



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 10, 2022

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BOARD DECISIONS

Appellant: George Haas
Agency: Department of Homeland Security
Decision Number: [2022 MSPB 36](#)
Docket Number: AT-3330-19-0438-I-1
Issuance Date: November 7, 2022
Appeal Type: Removal

MEDICAL INABILITY TO PERFORM

The agency removed the appellant from his Customs and Border Patrol Officer position for inability to perform the essential functions of his position. The administrative judge affirmed, relying on 5 C.F.R. § 339.206, and the appellant filed a petition for review.

Holding: Because the agency did not remove the appellant based solely on his medical history, 5 C.F.R. § 339.206 does not apply to the agency's charge, even though the appellant's position was one with medical standards.

- Section 339.206 generally prohibits the removal of an employee whose position is subject to medical standards based solely on their medical

history, while providing a limited exception if the condition itself is disqualifying, recurrence “is based on reasonable medical judgment,” and the position’s duties are such that a recurrence “would pose a significant risk of substantial harm to the health and safety of the . . . employee or others that cannot be eliminated or reduced by reasonable accommodation or any other agency efforts to mitigate risk.”

- The Board has previously applied this regulation to all medical inability cases involving positions with medical standards, rather than just those in which the removal was based solely on the employee’s medical history. That precedent was mistaken.
- For cases involving a current medical condition, the agency must prove either a nexus between the employee’s medical condition and observed deficiencies in his performance or conduct, or a high probability, given the nature of the work involved, that his condition may result in injury to himself or others.
- Although the appellant was asymptomatic at the time of his removal, his bipolar disorder was a chronic condition, so section 339.206 does not apply. Applying the correct standard, for a current condition, the agency proved the appellant’s medical inability to perform.

Holding: The appellant failed to prove his claims of disability discrimination or EEO reprisal.

- Status-based disability discrimination claims and disability discrimination claims based on a failure to accommodate both require that the individual be “qualified,” i.e., an individual who can “perform the essential functions of the . . . position that such individual holds or desires” with or without reasonable accommodation.
- Because the appellant in this appeal was not “qualified,” his disability discrimination claim necessarily fails.
- Regarding his EEO reprisal claim, the applicable standard depends on the nature of his EEO activity. The motivating factor standard applies to claims of reprisal for engaging in activity protected by Title VII, while but-for causation applies to reprisal claims arising under the ADA.
- The appellant failed to prove that his protected activities were a motivating factor in his removal, much less a but-for cause of his removal.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Elfina McIntosh

Respondent: Department of Defense

Intervenor: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2019-2454](#)

MSPB Docket No.: DC-0752-17-0803-I-4

Appeal Type: Removal

APPOINTMENTS CLAUSE

The appellant challenged her removal before the Board and presented a whistleblower reprisal affirmative defense. The administrative judge sustained the removal. On appeal to the Court, the appellant challenged the administrative judge's findings. She also argued, for the first time, that the administrative judge's decision was invalid because the administrative judge was not properly appointed under the Appointments Clause.

Holding: Board administrative judges are not principal officers.

- There are three factors that are particularly relevant for “distinguishing principal and inferior officers: (1) whether an appointed official has the power to review and reverse the officers’ decision; (2) the level of supervision and oversight an appointed official has over the officers; and (3) whether an appointed official has the power to remove the officers without cause.”
- The first two factors weigh against a finding that Board administrative judges are principal officers because the Board members are principal officers and have “unfettered” review authority over the administrative judges’ decisions. Those factors are controlling, even if Board administrative judges cannot be removed without cause.
- The absence of a quorum was a “temporary circumstance, not a structural defect” that rendered the Board’s review process unconstitutional under the Appointments Clause throughout much of the appellant’s case.

Holding: The appellant failed to timely present her claim that the administrative judge was an inferior officer, not properly appointed.

- In her reply brief before the Court, the appellant argued for the first

time that the administrative judge was an inferior officer that was not properly appointed. The Court found that the appellant forfeited this argument by not including it in her opening brief.

Holding: The administrative judge properly sustained the appellant's removal.

- Despite the appellant's arguments to the contrary, the administrative judge's findings regarding proof of the charges were supported by substantial evidence, and the penalty of removal was not an abuse of discretion.
- The agency also rebutted the appellant's prima facie case of reprisal. The evidence in support of the appellant's removal was strong, while the motive to retaliate was neutral, and there were no similarly situated non-whistleblowers for purposes of comparison. Considered together, these factors demonstrated that the agency would have removed the appellant in the absence of her protected whistleblowing activity.

NONPRECEDENTIAL:

Lentz v. Department of the Interior, No. [2022-2007](#) (Fed. Cir. Nov. 4, 2022) (MSPB Docket No. SF-4324-16-0680-I-1) The appellant filed a USERRA claim, alleging that the agency provided negative references to prospective employers in reprisal for his prior USERRA complaint. The Court affirmed the Board's decision, which denied corrective action. The Court agreed with the Board's determination that the appellant failed to prove an improper motive.

Lentz v. Department of the Interior, No. [2022-2009](#) (Fed. Cir. Nov. 4, 2022) (MSPB Docket No. SF-1221-15-0688-W-1) The appellant filed an IRA appeal, alleging that his reprimand and suspension were reprisal for protected whistleblowing. The Court affirmed the Board's decision, which denied corrective action. The Court agreed with the Board's determination that the appellant failed to prove that he made any protected disclosures.

Norris v. Department of Commerce, No. [2021-2142](#) (Fed. Cir. Nov. 7, 2022) (MSPB Docket No. DC-0752-19-0724-I-3) Rule 36 affirmance.

Melton v. Merit Systems Protection Board, No. [2022-1993](#) (Fed. Cir. Nov. 9, 2022) (MSPB Docket No. CH-0752-09-0448-M-1) The court dismissed

the appellant's petition as untimely, because it was filed more than 60 days after the Board's final order.

Moghadam v. Department of Veterans Affairs, No. [2021-2221](#) (Fed. Cir. Nov. 9, 2022) (MSPB Docket No. SF-1221-19-0198-W-2) The appellant filed an appeal with the Court, requesting attorney fees for an IRA appeal before the Board in which she did not prevail. The Court declined to address the issue, since it was not decided below or properly raised.

Cordaro v. Department of Defense, No. [2022-2247](#) (Fed. Cir. Nov. 10, 2022) (MSPB Docket No. NY-0432-18-0217-I-1) Transferring the appellant's appeal to District Court because his is a mixed case.

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