

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

2009 MSPB 215

Docket No. PH-0752-08-0437-I-2

**Brenda L. Blyther,
Appellant,**

v.

**United States Postal Service,
Agency.**

October 28, 2009

Richard Heavey, Esquire, Brookline, Massachusetts, for the appellant.

Anna V. Crawford, Esquire, Windsor, Connecticut, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision (ID) that did not sustain her affirmative defenses of discrimination and retaliation. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the ID, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant's supervisor placed the appellant, a Tour 3 EAS-17 Distribution Operations Supervisor, on a performance improvement plan (PIP); after the PIP concluded, he proposed to reduce her in grade to the position of Mail Handler, on a charge that she failed to perform her duties in a satisfactory

manner. Appeal File, MSPB Docket No. PH-0752-08-0437-I-1 (I-1 File), Tab 6, Subtabs 4g, 4p. The agency's deciding official, who, as the Senior Manager on Tour 3, was the appellant's second-level supervisor, subsequently found that the charge was supported by the evidence and issued a decision reducing the appellant in grade. *Id.*, Subtab 4d.

¶3 The appellant appealed her reduction in grade and, during the prehearing conference, the agency asserted that it was rescinding the action and returning the appellant to the *status quo ante*. I-1 File, Tab 1; *see id.*, Tab 26 at 1. However, the administrative judge (AJ) to whom the case was assigned noted that the appeal was not moot because the appellant had raised claims of discrimination and reprisal for filing discrimination complaints. *Id.*, Tab 26 at 1. After holding a hearing, the AJ found that the appellant failed to show that her reduction in grade was taken on the basis of sex or age discrimination, or that it was taken in reprisal for her filing of discrimination complaints. Appeal File, MSPB Docket No. PH-0752-08-0437-I-2 (I-2 File), Tab 35, ID.

¶4 The appellant asserts on petition for review (PFR) that the AJ's fact findings are incomplete, based on credibility determinations unsupported by the record, and fail to take relevant testimony into consideration. I-2 Petition for Review File (PFRF), Tab 1, PFR at 3-12. She further argues that she proved her affirmative defenses by preponderant evidence. *Id.* at 12-24. The agency has responded in opposition to the petition. PFRF, Tab 3.

ANALYSIS

Discrimination Claims

¶5 In concluding that the appellant had failed to substantiate her sex discrimination claim, the AJ relied largely on the testimony and disciplinary record of a male supervisor, George Mungai, whose position the AJ found "the most comparable to that of the appellant." *See ID* at 4-5. He stated that Mr. Mungai's disciplinary record was "virtually identical" to that of the appellant,

and that Mr. Mungai had testified “that he was convinced that at some point he, like the appellant, was going to be subjected to a performance-based action.” *Id.* at 5. He also indicated that Mr. Mungai had testified that the proposing official had “treated him essentially the same way he treated the appellant, that is to say, not well,” *id.* at 4; and he stated that Mr. Mungai’s testimony had convinced him that the proposing official treated the appellant and her male counterparts the same, *id.* at 5. Similarly, in finding that the appellant failed to substantiate her age discrimination claim, the AJ stated that the proposing official “issued performance-related discipline to Mr. Mungai and Ann Dempsey both of whom are younger than the appellant.” *Id.*

¶6 We note first that nothing in the record suggests that Mr. Mungai, Ms. Dempsey, or any other comparator identified by the appellant was ever placed on a PIP or reduced in grade. In fact, the ID includes a statement that the comparators identified by the appellant in support of her discrimination claim consisted of supervisors who had not been subjected to either kind of action. ID at 3-4. More important, in comparing the treatment of the appellant with the treatment of other supervisors, the AJ appears to have relied only on actions taken against the appellant other than her change to lower grade, and other than the PIP that led to that action. See ID at 4-5 (referring to evidence that the proposing official talked to employees in a similarly derogatory, condescending manner, and that he would admonish employees for problems for which he was responsible). The discrimination issue raised here, however, is not whether the appellant was treated disparately with respect to matters other than her change to a lower grade. Instead, it is whether the agency discriminated against the appellant by changing her to a lower grade. The AJ erred in failing to address this issue.

¶7 On review, the appellant asserts that the AJ also failed to address the testimony of a number of witnesses, including that of Linda Bornstein, a retired clerk who served under the appellant’s supervision, and that of Robert Aspell, a

mail handler and union steward who also had worked for the appellant. PFR at 7-9; HT at 14, 16, 79-80. As the appellant notes, Ms. Bornstein testified, when addressing the manner in which the proposing official addressed the appellant, that “in [her] 38 years of service [she] had never, ever seen anybody treated so horribly as” the appellant, PFR at 9; HT at 94; and Mr. Aspell testified that the proposing official yelled at the appellant over a radio communication device that could be heard by every other supervisor in the building, was very demanding of her, generally treated her badly, and did not treat any other supervisor similarly, HT at 22-24, 26. None of this testimony is mentioned in the ID.

