

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

WAYNE Y. KITAURA ,
Appellant,

DOCKET NUMBER
SE-0752-97-0394-G-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 13, 1999

EEOC PETITION NUMBER 03980089

Wayne Y. Kitaura, Honolulu, Hawaii, pro se.

Paul H. Mabus, So. San Francisco, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman

Beth S. Slavet, Vice Chair

Susanne T. Marshall, Member

VICE CHAIR SLAVET ISSUES A CONCURRING OPINION.

ORDER

On March 11, 1999, pursuant to 5 U.S.C. § 7702(b)(4), the Equal

Employment Opportunity Commission (EEOC) issued a decision remanding this case to the Board for the taking of additional evidence.

On September 24, 1997, an administrative judge in the Board's Seattle Field Office issued an initial decision finding that the appellant failed to prove his affirmative defense of disability discrimination. He sustained the agency's action placing the appellant on enforced leave due to his inability to perform the essential functions of his position. The appellant petitioned the full Board to review the initial decision. When the Board denied the appellant's

petition for review, the initial decision became the final decision of the Board. The appellant then petitioned EEOC to review the final decision.

Upon review of the Board's decision, EEOC determined that there was insufficient evidence in the record for it to render a decision in the matter. Accordingly, it remanded the case to the Board for supplementation of the record.

The case, therefore, is REMANDED to the Board's Seattle Field Office for the taking of additional evidence as specified in EEOC's decision. The administrative judge is instructed to conduct further proceedings, including the taking of testimonial evidence, to supplement the record in accordance with EEOC's decision. The additional evidence shall be transmitted, within 45 days, to the Clerk of the Board, who will, in turn, transmit the evidence to EEOC so that it may decide whether to concur with the Board's decision in this matter.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

Wayne Y. Kitaura v. U.S. Postal Service,

MSPB Docket No. SE-0752-97-0394-G-1

I agree with the majority's disposition. I write separately only to express my concern that the decision of the Equal Employment Opportunity Commission (EEOC) referring this case to the Board under 5 U.S.C. § 7702(b)(4)¹ for supplementation of the record is somewhat problematic, insofar as it provides no guidance on how the Board should develop the record when an appellant raises a disability discrimination claim before the Board. The EEOC's decision also appears to run counter to federal court and Board precedent that sets out the respective obligations of the parties to present evidence concerning accommodation of a disability by placement in a vacant position. This EEOC decision does not acknowledge such precedent, nor have I found any other EEOC decision that explains the EEOC's approach to discrimination claims involving a federal agency's alleged failure to accommodate an employee's disability.

BACKGROUND

The agency placed the appellant on enforced leave from his Distribution Clerk position based on its determination that he is unable to perform the essential functions of that position. On appeal, and after a hearing, the administrative judge (AJ) found, based on the parties' stipulations as to the appellant's condition of bilateral carpal tunnel syndrome and the consequent restrictions on lifting and grasping placed on him by his physician, that the agency proved that he is unable to perform the essential functions of his position. Turning to the appellant's disability discrimination claim, the AJ found that the appellant is disabled, and that his suggested accommodations (e.g., altering his duties, providing him with a harness and a cart) would not have allowed him to perform the essential functions of his position-, the AJ also found that there were no vacant positions, the duties of which the appellant could have performed, to which he could have been reassigned. In so finding, the AJ credited the testimony of two agency officials, who stated that they had no vacancies and in fact had 10

"excess" employees. See Initial Appeal File, Tab 14. at 10. The full Board denied the appellant's petition for review, and the administrative judge's decision thus became the final decision of the Board. *Kitaura v. U.S. Postal Service*, 79 M.S.P.R. 257 (1998) (Table).

