

John E. Smith v. U. S. General Accounting Office

Docket No. 01-05

Cite as: Smith v. GAO (8/23/02)

Before: Michael Wolf, Member

Retaliation

Prohibited personnel practice

Mootness

Work assignments

Damages

INITIAL DECISION

I. Background

Petitioner, John E. Smith, commenced his employment with the Respondent, U.S. General Accounting Office (GAO or the Agency) in 1980 and was continuously employed in the Personnel Office (now Human Capital Office) until his retirement in January 2002. From 1996 through January 2002, he was assigned as a GS-14 Personnel Management Specialist in the Policy and Program Development Branch (PPDB) of the Personnel Office. At all times relevant to this proceeding, Petitioner's immediate supervisor was Richard A. Smith, Jr., Director of PPDB, and his second level supervisor was Patricia M. Rodgers,¹ Director of Personnel.

The Petition for Review (Pfr), filed on March 12, 2001, claimed that Richard Smith and Patricia Rodgers had engaged in unlawful retaliation against Petitioner within the meaning of 5 U.S.C. §2302(b)(9)(A), which makes it a prohibited personnel practice for an employing agency to "take or fail to take ... any personnel action against any employee because of— (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation..."² The Petition for Review cited the following examples of protected activities that drew retaliatory responses from Mr. Smith and Ms. Rodgers:

¹ Ms. Rodgers retired from the Agency in June 2000. Tr. 120.

² Section 2302(b) is incorporated by reference into the General Accounting Office Personnel Act, 31 U.S.C. §§731, 732(b)(2), and is thereby applicable to GAO employees.

1. In 1988, Petitioner was made a designated representative in a class action lawsuit against the Agency, alleging discrimination against African-American employees.
2. Petitioner filed three complaints of discrimination based on his race with the Agency's Civil Rights Office (CRO). Petitioner filed these complaints in October 1991, September 1996 and November 1996.
3. Petitioner filed charges with the Personnel Appeals Board Office of General Counsel (PAB/OGC) alleging retaliation, violations of regulations and discrimination. These charges were filed in June 1993, December 1993 and June 1998. The last of these three charges named Richard Smith and Patricia Rodgers as responsible officials.
4. Petitioner was President of the Agency's chapter of Blacks in Government (BIG). In that capacity, he assisted other employees in exercising their employment rights and communicated repeatedly with senior Management opposing several proposed orders, including the Agency's proposed changes to its reduction-in-force regulations.

Petitioner alleged that Richard Smith and Patricia Rodgers retaliated against him by giving him work assignments that were of lesser quality and quantity than those given to his three peers in PPDB and that, as a result of these assignments (or lack of assignments), he was "unable to obtain higher performance appraisal ratings and awards during FY 1999." PFR ¶3. Petitioner alleged that, in 1998 and 1999, he complained to Richard Smith about the lack of work being assigned to him and the fact that his assignments were not comparable to those given to the other three GS-14s in PPDB. Petitioner contended that these requests and complaints were not heeded and that, as a result, he received an unfair and inaccurate performance appraisal in FY 1999;³ he also complained that he had not been recommended for a monetary award in 1999. PFR ¶¶17, 25.

As a remedy, Petitioner requested a finding that the Agency committed a prohibited personnel practice "by retaliating against him because of his prior appeal activity" and an order directing the Agency to "provide him assignments comparable in quantity and quality to the assignments given to his peers in PPDB." PFR ¶¶28, 29. He also requested that "the [Personnel Appeals] Board, at the very minimum, direct GAO to rescind the appraisal ratings he received on his FY 1999 performance appraisal and replace them with ratings of at least the 'Exceeds Fully Successful' level." *Id.* ¶29. Finally, Petitioner requested "such other relief as the Board may deem appropriate." *Id.* ¶30.

On January 3, 2002, Petitioner retired from the Agency. Hearing Transcript (Tr.) 8. Subsequent to his retirement, on January 15, 2002, the Agency amended Petitioner's 1999 performance appraisal to "Exceeds Fully Successful" in all performance dimensions; the original appraisal was removed from Petitioner's official personnel records. Pleadings File, Tab 19; Tr. 185-86.

