UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

MONICA L. BAKER,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
AT-0752-14-0589-I-1

DATE: December 12, 2014

Adam Jerome Conti, Esq., Atlanta, Georgia, for the appellant.

Christopher M. Kenny, Esq., Fort Gordon, Georgia, for the agency.

BEFORE
Pamela B. Jackson
Administrative Judge

INITIAL DECISION

On April 2, 2014, the appellant, Monica Baker, appealed the agency's decision to remove her effective March 21, 2014. The appellant held the position of Instructional Systems Specialist, GS-1750-12, at the Headquarters U.S. Army Center for Excellence, Fort Gordon, Georgia. AF, Tab 4.

The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511 (a)(1)(A), 7512 (1), and 7513(d). The hearing the appellant requested was held on July 15, 2014, in Augusta, Georgia. For the reasons set forth below, the agency's action is REVERSED.

ANAYLYSIS AND FINDINGS

The charge

The agency has charged the appellant with one specification of "Absence without leave (AWOL)/Unexcused Tardiness." The agency has the burden of proof on the charge by preponderant evidence. 5 U.S.C. § 7701(c)(1)(B).

The circumstances surrounding the charge

The record reflects that the appellant, who has 17 years of federal service, was employed by the agency as an Instructional Systems Specialist (Applied Technology), at the Staff & Faculty Development Branch of the Training Support Division, Fort Gordon, Georgia. The mission of the Staff & Faculty Development Branch is to provide training for soldiers, military members, civilians, and the occasional contractor who are or will be instructors and/or training developers for the military. Hearing CD (HCD)(Gamble Testimony). Some type of training occurs daily by one of nine training personnel and takes place between 8:00 a.m. and 4:00 p.m., Monday through Friday. *Id.* The appellant's first level supervisor, Dr. Angie Gamble, Chief of Staff Development Branch, preferred that the instructors were in the classroom prior to 8:00 a.m., so they could greet attendees as they arrived. *Id.*

The appellant began working under Gamble's supervision in November 2012. *Id.* The appellant's specific duties were to provide training, revise lesson plans, handle project officer activities, perform customer service, and perform administrative duties. *Id.* On November 8, 2012, the appellant signed a work schedule memorandum indicating that her work schedule would be 7:30 a.m. to 4:30 p.m., Monday through Friday. Appeal File (AF), Tab 5 at 127.

The record reflects that between November 2012, and February 8, 2013, the appellant was allowed to use sick and/or annual leave to cover her absences, if she arrived at work after 7:30 a.m. On February 8, 2013, however, Gamble issued a memorandum, stating that the appellant's "tardiness will no longer be approved," and effective Monday, February 11, 2013, the appellant would be

charged with AWOL on any day she reported to work after her scheduled start time, regardless of the reason because the appellant's "presence [was] required at work." AF, Tab 5 at 84. The memorandum further indicated that the AWOL "may be charged in 15-minute increments." *Id*. Thereafter, when the appellant requested to use leave for the time periods during which she was tardy, Gamble denied the appellant's request for leave and required the appellant to be carried in an AWOL status.

On June 27, 2014, Gamble issued the appellant a Letter of Reprimand for Unauthorized absences (AWOL) due to tardiness on numerous occasions between February and April 2013. AF, Tab 3 at 32-34. Sometime later, in an attempt to justify being carried in a sick leave status rather than AWOL status, the appellant provided to Gamble a letter from her physician, Leslie J. Pollard, M.D., dated August 1, 2013, stating that there would be times that the appellant would be "unable to make it to work" because of Rheumatoid Arthritis (RA), lower back pain, and backache. AF, Tab 7 at 38. Gamble, however, found the medical documentation insufficient to support the appellant's leave request to cover her tardiness. AF, Tab 7 at 38 and Hearing CD (appellant's testimony). The record does not reflect that the agency ever informed the appellant of why it found her medical documentation deficient.

