UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 161

Docket No. AT-0752-09-0860-I-1

Annette Davis,

Appellant,

v.

Department of the Interior,

Agency.

August 5, 2010

Adam J. Conti, Esquire, Atlanta, Georgia, for the appellant.

Isaiah D. Delemar, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This matter comes before the Board upon the appellant's petition for review (PFR) of an initial decision that affirmed her removal for misconduct. For the reasons set forth below, we GRANT the PFR to discuss the appellant's contentions regarding the administrative judge's dismissal of her affirmative defenses of discrimination, AFFIRM the initial decision as MODIFIED, SUSTAINING the administrative judge's findings with regard to the three specifications and the charge and his conclusions regarding the appellant's

affirmative defenses of harmful error and reprisal, and REMANDING the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 On July 18, 2009, the agency removed the appellant from her Fiscal Officer position based on one charge of failure to comply with proper directives (including three specifications). *See* Initial Appeal File (IAF), Tab 7, Subtabs 4a (the appellant's removal SF-50), 4b (Decision on Proposed Removal), 4d (Notice of Proposed Removal). The appellant filed a Board appeal and alleged, among other things, that the agency's action was based on prohibited discrimination (race and sex), and that it was taken in retaliation for filing an equal employment opportunity (EEO) complaint. IAF, Tab 1 at 4-8.

¶3 On August 19, 2009, the administrative judge issued an Affirmative Defenses Order, noting that the appellant raised affirmative defenses of discrimination and retaliation for filing an EEO complaint, and explaining the parties' shifting burdens for each of these claims. *See* IAF, Tab 4. He also directed the appellant to "specifically identify the factual bases for her claims on these matters," including any information about persons she claimed were similarly situated but were treated differently, and he directed the agency to respond to those claims. *See id.* at 1, 3. The appellant filed a response at IAF, Tab 8. During the prehearing conference, and over her objections, the administrative judge struck the appellant's affirmative defenses of race and sex discrimination. In his Order and Summary of the conference, the administrative judge stated, in a single sentence, that the appellant "failed to allege facts which, if proven, would establish a prima facie case of either claim." IAF, Tab 17 at 2. The appellant filed a written objection to the ruling. *See* IAF, Tab 18.

¶4 During the October 20, 2009 hearing, the parties presented evidence only on the charge and the appellant's reprisal defense. *See* Hearing CD (HCD). The administrative judge issued a written decision, concluding that the agency proved

all three specifications and the charge of failure to comply with proper directives, finding that the appellant did not prove her affirmative defenses of reprisal for EEO activity and harmful error,[1] and affirming the removal penalty. IAF, Tab 19. The initial decision did not address the dismissed discrimination claims other than to note that they were struck during the prehearing conference for failure to allege facts, which, if proven, would establish a prima facie case, and to state that the appellant's objection to this ruling did not remedy the insufficiency of her previous allegations. The appellant filed a PFR and the agency filed a response. Petition for Review File (PFR File), Tabs 1, 3.

ANALYSIS

¶5 On PFR, the appellant does not specifically challenge the administrative judge's decision to sustain the charge and specifications of failure to comply with proper directives, his conclusion that the appellant did not prove her harmful error affirmative defense, or his finding that the removal penalty was within the bounds of reasonableness. However, she does contend that the administrative judge erred when he summarily dismissed her race and sex discrimination claims, and when he found her reprisal defense unproven. PFR File, Tab 1 at 1-2. We affirm the administrative judge's findings with regard to the three specifications and the charge and his conclusion regarding her failure to prove the harmful error affirmative defense. We also discern no error with the administrative judge's analysis of the appellant's reprisal defense, and we affirm that conclusion herein. We find, however, that the administrative judge erred in his handling of the appellant's affirmative defenses of race and sex discrimination.

[1] The administrative judge noted in the initial decision that even though the appellant did not allege harmful error in her appeal or her response to the Affirmative Defenses Order, she appeared to allege it during the hearing. IAF, Tab 19 at 12.

