

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 84**

Docket No. AT-0752-07-0272-I-1
AT-1221-05-0774-W-2

**Theresa Faye Kohler,
Appellant,**

v.

**Department of the Navy,
Agency.**

April 9, 2008

Ronald S. Webster, Esquire, Orlando, Florida, for the appellant.

Joe Baker, Jacksonville, Florida, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review of an initial decision in these cases that affirmed her removal for excessive absences. We GRANT the petition for review and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the appellant's removal.

BACKGROUND

¶2 In 1997, the appellant was reassigned from a GS-12 Supervisory Contract Specialist position to a GS-12 Procurement Analyst position and given a position description (PD) specific to her new position, apparently as a result of her

allegations of work-related stress. MSPB Docket No. AT-0752-07-0272-I-1 Initial Appeal File (IAF-I-1), Tab 4, Part II at 225-48. She worked under that PD until approximately October 5, 2004, when she requested and was approved leave for one month. *Id.*, Part I, Subtabs 4T, 4H.

¶3 In November 2004, the appellant was again granted leave based on letters from her physicians stating that she could not report for work because of mental health issues. IAF-I-1, Tab 4, Part I, Subtabs 4J, 4I. Her physicians also recommended that agency personnel have no direct contact with the appellant, as this would exacerbate her condition. *Id.* She was carried on sick and annual leave until she exhausted her leave balance, and then was approved for donated leave. *Id.*, Subtab 4G.

¶4 On January 28, 2005, the agency sent the appellant a letter informing her that she had exhausted her leave balances and her physicians did not provide any date on which the agency could expect her to return to work. The letter further informed her that continued absence could result in her removal. IAF-I-1, Tab 4, Part I, Subtab 4N. On February 2, 2005, the appellant's attorney responded, stating that the appellant intended to return to work "as long as her duty is as specified in the attached job description dated October 29, 1997, which was a permanent accommodation created so that [the appellant] could continue to perform her duties in spite of her disability." *Id.*, Subtab 4P.

¶5 Beginning on February 2, 2005, the appellant was placed on leave without pay (LWOP). IAF-I-1, Tab 4, Part II at 479-83. In a February 15 letter to her attorney, the agency granted the appellant's request for an extension of time to submit medical documentation until February 25 after which the appellant's "leave status will be adjusted based upon information available to management at that time." *Id.*, Part I, Subtab 4R. In a February 23 letter, Dr. Carlos Torrellas informed the agency that it was his opinion that the appellant was "unable to work in any capacity at the present time. . . . While I remain hopeful that her condition will improve, it is not possible for me to establish a time frame in

which she could return to work, or to what capacity level.” *Id.*, Subtab 4S. Dr. Torrellas further stated that he anticipated that the appellant would “continue to receive treatment . . . on a regular basis for the next six to eight months. At that time she will be reevaluated to determine if she has sufficiently improved to return to work.” *Id.*

¶6 On March 9, 2005, the agency proposed to remove the appellant for excessive approved absence. IAF-I-1, Tab 4, Part I, Subtab 4T. The agency subsequently removed the appellant, effective April 23, 2005. *Id.*, Subtab 4V. The appellant filed an Individual Right of Action (IRA) appeal of her removal. MSPB Docket No. AT-1221-05-0774-W-1 Initial Appeal File (IAF-W-1), Tab 1. She also had filed an Equal Employment Opportunity (EEO) complaint, which was amended to include her removal. IAF-I-1, Tab 4, Part II. Her IRA appeal was dismissed without prejudice, pursuant to her request, while her formal EEO complaint was pending. IAF-W-1, Tab 24. After the agency issued a final agency decision on the EEO complaint, the appellant refiled her IRA appeal and filed a direct appeal of her removal under 5 U.S.C. Chapter 75. MSPB Docket No. AT-1221-05-0774-W-2 Initial Appeal File, Tabs 1, 2; IAF-I-1, Tab 1. Subsequent medical documentation indicates that the appellant remained unable to report to work while these appeals were pending. IAF-I-1, Tab 26, Ex. 3-9. Ultimately, the appellant was approved for Office of Workers’ Compensation Programs (OWCP) benefits and disability retirement. *Id.*, Tab 26, Ex. 15, 16; Tab 28.