³ Petitioner's 1999 appraisal consisted of "Fully Successful" in seven job dimensions and "Exceeds Fully Successful" in one job dimension. *Jt. Ex. 1* at 4.

On January 17, 2002, the Agency moved to dismiss the case or, alternatively, for summary judgment on the ground that the claims were moot, because Petitioner's retirement removed him from eligibility for GAO work assignments and because the revised performance appraisal provided Petitioner all of the relief to which he was entitled. Memorandum in Support of Motion to Dismiss at 5. Petitioner opposed the Motion on the ground that the amended performance appraisal did not "restore the *status quo ante*" because it did not provide him all of the relief to which he is entitled. Opposition to Motion at 2-3. Specifically, Petitioner contended that he was entitled to monetary relief for the improper denial of his monetary award in 1999 and for "pain, suffering and damage to his reputation." *Id.* at 3. On January 24, 2002, I ruled that the Agency's motion would be ruled upon after the close of the evidentiary hearing.

The trial was then conducted on January 28, 2002, at which time Petitioner was called as the sole witness in support of his case; the Agency's only witness was Richard A. Smith, Jr. After the conclusion of the hearing, Petitioner advised, through his counsel, that he was satisfied with the amended rating for FY 1999 that had been issued on January 15, 2002 and that he would no longer seek relief requiring a revision of his 1999 performance appraisal.⁴ However, Petitioner did not abandon his other requests for relief and emphasized that the facts giving rise to his complaint about the original 1999 rating remained relevant to the remedial issues in the case.⁵ The parties filed post-hearing briefs on March 15, 2002.

II. Findings of Fact

The parties agreed on all of the facts material to this case. Their disagreements revolve about the interpretation and legal import of those facts. The following are the facts necessary to decide the remaining issues in this case:

1. Petitioner was hired by the Agency in 1980. Tr. 7.
2. In the 1980s, Petitioner participated as a plaintiff in a class action lawsuit ("Long/Hawkins") filed against the Agency. Tr. 25. The complaint alleged racial discrimination against African-American employees in the Personnel Office. Tr. 92. Ms. Rodgers was a member of the covered class. Tr. 25, 66, 92.
3. In October 1991 and February 1992, Petitioner filed complaints of discrimination with the Agency's Civil Rights Office. P.Exs. 5, 6. Ms. Rodgers was at least aware of the February 1992 complaint. P.Ex. 7.
4. In June 1993 and December 1993, Petitioner filed charges with the PAB/OGC alleging prohibited personnel practices by the Agency. Pfr ¶8; Answer ¶8.

⁴ See Tr. 186-87.

⁵ Letter from Janice M. Reece, PAB General Counsel, to Joan M. Hollenbach, GAO Managing Associate General Counsel, Mar. 4, 2002 (Pleadings File, Tab 24).

5. Between 1995 and the end of 2000, Petitioner was the President of the Agency's chapter of Blacks in Government (BIG). Tr. 14. In this capacity, he represented the interests of African-American employees of the Agency in communications with Management, monitored the Agency's activities and programs for EEO impact and, on occasion, assisted other employees in the preparation of documents relating to Civil Rights Office complaints and grievances. Tr. 14-25; P.Exs. 1-4. Patricia Rodgers and Richard Smith were aware of Petitioner's role in BIG. Tr. 68.

6. Petitioner was assigned to PPDB in the Personnel Office in 1996 and worked there continuously until his retirement in January 2002. Tr. 8.

7. After his assignment to PPDB, Petitioner filed two charges with the CRO protesting the new assignment for being non-supervisory in nature and challenging his performance appraisal. He raised allegations of race discrimination and retaliation in these charges.⁶ Ms. Rodgers was named as a responsible official. Tr. 66-67, 101-03; P.Ex. 8.

8. At all relevant times, the PPDB unit had four Personnel Management Specialists, including Petitioner. Tr. 114; Jt. Exs. 1, 6, 9, 12.

