

ROBERTA H. GASTON v. U.S. General Accounting Office

Docket No. 99-02

Date of Decision: July 11, 2000

Cite as: Gaston v. GAO, Docket No. 99-02 (7/11/00)

Before: Jeffrey S. Gulin, Administrative Judge

Headnotes:

Disability Discrimination

Discovery

Motion to Dismiss

Qualified Individual with Disability

Reasonable Accommodation

Summary Judgment

Timeliness of Complaint

ORDER

PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

_____)	
ROBERTA H. GASTON,)	
)	
Petitioner)	
)	
v.)	Docket No. 99-02
)	
UNITED STATES GENERAL)	
ACCOUNTING OFFICE,)	
)	Date: <u>July 11, 2000</u>
Respondent)	
_____)	

ORDER

The Respondent, U.S. General Accounting Office (GAO), has filed a Motion to Dismiss and for Summary Judgment on the Petition for Review filed by Roberta H. Gaston, a former evaluator in the Washington, D.C. Office. The Agency seeks dismissal of Petitioner's claims arising before April 7, 1996;¹ claims not raised in her Civil Rights Office Complaint or PAB Office of General Counsel (PAB/OGC) charge; allegations challenging the investigations conducted separately by the Civil Rights Office and the PAB/OGC; and allegations concerning

¹ Respondent uses the date April 7, 1996 in several references in the Argument section of the Motion. See Motion at 8, 11, & n.9. In the Introduction, Respondent seeks dismissal of all claims arising before April 17, 1997. See Motion at 2. The reason for this discrepancy is not readily apparent.

lack of adequate guidance and standards on accommodations for disability. Motion at 2, 27.

Moreover, the Agency requests summary judgment on Petitioner's allegation that GAO violated the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, by failing to permit her to work at home as an accommodation for her alleged disability. Motion at 2, 27.

Responding *pro se*, Petitioner argues that she is a qualified individual with a disability; that she was treated disparately in her efforts to obtain an accommodation; that she was harassed by GAO management for seeking an accommodation and for pursuing her civil rights complaint. She contends that the lack of adequate guidance contributed to the discriminatory acts against her and that the question of lack of adequate guidance on seeking an accommodation may be adjudicated before the PAB. Petitioner's Response to Respondent's Motion to Dismiss and for Summary Judgment at 2.

Motion to Dismiss

GAO seeks dismissal of the claims arising earlier than 45 days prior to April 7, 1996, and those raised "for the first time in the petition for review," on the grounds of lack of subject matter jurisdiction. Motion at 2. Respondent argues that PAB jurisdiction is limited to discrimination claims timely made in a Civil Rights Office complaint and those that

are "reasonably related." Motion at 10-11. Respondent's interpretation of this standard, however, is too narrow for the circumstances presented here. What is "reasonably related" to an allegation of failure to accommodate may well extend to events prior to April 1996, as well as to theories that only become evident in the course of investigating such a complaint. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). Accordingly, at this juncture it is premature to determine the full scope of what, if any, allegations are reasonably related to the claim of failure to accommodate. Petitioner cannot be foreclosed from pursuing these theories based on the information now before the Board. Respondent's motion to dismiss this portion of the petition is therefore denied.

The Agency also argues that Petitioner's allegations concerning improper investigations by the Civil Rights Office and the PAB/OGC should be dismissed for failure to state a claim upon which relief can be granted. The Board is not privy to the investigative results or conclusions reached by the PAB/OGC; Petitioner's right to review before the Board goes to the merits of her complaint, not to review of any prior investigation. See 4 C.F.R. §28.12(c); GAO Order 2713.2, ch.6 ¶¶1, 4. Accordingly, this case does not offer a forum for challenging the investigations conducted by either the Civil

Rights Office or the PAB/OGC. The portions of the petition purporting to do so are, therefore, dismissed.

Nevertheless, Petitioner is not bound by the conclusions reached by either of those investigations and may proceed to present her best case before the Personnel Appeals Board. The Board will take a fresh look at her allegations.

The Agency also seeks dismissal of the claim that GAO lacked adequate guidance and standards concerning accommodations for disability on the basis that it fails to state a claim upon which relief can be granted. The Agency points to its Order 2306.1, Employment of Individuals with Disabilities (Jan. 17, 1992), and the requisite standards derived from the ADA, 42 U.S.C. §12111(8), to refute the charge of lack of standards. Respondent also states that Petitioner failed to exhaust administrative remedies on this issue. Respondent does not elaborate on its arguments.

The Agency is correct in arguing that lack of guidance is not a separate claim cognizable under the ADA. For this reason, the claim seeking a remedy on the basis of lack of standards and guidance is hereby dismissed. However, the Agency's alleged lack of standards and guidance on reasonable accommodation may well be relevant to whether Respondent attempted to reasonably accommodate Petitioner's alleged disability and it may be relevant to the question of remedy.

Petitioner may present evidence on the lack of standards and guidance within this context, but not as an independent claim.

Motion for Summary Judgment

The Agency seeks summary judgment on Petitioner's allegations under the Americans with Disabilities Act, arguing that Petitioner cannot prove that she is a qualified person with a disability. Motion at 26-27. The applicable standard governing consideration of a motion for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. See 4 C.F.R. §28.1(d). Summary judgment "is proper, '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 any material fact and that the moving party is entitled to a judgment as a matter of law'." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because summary judgment deprives the nonmoving party of the opportunity to present evidence at a hearing, the party seeking judgment has the burden of proving the absence of any dispute as to material facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Madson v. GAO*, PAB Docket No. 96-07 at 13 (Apr. 23, 1997), *aff'd en banc* (Dec. 2, 1997); *Alamilla v. GAO*, PAB Docket No. 94-01 at 8 (Mar. 17, 1995), *aff'd mem.*, 78 F.3d 604 (Fed. Cir. 1996); *Rosenbaum v. GAO*, 2 PAB 257, 261-62 (1993), *aff'd en banc*, 2 PAB 368 (1994). In determining

whether there are any disputed issues of material fact, the nonmoving party's version of the facts material to the decision must be accepted. *Bishop v. Wood*, 426 U.S. 341, 347 n.11 (1976). To prevail on summary judgment, therefore, the moving party must present undisputed evidence in support of factual allegations which, standing alone, would permit judgment in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Malphurs v. GAO*, 2 PAB 1, 5 (1990).

Applying these legal principles to the instant case, the Board concludes that the Agency has failed to meet its burden for summary judgment. In reaching this conclusion, I have considered all the pleadings and supporting documents of record. There remains sufficient question as to whether Petitioner was a qualified individual with a disability, whether the Agency's accommodation offer was reasonable under the circumstances, and whether discrimination was a component of Petitioner's employment situation. Accordingly, the Agency's motion for summary judgment is hereby denied.

The parties should proceed to prepare for an evidentiary hearing. An order regarding the scheduling of a status conference for the purpose of setting briefing and trial dates will follow shortly.

Conclusion

Upon consideration of Respondent's Motion, and the Response thereto, and as set forth above, the Motion to Dismiss is hereby granted in part and denied in part. Respondent's Motion for Summary Judgment is hereby denied.

SO ORDERED.

DATED

7/11/00

/s/
Jeffrey S. Gulin
Administrative Judge