The appellant's prima facie case

¶6 In an Order dated August 19, 2009, the administrative judge directed the appellant to identify the factual bases for her discrimination claims and identified the following elements as defining her prima facie burden of proof:

> (a) that the appellant is a member of a protected group; (b) that she was similarly situated to an individual who was not a member of the protected group; and (c) that she was treated more harshly or disparately than the individual who was not a member of his (sic) protected group.

IAF Tab 4 at 2-3. However, as discussed below, comparator evidence is not essential to establish a prima facie case of disparate treatment discrimination.

¶7 In the absence of direct evidence[2] of discrimination, the Board typically uses the "pretext standard" of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under this framework, an employee may establish a prima facie case of prohibited discrimination by introducing evidence to show that she (1) is a member of a protected group; (2) suffered an appealable adverse employment action; and (3) that the unfavorable action gives rise to the inference of discrimination. 411 U.S. at 802. As to the third element, an employee may rely on *any* evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. *See, e.g.*, *Chappell-Johnson v. Powell*, 440 F.3d 484, 488-89 (D.C. Cir. 2006); *Stella v. Martin*, 284 F.3d 135, 145 (D.C. Cir. 2002) (no requirement in a failure to hire case that the plaintiff show that the employer filled the position with a person

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[2] Direct evidence may be any statement made by an employer that: (1) reflects directly the alleged discriminatory attitude; and (2) bears directly on the contested employment discrimination. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). However, such evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999) (quoting *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989)). If an alleged discriminatory statement at best merely suggests a discriminatory motive, then it is only circumstantial evidence. *Id.*

outside the protected class) In light of the foregoing, we find that the administrative judge erred in requiring the appellant to demonstrate that she was treated more harshly than a similarly situated individual who was not a member of her protected class and in summarily dismissing her discrimination claims prior to a hearing when she failed to do so. Thus, a prima facie case of disparate treatment discrimination can be established by any proof of actions taken by the employer that shows a "discriminatory animus," where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Schoenfeld*, 168 F.3d at 1268.

¶8 If an appellant meets her prima facie burden, the burden of production shifts to the employer to "articulate some legitimate nondiscriminatory reason" for its action.[3] *McDonnell Douglas*, 411 U.S. at 802. If the employer does so, the appellant must then be given an opportunity to demonstrate that, based on all of the evidence, the stated reason is a pretext and that the action was taken for a discriminatory reason. *Id; see also Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006). With regard to this ultimate burden, an appellant can rely on "any combination of (1) evidence establishing the plaintiff's *prima facie* case; (2) evidence the plaintiff presents to attack the employer's proffered explanation for its action; and (3) any further evidence of discrimination that may be available to the plaintiff, such as independent evidence of discriminatory statements or attitudes on the part of the employer." *Holcomb*, 433 F.3d at 897 (citing *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998)) (en banc).

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[3] In most appeals of adverse actions taken under 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action, i.e., the charged misconduct. Accordingly, the agency has done everything that would be required of it if an appellant had made out a prima facie case, and whether she in fact did so is no longer relevant. *See Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). As a result, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving illegal discrimination. *See id*.

Again, while such evidence may include proof that the employer treated similarly situated employees differently, an appellant may also prevail by introducing evidence (1) that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of minority employees or those who engage in protected activities; (5) of incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008).

The standard for dismissing a claim of discrimination without a hearing.

¶9 In *Redd v. U.S. Postal Service*, 101 M.S.P.R. 182, ¶¶ 5, 13 (2006), the Board found that an appellant does not have an "unconditional right" to an evidentiary hearing on discrimination; rather, when there is no genuine dispute of material fact regarding discrimination, a hearing need not be conducted.[4] As we recognized in *Redd*, a factual dispute is "material" if, in light of the governing law, its resolution could affect the outcome. *Id.*, ¶ 14 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is "genuine" if there is sufficient evidence favoring the party seeking an evidentiary hearing for the administrative judge to rule in favor of that party should that party's evidence be credited. *Id*. We also instructed administrative judges

> to be extremely cautious in applying these standards and exercising their authority to resolve discrimination claims without evidentiary hearings. In fact, often an administrative judge will be holding an evidentiary hearing on the merits anyway, and in the interest of having a complete record should either party seek review it will generally be preferable for the administrative judge to allow the appellant to present whatever evidence he has on discrimination.

