounds. The appellant provided the prescription slip to his supervisor, Henry Martin. RSF, Tab 10, Subtab A at 5; SF, Tab 5, Subtab 4I; HT at 13, 17.

¶4 On March 17, 2009, the agency gave the appellant another letter, again requesting a prognosis and a date for his return to full duty and stating that the appellant had failed to provide medical documentation since he returned to duty. SF, Tab 5, Subtab 4I. The appellant met with Dr. Vasavda on March 20, 2009, RSF, Tab 14 at 8, and Dr. Vasavda provided the appellant with a prescription slip ordering light duty until May 1, 2009, RSF, Tab 10, Subtab A at 7. The appellant provided Mr. Martin with the updated slip and a February 24, 2009 letter from Dr. Vasavda to Marc Coby, the appellant's workers' compensation lawyer. *Id.*; SF, Tab 5, Subtab 4L at 1-2; HT at 11-13. On March 23, 2009, Dr. Vasavda referred the appellant to an orthopedist and for physical therapy. RSF, Tab 10, Subtabs C, D.

¶5 On April 28, 2009, the agency proposed to suspend the appellant for 30 days based on a charge of insubordination due to his failure to provide the requested medical information. SF, Tab 5, Subtab 4F. On this same date, Dr. Vasavda provided documentation that the appellant should continue on a 10-pound lifting restriction and that an orthopedist consultation was pending. *Id.*, Subtab 4G. At some point, the appellant provided Dr. Vasavda with a copy of the proposed suspension letter. HT at 28. The agency issued a decision letter on June 22, 2009, suspending the appellant for 30 days. SF, Tab 5, Subtab 4D. The

decision letter noted that the appellant claimed he had tried to obtain the requested information but that he had not been able to do so. *Id.* The appellant served the suspension from July 6, through August 4, 2009, and he filed an appeal with the Board. SF, Tab 1, Tab 5, Subtab 4B.

¶6 On August 12, 2009, the appellant provided the agency with medical documentation from Dr. Anh Le at Alpine Orthopaedic Medical Group. RSF, Tab 10, Subtab E; SF, Tab 5, Subtab 4A at 1. On August 20, 2009, the agency issued a third request for medical documentation, stating that the documentation from Alpine Orthopaedic did not sufficiently respond to the agency's request. SF, Tab 5, Subtab 4A. On August 27, 2009, the appellant saw Dr. Vasavda but apparently did not receive any further information. RSF, Tab 14 at 9.

¶7 On September 16, 2009, Mr. Martin proposed to remove the appellant based on the following charges: (1) insubordination for not providing the requested medical documentation; (2) 1 hour of AWOL on August 25, 2009, when he was 1 hour late for work; and (3) failure to request leave in accordance with established procedures when the appellant did not follow correct call-in procedures on September 8 and 14, 2009. RAF, Tab 4, Subtab 4F. Following the appellant's oral reply, Clarence Allen, Jr., the deciding official, issued his decision letter on October 20, 2009, removing the appellant effective November 6, 2009. *Id.*, Subtab 4D. The appellant filed a timely appeal of his removal with the Board. RAF, Tab 1.

¶8 Following a hearing, the administrative judge (1) sustained the charges of AWOL and failure to request leave in accordance with established procedures; (2) declined to sustain both insubordination charges (relating to the suspension and the removal); (3) found that the appellant proved his affirmative defense of disability discrimination because the deciding official considered the appellant's disabled status when deciding to remove him and would not have taken the same action in the absence of the discriminatory motive; (4) found that the sustained charges warranted no more than the written counseling memoranda already issued

to the appellant as a result of his being AWOL and improperly following call-in procedures; and (5) reversed the agency's actions.[2] RSF, Tab 24, Initial Decision.

