U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 16, 2022

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BOARD DECISIONS

Appellant: Thomas Michael Dieter
Agency: Department of Veterans Affairs
Decision Number: 2022 MPSB 32
Docket Numbers: AT-0752-14-0475-I-1

ADVERSE ACTION
DUE PROCESS
HARMFUL ERROR

The appellant, a Roman Catholic Priest, was formerly employed as a Chaplain at an agency medical center. His position required him to have an ecclesiastical endorsement, dated within the past 12 months, from the official national endorsing authority of his faith group or denomination. By letters dated October 17, 2013, the Archdiocese for the Military Services, USA (AMS), a division of the Roman Catholic Church, notified the appellant and the agency that it had withdrawn the appellant's ecclesiastical endorsement to serve as a Chaplain with the agency. Although AMS did not provide a reason for its decision, prior to the decision, during a mass on September 15, 2013, the appellant gave a homily to the congregation in which he stated that while wearing the "Roman Collar" earlier that morning he had "hit" and "knocked out," or words to that effect, two teenage boys who were attempting to burglarize a veteran. Thereafter, the agency removed the appellant based on his failure to maintain a condition of employment—an ecclesiastical endorsement. The appellant filed a Board appeal challenging his removal and raising affirmative defenses of due process violations and harmful procedural error. After holding a hearing, the administrative judge issued an initial decision affirming the appellant's removal and finding that the appellant failed to prove his affirmative defenses. The appellant filed a petition for review, asserting that the administrative judge erred in denying his affirmative defenses. The Board denied the appellant's petition for review.

Holding: The Board lacks the authority to review the AMS's decision to withdraw the appellant's ecclesiastical endorsement because it is precluded from doing so by the First Amendment.

1. The appellant had no property or liberty interest in his ecclesiastical endorsement, no due process rights concerning the procedures used by the AMS in deciding to withdraw his endorsement, and no constitutional right to receive the documentary or testimonial evidence underlying the AMS's decision to withdraw his ecclesiastical endorsement.

2. Thus, the administrative judge properly found that the appellant failed to prove that the agency violated his due process rights by providing information to the AMS without affording him notice and an opportunity to respond, by providing allegedly stigmatizing information to the AMS, or by failing to conduct an investigation prior to communicating with the AMS.

Holding: The agency afforded the appellant due process in connection with his property interest in his continued Federal employment.

1. The appellant received written notice that the agency was proposing to remove him based on a charge of failure to maintain a condition of employment (his ecclesiastical endorsement), the appellant was afforded an opportunity to respond to the proposal notice orally and in writing, and the deciding official considered the appellant's responses.

2. The appellant failed to show that the agency violated his due process rights based on his claims that the deciding official was biased against him.

3. The deciding official did not rely on ex parte information in making her decision to remove the appellant because the proposal notice specifically stated that the appellant's prior reprimand for disrespectful conduct would be taken into consideration in determining the appropriate penalty and the deciding official did not consider any

"disruptions" that were not referenced in the proposal notice.

Holding: The appellant failed to prove his affirmative defense of harmful procedural error based on his claim that the agency failed to conduct an adequate investigation.

1. Even if the agency committed procedural error regarding its obligation to conduct a certain type of investigation, the appellant failed to establish that it was harmful because the agency's Liaison to the AMS testified that the statements the appellant made in his homily were "totally inappropriate regardless of whether the appellant had actually engaged in the activities he described."

Appellant: Marguerite Pridgen
Agency: Office of Management and Budget
Decision Number: 2022 MSPB 31
Docket Numbers: DC-0432-14-0557-I-1

PERFORMANCE-BASED ACTIONS
RACE DISCRIMINATION
DISABILITY DISCRIMINATION
EEO REPRISAL
BURDEN OF PROOF
WHISTLEBLOWER REPRISAL

The appellant, a GS-15 Policy Analyst for the agency's Office of Federal Financial Management, filed a Board appeal challenging her performance-based removal and alleging that the agency discriminated against her, among other things, based on her race, color, and disability as well as retaliated against her for her prior equal employment opportunity (EEO) and protected whistleblowing activity. After holding a hearing, the administrative judge issued an initial decision affirming the appellant's removal and finding that the appellant failed to prove her affirmative defenses. The appellant filed a petition for review, which the Board granted. The Board reversed the appellant's removal and remanded for further adjudication of the appellant's claims of discrimination and reprisal.

Holding: The Board reversed the agency's removal action, finding that the agency failed to prove that the appellant's performance was unacceptable in at least one critical element.

1. The appellant's performance deficiencies were associated with strategic, i.e. noncritical goals, not critical elements of her position.

Holding: Title VII discrimination claims in the Federal sector may be proved through either the motivating factor or but-for causation standard, but the appellant must prove but-for causation to obtain full relief.

1. An appellant may prove discrimination under Title VII by showing that the prohibited discrimination was a motivating factor in the employment decision.

2. An appellant who proves motivating factor is entitled to injunctive or other "forward-looking relief." To obtain the full measure of relief under the statute (including status quo ante relief, compensatory damages, or other relief related to the end result of the employment outcome), however, an appellant must prove that discrimination was a but-for cause of the employment outcome.

3. One may prove discrimination by various methods, which can be sufficient by themselves or can be used together, including the following:

   A. Direct evidence;
   B. Circumstantial evidence, which may include:
      i. Convincing mosaic evidence, i.e. evidence of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn.";
      ii. Comparator evidence; or
      iii. Evidence that the agency's stated reason for its action is unworthy of belief, a mere pretext for discrimination (i.e. the burden-shifting standard under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); or
   C. Some combination of direct and indirect evidence.

