

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 115

Docket No. AT-0752-03-0286-P-1

**Robert E. Boots,
Appellant,**

v.

**United States Postal Service,
Agency.**

April 13, 2007

J.R. Pritchett, South Lyon, Michigan, for the appellant.

John C. Oldenburg, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Chairman McPhie issues a separate concurring opinion.

OPINION AND ORDER

¶1 The appellant petitions for review from an initial decision (ID) issued on December 28, 2005, denying his motion for compensatory damages under 42 U.S.C. § 1981a(a)(2). For the reasons set forth below, we GRANT his petition for review (PFR), REVERSE the ID, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The agency removed the appellant for inability to perform the essential duties of his position as a Tractor-Trailer Operator. The agency found, based on its medical evaluation, that the appellant's use of anti-seizure medication disqualified him from operating a commercial motor vehicle under Department of Transportation (DOT) regulations.¹ Further facts and the procedural history regarding his removal appeal are set forth fully in *Boots v. U.S. Postal Service*, 100 M.S.P.R. 513, ¶¶ 8-12 (Spec. Pan. 2005). In that decision, the Special Panel, which was convened pursuant to 5 U.S.C. § 7702(d)(1), deferred to the finding of the Equal Employment Opportunity Commission (EEOC) that the agency had discriminated against the appellant on the basis of his disability by relying on DOT regulations to remove him rather than conducting an individualized assessment of him to determine whether he posed a direct threat that could not be eliminated or reduced by reasonable accommodation. *Boots*, 100 M.S.P.R. 513, ¶¶ 11, 26-27; see *Boots v. Potter*, EEOC Petition No. 03A40060, 2004 WL 2983717, at *4 (Dec. 13, 2004).

¶3 Pursuant to the Special Panel's decision, the Board ordered the agency to cancel its removal action and award the appellant back pay, interest, and other benefits due. *Boots v. U.S. Postal Service*, MSPB Docket No. AT-0752-03-0286-R-1, slip. op. at 2 (Aug. 10, 2005). The Board also apprised the appellant of his right to request attorney fees and compensatory damages. *Id.* The appellant then filed motions for attorney fees and compensatory damages, which the administrative judge (AJ) denied in separate decisions. Compensatory Damages File (CDF), Tabs 1, 4; *Boots v. U.S. Postal Service*, MSPB Docket No. AT-0752-

¹ As pertinent here, DOT regulations, 49 C.F.R. § 391.41(b)(8), stated that an "established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle" will disqualify a person from operating a commercial vehicle.

03-0286-A-1, Attorney Fees File (AFF), Tabs 1, 4. The appellant has filed this petition for review challenging only the compensatory damages decision. PFR File (PFRF), Tab 1.²

ANALYSIS

¶4 Under the Civil Rights Act of 1991, an employee may recover compensatory damages from a federal agency that engaged in unlawful and intentional discrimination against him on the basis of his disability or failed to provide reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(2)-(3); *Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 504 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table). The Board may order the payment of compensatory damages when there has been a finding that such discrimination occurred. 5 C.F.R. § 1201.202(c). Here, the Special Panel deferred to the EEOC's finding that the agency discriminated against the appellant on the basis of his disability by relying on DOT regulations to remove him rather than conducting an individualized assessment of him to determine whether he posed a

² In a supplemental motion for compensatory damages, the appellant sought pecuniary damages in the amount of \$4,648.62 for fees incurred for services from his representative, J.R. Pritchett. CDF, Tab 4. Compensatory damages do not include fees incurred for representation. *See* 42 U.S.C. § 1981a(b)(3); 5 C.F.R. §§ 1201.201(d), 1201.202(c); *see, e.g., Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy District*, 739 F.2d 1472, 1480 (10th Cir. 1984) (expenses such as legal fees and costs are generally not considered “damages” because they are not the legitimate consequences of the tort or breach of contract sued upon); *Kania v. United States*, 227 Ct. Cl. 458, 650 F.2d 264, 269 (1981) (counsel fees and other litigation expenses are not the kind of consequential damages awarded in contract breach cases); *Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 504 (1994) (“[c]ompensatory damages contemplated by Congress in enacting the [Civil Rights Act of 1991] include ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses’ 42 U.S.C. § 1981a(b)(3).”), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table). Accordingly, our finding herein that the appellant is entitled to compensatory damages necessarily excludes his fee request for Pritchett’s services. This must be raised as a separate matter.