¶9 On review, the Board affirmed the administrative judge's findings with respect to the charges of AWOL and failure to request leave in accordance with established procedures but vacated the administrative judge's findings with respect to the insubordination charges because he failed to make necessary credibility determinations. *Southerland*, 117 M.S.P.R. 56, ¶¶ 14, 22-23. In order to further develop the record for the administrative judge on remand, the Board ordered the appellant to produce all medical records related to the agency's discovery requests for medical information and remanded the appeal for further consideration and credibility findings by the administrative judge on the insubordination charges. *Id.*, ¶ 23. The Board also remanded the appellant's claim of disability discrimination, finding that, under recently issued Equal Employment Opportunity Commission (EEOC) regulations implementing the ADAAA, the analysis should have focused on whether the appellant meets the "regarded as" definition of disability under 29 C.F.R. §§ 1630.2(g)(1)(iii), 1630.2(l)(1). *Southerland*, 117 M.S.P.R. 56, ¶¶ 26-28. The Board also found that the administrative judge's consideration of the appellant's disability discrimination claim under the ADAAA should not employ a mixed-motive analysis but, instead, should apply a "but for" analysis, consistent with the recent decisions in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010), and *Brott v. General Services Administration*, 116 M.S.P.R. 410 (2011). *Southerland*, 117 M.S.P.R. 56, ¶ 38.

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[2] The administrative judge joined the appellant's appeals of his 30-day suspension and his removal for hearing purposes and issued a single initial decision. *See* RSF, Tab 3.

¶10 On remand, the administrative judge affirmed the agency's actions. MSPB Docket No. SF-0752-09-0864-B-1, Remand File (RF), Tab 11, Remand Initial Decision. The administrative judge sustained both insubordination charges, finding that the testimonies of Dr. Vasavda, Mr. Martin, and Mr. Allen "strongly suggest[ed]" that the appellant had no intention of responding to the agency's repeated requests for specific medical information and concluding that their testimony was more credible than the appellant's testimony that he tried to obey the agency's instructions to provide the requested medical documentation. *Id.* at 12-13. In particular, the administrative judge found that it was clear from Dr. Vasavda's testimony that the appellant did not make him aware that the agency was still in need of, and had requested, a prognosis for him. *Id.* at 12. The administrative judge thus concluded that preponderant evidence demonstrated that the appellant "willfully and intentionally" failed to comply with the agency's requests. *Id.* at 12-13. The administrative judge further found a nexus between the sustained misconduct and the efficiency of the service and determined that a 30-day suspension for the first charge of insubordination was reasonable in light of the appellant's prior 15-day suspension in 2008 for refusal to participate in a required random drug test. *Id.* at 13-14. The administrative judge also found that, in light of the appellant's prior discipline, removal was reasonable for the appellant's second offense of insubordination along with the sustained charges of AWOL and failure to request leave in accordance with established procedures, even considering the appellant's 22 years of federal service and fully successful performance appraisals. *Id.* at 14.

¶11 The administrative judge further found that the appellant failed to prove his affirmative defense of disability discrimination because, even though Mr. Allen considered the appellant's disabled status when deciding to remove him on other bases, and even though the appellant met the "regarded as" definition of disability, the appellant failed to show that the agency would not have taken its action but for his disability. *Id.* at 17-18. Rather, the administrative judge

inferred that Mr. Allen's statements in the decision letter regarding the appellant's inability to perform the duties of his position were meant to describe the resulting effects of the appellant's failure to provide the medical documentation reasonably requested by the agency. *Id*. at 18. The appellant has filed a petition for review, and the agency has filed a response. Remand Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

The administrative judge properly sustained both insubordination charges.

¶12 In his petition for review, the appellant challenges the administrative judge's analysis of the insubordination charges. Specifically, he makes the following arguments: (1) on remand, the administrative judge failed to consider that the appellant provided sufficient information to the agency both prior to the notice of proposed removal and at the oral reply, as the administrative judge had previously found; and (2) the administrative judge's credibility findings are not supported by the evidence. PFR File, Tab 1. Neither of these arguments is persuasive.

