

JOAN E. GERLACH
v.
FEDERAL TRADE COMMISSION

DOCKET No.
DC07528010020

OPINION AND ORDER

Appellant filed a timely petition for appeal from the action of the Federal Trade Commission removing her from her position as EEO Specialist. The removal action was based on the charge of "Continuing Unwillingness or Inability to Follow Supervisory Directives." The specifications of the charge related to an alleged failure to prepare technically correct and timely products incorporating the changes requested by appellant's supervisor for four writing assignments during the period of July 11 through December 6, 1979. Appellant contended that the removal action was initiated by her supervisor in retaliation for a grievance filed by appellant and that the removal was also based on race, sex, and age discrimination.

BACKGROUND

The agency appointed appellant as a part-time employee in March 1979. In August 1979 appellant filed a formal grievance concerning secretarial support and work assignments by her supervisor. In October 1979 the chairman of the agency determined that the appellant's supervisor had taken steps to remedy the problems cited in the grievance and that no further action by him was required. Appellant's removal was proposed by her supervisor in January 1980 and directed by the deciding official in April 1980.

At a hearing before a Board presiding official, appellant's supervisor conceded that she was aware of appellant's grievance against her, and appellant testified that adverse changes in the supervisor's conduct toward her occurred after the filing of the grievance. Appellant's testimony was corroborated by a former agency EEO office employee who testified concerning her comparable experiences with appellant's supervisor. In the initial decision, the presiding official found the supervisor's denial of any memory of problems experienced with the former employee, and the supervisor's assertion that the four relatively short writing assignments constituted very close to 99 percent of appellant's work for the 5-month period involved in the removal action, to be "incredible."

The presiding official also found that the testimony offered by the appellant was far more credible than that offered by the agency and that although the majority of the specifications were sustained, they did not constitute serious noncompliance with supervisory directives. The presiding official further found that the penalty of removal was

inappropriate for the minor legitimate performance deficiencies and held that the removal action was taken, at least in part, in reprisal for appellant's having filed the grievance, thus constituting a prohibited personnel practice pursuant to 5 U.S.C. § 2302(b)(9). Citing 5 U.S.C. § 7701(c)(2)(B), which provides that an adverse action may not be sustained if it is shown to be based on a prohibited personnel practice, the presiding official reversed the removal.¹

PETITION FOR REVIEW

The agency filed a timely petition for review pursuant to 5 C.F.R. § 1201.115. The agency argued that the presiding official's finding of reprisal, in violation of 5 U.S.C. § 2302(b)(9), was based upon incorrect credibility determinations. In the alternative, the agency contended that even if reprisal played some part in the removal decision, that based upon the record in this case, that fact would not require reversal pursuant to 5 U.S.C. § 7701(c)(2)(B). This latter argument is based on the rationale that the ultimate decision as to whether the personnel action was based on a prohibited personnel practice depends on whether the record establishes that the adverse action would not have been taken but for the prohibited personnel practice. The agency cited the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), as authority for this position.²

Appellant's response to the petition for review contended that the presiding official's findings of fact were clearly supported by the record and that her conclusions of law and ultimate decision were in accord with statutory and case law.

As detailed in the Analysis and Decision section of this opinion, we have concluded that the presiding official incorrectly interpreted the mandate of 5 U.S.C. § 7701(c)(2)(B). Moreover, the Board believes that it is necessary to clarify the analytical process of decisionmaking in adverse action appeals involving claims of reprisal for protected conduct and discrimination on the basis of protected status. Accordingly, the petition for review is GRANTED.

ANALYSIS AND DECISION

A claim of reprisal for filing a grievance constitutes an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). To establish a violation of section 2302(b)(9), an appellant must demonstrate that he or she engaged in an activity protected by the section; that he or she subsequently was treated in an adverse fashion by the

¹The presiding official held that appellant did not establish that she was discriminated against on the basis of race, sex, or age.

²The agency also relied upon *Mt. Healthy* for the proposition that the appellant bears the burden of proof on the "but for" issue. This argument is inconsistent with the Supreme Court's decision. See Analysis and Decision section, *infra*.

employer; and that the deciding official had actual or constructive knowledge that the employee was engaged in the protected activity. The appellant must also demonstrate that there is a causal connection between the protected activity and the adverse action and that the protected activity was a significant factor in the taking of the adverse action. *In the Matter of Frazier*, 1 MSPB 159 (1979).

