LEON GILL v. U.S. Government Accountability Office

Docket No. 08-07

Date of Decision: October 22, 2008

Cite as: Gill v. GAO, Docket No. 08-07 (10/22/08)

Before: Paul M. Coran, Administrative Judge

Headnotes:

Adverse Action

Motion to Dismiss

Progressive Discipline

Race Discrimination

ORDER

PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.

LEON GILL,	)	
Petitioner	)	
	)	
v.	)	
	)	**Docket No. 08-07**
UNITED STATES GOVERNMENT	)	
ACCOUNTABILITY OFFICE,	)	October 22, 2008
Respondent	)	
	)	

ORDER

I. Procedural Background

Petitioner, through the Personnel Appeals Board General Counsel (PAB/GC), on July 23, 2008, filed a Petition with the Board "for review of his proposed suspension." Respondent U.S. Government Accountability Office (GAO or the Agency) filed its "Unopposed Motion for Leave to File a Motion to Dismiss in Lieu of Response and Unopposed Motion to Stay Discovery and Motion for Extension of Time to File Motion to Dismiss (Opposed)," on August 8, 2008. The undersigned, on August 11, 2008, granted the Agency's August 8, 2008 Motion. GAO then filed its Motion to Dismiss on August 15, 2008, which Petitioner countered with a "Memorandum of Points and Authorities in Opposition to Motion to Dismiss," on August 25, 2008.

II. Legal Standards and Discussion

The Petition can withstand a motion to dismiss if it has plead "enough facts to state a claim to relief that is plausible on its face" and to "nudge [his or her] claims across the line from

conceivable to plausible." *Bell Atl. Corp. v. Twombly,* 550 U.S. ___, 127 S.Ct. 1955, 1974 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969.

Under the *Twombly* standard, a tribunal "deciding a motion to dismiss must not make any judgment about the probability of the plaintiff's success [and] . . . must assume 'all the allegations in the complaint are true'," and must give the plaintiff 'the benefit of all reasonable inferences derived from the facts alleged'." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.,* 525 F.3d 8, 17 (D.C. Cir. 2008).

Therefore, for purposes of considering the Motion to Dismiss I must consider the Petition allegations to be true. The Petition is predicated upon GAO's <u>proposal</u> to suspend Petitioner for two days on the basis of conduct unbecoming a GAO employee. Petitioner alleges that the Agency's true motivation in proposing his suspension was retaliation—specifically for his outspokenness with management officials on behalf of an African-American female applicant for the summer intern program at GAO's Huntsville, Alabama Field Office, where Petitioner is assigned. Petitioner alleges that he initially expressed his concerns about a qualified African-American applicant not being interviewed for a summer internship, and that he elevated his concerns when she was subsequently interviewed but not offered an internship. The applicant ultimately was hired to participate in the summer intern program.

Petitioner alleges that in proposing his suspension GAO engaged in unlawful discrimination and retaliation. Petitioner, *inter alia*, seeks rescission of the proposed suspension "and any ensuing action taken as a result of the proposed suspension," and expungement of "[a]ny reference to the proposed suspension <u>or to any ensuing action taken as a result of the</u>

proposed suspension from his official personnel file and any other Agency record." Petition at unnumbered page 4 ¶¶(4), (5) (emphases in original).

GAO seeks dismissal on the proffered basis that the asserted facts do not entitle Petitioner to a remedy. The Agency essentially contends that the Petition is not actionable under either prohibited personnel practice or Title VII retaliation paradigms because proposed disciplinary actions may not be challenged under either construct. GAO points to Federal sector Executive branch authority in support of its position.

In view of my holding below I do not find it necessary to decide whether proposed disciplinary actions are subject to prohibited personnel practice or Title VII retaliation challenge, while observing that retaliation presents the closer question.

GAO correctly notes at footnote 5 on page 8 of its dismissal Motion:

> Petitioner fails to state in his Petition that the proposed suspension was mitigated to a letter of reprimand issued in [sic] January 7, 2008, which Petitioner can ask to have removed from his file in January 2009.

While Petitioner, for some unapparent reason, failed to allege that consequent written reprimand, Petitioner contemplated such a reduced penalty by seeking rescission and expungement of any "ensuing action" taken as a result of the proposed suspension (Petition, unnumbered page 4, remedies ¶¶(4), (5)).

