U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Truman B.,[1]
Petitioner,

v.

Antony Blinken,
Secretary,
Department of State,
Agency.

Petition No. 2024004706

MSPB No. PH-0752-18-0329-I-1

DECISION

On July 13, 2024, Petitioner filed a timely petition with the Equal Employment Opportunity Commission (EEOC or Commission) asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning his claim of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission CONCURS with the MSPB.

ISSUE PRESENTED

The issue presented is whether the MSPB properly found that Petitioner did not establish his affirmative defenses of discrimination based on age or disability, or in reprisal for prior protected EEO activity, for his removal.

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[1] This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Petitioner worked as a Passport Specialist at the Agency's National Passport Center, Bureau of Consular Affairs in Portsmouth, New Hampshire.

On April 18, 2018, the Agency issued a decision to remove Petitioner based on Absence without Leave (AWOL) in September and October 2017, totaling 62.75 hours; Failure to Follow Leave Procedures; Failure to Follow Supervisory Instructions; and Improper Personal Conduct, including use of profanity and speaking in a loud, agitated, and aggressive manner ("Removal Decision"). The Deciding Official reviewed the materials and applied the Douglas Factors to sustain the removal action.[2] He highlighted Petitioner's prior 5-day and 14-day suspensions for similar misconduct and found Petitioner's actions egregious given the repetitive nature. After considering the mitigating factors, the Deciding Official concluded that they did not outweigh the severity and impact of Petitioner's misconduct.

Petitioner appealed his removal before the MSPB and alleged that the Agency discriminated against him based on age (YOB: 1960) and disability (physical and mental), and in reprisal for prior protected EEO activity.

Petitioner withdrew his hearing request and thereafter an MSPB Administrative Judge (AJ) issued an Initial Decision based on the written record on March 8, 2019. The AJ affirmed the charges in the removal action. The AJ noted that Petitioner confirmed the 62.75 hours of AWOL on seven days, and he admitted to failing to follow leave procedures on three occasions. While Petitioner attempted to explain that his illness caused his failure to follow supervisory instructions, the AJ found that he provided no documentary evidence to prove that any medical condition played a part in his inability to meet with his first-line supervisor ("Supervisor"). Petitioner also confessed to shouting an expletive in the workplace to sustain the charge of Improper Personal Conduct.

The AJ then considered Petitioner's affirmative defenses. For his claim of disability discrimination, Petitioner stated that he had chronic arthritis; a deteriorating back; sleep issues; and issues with concentrating. While he submitted some medical documentation, it did not connect his medical

[2] The Douglas Factors are the list of factors that may be relevant to a determination of discipline. Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-6 (1981).

problems to any limitations of a daily life activity. The AJ noted that an accommodation to permit Petitioner to come and go whenever he saw fit and to work as many or few hours as he saw fit, without advanced notice to the Supervisor, would have been unreasonable because of the nature of Petitioner's duties. He was assigned to work as part of a team and the members' schedules needed to be coordinated to ensure adequate coverage of tasks. The AJ determined that Petitioner's unpredictable and unscheduled absences rendered him not qualified for his position.

Regarding the age discrimination claim, the AJ highlighted that Petitioner was non-responsive when asked about it during his deposition, and that there was no evidence that management officials factored his age into the removal action or that younger employees were treated more favorably than Petitioner. Further, there was no indication of retaliation because the Agency had been counseling Petitioner about his attendance and behavior for more than one year by the time he first contacted the EEO Office on September 14, 2017. The AJ concluded by affirming the Agency's removal action.

Petitioner filed a petition for review from the full Board. On June 14, 2024, the MSPB issued a Final Order affirming the AJ's Initial Decision. However, the MSPB modified the decision to address matters not specifically addressed by the AJ. Petitioner alleged that the AJ erred in failing to mention an EEOC disability discrimination case, Solomon v. Department of State, EEOC Appeal Number 0120160352 (February 22, 2018), in which the Commission ordered an accommodation for a Passport Specialist. However, the MSPB found that this case was not relevant because Petitioner did not show that he was an individual with a disability and qualified for his position.