On review of the Board's final decision, the Equal Employment Opportunity Commission (EEOC) determined that there is insufficient evidence in the record for it to render a decision. Specifically, the EEOC agreed with the AJ's finding that the appellant cannot perform his normal Distribution Clerk duties because of a disability; it also agreed with the AJ's finding that the appellant cannot be accommodated in his position, finding that there are no reasonable measures available which would not "unduly burden the agency and expose [the appellant] to safety hazards." EEOC File, Tab I at 3-4. The EEOC also found, however, that there was "no objective evidence" to support the agency's determination that there were no vacant positions the duties of which the appellant could perform, and to which he could, be reassigned, and no evidence that the agency conducted an adequate search for a vacant position. *Id.* at 4. Accordingly, the EEOC remanded the case to the Board for supplementation of the record. *Id.* at 4-5.

DISCUSSION

The EEOC's decision in this case is inconsistent with Board precedent. In *Jackson v. U.S. Postal Service*, 73 M.S.P.R. 512 (1997) (*Jackson I*), the Board reversed the appellant's removal for inability to perform. The Board found that the appellant had made a prima facie case of disability discrimination by articulating "a reasonable accommodation of reassignment to another position. *Id.* at 520-21 (relying on *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988)). The Board held that this was sufficient to shift the burden to the agency to show that the articulated accommodation was not possible, and concluded that the agency failed to meet its burden. 73 M.S.P.R. at 521-24.

Upon the appellant's petition for enforcement, however, the Board modified its decision, when it became apparent that there was no vacant position to which the appellant could have been reassigned.- The Board held -that under *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983), once a case has been fully tried on the merits (as

Jackson had been), the question whether the employee claiming discrimination has established a prima facie case is no longer relevant, and the factfinder should resolve the ultimate issue of whether the employee met his overall burden of proving discrimination. Jackson 1, U.S. Postal Service, 79 M.S.P.R. 46, 51-54 (1998) (Jackson H). Applying this principle, the Board held that its decision in Jackson I was incorrect, and that it should have held that the appellant failed to meet her burden of proving that her disability could be accommodated by reassignment. The Board noted that an agency is obligated, under 29 C.F.R. § 1614.203(g), to identify vacant funded positions in the commuting area, at or below a disabled employee's grade or pay level, to which the employee could be reassigned. 79 M.S.P.R. at 53. The Board nonetheless held that "if the agency falls to meet its reassignment obligation before it removes the employee, the agency's failure at that time to look for a position as a reasonable accommodation does not relieve the appellant of her burden of ultimately showing, before the Board, that such positions existed and were available." Id. at 54. The Board restated its holding as follows: "[A]lthough the agency may not have fulfilled its obligation to look for a position to which the appellant could be reassigned, the appellant did not meet her ultimate burden of proving that there was a position the agency would have found and could have assigned her to if it had looked." Id. ²

In this case, by contrast, the EEOC's finding that the agency did not conduct an adequate search for a position to which the appellant could be reassigned does relieve the appellant of his burden of showing that there was such a vacancy, since the EEOC has directed the Board to require the agency to present evidence concerning vacancies. The EEOC has held, in essence, that the agency, not the employee, bears the burden of proof on the question of whether there was a vacant position to which a disabled employee could have been reassigned.: Cf. *Bassingthwaite v. West*, EEOC No. 03970051 (Oct. 2, 1997) (rejecting a claim of disability discrimination after discussing the agency's "thoroughly documented" attempts to locate a position to which the appellant could have been reassigned; the appellant failed to "contradict the evidence presented by the agency that no such positions were available").

This is not the first time that the EEOC has returned a case to the Board for the presentation of evidence from the agency concerning reassignment efforts, upon finding that the agency did not conduct an adequate search for a vacant position in which a disabled

employee could have been placed. See *Schuetter v. Cohen*, EEOC No. 03970140 (Jan. 15, 1999); *Conover v. Runyon*, EEOC No. 03960113 (Sept. 11, 1997). The EEOC appears to have taken a similar approach when an employee appeals to the EEOC from a final agency decision denying a claim of disability discrimination; when the EEOC finds that the agency did not conduct an adequate search for a vacant position, it remands the matter to the agency for a "supplemental investigation." See *Cotter v. West*, EEOC No. 01963628 (Dec. 23, 1998); *Schwartz v. Runyon*, EEOC No. 01956312 (Jan. 5, 1998).