¶13 Regarding the appellant's contention that the administrative judge's earlier finding precludes a finding of willful refusal to obey an agency order, the Board's prior decision vacated all of the administrative judge's findings with respect to the insubordination charges contained in the original initial decision. *Southerland*, 117 M.S.P.R. 56, ¶ 23. That the administrative judge changed his analysis of the insubordination charges after he conducted the required credibility analysis on remand does not provide a reason to disturb his new findings.

¶14 We have considered the appellant's contentions that the administrative judge's credibility findings are not supported by the evidence and, in particular, that Dr. Vasavda's testimony is internally inconsistent regarding whether the appellant sought the requested information from him. PFR File, Tab 1 at 15-17. However, a reading of Dr. Vasavda's entire testimony shows that, in the early

portions of his testimony, he did not appreciate the difference between the agency's requests for medical information at issue in this appeal and other requests for medical information that were made in connection with the appellant's Office of Workers' Compensation Programs (OWCP) claim. For example, it was not until nearly half way through Dr. Vasavda's testimony that the appellant's representative explained that references to the agency concerned the appellant's employer, not OWCP or Mr. Coby, the appellant's attorney in the OWCP matter. HT at 16. At that point, Dr. Vasavda sought to "clarify" his testimony and stated that "there were requests from Office of Workers['] Compensation Programs" and requests from Mr. Coby. *Id.* In response to whether the appellant showed Dr. Vasavda "documentation from his employer requesting certain information," Dr. Vasavda stated that he was "trying to find proof of anything that [he] received from [the agency]." *Id.* Dr. Vasavda then apparently found the agency's January 22, 2009 request in his file, testifying that "[o]n January 22[], 2009 there is a note here in the file from Defense Logistics Agency" requesting additional medical information and that he "did receive that one document." *Id.* at 17. Accordingly, the appellant's assertion that Dr. Vasavda's testimony was somehow internally inconsistent and lacked credibility is unavailing.

¶15 Based on our review of the remand initial decision and the petition for review, including the relevant testimony cited by the administrative judge and the appellant, the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions. Therefore, we discern no reason to reweigh the evidence on credibility issues. *See Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987). Accordingly, the appellant has failed to identify any reason to disturb the administrative judge's findings sustaining both insubordination charges. *See id.*; *see also Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997) (the Board will give due deference to the credibility findings of the administrative judge and

will not grant a petition for review based on a party's mere disagreement with those findings).

The administrative judge properly concluded that the appellant meets the "regarded as" definition of disability.

¶16 As the Board discussed in its prior Opinion and Order, the definition of disability as set forth in the ADAAA applies here. *Southerland*, 117 M.S.P.R. 56, ¶ 25. The administrative judge found that the appellant meets the "regarded as" definition of disability because Mr. Allen explicitly considered the appellant's physical impairment in his decision letter affirming the proposed removal when he noted that the appellant was unable to fulfill the full range of his duties and the resulting burden placed on his co-workers. Remand Initial Decision at 16-17; HT at 106-07; RAF, Tab 4, Subtab 4D at 3; *see* 29 C.F.R. §§ 1630.2(g)(1)(iii), 1630.2(l). The appellant does not dispute the administrative judge's finding that he meets the "regarded as" definition of disability, and we discern no reason to disturb it.

¶17 That is not the end of our inquiry. Rather, the EEOC's amended regulations explain that "[e]stablishing that an individual is 'regarded as having such an impairment' does not, by itself, establish liability. Liability is established under Title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112." 29 C.F.R. § 1630.2(l)(3); *see Southerland*, 117 M.S.P.R. 56, ¶ 28. Thus, we must determine whether the agency discriminated against the appellant based on his disability.

A mixed-motive analysis *does* apply to disability discrimination claims arising under the ADAAA.