Shortly thereafter, on September 13, 2013, the agency proposed to suspend the appellant for two days, alleging that the appellant arrived at work 15 minutes late on June 28, 2013. AF, Tab 4 at 29-31. On October 28, 2013, the appellant submitted a FMLA certification to the human resources office. The certification indicated that the appellant has a medical condition which causes severe joint pain, decreased mobility, fatigue, flu-like symptoms, back pain, stiffness, and flare-ups. It further indicated that the appellant would have flare-ups throughout the course of her life and that the severity of the flare-ups would be unpredictable. AF, Tab 7 at 29-30.

On the next day, October 29, 2013, the agency issued a decision suspending the appellant for two days based upon the appellant's alleged 15-minute late arrival on June 28, 2013. AF, Tab 8 at 24-26. That same day, the agency also issued to the appellant a Notice of Leave Restriction. AF, Tab 8 at 30-32. The leave restriction notice indicated that Gamble would not approve any additional leave for medical reasons unless the appellant submitted supporting documentation from a physician or invoked her rights under the Family and Medical Leave Act. (FMLA). *Id*. at 30. Two days later, on November 1, the agency again charged the appellant with 15 minutes of AWOL.

On December 3, 2013, the appellant received approval of her FMLA certification request, with the effective date being October 28, 2013. AF, Tab 7 at 37. Ten days later, on December 13, 2013, the agency issued to the appellant a proposed removal for one charge of AWOL/Unexcused Tardiness, specifying that the appellant was AWOL a total of 75 minutes over the course of four days: 15 minutes on October 21, 2013; 30 minutes on October 24, 2013; and 15 minutes on October 25, 2014. AF, Tab 8.

On January 6, 2014, the appellant submitted a written reply to the proposal notice, asking, among other things, that Colonel Churchwell recuse himself due to his involvement with the appellant's pending EEO complaints. In response, the agency appointed Colonel Robert Barker as the deciding official, who on March 20, 2014, issued a decision removing the appellant from federal service. AF, Tab 4 at 11-13.

In support of the AWOL charge, Gamble testified that she could see the appellant when she arrived at work, and the appellant was late to work on the four days at issue. Gamble would determine appellant's arrival time by looking at a clock when she first saw the appellant. If Gamble did not see the appellant at precisely 7:30 a.m., she would mark the appellant 15 minutes AWOL. Gamble stated that on the dates at issue, the appellant did not call to tell her she was running late, did not request to take sick leave at any time, was not absent due to

pre-approved leave, and did not tell Gamble she was sick when she arrived.[1] Gamble further testified that the appellant was scheduled to be in one of the Army Basic Instructor Courses the days at issue, and if the appellant was late on a day on which she was scheduled to conduct training, another staff member would have to step in and replace the appellant. Gamble stated she proposed the appellant's removal because the days identified in the proposal were a continuation of her "habitual tardiness." HCD (Gamble Testimony).

The appellant testified that although Ft. Gordon has a flexible schedule policy, Gamble set the hours for her office to be 7:30 a.m. to 4:30 p.m. The appellant was the course manager for small group instruction, and her one-week course was taught once a quarter. On the days at issue in October, she was not "on platform" as a primary instructor. She asserted that she was never tardy on a day she was scheduled to be on platform and was always prepared the day before.

The appellant further testified that she was diagnosed with RA in 2003. Her RA impacted her ability to get to work at a specific time because she had trouble sleeping at night, and upon waking, she was sometimes ill and in pain. She also awoke with mobility issues – the RA affected her ability to stand and walk, and though she could take medication for her symptoms, it took time for the medication to take effect. The appellant stated that she had no way of knowing when her RA would flare up, but when it affected her ability to get to work on time, she would contact Gamble. Although she was initially allowed to email or text Gamble, Gamble changed her policy to require the appellant to speak to her

---

[1] In an effort to bolster Gamble's claim that the appellant never informed Gamble that she was ill when she was late, the agency points to an electronic mail message the appellant sent Gamble on December 11, 2012, in which the appellant did not indicate she was late because she was ill, but by way of explanation states, "I don't know how I always get thrown behind." Appeal File, Tab 5, p. 126 of 225. I do not find the agency's evidence probative, however, given the electronic mail message pertains to an incident which occurred nearly a year before any tardiness incident at issue in the instant appeal.

on the phone. The appellant had difficulty contacting Gamble in the morning, as Gamble would not answer her calls. On occasion, when Gamble did not answer her phone, the appellant would call other employees to find out if Gamble was in the office. Although employees told the appellant Gamble was present, Gamble would not return the appellant's phone calls. If the appellant was late to work, even by one minute, Gamble would charge her with 15 minutes of AWOL; AWOL was input into the time and attendance system in 15 minute increments.