direct threat that could not be eliminated or reduced by reasonable accommodation. *Boots*, 100 M.S.P.R. 513 ¶¶ 11, 26-27. The finding of discrimination in this case, therefore, does not initially involve the issue of whether the agency failed to provide a reasonable accommodation. Instead, the discrimination finding is based on the conclusion that the agency failed to establish the defense of “direct threat as a qualification standard,” under 29 C.F.R. § 1630.15(b)(2). See *Fellows-Gilder v. Chertoff*, EEOC Appeal No. 01A33476, 2005 WL 3452280, *recon. denied*, 2006 WL 1464810 (Where employee who was removed because she experienced seizures, was performing her job without an accommodation, and had not requested accommodation, the issue was “whether or not [the employee] posed a direct threat to herself or others at the workplace.” *Id.*).

¶5 Nevertheless, the issue of reasonable accommodation arises in the direct threat defense. The definition of direct threat in 29 C.F.R. § 1630.2(r) is: “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” In discussing this section of the regulations, the EEOC’s *Interpretive Guidance on Title I of the Americans with Disabilities Act* states:

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

Appendix to 29 C.F.R. Pt. 1630, § 1630.2(r).

¶6 To establish the direct threat defense, an employer must show that no reasonable accommodation exists that would either eliminate or reduce the threat. See, e.g., *Lovell v. Department of Justice (Federal Bureau of Investigation)*, EEOC Appeal No. 01A41642, 2006 WL 3877373 (“Where the agency concludes that an individual poses a direct threat as a result of a disability, the agency must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no such accommodation exists, the agency may refuse to hire an applicant.”); *Ganson v. United States Postal Service*, EEOC Appeal No. 01A01214, 2004 WL 321029 (“If it is determined that an individual does pose a direct threat because of a disability, the employer must determine whether a reasonable accommodation would eliminate the risk of harm or reduce it to an acceptable level.”). In *Love v. United States Postal Service*, EEOC Appeal No. 01A11561, 2002 WL 1590129, the Commission noted that the record contained documentation showing that complainant was not medically fit to work. It also took cognizance of the restrictions imposed by Associate Area Medical Officer after reviewing the medical impairments considered by the VA in giving complainant an 80% compensable disability as well as non-military impairments documented in complainant’s medical records. On the basis of this assessment of complainant, the Commission concluded that “the agency acted reasonably when it determined it could not reasonably accommodate complainant’s disability without posing a direct threat to her or other employees, and assessed her as a moderate risk.” Similarly, in *Parker v. Department of the Navy*, EEOC Appeal No. 01981917, 2001 WL 1561930, the Commission noted that the record contained documentation from complainant’s physician advising that complainant might become violent in the workplace, that his condition persisted despite treatment with anti-psychotics, and that transferring him to another facility would not ameliorate his symptoms. On the basis of this assessment of complainant, the Commission concluded that “the agency acted reasonably when it determined it

could not reasonably accommodate complainant's disability without posing a direct threat to other employees, and issued complainant the Letter of Exclusion."

¶7 Because the direct threat defense involves the issue of reasonable accommodation, the AJ was correct to apply 42 U.S.C. § 1981a(a)(3) when considering the appellant's motion for compensatory damages. In referring to compensatory damages, that section of the statute provides:

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

¶8 As the AJ noted, the EEOC has referred to good faith efforts when discussing compensatory damages in two cases involving a direct threat defense virtually identical to the instant case: *Masteller v. Potter*, EEOC Appeal No. 01994458, 2004 WL 321028 (Feb. 12, 2004) (tractor-trailer operator with multiple sclerosis reassigned to light-duty position without driving duties although he had successfully and safely driven commercial motor vehicles for 5 years), and *Suprenant v. Potter*, EEOC Appeal No. 01996186, 2001 WL 885325 (July 26, 2001), *recons. denied*, EEOC Request No. 05A11071, 2004 WL 321030 (Feb. 12, 2004) (tractor-trailer operator with insulin dependent diabetes reassigned to the Mailhandler Craft although he had no record of accidents or unsafe driving and had not experienced a hypoglycemic episode for four years). In *Masteller* and *Suprenant*, complainants suffered from medical conditions that, under DOT safety-based qualification standards, disqualified them from maintaining a license necessary to drive a tractor trailer. In each case, the EEOC found that complainant was a qualified individual with a disability who had successfully and safely driven commercial motor vehicles for years and who had

been removed from his position because his medical condition triggered the restrictions of the DOT safety standard. In each case, the EEOC found that the agency should have conducted an individualized assessment of complainant to determine whether he posed a direct threat which could not be eliminated or reduced by reasonable accommodation, rather than rely on the DOT regulations. Finding in each case, that the agency had not established that complainant posed a significant risk of substantial harm, the EEOC found that the agency discriminated against the complainant on the basis of his disability when it reassigned him from his driving position. Finally, in each case the EEOC, citing *Teshima v. United States Postal Service*, EEOC Appeal No. 01961997, 1998 WL 236476, found that the agency was not relieved of its obligation to award appropriate compensatory damages because there was no showing that the agency made a “good faith effort” to reasonably accommodate the complainant. *Masteller*, 2004 WL 321028, at *5; *Suprenant*, 2001 WL 885325, at *6.

¶9 Under the principles established in *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471, 486 (Spec. Pan. 1986), the Board defers to the EEOC’s interpretation of discrimination laws. Given the procedural history of this appeal and its similarity to *Masteller* and *Suprenant*, we are compelled to follow the EEOC’s interpretation and find, in agreement with the AJ, that this case involves the provisions of a reasonable accommodation under 42 U.S.C. § 1981a(a)(3), which provides that damages may not be awarded where the covered entity demonstrates good faith efforts to make a reasonable accommodation. However, we disagree with the AJ’s conclusion that the agency made such a demonstration here.

¶10 In support of his conclusion, the AJ cited record evidence showing that the agency’s Reassignment/Reasonable Accommodation Committee had identified positions within the appellant’s commuting area in the Mailhandler Craft and advised him of his responsibility to request a craft change. *Id.*; see CDF, Tab 1, Att. D. The appellant acknowledged this was the case, though he complained that

the committee did not invite him to participate in or contribute to its activities. CDF, Tab 1, Att. A at 2. Additionally, the AJ noted that the agency's medical officer proposed a scheme, modeled upon the DOT Medical Advisory Criteria, wherein the appellant could establish definitively his fitness to drive by foregoing anti-seizure medication for a period of time, and thus retain his position. ID at 3; Initial Appeal File, MSPB Docket No. AT-0752-03-0286-I-1, Tab 4, Subtab 4M. The AJ reasoned that, even if these efforts fell short of what the EEOC and the Special Panel required, the agency had acted in good faith and was thus within the "safe-harbor" provision set forth in section 1981a(a)(3) and not liable for compensatory damages. ID at 3. As support for his finding that compensatory damages were not recoverable here, the AJ cited *Teshima v. United States Postal Service*, EEOC Appeal No. 01961997, 1998 WL 236476. ID at 3.

¶11 The agency's Reassignment/Reasonable Accommodation Committee identified alternative employment in the Mailhandler Craft within the appellant's commuting area, and advised the appellant of his responsibility to request a craft change if he desired the position. Comp. Dam. File, Tab 1, Attachment D. This offer, which is outside of the appellant's craft, does not constitute a good faith effort to make a reasonable accommodation. *Teshima*, on which the AJ relied, does not persuade us otherwise. In *Teshima*, the EEOC found that the agency was not liable for compensatory damages to the appellant because, while it had not considered the accommodations he suggested, the agency had made a good faith effort by offering him a light-duty position in another location as an accommodation for his disability -- paranoid schizophrenia. *Teshima*, 1998 WL 236476, at *1, 5. Unlike the appellant in the instant case, the appellant in *Teshima* received an offer of light-duty work in his craft but in a different location. For this reason, *Teshima* is significantly distinguishable.