¶18 The Board previously held that a mixed-motive theory cannot be applied to disability discrimination claims under the ADAAA, in light of the following: (1) the Supreme Court's decision in *Gross*, which held that a mixed-motive analysis did not apply to age discrimination claims under the Age Discrimination

in Employment Act; (2) the Seventh Circuit's decision in *Serwatka*, which applied the Supreme Court's rationale in *Gross* to Americans with Disabilities Act (ADA) cases; and (3) the Board's prior decision in *Brott*, in which it agreed with the Seventh Circuit's rationale in *Serwatka* and held that a mixed-motive analysis did not apply in ADA cases. *Southerland*, 117 M.S.P.R. 56, ¶ 29. The Board held that, in order to prove a claim of disability discrimination under the ADAAA, an appellant must prove by preponderant evidence that the agency took an action "on the basis" of his disability, i.e., that the agency would not have taken its action "but for" his actual or perceived disability; thus, the burden of persuasion did not shift to the agency to show that it would have taken the action regardless of disability, even if the appellant produced some evidence that disability was one motivating factor in the adverse employment action. *Id.*, ¶¶ 29-38. At the time of the Board's decision in *Southerland*, neither our reviewing court, nor the EEOC, had addressed the applicability of a mixed-motive analysis to a disability discrimination claim under the ADAAA.

¶19 Since *Southerland* was issued, the EEOC has applied a mixed-motive analysis in a case involving a claim of reprisal for protected activity (seeking an accommodation) under the Rehabilitation Act.[3] *See Feder v. Holder*, Appeal No. 0720110014, 2012 EEOPUB LEXIS 2115, at *50-56 (Jul. 19, 2012). In *Feder*, agency officials sent an electronic submission to the appellant's work unit alleging that Mr. Feder had engaged in unprofessional misconduct and seeking the unit's adjudication of the matter. The communication stated, in part, that Mr. Feder "has had his personal work space moved numerous times in order to avoid the peripheral noise created in the normal course of business." *Id.* at *7. Mr. Feder had a health condition called hyperacusis, "which made him overly sensitive to certain sounds that caused him pain, distraction, and disruption." *Id.*

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[3] The regulatory standards for the ADA have been incorporated by reference into the Rehabilitation Act. *Southerland*, 117 M.S.P.R. 56, ¶ 29 (citing 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b)).

at *2. The EEOC found the communication constituted direct evidence of a retaliatory motive by those agency officials because it "prove[d] on its face that [these officials] informed the deciding official . . . about Complainant's protected activity and asked the deciding official to remove Complainant because of that protected activity." *Id.* at *6-7, 39-40. Although the EEOC in *Feder* did not mention *Gross* or *Serwatka*, it explicitly held that, in light of its finding that Mr. Feder's removal was motivated by reprisal for protected activity, "this matter should be reviewed under a mixed-motive analysis because the deciding official also provided a non-retaliatory reason for removing Complainant." *Id.* at *50.

¶20 The Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support or is so unreasonable that it amounts to a violation of civil service law. *Alvara v. Department of Homeland Security*, 116 M.S.P.R. 627, ¶ 8 (2011); *see Morales v. Department of Justice*, 77 M.S.P.R. 482, 484 (1998). The EEOC's decision in *Feder* does not rest on civil service law for its support, nor is it so unreasonable that it amounts to a violation of civil service law.

¶21 We note that the EEOC framed Mr. Feder's claim as one of reprisal for engaging in the protected activity of requesting a reasonable accommodation for his disability, not a claim based on his disability, *id.* at *33-34, and the EEOC analyzed the mixed-motive issue in that context, *id.* at *50-56. In this matter, however, the applicability of a mixed-motive analysis arises in the context of the appellant's disability discrimination claim. These procedural differences do not require a separate analytical framework because the ADA and ADAAA contain a provision prohibiting retaliation for ADA or ADAAA-covered activity at 42 U.S.C. § 12203(a), and various circuit courts and the EEOC have concluded that a request for an accommodation constitutes such covered activity. *See, e.g.*, *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1180 (7th Cir. 2013) ("[i]n addition to requiring reasonable accommodations, the ADA [at 42 U.S.C. § 12203(a)] also protects employees from being retaliated against for asserting their ADA rights,"

