Shirley A. Perry V. U.S. Government Accountability Office

Docket No. 07-02

Date of Decision: January 29, 2008

Cite as: Perry v. GAO, No. 07-02 (1/29/08)

Before: Paul M. Coran, Administrative Judge

Headnotes:

Constructive Discharge

Exhaustion of Remedies

Jurisdiction

Motion to Dismiss

Motions Practice

Timeliness of Complaint

DECISION ON RESPONDENT'S PARTIAL MOTION TO DISMISS, OR IN THE ALTERNATIVE, PARTIAL MOTION FOR SUMMARY JUDGMENT

This matter is before the Personnel Appeals Board (PAB or Board) as a result of a Petition filed on behalf of Shirley A. Perry (Petitioner) by the PAB Office of General Counsel (PAB/OGC), dated August 15, 2007. Petitioner alleges that the U.S. Government Accountability Office (Respondent or GAO or the Agency) failed to promote her to a GS-12 Writer-Editor position in violation of the GAO Personnel Act (GAOPA), 31 U.S.C. §731, *et seq*. GAO filed Respondent's Partial Motion to Dismiss, or in the Alternative, Partial Motion for Summary Judgment (Motion) on December 21, 2007. Petitioner filed her Opposition to Respondent's Motion on January 16, 2008. For the reasons stated below, the Motion is denied except to the extent that Petitioner is precluded from presenting evidence in support of any claim (1) that her retirement was involuntary and/or constituted a constructive discharge;[1] and (2) seeking any remedy for the GAO Office of Opportunity and Inclusiveness (O&I) processing of her underlying EEO discrimination complaint beyond Petitioner's request to litigate the basis of Race discrimination in this proceeding.

[1] While Petitioner's Opposition (at 16-17) disclaims any contention of constructive discharge she seeks "to be reinstated and retroactively promoted. . . ." Petition at page 11. Petitioner retired from GAO on December 31, 2004. Petition ¶19.

I. INTRODUCTION

A. Background

Petitioner is an African-American female who was employed by the Agency as a GS-1082-11 Writer-Editor. Petitioner was 58 years of age when she was not selected for promotion to the GS-1082-12 Writer-Editor position in early 2004. Petitioner retired in December 2004. Petition at 2 and ¶24.

On March 3, 2004, an editing supervisor informed Petitioner that she had not been selected for either of the two GS-12 promotional opportunities for which she applied. Petition ¶8. "Immediately" thereafter Petitioner sent an email to higher management, the head of O&I, and an EEO counselor essentially alleging that pre-selection had occurred. Petitioner contacted the two O&I officials on several more occasions between March and April 2004 requesting an investigation of her non-selection. On June 17, 2004 the counselor sent Petitioner a letter notifying her of her right to file a formal employment discrimination complaint. On June 23, 2004 O&I received Petitioner's formal Complaint alleging Age discrimination regarding her non-selection for promotion to the GS-12 Writer-Editor position for which she had applied. O&I did not acknowledge receipt of Petitioner's Complaint or otherwise notify her of the issues that had been accepted for investigation. Petitioner retired on December 31, 2004, and one year later, after having heard nothing from O&I, she approached Sallyanne Harper, the Agency's Chief Administrative Officer (CAO), about her non-selection. Consequently, on February 21, 2006, Ms. Harper informed Petitioner that O&I had found no discrimination as alleged in Petitioner's Complaint and that O&I had closed the case on some unspecified date. Petitioner has not been provided O&I's Report of Investigation or a Final Agency Decision. Nor was she advised of her appeal rights. O&I's letter to Petitioner, dated March 9, 2006, acknowledged receipt of Petitioner's 2004 Complaint and stated that it was dismissing the Complaint after finding no unlawful discrimination had occurred. On February 21, 2006 Petitioner filed her Charge with the PAB Office of General Counsel alleging Age and Race (African-American) discrimination in her non-selection for promotion to the GS-12 Writer-Editor position. Petition ¶¶ 9, 15-27.