¶12 The only other evidence of the agency's efforts is that the agency's examining physician proposed a scheme by which the appellant's fitness to drive and keep his position could be authoritatively ascertained. This scheme, modeled

on the Department of Transportation Medical Advisory Criteria, required that the appellant cease taking seizure medication. Initial Appeal File, Agency File, Tab 4m. It was not an effort to accommodate the appellant; it was, instead, a means for him to show that he could meet the DOT standards without accommodation.

¶13 For these reasons, we find that the agency is not relieved of its obligation to award appropriate compensatory damages.

¶14 Accordingly, we REVERSE the ID and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order. 3

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

³ Though not required, a hearing may assist in the calculation of compensatory damages. While the appellant did not specifically request a hearing, the evidentiary record is thin and he makes serious claims about the effects of the agency's action on his mental health. CDF, Tab 1 at 3, 7-8. We also note that the agency asked for a hearing below to explore the issues of fact and credibility in the appellant's written submissions. CDF, Tab 2 at 4.

CONCURRING OPINION OF NEIL A. G. MCPHIE

in

Robert E. Boots v. United States Postal Service

MSPB Docket No. AT-0752-03-0286-P-1

¶1 I agree with the majority that the appellant is eligible for an award of damages, but for the reasons given below, I do not agree with the majority's rationale.

Background

¶2 The appellant suffered a seizure episode in 1984 and has been taking anti-seizure medication ever since. The agency hired him in 1998 as a Tractor Trailer Operator, at which time he disclosed that he was taking anti-seizure medication. Some time later, the agency voluntarily adopted Department of Transportation (DoT) rules that generally prohibit private sector companies from employing individuals who take anti-seizure medication as drivers of large trucks. The agency informed the appellant that it could no longer allow him to drive a tractor trailer and offered him permanent reassignment to another position. He declined. The agency also proposed that he be temporarily reassigned and that he stop taking anti-seizure medication for several months; if he remained seizure-free for that time its medical officer would certify him as fit to drive a tractor trailer. The appellant rejected this proposal as well. The agency then removed the appellant for failure to meet the medical requirements of his position.

¶3 On appeal, the administrative judge sustained the charge and found the appellant's disability discrimination claim unproven. The Board denied the appellant's petition for review in a non-precedential Final Order. *Boots v. U.S. Postal Service*, 95 M.S.P.R. 429 (2004) (Table).

¶4 Upon further review, the Equal Employment Opportunity Commission (EEOC) differed with the final Board decision. According to the EEOC, the agency committed disability discrimination by removing the appellant without first conducting an “individualized assessment” to determine whether allowing him to continue to drive a tractor trailer would create a direct threat to the safety of himself or others. *Boots v. Potter*, EEOC No. 03A40060 (Dec. 13, 2004). The Board did not concur in the EEOC’s decision and certified the case to the Special Panel pursuant to 5 U.S.C. § 7702. *Boots v. U.S. Postal Service*, 98 M.S.P.R. 268 (2005). The Special Panel deferred to the EEOC’s decision. *Boots v. U.S. Postal Service*, 100 M.S.P.R. 513 (2005).

¶5 As a result of the Special Panel’s decision, the agency was ordered to reinstate the appellant with back pay. R-1 File, Tab 2. After his reinstatement, the appellant chose to retire. P-1 File, Tab 1, Att. A, ¶ 21; Tab 6 at 5. He then instituted this proceeding seeking \$80,000 in damages for “grief, emotional pain, mental anguish, diminishment of character and self-esteem, [and] diminishment in consortium.” P-1 File, Tab 1, Att. A, ¶ 23. The administrative judge denied the appellant’s request for damages, finding that the agency made good faith efforts to accommodate the appellant’s condition. P-1 File, Tab 9. The majority reverses the initial decision on the ground that the agency did not make good faith efforts to accommodate the appellant’s condition.