In the instant case, appellant had clearly engaged in the protected activity of filing a grievance. Both the proposing and the deciding official had actual knowledge that appellant had engaged in such an activity. The testimony adduced from appellant and her witnesses conflicted with that of her supervisor as to the supervisor's conduct and motives for bringing the removal action. The presiding official found the testimony and circumstantial evidence presented by appellant to be more credible than that presented by the agency. The presiding official's holding that the removal action was brought, at least in part, in reprisal for appellant's having filed a grievance against her supervisor was to a substantial extent based on the credibility findings.

When questions of credibility are presented, we must necessarily give due deference to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980). While the Board "is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's findings only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning,"³ after review of the record before us, the Board can find no reason to set aside the presiding official's findings of fact.

The Board agrees with the presiding official's holding that the protected conduct was a significant factor in the decision to remove appellant. This conclusion is based upon the findings of fact and credibility determinations set forth in the initial decision and the extreme disparity between the minor nature of the sustained specifications and the penalty of removal. It is also based upon a comparison between this action and the agency's record of disciplinary actions taken during the year preceding this action,⁴ and the fact that there was no attempt to utilize progressive discipline to remedy appellant's legitimate deficiencies.

³ *Weaver* at 298.

⁴ According to information provided by the agency, in the year prior to appellant's removal only two other disciplinary actions were taken in the entire agency. Both actions were suspensions; one was a 14-day suspension for failure to obey a lawful supervisory directive to operate certain machinery, and the other was a 30-day suspension for addressing another employee in a vulgar, offensive, and threatening manner, and physically assaulting that person.

The presiding official held, and the Board agrees, that the sustained charges in this case were not sufficient to support the removal action. The initial decision further held, however, that reversal of the action was required by 5 U.S.C. § 7701(c)(2)(B), because appellant had proven that the removal was motivated, in part, by a prohibited personnel practice.

After review of the specific language of 5 U.S.C. § 7701(c)(2)(B) and the legislative history of the Civil Service Reform Act, the Board cannot agree with the presiding official's interpretation of 5 U.S.C. § 7701(c)(2)(B). Section 7701(c)(2)(B) of title 5 provides that, notwithstanding proof of the agency's charges, an agency decision may not be sustained if the employee:

(B) shows that the decision was *based* on any prohibited personnel practice described in section 2302(b) of this title; (emphasis added).

The customary definition of "based" as it is used in this provision connotes that the matter referred to is the most important element.⁵ Such definition is in accord with the legislative history of the Civil Service Reform Act, which sought to protect employees from prohibited personnel practices, but at the same time not to insulate them from legitimate conduct or performance-based adverse actions. Congress' intention to assure that the rights of employees were balanced against management responsibilities to assure an efficient work force was set forth as follows:

Finally, it should be noted that this section is a prohibition against reprisals. The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action. If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings, or if an employee has engaged in action which would constitute dismissal for cause, the fact that the employee 'blows the whistle' on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action. Whether the disciplinary action is a result of the individual's performance on the job, or whether it is a reprisal because the employee chose to criticize the agency, is a matter for judgment to be determined in the first instance by the agency, and ultimately by the Special Counsel and the Merit Systems Protection Board. S. Rep. No. 696, 95th Cong., 2nd Sess. 22 (1978).

⁵Webster's New Twentieth Century Dictionary Unabridged, Second Edition, p. 154 (1968); Webster's Third New International Dictionary, p. 180 (1976).

The foregoing statement of legislative intent related to 5 U.S.C. § 2303(b)(8), which sets forth the prohibited personnel practice of reprisal for "whistleblowing." Since protection for "whistleblowers" was one of the major concerns of Congress in enacting the Civil Service Reform Act, we must conclude that Congress did not intend to provide less protection for "whistleblowers" than for employees engaging in other conduct protected by 5 U.S.C. § 2302(b). Thus, we hold that 5 U.S.C. § 7701(c)(2)(B) mandates reversal of the agency's action only where the Board has determined that a prohibited personnel practice was the "motivating factor" or "real reason" for the agency action.

The Board has studied federal court precedents in analogous areas of the law for guidance in developing an analytical framework for determining whether the adverse action was based on a legitimate or prohibited reason, where both appear to have contributed to the agency action.

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), involved a school board's refusal to renew the contract of an untenured teacher. The two written reasons cited by the school board were the teacher's use of obscene language and gestures in the school cafeteria and his communication of a change in school policies to a local radio station. The teacher sued, alleging that the refusal to renew violated his rights under the first and fourteenth amendments.

The district court found that the first reason relied upon by the school board involved unprotected conduct, while the second involved conduct protected by the first and fourteenth amendments. The district court held the failure to renew to be improper because the protected conduct was a substantial factor in the school board's decision, and the Court of Appeals for the Sixth Circuit affirmed.