including for requesting accommodation for disabilities); *Valle-Arce v. Puerto Rico Ports Authority*, 651 F.3d 190, 198 (1st Cir. 2011) (explaining that requesting an accommodation and complaining of disability discrimination constitute activity that is protected for purposes of the ADA's anti-retaliation provision); *see also Hudson v. Donohoe*, Appeal No. 0120093843, 2011 EEOPUB LEXIS 1658, at *19 (June 6, 2011) ("Although a person making [a reasonable accommodation] request might not literally 'oppose' discrimination or 'participate' in the administrative complaint process, he is protected against retaliation for making the request."). Because Mr. Feder's request for a reasonable accommodation, like complaining of disability discrimination, is activity that is protected by the ADA, the ADAAA, and the Rehabilitation Act, coupled with the Board's prior finding that there was no meaningful distinction between the text of the ADA and the ADAAA with respect to the applicability of a mixed-motive analysis, *see Southerland*, 117 M.S.P.R. 56, ¶¶ 31-35, we find it appropriate to defer to the EEOC's analysis in *Feder* in this regard. Therefore, we overrule the Board's prior finding in *Southerland* that a mixed-motive analysis does not apply in disability discrimination cases arising under the ADAAA.[4]

¶22 Consistent with *Feder*, we further find that Mr. Allen's statements in the decision letter constituted direct evidence of a discriminatory motive. Notably, Mr. Allen "consider[ed] the impact of [the appellant's] inability to fulfill the full range of [his] duties on the efficiency of this organization." RAF, Tab 4, Exhibit 4D at 3. Mr. Allen also stated that the appellant occupied a full time position and that his "inability to fulfill the full range of [his] duties has a detrimental impact on the ability of this organization to efficiently accomplish its mission," and it "also causes an unnecessary burden on [his] co-workers who must accomplish

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[4] Because the Board concluded in *Brott* that a mixed-motive analysis does not apply in disability discrimination cases under the ADA, *Brott*, 116 M.S.P.R. 410, ¶ 14, that holding is also expressly overruled.

[his] duties in addition to their own while [he is] on light duty." *Id.* Because we find that Mr. Allen's statements in the decision letter constitute direct evidence of a discriminatory motive,[5] this matter should be reviewed under a mixed-motive analysis because the agency also had a non-discriminatory reason for suspending and removing the appellant, namely his misconduct.

Under a mixed-motive analysis, an appellant's remedy is limited if the agency demonstrates, by clear and convincing evidence, that it would have taken the same action against him absent the discriminatory motive.

¶23 Under the Rehabilitation Act, the remedies that are available to a federal employee who proves disability discrimination are defined by Title VII of the Civil Rights Act of 1964. 29 U.S.C. § 794a.[6] Accordingly, under a mixed-motive analysis, an employee is entitled to some relief if he proves that his disability was "a motivating factor" in the decision, "even though other factors also motivated the practice." *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(1). An agency, however, may limit the extent of the remedy if it demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). If the agency meets this burden, an employee would not be entitled to reinstatement, hiring, promotion, back pay, or damages, but he may be awarded declaratory relief, injunctive relief, and attorney's fees and costs "demonstrated to be directly attributable only to the pursuit of a claim under [42 U.S.C. § 2000e-2(m)]." *Id.*

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[5] Notwithstanding this finding, we distinguish the circumstances of this case from other, more egregious cases of direct evidence of a discriminatory motive, involving name-calling or offensive or abusive language. *See, e.g.*, *Brott*, 116 M.S.P.R. 410, ¶ 8.

[6] The remedies that are available to employees that have proven disability discrimination under the ADA, ADAAA, or Rehabilitation Act are also available to individuals claiming retaliation for protected activity pursuant to the ADA or ADAAA. *See* 42 U.S.C. § 12203(c) (the ADAAA anti-retaliation statute states that the remedies at 42 U.S.C. §§ 12117, 12133, and 12188 are available for violations therein). Accordingly, we may rely on the EEOC's discussion of the proper burden of proof and available remedies in *Feder* to resolve those same issues in this matter.

