UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 42

Docket Nos. DC-0752-09-0881-I-1
DC-0752-10-0223-I-1

John Doe,[1]
Appellant,
v.
Pension Benefit Guaranty Corporation,
Agency.

March 27, 2012

Stuart E. Bernsen, Washington, D.C., for the appellant.

Monica Pogula, Esquire, and Scott E. Schwartz, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 These matters are before the Board on: (1) the appellant's petition for review of a July 1, 2010 initial decision reversing the agency's action placing her on enforced leave from August 4, 2009, to September 9, 2009; finding the appellant's placement on enforced leave was not taken because of disability

[1] For the reasons we explain in ¶ 23, we grant the appellant's request to proceed as John Doe. The Board no longer uses Jane Doe and John Doe, universally using "John Doe" for all appeals when anonymity is granted.

discrimination; and issuing sanctions against the appellant for her failure to comply with multiple Board orders (0881 appeal); and (2) both parties' petitions for review[2] of a February 24, 2010 initial decision reversing the agency's decision to place the appellant on absence without leave (AWOL) starting on November 9, 2009, and finding that the appellant was not entitled to a hearing on her affirmative defenses of discrimination based on perceived disability and reprisal for equal employment opportunity (EEO) activity, for filing a Board appeal and for protected whistleblowing activity. The appellant alleges, among other things, that the administrative judge improperly failed to consider her discrimination claims of disparate treatment, harassment, and hostile work environment (0223 appeal). For the reasons discussed below, we JOIN these appeals on review.

¶2 In the 0881 appeal, we AFFIRM the initial decision insofar as it determined that the agency did not have the authority to order the appellant to take a fitness-for-duty (FFD) examination and reversed the agency's enforced leave action. We VACATE the part of the initial decision addressing the appellant's disability discrimination claim and REMAND that claim to the regional office for further adjudication consistent with this Opinion and Order. We also VACATE the sanctions award. In the 0223 appeal, we AFFIRM the initial decision insofar as it reversed the agency's enforced leave action and dismissed the appellant's retaliation claims. We VACATE the initial decision with respect to the appellant's disability discrimination claim based on disparate treatment, harassment and hostile work environment and REMAND the appeal for further adjudication of those issues.

---

[2] Although the appellant labels her response to the agency's petition for review as both a response and a cross-petition for review, it is more appropriate to consider it a response and a supplement to her petition for review. Petition for Review File-0223, Tab 6. Because the parties filed their respective petitions for review so close in time, we have not designated one a petition for review and the other a cross petition.

BACKGROUND

¶3 The appellant is a GS-13 Administrative Officer with the agency's Office of Information Technology (OIT), Resource Management Division (RMD). *See Doe v. Pension Benefit Guaranty Corporation*, MSPB Docket No. DC-0752-09-0881-I-1, Initial Appeal File (IAF-0881), Tab 1 at 3, Tab 6, Subtab 4SS. On February 17, 2009, the appellant sent an e-mail to Deborah Stover-Springer, the agency's Deputy Inspector General, claiming that her home had been broken into several times since she released information to Ms. Stover-Springer's former colleague and asking whether any of Ms. Stover-Springer's staff had been in her home without her consent. IAF-0881, Tab 6, Subtab 4RR.

¶4 On March 11, 2009, the appellant sent an e-mail to her then-supervisor, Resource Manager Latreece Wade, accusing Ms. Wade of harassing her and alleging that Ms. Wade had called a transit officer the previous evening and provided him with the number of the train car in which the appellant had been riding. IAF-0881, Tab 6, Subtab 4PP. The appellant also claimed that, according to the "rumor mill," Ms. Wade was trying to get her fired. *Id.*

¶5 During a May 22, 2009 meeting with her supervisor, Acting RMD Manager Verna Leiner, the appellant accused Ms. Leiner and OIT Deputy Chief Information Officer Margaret Hamilton of listening to her conversations and stated that she knew about the "ear piece." IAF-0881, Tab 6, Subtab 4HH. Following the meeting, the appellant sent Ms. Leiner an e-mail in which she stated, "Hope you presented yourself well before the hidden camera." *Id.*, Subtab 4II. In response, Ms. Leiner sent the appellant an e-mail in which she suggested that they meet with Ms. Hamilton to address the appellant's views and notified the appellant that she would send an invitation for a meeting the following week. *Id.* In an e-mail reply, the appellant stated, "Thanks for the invite but based on the conversation we just had and your hidden agenda, I will not accept." *Id.*

¶6 By memorandum dated May 28, 2009, Ms. Leiner ordered the appellant to undergo an FFD examination with agency medical consultant Neil Hibler, Ph.D., on June 4, 2009, based upon "unusual and inappropriate behavior" the appellant had exhibited during the past several months. IAF-0881, Tab 6, Subtab 4DD. The agency placed the appellant on administrative leave pending the results of the examination. *Id.*

¶7 In a June 4, 2009 report summarizing the results of the appellant's examination, Dr. Hibler stated that the appellant was experiencing a psychotic delusional disorder and was unfit to perform her duties. IAF-0881, Tab 6, Subtab 4Z at 2. He recommended that the appellant "not be considered for potential return to the workplace until a treating practitioner advises she is stable and has resources sufficient to perform her duties. At that time, she should be returned for follow-up [FFD] evaluation to objectively determine her emotional status and readiness to perform her duties." *Id.* at 9-10.

¶8 By letter dated June 29, 2009, Ms. Leiner informed the appellant:

> Based on Dr. Hibler's evaluation and conclusions concerning your fitness for duty, I am proposing that you be placed on Enforced Leave until you submit documentation from your health care provider confirming that (1) your condition has stabilized, (2) you are no longer a danger to yourself or others in the workplace, and (3) you are fit to return to work.

