UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE C. SAVAGE, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER PH07528510760 DATE: FEB 10 1988

Dennis Friedman, Esquire, Philadelphia, Pennsylvania, for the appellant.

Robert E. Campbell, Philadelphia, Pennsylvania, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on January 23, 1986, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

Effective September 5, 1985, the agency removed the appellant from his position as Plastic Fabricator, WG-10, at the Philadelphia Naval Shipyard. The basis for the removal was the appellant's inability to meet the physical requirements of his position due to his medical condition, asbestosis. The appellant's medical restrictions required him to avoid asbestos fibers, fiberglass, and dusty work environments. The agency provided counselling to the appellant to place him in the Shipyard's restricted duty referral system. When no vacancies were found for which the appellant was qualified, the agency proposed and effected his removal.

The appellant appealed his removal to the Board's Philadelphia Regional Office and raised the affirmative defense of handicap discrimination. After a hearing, the administrative judge affirmed the agency's finding that the appellant was unable to perform the duties of his position. He also found that the appellant had not established his affirmative defense of handicap discrimination because he had not shown that he was a qualified handicapped individual.

In his petition for review, the appellant contends that the agency failed to consider him as a handicapped person and failed to attempt reasonable accommodation, and that these failures constitute violations of the appellant's substantive rights under the Rehabilitation Act of 1973. He also argues that, if the agency's actions are considered as an attempt to reasonably accommodate his condition, the agency's efforts

failed to meet its statutory and regulatory obligations. In addition, he argues that the administrative judge's analysis of the agency's attempts to accommodate him is incorrect.

ANALYSIS

1. The appellant has established a prima facie case of handicap discrimination.

A federal agency is required to make reasonable accommodation to the known physical or mental limitations of a qualified handicapped employee unless the agency can demonstrate that the accommodation would pose an undue hardship on the operation of its program. 29 C.F.R. § 1613.704(a). *See also* 29 U.S.C. § 794. Failure to make reasonable accommodation in accordance with this requirement constitutes discrimination on the basis of handicap, see *Stalkfleet v. United States* [illegible] 6 M.S.P.R. 637, 647 (1981), and an action [illegible]ed from such discrimination cannot be sustained [illegible] to the Board, 5 U.S.C. §§ 2302(b)(1)(D), [illegible].

An appellant in a removal or demotion appeal who raises the affirmative defense of discrimination based on handicap has the burden of proving this defense by a preponderance of the evidence. 5 C.F.R. § 1201.56; *Clancy v. Department of the Navy*, 6 M.S.P.R. 196, 199 (1981). In doing so, he must first establish a *prima facie* case of discrimination. While the necessary elements of the *prima facie* case vary according to the particular facts and circumstances at issue, *see Stalkfleet*, 6 M.S.P.R. at 647, they generally include (1) a

showing that the appellant is a "handicapped person" under 29 C.F.R. § 1613.702(a)[1] and that the action appealed to the Board was based on his handicap; and (2) to the extent possible,[2] articulation of a "reasonable accommodation" under which the appellant believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *See Doe v. New York University*, 666 F.2d 761, 776 (2d Cir. 1981); *MacKay v. United States Postal Service*, 607 F. Supp 271, 179 (E.D. Pa. 1985); *Stalkfleet v. United States Postal Service*, 6 M.S.P.R. at 647.

We find that the appellant in the case now before the Board has established a *prima facie* case of handicap discrimination. He has shown that he has a physical impairment (asbestosis) that substantially limits one or more

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[1] A "handicapped person" is defined in that section as "one who: (1) Has a physical or mental impairment which substantially limits one or more of his major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment."

[2] The extent to which an appellant is able to articulate a reasonable accommodation will vary depending on the issues and circumstances of the case. In general, however, the agency can be expected to know more than the appellant about the essential duties of the position or positions at issue, about its own ability to modify duties or working conditions, and about the availability of positions that could be filled by employees with certain limitations. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981). On the other hand, the appellant can be expected to know more than the agency about his qualifications and capabilities, and, as we have noted above, he bears the ultimate burden of persuasion in establishing his affirmative defense of handicap discrimination. Accordingly, although the agency has the ultimate burden of showing an inability to accommodate the appellant's handicap, the appellant "initially has the burden of coming forward with evidence to make at least a facial showing that his handicap can be accommodated." *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983).

of his major life activities;[3] and his removal was explicitly based on his resulting inability to perform the duties of his position. Furthermore, by requesting that the agency restructure his position, modify his work schedule, reassign him, and/or obtain and allow him to use equipment designed to protect him from exposure to a dirty environment, he has articulated methods by which he believes the agency could reasonably accommodate his handicap.

2. The agency has shown that the action at issue was based on a legitimate, nondiscriminatory reason.

Once an appellant has established a prima facie case of handicap discrimination, the agency has the burden of showing that the action at issue was based on a legitimate, nondiscriminatory reason. *Stalkfleet*, 6 M.S.P.R. at 647-48, *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See also Mantolete v. Bolger*, 96 F.R.D. 179, 183 (Ariz. 1982); *Norcross v. Sneed*, 573 F. Supp. 533, 543 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985). This burden can be met by showing that the action was not based on the appellant's handicap, or by showing that the appellant is not a "qualified handicapped person" as that term is used in 29 C.F.R. Part 1613, Subpart G.

