UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 38

Docket No. DA-0752-11-0553-I-1

Jessie B. Crutch,

Appellant,

v.

United States Postal Service,

Agency.

May 22, 2013

Pearson E. Dunbar, Overland Park, Kansas, for the appellant.

Nadalynn F. Hamilton, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his constructive suspension appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition for review and REVERSE the initial decision. We also FORWARD this appeal for adjudication of the appellant's compensatory damages claim.

BACKGROUND

¶2 The material facts in this case are largely undisputed. The preference eligible appellant started working as a Laborer Custodian at the agency's Houston Processing and Distribution Center in Texas on September 12, 1998. Initial Appeal File (IAF), Tab 4 at 41. The appellant fractured his hip in 1989 and reinjured his hip in 2000. Hearing Compact Disc (HCD), testimony of the appellant. On June 13, 2001, the appellant provided the agency with a medical certificate form, completed by his doctor, which indicated that the appellant had a "PERMANENT" medical condition of "Right acetabulum fracture, Post traumatic arthritis Right hip." IAF, Tab 16 at 10. The medical certificate also indicated that the appellant had no limitations regarding the activities related to the performance of his duties but that "[t]he patient may be required intermittent resting of Right hip while performing his regular duties." *Id.*

¶3 The appellant testified that, after submitting the June 2001 medical certificate to his supervisor at that time, the supervisor allowed him to sit from time to time; however, after his supervisor left in 2002, the agency began to harass him about his need to sit down to rest his hip. HCD, testimony of the appellant; IAF, Tab 28 at 10. The record reflects that the appellant submitted Family and Medical Leave Act (FMLA) medical provider certifications regarding his hip condition to the agency in December 2008, February 2009, and February 2010. IAF, Tab 20 at 3-8. The agency did not respond to those submissions by requiring the appellant to remove the reasonable accommodation request to intermittently sit and rest his hip, provide a more detailed explanation of the accommodation that he needed to rest his hip, or submit a written request for light duty. Further, the agency acknowledged that, although it sent the appellant a March 9, 2011 letter informing him that he was required to submit a written request for "light duty," the appellant nonetheless "continued to report for duty and work 8 hours/day through March 23, 2011." IAF, Tab 4 at 5, 30.

¶4 The appellant testified that, because of the agency's harassment when he would sit to rest his hip, he requested FMLA leave to deal with his hip pain on March 24-25, 2011. HCD, testimony of the appellant; IAF, Tab 28 at 11. While the appellant was on leave, the agency sent him a March 24, 2011 letter indicating that the agency had received an FMLA Form 380 from his physician on March 4, 2011, stating that the appellant was restricted to walking/standing for 15 minutes per hour. IAF, Tab 4 at 29. The letter informed the appellant that the "Houston District Policy on light duty states that all requests for light duty must be in writing."[1] *Id.* Acting Maintenance Supervisor Louis Thomas and the appellant testified that, when the appellant reported for work on March 26, 2011, he submitted the same medical documentation that he had submitted in the past and that Thomas informed him that he would not be permitted to work again until he either submitted new medical documentation without the restriction that he be able to rest his hip or submitted a written request for light duty. HCD, testimonies of the appellant and Thomas; IAF, Tab 28 at 6-7, 11.

¶5 The appellant reasserts on review that the agency constructively suspended him from March 26, 2011, through August 19, 2011, because his initially voluntary absence for medical reasons on March 24-25, 2011, became involuntary when he reported for work on March 26, 2011, and the agency refused to continue to afford him a reasonable accommodation for his disabling hip condition. Petition for Review File, Tab 1. The appellant contends that the agency instead told him that he would not be permitted to return to work unless he either provided updated medical evidence that removed the condition that he be permitted to intermittently rest his hip while performing the duties of his regular position or submitted a request for light duty. *Id*. The appellant asserts that the

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[1] The appellant testified that the FMLA Form 380 set forth the temporary restrictions that would be necessary following a surgical procedure on his hip, which had not yet been scheduled. HCD, testimony of the appellant; IAF, Tab 28 at 11.

agency's refusal to allow him to return to work with his existing reasonable accommodation constituted disability discrimination and, thus, a constructive suspension. *Id.* Therefore, he asserts that the administrative judge erred in dismissing this appeal for lack of jurisdiction. *Id.*

