

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

2009 MSPB 148

Docket No. SF-0752-08-0062-E-1

EEOC Petition Number 0320080101

Linda D. Edwards,

Appellant,

v.

Department of Transportation,

Agency.

August 3, 2009

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

Lierre M. Green, Esquire, Los Angeles, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The Equal Employment Opportunity Commission (EEOC) has referred this case to the Board for further consideration under [5 U.S.C. § 7702\(b\)\(5\)\(B\)](#) because it disagrees with the Board's final order in this appeal. For the reasons that follow, we CONCUR IN and ADOPT the EEOC's finding that the agency discriminated against the appellant on the basis of disability. We also FIND that the appellant is entitled to back pay, and we FORWARD this case to the regional

office for consideration of any additional remedies to which the appellant is entitled.

BACKGROUND

¶2 The appellant was appointed to her position of air traffic control specialist (ATCS) in the Federal Aviation Administration (FAA) on October 2, 2005. Initial Appeal File (IAF), Tab 6, Subtab 4g. The appointment was made pursuant to an agreement settling a civil action the appellant had filed against the agency some time earlier. *See id.*, Subtabs 4z, 4aa. Consistent with that agreement, the appellant's duties were modified to accommodate her medical restrictions. *See id.*, Subtab 4z at 2; *id.*, Subtab 4aa at 1. Specifically, the appellant was to be assigned to a facility accessible to physically restricted individuals; her lifting, walking, and standing were to be restricted; and she was not to be required to bend, climb, descend stairs, or stoop. *See id.*, Subtab 4aa at 1. Because she was hired as a "developmental" ATCS, she was expected to complete a lengthy training program before becoming a certified ATCS. *See* Hearing Transcript (H.T.) at 6-8.

¶3 On or about October 6, 2005, shortly after she reported to work at her new job, the appellant injured her knees while climbing stairs at the facility where she was employed. *See* IAF, Tab 6, Subtab 4cc at 12; H.T. at 11. For about 4 months after her injury, she continued with her training program. *See* H.T. at 11-13. In early February 2006, however, she informed her supervisor that the Office of Workers' Compensation Programs (OWCP) had approved her claim for compensation, and that she would be absent for surgery beginning near the end of the month. *See id.* at 12-13. Because her absence was expected to be lengthy, her supervisor decided to suspend the training. *See id.* at 13. Until she left for her surgery, therefore, the appellant performed administrative duties. *See id.*

¶4 The appellant began an extended absence from work on or about February 26, 2006, and on February 27, she had surgery on her left knee. *See id.* at 13,

126; IAF, Tab 6, Subtab 4cc at 10. She was diagnosed with breast cancer on April 24; she had surgery for that condition on May 15, 2006; and on May 30, she had surgery on her right knee. *See* H.T. at 126, 139, 145; IAF, Tab 6, Subtab 4cc at 6. Although she was scheduled to begin radiation therapy the following month, that therapy was canceled after the appellant learned that she was pregnant. *See* H.T. at 148.

¶5 In the fall of 2006, the appellant contacted her air traffic manager to ask about returning to work. *See id.* at 19, 141. That official advised her, however, that the restrictions on her activity that had been described by her orthopedist did not permit her to return to work. *See id.* at 19, 141. The orthopedist continued to prescribe the same restrictions after further treatment and examination; pregnancy-related complications further restricted the appellant's ability to work after November; the appellant gave birth on February 26, 2007; and on June 1, 2007, she began chemotherapy for her cancer. *See id.* at 141-44, 146-49. The chemotherapy was discontinued after its initial administration caused a serious adverse reaction, but, for some time afterward, the appellant was treated for the effects of the treatment she had received. *See id.* at 149-52, 156-57, 159.

¶6 On March 27, 2007, before the appellant had been administered the chemotherapy mentioned above, the air traffic manager sent her a letter expressing concern about her ability to perform her duties. IAF, Tab 6, Subtab 4o at 1. He stated that the appellant had not been at work since about February 27, 2006, that she had not submitted any documentation indicating that she would be able to perform her duties, and that her absence created a hardship. *Id.* The air traffic manager described the kind of medical documentation he needed to receive in order to assess the appellant's ability to return to her position, and he stated that steps would be taken to separate the appellant for unavailability for duty if she failed to submit documentation meeting that description, or if the documentation she submitted indicated that she would remain unavailable. *Id.* at 1-2.