The appellant is eligible for an award of damages because the agency was found to have committed discrimination under regulations implementing 29 U.S.C. § 791.

¶6 The appellant’s claim for damages arises under 42 U.S.C. § 1981a, which provides in relevant part:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights. * * *

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717

of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent

[A] who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or

[B] who violated the requirements of

[i] section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or

[ii] section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or

[C] [who] committed a violation of section 102(b)(5) of the [Americans with Disabilities] Act,

against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

The Board is empowered to award damages for disability discrimination under section 1981a. *Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 505 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table).

¶7 I would find that the appellant is eligible for damages under that portion of 42 U.S.C. § 1981a which I have designated [A] in the quotation above, because the EEOC and the Special Panel found that the agency violated “regulations

implementing section 791 of Title 29 [of the U.S. Code].” Specifically, the EEOC found that the agency violated 29 C.F.R. § 1630.2(r), which requires an employer to conduct an “individualized assessment” of whether allowing an employee to perform in a certain job would pose a “direct threat” to the employee’s safety or the safety of others, before excluding the employee from that job for failure to meet certain kinds of qualification standards. The Special Panel refined the EEOC’s reasoning, and concluded that the agency violated the EEOC’s *Interpretive Guidance on Title I of the Americans with Disabilities Act*, which provides in relevant part:

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the “direct threat” standard in § 1630.2(r) [based on an “individualized assessment”] in order to show that the requirement is job-related and consistent with business necessity.

Appendix to 29 C.F.R. Pt. 1630, § 1630.15(b) – (c). *See Boots*, 100 M.S.P.R. 513, 517 n.11. The cited provisions from the EEOC’s regulations and *Interpretive Guidance* are based on the following portion of the Americans with Disabilities Act (ADA):

Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term “qualification standards” include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113.

¶8 The agency is covered by the Rehabilitation Act, 29 U.S.C. §§ 791-794, not the ADA. However, in a 1992 amendment to the Rehabilitation Act, the

employment-related portions of the ADA were incorporated by reference into the Rehabilitation Act. *See* 29 U.S.C. § 791(g); *Fraser v. Department of Agriculture*, 95 M.S.P.R. 72, 76 n.* (2003). The EEOC’s current ADA regulations at 29 C.F.R. Part 1630 are a unified set of rules covering private employers and the federal government. *See* 67 Fed. Reg. 35,732, 35,735 (2002) (explaining that the standards used to resolve employment-related discrimination claims under the ADA, set forth in 29 C.F.R. Part 1630, shall also be used in resolving employment-related discrimination claims under the Rehabilitation Act). Accordingly, for purposes of this case I would find that 29 C.F.R. § 1630.2(r) and 29 C.F.R. Pt. 1630 App., § 1630.15(b) – (c), are “regulations implementing section 791 of Title 29 [of the U.S. Code]” within the meaning of 42 U.S.C. § 1981a(a)(2). Consequently, the appellant is eligible for an award of damages. I would remand this matter to the administrative judge for presentation of argument and evidence and a new initial decision on damages.

This case is not one “where a discriminatory practice involves the provision of a reasonable accommodation” within the meaning of 42 U.S.C. § 1981a(a)(3), and the Board is not bound to treat it as if it were.

¶9 “In cases where a discriminatory practice involves the provision of a reasonable accommodation . . . , damages may not be awarded” when the employer shows that it made good faith efforts to provide reasonable accommodation to a disabled employee. 42 U.S.C. § 1981a(a)(3). The majority finds that this case must be treated as one “involv[ing] the provision of a reasonable accommodation” because the EEOC treated two factually similar cases as if they involved reasonable accommodation. The majority then goes on to discuss the agency’s actions in this case and finds that the agency did not make good faith efforts to accommodate the appellant’s medical condition. I disagree with the majority’s approach because it is not consistent with what the EEOC and the Special Panel actually found in their decisions in this case; the EEOC decisions relied upon by the majority do not represent a developed, consistent

EEOC interpretation of discrimination law to which to defer; and the majority introduces confusion into the law that is bound to create analytical difficulties in future cases.