¶24 In *Feder*, the EEOC noted that the appellant's remedy would be so limited if the agency proved by clear and convincing evidence that it would have taken the same action absent the discriminatory motive. *Feder*, 2012 EEOPUB LEXIS 2115, at *50-51 (citations omitted); *see also* 29 C.F.R. § 1614.501(c) (explaining that an employee's remedies are limited upon a showing by clear and convincing evidence that the employer would have taken the personnel action absent discrimination). This standard is different than the preponderant evidence standard that the Board previously applied in mixed-motive cases involving disability discrimination. *See Caronia v. Department of Justice*, 78 M.S.P.R. 201, 212 (1998), *overruled in part by Carter v. Department of Justice*, 88 M.S.P.R. 641 (2001), *and by Brott*, 116 M.S.P.R. 410, ¶ 13 n.* (overruling *Caronia* when the Board determined that a mixed-motive analysis was improper in cases arising under the ADA).

¶25 Because application of a clear and convincing standard does not rest on civil service law and is not so unreasonable that it amounts to a violation of civil service law, we find it appropriate to defer to the EEOC's judgment on the issue of the applicability of the clear and convincing standard in mixed-motive cases. *See Alvara*, 116 M.S.P.R. 627, ¶ 8. To the extent that *Caronia* and other Board decisions are inconsistent with this Opinion and Order, they are hereby overruled.

The agency has proven, by clear and convincing evidence, that it would have removed the appellant absent consideration of a discriminatory motive, and the appellant is not entitled to any relief.[7]

¶26 Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). It is a higher standard than the

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[7] In the Remand Initial Decision, the administrative judge noted that the appellant alleged that only the *removal* action was motivated by disability discrimination, and the appellant does not challenge that statement on review. Therefore, we need not consider whether the agency's decision to suspend the appellant for 30 days was motivated by disability discrimination.

preponderant evidence standard as defined in 5 C.F.R. § 1201.56(c)(2). *Id.* The EEOC in *Feder* explained that, in order to meet this burden, an agency must offer "objective evidence that it would have made the same decision even absent the discrimination" and that such "proof of a legitimate reason for the action" actually motivated it at the time of the decision. *Feder*, 2012 EEOPUB LEXIS 2115, at *51. Based on this record, the agency has met its burden.

¶27 The appellant's insubordinate behavior weighs in the agency's favor.[8] The administrative judge, after having reviewed the documentary and testimonial evidence, did not credit the appellant's assertion that he tried to comply with the agency's requests. Remand Initial Decision at 12-13. Rather, the administrative judge found, among other things, that the appellant did not seek a formal prognosis, or any other information, for the purpose of responding to the agency's specific requests for information and that preponderant evidence demonstrated that the appellant "willfully and intentionally failed to comply with the agency's requests for medical information." *Id.* The administrative judge's decision not to credit the appellant in this regard also weighs heavily in the agency's favor. We note, too, that insubordination is a serious charge. *See Jackson v. Small Business Administration*, 40 M.S.P.R. 137, 146 (1989) ("Insubordination is a serious offense which undermines the capacity of management to maintain employee efficiency and discipline."). We further credit Mr. Allen's statement in the decision letter that he viewed the appellant's misconduct as "very serious." RAF, Tab 4, Subtab 4D.

¶28 The appellant's disciplinary history also weighs in the agency's favor. Before the 30-day suspension for insubordination, discussed above, the appellant had a prior suspension for refusing to participate in a required random drug test.

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[8] We agree with the administrative judge that the infractions described in the sustained AWOL and failure to request leave charges are de minimis. *See* Remand Initial Decision at 8, 14. Therefore, we give little weight to these charges in our assessment of whether the agency met the clear and convincing standard.

SF, Tab 5, Subtabs 4U, 4W. Thus, it appears that the appellant has a history of failing to follow agency orders.