9. Each Specialist in PPDB was assigned to one of the following four specific areas of responsibility: (1) position classification and related matters, (2) compensation and personnel staffing, (3) performance management, employee relations and appraisals, and (4) leave and work/family issues and time and attendance. Tr. 31-36, 115-16.

10. As head of the Personnel Office, Ms. Rodgers had the final determination concerning the work responsibilities for all GS-14 Personnel Management Specialists in PPDB. Pfr ¶11; Answer ¶11; *see* Tr. 30-34, 116-17. Ms. Rodgers assigned the broad subject matter to the four individuals. P.Ex. 9 at 4, 7, 13, 15-19. Richard Smith assigned individual tasks to them. P.Ex. 9 at 4, 7-8, 13-20, 23.

11. Prior to 1996, Petitioner had developed experience and expertise at the Agency in employee classifications. Tr. 74-76.

12. Upon his transfer to the PPDB unit in 1996, Petitioner was assigned the responsibility for personnel staffing and classification. Tr. 30. He believed that Patricia Rogers and Lee Bassoff (Richard Smith's predecessor as Assistant Director for PPDB) made the assignments.⁷ Tr. 30.

⁶ Although Petitioner testified that he filed a charge with the PAB/OGC in 1996 (Tr. 65-66), this apparently reflects confusion over the processes and timing of events. The documentary evidence, Pfr, and Petitioner's briefs all support the conclusion that the 1996 filings were with the CRO and not the PAB/OGC.

⁷ Although Richard Smith qualified his testimony as an assumption, he testified that the same two individuals originated the concept of the areas of responsibility for the unit. Tr. 117.

13. Petitioner complained to Ms. Rodgers and Mr. Bassoff at the time of his assignment in PPDB about the “dormant” nature of the work assigned to him. Tr. 33.

14. Richard Smith became head of the PPDB unit and Petitioner’s immediate supervisor in May 1997. Tr. 34, 116. The work assignments in the unit were already established at that time and did not essentially change thereafter. Tr. 116.

15. In FYs 1998 and 1999, Petitioner complained to Mr. Smith that he was not being given sufficient work and that he wanted to be given duties outside the classification area. Tr. 38-39, 49, 121. He also complained that he “wanted to be seen as an equal to the other staff members within that unit.” Tr. 39.

16. In June 1998, Petitioner filed a charge with the PAB/OGC alleging that Richard Smith and Patricia Rodgers committed prohibited personnel practices against him, including discriminating against him based on his race and retaliating against him in decisions concerning performance and work assignments. PFR ¶8; Answer ¶8. This was the first charge ever filed against Mr. Smith during his tenure at the Agency. Tr. 162-63. Prior to the 1999 appraisal process, Richard Smith and Patricia Rodgers were both notified by GAO’s Office of General Counsel of the need to give a statement concerning Petitioner’s 1998 charge. Tr. 163-64.

17. In FY 1999, Richard Smith began assigning additional duties to Petitioner outside of the classification area. Tr. 39-48, 86-87, 123.

18. In 1999, Petitioner requested a meeting with Patricia Rodgers to discuss his work assignments, but she declined to meet with Petitioner and instructed him to discuss his work assignments with Richard Smith. Tr. 58-59.

19. Petitioner’s FY 1998 performance appraisal rated him as “Exceeds Fully Successful in six job dimensions and “Fully Successful” in two job dimensions; this was the lowest overall rating given to any of the four Specialists in PPDB. Jt. Exs. 4, 5, 8, 11. Petitioner’s FY 1999 performance appraisal rated him “fully successful” in seven job dimensions and “Exceeds Fully Successful” in one job dimension; again, this was the lowest rating among all four Specialists in the PPDB unit. Jt. Exs. 1, 6, 9, 12. The 1998 and 1999 performance appraisals for the four Specialists were issued by Richard Smith and reviewed by Patricia Rodgers. Jt. Exs. 1, 4-6, 8-9, 11-12.