The appellant testified that on at least three of the dates upon which her removal was based, she was late to work because of her illness. She acknowledged that on one of the dates, she may have been delayed because of a traffic accident. She recalled, however, that on each of the dates, she tried to contact Gamble by leaving a voice mail message on her work phone and calling her cell phone, which Gamble did not answer. The appellant stated that she requested to take leave for the time she was late, but Gamble would not approve it. The appellant followed the general practice of submitting a leave request through the time and attendance system. When she requested to use leave for the time periods at issue, Gamble denied those requests and told the appellant to resubmit the time as AWOL. HCD (Baker Testimony).

Cheryl Butler worked with the appellant during the time frame at issue and corroborated the appellant's testimony that when the appellant was late, she would call to speak to Gamble, but could not always reach her. According to Butler, on several occasions, the appellant called her when she was unable to reach Gamble by phone, asking Gamble's whereabouts and asking Butler to let Gamble know she was ill. Butler would relay the appellant's messages to Gamble. When the appellant was trying to reach Gamble, on several occasions, Butler observed Gamble talking to other employees while her cell phone was ringing, but ignoring the call. Butler also recalled seeing other employees reporting to work after the appellant, and as far as she knew, no action was taken against those employees.

The agency abused its discretion in denying the appellant's request for leave.

Initially, I note that the agency has not charged the appellant with failing to follow leave procedures. Although Gamble testified that the appellant failed to request leave, there is no evidence in the record, other than Gamble's assertion, to support that claim. To the contrary, the record reflects that the appellant entered her leave requests into the electronic system, as was the customary practice, and Gamble informed her that she would not be allowed to take leave but would be carried in an AWOL status.

To sustain an AWOL charge, the agency must prove that the employee was absent and that either the absence was not authorized or a request for leave was properly denied. *See Cook v. U.S. Postal Service*, 67 M.S.P.R. 401, aff'd, 73 F.3d 380 (Fed. Cir. 1995)(Table); *Boscoe v. Department of Agriculture*, 54 M.S.P.R. 315, 325 (1992). In reviewing the propriety of an absence without leave determination, the Board will examine medical evidence presented for the first time to the Board, as well as any medical documentation presented to the agency. *Burge v. Department of the Air Force*, 82 M.S.P.R. 75, 89-90, ¶ 26 (1999). A charge of AWOL will not be sustained if the appellant presents administratively acceptable evidence that she was incapacitated for duty during the relevant period if she has sufficient sick leave to cover the period of the absence. *Valenzuela v. Department of the Army*, 107 M.S.P.R. 549, 553, ¶ 9 (2007).

In the instant matter, the appellant provided unrebutted testimony, corroborated by medical evidence in the record, that she suffers from RA, and the RA interferes with her ability to arrive at work every morning promptly at 7:30. Having had the opportunity to hear and observe the testimony of the appellant at hearing, based upon her manner and appearance at the hearing, I find that she has presented credible testimony, with no evidence of dissembling, that she was late due to illness on at least three occasions, and if not illness, a traffic accident on the fourth occasion. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458

(1987). I further find credible the appellant's testimony that she made Gamble aware that she suffered from RA, and informed her how the condition affected her. Additionally, I credit the appellant's testimony that she attempted to reach Gamble by phone on the dates in question to inform her of her circumstances, and thereafter requested leave for her absences in the customary manner.