¶29 The Board has upheld removal actions based on sustained insubordination charges, both in connection with other sustained charges and standing alone. *See, e.g.*, *Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 309, 316-17 (1993) (affirming the removal based on charges of insubordination and insolent behavior); *Yartzoff v. Environmental Protection Agency*, 38 M.S.P.R. 403, 408-09 (1988) (removal was an appropriate penalty for the sustained charge of insubordination), *overruled in part on other grounds by Wilkinson v. Department of the Air Force*, 68 M.S.P.R. 4 (1995). In each of these cases, the Board noted that the appellants had recent disciplinary history that was similar to the misconduct for which they were removed. *See Redfearn*, 58 M.S.P.R. at 317 (noting that the appellant's disciplinary record was "progressive in nature"); *Yartzoff*, 38 M.S.P.R. at 409 & n.5 (stating that the appellant's disciplinary record included a recent suspension for insubordination and refusal to follow leave requesting procedures). Thus, the agency's decision to remove the appellant under these circumstances, irrespective of any evidence of a discriminatory motive, was reasonable pursuant to Board precedent.

¶30 We also have considered the relevant evidence that favors the appellant. For instance, Mr. Martin testified that the appellant was a "good" employee, that the appellant's past work performance was fully successful, and that he had 22 years of federal service. HT at 71; SF, Tab 5, Subtab 4D at 2. Additionally, regarding the insubordination charge, the appellant presented *some* documentation to the agency in response to its multiple requests for information.

¶31 We note that the appellant's representative testified that the deciding official, Mr. Allen, stated upon reviewing the medical documentation presented at the oral reply, "[i]f you had brought this [documentation] a month ago, we wouldn't be sitting here right now," and at the end of the oral reply Mr. Allen stated that the agency might be able to accommodate the appellant and that he

probably was not going to be fired. HT at 121-31. The appellant testified that Mr. Allen had stated that the appellant should have provided the documentation before and "it would have stopped everything from happening." HT at 159. Mr. Allen denied making these statements. HT at 84. In the original initial decision, the administrative judge credited the appellant's and his representative's version of the conversation with Mr. Allen during the oral reply, which led them to believe that Mr. Allen would not remove the appellant, over Mr. Allen's denial of that conversation. Initial Decision at 5-6. However, even if Mr. Allen made the statements attributed to him, the appellant's representative acknowledged in his testimony that Mr. Allen did not actually make a decision regarding the penalty during the oral reply. *See* HT at 131. Assuming that Mr. Allen made the statements set forth above, it appears that he changed his mind upon further review of all of the evidence. In his letter to Human Resources following the oral reply, Mr. Allen wrote: "I'm sure that documents provided do[] not meet request for additional medical documentation therefore my decision is to process [the removal]." SF, Tab 4, Subtab 4E at 2.

¶32 Having considered the evidence in the record as a whole, we are persuaded that the agency would have still removed the appellant, even in the absence of a discriminatory motive. Therefore, we affirm the administrative judge's decision to uphold the 30-day suspension and removal, based on his analysis of the relevant factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).[9] *See* Remand Initial Decision at 13-14.[10]

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[9] Thus, the appellant is not entitled to damages, reinstatement, or back pay. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). If the appellant wishes to seek declaratory relief, injunctive relief, or attorney's fees and costs, he should file a request with the Western Regional Office.

[10] The appellant asserts that, if the insubordination charges are sustained, the Board should consider, in its assessment of the appropriate penalty, that he provided extensive medical documentation to the agency. PFR File, Tab 1 at 12-13. We disagree. Because the administrative judge found that the appellant intentionally failed to obey the agency's repeated orders to provide specific medical documentation, *see* Remand

ORDER

¶33 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 review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *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:

Initial Decision at 12-13, we are not persuaded that the appellant's submission of some medical documentation to the agency constitutes a mitigating factor that should have been considered by the administrative judge in his penalty analysis.

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.