IAF-0881, Tab 6, Subtab 4W at 2.

¶9 In her July 16, 2009 reply to the notice of proposed enforced leave, the appellant asked to remain on administrative leave for an additional two to three months so that she could locate a new primary care physician and make an appointment with a psychiatrist. IAF-0881, Tab 6, Subtab 4V. By letter dated August 3, 2009, the agency denied the appellant's request and placed her on enforced leave, effective August 4, 2009, until she submitted the documentation set forth in Ms. Leiner's June 29, 2009 letter. IAF-0881, Tab 6, Subtab 4U at 2-3.

¶10 On September 9, 2009, the appellant submitted an August 28, 2009 medical report from Scott T. Schell, M.D., in which he stated: "[The appellant] does not have a history of being a threat to others and is not a present danger to herself or others. She is able to retur [sic] to work without restriction." IAF-0881, Tab 6, Subtab 4R at 2. Because the appellant had submitted medical documentation regarding her fitness for duty from her doctor, the agency removed the appellant from enforced leave and placed her on administrative leave, effective September 9, 2009, pending Dr. Hibler's review of the medical documentation she provided. *Id.*, Subtab 4O at 2.

¶11 By letter dated September 14, 2009, Dr. Hibler stated that "Dr. Schell's report does not contain details and an explanation that would be needed to sufficiently understand [the appellant's] fitness for her to return to work (whether with or without accommodation)." *Doe v. Pension Benefit Guaranty Corporation*, MSPB Docket No. DC-0752-10-0223-I-1, Initial Appeal File (IAF-0223), Tab 16, Subtab 4P at 2. Dr. Hibler recommended that the appellant "be reevaluated by an [Independent Medical Examination] sponsored by [the] agency. That assessment should include a psychiatric examination to ensure that perspectives offered by Dr. Schell are considered by an evaluator of the same professional discipline." *Id.*

¶12 By letter dated September 21, 2009, the agency notified the appellant of the deficiencies that Dr. Hibler found in Dr. Schell's report and stated that the appellant must either: (1) submit medical documentation that cured those deficiencies no later than September 30, 2009; or (2) submit to a follow-up evaluation by Dr. Hibler on September 29, 2009, with psychiatric consultation by Martin Allen, M.D. IAF-0223, Tab 16, Subtab 4L at 2.

¶13 The appellant elected the first option and submitted a September 24, 2009 "progress note" from Dr. Schell. IAF-0223, Tab 16, Subtab 4K. Dr. Hibler reviewed the progress note and found that his concerns regarding Dr. Schell's earlier report had not been addressed. *Id.*, Subtab 4H at 1. He recommended a

reexamination of the appellant, including a psychiatric evaluation by Dr. Allen. *Id.*

¶14 By letter dated October 1, 2009, the agency ordered the appellant to undergo a follow-up FFD examination with Dr. Hibler on October 8, 2009, and a psychiatric evaluation with Dr. Allen on October 9, 2009. IAF-0223, Tab 16, Subtab 4F. The appellant attended the appointment with Dr. Hibler but did not attend the appointment with Dr. Allen. *Id.*, Subtab 4D.

¶15 In an October 13, 2009 report on his October 8, 2009 evaluation of the appellant, Dr. Hibler found that she "[was] still evidencing severe mental illness, the consequence of which is that she [was] too fragile to be safely returned to the workplace." IAF-0223, Tab 16, Subtab 4C at 7. He recommended that "[p]ending independent psychiatric examination, which would consider her stability in terms of potential psychiatric intervention, she should be restricted from her duty location." *Id.*

¶16 By letter dated October 28, 2009, Ms. Leiner notified the appellant that, in order for the agency to adequately determine her ability to return to work, she must choose one of the following options: (1) sign an attached Authorization for Disclosure of Information form allowing Dr. Hibler to consult directly with Dr. Schell to attempt to resolve the deficiencies in the medical documentation and to determine her suitability to return to work; or (2) undergo a psychiatric evaluation with Dr. Allen. IAF-0223, Tab 7, Subtab 4G at 2. Ms. Leiner directed the appellant to inform Human Resources Specialist Gary Birmingham of her decision by November 6, 2009, and advised the appellant that failure to comply with the instruction would result in her pay status being changed from administrative leave to AWOL for each work day beyond November 6, 2009. *Id.* The appellant did not comply with the instruction, and the agency placed her on AWOL, effective November 9, 2009. *Id.*, Tab 7, Subtab 4E.

¶17 The appellant filed two Board appeals. In the first appeal, the appellant challenged her placement on enforced leave from August 4, 2009, to September 9,

2009. IAF-0881, Tab 1. The appellant raised affirmative defenses of harmful procedural error and disability discrimination.[3] *Id.* at 7, 10. She initially requested a hearing, *id.* at 4, but subsequently withdrew that request, IAF-0881, Tab 27 at 4. Based on the parties' written submissions, the administrative judge issued an initial decision reversing the agency's action, finding that the agency did not have the authority to order the appellant to take an FFD examination. IAF-0881, Tab 41, Initial Decision (ID-0881), at 5-9. Specifically, the administrative judge found that the agency failed to prove its reason for the appellant's suspension (i.e., Dr. Hibler's conclusion that the appellant was not fit for duty) because it did not have the authority in the first place to order the appellant to be examined by Dr. Hibler. *Id.* at 9. Accordingly, the administrative judge ordered the agency to cancel the appellant's suspension and retroactively restore her effective August 4, 2009. *Id.* at 15. The administrative judge also found that the appellant failed to prove her affirmative defenses. *Id.* at 9-14. In addition, the administrative judge denied the appellant's request to seal the record. *Id.* at 1 n.1.

