



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 11, 2015

BOARD DECISIONS

Appellant: Tommie G. Savage

Agency: Department of the Army

Decision Number: [2015 MSPB 51](#)

MSPB Docket Nos.: AT-0752-11-0634-I-2, AT-1221-12-0591-W-1

Issuance Date: September 3, 2015

Appeal Type: Adverse Action/Individual Right of Action

Action Type: Removal/Constructive Suspension/Hostile Work Environment

Constructive Action IRA Appeal Jurisdictional Requirements

Involuntary Absence Due to Medical Condition

Hostile Work Environment Under the WPA

AWOL Requirement

Excessive Absence Charge

Title VII Federal Sector Bases of Discrimination

Causation in Federal Sector Discrimination

Burden of Proof in Federal Sector Discrimination

Circumstantial Evidence in Federal Sector Discrimination

Background

The appellant served as the contracting officer for the agency's "Ranges Program". In 2006 and 2007, the appellant reported alleged illegal and improper contracting activity in the program. In 2007, the appellant filed an EEO complaint alleging that she had been subjected to a hostile work

environment based on her race and sex, which she later settled in exchange for receiving a reassignment to a position comparable to her then-current grade and salary at the agency's Small Business Office in Huntsville. Pursuant to the agreement, the appellant was reassigned, with no reduction in pay, from her Supervisory Contract Specialist position to a nonsupervisory Contract Specialist position, which had a lower cap on her salary. In December 2007, the appellant received a performance appraisal rating of 3 out of 5, which was much lower than the performance appraisal ratings she had received over the previous 13 years.

In June 2008, the appellant made additional disclosures regarding the agency's failure to use a required form, which led to an argument between the appellant and her supervisor. The next day, the appellant's psychologist recommended that she take an 8-week leave of absence until October 20, 2008, due to depression, anxiety, and stress, and the appellant's supervisor granted the request. On October 18, 2008, the appellant's psychologist recommended that the appellant's leave of absence be extended to December 22, 2008, but the appellant's supervisor only granted the request until December 5, 2008. The appellant then requested leave under the Family and Medical Leave Act ("FMLA") until March 5, 2009, and the appellant's supervisor granted the request. During December 2008, the appellant's supervisor also issued the appellant a performance rating of 3 out of 5. On March 4, 2009, the appellant requested that her return to work date be changed to May 4, 2009, pursuant to her psychologist's recommendation. The appellant's supervisor denied the request, citing to the appellant's previous inability to return to work based on her psychologist's estimates, and subsequently ordered the appellant to return to work by March 26, 2009, the date on which her accrued leave would expire. The appellant responded by requesting either advanced sick leave or leave without pay for the same time period, and her supervisor rejected the request.

On April 3, 2009, the appellant's supervisor informed the appellant that her leave had expired and she was being placed on AWOL status. On the same day, the appellant filed another EEO complaint, alleging that she was subjected to a hostile work environment as reprisal for her 2007 EEO complaint and for another EEO complaint she filed in 2008. On May 4, 2009, the appellant attempted to return to work, but quickly became ill and left work. On May 6, 2009, the appellant's psychologist recommended that the appellant return to work on September 1, 2009. The appellant then requested that her AWOL status be changed to leave without pay status, and in response, the appellant's supervisor requested that the appellant provide additional medical information, as well as meet with a second psychologist. The appellant met with the second psychologist in July 2009, and the second psychologist stated

that it was unlikely that the appellant would return to work in the next 6 to 12 months, and there was considerable doubt as to whether she would ever return to her then-currently assigned workplace.

Proposed Removal

On September 14, 2009, the appellant's supervisor proposed to remove the appellant based on three charges: (1) AWOL; (2) Excessive Absences; and (3) Unavailability to Report for Duty with No Foreseeable End. The appellant did not respond to the notice, and on November 3, 2009, the deciding official removed the appellant. The appellant filed another EEO complaint regarding her removal, and on April 8, 2011, the agency issued a final agency decision finding no discrimination in her removal.

Appeal to MSPB and Complaint at OSC

On May 6, 2011, the appellant appealed her removal to the MSPB, alleging that her removal was the result of the agency's hostile work environment, which created the need for her excessive absences. In September 2011, the appellant requested that her appeal be voluntarily dismissed without prejudice to allow her to file a whistleblowing retaliation complaint with the Office of Special Counsel ("OSC"), and the MSPB administrative judge ("AJ") granted the request. In October 2011, the appellant filed a complaint with OSC, alleging that the agency retaliated against her through various personnel actions due to her reporting contract fraud and participating in the agency's internal investigation. In May 2012, OSC informed the appellant it had closed its investigation, at which point the appellant filed an IRA appeal and refiled her removal appeal.