¶7 The administrative judge joined both appeals, and affirmed the appellant’s removal in a single initial decision. IAF-I-1, Tab 31. The administrative judge found that the agency had proven its charge, and the appellant had not proven her affirmative defenses. *Id.*

¶8 The appellant filed a petition for review (PFR) of the initial decision, arguing inter alia that the administrative judge failed to address her affirmative defense of retaliation for filing an EEO complaint. PFR File (PFRF), Tab 1.

ANALYSIS

¶9 The appellant's PFR generally fails to meet the Board's criteria for review at 5 C.F.R. § 1201.115(d) because it does not present previously unavailable new and material evidence or establish that the administrative judge erred in interpreting a law or regulation. We have granted the PFR, however, because the administrative judge did not address the appellant's claim, raised both below and on review, that the agency removed her in retaliation for filing an EEO complaint. In addition, although the appellant has not contested the reasonableness of the penalty on review, the administrative judge failed to evaluate the *Douglas* factors in the initial decision or assess the reasonableness of the penalty.

The appellant failed to show that the agency removed her in retaliation for her EEO protected conduct.

¶10 In her prehearing submissions, the appellant asserted that Commander H. V. Dobson, the official who proposed her removal, sent her a January 28, 2005 letter threatening disciplinary action because she had filed an EEO complaint. IAF-I-1, Tabs 13, 15. In his Order and Summary of Telephonic Prehearing Conference, the administrative judge identified as an issue in this appeal the following: "Whether the agency took its action in retaliation for prior EEO activity." *Id.*, Tab 16 at 9. The administrative judge, however, failed to address this issue in his initial decision. An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge'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). Affirmative defenses are material issues of fact and law that the administrative judge must address when an appellant timely raises them. *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 9 (2007).

¶11 For an appellant to prevail on a contention of illegal retaliation for EEO activity, she has the burden of showing that: (1) She engaged in a protected activity; (2) the accused official knew of the protected 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); *Dobruck v. Department of Veterans Affairs*, 102 M.S.P.R. 578, ¶ 19 (2006), *aff'd*, 212 F. App'x. 997 (Fed. Cir. 2007).

¶12 To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 26 (2005). Where there has been a hearing and the record is complete, as is the case here, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving illegal retaliation. *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005).

¶13 To show retaliation using circumstantial evidence, an appellant must provide evidence showing a “convincing mosaic” of retaliation against her. *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994); *FitzGerald v. Department of Homeland Security*, 107 M.S.P.R. 666, ¶ 20 (2008). A mosaic is a work of visual art composed of a large number of tiny tiles that fit smoothly with each other, a little like a crossword puzzle. “A case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction: ‘a number of weak proofs can add up to a strong proof.’” *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (quoting *Mataya v. Kingston*, 371 F.3d 353, 358 (7th Cir. 2004)). As a general rule, this mosaic has been

defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Troupe*, 20 F.3d at 736-37; *see, e.g., Culver v. Gorman & Co.*, 416 F.3d 540, 546-47 (7th Cir. 2005). Where an employer's motives or state of mind are relevant, the record must be carefully scrutinized for circumstantial evidence that would support an inference of retaliatory animus. *Cooney v. Consolidated Edison*, 220 F.Supp.2d 241, 250-51 (S.D.N.Y. 2002), *aff'd*, 63 F. App'x 579 (2nd Cir. 2003).

¶14 It is undisputed that the appellant engaged in protected activity, and that Dobson knew of her EEO activity. Thus, the first and second *Warren* criteria are met. Further, because the record is complete, we need not address the third *Warren* criterion, whether the removal action could have been retaliation, and we proceed directly to the fourth criterion, whether the appellant showed that she was removed because of her EEO activity. *See Simien*, 99 M.S.P.R. 237, ¶ 28; *see also Dobruck*, 102 M.S.P.R. 578, ¶ 20.