¶18 The appellant filed a petition for review challenging the administrative judge's denial of her disability discrimination claim. Petition for Review (PFR) File-0881, Tab 1. The appellant also asks to proceed anonymously as "Jane Doe" and to seal those portions of the record that contain information from her examination by Dr. Hibler and all documents and other evidence from Dr. Schell. PFR File-0881, Tab 1 at 4 & n.2, 14 n.5, 21 n.6, 22, n.7.[4]

---

[3] Initially, the appellant also raised affirmative defenses of whistleblowing reprisal as well as retaliation for her prior EEO activity and for filing grievances. IAF-0881, Tab 1 at 7, 10. She later withdrew those affirmative defenses. *Id.*, Tab 24 at 5.

[4] The agency submitted a response to the appellant's petition for review one day after the filing deadline had expired. PFR File-0881, Tab 3. Two days later, the agency filed a motion to excuse its delay, stating that its response was untimely filed because agency counsel miscalculated the filing deadline. *Id.,* Tab 4 at 4. We find that this showing does not establish good cause for the agency's late filing of its response to the

¶19 In the second Board appeal, the appellant challenged her placement on AWOL as a suspension and raised affirmative defenses of harmful procedural error, perceived disability discrimination, retaliation for her prior EEO activity, filing a Board appeal, and filing grievances, and whistleblower reprisal. IAF-0223, Tab 1, Tab 11 at 42. She requested a hearing. *Id.*, Tab 1 at 3.

¶20 On January 4, 2010, the administrative judge issued an Order to Show Cause in which she explained the jurisdictional prerequisites for filing a constructive suspension appeal and directed the appellant to file evidence and argument to prove that this action is within the Board's jurisdiction. *Id.*, Tab 3. Both parties filed responses. *Id.*, Tabs 5, 7. On February 2, 2010, the administrative judge issued another Order to Show Cause noting that an evidentiary hearing on a discrimination or reprisal claim need not be conducted when there is no genuine dispute of material fact regarding discrimination. IAF-0223, Tab 9. The administrative judge further advised the appellant of her burden and elements of proof regarding her affirmative defenses and directed her to describe the factual allegations in support of her claims and identify any genuine disputes of material facts concerning them. *Id.* Both parties filed responses. *Id.*, Tabs 11, 12, 15. In her response, the appellant also raised claims of disparate treatment based on race, perceived disability, and EEO activity, as well as claims of harassment and hostile work environment due to perceived disability. *Id.*, Tab 11 at 5.

¶21 Without holding the requested hearing, the administrative judge issued an initial decision finding that the agency did not have the authority to order the appellant to take an FFD examination, Dr. Hibler's recommendation that the appellant undergo a psychiatric or psychological examination was improper, and the action must be reversed because the agency did not give the appellant the

---

appellant's petition for review and, therefore, we have not considered it in adjudicating this appeal. *See Fishback v. U.S. Postal Service*, 54 M.S.P.R. 257, 259 n.2 (1992).

procedural protections found at 5 U.S.C. chapter 75. IAF-0223, Tab 17 (ID-0223) at 4-6. She therefore reversed the agency's action and ordered the agency to cancel the suspension, retroactively restore the appellant effective November 9, 2009, and award her back pay and benefits. *Id.* at 6, 14. Each party has filed a petition for review and a response in opposition to the other party's petition for review. Petition for Review (PFR) File-0223, Tabs 4-7.

¶22 On review, the agency alleges that the appellant was not subjected to a constructive suspension because her absence became voluntary on November 9, 2009, when she failed to comply with her supervisor's instructions to either authorize her doctor to speak with Dr. Hibler or undergo a psychiatric evaluation with Dr. Allen. PFR File-0223, Tab 4 at 6. The agency certified that, in compliance with the administrative judge's initial decision in the 0223 appeal, it placed the appellant on paid administrative leave, effective February 24, 2010, because her "return to the workplace would be unduly disruptive to the work environment." *Id.*, Tab 4 at 23. In her petition for review, the appellant appears to reiterate her request to keep "documents and other evidence from the Hibler examination," i.e., her medical information, under seal. *Id.*, Tab 5 at 16 n.5, 24 n.8, 27 n.9. She also reiterates her affirmative defenses of discrimination and retaliation. *Id.*, Tab 5 at 31-55.

ANALYSIS

It is appropriate to join the appeals and grant the appellant John Doe status.

¶23 Joinder of two or more appeals filed by the same appellant is appropriate when doing so would expedite processing of the cases and not adversely affect the interests of the parties. *Tarr v. Department of Veterans Affairs*, 115 M.S.P.R. 216, ¶ 9 (2010) (internal citations omitted); *see* 5 C.F.R. § 1201.36. Given the interrelatedness of the subject matter and the similar procedural posture of both appeals, we find that the regulatory criteria have been satisfied and we join the appeals on review. In addition, the appellant requests to proceed anonymously

and to have her medical information sealed in both appeals. The Board has not adopted a rigid, mechanical test for determining whether to grant anonymity but instead applies certain general principles and considers several factors in making such determinations. *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 10 (2007). For the reasons we discuss below, we find that the agency improperly ordered the appellant to take an FFD examination, and thus all of the sensitive medical information obtained in both appeals stems from this initial improper order. We therefore find it appropriate to allow the appellant to proceed anonymously and grant her John Doe status.[5]

<u>The 0881 appeal</u>

The Agency lacked authority to order the appellant to take a fitness for duty examination.

¶24 This appeal raises the issue of whether the agency had the authority to order the appellant to undergo an FFD examination with Dr. Hibler. In addressing this issue, we consider three possible sources of such authority: (1) Office of Personnel Management (OPM) regulations; (2) Equal Employment Opportunity Commission (EEOC) regulations; and (3) the applicable collective bargaining agreement (CBA).