ANALYSIS

¶6 An employee's involuntary absence for more than 14 days that results in a loss of pay or forces an employee to take leave that he did not intend to use is a constructive suspension within the Board's jurisdiction under 5 U.S.C. §§ 7512(2) and 7513(d). *Zygas v. U.S. Postal Service*, 116 M.S.P.R. 397, ¶ 16 (2011); *Minnis v. Veterans Administration*, 42 M.S.P.R. 460, 462 (1989). Constructive suspension claims arise in two situations. The first occurs when an agency places an employee on enforced leave pending an inquiry into his ability to perform. *Johnson v. U.S. Postal Service*, 85 M.S.P.R. 184, ¶ 5 (2000). In that situation, the key question is whether the agency or the appellant initiated the absence. *Id*. Second, if an employee who initiated his own absence requests to return to work within certain medical restrictions, and if the agency is obligated to offer available light-duty work or is bound by the Rehabilitation Act of 1973 to accommodate the medical condition and to allow the employee to return, the agency's failure to offer available light-duty work or reasonably accommodate the employee becomes a constructive suspension. *Id*.; *McFadden v. Department of Defense*, 85 M.S.P.R. 18, ¶ 16 (1999). We find that the appellant has proven a constructive suspension under both of the above situations.

¶7 The undisputed facts in this appeal demonstrate that the agency barred the appellant from returning to his position pending his submission of new medical documentation or a request for light duty. First, we note that an employee absent on FMLA leave has a right to return to the same position he held when leave commenced. 29 C.F.R. § 825.214. While an employer may require a medical certification from such an individual upon return to duty, it must first provide the

employee with a list of the essential functions of the job and must request that the certification address the employee's ability to perform those functions. 29 C.F.R. § 825.312(b).

¶8 Here, contrary to 29 C.F.R. § 825.214, the agency did not reinstate the appellant to the position that he held prior to his taking FMLA leave. Nor did it properly request a return to duty certification. In this regard, if an employee's medical provider certifies that the employee can perform the essential functions of the position in a return to duty certification, which happened here, the employer may seek clarification from the provider, but, under the FMLA, the employer may not delay the employee's return to duty while this clarification is sought. 29 C.F.R. § 825.312(b). By demanding additional medical information from the appellant's physician before allowing him to return to duty, the agency improperly delayed his return to duty under FMLA-mandated procedures.

¶9 Second, the agency improperly demanded that the appellant request a light duty assignment before allowing him to return to duty. The agency's Employee and Labor Relations Manual indicates that light duty is for an employee who cannot perform the essential functions of his position. IAF, Tab 19, Exhibit A. The appellant has shown that he can perform the essential functions of his position with a reasonable accommodation. The agency, therefore, inappropriately demanded that he request light duty.

¶10 In sum, we find that the agency initiated the appellant's absence pending further inquiry into his ability to perform and, therefore, constructively suspended him under the first scenario noted above.

¶11 In addition, we find that the record supports finding that the agency constructively suspended the appellant under the second scenario. In *Schultz v. U.S. Postal Service*, 78 M.S.P.R. 159, 163 (1998), the Board held that an agency's obligation to return to duty within his medical restrictions an employee who was previously voluntarily absent for medical reasons includes the duty to provide reasonable accommodation in accordance with the Rehabilitation Act of

1973 and that an agency's failure to do so constitutes a constructive suspension.[2] Here, it is undisputed that the appellant was able to fully perform the essential functions of his position from June 13, 2001, until March 26, 2011—almost 10 years—with the reasonable accommodation of allowing him to intermittently rest his hip, when the agency refused to allow him to return to work unless the reasonable accommodation was removed or he submitted a written request for light duty. HCD, testimony of the appellant; IAF, Tab 28 at 12. The appellant testified that he would sometimes need to sit down for 2-3 minutes to rest his hip. HCD, testimony of the appellant; IAF, Tab 28 at 10, and Tab 16 at 12. When the appellant returned to work on March 26, 2011, and submitted the same medical documentation he had submitted in the past, indicating that he could perform his full duties provided he intermittently sit and rest his hip, he was again requesting to return to the full duties of his position with medical restrictions, regardless of the agency's previous work arrangements. We find that a preponderance of the evidence in this case establishes that the agency failed to continue to provide him with a reasonable accommodation for his hip condition, that his absence became a constructive suspension from March 26, 2011, through August 19, 2011, and that the Board therefore has jurisdiction over this appeal.