Although Gamble attempted to justify her denial of leave by suggesting that the appellant had primary teaching duties on the dates at issue, and other instructors had to be pulled from other assignments to cover the appellant's absence, I did not find Gamble's testimony credible. Gamble's testimony implied that the appellant was scheduled to be "on platform" and teach her own course. Her testimony also insinuated that other employees had to be pulled from other duties and teach or otherwise perform the appellant's duties in her absence. Nothing in the record supports the assertion that the appellant was scheduled to teach her course on the days in question. At best, the evidence suggests that the appellant was scheduled to be a secondary instructor whose presence in the training room was only needed for technical reasons. Indeed, had the appellant failed to get to work in time to teach her own course, I would expect some documentation memorializing that fact to be in the record. Yet, the record is devoid of any such evidence. Moreover, even if the appellant were late to work for the periods specified by the agency, and not the few minutes as testified by the appellant, the appellant's tardiness would not have prevented her from being present in the classroom by 8:00 a.m. and performing her duties.

Furthermore, the record reflects that the appellant took leave the week of the alleged October offenses, which presumably would not have been allowed had she been teaching her own course that week. As for the week of the November 1, 2013 offense, considering that the appellant served a two-day suspension just prior to that date, the appellant was obviously not teaching her course that week either. Thus, I find that the agency has failed to establish any legitimate reason for denying the appellant's leave requests.

Given the record reflects that the appellant had leave to cover her absences[2] and that she was either incapacitated for duty, or detained for reasons beyond her control, I find Gamble abused her discretion, when she failed to approve the appellant's leave requests. Accordingly, the AWOL charges cannot be sustained.[3]

The agency discriminated against the appellant based upon her disability.

The appellant alleges that the agency discriminated against her by failing to accommodate her RA. The accommodation the appellant states that she was seeking was a flexible start time. The agency responds that the appellant never requested a flexible start time.

An agency is required to make a reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that the accommodation would cause an undue hardship on its business operations. 29 C.F.R. § 1630.09(a). In order to establish disability discrimination, an employee must show that (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a qualified individual with a disability, as defined by 29 C.F.R. § 1630.2(m); and (3) the agency failed to provide a reasonable accommodation. *Miller v. Department of the Army*, 121 M.S.P.R. 189, ¶ 13 (2014); *White v. Department of Veteran Affairs*, 120 M.S.P.R. 405, ¶ 9 (2013).

---

[2] Appellant's leave and earnings statement for the pay period ending on October 19, 2013, shows that, as of that date, appellant had a current leave balance of 7 hours of sick leave and 22 hours of annual leave. AF, Tab 7 at 28.

[3] In my prehearing conference summary I advised the parties that whether the agency complied with the requirements of the FMLA was at issue in this appeal. Given, however, the October dates occurred prior to the appellant's submission of her FMLA certification, they are not FMLA protected. 5 C.F.R. § 630.1203(b)(employees may not retroactively invoke FMLA entitlement). As for the November 1, 2013, date, the record does not reflect that the appellant tried to invoke FMLA protection for that absence. The appellant testified that she did not invoke the FMLA because her FMLA certification had not yet been approved.

In order for the appellant to establish that she is a disabled person entitled to the protection of the Rehabilitation Act and the ADA, as amended by the ADAAA, she must show that she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment. 42 U.S.C. § 12102(1), 29C.F.R. § 1630.2(g)(1), (2), (3); *Miller v. U.S. Postal Service*, 43 M.S.P.R. 473, 477 (1990).

It is undisputed that the appellant has RA, and that such is a permanent, crippling condition. The appellant testified that she was diagnosed with RA around 2003, but that it was in remission for some time. In 2012, her symptoms increased and her remission ended. Because of the joint pain and stiffness and back pain, the appellant must walk slowly, cannot stand for more than two hours, and must take frequent breaks when driving. The appellant testified that her medical condition directly impacts her ability to get to work. Some mornings she awakes ill or nauseous; other times she is in pain and unable to walk. On those days, the appellant takes pain medication but has to wait for the medication to take effect before she is mobile. She has no way of knowing when the problems related to her medical condition are going to occur. HCD (Baker Testimony).