¶7 The appellant responded by letter in which she stated that her physician had advised her that she would remain “totally disabled” until her next appointment on April 3, 2007. IAF, Tab 6, Subtab 4p at 1. She also indicated in her letter she had been attempting to obtain documentation from her orthopedist and her oncologist, and that she would forward that documentation when she received it. *Id.*

¶8 On May 4, 2007, the air traffic manager issued a letter proposing the appellant’s removal for unavailability for duty. *Id.*, Subtab 4d at 1. In his letter, he stated that the appellant had been unable to perform her duties as an ATCS since her October 2005 injury, and that she had been unable to provide acceptable documentation indicating that she would be able to return to those duties. *Id.* at 1-2. On May 30, however, after receiving further information concerning the appellant’s medical condition, he issued a letter to the appellant, finding that her orthopedist’s restrictions were consistent with the duties she had been assigned before her injury, and ordering the appellant to report to work within 2 days after her receipt of the letter. Agency Prehearing Submission at 2 & Exhibit 2, IAF, Tab 10. The appellant did not return as ordered. *See* H.T. at 26. Instead, she submitted written and oral responses to the proposal, requested leave, and advised the agency that she was still receiving workers’ compensation and was still unable to return to work. IAF, Tab 6, Subtab 4c; *id.*, Subtab 4w at 7-8; *id.*, Subtab 4bb at 3-5.

¶9 On July 18, 2007, the air traffic manager issued a decision to remove the appellant effective August 19, 2007, stating that the appellant had failed to provide evidence indicating her ability to return to her regular duties. *Id.*, Subtab 4b. This decision was never put into effect, evidently because the appellant had returned to work on August 13, the day on which her workers’ compensation benefits were terminated. *See* H.T. at 161, 170. After she had worked 9 days, however, performing administrative duties, she learned that her daughter had died, and she took the “bereavement leave” provided under the applicable

collective bargaining agreement. *See id.* at 168-69; IAF, Tab 6, Subtab 4w at 5. Although she advised an agency supervisor in late September that she hoped to return to work on Monday, October 2, after obtaining medical clearance from her oncologist, she learned just before then that her cancer had returned. *See* IAF, Tab 6, Subtab 4bb at 27; H.T. at 172. On Sunday, October 1, she provided this information to the supervisor; she stated that she was to have further surgery for that condition; and she said that she would be unable to return until December 1. *See* IAF, Tab 6, Subtab 4w at 3; H.T. at 173.

¶10 On October 2, 2007, after learning that the appellant had not reported to work that day, the air traffic manager issued an amended decision notice indicating that the appellant had remained unavailable to perform her regular ATCS duties. IAF, Tab 4, Subtab 4a at 1-2; H.T. at 69. He noted that the appellant had not been permitted to work at all when she initially reported to work in August; that she had later been permitted to perform only administrative duties later that month, in light of restrictions described in her medical documentation; that she was currently on leave without pay; that the medical documentation she had presented indicated that she remained unable to perform her regular duties; and that she would be removed effective October 13. IAF, Tab 6, Subtab 4a at 1. Although the appellant's representative provided the air traffic manager on October 10 with a statement, dated October 5, indicating that she was expected to be able to resume her ATCS duties by January 2, 2008, she was removed as stated in the amended decision notice. IAF, Tab 6, Subtabs 4e, 4bb at 32 (statement by D. Kohl, Oct. 5, 2007); H.T. at 76, 198.

¶11 The appellant appealed her removal to the Board's Western Regional Office. IAF, Tab 1. Following a hearing on the matter, the administrative judge assigned to the case issued an initial decision sustaining the charge of unavailability; finding that the appellant had failed to substantiate her claims of disability discrimination, disparate treatment, and harmful procedural error; and sustaining the removal. Initial Decision at 15-21, IAF, Tab 19.

¶12 The appellant filed a timely petition for review of the initial decision. Petition for Review (PFR), PFR File, Tab 3. She did not challenge the administrative judge's findings on her claims of disability discrimination and disparate treatment, and instead only argued that the initial decision was inconsistent with case law governing removals for absences such as hers. PFR at 2-6, PFR File, Tab 3. The Board granted the appellant's petition for review, reversed the initial decision, and ordered the agency to cancel the appellant's removal because it was not taken for such cause as would promote the efficiency of the service. *Edwards v. Department of Transportation*, [109 M.S.P.R. 579](#), ¶¶ 1, 22-23 (2008). As the appellant did not raise the issue, *see id.*, ¶ 12, the Board did not address her discrimination claims on review. The Board noted that it was unable to award the appellant back pay because she is an FAA employee. *Id.*, ¶ 23 n.6; *Ivery v. Department of Transportation*, [102 M.S.P.R. 356](#), ¶¶ 12-16 (2006), *dismissed*, 240 F. App'x 413 (Fed. Cir. 2007).

