NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

THERESA DURAN,
Petitioner

v.

DEPARTMENT OF JUSTICE,
Respondent

2024-1803

Petition for review of the Merit Systems Protection Board in No. DE-0752-16-0116-I-2.

Decided: August 24, 2026

STEPHEN GOLDENZWEIG, Goldenzweig Law Group, PLLC, Bellaire, TX, argued for petitioner.

STEPHANIE FLEMING, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before TARANTO, HUGHES, and CUNNINGHAM, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Theresa M. Duran petitions for review of a decision of the Merit Systems Protection Board sustaining her removal from federal service. For the following reasons, we affirm.

I

Ms. Duran was employed as an industry operations investigator (IOI) with the Bureau of Alcohol, Tobacco, Firearms, and Explosives from October 2005 through November 2015. As part of her duties and responsibilities, Ms. Duran managed various regulatory investigations, analyzed industry member records and intelligence data, and developed strategies as investigations progressed. Her role required "extensive computer work." Appx. 491.

In December 2011, Ms. Duran began requesting accommodations because she was diagnosed with a neurological disorder that causes light sensitivity, neck pain, and fatigue. One of Ms. Duran's main requests was for her desk to be moved to another part of her cubicle to reduce her light exposure. She also asked for an increase in telework allotment, including during the week she served as the on-duty IOI. Ms. Duran's request to move her desk was granted, but her telework request was denied because certain responsibilities as the on-duty IOI required her to be in the office. The agency proposed that Ms. Duran could work in the office conference room until her cubicle was reconfigured. The agency also informed Ms. Duran that other interim measures would be implemented to accommodate her condition, such as drawing blinds in the conference room, moving her seat in the room, and turning off the overhead lights. Her cubicle was eventually reconfigured in June 2012, but Ms. Duran submitted a letter from her doctor indicating that her headaches had increased since her initial request, and that she would need ongoing accommodations because her light sensitivity was likely permanent. Her doctor recommended that she "should be given a work area with reduced or subdued lighting, or be allowed to telework." Appx. 1047. In October 2012, the agency requested additional information from Ms. Duran's medical provider about her condition, which she provided through her attorney.

Eventually, the agency fitted the conference room with blackout curtains in May 2013. This accommodation was initially helpful, but Ms. Duran's symptoms persisted. In February 2015, Ms. Duran asked for certain lights to be removed from the conference room during meetings she was to attend because they triggered her headaches. Her supervisor approved the request and agreed that the agency would seek to reduce the lighting in the conference room.

Ms. Duran then filed a Family and Medical Leave Act (FMLA) request for episodic leave two times per month, for one to two days each time. Her request was accompanied by a medical provider certification form, which indicated that (1) she was unable to work on a computer or attend meetings in a brightly lit room, (2) her new medical diagnosis of Baseline Chiari Malformation caused increased headaches and neck pain, and (3) she would be unable to work during flare-ups because of her episodic symptoms and medication. Ms. Duran's request was approved. In March 2015, the agency requested clarification on the restrictions listed on Ms. Duran's FMLA form. In April 2015, the agency explained that clarification was needed to evaluate the sufficiency of the reasonable accommodations that had been provided. Ms. Duran refused to provide the additional documentation requested by the agency.

Because Ms. Duran elected not to provide clarification about her medical conditions, the agency proposed her removal for medical inability to perform in July 2015. The agency's determination was based on the representations made in Ms. Duran's FMLA form and the accompanying medical provider certification form and based on her failure to provide clarification about her medical conditions. The agency then removed Ms. Duran from her position, effective November 20, 2015.

In December 2015, Ms. Duran appealed the agency's removal decision to the Board and asserted, among other affirmative defenses, that her removal constituted whistleblower reprisal in violation of the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8)–(9). Ms. Duran claimed that (1) she made several protected disclosures to the Director of Industry Operations about alleged violations of law, gross mismanagement, and abuse of authority by her supervisor; (2) she filed several complaints with the Equal Employment Opportunity Commission (EEOC); and (3) she identified other employees failing to follow agency guidelines and other federal requirements, including the FMLA notice obligations.

In July 2016, while her appeal was pending, Ms. Duran applied for disability annuity from the Office of Personnel Management, which was granted in July 2017. In her disability application, Ms. Duran attested that as early as August 2011, she knew that she would not be able to continue as an IOI and that "functional limitations, chronic pain, and overwhelming and debilitating fatigue made it impossible for [her] to continue in [her] position." Appx. 491. She expressly stated that she was no longer able to perform her job and that no accommodations would be possible "because of the nature, extent and severity of [her] medical conditions." Appx. 489.

