

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
Washington, DC 20013**

**Laura R. Boltz, Petitioner,
v.
Michael J. Astrue, Commissioner,
Social Security Administration,
Agency.**

Petition No. 0320100006
MSPB No. [DE-0752-08-0436-I-1](#)

DECISION

INTRODUCTION

Petitioner filed a timely petition with the Equal Employment Opportunity Commission asking for review of an Opinion and Order issued by the Merit Systems Protection Board (MSPB) concerning her claim of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of the events at issue, petitioner was employed by the agency in the position of Assistant Regional Counsel, GS-905-14, Office of General Counsel in Denver, Colorado. Petitioner timely filed an EEO complaint alleging that she was discriminated against on the bases of sex (female), age (42), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when she was removed from her position effective November 23, 2007. On June 25, 2008, the agency issued its final decision on the complainant, concluding no discrimination occurred. Thereafter, petitioner filed an appeal with the MSPB.

Briefly, the agency proposed petitioner's removal based on the charge of "inappropriate behavior by an Assistant Regional Counsel." Petitioner was accused of making three false statements in a motion for extension of time to file a response brief filed with the District Court in July 2007. The record indicates that an attorney in petitioner's office retired in July 2007, and her cases were reassigned among the staff. Among them was one (hereinafter referred to as "the B case") that was reassigned to petitioner. On July 25, 2007, petitioner was contacted at home to determine whether she had filed a response brief for the B case, which was due on July 20, 2007. Petitioner had not filed the brief, asserting that she did not

recall being assigned the B case. To rectify the situation, petitioner promptly filed a motion for an extension to file the brief with the Court. In support of her motion for the extension, petitioner stated that: (1) the retired co-worker's caseload was assigned to petitioner and other attorneys in the office after July 13, 2007; (2) due to a docketing error, she was unaware that the B case had been assigned to her until July 25, 2007; and (3) she was currently busy working on a matter pending with the EEOC in which she was representing the agency.

Information in the record indicates that it is unclear exactly when the B case was reassigned to petitioner, but the agency argued that it was no later than July 2, 2007, and that petitioner should have known she had the case. Therefore, the agency claimed that petitioner's assertions to the Court in support of the motion for an extension were false. Further, the agency argued that petitioner had not done any work on the EEOC case (where she represented the agency) during the month of July. According to agency witnesses, upon reading petitioner's motion, and feeling that the three reasons given for requesting the extension were false, a meeting was held between petitioner and her supervisors. Thereafter, petitioner was told to leave her office and was later terminated from her position. In the notice of proposed removal, each of the three statements proffered by petitioner in support of her motion to the Court for the extension were cited as a separate specification of "inappropriate behavior" to justify the removal.¹

Following a hearing on the matter, an MSPB Administrative Judge (AJ) found that, with respect to specification 1, there was no evidence that any misstatement petitioner made regarding the date the retired coworker's caseload was reassigned to her occurred intentionally. The AJ found that although it appeared that all the retired coworker's cases were reassigned to other staff, including petitioner, by her last day of work (July 13, 2007), petitioner's testimony was credible that she believed that not all of the co-worker's cases had been reassigned by that date. The AJ noted that the supervisors admitted that July had been a chaotic month, and further that the retired co-worker herself testified that she did not believe all her the cases had been reassigned by her last day on July 13.

With respect to specification 2, the AJ found that the agency did not establish that petitioner was aware that case B had been assigned to her until she was called on July 25, 2007, and asked whether she had filed the brief in the case. The AJ noted that petitioner did not represent to the Court that the case was not assigned to her, only that she was unaware of the assignment. The AJ found petitioner's testimony credible and further found that it was corroborated by the paralegal who called to ask about the brief. The paralegal testified that petitioner was upset and "horrified" upon being told that the case was assigned to her and she had missed the due date.

As to specification 3, the AJ found that petitioner's statement that she was working on an EEOC case was unintentional. The AJ found that petitioner's testimony that she inadvertently included the language when she "cut and pasted" from a previous document was credible. The AJ found that there was no reason for petitioner to fabricate this language.

However, although the AJ found that there was no intent on petitioner's part to fabricate the matters cited in the specifications, he concluded that because the agency used a general

charge such as "inappropriate conduct" it did not have to prove intent. Therefore, since some incorrect statements were made to the Court, albeit unintentionally, the AJ found support for the agency's charges. However, the AJ determined that removal was too harsh a penalty and reduced the disciplinary action issued to a letter of warning.

With respect to petitioner's discrimination and reprisal claims, the AJ noted that petitioner failed to show that the agency's actions were a pretext for reprisal or discrimination. Although petitioner provided testimony and witnesses from other females regarding the atmosphere in the office, the AJ found that petitioner did not show that others were treated more favorably in substantially similar circumstances. The AJ noted that management's testimony that there was concern about the incorrect statements proffered to the Court because petitioner could lose her status as a Special Assistant United States Attorney. The AJ reiterated that petitioner was not removed for missing a deadline, but rather for the incorrect statements.

Petitioner sought review of the AJ's decision by the full Board. The Board first addressed petitioner's retaliation and discrimination claims, concurring with the AJ's determination that she failed to present evidence that other attorneys were treated more favorably despite engaging in inappropriate behavior by making allegedly false claims in a court filing. The Board also found that there was no error by the AJ in focusing on whether petitioner had met her overall burden of proving discrimination or retaliation rather than on establishing a prima facie case. Thus, the AJ's findings concerning petitioner's discrimination claims were upheld.