FOR THE BOARD:

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

CONCURRING OPINION OF MEMBER MARK A. ROBBINS

in

Robert Southerland v. Department of Defense

MSPB Docket Nos. SF-0752-09-0864-B-1 and SF-0752-10-0111-B-1

¶1 I concur with the disposition of this case. I write separately to express concern over the degree of our deference to the U.S. Equal Employment Opportunity Commission (EEOC) on a matter of law and procedure that I believe is contrary to persuading, if not controlling, application of U.S. Supreme Court and Court of Appeals analysis we have utilized previously.

¶2 The Board has long held that, under the mixed case system governed by 5 U.S.C. § 7702, it should defer to the EEOC's interpretation of discrimination law. *E.g.*, *Smith v. Department of the Army*, 93 M.S.P.R. 611 (2003); *Conaway v. U.S. Postal Service*, 82 M.S.P.R. 226 (1999); *Walker v. Department of the Air Force*, 72 M.S.P.R. 487 (1996). This is generally appropriate.

¶3 As the then-MSPB Chairman Neil McPhie noted in his dissenting opinion in *Boots v. United States Postal Service*, 100 M.S.P.R. 513, ¶ 36 (2005), "[i]n creating a right to appeal the Board's decision in a mixed case to the EEOC, Congress placed the EEOC in a superior position vis-à-vis the Board insofar as the interpretation of discrimination law is concerned. *See* 5 U.S.C. § 7702(b)(3)(B)(i). . . . [I]t is the EEOC, not the Board, which is primarily responsible for issuing regulations implementing the laws against discrimination, investigating charges of discrimination, and bringing enforcement actions. The relationship between the Board and the EEOC is reflected in the due deference to the respective expertise of the Board and the Commission. 5 U.S.C. § 7702(d)(2)(B)."

¶4 As Chairman McPhie went on to discuss, I, too, "would read this language to mean that when the EEOC has reasonably interpreted a point of discrimination law, the Board cannot properly apply a different interpretation merely because the Board's interpretation is also reasonable. *Cf. Fulman v. United States*, 434 U.S. 528, 534-36 (1978) (a

reasonable interpretation of statute by the agency primarily charged with its administration is entitled to deference, even if there is a different interpretation that is also reasonable)." *Id.* Certainly Congress did not intend that the Board defer to the EEOC's interpretation when it is unreasonable or, as in this case, out of context and contrary to our standing application of controlling analysis.

¶5 The Board previously held in this matter that a mixed-motive theory cannot be applied to disability discrimination claims under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), given the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which held that a mixed-motive analysis did not apply to age discrimination claims under the Age Discrimination in Employment Act; the Seventh Circuit's decision in *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010), which applied the *Gross* rationale to Americans with Disabilities Act (ADA) cases; and the Board's prior decision in *Brott v. General Services Administration*, 116 M.S.P.R. 410 (2011), in which we agreed with the Seventh Circuit's *Serwatka* rationale and held that a mixed-motive analysis did not apply in ADA cases.

¶6 But, as this case was proceeding through the process, the EEOC issued a decision in *Feder v. Holder*, Appeal No. 0720110014, 2012 EEOPUB LEXIS 2115 (Jul. 19, 2012), which applied a mixed-motive analysis in a federal sector disability discrimination case. The EEOC gives no explanation for this holding. It simply cites *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Title VII case whose mixed-motive analysis was later codified in amendments to Title VII, and says that this approach applies in federal sector disability discrimination cases when there is evidence that the employer had a mixture of legitimate and impermissible motives for its action. But context matters. As the majority notes, the *Feder* claim was based on reprisal for engaging in the protected activity of requesting a reasonable accommodation for his disability, not a claim based on disability discrimination, as in the present case.

¶7 Under these circumstances, I see no compelling reason to defer to the EEOC and adopt a mixed–motive analysis, and would affirm the administrative judge's decision that the appellant failed to prove his disability discrimination affirmative defense because, even though the deciding official considered the appellant's disabled status in removing him, the appellant failed to show that the agency would not have taken the action "but for" his disability.

_____
Mark A. Robbins
Member