¶8 The AJ’s failure to mention all of the evidence of record regarding the appellant’s claims of discrimination and reprisal does not mean that he did not consider it in reaching his decision. *See Marques v. Department of Health & Human Services*, [22 M.S.P.R. 129](#), 132 (1984), *aff’d*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). The Board has held, however, that an ID must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ’s conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980). The ID in this case does not meet these requirements. It includes little explanation of the bases for the AJ’s conclusion that the appellant had not substantiated her discrimination claims. The only support for that conclusion, aside from the AJ’s statements to the effect that the appellant was treated essentially the same as other supervisors, is a brief, unexplained statement that the proposing and deciding officials had presented “credible testimony that their respective decisions were not based on the appellant’s age or sex.” ID at 5. Thus, the AJ’s findings and conclusions regarding the appellant’s discrimination claims must be VACATED and the appeal REMANDED for further analysis and findings on this issue.

Reprisal Claims

¶9 The appellant asserted below that she initiated a discrimination complaint the month before she was placed on a PIP, naming, as the person responsible for the alleged discrimination, the official who later proposed the reduction in grade at issue in the present appeal. *E.g.*, I-2 File, Tab 34, Closing Statement at 5. She also asserted that she initiated another complaint during the 3-1/2-month period in 2008 between the time her reduction in grade was proposed and the time the agency decided to effect that action, and she alleged that the action constituted reprisal for her filing of discrimination complaints. *Id.*

¶10 For an appellant to prevail on a contention of illegal retaliation, she has the burden of showing that: (1) She engaged in protected activity; (2) the accused official knew of that activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Warren v. Department of the Army*, [804 F.2d 654](#), 656-58 (Fed. Cir. 1986). The AJ found that the appellant met the first three elements set forth above, and therefore that her reduction in grade could have been retaliation.¹ *ID* at 6-7. He concluded, however, that the appellant had ultimately failed to prove that the action constituted reprisal for her protected activity. *Id.* at 8.

¶11 The AJ's conclusion on the reprisal issue was based in part on reasons similar to those on which his conclusion regarding the discrimination issue was based. That is, the AJ found that the proposing official "was basically demanding of all his subordinates"; he referred to Mr. Mungai's testimony that he expected that he, like the appellant, would be subjected to a performance-based action in

¹ The only discrimination complaint to which the AJ referred specifically in his ID was the 2007 complaint. *See ID* at 6-7. The AJ indicated in that decision, however, that the appellant had alleged reprisal for filing "complaints," *id.*, and he did not indicate that the 2008 complaint was outside the scope of his review. On remand, the AJ shall identify specifically the protected activity at issue in the appellant's reprisal claim.

the future; and the AJ stated that there was no evidence that Mr. Mungai had ever filed a discrimination complaint against the proposing official. ID at 7. As we have indicated above, however, the record does not indicate that Mr. Mungai or any other comparator has been subjected to the kind of action at issue here, i.e., a reduction in grade for performance-related reasons. As with the discrimination issue addressed above, we find that the AJ erred in failing to consider the adverse action at issue in this appeal when analyzing the appellant's reprisal claim.

¶12 Finally, we note that the AJ's conclusion that the appellant had failed to substantiate her claim of reprisal also was based on a finding that the proposing and deciding officials "had ample reason to believe that the appellant's performance was not satisfactory," and that the appellant's performance deficiencies therefore "were sufficiently serious . . . to outweigh any motive [those officials] might have had to retaliate against her" ID at 7-8. These findings regarding the appellant's alleged performance deficiencies, however, are unexplained and unsupported in the ID. In fact, the ID includes no specific description of the alleged deficiencies, no description of the evidence on which the charge against the appellant was based, and no analysis of the appellant's claim, *see, e.g.*, I-2 File, Tab 34 at 4 & n.1, that her performance was not deficient as alleged. That decision therefore is not consistent with the Board's holding, cited above, that an ID must summarize relevant evidence and resolve issues of credibility. *See Spithaler*, 1 M.S.P.R. at 589.

¶13 For the reasons stated above, the AJ's findings and conclusions on the appellant's claim of reprisal must be VACATED.

ORDER

¶14 The ID is VACATED. Because further analysis and findings are needed, both with respect to the appellant's discrimination claims and with respect to her claims of reprisal, because the credibility of witnesses at the hearing in this case is at issue, and because deciding issues of credibility is normally the province of

the AJ, *see, e.g., Marchese v. Department of the Navy*, [65 M.S.P.R. 104](#), 109 (1994); *Uske v. U.S. Postal Service*, [60 M.S.P.R. 544](#), 557 (1994), *aff'd*, [56 F.3d 1375](#) (Fed. Cir. 1995), the case must be REMANDED to the AJ. On remand, the AJ shall adjudicate the appellant's discrimination and reprisal claims consistent with this Opinion and Order, and shall issue a new ID.²

FOR THE BOARD:

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

² *See Berry v. Department of Commerce*, [105 M.S.P.R. 596](#), ¶ 10 (2007) (where a hearing has been held and the record is complete, analysis of a discrimination or reprisal claim will proceed directly to the ultimate question of whether the appellant has demonstrated by a preponderance of the evidence that the agency's reason for its action was a pretext for discrimination or retaliation).