Petitioner also argued that the AJ failed to consider his arguments about his prior suspensions, but the MSPB's review of prior disciplinary action is limited to determining whether the employee was informed of the action in writing; the action was a matter of record; and the employee was permitted to dispute the charges before an imposition of discipline. The MSPB found that this occurred, and Petitioner did not show that the previous suspensions were clearly erroneous. Even if the AJ failed to address Petitioner's assertions, it did not harm his substantive rights, and an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision.

The instant petition followed.

STANDARD OF REVIEW

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation, or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

CONTENTIONS ON PETITION

In his petition, Petitioner states that he filed an appeal with the Commission in 2019, and it was "placed on hold" pending the MSPB decision.[3] Petitioner contends that the Agency has Schedule A medical documentation that establishes that he is an individual with a disability.[4] Petitioner also disputes the MSPB's determination that EEOC Appeal Number 0120160352 was irrelevant because the complainant was also a Passport Specialist. Petitioner further contends that he was denied the right to appeal his prior suspensions when the union received his timely grievances but refused to file them on his behalf. Petitioner requests damages, such as back pay and a promotion.

The Agency opposes the petition. It asserts that Petitioner failed to meet the requirements for a petition for review. Specifically, he only submitted the first page of the MSPB's decision and not the entire decision,[5] and he failed to articulate why the MSPB decision was incorrect. In addition, Petitioner did not allege that he was denied a right to appeal his suspensions because of discrimination, and the Commission lacks authority to review this element of the MSPB decision. The Agency requests that the Commission dismiss the petition.

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[3] Petitioner's prior appeal to the Commission, EEOC Appeal Number 2019003266, was dismissed as premature.

[4] The "Schedule A" hiring authority is a non-competitive appointment authority used for hiring applicants with disabilities. See generally 5 C.F.R. § 213.3102(u).

[5] We find this to be a harmless procedural error and exercise our discretion to not dismiss the instant petition on this basis.

ANALYSIS

Reasonable Accommodation

Petitioner alleged a failure to accommodate as part of his affirmative defense of disability discrimination. An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), (p). In order to establish that he was denied a reasonable accommodation, Petitioner must show that: (1) he is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii).

Petitioner asserts that the Agency had his Schedule A documentation showing that he is an individual with a disability, but he did not provide a copy of this document nor show where it can be found in the record. Regardless, the record contains Petitioner's medical documentation for various conditions. For example, a document dated July 31, 2015, noted that the symptoms of Petitioner's anxiety included constant sleep disruption, and on October 18, 2017, Petitioner's doctor described Petitioner's sleep issues as persistent, and specified that he sleeps 2 to 3 hours and cannot go back to sleep after waking up in the middle of the night. Petitioner also submitted medical documentation for his Family and Medical Leave Act (FMLA) request related to his "back issues," which resulted in his inability to drive when he experiences a flare-up. Petitioner Findings of Fact at 45, 66; Agency Pre-Hearing Submission at 55. As such, we will credit that Petitioner is an individual with a disability.

In the notice of removal, the Deciding Official disclosed that Petitioner's performance evaluations were Fully Successful in the past two years, which supports that Petitioner was qualified for his position. Removal Decision at 8.

Petitioner alleged that he was denied a reasonable accommodation when he was not allowed to work compensatory time on the weekend or overtime, and he was denied "flex time," which allows two hours of flexibility. Petitioner Deposition at 18-19, 22. However, he only offered vague assertions that he requested overtime or "flex time," without providing details such as the dates of any requests or the responsible management officials who purportedly denied such requests. We find this limited evidence does not substantiate that he was denied these accommodations.

Petitioner relied upon an email from the Supervisor on March 8, 2017, as proof that he asked for compensatory time as a reasonable accommodation. Petitioner Deposition at 150. A review of this email confirms that the Supervisor denied Petitioner's request for compensatory time. However, the Supervisor noted that Petitioner may be eligible for FMLA leave and offered his assistance. Agency File Part 2 at 50-1. The Rehabilitation Act provides that qualified individuals with a disability be granted an effective reasonable accommodation, and it does not entitle them to the accommodation of their choice. See Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994); see also Enforcement Guidance at Question 9. Petitioner corroborated that he was granted the full amount of FMLA leave, and he was given an additional 80 hours of leave without pay (LWOP), which he exhausted by September 12, 2017. Petitioner Deposition at 63. Unpaid leave is a form of reasonable accommodation, whether or not provided under the FMLA. See Enforcement Guidance, at Questions 16-21, 28. As such, Petitioner was granted an effective accommodation of unpaid leave through September 2017.