¶25 OPM's regulations governing an agency's authority to require a medical examination are set forth at 5 C.F.R. Part 339, Subpart C. These regulations, which became effective February 10, 1984, amended the then-existing regulations in 5 C.F.R. Parts 339, 432, 752, and 831. *Collins v. Department of the Navy*,

---

[5] We deny the appellant's request to seal all or part of the record. The case files from these appeals are not available to the public by e-Appeal Online or the Board's website. However, to the extent that the appellant's medical information could be sought through a Freedom of Information Act (FOIA) request, such records are exempt from disclosure under FOIA. *See* 5 U.S.C. § 552(b)(6). Also, pursuant to the Privacy Act, *see* 5 U.S.C. § 552a, the appellant's medical records cannot be disclosed by the Board without the appellant's express written consent. Thus, granting the appellant's request to seal her records would not provide her with any additional privacy protection. *See Nefcy v. Environmental Protection Agency*, 94 M.S.P.R. 435, ¶ 7 (2003).

41 M.S.P.R. 256, 258 n.3 (1989). As the Board explained in *Collins*, "The revised regulations were intended to limit significantly the authority of agencies to order medical examinations for employees in light of previous abuses, particularly in cases involving psychiatric examinations and disability retirement." *Id.* at 258 (internal citations omitted). In its January 11, 1984 Federal Register Notice, OPM stated as follows:

> The Part 339 regulations are explicitly intended to substantially constrain the number of situations where an agency may order an employee to undergo a medical examination. In most circumstances where the previous "fitness for duty" process would be initiated, the agency no longer has any authority to require an examination. . . . Only under the very limited circumstances where medical standards or medical surveillance programs exist, or certain other limited situations, is the agency authorized to require an examination.

49 Fed. Reg. 1321, 1324 (1984).

¶26 The Board explained in *Harris v. Department of the Air Force*, 62 M.S.P.R. 524, 528, *review dismissed*, 39 F.3d 1195 (Fed. Cir. 1994) (Table), that OPM placed restrictions on agency use of psychiatric examinations in response to the concerns of a Congressional subcommittee with oversight responsibility for the civil service. The subcommittee had held hearings on the use of psychiatric FFD examinations by federal agencies and found that an involuntary psychiatric examination "places . . . the employee in a position of being a defendant who may lose his or her present and future prospects for employment as well as reputation in the community." *Id.* (citing Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, 95th Cong., 2d Sess., *Forced Retirement/Psychiatric Fitness for Duty Exams* 18 (Comm. Print 1978)). The subcommittee recommended the adoption of statutory or regulatory reforms to eliminate the potential for agency abuse of psychiatric FFD examinations and ensure procedural protections for employees who may be having performance difficulties due to mental conditions. *Id.*

¶27 Under 5 C.F.R. § 339.301(b)-(d), an agency may order a medical examination only in the following limited circumstances: (1) An individual has applied for or occupies a position which has medical standards or physical requirements or which is part of an established medical evaluation program, 5 C.F.R. § 339.301(b); (2) an employee has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease, 5 C.F.R. § 339.301(c); or (3) an employee is released from his or her competitive level in a reduction in force and the position to which the employee has reassignment rights has medical standards or specific physical requirements which are different from those required in the employee's current position, 5 C.F.R. § 339.301(d). An agency may *offer*, rather than order, a medical examination (including a psychiatric evaluation) in any situation where the agency needs additional medical documentation to make an informed management decision, including situations where an individual has a performance or conduct problem which may require agency action. 5 C.F.R. § 339.302.

¶28 Here, it is undisputed that the appellant's position did not have medical standards or physical requirements, and she was not in an established medical evaluation program. Moreover, neither of the circumstances set forth in 5 C.F.R. § 339.301(c) and (d) applies here. If agency officials believed that they needed additional medical documentation in order to make an informed decision about the appellant's conduct problem, the agency could have offered the appellant a psychiatric evaluation pursuant to 5 C.F.R. § 339.302. The agency did not have the authority, however, to order her to undergo such an examination. *See L'Bert v. Department of Veterans Affairs*, 88 M.S.P.R. 513, ¶¶ 8-10 (2001); *Harris*, 62 M.S.P.R. at 527-29.

¶29 We next turn to the issue of whether the agency had the authority to order the appellant to take an FFD examination under the EEOC regulations

implementing the Americans with Disabilities Act (ADA), as amended.[6] Under 29 C.F.R. § 1630.14(c), an agency may require that an employee have a medical examination if it is job-related and consistent with business necessity. Further, 29 C.F.R. § 1630.15(f) provides: "It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by § 1630.14 . . . ."[7]

¶30 Thus, if an individual alleges that an agency violated the ADA by ordering her to take a medical examination, the agency may claim as a defense that the examination is job-related and consistent with business necessity. Title 29 C.F.R. § 1630.14(c) only provides that an agency does not violate the ADA by requiring an appellant to undergo an FFD examination if the examination is job-related and consistent with business necessity. It does not give an agency independent authority to order an examination that is prohibited under the OPM regulations governing medical examinations.[8]

---

[6] The ADA Amendments Act of 2008 (ADAAA), P.L. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12101 *et seq.*, apply to this appeal because the incidents in question occurred after the January 1, 2009 effective date of the ADAAA. The EEOC issued amended regulations implementing the ADAAA, but these regulations did not become effective until May 24, 2011. *See* Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,978 (Mar. 25, 2011) (codified at 29 C.F.R. Part 1630). We note that the EEOC did not change 29 C.F.R. § 1630.14 as a result of the amendments. Any subsequent reference to the ADA in this Opinion and Order, unless specifically stated otherwise, should be interpreted to also include the amendments.