B. Petitioner's Causes of Action

The nine count Petition is predicated upon Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. §2000e *et seq.* (**Count I**); the Age Discrimination in Employment Act, as amended (ADEA), 29 U.S.C. §621 *et seq.* (**Count II**); 5 U.S.C. §2302(b)(1)(A) (derivative of Title VII) (**Count III**); 5 U.S.C. §2302(b)(1)(B) (derivative of the ADEA) (**Count IV**); 5 U.S.C. §2302(b)(4) (obstruction or deception regarding a person's right to compete for employment) (**Count V**); 5 U.S.C. §2302(b)(6) (granting preference or advantage not authorized by law) (**Counts VI and VII**); GAO Order 2335.6 (Competitive Selection Program) and GAO Order 2335.1 (Merit Promotion Program) in violation of 5 U.S.C. §2302(b)(12) (taking or failing to take a personnel action in violation of merit systems principles recognized in 5 U.S.C. §2301) (**Count VIII**); and GAO Order 2713.2 (Discrimination Complaint Process) and GAO Order 0130.1.26 (Office of O&I) (failure to properly process Complainant's discrimination Complaint in violation of 5 U.S.C. §2302(b)(12) (**Count IX**).

C. Respondent's Partial Motion for Dismissal or, in the Alternative, Partial Motion for Summary Judgment

GAO seeks dismissal of Petition **Counts I and III** on the ground that Petitioner failed to exhaust her administrative remedies because she did not allege Race discrimination in her Complaint with the Office of Opportunity and Inclusiveness. Motion at 1. The Agency moves for dismissal of Petition **Count IX** on the basis that "the processing of an employment discrimination complaint is not a 'personnel action' and may not form the basis of a section 2302(b)(12) violation." *Id.* at 2. Finally, GAO requests judgment against Petitioner's requested remedy of reinstatement on the basis that "the genuine material undisputed facts establish that Petitioner cannot prevail on such a claim [constructive discharge/involuntary retirement theory]." *Id.*

Counts I and III

The Agency points out that in Petitioner's formal discrimination Complaint with O&I, she did not check off the box alleging Race discrimination. Motion at 3, ¶16. GAO submits that the PAB's jurisdiction over discrimination claims is limited to appeals for claims timely made to O&I, pursuant to GAO Order 2713.2 (Discrimination Complaints Resolution Process) and 4 C.F.R. §28.98. GAO argues that Petitioner's failure to allege Race discrimination before O&I barred her under the PAB's regulations (4 C.F.R. §28.98(a)) from raising that basis in her Charge with the PAB Office of General Counsel.
Respondent supports its position with reference to Supreme Court and lower court precedents barring discrimination claims on failure to exhaust principles where plaintiffs did not allege newly proffered bases earlier in the administrative process (*e.g.*, sex discrimination, hostile work environment). Respondent notes that Petitioner only alleged Age discrimination in her Complaint with O&I "and there is no evidence that Petitioner ever informally raised the issue of race discrimination with O&I." Motion at 7.

Count IX

GAO asserts that Petitioner's allegation that the Agency failed to adhere to its published Discrimination Complaint Resolution Process (GAO Order 2713.2 and GAO Order 0130.1.26) in processing Petitioner's Complaint in violation of 5 U.S.C. 2302(b)(12) is not actionable because the processing of a complaint is not a "personnel action." Basing its position upon cited holdings of the PAB, U.S. Merit Systems Protection Board, and the Federal courts, GAO concludes:

> Thus, even assuming arguendo, that O&I failed to properly process Petitioner's claim of age discrimination, Petitioner suffered no loss of her underlying right to seek redress of her age discrimination complaint at the PAB. [Petitioner] was able to file a Petition at the PAB and did so. She is entitled to no further relief regarding the investigative actions of O&I.

Motion at 10.

Coerced Retirement or Constructive Discharge

Respondent points out that an employee's decision to resign or retire is presumed to be voluntary. Respondent refers to clear and unambiguous legal precedent, including that of the PAB, demonstrating the high burden an employee faces in establishing those adverse circumstances that would support a constructive discharge theory. Finally, Respondent relies upon Petitioner's failure to allege facts consistent with a constructive discharge construct and Petitioner's deposition testimony disproving the elements of a constructive discharge. Motion at 11-13. GAO seeks summary judgment on this issue.