¶15 The appellant has failed to carry her burden of proving that her removal was in retaliation for her EEO protected activities. As previously noted, the appellant primarily asserts that Dobson threatened in a January 28, 2005 letter to take disciplinary action against her for filing an EEO complaint. IAF-I-1, Tabs 13, 15. She reiterates this argument on PFR. PFRF, Tab 1. However, the appellant misrepresents Dobson's statements in this letter, a Notice of Excessive Absence. Dobson merely noted that, during her recovery period, while her doctors recommended that she have no contact with the workplace, the appellant had written lengthy and detailed letters, sent numerous e-mails to agency employees seeking information, filed a long and detailed OWCP claim, filed informal and formal EEO complaints, made a lengthy allegation of contract office

irregularities, filed Freedom of Information Act requests for documentation, circulated a “to whom it may concern” letter concerning agency selection processes, and made numerous phone calls to agency employees. IAF-I-1, Tab 4, Part I, Subtab 4N. Dobson then opined that, if the appellant was experiencing work-related stress, it may have been the result of her own actions. We find that the letter did not suggest that her removal was based on her filing of EEO complaints; rather, it suggested that her continuing inability to return to work may be the result of her failure to follow her doctor’s advice to avoid contact with the workplace.

¶16 The appellant also argues that the administrative judge failed to consider evidence that others were treated differently and refers specifically to her exhibits AE-M and AE-P. PFRF, Tab 1. The first of these exhibits is a portion of the agency’s regulation on granting LWOP. IAF-I-1, Tab 25, Exhibit AE-M. We find that this document does not support the appellant’s argument that her removal was retaliation for EEO activity because the appellant has failed to show that the agency failed to follow its LWOP policy. The second is a list of employees who were approved for participation in the agency’s leave donor program. *Id.*, Exhibit AE-P. The appellant has offered no specific evidence that these employees are appropriate comparators on the basis that the circumstances of their leave requests are substantially similar to hers, but they did not file an EEO complaint. Indeed, only one of them, Crystal Life, is a member of the appellant’s work group. Further, the document shows that Life participated in the leave donor program for approximately 4 months in 2006. However, nothing in the record indicates that Life, like the appellant, informed her supervisor that she could not return to work for 6-8 months at which time she would be evaluated to see if she would ever be able to return to work.

¶17 Overall, the pattern of circumstantial evidence in this case falls short of showing that any agency official had a strong motive to retaliate against the appellant because of her EEO protected activities. Neither Dobson nor the

deciding official, Captain Robert P. Walden, was significantly involved in the appellant's EEO claims. Furthermore, Dobson's comment regarding the appellant's EEO complaints does not indicate any resentment toward the appellant's protected conduct. We therefore find that the appellant has failed to meet her burden of proof for this affirmative defense.

The agency's penalty of removal was reasonable.

¶18 The Board has articulated factors to be considered in determining the propriety of a penalty, such as the nature and the seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the employee's ability to perform her assigned duties, the consistency of the penalty with the agency's table of penalties, and the consistency of the penalty with those imposed upon other employees for the same or similar offenses. *Gmitro v. Department of the Army*, 95 M.S.P.R. 89, ¶ 7 (2003), *aff'd*, 111 F. App'x. 610 (Fed. Cir. 2004); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). The Board places primary importance upon the nature and seriousness of the offense and its relation to the appellant's duties, position and responsibilities. *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). Not all of the factors will be pertinent in every instance, and so the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Douglas*, 5 M.S.P.R. at 306.

¶19 Where, as here, the agency's charge is sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 9 (2003), *aff'd*, 104 F. App'x. 155 (Fed. Cir. 2004). In making this determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Singletary*, 94 M.S.P.R. 553,

¶ 9; *Douglas*, 5 M.S.P.R. at 306. The Board will modify or mitigate an agency-imposed penalty only where it finds the agency failed to weigh the relevant factors or the penalty clearly exceeds the bounds of reasonableness. *Singletary*, 94 M.S.P.R. 553, ¶ 9.

¶20 Although the appellant has not contested the reasonableness of the penalty on review, we note that the AJ failed to evaluate the *Douglas* factors in the initial decision or assess the reasonableness of the penalty. However, the deciding official, Captain Walden, properly considered the *Douglas* factors in the penalty determination. IAF-I-1, Tab 4, Subtab 4V; Subtab 4 at 527-30. In particular, Walden considered the nature and the seriousness of the offense; the appellant's lengthy service, her satisfactory job performance; her lack of prior discipline; and the consistency of the penalty with the applicable agency table of penalties. *Id.* Consequently, because the record demonstrates that the agency appropriately considered the *Douglas* factors, we find that the penalty of removal is within the bounds of reasonableness. Furthermore, while the AJ's failure amounts to error, it does not appear that the appellant's substantive rights were violated. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Accordingly, the appellant's removal is SUSTAINED.

ORDER

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the

United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

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. § 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 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.