[7] Under the new EEOC regulations, this provision was redesignated as 29 C.F.R. § 1630.15(g). *See* 76 Fed. Reg. at 17,003. Regardless of whether we consider subsection (f) in the former regulation or subsection (g) in the current regulation, the outcome is the same.

[8] The ADAAA and its implementing regulations identify their purposes as the elimination of discrimination against, and to provide equal employment opportunities for, individuals with disabilities, respectively. 42 U.S.C. § 12101(b); 29 C.F.R. § 1630.1(a). Both the ADAAA and the regulations also provide that they do not invalidate any remedies, rights and procedures granted by any other federal, state or local law that provides greater protection. To the extent that OPM's regulations

¶31 Regarding whether the agency had the authority under the applicable CBA to order the appellant to undergo an FFD examination, Article 18, Section 8, Item 4(B) of the CBA provides:

> A fitness-for-duty examination may also be ordered before management takes disciplinary and/or adverse action against an employee for unacceptable conduct or behavior if it appears that a medical condition may be at the root of the problem.

IAF-0881, Tab 6, Subtab 2A at 14.

¶32 This provision of the CBA is inconsistent with 5 C.F.R. Part 339 insofar as it allows the agency to order an employee to undergo an FFD examination in situations where such an examination clearly would not be authorized under Part 339. ID-0881 at 8. In rejecting the agency's argument that the CBA provided it with the requisite authority to order the appellant to take an FFD examination, the administrative judge noted that, "under 5 U.S.C. § 7117(a)(1)[,] the parties to a negotiated agreement may not have been authorized to bargain for a term of the CBA that was inconsistent [with] part 339 because part 339 is a Government-wide regulation." *Id.* (citing *American Federation of Government Employees v. Federal Labor Relations Authority*, 794 F.2d 1013, 1014-15 (5th Cir. 1986)). The administrative judge reasoned that, because the agency is covered by Part 339 and Part 339 is a government-wide regulation, the CBA does not provide the agency authority that would be lacking under Part 339. ID-0881 at 8.

¶33 We agree with the administrative judge. The Federal Service Labor-Management Relations Statute precludes collective bargaining with regard to matters that conflict with government-wide rules and regulations. 5 U.S.C. § 7117(a)(1); *see National Association of Government Employees Local R1-109 and U.S. Department of Veterans Affairs Veterans Administration Medical Center*

---

provide greater protection for employees regarding medical and psychiatric examinations, the regulations are consistent with the ADAAA and its implementing regulations.

Newington, Connecticut, 37 F.L.R.A. 500, 501 (1990). OPM's regulations set forth in 5 C.F.R. Part 339 are patently government-wide. Because the contractual provision relied upon by the agency as authority for ordering the FFD at issue here directly conflicts with 5 C.F.R. Part 339, a government-wide regulation limiting the agency's authority to order employees to take medical examinations, the Board cannot enforce it in this proceeding.[9]

¶34 Therefore, we affirm the initial decision insofar as it held that the agency did not have the authority to order the appellant to take an FFD examination and reversed the agency's action placing the appellant on enforced leave.[10]

---

[9] The Board treats provisions of a collective bargaining agreement in the same manner as agency regulations. *See Giesler v. Department of Transportation*, 3 M.S.P.R. 277, 280 (1980), *aff'd sub nom. Giesler v. Merit Systems Protection Board*, 686 F.2d 844 (10th Cir. 1982). While this long-standing rule typically results in the enforcement of a contractual obligation assumed by the agency, *see id.*, where, as here, the collective bargaining provision conflicts with a government-wide regulation, the Board will not give it effect. *Cf. Dodson v. Department of the Navy,* 111 M.S.P.R. 504, 508 (2009) (declining to give effect to agency regulations under the National Security Personnel System that appeared to be in conflict with government-wide regulations and statute).

[10] We note that an agency has the authority and responsibility to maintain a safe workplace; an agency has several options when addressing troubling situations. An agency can immediately place an employee on administrative leave and order an employee to leave the workplace if necessary for workplace safety. An agency can initiate disciplinary action under 5 U.S.C. chapter 75 for acts of misconduct committed by the employee; neither the Rehabilitation Act nor the ADA immunizes disabled employees from being disciplined for misconduct in the workplace, provided the agency would impose the same discipline on an employee without a disability. *Fitzgerald v. Department of Defense*, 85 M.S.P.R. 463, ¶ 12 (2000) (citing *Laniewicz v. Department of Veterans Affairs,* 83 M.S.P.R. 477, ¶¶ 5-8 (1999)). An agency can also utilize a shortened notice period for an adverse action if it reasonably believes a serious crime has been committed. *See* 5 U.S.C. § 7513(b)(1). Further, as we noted above an agency can *offer* an employee a psychiatric examination pursuant to 5 C.F.R. § 339.302 if it needs the information to make an informed management decision. In addition, both the Board and the Federal Circuit have long-recognized that an agency can indefinitely suspend an employee, pending inquiry, for psychological or other medical reasons if the agency has a sufficient objective basis for doing so. *See Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010); *see also Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 599-600 (Fed. Cir. 1997); *Mercer v. Department of Health & Human Services*, 772 F.2d 856, 858 (Fed. Cir. 1995).

The appellant's disability discrimination claim must be remanded.

¶35 The appellant argues on review that the administrative judge erred in denying her affirmative defense of disability discrimination by failing to first determine whether the agency had acted against her by regarding her as disabled, and that the administrative judge improperly found that the agency had met its burden of proving an affirmative defense of "direct threat." PFR File-0881, Tab 1 at 21-28. The appellant further contends that the agency's action demonstrated "direct evidence" of discriminatory intent because it was explicitly based on her perceived disability, citing to *Ellshoff v. Department of the Interior,* 76 M.S.P.R. 54, 79-81 (1997). Although we agree with the appellant that the administrative judge erred in not determining whether the appellant was a qualified individual with a disability under the ADA, we disagree that the agency's action demonstrated direct evidence of discrimination.