D. Petitioner's Opposition to Respondent's Partial Dispositive Motion

Counts I and III

Petitioner argues that she timely exhausted her administrative remedies regarding her race-based non-selection discrimination allegation. While acknowledging that she alleged only Age discrimination in the formal Complaint she filed with O&I, "she did so in reliance upon information and advice from the OOI's then Deputy Director, who was functioning as her EEO Counselor." Opposition at 6. Petitioner specifically asserts that she removed her checkmark from the "Race" block on the Complaint form upon the advice of the EEO counselor. *Id.* On June 17, 2004, the counselor sent Petitioner a letter notifying her of her right to file a formal discrimination compliant, which she did on June 23, 2004. Thereafter, Petitioner was not contacted by O&I until March 9, 2006, when O&I sent her a letter dismissing her case.[2] Petitioner contends that the cases upon which the Agency relies regarding failure to exhaust are inapposite because there is no question that her Complaint to O&I was timely regarding her 2004 non-selection for promotion. Opposition at 7.

Petitioner contends, in the alternative, that the PAB has jurisdiction over her Race discrimination allegation even if she had failed to properly raise it before O&I because of the unique two-tiered nature of the GAO discrimination complaint process in non-adverse action cases. *Id.* at 8. Initially, she points out that she put the Agency on notice of the Race claim when she filed a Charge with the PAB/OGC (Opposition, Ex. 2). Petitioner submits that nothing in the PAB's regulations specifically precludes a charging party from amending EEO complaint allegations when filing a charge with the PAB/OGC, nor do they preclude the PAB/OGC from doing so in the course of an investigation. *Id.* Further, Petitioner avers that informative U.S. Equal Employment Opportunity Commission (EEOC) regulations and precedent permit such amendments to allow a complainant to include *like or related issues or claims*, even after a complainant has requested a hearing before an administrative judge. *Id.* at 9.

Finally, Petitioner notes that during the PAB/OGC's investigation of this matter GAO provided responsive copies and documents regarding both the Race and Age allegations. *Id.*

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[2] See Petitioner's signed [and purportedly notarized] Statement, dated Jan. 11, 2008, attached to her Opposition.

Count IX

Petitioner argues that the PAB has jurisdiction over her claim that OOI "mishandled" her discrimination claims. Petitioner contends that the cited PAB precedents to the contrary

> [are] premised on the flawed notion that GAO's failure to adhere to its own regulations in processing employee discrimination claims does not affect the PAB's ability to reach the merits of the claim [footnote omitted]. . . . Indeed, in this very case, the Board is presented with an instance where GAO improperly declined to process [Petitioner's] race discrimination claim only to invoke her alleged failure to do so as grounds for precluding Board jurisdiction on exhaustion grounds.

Opposition, at 14-15.

Petitioner also relies upon GAO Order 2713.2, which requires fair, thorough and timely complaint processing and the investigation and development of a complete and impartial factual record upon which to make findings on the matters alleged in the written complaint. Petitioner concludes that the PAB/OGC is authorized to investigate and prosecute such claims pursuant to its authority under 4 CFR §28.12(d)(1) to investigate violation of rights under the GAO Personnel Act. *Id.* at 15-16.

Petitioner addresses the Agency's contention that Petitioner erroneously premised this claim upon 5 U.S.C. §2302(b)(12), which is restricted to "personnel actions." First, Petitioner argues that the PAB had not relied on this authority in the cases cited by GAO. However, should the PAB now accept GAO's position, Petitioner would seek leave to amend her Petition to premise the claim on violation of the GAO Personnel Act rather than as a prohibited personnel practice.

Constructive Discharge

Petitioner categorically disclaims that she has raised a constructive discharge claim: "[N]o such claim appears on the face of the Petition, and [Petitioner] does not here proffer a legal claim that she was constructively discharged." Opposition, at 16-17.

II. ANALYSIS

A. Legal Framework

In addressing GAO's Motion for partial dismissal on failure to exhaust administrative remedies I am guided by Rule 12(b)(6) of the Federal Rules of Civil Procedure pursuant to 4 C.F.R. §28.1(d). In deciding a dismissal motion for failure to state a claim for which relief may be granted I "must accept as true all of the factual allegations contained in the [Petition]." *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (citing *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007)).