Indeed, in *Schuetter*, a case appealed to the EEOC from a final Board decision, the EEOC returned the case to the Board for "further investigation" (emphasis supplied). The EEOC's use of the word "investigation" may highlight what appears to be a fundamental difference between the way the EEOC and the Board view their respective roles, and how they operate. In *Jackson I*, the Board found that the agency had committed disability discrimination based on a lack of evidence, i.e., the agency's failure to show that it could not have reassigned her. In *Jackson II* the Board modified *Jackson I* because the order in *Jackson I* could not be enforced. The Board also held, in light of *Aikens*, that in future cases decided after a hearing the ultimate question would be whether the appellant showed that there was a vacant position to which she could have been reassigned. Thus, *Jackson I* and *Jackson II*, although differing with regard to which party must produce evidence, are similar in that they rely on an adversarial model of adjudication, under which uncertainty is resolved against the party that bears the burden of proof on a particular question. See 5 U.S.C. § 7701(c) (in general, an agency bears the burden of proof on the merits, and the appellant bears the burden of proof on affirmative defenses), 5 C.F.R. § 1201.56 (further explaining allocation and standard of proof in Board appeals).

It may be that the EEOC's decision in this case, and its decisions in *Schuetter* and *Conover*, rest on an investigatory approach rather than on the adversarial model that the Board normally employs. In all three cases, the EEOC declined to make a decision when it saw uncertainty as to the possibility of reassignment, and asked a party to present additional evidence so that the EEOC could resolve the reassignment issue with a positive finding, that is, one based on evidence actually presented rather than on a party's failure to present evidence.³ It may also be that the EEOC subjects a federal agency's decision to remove a

disabled employee to heightened scrutiny in light of the Rehabilitation Act's mandate that federal agencies develop "affirmative action program plan[s] for, the hiring, placement, and advancement of individuals with disabilities," 29 U.S.C. § 791(b), and the EEOC's related rule stating that the federal government "shall become a model employer" of the disabled, 29 C.F.R. § 1614.203(b).

In any case, the Board makes the evidentiary record for the EEOC's review in mixed cases under 5 U.S.C. § 7702. If the EEOC disagrees with the Board's rule that an appellant who claims that his disability could have been accommodated by reassignment bears the burden of proving that there was a specific vacant position the duties of which lie could perform, it would be beneficial to parties who appear before the Board, Board administrative judges, and the Board itself for the EEOC to make that express pronouncement. In that event, the Board could then consider requiring the agency to show, in every case in which the agency has taken an action based on a charge of inability to perform and the appellant claims disability discrimination, that there was no vacant position to which the appellant could have been reassigned.⁴ In this connection, it should be noted that under 5 U.S.C. § 7701(c)(2)(B), the appellant bears the burden of proving, by a preponderance of the evidence, an affirmative defense of disability discrimination. Arguably, there is a tension between section 770 1 (c)(2)(B) and the EEOC's view that the agency bears the burden of proving that there was no vacant position to which a disabled employee could have been reassigned. It would be helpful for the EEOC to give its view on whether there is such a tension, and if so, how it should be resolved.

Finally, the EEOC noted in its decision returning this case to the Board that under the Rehabilitation Act Amendments of 1992, 29 U.S.C. § 791(g), "for nondiscrimination purposes, federal agencies must follow the ADA [Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.] standards." The EEOC did not acknowledge that requiring the agency to produce evidence concerning the nonexistence of a vacant position to which the appellant could have been reassigned is contrary to these federal court decisions interpreting the ADA and the Rehabilitation Act, which hold that the employee bears the burden of proving that there was a vacancy to which he could have been reassigned.⁵ Nevertheless, the EEOC's decision in this case "rests upon an interpretation of discrimination law," and "is not so unreasonable that it

amounts to a violation of civil service law," so the Board "lacks authority to disagree" with the EEOC's decision. *Sloan v. U.S. Postal Service*, 77 M.S.P.R. 58, 68 (1997). Accordingly, I agree with the majority that this case should be returned to the AJ for supplementation of the record.