¶12 Having found, for the reasons set forth above, that the agency constructively suspended the appellant and that the Board has jurisdiction over this appeal, we further find that the constructive suspension must be reversed

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[2] The Board held in *Moon v. Department of the Army*, 63 M.S.P.R. 412, 419-20 (1994), that, because an employee's absence was voluntary, it lacked jurisdiction over the constructive suspension appeal and also lacked jurisdiction over the appellant's allegation of disability discrimination raised in connection with such an appeal. To the extent that *Moon* is inconsistent with *Schultz*, this holding in *Moon* is overruled. *See McFadden*, 85 M.S.P.R. 18, ¶ 16 (if an employee who initiated her own absence requests to return to work within certain medical restrictions, and if the agency is bound by the Rehabilitation Act of 1973 to accommodate the medical condition and to allow the employee to return, the agency's failure to reasonably accommodate the employee becomes a constructive suspension).

because the agency effected it without affording the appellant minimum due process. *See Lohf v. U.S. Postal Service*, 71 M.S.P.R. 81, 86 (1996).

¶13 We now turn to the appellant's claim of disability discrimination. *See Pledger v. Department of the Navy*, 50 M.S.P.R. 325, 330-31 (1991) (reversing the appellant's constructive suspension because the agency effected it without affording him minimum due process and then addressing his disability discrimination claim). As explained below, preponderant evidence establishes that, during the period of the appellant's constructive suspension, the agency unjustifiably withdrew a reasonable accommodation for the appellant's disabling hip condition and that the agency therefore committed disability discrimination in violation of the ADA Amendments Act of 2008 (ADAAA).[3]

¶14 The ADAAA prohibits discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training,

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[3] As a federal employee, the appellant's claim of discrimination on the basis of disability arises under the Rehabilitation Act of 1973. However, the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act, and the Board applies them to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Further, the ADA regulations superseded the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7–8 (2005) (stating that 29 C.F.R. § 1614.203(g) and other portions of the regulation at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); 29 C.F.R. § 1614.203(b). The ADA Amendments Act of 2008 (ADAAA), which liberalized the definition of disability, became effective on January 1, 2009. *See* Pub. L. No. 110-325, 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12101 *et seq*. The EEOC issued final amended regulations implementing the ADAAA effective May 24, 2011. *See* Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978 (Mar. 25, 2011) (codified at 29 C.F.R. Part 1630). The Board has determined that the EEOC's May 24, 2011 final ADAAA regulations are applicable to any agency action that occurred after the January 1, 2009 effective date of the ADAAA. *See Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R. 579, ¶¶ 38-39 (2012); *Southerland v. Department of Defense*, 117 M.S.P.R. 56, ¶¶ 25-28 (2011).

and other terms, conditions, and privileges of employment." *See* 42 U.S.C. § 12112(a). The ADAAA defines "qualified individual," in part, to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *See* 42 U.S.C. § 12111(8). The ADAAA defines "disability" to mean: "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment (as described in paragraph (3))." *See* 42 U.S.C. § 12102(1)(A)-(C). "Major Life Activities" include, but are not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *See* 42 U.S.C. § 12102(2)(A).

¶15 The EEOC's ADAAA regulations provide that the term "'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADAAA. 'Substantially limits' is not meant to be a demanding standard." 29 C.F.R. § 1630.2(j)(1)(i). "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section." 29 C.F.R. § 1630.2(j)(1)(ii). "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis." 29 C.F.R. § 1630.2(j)(1)(ii). "The comparison

of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate." 29 C.F.R. § 1630.2(j)(1)(v). "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D). The term "reasonable accommodation" includes job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

¶16 The appellant's testimony and medical evidence establish that he was a qualified individual with a permanent right hip disability that substantially limited his ability to stand and walk and that he had requested a reasonable accommodation for his disability that would allow him to fully perform the essential functions of his Laborer Custodian position. HCD, testimony of the appellant; IAF, Tab 16 at 10; *see* 42 U.S.C. §§ 12102(1)(A)-(C), (2)(A), (4)(C), 12111(8), (9)(B); 29 C.F.R. §§ 1630.2(j)(1)(i)-(vii), (o)(1)(i)-(ii), (o)(2)(ii).