The Agency's Motion for partial summary judgment regarding constructive discharge is informed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law.

For a fuller discussion of this standard see *Gaston v. GAO,* Docket No. 99-02, Order of July 11, 2000.

B. Motion for Partial Dismissal

1. Failure to Exhaust

The Agency seeks dismissal of Counts I and III of the Petition on the ground that Petitioner failed to allege Race discrimination in the formal administrative Complaint she filed with O&I. GAO has presented a copy of Petitioner's said Complaint of discrimination, dated June 23, 2004, in which Petitioner only checked off the Age discrimination basis box. Motion, Ex. 3.

The Petition alleges that following the filing of Petitioner's Complaint with O&I on June 23, 2004, O&I did not formally or informally acknowledge receipt of her Complaint or otherwise notify her of the issues that had been accepted for investigation. Petition ¶17. Nor did O&I officials respond to Petitioner's inquiries about the status of her Complaint. Petition ¶¶17, 20. In 2005, following her retirement, Petitioner again inquired of O&I regarding her Complaint. After inquiries to GAO's upper management, Petitioner was advised on February 21, 2006 that O&I had closed her Complaint case at some unspecified date after finding no discrimination. Petitioner at no time received a Report of Investigation or Final Agency Decision in writing. Nor was she advised of her appeal rights. O&I provided Petitioner a letter, dated March 9, 2006, acknowledging receipt of her June 2004 Complainant and announcing its dismissal because O&I found no discrimination in her non-selection for the promotion in issue.

Petitioner filed her Charge with PAB/OGC, dated February 21, 2006, alleging discrimination on the bases of Race (African-American) and Age (58 at the date of alleged discrimination). The PAB/OGC investigated both bases and the Agency provided requested evidence addressing both bases. Petition, ¶¶15-27.

I am constrained to deny the Motion on two independent grounds. First, taking the Petition's allegations as true, as I must for purposes of a motion to dismiss, it does not appear that Petitioner's administrative Complaint was afforded even a minimum degree of process. There is no indication of any investigation or review, or that Petitioner was informed of her further procedural rights. Her requests for status reports were unheeded and she only learned of the Complaint's disposition from a manager outside of the EEO process. Finally, Petitioner's statement attached to her Opposition avers that she initially checked off the Race discrimination box on the Complaint form but that she removed it on the advice of the EEO counselor/Deputy

O&I Director. Based upon this scenario, I am constrained to conclude, in essence, there was no administrative process for the Petitioner to exhaust.[3]

Second, there is no question that Petitioner timely filed her claim with O&I regarding her non-selection for promotion to the GS-12 Writer-Editor position. Respondent was on notice from the very beginning as to the focus of Petitioner's claim. Although Petitioner formally may only have made the Age discrimination allegation in her Complaint with O&I, both grounds were formally raised with PAB/OGC and were investigated by PAB/OGC with the cooperation of the Agency.

My review of the authorities and the U.S. Government Federal Sector EEO complaints process convinces me that Petitioner was within her rights to add the Race discrimination basis in the Charge she filed with PAB/OGC.

The EEOC has held that a complainant may amend a complaint by adding a new basis (*e.g.,* Age) without changing the identity of the claim. *Schmaltz v. Babbitt*, 1997 EEOPUB LEXIS 3316 (Sept. 17, 1997) (citing *Dragos v. USPS,* EEOC Req. No. 05940563 (Jan. 19, 1995) (citing *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970)).

In a recent D.C. Circuit case, the Court found the inapplicability of holdings cited by Respondent to the extant circumstances.[4] *Weber v. Battista,* 494 F.3d 179, 184 (D.C. Cir. 2007). The Court stated, in pertinent part:

> In this case, we need not adopt either of the foregoing views in order to conclude, pursuant to her alternative argument, that Weber exhausted her administrative remedies with regard to her claim of discriminatory nonselection for the position of Deputy Executive Secretary. As contemplated in *29 C.F.R. § 1614.106(d)* and *Core*, that claim "could have reasonably been expected to grow out of" her earlier complaint concerning her nonselection as Acting Deputy Executive Secretary, and the two are therefore "like or related." The OEEO may entertain such a claim even though it was raised after the filing of the formal administrative complaint, *29 C.F.R. § 1614.107(a)(2)*, and here the OEEO did just that; by inquiring of Weber's immediate supervisor, Executive Secretary John Toner, the OEEO investigated and put the Board on notice of the matter. Therefore, we conclude Weber gave the Board an opportunity to resolve her claim administratively before she filed her complaint in district court. Accordingly, we remand this aspect of the case for the district court to resolve on its merits Weber's claim with respect to her nonselection as Deputy Executive Secretary.