The Supreme Court vacated and remanded, holding that where dual causation is involved, although the employee carried the burden of showing that protected conduct was a substantial factor in the personnel decision, the employer must be given the opportunity to prove by a preponderance of the evidence that it would have taken the same action if the protected conduct had not occurred. The Court reasoned as follows:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—

even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decisions. [429 U.S. at 285-286.]

Based upon this reasoning, the Supreme Court enunciated a two-part test to be applied in a dual motivation case.⁶ First, the employee has the burden of establishing by a preponderance of the evidence that the protected conduct was a "substantial" or "motivating" factor.⁷ If the employee carries that burden, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even if the protected conduct had not taken place.

As noted, *Mt. Healthy* was a case involving reprisal for the exercise of constitutional rights. Its analytical approach, however, has been used by the Court of Appeals for the District of Columbia Circuit in deciding cases of alleged discrimination in violation of Title VII of the Civil Rights Act of 1964 and in appeal reprisal cases.⁸ The National Labor Relations Board has also adopted the *Mt. Healthy* test for cases brought by its General Counsel alleging reprisal for union activities.⁹

Because neither the *Mt. Healthy* decision nor those decisions utilizing its analytical framework in other areas of the law involve cases arising pursuant to the Civil Service Reform Act, the Board is not compelled to adopt the *Mt. Healthy* test. After careful review of the decisions utilizing the *Mt. Healthy* test, however, we have concluded that it constitutes an approach which is inherently logical and totally consistent with the Civil Service Reform Act and its legislative history. It presents a coherent analytical framework for

⁶429 U.S. at 287.

⁷This portion of the test is identical to that adopted by the Board in *In the Matter of Frazier*, 1 MSPB 159 (1979). The facts of that case, however, did not require the Board to consider the applicability of the second element of the *Mt. Healthy* test to Board cases. 1 MSPB 159, 189 n.52.

⁸*Williams v. Boorstin*, 24 EPD § 31,283 (D.C. Cir. October 3, 1980); *Day v. Matthews*, 530 F.2d 1083 (D.C. Cir. 1976).

⁹*Wright Line, A Division of Wright Line, Inc.*, 105 LRRM 1169 (1980).

determining causality assuring that an employee who may have engaged in protected activity is not thereby granted immunity from the ordinary consequences of misconduct or poor performance and equitably allocates the burdens of proof.¹⁰

Accordingly, the Board will adhere to the *Mt. Healthy* test for all dual causation cases involving allegations of discrimination or reprisal.¹¹ It is our intention that the test be utilized as a method of allocating the respective burdens of proof and as an analytical tool for determining ultimate causality. It is not intended to dictate the order of presentation of evidence, and the Board does not anticipate that it will result in alteration of the present hearing process.

Applying the *Mt. Healthy* test to the instant case, having previously concluded that the appellant demonstrated by a preponderance of the evidence that retaliation was a significant factor in the removal action, we must now determine whether the agency established by a preponderance of the evidence that the appellant would have been removed absent the retaliatory motive.

The Board has stated its agreement with the presiding official that the sustained specifications were so minor as to be insufficient cause to take a removal action. In addition, the record of agency disciplinary actions for the year preceding the appellant's removal establishes that no similar action was taken against any other employee, and that a far less drastic penalty was imposed for a much graver charge involving a physical assault of another employee.¹² Therefore, we find that the agency failed to establish by a preponderance of the evidence that the removal action would have been taken even in the absence of the retaliatory motive of appellant's supervisor.¹³

¹⁰The Court of Appeals for the District of Columbia Circuit has held that the standard to be used in determining whether the employer has established that the action would have been taken even in the absence of the protected conduct or status is "clear and convincing evidence." *Day v. Matthews, supra*. Adoption of the standard of "clear and convincing" would require the agency to prove its charges by a higher standard than the Reform Act requires for any adverse action. The "preponderance of the evidence" standard set forth by the Supreme Court in *Mt. Healthy* is in accord with the standards provided for in the Civil Service Reform Act and will be utilized by the Board.

¹¹The *Mt. Healthy* analysis may also be adaptable to cases involving other prohibited personnel practices. Such applicability will be decided on a case by case basis.

¹²See p. 5, n.3 *infra*.

¹³That the agency *could* possibly have taken some lesser action against the appellant on the basis of the sustained specifications is irrelevant to this determination; the question before the Board is whether the agency *would* have removed the appellant in the absence of the proven retaliatory intent of her supervisor.

Accordingly, the initial decision of the presiding official is **AF-FIRMED AS MODIFIED** herein, and the agency is hereby **ORDERED** to cancel the removal.

Proof of compliance with this Order shall be submitted to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the D.C. Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is hereby also notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *December 15, 1981*