However, the Board found that the agency used terms in its removal notice such as petitioner "knew" and "was well aware" that the case had been assigned to her. Additionally, the agency stated that the statements were "false" and that petitioner "intentionally misstated" the true facts. Thus, the Board found that the agency's charges included the specific intent required for a falsification charge. The Board held that the agency had to prove that petitioner knowingly provided wrong information, with the intent of defrauding, deceiving, or misleading the agency. Given the AJ's findings that petitioner did not intend to mislead the court, the Board found that the agency's specifications supporting the removal could not be sustained. As a result, the Board reversed the AJ's initial decision upholding the charges and finding that some disciplinary action was appropriate in this case. The Board ordered the complete cancellation of the disciplinary action and the restoration of petitioner to her position with an appropriate backpay award.

Although she prevailed before the Board and has been reinstated to her position with the agency, petitioner filed the instant appeal, requesting that this Commission reverse the Board's conclusion that the removal, although improper, was not the result of unlawful discrimination or retaliation. Petitioner asserts that she is entitled to additional relief such as compensatory damages to make her whole for the harm she suffered as a result of the removal.

ANALYSIS AND FINDINGS

EEOC regulations provide that the Commission has jurisdiction over mixed case complaints 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).

To prevail in a disparate treatment claim such as this, petitioner must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the agency has articulated legitimate and nondiscriminatory reasons for its conduct. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-17 (1983); *Holley v. Department of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997). As noted by the MSPB AJ, management witnesses testified that the removal action was instituted because of a belief that petitioner had made false statements to the Court in support of her motion for an extension of time. This is a sufficient articulation by management of its reasons for instituting the removal action against complainant.

To ultimately prevail, petitioner must prove, by a preponderance of the evidence, that the agency's explanation is a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Holley v. Department of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997); *Pavelka v. Department of the Navy*, EEOC Request No. 05950351 (December 14, 1995). The Commission finds assuming petitioner has established a prima facie case of discrimination and reprisal, she has failed to show that the agency's reasons were a pretext for reprisal or discrimination.

Petitioner argues that she produced other evidence that discrimination and/or retaliation played a role in the decision to terminate her. She points to the testimony of several female coworkers who were also over 40 years old, and had filed EEO complaints, who expressed their perceptions that the supervisors (who were also responsible for the removal action against petitioner) treated them differently and less favorably than other attorneys in the office.² The MSPB AJ specifically considered this testimony in his decision, but concluded that it did not amount to a "convincing mosaic" of discriminatory treatment towards petitioner. Petitioner argues that the MSPB AJ erred in ruling that evidence presented regarding the lack of discipline of another attorney was not relevant to proving discrimination in this case. We note that the AJ justified his conclusion based on his finding that the alleged misconduct committed by the comparator (alleged inappropriate conduct with two women in the office) was very dissimilar to the petitioner's alleged misconduct (falsification of a court document). Substantial evidence of record supports the AJ's ruling in this matter. We do note that petitioner also presented evidence suggesting that this same comparator also submitted a motion to the Court containing errors. However, the AJ found credible the supervisor's testimony that, unlike petitioner, any errors in the comparator's motion "were not material misrepresentations, more carelessness in what he called the document, what he

named it." Hearing Transcript, October 30, 2008, at 174. There is nothing in the record to justify not deferring in this matter to the credibility determinations of the MSPB AJ.

Petitioner also argues that the MSPB AJ erred in excluding the testimony of two other similar witnesses on the grounds of irrelevance or cumulative testimony. Based on our review of the record, we do not find adequate support for a finding that the AJ abused his discretion in this ruling.

Finally, we note that, while the AJ found that complainant had engaged in prior, protected EEO activity, he concluded that the evidence in its totality did not support a finding of an adequate nexus between the EEO activity and the removal action. Based on our review of the record, we find that while the evidence of record supports a prima facie showing of retaliatory motivation, this initial inference was successfully rebutted by agency management's articulation of legitimate, nondiscriminatory reasons for the removal action, which petitioner did not prove was a pretext for unlawful retaliation.

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 reprisal. The Commission finds that the MSPB's decision constitutes a correct interpretation of the laws, rules, regulations, and policies governing this matter and is supported by the evidence in the record as a whole.

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

January 5, 2010

Date

1 It is noted that agency management witnesses maintained that petitioner was not removed because she had not filed the brief by the original deadline, but solely because the reasons given in her motion for the extension were false.

The Commission also notes that management witnesses testified that in July 2007, there was a show cause order pending with a judge against petitioner, which raised some concern with management. Management witnesses stated that the judge had ordered petitioner to work with another attorney and the attorney alleged that petitioner had refused to do so. The record indicates that the matter was later dismissed and the judge accepted the explanation that the incident occurred because of a miscommunication. However, again the record establishes that the show cause order was not used by

management as a reason for petitioner's termination.

2 These witnesses testified, for example, that their work was excessively scrutinized, they were criticized in front of others, and threatened with unacceptable performance evaluations.

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P.O. Box 77960
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PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0408)

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 his or her 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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").