A review of Federal sector Executive branch precedent, as GAO suggested, is instructive and persuasive in this matter. In particular, that precedent relates to the impact of subsequently effected disciplinary actions upon proposed disciplinary action discrimination complaints.

The Equal Employment Opportunity Commission (EEOC) permits complainants alleging proposed disciplinary action to proceed when actual disciplinary action was imposed during the

processing of the underlying complaint. *See Anderson v. USPS,* EEOC App. No. 01975635, 1998 EEOPUB LEXIS 4001, where the Commission stated, in pertinent part:

> Appellant filed the instant appeal from the agency's decision dated June 9, 1997 dismissing a portion of appellant's complaint on the grounds that appellant alleged that a proposed action was discriminatory. The agency dismissed the allegation that appellant received a Notice of Proposed Removal on March 12, 1997. On appeal appellant argues that he was actually removed. On appeal the agency admits that appellant received a Notice of Removal on April 11, 1997, but argues that appellant has not filed an EEO complaint on the matter. The Commission has held that "where an individual received EEO counseling on a proposed action and the agency ultimately carries out the proposed action, the otherwise premature allegation merges with the effectuated action." *Siegel v. Department of Veterans Affairs*, EEOC Request No. 05960568 (Oct. 9, 1997) (citations omitted). The Commission finds that the Notice of Proposed Removal merges with the actual removal and that the agency should process the removal allegation. *Id.*

Accord, *Holland v. Department of Veterans Affairs*, EEOC App. No. 0120073184, 2007 EEOPUB LEXIS 4543 ("[w]hen a complaint is filed on a proposed action, and the agency subsequently proceeds with the action, the agency should consider the action to have merged with the proposal and process the complaint") (constructive discharge); *Harding v. Department of Agriculture*, EEOC App. No. 01A33391, 2003 EEOPUB LEXIS 6067 (proposal to suspend for 5 days subsumed by decision to mitigate to 1-day suspension); *Thomas v. Department of the Army*, EEOC App. No. 01990213, 2000 EEOPUB LEXIS 4401 (proposal to suspend merged with suspension).

My inquiry does not end here. GAO's dismissal Motion correctly points out that for the Petition to be actionable, Petitioner must have suffered "[a]n adverse personnel action . . . 'a tangible change in working conditions that produces a material employment disadvantage'." Motion to Dismiss at 8. I find for the purposes of this Motion to Dismiss that Petitioner has suffered the requisite harm.

As stated at footnote 5 of the Agency's Motion to Dismiss, GAO mitigated Petitioner's proposed suspension to a written reprimand, which it placed in his official personnel folder until at least January 2009. A retaliatory written reprimand in an employee's official personnel folder would certainly serve to discourage a reasonable person from again engaging in protected EEO activity. I take official notice of GAO Order 2751.1 (Discipline) (Sept. 26, 2005), which states as follows, at Chapter 2, paragraph 2:

> 2. LETTERS OF REPRIMAND. Letters of reprimand shall cite the specific acts for which the employee is reprimanded, and shall include a warning that repetition of the offense or other improper action may lead to a recommendation for more severe disciplinary action. They shall inform the employee that the reprimand may be grieved through GAO's grievance procedure, that a copy of the letter will be filed in his/her official personnel folder for a period of at least 1 year but not more than 3 years, and that he/she can ask, after 1 year, that the letter be removed from the official personnel folder. In most cases, it is best if the warning about more severe disciplinary action is stated in general terms (e.g., "repetition . . . may lead to more severe disciplinary action, up to and including removal").

I am satisfied that the issuance of a written reprimand to the Petitioner constituted such an employment "disadvantage" so as to render the matter actionable at this Motion to Dismiss stage. It subjects him to the risk of harsher disciplinary action than had the reprimand not been issued, and it is lurking in his official personnel folder for whatever purposes it may serve.

In view of the foregoing, GAO's Motion to Dismiss is <u>denied</u>. Therefore, the previous order relieving the Agency from responding to the Petition and staying discovery is dissolved herewith.

I have found that GAO's written reprimand of Petitioner merged with the underlying proposed disciplinary action alleged in the Petition. However, I instruct Petitioner to

file a motion to amend his Petition, accordingly and forthwith, consistent with the Board's Procedural Rules (28 C.F.R. §28.21).

SO ORDERED.

Dated: __10/22/08_____

____/s/_____
Paul M. Coran
Administrative Judge