The FMLA health care provider certification confirms that the appellant's medical condition began in 2003 and will last her lifetime. AF, Tab 7 at 29-32. The certification prohibited the appellant from heavy lifting and standing for long periods of time, and stated that the medical condition causes the appellant severe joint pain, decreased mobility, fatigue, flu-like symptoms, back pain, stiffness, and flare-ups. *Id.* The certifying doctor indicated that the appellant will have frequent flare-ups over the course of her life and that the severity of the flare-ups will be unpredictable. *Id.* An April 2, 2014 medical report by the appellant's physician added that the appellant experiences regular headaches and has had an increased number of flare-ups of her medical condition since August 2012. *Id.* at 45.

I find that the appellant's testimony and the evidence of record are sufficient to establish that she has a disability which substantially limits her in a major life activity. Accordingly, I find the appellant has established that she is disabled pursuant to 29 C.F.R. § 1630.2(g)(1)(i) or (ii).

The next issue to be resolved is whether the appellant is a "qualified individual with a disability." A qualified individual with a disability is a person with the skills, training and experience to perform the essential functions of a position, with or without reasonable accommodation. *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). Reasonable accommodation may entail modifications to the individual's current position or reassignment to a vacant position. *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o). Regular attendance is not a fundamental job duty of any position and cannot be considered an essential function. *Cottrell v. United States Postal Service*, EEOC Appeal No. 07A00004 (2001). Furthermore, there is no evidence that reporting to work at 7:30 a.m. sharp on non-teaching days is an essential function of the position the appellant holds. Nor, for that matter, has it been established that being at work 30 minutes before class time on teaching days is an essential function of the position the appellant held. Given the record reflects that the only supervisory requirement the appellant had difficulty meeting was reporting to work every day at 7:30 a.m., I find the record supports a finding that the appellant is a qualified individual with a disability.

In order to establish disability discrimination based upon the agency's failure to accommodate her, the appellant must show that: (1) she is a disabled person; (2) the action appealed was based on her disability; and (3) to the extent possible, that there was a reasonable accommodation under which the appellant believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned. *White v. U.S. Postal Service*, 117 M.S.P.R. 244, ¶ 16 (2012). *See also White v. Department of Veterans Affairs*, 120 M.S.P.R. 405, ¶ 9 (2013). After the appellant has established a prima facie

case, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations, as an agency must provide reasonable accommodation to the known limitations of a qualified individual with a disability unless to do so would create an undue hardship. *See* 42 U.S.C. §§ 12112(a), (b)(5)(A); *Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 11 (2006); 29 C.F.R. § 1630.9.

Under the Rehabilitation Act, an employee is not required to use the words "reasonable accommodation" when making a request. *Durr v. Secretary of the Treasury*, EEOC Appeal No. 0120080078 (2010); *Lyons v. Department of Veteran Affairs*, EEOC Appeal No. 0120053779 (2008). See also *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002). An accommodation request is a statement that an employee needs an adjustment or change at work for a reason related to a medical condition, including requests for paid or unpaid leave related to the disability. *Id.*; *EEOC Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation* (October 20, 2000). Reasonable accommodations may include a modified schedule or taking leave for a few hours at a time. *Cottrell* at 4.

I find that when the appellant called in and requested to take leave due to illness on the days she was tardy, she was in effect making a request for a reasonable accommodation. *See Wallace v. United States Postal Service*, EEOC Appeal No. 01A45428 (2005)(a request for a change at work related to a medical condition is a request for a reasonable accommodation). Despite having knowledge of the appellant's medical condition, rather that treating the appellant's request for leave as a request for accommodation, Gamble treated the appellant as if she were being defiant, even though she had more than ample evidence showing she was ill. I find that the agency too narrowly construed the appellant's medical documentation because it provided that the appellant might not be able to come to work, and did not specifically provide that the appellant's

medical condition might cause her to be "tardy." From the information the agency was provided, it could have easily extrapolated that her arthritic condition and the described symptoms could cause one to be late for work. Moreover, if the agency had doubts or questions, it could have made the appellant aware of such so that she could have had her physician address its concerns, but it did not.