In the sense of *Weber, supra*, Petitioner's Race claim is like and related to her Age claim; both arise from her non-selection for promotion to the GS-12 Writer-Editor position in 2004, as alleged in her original Complaint before O&I. Moreover, PAB/OGC investigated and put

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[3] Respondent's Answer to Petition for Review conceded that the Agency has no record of providing Petitioner an acknowledgement letter, statement of issues accepted for processing, a Report of Investigation or a statement of appeal rights regarding her administrative Complaint. Answer, ¶¶17, 23.

[4] 494 F.3d at 183-84 (discussing *AMTRAK v. Morgan,* 536 U.S. 101, 108 (2002), and *Ledbetter v. Goodyear Tire & Rubber Co.,* 127 S. Ct. 2162, 2166-72 (2007)); *see* Motion at 6-7.

Respondent on notice of this claim. Therefore, Respondent had the opportunity to resolve Petitioner's claim before the filing of her Petition with the PAB.

For each of the foregoing two reasons I conclude that Petitioner has exhausted her administrative remedies regarding her Race discrimination allegation.

2. Failure to Process Petitioner's Employment Discrimination Complaint

Petitioner alleges that the Agency failed to follow GAO Order 2713.2 and GAO Order 0130.1.26 in processing her employment discrimination Complaint and, thus, violated 5 U.S.C. §2302(b)(12). GAO responds that Petitioner has failed to state an actionable claim under PAB and other precedent. The Agency further notes that the Count does not establish that a personnel action occurred as required by 5 U.S.C. §2302(b)(12). Petitioner counters that the claim is actionable under the GAO Personnel Act and offers to amend its Petition to so allege.

The PAB has decided that allegations of improper or inadequate processing of GAO discrimination complaints by O&I or its predecessor office are not actionable through a Petition filed with the PAB. *Horton v. GAO*, PAB Docket No. 01-09 (Order of Sept. 19, 2002 at 1, 7); *Gaston v. GAO*, PAB Docket No. 99-02 (Order of July 11, 2000 at 3-4). *See also, Uberoi v. EEOC,* 180 F.Supp. 2d 42, 45-46 (D.D.C. 2001), *aff'd,* 36 Fed. Appx. 457 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 947 (2003). The rationale behind the PAB's holdings is that because the PAB process affords a petitioner a full and *de novo* opportunity to present and litigate his/her claims it would serve no useful purpose to permit the Petitioner to attack the Agency's earlier investigation of his/her claim.

This claim goes beyond critiquing the earlier investigation and instead extends to the core jurisdictional issue of whether O&I representatives impeded Petitioner's effort to claim Race discrimination, as alleged. Accordingly, Petitioner's pursuance of this claim is circumscribed to only that question.[5] However, in view of my earlier finding that Petitioner exhausted the administrative process regarding her Race discrimination claim this point now appears moot.

3. Constructive Discharge

It does appear that GAO has anticipated the constructive discharge theory of relief although Petitioner had not alleged that Petitioner's December 31, 2004 retirement was coerced and involuntary. In view of Petitioner's representation in her Opposition that she is not alleging constructive discharge, there is no basis to dismiss a claim that has not been made. However, I shall state for the record that I will not permit Petitioner to present evidence seeking to establish constructive discharge. Petitioner will be limited to other legal theories in pursuit of her requested reinstatement and related make whole remedies.

[5] Petitioner's Opposition offered the new argument that this claim may be entertained by the PAB pursuant to the GAO Personnel Act. Petitioner has offered to seek to amend her Petition accordingly. I shall reserve ruling on that argument until and unless it is properly before me.

III. CONCLUSION

For the reasons heretofore stated, Respondent's Motion for partial dismissal and partial summary judgment is denied.

SO ORDERED.