In June 2017, an administrative judge of the Board held several hearings on Ms. Duran's removal and her whistleblower reprisal claim. In one such hearing, Ms. Duran repudiated the attestations she made in her disability application, claiming that she only signed the disability application stating that no workplace accommodations were possible because her attorney told her to do so. However, on February 8, 2018, the administrative judge determined that the agency proved its charge of medical inability to perform, particularly in light of Ms. Duran's attestation in her disability application that no workplace accommodations would be sufficient to enable her to perform her duties. *Duran v. Dep't of Just.*, No. DE-0752-16-0116-I-2, 2018 MSPB LEXIS 539, at *39 (Feb. 8, 2018) (*Initial Decision*). The administrative judge found Ms. Duran's testimony attempting to minimize the representations in her disability application to be "awkward, strained, and wholly unbelievable" and therefore did not credit it. *Id.* at *34. Instead, the administrative judge credited the evidence relied on by the agency and her own statements in her disability application. *Id.* at *37–39. The administrative judge also determined that Ms. Duran failed to establish by a preponderance of the evidence that she engaged in a protected whistleblower activity because "other than [Ms. Duran's] bare allegations, the record [was] devoid of any credible documentary or testimonial evidence regarding [her] allegations of reprisal for whistleblowing." *Id.* at *42.

Ms. Duran petitioned for review of the initial decision, which the Board denied on March 8, 2024. *Duran v. Dep't of Just.*, No. DE-0752-16-0116-I-2, 2024 MSPB LEXIS 1132, at *2 (Mar. 8, 2024) (*Final Decision*). While the Board determined that the agency did not establish a connection between Ms. Duran's condition and her performance deficiencies, it nonetheless sustained the removal because the agency proved, given that Ms. Duran's position required regular computer use, that there was a high probability that her condition would worsen if she continued working. *Id.* at *10. The Board also found that, rather than challenge the administrative judge's findings regarding her whistleblower defense, Ms. Duran set forth new alleged disclosures. *Id.* at *15. For example, Ms. Duran summarily alleged to the Board that she made protected disclosures to the EEOC regarding violations of law, rules, and regulations, including the agency's failure to abide by the FMLA, and she pointed to reports that purportedly demonstrated that her coworkers were not following policies. *Id.* The Board found that these allegations failed to amount to nonfrivolous allegations and failed to establish any error in the administrative judge's analysis. *Id.* Ms. Duran then petitioned this court for review of the Board's final decision.

II

We must affirm a decision of the Board unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *see also Baird v. Dep't of the Army*, 517 F.3d 1345, 1349 (Fed. Cir. 2008). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *McGuffin v. Soc. Sec. Admin.*, 942 F.3d 1099, 1107 (Fed. Cir. 2019) (citation omitted).

On appeal, Ms. Duran appears to argue that (1) the Board erred in finding that the agency proved its charge of medical inability to perform, and (2) the Board erred in determining that she failed to prove her affirmative defense of whistleblower reprisal. We address each in turn.

A

Regarding Ms. Duran's argument that the Board erred in concluding that the agency proved its charge, we are unpersuaded.

To the extent that Ms. Duran challenges the sufficiency of the evidence relied upon by the Board in its decision, we find that the Board's decision to sustain the agency's removal is supported by substantial evidence. The Board cited to and relied upon the credibility determinations in the initial decision regarding Ms. Duran's statements in her disability retirement application attesting that she was unable to perform her job due to "constant and chronic headaches, photosensitivity and loss of cognitive capacity." *Final Decision*, 2024 MSPB LEXIS 1132, at *5 (internal quotation marks omitted). The Board highlighted the administrative judge's finding that Ms. Duran's disability application was "extremely consistent" with the evidentiary record and her doctor's statements that Ms. Duran was prevented by her conditions from performing her job duties. *Id.* at *6 (quoting *Initial Decision*, 2018 MSPB LEXIS 539, at *37). And the Board noted that the administrative judge discredited Ms. Duran's testimony about her representations in her disability application because it found that it was "awkward, strained, and wholly unbelievable" and "completely self-serving to [her] legal claims." *Id.* (quoting *Initial Decision*, 2018 MSPB LEXIS 539, at *34). Importantly, the Board also incorporated the administrative judge's finding that, despite Ms. Duran's testimony, she had not corrected her disability application to reflect her position that she could work with reasonable accommodations—rather, she continued to accept a disability annuity. *Id.* at *6–7.