The relevant dates for the AWOL charges were September 12, 2017, and October 6, 10, 12, 13, 16, and 17, 2017. Removal Decision at 2. The record shows that on September 12, 2017, Petitioner emailed the Supervisor that he fell asleep watching football and either forgot to set his alarm or shut it off while sleeping, and he admitted that he did not call "the leave line." Petitioner's Findings of Facts at 52. The Supervisor informed Petitioner that he did not have leave to cover this absence and would be charged AWOL. The Supervisor also denied Petitioner's request to work compensatory time to make up the hours missed because the request was not made prior to his absence from work. Agency File Part 2 at 24.

On October 6, 2017, Petitioner informed the Supervisor that he was leaving for the day because he felt ill. The Supervisor replied that this leave was not approved, and he wanted to speak in his office. However, Petitioner refused and left. Agency File Part 1 at 220-1. On Monday, October 16, 2017, Petitioner stated to the Supervisor that he was going home sick. The Supervisor instructed Petitioner to submit a leave slip, and Petitioner declined. A witness corroborated that the Supervisor asked Petitioner to come to his office to fill out a leave slip, and he responded, "no, I'm leaving see you on Thursday." Agency File Part 2 at 41, 44.

On November 30, 2017, Petitioner requested LWOP for October 6-19, 2017, and he submitted a doctor's note, dated October 18, 2017, stating that "excessive sleepiness" caused him to miss work from October 5-18, 2017. Agency File Part 1 at 235, 243. However, the Commission has long held that an agency's obligation to provide a reasonable accommodation is always prospective and it is not obligated to excuse misconduct, even if the past misconduct was based on the employee's disability. See Enforcement Guidance, at Question 36; see also Stan H. v. Dep't of Veterans Affairs, EEOC Appeal No. 2023003631 (Nov. 7, 2023); Marguerite W. v. U.S. Postal Serv., EEOC Appeal No. 20224249 (Jan. 31, 2023); Traylor v. Environmental Protection Agency, EEOC Appeal No. 01A14117 (Nov. 6, 2003). The Agency was not obligated to grant compensatory time or LWOP for Petitioner's unscheduled absences in September and October 2017.

In his petition, he challenges the MSPB's determination that Solomon v. Department of State, supra, was irrelevant. We agree that this case was not pertinent because it involved another employee in a separate duty station and entirely different facts. Notably, the Agency broadly denied the complainant's requested accommodations when it should have engaged in the interactive process. The only similarity between the complainant and Petitioner is they both held Passport Specialist positions, which is insufficient to support Petitioner's claim of a failure to accommodate.

We find no violation of the Rehabilitation Act when the Agency denied Petitioner's requests for compensatory time and LWOP to retroactively excuse Petitioner's unscheduled absences as a reasonable accommodation.

Collateral Attack (Suspensions)

Regarding Petitioner's prior suspensions, he specifically complains of the union's actions regarding his attempts to grieve the suspensions, which is a collateral attack.

A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's proceeding, such as the grievance process, the workers' compensation process, an internal agency investigation, or state or federal litigation. See Fisher v. Dep't of Defense, EEOC Request No. 05931059 (July 15, 1994). The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Dep't of Defense, EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993). The proper forum for Petitioner to have raised his complaints is within the negotiated grievance process.

Disparate Treatment (Removal)

As an initial matter, the AJ relied upon the MSPB's decision in Savage v. Department of the Army, 122 M.S.P.R. 612 (2015) when finding no retaliation. In Savage, the MSPB, among other things, determined that the analytical framework set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), was not applicable to its proceedings. Savage, 122 M.S.P.R. at 637. In rejecting the McDonnell Douglas framework, the MSPB maintained that the MSPB's authority to adjudicate and remedy alleged violations of 42 U.S.C. § 2000e-16 is a matter of civil service law. Id.