I

¶10 The majority’s conclusion that this case “involves the provision of a reasonable accommodation” contradicts what the EEOC and the Special Panel actually found in their decisions. Again, the EEOC found that the agency violated an EEOC regulation requiring an “individualized assessment” of whether the appellant posed a “direct threat” to the safety of himself or others if he were allowed to remain in the Tractor Trailer Operator position. *See* 29 C.F.R. § 1630.2(r). The Special Panel agreed, and added that the agency violated a related provision of the EEOC’s *Interpretive Guidance on Title I of the Americans with Disabilities Act* dealing with safety-based qualification standards. *See* 29 C.F.R. Pt. 1630, App. § 1630.15(b) – (c). The EEOC and the Special Panel did not find that the agency failed to provide the appellant with a reasonable accommodation. Indeed, at all relevant times, the appellant was performing his job satisfactorily without accommodation, and he did not argue on appeal that he needed an accommodation. The agency, for its part, did not argue that the appellant was unable to perform the essential functions of his position, but instead argued that its decision to remove the appellant was lawful because he was not qualified for his position under the DoT rules, which the agency had voluntarily adopted. *See* Initial Appeal File, Tab 8; Tab 10 at 3-4. Simply put, the discriminatory act in this case, as found by the EEOC and the Special Panel, was not a failure to accommodate. Rather, it was the agency’s decision to exclude the appellant from the Tractor Trailer Operator position for failure to

meet a qualification standard without first conducting an individualized assessment aimed at determining whether he posed a direct safety threat.*

II

¶11 The EEOC decisions cited by the majority do not represent a developed, consistent interpretation of discrimination law to which the Board might defer. The majority cites *Masteller v. Potter*, EEOC Appeal No. 01994458, 2004 WL 321028, and *Surprenant v. Potter*, EEOC Appeal No. 01996186, 2001 WL 885325, *recon. denied*, EEOC Request No. 05A11071, 2004 WL 321030, as examples of cases in which the EEOC found an entitlement to damages where in each case the employer excluded an employee from driving a tractor trailer for failing to meet DoT qualification standards; the EEOC commented in each case that the employer had not made good faith efforts to accommodate the employee's medical condition, suggesting that in the EEOC's opinion each case "involve[d] the provision of a reasonable accommodation" within the meaning of 42 U.S.C. § 1981(a)(3). The majority goes on to hold that under *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471, 483 (Special Panel 1986), the Board must defer to the EEOC's "interpretation of discrimination laws." The majority thus concludes that the Board is bound to treat the present case as if it involved the provision of reasonable accommodation.

* If the agency had conducted an individualized assessment that showed the appellant would pose a direct threat to the safety of himself or others if he remained in the Tractor Trailer Operator position, then the inquiry might have proceeded from there to the question of whether the agency had a duty to accommodate him by reassignment. However, as noted above, the discriminatory act in this case, as found by the EEOC and the Special Panel, was the agency's failure to conduct an individualized assessment of whether the appellant would pose a direct safety threat if he remained in the Tractor Trailer Operator position. There is no indication that the agency ever conducted such an individualized assessment, and it never will given the appellant's decision to retire. To say that this case involves the provision of reasonable accommodation is to disregard what actually happened.

¶12 One problem with the statements in *Masteller* and *Surprenant* that the majority says deserve deference is that they are terse off-hand comments with no discussion or analysis of the relevant statutory and regulatory provisions, and no explanation whatsoever of how those cases had anything to do with reasonable accommodation. As such, the *Masteller* and *Surprenant* decisions are not “interpretations of discrimination law” on the relationship between the direct threat defense and reasonable accommodation principles.