¶13 The appellant sought review of the Board's decision concerning her claim of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e](#) *et seq.* and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, [29 U.S.C. § 791](#) *et seq.* before the EEOC. Noting that the full Board addressed only the appellant's removal as a merit principle and did not address her affirmative defense of discrimination, the EEOC reviewed the administrative judge's findings of no disability or racial discrimination. *See Edwards v. Department of Transportation*, EEOC Petition No. 0320080101 at 5 (June 23, 2009). The EEOC concurred with the administrative judge's finding of no discrimination based on race. *Id.* at 7. It differed with the final decision of the administrative judge, however, by finding that the agency committed disability discrimination. *Id.*

ANALYSIS

¶14 In *Ignacio v. U.S. Postal Service*, [30 M.S.P.R. 471](#), 486 (Spec. Pan. 1986), *modified on other grounds by Konieczko v. U.S. Postal Service*, [47 M.S.P.R. 509](#), 514-15 (1991), the Special Panel held that the Board is permitted to disagree with the EEOC only where the EEOC misinterprets civil service law. Thus, the Board may not require Special Panel review of an EEOC decision merely because the Board disagrees on discrimination law unless the EEOC decision depends upon civil service law for its support or is so unreasonable that it amounts to a violation of civil service law.

¶15 Here, the EEOC decision rests solely upon an interpretation of discrimination law. It noted that an agency is required to reasonably accommodate the known limitations of a qualified individual with a disability, such as the appellant, unless the agency can show that accommodation would cause an undue hardship. *Edwards*, EEOC Petition No. 0320080101 at 6. It found that the agency failed to present credible evidence that allowing the appellant to return in January 2008, as indicated in her medical restrictions, would have imposed an undue hardship. *Id.* at 6-7. It further found that the agency denied this accommodation based on the appellant's "record of" disability. *Id.* at 7. We find no proper basis on which to conclude that the EEOC decision is so unreasonable that it amounts to a violation of civil service law. Thus, under *Ignacio*, the Board lacks authority to disagree with the EEOC decision. Accordingly, we CONCUR IN and ADOPT the EEOC's finding that the agency discriminated against the appellant on the basis of disability. See [5 U.S.C. § 7702\(c\)\(1\)](#).

¶16 The EEOC has asked the Board to "consider all remedies appropriate with . . . a finding [of discrimination] under the Rehabilitation Act, including reconsideration of back pay." *Edwards*, EEOC Petition No. 0320080101 at 7. We note first that the Board may not order the sovereign to expend funds from the public fisc without an explicit waiver of the sovereign's immunity. See *Ivery*,

[102 M.S.P.R. 356](#), ¶ 14. Although the Back Pay Act, [5 U.S.C. § 5596](#), generally provides such a waiver, [49 U.S.C. § 40122\(g\)\(2\)](#), which established the FAA’s personnel management system, has the effect of making certain provisions of title 5 of the U.S. Code—including the Back Pay Act—inapplicable to FAA employees. See *Gonzalez v. Department of Transportation*, [551 F.3d 1372](#), 1376-77 (Fed. Cir. 2009); *Bennett v. Department of Transportation*, [105 M.S.P.R. 634](#), ¶ 10 (2007); *Mitchell v. Department of Homeland Security*, [104 M.S.P.R. 682](#), ¶ 5 (2007); *Ivery*, [102 M.S.P.R. 356](#), ¶ 14. Although the Board has noted the possibility that it may have been an oversight by Congress to restore Board appeal rights to FAA employees without also restoring the right of a successful Board appellant to be awarded back pay under [5 U.S.C. § 5596](#), see *Ivery*, [102 M.S.P.R. 356](#), ¶ 14, the doctrine of sovereign immunity will not allow the Board to assume such authority in the absence of the required explicit waiver of that immunity. Accordingly, as the Board noted in its August 6, 2008 Opinion and Order, the appellant, as an FAA employee, is not eligible for back pay under the Back Pay Act. See *Edwards*, [109 M.S.P.R. 579](#), ¶ 23 n.6; see also *Gonzalez*, 551 F.3d at 1376-77; *Ivery*, 102 M.S.P.R. 356, ¶¶ 12-16.

