UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

KAREN J. NORDELL	)	
	)	
v.	)	DOCKET NUMBER
	)	DC07528110557
DEPARTMENT OF HEALTH AND HUMAN SERVICES	)	
	)	

OPINION AND ORDER

The agency has petitioned for review of an initial decision that did not sustain the removal of appellant from her position as Microbiologist, GS-5.

BACKGROUND

Appellant was removed from her position for "Conduct Unbecoming a Federal Employee." The conduct specified was striking her supervisor in the face with some papers after receiving a "Redetermination of Decision to Withhold Within-Grade Increase." After a hearing,1/ the presiding official official held that although the agency proved its charge by a preponderance of the evidence, the penalty

1/ For the purpose of the hearing, this action was joined with appellant's appeal of the prior denial of a within-grade increase and a negative redetermination of the within-grade increase. Two initial decisions were issued; one for the removal action which is the subject of this Opinion and Order, and a second for the within-grade appeals. The agency has also petitioned for review of the within-grade decisions and such matter will be treated in a separate Opinion and Order.

of removal was inappropriate because it was disparate to penalties assessed against similarly situated employees. He thus mitigated the penalty to a three day suspension.

Appellant had raised the affirmative defenses of discrimination on the basis of sex and reprisal for the filing of equal employment opportunity (EEO) complaints. The presiding official, however, found that these defenses were no longer in issue because they were not referred to in appellant's closing argument at the hearing.

The petition for review contends that the initial decision is based on erroneous interpretation of statute and regulation, and is not in accordance with Board precedent.2/ The appellant's response to the petition for review urges that it be denied and contends that the presiding official erred in finding that appellant was no longer asserting her affirmative defenses.

2/ The agency also asserts that there is new and material evidence that despite due diligence, was not submitted prior to the closing of the record. A portion of the new evidence proffered is an affidavit which solely relates to proof of the charge. Since proof of the charge is undisputed, the new evidence is not material and does not provide a basis for the grant of the petition for review. The remainder of the alleged new evidence is documentation of actions taken against those employees alleged by appellant to have received lesser penalties for like offenses. There is no showing that such evidence was not available, despite due diligence, prior to the close of the record. Accordingly, it too does not meet the requirements for review. 5 C.F.R. § 1201.115.

DISCUSSION

Propriety of Penalty

The agency argues that the presiding official erroneously interpreted statute and regulation by failing to afford appropriate deference to the exercise of agency discretion in the selection of the penalty and by ruling in a manner contrary to the Board's interpretation of statute and regulation in Douglas v. Veterans Administration, 5 MSPB 313 (1981). Because the agency's contentions of error are meritorious, the petition for review is hereby GRANTED.

The Board will review an agency-imposed penalty to determine whether it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. Id. at 313. However, we must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness. Id. at 329. Only if the Board finds that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness is it appropriate for the Board to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. Id. at 333.

The presiding official's determination to mitigate the appellant's removal to a three day suspension is based on his conclusion that the agency treated appellant in a disparate manner by assessing a greater penalty than that assessed against other employees for equal offenses. Further, he found additional mitigating circumstances.

In finding disparate treatment, the presiding official compared penalties previously assessed for charges labeled "conduct unbecoming a federal employee" and found that the most serious disciplinary action taken against any such employee was a three day suspension. The record does not, however, contain any assertion that the other cases involved physical attacks on supervisors and indeed they did not. Although the employees compared with the appellant were charged with "conduct unbecoming a federal employee", the underlying conduct was substantially different from that conduct charged to appellant, i.e., "failure to follow instructions", "excessive absence without leave", and "horseplay". Initial Decision at 3, TR IV at 32. Clearly such conduct is totally dissimilar from that charged and proven against appellant, and the comparisons made by the presiding official were inappropriate.

The presiding official also found that because appellant allegedly had directed that agency papers be sent to her

attorney, and because the negative redetermination was given directly to her, the agency was not "blameless" in the incident, and such procedure by the agency created a mitigating circumstance.

There is no question that the relationship between appellant and her supervisor was not optimal. However, we cannot find that the deciding official's direct presentation of the negative redetermination supports any inference of provocation which would provide a basis to mitigate the agency's penalty for an assault on appellant's supervisor.

The Board has held that an agency has the right and the responsibility to maintain discipline and order among its employees. The unprovoked striking of a supervisor is a serious offense which directly affects an agency's obligation to maintain a safe work place for its employees and directly affects the efficiency of the service. Harris v. Department of the Treasury, MSPB Docket No. CH075209182 at 3-4 (March 26, 1982). Thus, we find the penalty of removal to be within the limits of reasonableness.

Affirmative Defenses

Appellant alleged that the removal was based on sex discrimination and reprisal for EEO activities. The record discloses no basis for a finding that appellant abandoned these affirmative defenses, and we therefore hold that the presiding official erred when he did not consider them.

Appellant bears the burden of proof with respect to affirmative defenses set forth in 5 U.S.C. § 7701(c)(2). To meet her burden of proof, appellant must establish by a preponderance of the evidence that the action was based on discrimination and/or retaliation.

The order and allocation of proof in individual claims of employment discrimination were set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973). The employee has the initial burden of presenting a prima facie case of discrimination. Establishment of a prima facie case in a removal situation requires that the employee show:

1) that she is a member of a protected class;
2) that she was the object of an adverse employment action; and
3) that there was a causal relationship between membership in the protected class and the adverse action which she suffered.

Watson v. Magee Women's Hospital, 472 F. Supp. 325, 330 (W.D. Pa. 1979).

We find that appellant has not established a prima facie case of discrimination on the basis of sex. While she has satisfied the first two requisite elements, she has not shown a causal connection between her membership in the protected class and the agency's decision to remove her. We base this determination on the fact that appellant's proven misconduct was totally within her control, that such conduct has a clear relationship to the efficiency of the service and our finding of no disparate treatment.

In order to establish an affirmative defense of reprisal, appellant must show (1) that she engaged in protected activity and that such activity was known by her employers; (2) that she was subsequently discharged; and (3) that there was a causal connection between the protected activity and the discharge. Buercklin v. Department of the Air Force, 1 MSPB 375 (1980); In re Frazier, 1 MSPB 186 (1979).

Appellant had filed numerous EEO complaints and the record shows that her supervisor and the deciding official were aware of such complaints. Nevertheless, for the reasons noted in regard to her discrimination claim above, appellant again has not demonstrated the requisite causal connection between the filing of the complaints and her removal.

Having failed to establish a causal connection between her sex or her protected activity and the removal, the appellant's affirmative defenses must fail.

Accordingly, the initial decision is REVERSED and the agency removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, cost, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be filed with the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

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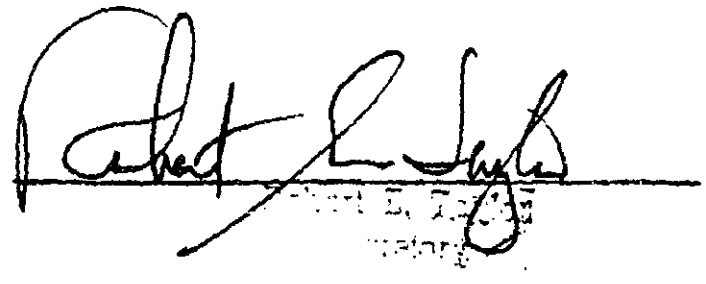
(Date)



Washington, D.C.