The term "qualified handicapped person," as it concerns employment, is defined in 29 C.F.R. § 1613.702(f) as "a handicapped person who, with or without reasonable

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[3] The term "major life activities" is defined as including the function of breathing, a function that has been shown to be impaired by the appellant's asbestosis.

accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . . ." "Reasonable accommodation," as that term is used in the same context, may include actions such as reassignment to a vacant position in the agency, *Ignacio v. United States Postal Service*, 30 M.S.P.R. 471 (Spec. Pan. 1986), job restructuring, acquisition of equipment or other devices, and other, similar actions, 29 C.F.R. § 1613.704(b). It does not, however, include accommodation that would impose an undue hardship on the operation of the agency in question. 29 C.F.R. § 1613.704(c).

Factors to be considered in determining whether a proposed accommodation would impose an undue hardship on the operation of an agency include the following:

> (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

29 C.F.R. § 1613.704(c). *See Prewitt v. United States Postal Service*, 662 F.2d 292, 309 (1981) (court found that 29 C.F.R. § 1613.704(c) adequately responded to congressional concern expressed in connection with the legislation on which that section of the regulations was based). An agency is not required to make an accommodation unless any employment barrier posed by the appellant's handicap is surmountable without substantial modification in the requirements of the position at issue, and without undue administrative or

financial burden on the agency. *MacKay v. United States Postal Service*, 607 F. Supp. 271, 279 (E.D. Pa. 1985).

We find that the agency in this case has shown that the accommodations requested by the appellant would impose an undue hardship on the operation of its programs. The record establishes that the agency did attempt to reassign the appellant to other positions by placing him in its restricted duty program but that it was unable to find a vacant position in which the appellant could work within his medical restrictions. Appeal File, Tab 4(1). We find further that the administrative judge did not err in concluding that the appellant was not entitled to reassignment to positions that were not vacant. Although federal employers may have "affirmative action" obligations that extend beyond "mere 'evenhanded treatment,'"[4] we know of no basis for requiring agencies to remove other employees from their positions so that handicapped employees may be reassigned to those positions.[5]

The record also supports the administrative judge's conclusion that job restructuring and modification of the

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[4] *See Shirey v. Devine*, 670 F.2d 1188, 1201 (D.C. Cir. 1982); *Whitlock v. Donovan*, 598 F. Supp. 126, 130 (D.D.C. 1984), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986).

[5] Both *Shirey* and *Whitlock*, on which the appellant relies, concerned different issues from those in the case *sub judice*. In *Shirey*, the plaintiff was adversely affected during a reduction in force because, for reasons related to his handicap, he had received an appointment in the excepted service, rather than an appointment in the competitive service. In *Whitlock*, the plaintiff, an alcoholic employee, was not seeking reassignment.

appellant's work schedule were not reasonable accommodations because there was no practicable way to eliminate the appellant's continuing exposure in his position to dust and dirt. *See Bristow v. Department of the Army*, 29 M.S.P.R. 417, 418-19 (1985) (appellant unable to perform essential functions of position even with requested accommodation). In addition, even the appellant's proposed use of an air-feed respirator was not a "reasonable accommodation" because its limited range (twenty-five feet) would preclude access to areas where plastic fabricators frequently were required to work, because the appellant would be able to work only for about twenty-five minutes at a time in the suit, and because another employee would be required to assist the appellant whenever he put on or took off the respirator. Appeal File, Tab 8.

The appellant also claims that the agency failed to consult with vocational or occupational experts, or with medical personnel, before determining that it could not reasonably accommodate the appellant's handicap. We see no basis, however, for finding that consultations of this nature were necessary. The medical restrictions that resulted in the appellant's inability to perform his duties were imposed as a result of examinations by the appellant's and the agency's physicians, and the appellant has failed to show that the agency needed further assistance in determining the extent of the appellant's handicap or the availability of reasonable methods of accommodating that handicap.

Under the facts of this case, the appellant cannot be considered a qualified handicapped individual because he is unable to perform the essential duties of his position, and because there is no reasonable or practicable accommodation that would enable him to do so without continuing to expose him to unacceptable levels of dust. *See Rosiak v. Department of the Army*, 31 M.S.P.R. 140, 146 (1986).

3. The appellant has failed to show that the agency's stated reason for failing to accommodate the appellant's handicap constitutes pretext for prohibited handicap discrimination.

Finally, we note that, if the agency meets the burden of production described above, the appellant must be afforded a fair opportunity to show that the agency's stated reason for failing to accommodate the appellant's handicap is in fact pretext for prohibited handicap discrimination. *Stalkfleet*, 6 M.S.P. R. at 648, *citing McDonnell Douglas*, 411 U.S. at 804. The appellant in this case, however, has offered no evidence to support a finding of pretext.

CONCLUSION

Our review of the record reveals that it supports the initial decision. Under the circumstances of this case, the appellant's removal was for such cause as promoted the efficiency of the service. The removal therefore is AFFIRMED. This is the final order of the Board in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims, and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. § 7702(b)(1). The address of the EEOC is Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an appropriate United States district court. 5 U.S.C. § 7703(b)(2). The law is unsettled regarding the time limit for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days

after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.