20. Two of the four Specialists in PPDB received monetary awards for their work in FY 1999. Jt. Exs. 14-15, 19-20; P.Ex. 9 at 20-21. Both of these employees were given “Outstanding” ratings in six job dimensions. Jt. Exs. 6, 9.

21. The third PPDB Specialist received no award for FY 1999 and was rated “Outstanding” in one dimension, “Exceeds Fully Successful” in six dimensions, and “Fully Successful” in one dimension. Jt. Ex. 12; *see* Jt. Ex. 16.

22. In FY 2000, all employees of the Personnel Office were given awards. Tr. 165.

23. Petitioner retired from the Agency on January 3, 2002. Tr. 7, 73.

24. On January 15, 2002, the Agency unilaterally amended Petitioner's performance appraisal for FY 1999, giving him an "Exceeds Fully Successful" rating in all eight job dimensions. Tr. 185-86.

25. By letter dated March 4, 2002, Counsel for Petitioner advised the Agency and the Board that Petitioner "has determined that he is satisfied with the increased ratings" for FY 1999 and would not seek further adjustment to that performance appraisal. *See* Letter, *supra*, n.5.

III. Conclusions of Law

As a result of Petitioner's retirement and the subsequent revision to his 1999 performance appraisal, the primary issues to be decided are whether Petitioner made out a case of a prohibited personnel practice under 5 U.S.C. §2302(b)(9) and, if there is such a violation, whether he is entitled to the requested relief. Petitioner argues that "the remaining issues in this case—the failure to grant an award and Petitioner's entitlement to further relief for denial of work assignments—are not rendered moot by the Respondent's unilateral action." P.Post-hearing Br. 31. Petitioner seeks other relief for the alleged retaliatory denial of assignments, including compensation for "pain, suffering and damage to [Petitioner's] reputation" and a monetary award for FY 1999. *Id.* 32. Petitioner also specifically requests an order "retroactively increasing his 1999 salary to a GS-15 grade level, or in the alternative, the GS-14 Step 10 grade level." *Id.* 33. The Agency argues that his case is moot because Petitioner already has obtained all of the relief to which he is entitled. R.Post-hearing Br. 13.

Initially, I conclude that Petitioner has established that the revision to his FY 1999 performance appraisal did not render the case moot. The Agency cited the decision of the Merit Systems Protection Board in *Currier v. United States Postal Service*, 72 MSPR 191 (1996) for an appropriate definition of mootness:

[O]nce Board jurisdiction has attached, it cannot be divested based on mootness unless the appellant has received all of the possible relief he sought before the Board, i.e., unless it is impossible for the Board to grant any further effectual relief. [*Id.* at 195.]

I agree with this definition and would apply it to the instant case. *See also County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Willis v. GAO*, PAB Docket No. 95-03 (Apr. 23, 1996), *aff'd*, 98 F.3d 1359 (Fed. Cir.) (Table); *Gatlin-Brown v. GAO*, PAB Docket No. 00-02 (Nov. 9, 2001) (Wolf, concurring).

Under the General Accounting Office Personnel Act, employees of the Agency are entitled to remedies comparable to those available to Executive Branch employees. 31 U.S.C. §§731, 732; *GAO v. GAOPAB*, 698 F.2d 516, 535 (D.C. Cir. 1983); *Turner v. GAO*, PAB Docket No. 94-07 at 25 (1995). The statutory remedies for both Agency and Executive Branch employees who

have been injured by actions violating Section 2302(b)(9) are found at Section 1214(g) of Title 5. The latter provision states:

If the [Merit Systems Protection] Board orders corrective action under this section, such corrective action may include—

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. [Emphasis added.]

In his Petition for Review, Petitioner explicitly averred that Ms. Rodgers' and Mr. Smith's conduct "directly impacted his FY 1999 performance appraisal ratings and his eligibility for awards." PFR ¶29 (emphasis added). He then requested, as a remedy, that the Board direct, "at a minimum" that his performance appraisal be amended. Although the Petition did not directly request that he be given a monetary award for FY 1999, that remedy was clearly contemplated and could not have surprised the Agency. Moreover, a monetary award must be deemed a "related benefit" for purposes of Section 1214(g).

