UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 24

Docket No. PH-0432-09-0111-I-1

Phillip M. Bowman, Jr.,

Appellant,

v.

Department of Agriculture,

Agency.

January 28, 2010

John C. Andrade, Esquire, Dover, Delaware, for the appellant.

Judith A. Herzog, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) affirming his removal for unsatisfactory performance. We DENY the PFR because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. For the reasons discussed below, however, we REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the ID as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 On June 6, 2008, the appellant, an appraiser, was issued a memorandum by his first-line supervisor, Cheryl Walker, informing him that his performance was at an unacceptable level in the critical element of "Execution of Duties," notifying him of six specific examples of his performance deficiencies, and placing him on a 90-day Opportunity to Improve (OTI) from June 6, 2008, to September 4, 2008. Initial Appeal File (IAF), Tab 20, Exhibit (Ex.) 5 at 1-3. The OTI memo also informed the appellant that Ms. Walker would meet with him once a week during the first 30 days of the OTI, and once every other week thereafter. *Id.* at 2. It also noted that the appellant could go to Richard Bergold, the State Executive Director and his second-line supervisor, for assistance. *Id.* On September 12, 2008, Ms. Walker issued a notice of proposed removal, proposing to remove the appellant for failing to perform at the fully successful level at the completion of the OTI. IAF, Tab 20, Ex. 8. The appellant submitted a written response, asserting that the deciding official, Mr. Bergold, should recuse himself and claiming that the agency discriminated against him in reprisal for his prior Equal Employment Opportunity (EEO) activity. *See* IAF, Tab 20 at 13. On October 27, 2008, Mr. Bergold issued a decision sustaining the appellant's removal for unsatisfactory performance, effective November 8, 2008. *Id.* at 12-15. The appellant filed a timely appeal with the Board. IAF, Tab 1 at 1-10.

¶3 After holding a hearing, the administrative judge (AJ) affirmed the appellant's removal, first finding that the agency established that the Office of Personnel Management (OPM) approved its performance appraisal plan. IAF, Tab 34, ID at 6. He also found that the performance standard under which the appellant's performance was deemed unacceptable was valid and that the appellant was duly notified of the standard. *Id.* at 11. In so finding, he rejected the appellant's argument that the 30-day time period imposed for submitting appraisals was unreasonable and arbitrarily concocted by Ms. Walker and Mr.

Bergold to ensure the appellant's failure. *Id.* at 10-11. He further found that the appellant's performance during the OTI was unacceptable based on the testimony of Ms. Walker, Mr. Bergold, and Sam Snyder, the agency's Chief Appraiser, and based on appraisal reviews. *Id.* at 11-12; *see id.* at 9. He also found that the appellant was afforded a reasonable opportunity to improve his performance, but failed to do so. *Id.* at 14.

¶4 The AJ rejected the appellant's affirmative defense of age discrimination, finding that the appellant failed to establish a prima facie case. *Id.* at 16-17. The AJ declined to apply *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), because it was decided after the hearing in the instant appeal. ID at 15 n.5. He found credible the testimony of Ms. Walker and Mr. Bergold that their decisions were not based on the appellant's age. *Id.* at 16-17. He further found that the appellant failed to identify similarly situated individuals because the individuals identified by the appellant were not Appraisers and were not retained after failing an OTI. *Id.* at 16. The AJ also rejected the appellant's affirmative defense of reprisal, finding that while the appellant filed a 2006 complaint of discrimination and while the proposing official and deciding official knew of his complaint, the appellant submitted no evidence of a causal connection or genuine nexus between the protected activity and the removal action. *Id.* at 17-18.

¶5 The appellant has filed a timely petition for review, Petition for Review File (PFRF), Tab 1, and the agency has filed a response in opposition, *id.*, Tab 3.[1]

ANALYSIS

¶6 On PFR, the appellant has not put forth any argument establishing error by the AJ or presented any new and material evidence that affects the outcome of

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[1] We have not considered the Appellant's Reply to Agency's Response, filed on September 8, 2009, as the record closed on review on August 28, 2009, and the appellant has failed to assert or demonstrate that his Reply contains evidence that was not readily available before the record closed. *See* 5 C.F.R. § 1201.114(i); PFRF, Tabs 2, 4.

this case. *See* 5 C.F.R. § 1201.115(d)(1); *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). We therefore deny the PFR.