¶36 The administrative judge noted in the initial decision that the ADAAA and the EEOC's then proposed regulations had made a significant change in the law, but she did not make a determination whether the appellant met the definition for being regarded as disabled. Instead, the administrative judge found that the agency had proved the appellant's placement on enforced leave was not discriminatory because the agency had objective evidence and a current medical report showing that the appellant's continued assignment in the workplace posed a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. ID-0881 at 13-14, *see* 29 C.F.R. §§ 1630.2(r), 1630.14(c) 1630.15(g).

¶37 As a federal employee, the appellant's disability discrimination claim arises under the Rehabilitation Act of 1973. *Simpson v. U.S. Postal Service*, 113 M.S.P.R. 346, ¶ 8 (2010). However, the regulatory standards for the ADA have been incorporated by reference into the Rehabilitation Act, and they are applied to determine whether there has been a Rehabilitation Act violation. *Id.* (citing 29 U.S.C. § 791(g)); *Pinegar*, 105 M.S.P.R. 677, ¶ 36 n.3; 29 C.F.R.

§ 1614.203(b). Further, the ADA regulations superseded the EEOC's regulations under the Rehabilitation Act. *Simpson*, 113 M.S.P.R. 346, ¶ 8; *see* 29 C.F.R. § 1614.203(b).

¶38 An appellant who raises a claim of disability discrimination must first establish that she is a disabled person entitled to the protection of the disability discrimination laws. *Davis v. Department of Veterans Affairs*, 106 M.S.P.R. 654, ¶ 8 (2007). The ADAAA, which liberalized the definition of disability, became effective on January 1, 2009. *See* P.L. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12101 *et seq*. Because the appellant was placed on enforced leave, effective August 4, 2009, the ADAAA definition and standards are applicable to this appeal. While the ADAAA became effective on January 1, 2009, the EEOC's new regulations implementing the ADAAA did not become effective until May 24, 2011, *see supra* at n.4, after issuance of the initial decision under review here. *See* 76 Fed. Reg. 16,978, 16,978-17,003 (codified at 29 C.F.R. Part 1630); *see also* Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 76 Fed. Reg. 16,978, 17,003-17,017 (Mar. 25, 2011); *Southerland v. Department of Defense*, 117 M.S.P.R. 56, ¶¶ 25-28 (2011) (discussing the EEOC's new regulations and guidance for a "regarded as" claim of disability discrimination under the ADAAA).

¶39 In light of the changes in the ADAAA and the EEOC regulations with respect to the type of disability discrimination claim made by the appellant, and the administrative judge's failure to determine if the appellant is disabled under these new standards, it is appropriate to remand this claim for the administrative judge to fully adjudicate the material issues.[11] The parties can, if they choose,

---

[11] For instance, an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment that is not both "transitory and minor." *See Southerland*, 117 M.S.P.R. 56, ¶ 26 (citing 42 U.S.C. § 12102(3), 29 C.F.R. §§ 1630.2(g)(1)(iii), 1630.(l)(2)); *see also* 29 C.F.R. § 1630.2(j)(2) ("Whether an individual's impairment 'substantially limits' a major life

present additional evidence and argument in order to meet their respective burdens, consistent with these new standards.[12]

---

activity is not relevant to coverage under paragraph (g)(1)(iii) (the 'regarded as' prong) of this section."). The Appendix to Part 1630 notes that "[c]overage under the 'regarded as' prong of the definition of disability should not be difficult to establish." Appendix to Part 1630, 76 Fed. Reg. at 17,014.

In *Southerland*, we noted that the amended regulations further 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." 117 M.S.P.R. 56, ¶ 28, (citing 29 C.F.R. § 1630.2(l)(3)); *see* Appendix to Part 1630, 76 Fed. Reg. at 17,015 ("[E]vidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.").

Moreover, even if the appellant demonstrates on remand that the agency perceived or regarded her as having an impairment, the direct threat affirmative defense, discussed at 29 C.F.R. § 1630.2(r), is still available to the agency with the same standards as under the ADA, before it was amended. *See* 76 Fed. Reg. at 16,979 (explaining that the EEOC "decline[d] to make changes requested by some commenters to portions of the regulations and the appendix that we consider to be unaffected by the ADA Amendments Act of 2008, such as to . . . 29 C.F.R. § 1630.2(r) (concerning the "direct threat" defense) . . . ."). In vacating the initial decision, we have not made a determination regarding this defense.

[12] In this regard, the record suggests that some facts and issues related to the appellant's disability discrimination claim were neither acknowledged nor discussed by the administrative judge in the initial decision, yet may nonetheless be critical to a proper resolution of this issue on remand. For instance, Dr. Schell wrote a report indicating that the appellant had an anxiety disorder and a personality disorder, but concluding that she was not a present danger to herself or others and she was able to return to work without restriction. *See* IAF-0881, Tab 6, Subtab 4R. Dr. Schell testified at his deposition, though, that had he seen some of the e-mails that the appellant had sent to her supervisors and other materials that were only shown to him <u>during</u> the deposition – which he said showed that the appellant was not able to appropriately respond to her supervisors' requests – he "[p]robably [would] not" have made the assessment that it was safe for the appellant to return to work. *See* IAF-0881, Tab 33, Exhibit 5. Unfortunately, the agency only included excerpts from this deposition, so we are unable to review Dr. Schell's full testimony. The appellant's representative included a declaration stating that he participated by telephone in Dr. Schell's deposition, and that Dr. Schell testified the appellant was not and had not been a threat, and he did not see that the appellant had any such intent. *See Id.*, Tab 35. The parties are advised to