Ms. Duran claims that the Board failed to consider her physical limitations and whether reasonable accommodations were available. Not so. The Board considered Ms. Duran's arguments but found that the administrative judge correctly stated that Ms. Duran refused to cooperate with agency officials when it tried to gather clarifying information about her medical condition. *Id.* at *8–9. And the Board cited the administrative judge's consideration of Ms. Duran's disability application form, where she attested that "[n]o accommodations are possible because of the nature, extent and severity of [her] medical conditions. *Id.* at *9 (quoting *Initial Decision*, 2018 MSPB LEXIS 539, at *32). Thus, we see no error in the Board's reliance on the administrative judge's analysis, which considered the contents of Ms. Duran's FMLA request and disability application, as well as her sworn testimony, in its determination that the agency proved its charge of medical inability to perform. Because Ms. Duran's arguments on appeal fail to establish that the Board's decision was unsupported by substantial evidence, we affirm.[1]

B

Ms. Duran also challenges the Board's determination that she failed to articulate any nonfrivolous protected disclosure sufficient to support a whistleblower reprisal defense. To assert a whistleblower defense, an employee "must prove by a preponderance of the evidence that he or she made a protected disclosure under § 2302(b)(8) that was a contributing factor to the employee's termination." *Oliva v. Dep't of Veterans Affs.*, 176 F.4th 650, 656 (Fed. Cir. 2026) (internal citation and quotation marks omitted). Subject to limited exceptions, a disclosure of information is protected under the WPA if the speaker "reasonably believes [it] evidences—(i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). The test for whether a belief is "reasonable" is an objective one: "whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude

[1] Ms. Duran also asks us to disturb the Board's credibility determinations regarding testimony that she could have worked with reasonable accommodations, despite indicating otherwise on her disability application. Pet.Br. 23–26. But the Board's credibility determinations are "virtually unreviewable" on appeal. *Holmes v. U.S. Postal Serv.*, 987 F.3d 1042, 1047 (Fed. Cir. 2021) (citation omitted). We therefore decline to review these credibility determinations here.

that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act." *Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323, 1328 (Fed. Cir. 2020). On appeal, Ms. Duran only argues that she made protected disclosures related to (1) agency employees failing to follow agency and federal guidelines, and (2) the agency's failure to abide by the FMLA when it requested additional medical information beyond her FMLA certification form. We address each in turn.

Ms. Duran claims that she reported instances of agency employees failing to follow Firearm Inspection Report formatting instructions, which she contends constitutes a protected disclosure under the WPA. But rather than disclosing any violation of law, rule, or regulation, these communications only show Ms. Duran questioning why certain information, such as where explosive magazines were stored on an airplane, was missing from an inspection completed by her coworker. *See* Appx. 2029–33. 2029–33. Thus, Ms. Duran failed to establish that she reasonably believed that she was disclosing any of the circumstances covered by section 2302(b)(8). Ms. Duran alternatively argues that she believed these deficiencies were a public safety issue, and thus a protected disclosure under section 2302(b)(8), because it could "result in subpar reports that could expose the Agency to liability and scrutiny by Congress," and "failure to have the Federal Explosives Permittee properly store explosive materials . . . could have resulted in grave injury to the public." Pet. Br. 28. But these bare assertions that she claims were matters of public safety do not "concern[ ] specific allegations or evidence either of actual past harm or of detailed circumstances giving rise to a likelihood of impending harm," which is required for disclosures of dangers to public health or safety to warrant protection under the whistleblower protection laws. *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010). Ms. Duran was not required to identify a particular statutory or regulatory provision that she believed was violated if her "statement and the circumstances surrounding the making of those statements clearly implicate[d] an identifiable violation of law, rule, or regulation." *Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). However, because Ms. Duran's alleged disclosures fail to clearly implicate an identifiable violation of law, rule, or regulation, or a matter of public safety, we agree with the Board's determination that she failed to make a nonfrivolous allegation that she made a protected disclosure.

Ms. Duran's purported disclosure of a violation of the FMLA to the EEOC fares no better. She argues that she disclosed to the EEOC that the agency's request for additional medical information was a violation of the FMLA amounting to a violation of law, rule, or regulation. But Ms. Duran does not provide any evidence detailing these purported interactions, such as when the communications occurred, to meet her burden of proving that she made a protected disclosure under section 2302(b)(8). *See Whitmore v. Dep't of Lab.*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (explaining that, once the agency proves its case for removal, a former employee has the burden of proving by a preponderance of the evidence that he or she made a protected disclosure under the WPA to establish a prima facie case of reprisal for whistleblowing). Thus, we affirm the Board's conclusion that Ms. Duran fails to prove her affirmative defense of reprisal for whistleblowing.

III

We have considered Ms. Duran's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the final decision of the Board.

AFFIRMED

COSTS

No costs.