Given the allegation that Petitioner's injuries included the denial of a monetary award in FY 1999, the Agency's unilateral decision to revise the FY 1999 performance appraisal did not provide him with all of the relief that he sought or that he might be entitled to in the event that he prevails on his claim that the Agency violated Section 2302(b)(9). Accordingly, I conclude that Petitioner's claims for relief were not rendered moot by the Agency's decision to revise his performance appraisal. At the very least, he was entitled to have his request for a monetary award adjudicated. Whether the record presented to me provided a sufficient evidentiary basis for granting that relief is a separate question that I address below.

A. Compensation for Denial of Work Assignments

1. Pain, Suffering and Damage to Reputation

Petitioner's claim for damages can be decided without actually reaching the merits of his claim under Section 2302(b) and without having to decide whether his Petition for Review adequately alleged this relief.⁸ Put simply, even if I were to find in favor of Petitioner with respect to all of his factual allegations and legal claims, he still would not be entitled to this particular type of remedy.

⁸ The Petition does not include a request for compensation for pain, suffering or loss to reputation. All it states in Paragraph 30 is that he seeks "such other relief as the Board may deem appropriate." The Agency contended that this prayer for relief was not sufficient to comply with the notice pleading requirements of the PAB's regulations.

Petitioner has recognized that he is not entitled to compensatory damages for the violation he alleges. P.Post-hearing Br. at 28-29. He contended, however, that he is not seeking compensatory damages, but rather has requested a make-whole remedy—one that restores the *status quo ante*. *Id.* This assertion does not withstand scrutiny and can be dismissed as a matter of law.

The only monetary loss that Petitioner claimed in this respect arose out of his testimony that Mr. Smith and Ms. Rodgers caused him to suffer humiliation and loss of reputation. Although his post-hearing brief (at 31) asserts that their treatment of him “was extremely painful and distressing,” there is only the briefest reference to his suffering in his testimony. Tr. 71. There is no evidence of pecuniary loss caused by the alleged pain and humiliation; Petitioner rests his claim solely on alleged non-pecuniary losses.

Section 1214(g) provides that employees who are the victims of a violation of Section 2302(b)(9) may be entitled to a make-whole remedy and “reimbursement for attorney’s fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.” The quoted provision is almost identical to Section 1221(g) of the Whistleblower Protection Act. Section 1221(g) was the subject of a recent analysis by the Federal Circuit in *Bohac v. Department of Agriculture*, 239 F.3d 1334 (2001). Noting that the doctrine of sovereign immunity requires the close scrutiny of any statutory provision that arguably waives immunity, the Court concluded that consequential damages cannot be equated with compensatory damages and that “section 1221, like section 1214, was designed to allow only for reimbursement of out-of-pocket costs.” *Id.* at 1342 (emphasis added). The Court’s ultimate conclusion was that “‘consequential damages’ in section 1221(g) is limited to reimbursement of out-of-pocket costs and does not include non-pecuniary damages.” *Id.* at 1343.

The decision in *Bohac* controls the instant case. As I recently concluded in another case (*Davis v. U.S. General Accounting Office*, Docket No. 00-05, 00-08 (2002)), “[b]ecause Congress intended the same scope of recovery under both Sections 1214(g) and 1221(g), it follows that Petitioner’s recovery here must be limited to pecuniary damages.” *Id.* at 55. In the instant case, Petitioner did not allege that he incurred pecuniary damages; he sought only non-pecuniary damages. Therefore, even if there were merit to his claim of a prohibited personnel practice, Petitioner would still not be entitled to a monetary remedy for his alleged pain, suffering and damage to reputation.

2. Request for Retroactive Salary Increase

Petitioner’s Post-hearing brief requests a retroactive salary increase in the form of either a promotion to GS-15 or an increase to GS-14 Step 10 level of pay. P.Post-hearing Br. 33. This argument is wholly unsupported in the record.