¶40 We do not find persuasive the appellant's argument that the agency's actions constituted direct evidence of discrimination. Direct evidence may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude; and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). However, such evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999) (quoting *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989)). If an alleged discriminatory statement merely suggests a discriminatory motive, then it is only circumstantial evidence. *Id.*

¶41 The Board has addressed the question of direct evidence in certain disability discrimination cases, for example, where the agency clearly acknowledged that the appellant was disabled and the disability was the basis for its action. *See Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 559-60 (1997). Similarly, in *Ellshoff,* the Board deemed the agency's charges of inability to work and AWOL to be direct evidence of discrimination because the charges were solely and explicitly based on the appellant's disability of depression and did not involve any independent acts of misconduct. *Ellshoff*, 76 M.S.P.R. at 79. Furthermore, the Board specifically noted in *Ellshoff* that the appellant had never received less than a "fully successful" performance rating and that, although she had been incapacitated for several months prior to her proposed removal, the

---

include a full copy of Dr. Schell's deposition transcript, so that the administrative judge and, if necessary, the Board, can evaluate the context in which such statements were made. The appellant alternatively argued below that the agency acted due to mixed-motives based on actual or perceived disability discrimination, *see Id.*, Tab 34 at 43; however, we recently held in *Southerland*, 117 M.S.P.R. 56, ¶¶ 29-38, that a mixed-motive analysis is not appropriate in disability discrimination claims arising under the ADAAA.

medical evidence showed that she was not incapacitated when the agency proposed her removal for inability to work. *Id.* at 65, 69.

¶42 However, under longstanding Board precedent, an agency may bring a charge against an employee for physical inability to perform job duties. *See Alvara v. Department of Homeland Security,* 116 M.S.P.R. 627, ¶¶ 1, 2, 14 (2011); *Edwards v. Department of Transportation,* 109 M.S.P.R. 579, ¶ 15 (2008); *Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, ¶ 7 (2001), *review dismissed*, 32 F. App'x 538 (Fed. Cir. 2002); *Ellshoff*, 76 M.S.P.R. at 68-69; *Sebald v. Department of the Air Force,* 32 M.S.P.R. 164, 165 (1987); *see also Jones v. Department of Transportation*, 295 F.3d 1298 (Fed. Cir. 2002) (affirming Board decision sustaining employee's removal for physical inability to perform functions of his position.)

¶43 Consequently, the mere fact that an agency brings a charge based on an employee's troubling conduct—even where that conduct is ultimately found to be symptomatic of a disabling condition—is not direct evidence of discrimination. Here, the agency placed the appellant on enforced leave because she had exhibited unusual and inappropriate behavior in the workplace, and it apparently believed she posed a threat to workplace safety. IAF-0881, Tab 6, Subtab 4W. Unlike in *Ellshoff*, there is no evidence in the record before us to indicate that the agency's decision to take this action was motivated by an intent to discriminate against the appellant based on an actual or perceived disability. Accordingly, we find that the record does not establish direct evidence of discrimination here.

¶44 In the absence of direct evidence of discrimination, an employee may rely on the evidentiary framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), in order to prove a claim of unlawful disparate treatment. Under this framework, an employee must produce sufficient evidence to show that she (1) is a member of a protected group; (2) suffered an appealable adverse employment action; and (3) that the unfavorable action gives rise to the inference of discrimination. 411 U.S. at 802. As to the third element, an

employee may rely on any evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g., Chappell-Johnson v. Powell*, 440 F.3d 484, 488-89 (D.C. Cir. 2006); *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002) (no requirement in a failure to hire case that the plaintiff show that the employer filled the position with a person outside the protected class); *Davis v. Department of the Interior,* 114 M.S.P.R. 527, ¶¶ 7-10 (2010). This burden can be met by any proof of actions taken by the employer that shows a "discriminatory animus," where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Schoenfeld*, 168 F.3d at 1268.

¶45 If an appellant makes the requisite prima facie showing as set forth above, the burden of production shifts to the employer to "articulate some legitimate nondiscriminatory reason" for its action. *McDonnell Douglas*, 411 U.S. at 802. If the employer does so, the appellant must then be given an opportunity to demonstrate that, based on all of the evidence, the stated reason is a pretext and that the action was taken for a discriminatory reason. *Id.*; *see also Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006). With regard to this ultimate burden, an appellant can rely on "any combination of (1) evidence establishing the plaintiff's prima facie case; (2) evidence the plaintiff presents to attack the employer's proffered explanation for its action; and (3) any further evidence of discrimination that may be available to the plaintiff, such as independent evidence of discriminatory statements or attitudes on the part of the employer." *Holcomb*, 433 F.3d at 897 (citing *Aka v. Washington Hospital Center,* 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc)). While such evidence may include proof that the employer treated similarly situated employees differently, an appellant may also prevail 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 disabled employees or those who engage in protected activities; or (5) of

incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008). The focus of this inquiry is not "the correctness or desirability of [the] reasons offered ... [but] whether the employer honestly believes in the reasons it offers." *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992); *see also Pignato v. American Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994) ("It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason.").

¶46 In this case, as with most appeals of adverse actions taken under 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action. Accordingly, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her burden of proving that the agency intentionally discriminated against her based on disability. *See Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). Because the record in this case has not been sufficiently developed to determine whether the appellant has met this burden, it is appropriate to remand this appeal for further adjudication of the appellant's claims of disability discrimination.

The administrative judge's decision to issue sanctions against the appellant is vacated.