¶17 By refusing to allow the appellant to return to work on March 26, 2011, with the same reasonable accommodation he had for approximately 10 years, the agency committed disability discrimination by failing to continue to provide a reasonable accommodation to a qualified individual with a disability in violation of 42 U.S.C. § 12112(a), (b)(5)(A). *See Durden v. Department of the Navy*, 18 M.S.P.R. 373, 374-76 (1983), *overruled on other grounds by Price v. U.S.*

Postal Service, 50 M.S.P.R. 107, 110 (1991); *see also Edwards v. Department of Transportation*, 112 M.S.P.R. 82, ¶¶ 2-15 (2009).[4]

¶18 We reject the agency's assertion and the administrative judge's finding that the agency refused to allow the appellant to return to work because his physician's April 1, 2011-indicated reasonable accommodation—that appellant be allowed to rest his hip due to pain—was "immeasurable and that in order for a restriction to be valid, it must contain measurable instructions so management can determine if an employee can work." IAF, Tab 4 at 37; Tab 28 at 7; HCD, testimony of Occupational Health Nurse Associate Jennifer Campbell; *see Zygas*, 116 M.S.P.R. 397, ¶¶ 17-19.

¶19 First, the agency had already refused to allow the appellant to return to work on March 26, 2011, several days prior to the allegedly vague April 1, 2011 physician's note. Moreover, preponderant evidence established that the agency repeatedly instructed the appellant that, in order to return to work, he "must" submit a written request for "light duty" or, alternatively, submit new medical documentation that removed the reasonable accommodation request that he be allowed to rest his hip. IAF, Tab 4 at 30 (agency's March 9, 2011 letter requiring the appellant to request "light duty"), at 31 (agency's March 24, 2011 letter requiring the appellant to request "light duty"), at 37 (Routing Slip dated April 9, 2012, by Supervisor Customer Services Earnest Rowe noting that the appellant was told by both the Occupational Health Services Office and by him that if he had "restrictions" he "must apply for light duty"), at 33 (May 24, 2011 memorandum from Rowe to the appellant noting the agency's letters of April 9,

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[4] Despite having been informed by the administrative judge that disability discrimination based on a failure to provide reasonable accommodation was an issue in this case, *see* IAF, Tab 23 at 1; HCD (opening statement of the administrative judge), the agency did not present any evidence showing that its continuation of the reasonable accommodation it afforded the appellant for almost 10 years would have caused the agency an undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A).

2011, and May 20, 2011, informing the appellant that if he had "restrictions" he "must fill out the light duty form"), at 23 (agency's May 13, 2011 letter to U.S. Senator Kay Bailey Hutchison indicating in part that the appellant is asking for an accommodation and that he "may request light duty by submitting the proper documents to his supervisor"); Tab 16 at 20 (May 10, 2011 sworn affidavit of Acting Maintenance Manager Peggy L. Morrison, in which she states in part in response to question 5 ("Q5"): "The complainant was told he must return to work with no restrictions, full duty, with no 'buts', or if he must rest hip, he must apply for light duty"). These instructions did not indicate that the appellant needed to provide measurable instructions to obtain a reasonable accommodation.

¶20 Second, Campbell testified that management provided her with the April 1, 2011 note from the appellant's physician for the purpose of determining if it qualified as a "full release" to duty and that she informed management that it was not a full release to duty because of the condition following the word "but" in the note. HCD, testimony of Campbell. Campbell's testimony demonstrated that, because the note was not a full release to duty, her assessment that the "restriction" in the physician's note was "immeasurable" and that a restriction must contain measurable instructions so that management can determine if an employee can work, was an assessment as to the sufficiency of a "restriction" under the Houston District Policy on light duty, not an assessment of a request for a reasonable accommodation. HCD, testimony of Campbell, IAF, Tab 28 at 7-8. Indeed, Campbell's testimony clearly established that the agency had not provided Campbell with information regarding the appellant's medical history and that Campbell's entire focus was on the Houston District Policy on "light duty." HCD, testimony of Campbell. Moreover, the April 1, 2011 physician's note contained no more detail than did the original June 13, 2001 physician-provided medical document indicating the need for the reasonable accommodation of allowing the appellant to rest his hip while fully performing his regular duties. IAF, Tab 4 at 27; Tab 16 at 10.