Finally, the agency argues that an undue hardship would result from allowing the appellant to have a flexible start time. Its argument, however, is unpersuasive, as it has offered no evidence establishing how allowing the appellant a flexible start time on days she was not required to teach would impact its ability to offer classes at the prescribed times. Here, the agency had two choices: it could have allowed the appellant to take leave on the mornings her disability caused her to be tardy or it could have allowed her to adjust her start time on those days she was not scheduled to teach, so as to allow her to make up her time and finish her duties later in the day.[4] With such an accommodation, the appellant could have timely completed all of her job functions, and the agency's need to conduct its classes at a certain time would not have been impacted. I, therefore, find that the agency failed to establish that granting the appellant a flexible start time or approving requests for leave would cause undue hardship. Accordingly, I find that the appellant has established her claim that the agency discriminated against her based upon a disabling medical condition.

The appellant has established that the agency retaliated against her for engaging in Equal Employment Opportunity (EEO) activity.

Under 5 U.S.C. § 2303(b)(9), an agency is prohibited from taking an action against an employee because of the exercise of any appeal, complaint, or

---

[4] The appellant credibly testified that she was never late on a day on which she was scheduled to teach and in fact took steps to ensure she would timely arrive at work on those days. Moreover, the evidence of record fails to show that the appellant was ever late on a day she was scheduled to teach her course. Thus, the flexible start time accommodation only pertains to those days on which she was not scheduled to teach.

grievance right granted by any law, rule, or regulation. The appellant has alleged that the agency removed her from federal service in retaliation for her filing EEO complaints prior to her removal. In order for the appellant to prevail on her claim, she must establish that: (1) she engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Warren v. Department of the Army*, 804 F.2d 654, 668 (1986); *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5 (2008); *Cloonan v. United States Postal Service*, 65 M.S.P.R. 1 (1994). To establish a genuine nexus, the appellant must show that the action was taken because of her protected activity. *Murray v. General Services Administration,* 93 M.S.P.R. 560, ¶ 6 (2003).

There is no dispute that the appellant filed EEO complaints prior to being removed. The appellant's first formal EEO complaint was filed on October 25, 2012, prior to her working under Gamble's supervision. In March and April 2013, however, the appellant amended her complaint to include allegations against Gamble. The appellant filed a second EEO complaint on January 3, 2014, after Gamble had proposed her removal but before the March 20, 2014 decision to remove her. Appeal File, Tab 4. p. 55 of 66.

The agency stipulated not only that that the appellant had filed EEO complaints, but also that both the proposing and deciding officials were aware of the appellant's EEO complaints at the time they proposed and decided to remove the appellant. *See Prehearing Conference Summary*, Appeal File, Tab 9. The appellant has, therefore, met elements (1) and (2), above. The issues to be decided are whether the appellant has meet elements (3) and (4), *i.e.*, whether she has established that her removal could have been retaliation under the circumstances (element 3), and whether there is a genuine nexus between the alleged retaliation and the adverse action (element 4).

Given Gamble was named as one of the alleged discriminators in two of the appellant's EEO complaints, and Gamble proposed the appellant's removal just eight months after the appellant amended her EEO complaint to include Gamble, I find that the appellant has established an inference of retaliation[5] sufficient to satisfy the third *Warren* element. *Warren v. Department of the Army,* 804 F.2d at 654(if official having knowledge of the protected disclosure had even slight involvement in effectuating adverse action, this may be enough to justify an inference of a retaliatory motive sufficient for test (3)).

To determine whether there is a genuine nexus between the alleged retaliation and the removal action, the intensity of the motive to retaliate must be weighed against the gravity of misconduct charged. *Id.* The record does not reflect that that the deciding official, Robert Barker, was implicated in the appellant's EEO complaint, and he testified at the hearing that although he was aware of the appellant's EEO activity, he was unaware of the particulars. It, therefore, does not appear that he had any motive to retaliate against the appellant for engaging in EEO activity. Given, however, Gamble had a motive to retaliate against the appellant, and Gamble was the proposing official and clearly the driving force behind the appellant's removal, the question to be answered is, notwithstanding Barker's lack of motive to retaliate, whether Gamble's motive to retaliate is sufficient to establish a "genuine nexus" or whether Gamble's motive was a significant causal factor in the appellant's removal. *See Webster v. Department of the Army*, 911 F.2d 679, 689 (Fed. Cir. 1990), *cert. denied,* 502 U.S. 861 (1991).