¶13 An even bigger problem is that other EEOC decisions cut directly against the statements in *Masteller* and *Surprenant* relied upon by the majority. The most notable example is *Fellows-Gilder v. Chertoff*, EEOC Appeal No. 01A33476, 2005 WL 3452280, *recon. denied*, 2006 WL 1464810, where the agency removed an employee because she experienced seizures, while on duty, that were unpredictable in their severity and timing. On appeal, the administrative judge found the employee’s disability discrimination claim unproven. The EEOC reversed. It noted that the employee “was performing her job without an accommodation and in an efficient manner,” and that the record “did not reveal that [the employee] requested accommodation in order to perform her job.” 2005 WL 3452280 at *3. The EEOC thus framed “the issue under consideration” to be “whether or not [the employee] posed a direct threat to herself or others at the workplace.” *Id.* After weighing the evidence, the EEOC concluded that the agency did not meet its burden of proving that the employee posed a direct threat, and that the agency’s decision to remove her was, therefore, discriminatory. *Id.* at *8. The EEOC expressly held that under the facts presented, which are very similar to the facts of the present case, the administrative judge “erred in framing the claim as a denial of reasonable accommodation.” *Id.* at *3.

¶14 In *Padron v. Potter*, EEOC Appeal No. 01A53132, 2006 WL 1725433, the agency was found to have discriminated against a Mailhandler when it barred her from operating a tractor on the workroom floor because of her hearing impairment. The employee had been performing her duties satisfactorily up until

the agency issued the disputed instruction, operating a tractor was within the scope of her duties, she was able to perform the task, and she held the required operator's license. The EEOC said nothing about accommodation in its decision. Instead, it examined the record and concluded that the agency had not met its burden of showing that the employee would pose a direct threat to her own safety or that of others if allowed to operate the tractor.

¶15 In *Harrison v. Ashcroft*, EEOC Appeal No. 01A03948, 2003 WL 21877356, the EEOC found that the Drug Enforcement Administration (DEA) committed disability discrimination by deeming an individual with insulin-dependent diabetes to be disqualified from a Special Agent position. The DEA was concerned that the individual could endanger himself or others if he had a hypoglycemic episode while on duty. The EEOC reviewed the evidence in detail and concluded that the DEA failed to show that the individual would pose a direct threat to the safety of himself or others in the Special Agent position. The EEOC did not treat the case as one involving reasonable accommodation.

¶16 There are additional decisions dealing with an employer's direct threat defense to a disability discrimination claim in which the EEOC did not frame the question as one involving reasonable accommodation, but instead focused entirely on whether the agency met its burden of proving that the employee posed a direct threat to the safety of himself or others. *See, e.g., Cashdollar v. Potter*, EEOC Appeal No. 01A50828, 2006 WL 1725371 (agency did not commit disability discrimination when it suspended driving privileges of a Tractor Trailer Operator who developed a panic disorder for which he took medication that caused severe side effects; the agency showed that it reasonably believed that the employee posed a direct threat to the safety of himself and others if allowed to continue driving a large truck); *Ison v. Johanns*, EEOC Appeal No. 01A60235, 2006 WL 1375130 (agency did not commit disability discrimination when it suspended driving privileges of an Archaeologist whose duties included driving a government vehicle after the employee began experiencing trancelike,

“dissociative episodes”; the agency showed that it reasonably believed that the employee posed a direct threat to the safety of himself or others if he were allowed to continue to drive); *Lewis v. Rumsfeld*, EEOC Appeal No. 01A24984, 2004 WL 1870641 (agency committed disability discrimination when it deemed an employee with insulin-dependent diabetes to be disqualified from temporary duty overseas; the agency’s decision was based on “generalized statistics” and “speculative” risk assessment, whereas an individualized assessment did not show that allowing the employee to serve on an overseas assignment would pose a direct threat to his own safety or that of others).