¶47 In the initial decision, the administrative judge granted the agency's motion for sanctions, finding that "the appellant's several failures to comply with Board orders have been flagrant and repeated" and "[h]er explanation [was] unconvincing." ID-0881 at 2. The administrative judge further determined that the most appropriate sanctions were to draw an inference in favor of the agency with regard to the information sought and to prohibit the appellant from introducing evidence concerning the information sought (including her own statements and/or testimony in any later stage of the litigation of this appeal). *Id.*

However, the initial decision does not reflect what, if any, inferences were made in the agency's favor or what specific evidence was prohibited. *See* ID-0881. While we agree that the appellant's refusal to comply with Board orders is unacceptable, and indeed, merits sanctions pursuant to 5 C.F.R. § 1201.43, in light of our decisions herein we vacate the administrative judge's issuance of sanctions. However, should the appellant continue to fail to comply with Board orders on remand, the agency may renew its motion for sanctions. The administrative judge should consider such a motion and decide whether any sanctions against the appellant are appropriate in light of the entire record of the appeals.

The 0223 appeal

The agency's petition for review lacks merit.

¶48 As we discussed above, the agency did not have the authority to order the appellant to take a psychological examination. Consequently, it may not discipline the appellant for avoiding that examination or otherwise failing to cooperate in connection with the order. *See L'Bert*, 88 M.S.P.R. 513, ¶ 14; *Harris*, 62 M.S.P.R. at 526-28. Accordingly, we DENY the agency's petition for review.

The appellant's disability discrimination claim must be remanded.

¶49 In her petition for review, the appellant argues that she made nonfrivolous allegations of disability discrimination and retaliation for protected activity and, therefore, she is entitled to a hearing on those claims.[13] PFR File-0223, Tab 5 at 7. With respect to her disability discrimination claim, she appears to have alleged below that she was indefinitely suspended because the agency perceived

[13] The appellant does not challenge the administrative judge's finding that she failed to make a nonfrivolous allegation that the agency did not retaliate against her for alleged protected whistleblowing activity, ID-0223 at 11-13. In the absence of any such challenge, we affirm the administrative judge's decision in this regard.

her as mentally disabled. *See* IAF-0223, Tab 11 at 33-40. For the reasons discussed above, *see supra* at ¶¶ 35-46, we vacate the portion of the initial decision regarding the appellant's disability discrimination claim and remand that claim for further adjudication consistent with this Opinion and Order.

The administrative judge correctly denied the appellant's retaliation claims.

¶50 As for her affirmative defense that the agency placed her on AWOL in retaliation for initiating EEO counseling, the appellant alleges that the administrative judge erred by dismissing this claim on the grounds that she did not allege facts that would show that the officials who took the action at issue here, Ms. Leiner and Mr. Birmingham, knew of the activity when they took the suspension action. PFR File-0223, Tab 5 at 53-54. The appellant contends that Ms. Leiner's decisions "were directed by higher officials" who were aware of her protected activity and participated in the decision to suspend her. *Id.* at 34, 54. Even if we assume that agency officials who knew that the appellant had initiated EEO counseling were involved in the decision to place her on AWOL, she does not offer any evidence that those officials had a motive to retaliate against her. Thus, the appellant has not made a nonfrivolous allegation of a nexus between her protected EEO activity and her placement on AWOL.

¶51 With respect to the appellant's claim that the agency retaliated against her for filing a Board appeal, the appellant alleges that, in finding that the appellant failed to allege facts that would establish a nexus between her protected activity and the adverse employment action, the administrative judge improperly disregarded the law that "relatively close timing of an adverse action following protected activity may be sufficient to satisfy this element of retaliation." PFR File-0223, Tab 5 at 54. The record reflects, however, that on September 21, 2009, two days *before* the appellant filed her first Board appeal, the agency informed her that it viewed her doctor's report as insufficient and that it would take action against her if she did not comply with its requests to submit additional

medical documentation or take another FFD examination. IAF-0223, Tab 16, Subtab 4L at 2. In light of these circumstances, the relatively short time between the appellant's Board appeal in the 0881 matter and the agency's adverse action does not give rise to an inference of retaliation. Accordingly, we affirm the initial decision insofar as it found that the appellant failed to make a nonfrivolous allegation of retaliation so as to be entitled to an evidentiary hearing on her retaliation claims.

The appellant's additional affirmative defenses must be considered on remand.

¶52 The appellant also alleges on review that the administrative judge erred by refusing to consider the claims that she initially raised in her response to the February 2, 2010 show-cause order. PFR File-0223, Tab 5 at 8. Under 5 C.F.R. § 1201.24(b), an appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case. The record reflects that the appellant raised claims of disparate treatment, harassment, and hostile work environment in her February 12, 2010 response to the administrative judge's February 2, 2010 show cause order, and the administrative judge never held a conference to define the issues in the case. Therefore, the administrative judge erred by refusing to consider these claims. Accordingly, we remand these claims to the Washington Regional Office for further adjudication.[14]

[14] The appellant also makes several additional allegations of error by the administrative judge relating to the Board's jurisdiction. PFR File-0223, Tab 6 at 4-5, 18-20. Because the administrative judge found that the Board has jurisdiction over the appeal, these alleged adjudicatory errors are harmless and do not provide any basis for disturbing the initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

ORDER

¶53 We remand these appeals to the Washington Regional Office for proceedings consistent with this Opinion and Order. On remand, and based upon a fully developed record, the administrative judge shall issue a new initial decision that addresses the appellant's disability discrimination claims in the 0881 and 0223 appeals and her affirmative defenses of disparate treatment, harassment and hostile work environment in the 0223 appeal. In addition, the administrative judge should also include notice of mixed-case appeal rights in the new initial decision.

FOR THE BOARD:

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