Although Gamble denies that she retaliated against the appellant based upon any protected activity, I was not persuaded by her testimony because I did

---

[5] Given the appellant filed a second EEO complaint after Gamble proposed the appellant's removal, the appellant's second EEO complaint obviously had no effect on Gamble's decision to propose the appellant's removal.

not find Gamble to be a reliable witness. During her testimony she asserted facts, some of which have been discussed above, which were contradicted or disproven by other evidence in the record. Most glaringly, however, she testified that she did not know why the appellant had been transferred to her supervision, when the record contains an electronic mail message she wrote, dated January 29, 2013, reflecting she was fully aware of the reasons the appellant was transferred to her supervision. Appeal File, Tab p. 207 of 255. Furthermore, although Gamble does not specifically mention in her electronic message the EEO complaint the appellant filed against her previous supervisor, given Gamble knew the various "issues" the appellant had under her previous supervisor, I find it more likely than not that Gamble knew the appellant was reassigned to her supervision after having filed an EEO complaint against her previous supervisor.

I note further the testimony of Cheryl Butler, who credibly testified that when she filed her own EEO complaint against Gamble, Gamble held a meeting with employees about Butler's EEO complaint. According to Butler's unrebutted testimony, in the meeting Gamble announced, in Butler's presence, that Butler had filed an EEO complaint, discussed what the employees should say to the investigators, and informed the contractors they did not have to speak to the investigators. Butler added that in close proximity after filing her complaint, Gamble issued to her in one day, several written counselings.

Based upon Butler's manner and appearance at the hearing, I credit her testimony that Gamble made the statements Butler attributed to her. *Hillen v. Department of Army,* 35 M.S.P.R. at 458. I further find Gamble's reaction to be evidence of animus toward those who file EEO complaints. Accordingly, I find that the intensity of Gamble's motive to retaliate was high.

When weighing the high intensity of Gamble's motive to retaliate against the gravity of the misconduct charged, I must conclude that a nexus exists between Gamble's retaliatory motive and the appellant's removal. In coming to this conclusion, initially I note that the evidence clearly establishes that Gamble

was the engine that drove the decision to remove the appellant. Further, as discussed above, that the agency's evidence was inadequate to support its AWOL charge. Moreover, even if I had sustained the charge, I would be compelled to find the penalty of removal was not within the bounds of reasonableness. The appellant had 17 years of satisfactory service; yet, Gamble proposed her removal based upon four instances of tardiness, some of which were less than 15 minutes in duration, when the appellant had leave to cover her absences, and, when the appellant's tardiness did not impact the performance of her job duties,[6] notwithstanding Gamble's claim to the contrary. I also note that Gamble jumped from suspending a 17-year employee for two days to a removal, and three of the instances of tardiness relied upon for the removal occurred prior to the agency issuing the decision regarding the two-day suspension. Gamble's rapid progression from a two-day suspension to a removal for small periods of tardiness gives the impression that she was overly eager to get rid of the appellant and motivated by factors other than the appellant's late arrival.

Additionally, although I found that the appellant credibly testified that she informed Gamble that it was a medical condition which prevented her from reporting to work on time, even if I were to take that fact out of the equation, and assume that the appellant failed to inform Gamble that a medical condition impacted her ability to get to work at 7:30 a.m., I note that the evidence does not reflect that Gamble ever initiated a conversation with the appellant to find out why a high achieving 17-year employee was having difficulty getting to work on time. To the contrary, Gamble seemed impervious to an explanation, early on informing the appellant that it did not matter if she had a reason to justify her tardiness. Appeal File, Tab 5, p. 84

---

[6] I do not mean to minimize the importance of an employee reporting to duty at the time set by her supervisor, I am simply pointing out that the offense would have been more egregious if the appellant's tardiness had impacted her ability to perform the duties of her position.