Preliminarily, the PfR does not request or even hint at this type of relief. The thrust of Petitioner’s complaint is that his “failure to obtain appropriate assignments directly impacted his FY 1999 performance appraisal ratings and his eligibility for awards.” PfR ¶29; *see also* ¶¶3, 25. Moreover, there was no evidence presented to indicate that Petitioner was denied any promotion

opportunity during the period in question. Beginning with the Petition, the focus of Petitioner’s case is on “assignments comparable in quality and quantity to . . . [those] given to his peers in PPDB.” *Id.* ¶29. The testimony revolved around the type of assignments that Petitioner and the other three GS-14s in the unit were given. There was no testimony concerning competition for promotion, nor any reference to any quality merit step increases for any individual. *See* Jt. Exs. 16-20; P.Ex. 9 at 20-21. Indeed, the record does not reflect the step increment for Petitioner or for the other Personnel Management Specialist who did not receive an award in 1999.⁹ There is no evidence that quality step increases were given at any time while Petitioner was in PPDB. On this record and this Petition, consideration of a retroactive salary increase would be inappropriate.

B. Monetary Award for 1999 Appraisal

Petitioner noted that two employees in PPDB were given monetary awards for their work in FY 1999 and that he did not receive an award. He also correctly pointed out that such awards are based on performance and performance appraisals. He argued that, because of his improper performance appraisal in FY 1999, he was deprived of the opportunity to be given an award. This remedy would be dependent upon proof of two things: (1) that his lowered performance appraisal was retaliatory and therefore in violation of Section 2302(b)(9), and (2) that the award is necessary to restore the *status quo ante*, *i.e.*, that it would place him “as nearly as possible, in the position [he] would have been in had the prohibited personnel practice not occurred.” *See* 5 U.S.C. §1214(g)(1). It is unnecessary for me to decide the first issue because, even if Petitioner were to prove the violation under Section 2302(b)(9), he could not satisfy the second test of entitlement to this remedy.

Petitioner’s rating for FY 1999 has now been revised to “Exceeds Fully Successful” in all job dimensions. He has conceded, through counsel, that this rating is appropriate and will not be the subject of any further litigation. By accepting the revised performance appraisal, Petitioner implicitly accepted that the revision represents what he would have achieved with assignments more to his liking.

The question then becomes whether Petitioner, with the revised rating, would have been likely to receive an award for his work in 1999. Without such proof, Petitioner cannot claim the make-whole remedy authorized by Section 1214(g)(1). In this respect, Petitioner failed to prove his case.

The four Specialists in PPDB received the following performance appraisals for FY 1999 (including Petitioner’s revised appraisal):

Employee 1	Six Outstanding, one Exceeds Fully Successful and one Successful.
Employee 2	Six Outstanding, two Exceeds Fully Successful.

⁹ The only reference to step level for any of the four individuals is found on the official Awards Request for each of the two who received awards in 1999. One of the awardees was a GS-14 Step 10 (Jt. Ex. 15), the other a GS-14 Step 7 (Jt. Ex. 20).

Employee 3 One Outstanding, six Exceeds Fully Successful and one Fully Successful.

Petitioner Eight Exceeds Fully Successful.

Employees 1 and 2 received monetary awards, while Employee 3 did not receive an award. The question is whether Petitioner, with his revised rating “would have” received an award if supervisors had considered his revised rating, as opposed to his original rating. Based on the record presented to me, I cannot reach this conclusion.

Employee 3 had an overall performance appraisal comparable to Petitioner’s revised rating, and she did not receive an award. In contrast, Employees 1 and 2 had overall ratings that far exceeded those for Petitioner and Employee 3. Absent additional evidence of the criteria used for granting awards in 1999, it is impossible to find that Petitioner’s revised rating would have placed him in the same category as Employees 1 and 2 for purposes of obtaining a monetary award. Accordingly, even if Petitioner proved a violation of Section 2302(b)(9) and proved his eligibility for a make-whole remedy, he cannot satisfy the standards set forth in Section 1214(g)(1) for claiming an entitlement to a monetary award.

SO ORDERED.