In Petitioner's case, we find that the MSPB AJ erred by not applying the analysis of McDonnell Douglas Corporation v. Green, supra, when deciding Petitioner's claims of discrimination and reprisal. We will analyze this case according to the McDonnell Douglas paradigm. See Raphael C. v. Dep't of Vet. Aff., EEOC Petition No. 0320160016 (May 10, 2016); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). We find, however, as outlined below, that the MSPB AJ correctly determined that Petitioner did not establish that the Agency discriminated against him as alleged.

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, supra. Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Petitioner to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13.

Once Petitioner has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Petitioner to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Petitioner retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004533 (August 17, 2023). As discussed above, Petitioner is an individual with a disability and was qualified for his position. The Deciding Official considered that the AWOL charges were, in part, related to Petitioner's medical issues. Removal Decision at 8-9. We will credit, for the sake of argument, that Petitioner established a prima facie case of disability discrimination.

Petitioner may establish a prima facie case of age discrimination by providing evidence that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) either that similarly situated individuals outside his protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted). Petitioner offered no similarly situated comparator who was outside of his age category and purportedly treated more favorably, and he admitted that he was not aware of any evidence or comments to connect his age to the removal action. Petitioner Deposition at 19-20. The circumstances of Petitioner's removal do not raise an inference of discrimination, and we find no prima facie case of age discrimination.

Petitioner may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). Petitioner initiated an EEO complaint on September 14, 2017, against the Supervisor and director. Petitioner's Findings of Fact at 7. The Deciding Official noted that Petitioner raised his EEO activity and complained of "civil and human rights abuses" in his response to the proposal notice. Removal Decision at 6-7. The Deciding Official was aware of Petitioner's protected EEO activity and there was a temporal nexus to the removal action to find that Petitioner established a prima facie case of reprisal.

The Deciding Official's determination letter contains the Agency's articulated legitimate, nondiscriminatory reasons for Petitioner's removal. The Deciding Official noted that Petitioner did not refute the number of AWOL hours, and he was on clear notice that he could be charged AWOL for unauthorized absences. Petitioner's frequent absences placed an unnecessary strain on his colleagues and had a negative impact on operations. His failure to improve led the Deciding Official to believe that there was no potential for rehabilitation. The Deciding Official specified that each charge alone was sufficient grounds to remove Petitioner.

The Deciding Official's Douglas Factors analyses show that he considered Petitioner's self-stated medical issues but found that they did not mitigate the misconduct because management officials consistently provided information about resources that were available to address any medical issues. The Deciding Official considered alternative sanctions before concluding that they would be inadequate due to the repetitive nature of Petitioner's misconduct, which occurred shortly after disciplinary action for similar misconduct. Agency File Part 2 at 90-3.

We find that Petitioner has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

Petitioner offers no arguments or evidence in his petition to prove that the proffered reasons are not worthy of belief. The prior suspensions confirm that Petitioner was previously warned about his misconduct. Specifically, he was issued a five-day suspension for 450 hours of AWOL, and he was suspended for fourteen (14) days for Improper Personal Conduct; Failure to Follow Supervisory Instruction; and Sleeping While on Duty. In addition to the evidence related to the AWOL charges and failure to follow instructions for the specifications included in the removal, Petitioner and two witnesses substantiated that Petitioner swore loudly in the office on October 6, 2017. Agency File Part 2 at 56-62, 66-71, 34-5; Petitioner Findings of Fact at 11.

The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency's actions.

Further, the Commission has long held that "[p]articipation in the EEO process does not shield employees from uniformly applied standards of conduct and performance; nor are the statutory anti-retaliatory provisions a license for employees to engage in misconduct." Berkner v. Dep't of Commerce, EEOC Petition No. 0320110022 (June 23, 2011).

Petitioner's bare assertions that management officials discriminated against him are insufficient to prove pretext, or that their actions were discriminatory or retaliatory. Accordingly, we find that the MSPB properly concluded that Petitioner did not establish his affirmative defenses of discrimination based on his age or disability, or in reprisal for prior protected EEO activity, when the Agency removed Petitioner.

CONCLUSION

Based upon a thorough review of the record, it is the decision of the Commission to CONCUR with the final decision of the MSPB finding no discrimination or retaliation.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

December 18, 2024
Date