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[4] In *Redd*, the Board overruled its earlier decision in *Currier v. U.S. Postal Service*, 79 M.S.P.R. 177, 182 (1998), in which it held that when an appellant who claims discrimination has requested an evidentiary hearing, the administrative judge may not find against the appellant on the discrimination claim without holding such a hearing. *Redd*, 101 M.S.P.R. 182, ¶ 5.

¶10 The standard articulated in *Redd* mirrors that governing summary judgment under Fed.R.Civ.P. 56. *Redd*, 101 M.S.P.R. 182, ¶ 10. Under that rule, a plaintiff facing a well-supported summary judgment motion risks losing if he or she fails to produce sufficient evidence of a triable issue of fact. *See Anderson*, 477 U.S. at 249; *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, summary judgment is circumscribed by a number of well-established rules. Specifically, the court "must view the evidence in the light most favorable to the non-moving party, …and draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true.[5] *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 15 (D.D.C. 2009) (citing *Anderson*, 477 U.S. at 255). However, a nonmoving party "cannot rely on 'mere allegations or denials,' and 'conclusory allegations unsupported by factual data will not create a triable issue of fact.' " *Id.* (internal citations and quotations omitted). Instead, he must "come forward with specific facts showing that there is a *genuine issue for trial*…and a genuine issue of material fact exists where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* (internal citations and quotations omitted).

¶11 In this appeal, the administrative judge dismissed the appellant's discrimination claims for failure to allege facts that, if proven, would establish a prima facie case of discrimination. IAF, Tab 17 at 2. In doing so, he applied a standard that is inconsistent with that articulated in *Redd* which authorizes dismissal of discrimination claims without a hearing only when there is no genuine dispute of material fact. Moreover, the administrative judge erred in dismissing the appellant's discrimination claims without notifying her of the requisite standard for obtaining an evidentiary hearing on those claims.

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[5] However, it is important to note that in deciding a summary judgment motion, a judge may not weigh the evidence or make credibility determinations with regard to the merits of the claim over which there exists a genuine dispute. *See Anderson*, 477 U.S. at 255.

¶12 The administrative judge also erred because he did not perform the requisite substantive analysis necessary to dispose of a discrimination claim without a hearing. An administrative judge must make findings of fact and conclusions of law on all material issues of fact and law presented in an appeal. *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 9 (2007). This duty extends to the dismissal of claims of prohibited discrimination. Accordingly, the appellant is entitled to a written decision on whether she has raised a genuine dispute of material fact regarding her affirmative defenses of race and sex discrimination.

¶13 Finally, the administrative judge prematurely dismissed the appellant's affirmative defenses of race and sex discrimination without a hearing. Consequently, the Board cannot reasonably assess the record as it presently exists to reach any determination on the merits of her discrimination claims. Accordingly, the appellant's race and sex discrimination claims must be remanded for further adjudication consistent with this Opinion and Order.

ORDER

¶14 The initial decision is vacated with regard to the appellant's affirmative defenses of race and sex discrimination; the remainder of the initial decision is affirmed. On remand, the administrative judge shall inform the appellant of her burdens for establishing her right to a hearing on her discrimination claims and for avoiding dismissal of these claims. The appellant also must be provided with an opportunity to submit evidence and argument on her discrimination claims. We make no finding here whether the appellant has established a genuine dispute of material fact. However, if the appellant makes this showing, the administrative judge shall conduct a supplemental hearing to develop the record on the appellant's discrimination claims. Finally, the administrative judge must issue a supplemental initial decision in this appeal, which makes findings of fact

and conclusions of law on all material issues of fact and law presented with regard to the appellant's affirmative defenses of race and sex discrimination.

FOR THE BOARD:

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