Based upon the above, using the test set forth in *Warren,* I was not persuaded that an "imaginary supervisor" who knew nothing of the appellant's EEO complaints would have been led to propose the appellant's removal, given her 17 years of service, based upon four instances of tardiness and a past record consisting of a reprimand and a two-day suspension.

I was further persuaded that the appellant has presented a "convincing mosaic" of retaliation, *see Rhee v. Department of Treasury*, 117 M.S.P.R. 640, ¶ 22 (2012)(to establish retaliation using circumstantial evidence, an appellant must provide evidence showing a "convincing mosaic" of retaliation against her), consisting of the timing of the proposed removal, Gamble's previous questionable behavior regarding an employee who had filed an EEO complaint, the lack of persuasive evidence to support the charge against the appellant, the excessive penalty imposed given the nature of the charge, and the appellant's long years of service. Taking all the foregoing circumstantial evidence into account, I find that the appellant has established her claim of retaliation under 5 U.S.C. § 2302(b)(9).

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **March 21, 2014**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits

due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the

appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: _____/S/_____
Pamela B. Jackson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 16, 2015**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with supporting evidence and argument, must be filed with Clerk of the Board at the address below.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific

evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by

filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

DECISION CASE CITES LISTING

Monica L. Baker v. Department of the Army

Docket No. AT-0752-14-0589-I-1

Miller v. U.S. Postal Service, 43 M.S.P.R. 473 (Feb. 15, 1990) (No. PH07528910178)

Murray v. General Services Administration, 93 M.S.P.R. 560, ¶ 6 (2003).....14
NOTHING FOUND IN IC-LIST.DOC

Paris v. Department of the Treasury, 104 M.S.P.R. 331, ¶ 11 (2006).....12
Paris v. Department of the Treasury, 104 M.S.P.R. 331, 2006 MSPB 362, (Dec. 20, 2006)

Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991) 25
Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991) (No. 90-3318)

Rhee v. Department of Treasury, 117 M.S.P.R. 640, ¶ 22 (2012) 18
NOTHING FOUND IN IC-LIST.DOC

Valenzuela v. Department of the Army, 107 M.S.P.R. 549, 553, ¶ 9 (2007) 7
Valenzuela v. Department of the Army, 107 M.S.P.R. 549, 2007 MSPB 313 (Dec. 21, 2007) (DA-0752-07-0143-I-1)

Wallace v. United States Postal Service, EEOC Appeal No. 01A45428 (2005) ..12
NOTHING FOUND IN IC-LIST.DOC

Warren v. Department of the Army, 804 F.2d 654, 668 (1986).....14
Warren v. Department of the Army, 804 F.2d 654 (Fed. Cir. 1986) (No. 86-817)

Webster v. Department of the Army, 911 F.2d 679, 689 (Fed. Cir. 1990).....15
Webster v. Department of the Army, 911 F.2d 679 (Fed. Cir. 1990) (No. 89-3369), reh'g en banc denied, 926 F.2d 1149 (Fed. Cir.), cert. denied, 502 U.S. 861 (1991)

White v. Department of Veteran Affairs, 120 M.S.P.R. 405, ¶ 9 (2013) 10
NOTHING FOUND IN IC-LIST.DOC

White v. Department of Veterans Affairs, 120 M.S.P.R. 405, ¶ 9 (2013).....12
White v. Department of Veterans Affairs, 120 M.S.P.R. 405, 2013 MSPB 97 (December 12, 2013) (No. DA-0432-12-0484-I-1)

White v. U.S. Postal Service, 117 M.S.P.R. 244, ¶ 16 (2012).....12
White v. U.S. Postal Service, 117 M.S.P.R. 244, 2012 MSPB 4 (January 19, 2012) (No. SF-0353-09-0895-I-2)

THIS CITE CHECK CONDUCTED BY _____ ON December 11, 2014.