MARIA VARGAS v. U.S. General Accounting Office

Docket Nos. 00-04; 00-06; 00-09; 01-01

Date of Decision: July 12, 2001

Cite as: Vargas v. GAO, Docket No. 00-04 (7/12/01)

Before: Anne M. Wagner, Administrative Judge

Headnotes:

Burden of Proof

Non-selection

Performance Ratings

Prima Facie Case

Retaliation

Summary Judgment

DECISION AND ORDER

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

MARIA VARGAS,	)	
	)	
Petitioner,	)	
	)	**Docket No. 00-04**
v.	)	**Docket No. 00-06**
	)	**Docket No. 00-09**
UNITED STATES GENERAL ACCOUNTING OFFICE,	)	**Docket No. 01-01**
	)	
	)	July 12, 2001
Respondent.	)	
	)	

DECISION AND ORDER

Barry D. Roseman, Esq., on behalf of Maria Vargas, Petitioner.

James M. Lager, Senior Attorney, Jeffrey D. Stacey, Senior Attorney, and Joan M. Hollenbach, Managing Associate General Counsel, for Respondent, United States General Accounting Office.

This matter comes before the Personnel Appeals Board (PAB) on Petitioner's Motion for Partial Summary Judgment and the United States General Accounting Office's Cross-Motion for Partial Summary Judgment. For the reasons set forth below, both motions are denied.

Petitioner, Ms. Maria Vargas, is a Band I, Full Performance Evaluator assigned to the Respondent's Denver Field Office. In July, 2000, she petitioned the PAB to review her claim that Mr. Richard Hembra, former Assistant Comptroller for Health, Education and Human Services Division, threatened to take disciplinary and other personnel actions against her if she continued to pursue her administrative appeals and other appeal activities. *See Vargas v. General Accounting Office (GAO),* PAB No. 00-04. She

thereafter filed three petitions for review alleging related claims. Specifically, she challenges her November, 1999 performance appraisal (PAB No. 00-06); Respondent's failure to place her on the Best Qualified (BQ) List and her nonselection for promotion in 1998 as well as her being denied a merit pay increase in the 1998 merit pay cycle (PAB No. 00-09); and, her nonselection for promotion in 1999 and alleged hostile work environment (PAB No. 01-01). Underlying each of these petitions is Ms. Vargas' charge that the Respondent's actions were in retaliation for her engaging in protected activity in violation of 5 U.S.C. §2309)(b)(9). The four petitions for review were consolidated by the Board at the status conference on March 6, 2001. *See* Order of March 8, 2001.

The instant motions for summary judgment were confined to two of the claims raised in PAB No. 00-09, namely, that the Respondent's failure to place Ms. Vargas on the BQ list, and her subsequent nonselection for promotion in 1998, were in retaliation for her having filed a discrimination complaint over her nonselection the previous year. The PAB's consideration of a motion for summary judgment is guided by the standards set forth in Rule 56 of the Federal Rules of Civil Procedure. *See* 4 C.F.R. §28.1(d). Thus, summary judgment is appropriate where "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." Fed.R.Civ.P. 56(c). The moving party's burden of demonstrating the absence of genuine issues of material fact can be met by showing that there is an absence of evidence to support the nonmoving party's case. *See Conroy v. Reebok Int'l, Ltd.*, 14 F.3d 1570, 1575 (Fed. Cir. 1994). But a nonmoving party bearing

the burden of proof on a particular issue cannot rest merely on its pleadings to overcome a properly supported motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49. (1986). Rather, the response must, by affidavits or otherwise, "set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248. The disposition of a summary judgment motion thus turns on "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." *Id*, at 251-52.

Here, the evidence presented in support of both motions is not so one-sided as to warrant the conclusion that one party must prevail as a matter of law. To establish a *prima facie* case of retaliation under 5 U.S.C. §2309(b)(9), the Petitioner must show that (1) she engaged in a protected activity; (2) the accused official knew of the activity; (3) the adverse personnel action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the personnel action. *See Webster v. Department of the Army*, 911 F.2d 679, 688-91 (Fed. Cir. 1990); *Warren v. Department of the Army*, 804 F.2d 654, 656, 58 (Fed. Cir. 1986). The Respondent can rebut Petitioner's *prima facie* case of reprisal with evidence that it would have taken the action anyway. *Webster*, 911 F.2d at 690.

GAO concedes that Ms. Vargas engaged in protected activity when she filed her discrimination complaint with GAO's Civil Rights Office on March 5, 1998. It further acknowledges that its decision not to promote her in 1998 is an adverse employment action. Consequently, the thrust of the dispute here is with regard to factors two and four of the applicable legal test, that is, whether the accused officials knew of Ms. Vargas'

discrimination complaint and whether there existed a causal connection between her having filed the complaint and her subsequent nonselection for promotion.

Ms. Vargas relies primarily on the evidence that the selecting official, Mr. James Soloman, acting Regional Manager of the Denver Field Office, knew of her complaint, and the proximity in time between the filing of her complaint and her nonselection for promotion to support her *prima facie* case. Presumably, Ms. Vargas would have the PAB infer from Mr. Soloman's knowledge that other officials in the Denver office, in particular the promotion panel members, may have been aware of Ms. Vargas' complaint. She also cites the deposition testimony of the promotion panel members reflecting their general inability to recall the reasons for rating her as they did as support for the argument that the Agency did not have a legitimate reason for not placing her on the BQ list for 1998.

GAO contends that the panel members did not have knowledge of Ms. Vargas' complaint. It relies on virtually identical affidavits of two panel members, Mr. Guthrie and Ms. Naiberk, attesting that they did not learn of the complaint until January 1999. The Agency does not provide evidence with regard to the knowledge of the other panel members. Respondent further maintains that although the selection panel members were generally unable to explain their promotion decision with regard to the 1998 selection process, that "GAO decision-makers can and will testify to the reasons for their promotion decisions."

As reflected by the foregoing, the record evidence at this stage is not so one-sided that one party must prevail as a matter of law. *See Anderson v. Liberty Lobby, Inc.* 477

U.S. at 251-52. Accordingly, the Petitioner's Motion for Partial Summary Judgment and GAO's Cross-Motion for Partial Summary Judgment are hereby DENIED.

SO ORDERED.

Date: 7-12-01

/s/
Anne M. Wagner
Administrative Judge