MSPB AJ's Initial Decision

At the MSPB, the AJ joined the appellant's two appeals for hearing. In the IRA appeal, the AJ determined the appellant established jurisdiction over 8 personnel actions: (1) the November 2007 reassignment; (2) the December 2007 performance appraisal; (3) the failure to confer a monetary award to her in 2008; (4) the December 2008 performance appraisal; (5) the refusal to extend her return-to-work date in March 2009; (6) the denial of her advanced sick leave request in March 2009; (7) the denial of her leave without pay request in March 2009; and (8) an alleged constructive suspension based on the creation of a hostile work environment that forced her to be absent from August 2008 through November 2009. In the removal appeal, the appellant raised affirmative defenses of retaliation based on both whistleblowing and

EEO activity, and discrimination based on race, gender, and disability.

After the hearing, the AJ issued separate decisions in the IRA and removal appeals. In the IRA appeal, the AJ determined that the appellant's protected disclosures were a contributing factor in all of the personnel actions at issue except for the constructive suspension. The AJ also found that the appellant did not exhaust her administrative remedies regarding her June 2008 disclosure regarding the agency's failure to use the proper form. The AJ then held that the agency failed to prove by clear and convincing evidence that it would have taken the actions regarding the two performance ratings and the performance award in the absence of the protected disclosure, but did prove that it would have taken the remaining personnel actions. The AJ further held that the appellant failed to establish she had been constructively suspended. In the removal appeal, the AJ sustained the action, finding that the agency met its burden of proof for all three charges, and that the appellant failed to establish her affirmative defenses.

Holding: The Board joined the two appeals and remanded the joined appeal for further adjudication.

1. When an appellant files an OSC complaint regarding a constructive adverse action, the jurisdictional requirements of an IRA appeal apply, even if the adverse action would otherwise be directly appealable to the Board. Thus, the Board found that the appellant was required to exhaust her administrative remedies with respect to her constructive suspension claim. However, the Board remanded the constructive suspension claim for further adjudication as a Chapter 75 adverse action appeal because the appellant expressly indicated that she wished for her constructive suspension claim to be adjudicated as a Chapter 75 adverse action appeal, the Board precedent at the time of her appeal did not require her to adhere to the IRA jurisdictional requirements, and neither the agency nor the AJ informed the appellant that filing a claim with OSC regarding the constructive suspension would preclude her from filing a Chapter 75 appeal of that action with the MSPB.

2. To establish involuntary absence from duty due to a medical condition, an employee need only notify the agency that she is medically incapable of returning to duty in her current work environment. Her failure to first request reassignment as a reasonable accommodation will not preclude the employee from establishing that her absence was involuntary.

3. The Board held that a hostile work environment can be considered a personnel action for purposes of the Whistleblower Protection Act, and

remanded the matter for a determination of whether the appellant established that the agency created a retaliatory hostile work environment.

4. With respect to the AWOL charge, the Board found that it would have been unreasonable for the agency to deny leave without pay for absences for which the agency was culpable, and remanded the matter for a determination of whether the appellant was constructively suspended during the period she was on AWOL status.

5. The Board did not sustain the Excessive Absences charge regarding the appellant's use of approved leave because the agency did not provide proper notice to the appellant that her use of approved leave may lead to an adverse action. The Board further held that the period in which she was AWOL should not be considered as part of an Excessive Absences charge, but instead should be viewed as an AWOL charge.

6. The Board held that the federal sector provision of Title VII does not incorporate the anti-retaliation provision applicable to private sector employment located at 42 U.S.C. § 2000e-3(a), but also held, based on the Supreme Court's decision in *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008), that retaliation for EEO activity is still prohibited in the federal sector, and is included within the discrimination prohibited by 42 U.S.C. § 2000e-16.

7. The Board held that a Title VII violation in the federal sector is established if an employee shows that discrimination or retaliation was a motivating factor for a personnel action. However, the Board will not reverse the action unless the employee can show that the action would not have occurred "but for" the discrimination or retaliation.

8. The Board will apply the *Mt. Healthy* test in appeals alleging an adverse action was discriminatory. Under this test, the employee must first prove that discrimination was a substantial or motivating factor in the adverse action. If the employee carries that burden, the burden shifts to the employer to prove that the action would have taken place even if no discrimination had occurred.

9. The Board overruled its prior decision, *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666 (2008), in which it held that to establish an EEO reprisal claim using circumstantial evidence, it must provide evidence showing a "convincing mosaic" of retaliation. The Board held that any of three types of circumstantial evidence may be used to establish a Title VII violation: (1) "convincing mosaic"; (2) comparator; or

(3) pretext.

- **The U.S. Court of Appeals for the Federal Circuit did not issue any MSPB decisions this week.**

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