AUGUST 13, 1999

Beth S. Slavet, Vice Chair

¹ As authority for its action, the EEOC cited 29 C.F.R. § 1614.305(d), which provides In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

The procedure outlined in the regulation is expressly authorized by 5 U.S.C. § 7702(b)(4).

² The holding in *Jackson H* that an agency's failure to conduct an adequate search for a vacant position does not automatically lead to a finding of discrimination is consistent with two federal court decisions interpreting the Americans with Disabilities Act (ADA), the standards of which apply to a claim of disability discrimination under the Rehabilitation Act, 29 U.S.C. § 791(g). See *Barnett v. USAir Inc.*, 157 F.3d 744, 750 (9th Cir. 1998) (the ADA does not create if independent liability" for an employer's failure to investigate possible means of accommodation); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (same); but see *Taylor v. Phoenixville School Dist.*, 1999 WL 18413 8, at * 15 (3rd Cir. 1999) (liability may be found under the ADA for an employer's failure to engage in the "interactive process" by discussing accommodation with a disabled employee).

³ On occasion the Board has taken a similar approach. See, e.g., *Wutke v. Office of Personnel Management*, 67 M.S.P.R. 523, 527-28 (1995) (the Board declined to decide a retirement case against the appellant based on "strict application of the adversarial model of adjudication," but instead allowed supplementation of the evidentiary record; there was reason to believe the wrong result might be reached if the case were decided on the record developed before the administrative judge).

⁴ As noted in *Jackson H*, the EEOC has expressly adopted the Aikens approach, and thus, the adversarial principle implicit in Aikens, in Title VII cases. See, e.g., *Pierce v. Apfel*, EEOC No. 01961642 (Feb. 20, 1998). It has even adopted Aikens in adjudicating disability discrimination claims brought under a disparate treatment theory. See *McKinney v. Runyon*, EEOC No. 01940021 (Mar. 16, 1995). However, I have not located an EEOC decision applying the Aikens approach to a disability discrimination claim alleging failure to accommodate.

⁵ See Barnett 17. USAir Inc., 157 F.3d 744, 749 (9th Cir. 1998) (under the ADA, the employee bears the burden of showing "the existence of a position that he or she could perform"); McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1165 (7th Cir. 1997) (under the ADA, the employee "bears the burden of showing that a vacant position exists and that [he] is qualified for that position"); Forman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (under the ADA, the employee must show that a position to which he could have been reassigned was "vacant" and that he was qualified for it), cert. denied, 118 S.Ct. 1050 (1998); Willis v. Conopco, Inc., 108 F.3d 282, 286 (11th Cir. 1997) (an employee's ADA claim was rejected because she failed to present evidence that "an alternative position" to which she could have been reassigned existed); Shiring v. Runyon, 90 F.3d 827, 832 (3rd Cir. 1996) (under the Rehabilitation Act, the employee must "demonstrate that there w[as a] funded, vacant position[] whose essential duties he was capable of performing"); but see Woodman v. Runyon, 132 F.3d 1330, 1344 (under the Rehabilitation Act, the employee "bears the ultimate burden of proving" that "there are jobs available that her disability will nevertheless allow her to do"; however, "[i]n accordance with ... the Rehabilitation Act's mandate that federal employers act affirmatively to provide reasonable accommodation for disabled workers," this burden "is not a heavy one"; once a "facial showing" is made that "accommodation is possible," the burden shifts to the employer to prove that accommodation would be an undue hardship).