¶21 Third, Campbell's testimony also established that, after reviewing the April 1, 2011 physician's note, she spoke to the appellant, and, after discussing his need to rest after working approximately 3 hours and that his normal schedule only required him to work for 2 hours before he would have a 15 to 30 minute break, she determined that he would be able to do his job and accommodate his need to rest his hip within his normal work schedule. HCD, testimony of Campbell; IAF, Tab 28 at 7-8. Thus, the appellant provided any needed clarification of his ability to fully perform the essential functions of his position with his requested reasonable accommodation.

¶22 Finally, the agency's assertion regarding the vagueness of the April 1, 2011 physician's note is unavailing because the agency received on March 31, 2011, an FMLA Form 380, completed by the appellant's physician on March 30, 2011, in which the physician indicated in response to question 4: "Patient is able to perform full duties, but must be able to rest right hip during the day due to pain"; and in response to question 3: "Patient must be able to sit down when needed periodically throughout the day due to hip pain." IAF, Tab 16 at 16-19. Thus, we find that the agency had adequate information regarding the appellant's reasonable accommodation even before the physician's April 1, 2011 note.

¶23 Based on the above, we find that the appellant proved that his initially voluntary absence on March 24-25, 2011, became involuntary for the period from March 26, 2011, through August 19, 2011, that the agency constructively suspended him for more than 14 days without affording him due process, and that the agency discriminated against him based on his disability.

ORDER

¶24 The initial decision is REVERSED. We ORDER the agency to cancel the appellant's constructive suspension from March 26, 2011, through August 19, 2011. We FORWARD this appeal to the regional office for adjudication of the appellant's claim for compensatory damages. The administrative judge shall

permit the appellant to present evidence and argument in support of his claim for compensatory damages and shall issue a decision resolving his claim. *See Edwards*, 112 M.S.P.R. 82, ¶ 21; *see also Edwards v. Department of Transportation*, 117 M.S.P.R. 222 (2012).

¶25 We ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act[5] and to restore any annual or sick leave the appellant used during the period of March 26, 2011, through August 19, 2011, no later than 60 calendar days after the date of this decision. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). 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.

¶26 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* 5 C.F.R. § 1201.181(b).

¶27 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. 5 C.F.R. § 1201.182(a).

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[5] As a preference eligible employee, the appellant is entitled to back pay under the Back Pay Act. *See Konieczko v. U.S. Postal Service*, 56 M.S.P.R. 660, 663-64 (1993).

¶28 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶29 This is the final order of the Merit Systems Protection Board regarding the appellant's constructive suspension claim. It is not the 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 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 requirements, 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 office that issued the initial decision on your appeal.

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 FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision regarding your constructive suspension and disability discrimination claims.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

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. § 2000e-5(f) and 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 review of this final decision on the other issues in your appeal by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27,

2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc., with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

CONCURRING OPINION OF MARK A. ROBBINS

in

Jessie B. Crutch v. United States Postal Service

MSPB Docket No. DA-0752-11-0553-I-1

¶1 I concur with the decision reached by my colleagues, but through a slightly different analysis. I believe that the agency initiated the appellant's absence beginning on March 26, 2011, and that the absence therefore became an appealable constructive suspension once it exceeded 14 days.

¶2 This case is not governed by the principle that a voluntary absence can become involuntary, and thus a constructive suspension, if the employee asks to return with certain medical restrictions and the agency is under a legal duty to provide work within the employee's restrictions. This case is distinguishable from cases applying that principle, *e.g.*, *McNamee-Marrero v. U.S. Postal Service*, 80 M.S.P.R. 487, ¶¶ 2-3, 9 (1999); *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996), because, here, the appellant was scheduled to work on March 26, 2011, he reported for work, and he did not ask for any change in his duties or the work environment in which he had performed successfully for years prior to March 26, 2011. Under these circumstances the agency's decision to bar the appellant from duty made his absence involuntary, and thus, whether he could perform his duties with or without accommodation is immaterial to whether he was constructively suspended. *Cf. Gallegos v. Department of the Air Force*, 70 M.S.P.R. 483, 485 (1996) (whether an employee's involuntary absence was an appealable suspension does not depend on whether there was work available within the employee's medical restrictions).

¶3 I would reverse the constructive suspension on the ground that the agency failed to afford the appellant minimum due process, and then address the appellant's disability discrimination claim.

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Mark A. Robbins
Member