4. The Board overruled *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 46 (2015) to the extent it held that, because the Board lacks summary judgment authority, the *McDonnell Douglas* framework has no application to Board proceedings.

   A. Although *McDonnell Douglas* outlined the order and allocation of proof as a three-stage process, this prima facie method was never intended to be rigid but rather merely articulated an orderly way to evaluate the evidence as it bears on the critical question of discrimination.

5. Applying the proper standards to the facts of the case, the Board held that the administrative judge viewed the appellant's comparator evidence too narrowly.

    A. The appellant's coworker was similarly situated to the appellant for purposes of determining whether the tasks assigned to the appellant during her performance improvement plan (PIP) were the product of discrimination because the coworker was the only other GS-15 Policy Analyst, he reported to the same supervisor, and he was subject to the same general standards governing performance.

Holding: Claims of retaliation for opposing discrimination in violation of Title VII in the Federal sector may be proved through either the motivating factor or but-for causation standard, but the appellant must prove but-for causation to obtain full relief.

1. The appellant failed to prove that her EEO complaints or Board appeals (which raised claims of discrimination and retaliation for engaging in EEO activity) were a motivating factor in her removal.

    A. As the administrative judge found, the appellant failed to prove that her first- or second-level supervisors were aware of her Board appeals.

    B. Regarding the appellant's prior EEO activity, the Board declined to disturb the administrative judge's explicit and implicit demeanor-based credibility findings regarding the lack of motive to retaliate on the part of the proposing and deciding officials.

2. The Board remanded, instructing the administrative judge to provide the parties with an opportunity to present evidence and argument concerning the appellant's claim that the agency's determination that her pre-PIP performance was unsatisfactory constituted EEO reprisal.

Holding: Disability discrimination claims under the Rehabilitation Act may be proved through either the motivating factor or but-for causation standard, but the appellant must prove but-for causation to obtain full relief.

1. Federal circuit courts are split regarding the level of causation an employee must meet to prove discrimination "on the basis of disability."

In light of such split, the Board deferred to the EEOC's use of a motivating factor standard.

2. As with Title VII claims, the remedies available for disability discrimination claims will vary based on the level of causation. When disability discrimination is a but-for cause of the personnel action, full relief, including reinstatement, back pay, and damages is available. When disability discrimination is only a motiving factor, injunctive or other forward-looking relief is available.

3. Applying the standards to the facts of the case, the Board remanded for the administrative judge to consider the appellant's claim that, due to her disability, she received less favorable assignments than her similarly situated coworker.

Holding: A "but-for" causation standard applies to claims of retaliation for engaging in activity protected by the Rehabilitation Act.

1. The Board relied on *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 351-53 (2013), in which the U.S. Supreme Court ruled that a "but-for" causation standard applied to Title VII's anti-retaliation provision applicable to the private sector, which contained language virtually identical to the language in the Americans with Disabilities Act anti-retaliation provision.

2. The Board overruled *Southerland v. Department of Defense*, 119 M.S.P.R. 566, ¶ 20 (2013), to the extent it held that a lesser standard was applicable for Rehabilitation Act retaliation claims and held that an agency could avoid liability by proving by clear and convincing evidence that it would have taken the same action absent an improper motive. *Southerland* was issued prior to *Nassar*.

3. Applying the proper causation standard to the facts of the case, the Board found that the appellant's "suspicious timing" arguments were insufficient to prove "but-for" causation between her protected activities (filing disability complaints and requesting reasonable accommodations) and her removal.

Holding: The Board held that the appellant made protected disclosures and remanded for further adjudication of the appellant's claims of reprisal for protected whistleblowing.

1. The administrative judge erred in concluding that the appellant provided

insufficient information to prove that she had a reasonable belief that she disclosed violations of laws related to grant law and policy.

2. The burden-shifting framework set forth in 5 U.S.C. § 1221(e) applies to the appellant's claim that a personnel action was taken against her after the effective date of the Whistleblower Protection Enhancement Act of 2012 (WPEA) because of her pre-WPEA activity protected by 5 U.S.C. § 2302(b)(9)(C).

3. Cooperating with or disclosing information to the Inspector General of an agency or the Office of Special Counsel is protected activity under 5 U.S.C. § 2302(b)(9)(C) irrespective of whether the appellant reasonably believed that she was disclosing wrongdoing as defined at 5 U.S.C. § 2302(b)(8).

4. The Board remanded the appeal for the administrative judge to determine whether the appellant proved contributing factor based on her disclosures related to violations of grant law and policy.

5. The Board also remanded for the administrative judge to reevaluate her finding that the agency met its burden of proving that it would have removed the appellant absent her disclosures to offices of inspector general. This finding must be reassessed because the Board reversed the agency's removal action and, on remand, the administrative judge must make further findings on the appellant's various disclosures and activity.

6. Among other things, the administrative judge should not limit her analysis of the agency's motive to retaliate to whether the appellant's first- and second-line supervisors were personal subjects of the appellant's disclosures. The administrative judge also should consider whether the disclosures reflect on their capacities as managers and employees, which may be sufficient to establish substantial retaliatory motive.

COURT DECISIONS

NONPRECEDENTIAL:

Lal v. Department of Health & Human Services, No. 2021-2330 (Fed. Cir. Sept. 9, 2022) (AT-0752-18-0564-I-4) (Rule 36 affirmance).