¶7 We reopen this appeal on our own motion, however, to apply the appropriate standard to the appellant's claim of age discrimination. First, the AJ's analysis of the appellant's age discrimination claim is flawed to the extent that it analyzes whether the appellant established a prima facie case. *See* ID at 15-17. When the record is complete and the agency has articulated a nondiscriminatory reason for its action, the issue of whether the appellant has made out a prima facie case of discrimination is no longer relevant, and the inquiry proceeds directly to the ultimate question of whether the agency discriminated against the appellant. *See, e.g.*, *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983); *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). The record in this case is complete, and the agency has articulated a legitimate, nondiscriminatory reason for the appellant's removal, i.e., his alleged unsatisfactory job performance. *See* IAF, Tab 20 at 12-15. Thus, the question to be resolved is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason and that the agency intentionally discriminated against him. *Aikens*, 460 U.S. at 714-16; *Marshall*, 111 M.S.P.R. 5, ¶ 17.

¶8 After the hearing in this appeal, the Supreme Court issued a decision clarifying the burden of proof applicable to adjudicating age-discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA). In *Gross*, 129 S. Ct. at 2352, the Supreme Court held that a plaintiff claiming age discrimination under the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse action. Even if the plaintiff produces some evidence that age was one motivating factor in the decision, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age. *See id.* While the Supreme Court in *Gross* interpreted the text of the ADEA as it applies to a private sector

employee, *see* 129 S. Ct. at 2350, a federal sector plaintiff must make the same showing as a private sector plaintiff to establish a violation of the ADEA, *see, e.g.*, *Baqir v. Principi*, 434 F.3d 733, 744 (4th Cir. 2006); *Cuddy v. Carmen*, 694 F.2d 853, 856 (D.C. Cir. 1982).[2] Accordingly, the holding in *Gross* applies to claims of federal sector plaintiffs under the ADEA.

¶9 The AJ erred in failing to apply the standard announced in *Gross* solely because it was issued following the completion of the hearing in the instant appeal. *See* ID at 15 n.5. With respect to retroactivity, the Board has relied on the standard articulated by the Supreme Court in *Harper v. Virginia Department of Taxation* for determining retroactivity in civil cases:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. 86, 97 (1993); *see Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶ 12 (2005). The Board has also relied on the Supreme Court's further explanation of retroactivity provided in *Reynoldsville Casket Co. v. Hyde*:

> [W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events.

514 U.S. 749, 752 (1995); *see Smart v. Department of Justice*, 111 M.S.P.R. 147, ¶ 8 (2009); *Porter*, 98 M.S.P.R. 461, ¶ 14. *Harper* and *Reynoldsville Casket Co.*

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[2] The ADEA, which as originally enacted did not apply to the federal government, prohibits private employers from taking certain personnel actions "because of" an individual's age. 29 U.S.C. § 623(a)(1), (2). The ADEA was later amended to provide that all personnel actions in the federal government affecting individuals who are at least 40 years old "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). Despite the difference in language between the private sector and federal sector provisions, Congress did not intend a difference in substantive protections. *Cuddy*, 694 F.2d at 856.

unquestionably require the Board to apply a new legal rule to claims currently pending. Moreover, we note that the Supreme Court in *Gross* did not announce a new legal standard for ADEA cases. Rather, the Court examined the text of the ADEA, explained the intent of Congress, and removed lingering confusion regarding the mixed-motive doctrine by clarifying that an ADEA plaintiff must prove that age was the "but-for" cause of the challenged adverse employment action. *See Gross*, 129 S. Ct. at 2349-52. For this reason, and given the standards announced by the Supreme Court in *Harper* and *Reynoldsville Casket Co.*, the AJ should have applied *Gross* to the appellant's claim of age discrimination as it was pending at the time the *Gross* decision was issued.

¶10 Here, declining to apply *Gross*, the AJ found that the appellant failed to establish that his age was the determinative factor in the agency's decision to remove him for unsatisfactory performance. ID at 16; *see Decker v. Department of Health and Human Services*, 40 M.S.P.R. 119, 132 (1989). We conclude that the appellant also did not meet the standard announced in *Gross*. The testimony of the appellant's supervisors, which the AJ found credible, supports the AJ's finding that the appellant's removal was based on his performance deficiencies, rather than on his age. *See* ID at 11-12. The appellant therefore has not established by preponderant evidence that his age was the but-for cause of his removal. *See Gross*, 129 S. Ct. at 2352. Accordingly, the appellant's affirmative defense of age discrimination fails under the standard announced in *Gross*.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulation, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.