¶17 We also note, however, that the Rehabilitation Act provides that the remedies set forth in Section 717 of Title VII, including the remedies provided in [42 U.S.C. § 2000e-5\(f\)](#) through (k), shall be available to any employee aggrieved under the Act. See [29 U.S.C. § 794a\(a\)\(1\)](#). Title 42 of the U.S. Code, section 2000e-5(g)(1) provides that if an agency has intentionally engaged in an unlawful employment practice, affirmative action, which may include back pay, may be ordered. An agency’s back pay liability under this section is limited to a period of 2 years prior to the filing of a charge with the EEOC, and may be reduced by interim earnings or “amounts earnable with reasonable diligence by the person . . . discriminated against” 42 U.S.C. § 2000e-5(g)(1).

¶18 The Board does not typically award back pay under the Rehabilitation Act; rather, it typically relies on the Back Pay Act as the appropriate authority under

which to award back pay because it is a more specific statute that applies to cases arising in the federal employment context and because it is often the more generous of the two statutes. *See, e.g., Schultz v. U.S. Postal Service*, [89 M.S.P.R. 123](#), ¶ 8 & n.5 (2001). In relying on the Back Pay Act to award back pay, however, the Board has never suggested that it is without the authority to award back pay under the Rehabilitation Act where awarding such pay under the Back Pay Act would be inappropriate. *See id.*, ¶¶ 7-8; *see also Caronia v. Department of Justice*, [78 M.S.P.R. 201](#), 214-15 (1998) (considering whether, under the circumstances, the appellant was entitled to a remedy under the Rehabilitation Act), *overruled on other grounds by Carter v. Department of Justice*, [88 M.S.P.R. 641](#), ¶ 25 n.5 (2001). In the present case, back pay may not be awarded under the Back Pay Act. Accordingly, and in light of the agency's discrimination on the basis of the appellant's disability in effecting her removal, we find that the appellant is entitled to back pay pursuant to [42 U.S.C. § 2000e-5\(g\)\(1\)](#).

¶19 The appellant may also be entitled to compensatory damages. Before the Civil Rights Act of 1991 (CRA), [42 U.S.C. § 1981a](#), compensatory damages were not available in Board appeals. *See Currier v. U.S. Postal Service*, [72 M.S.P.R. 191](#), 195 (1996). The CRA provides that in an action brought under the Rehabilitation Act against an agency who engaged in unlawful intentional discrimination, the complaining party may recover compensatory damages in addition to any relief authorized under [42 U.S.C. § 2000e-5\(g\)](#). [42 U.S.C. § 1981a\(a\)\(2\)](#). Compensatory damages awarded under [42 U.S.C. § 1981a\(a\)\(2\)](#) do not include back pay, interest on back pay, or any other type of relief authorized under [42 U.S.C. § 2000e-5\(g\)](#). *See* 42 U.S.C. § 1981a(b)(2). Compensatory damages contemplated by § 1981a include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses” 42 U.S.C. § 1981a(b)(3).

¶20 The EEOC has ruled that the CRA permits an award of compensatory damages to federal sector complainants in the administrative process. *See Jackson v. U.S. Postal Service*, EEOC Petition No. 01923399, at 2-3 (Nov. 12, 1992). Under the principles established in *Ignacio*, the Board defers to the EEOC's interpretation of discrimination laws. *See Ignacio*, 30 M.S.P.R. at 486. Accordingly, the appellant may be able to recover compensatory damages from the agency pursuant to the CRA. *See Hocker v. Department of Transportation*, [63 M.S.P.R. 497](#), 505 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table).

ORDER

¶21 We FORWARD this appeal to the regional office for adjudication of compensatory damages. The administrative judge shall permit the appellant to present evidence and argument in support of compensatory damages and shall issue a decision resolving the claim. *See Schultz v. U.S. Postal Service*, [70 M.S.P.R. 633](#), 640 (1996).

¶22 We ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Rehabilitation Act, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶23 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* Title 5 of the Code of Federal Regulations, section 1201.181(b) ([5 C.F.R. § 1201.181\(b\)](#)).

¶24 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. *See* [5 C.F.R. § 1201.182\(a\)](#).

¶25 This is the final order of the Merit Systems Protection Board concurring in and adopting the EEOC's decision. *See* Title 5 of the United States Code, section 7703(a)(1) ([5 U.S.C. § 7703\(a\)\(1\)](#)). It is not a final decision on the issue of the appellant's entitlement to compensatory damages because that issue has been forwarded to the regional office for adjudication.

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at [42 U.S.C. § 1981a](#). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.204. If you believe you meet these requirements, you must file a motion for compensatory damages **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The

regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the Clerk of the Board.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

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

Discrimination and Other Claims: Judicial Action

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:

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