¶17 Based on the foregoing, it cannot be said that stray statements in *Masteller* and *Surprenant* represent a consistent, developed EEOC view that when an employer attempts to justify an action with a direct threat argument, the issue on appeal is whether the employer denied a reasonable accommodation. In fact, in *Fellows-Gilder*, the EEOC expressly rejected such an interpretation of discrimination law. In *Fellows-Gilder*, just as in this case, the employee could perform all of her duties without accommodation, and the employer removed her based on a safety concern related to her medical condition. The EEOC made clear that in such a case, it is error to apply a reasonable accommodation analysis. Based on *Fellows-Gilder* and the other decisions discussed above, I would not follow the unexplained statements in *Masteller* and *Surprenant* that suggest using a reasonable accommodation analysis in a direct threat case.

III

¶18 The majority’s approach introduces confusion into the law that is bound to create analytical difficulties in future cases. According to the majority, when an agency takes an adverse action against an employee who can perform the essential functions of his position without accommodation based on the employee’s failure to meet a safety-based qualification standard, and if the employer asserts a direct threat defense to a disability discrimination claim, the issue for decision is whether the employer failed to provide a reasonable

accommodation. It is unclear how such an analysis could be undertaken, and I am concerned that litigants and administrative judges will not know how to proceed. This analytical difficulty is apparent in the majority opinion in this case. Given that the appellant satisfactorily performed his duties without accommodation for years before he was removed, the majority's finding that the agency failed to make good faith efforts to provide a reasonable accommodation is confusing.

¶19 In this regard, it is important to distinguish between a general qualification standard that the employer claims is directly related to the essential functions of a position, and a safety-based qualification standard to which the direct threat defense applies. *Cf. Kline v. Chao*, EEOC Appeal No. 01A31284, 2004 WL 189729, *2 (the results of a medical examination may be used to exclude an individual from a job if the individual has a condition that makes him unable to perform the job's "essential functions," or if the employee poses a direct threat to safety because of a medical condition). In the former situation, when the employee claims disability discrimination the inquiry naturally leads to reasonable accommodation, because the employer's assertion that the employee does not meet a general qualification standard is equivalent to an assertion that the employee cannot perform the essential functions of the position. For example, an employer might require an individual in a particular job to be able to lift 75 lbs. to waist height. If a disabled individual shows that he could lift 25 lbs. to waist height with accommodation, and if the actual day-to-day duties of the job never require lifting more than 25 lbs., then the employer would likely be required to allow the disabled individual to perform in the job with reasonable accommodation and could not rely on the qualification standard as a reason for excluding the individual from the job. *See* 29 C.F.R. Part 1630, App. § 1630.10 (explaining the relationship between general qualification standards, essential functions of a position, and the employer's duty to provide reasonable

accommodation; to meet the business necessity defense, a general qualification standard must be geared to the essential functions of a position).

¶20 In the case of a safety-based qualification standard, however, the employer's determination to exclude a disabled individual from a particular job is evaluated according to whether the employee would pose a direct threat to the safety of himself or others. This inquiry is distinct from a reasonable accommodation analysis. The "direct threat" defense is codified in the ADA at 42 U.S.C. § 12113(b), and it --

does not allude to any kind of job-relatedness; in that respect, it differs profoundly in its scope from both the business necessity defense in the ADA, and from the bona fide occupational qualification defense contained in several other employment discrimination statutes. Combined with the focus on danger to other individuals in the workplace, the absence of any job-related requirement suggests that the direct threat defense was meant as a very narrow permission to employers to exclude individuals with disabilities *not* for reasons related to their performance of their jobs, but because their mere presence could endanger others with whom they work and whom they serve.

Morton v. United Parcel Service, Inc., 272 F.3d 1249, 1258-59 (9th Cir. 2001) (citations omitted). Simply put, a reasonable accommodation analysis -- which focuses on whether an individual can perform the essential functions of a particular position, 29 C.F.R. § 1630.2(n), (o) -- is inappropriate in a direct threat case, where the employer defends against a discrimination claim based on a safety concern and not on the ground that the individual is unable to perform the essential functions of his position.

Conclusion

¶21 This appeal should be remanded to allow the appellant to put on evidence in support of his claim for damages because the EEOC and Special Panel decisions find that the agency violated regulations implementing 29 U.S.C. § 791. *See* 42 U.S.C. § 1981a(a)(2). I do not join the majority opinion because the majority's approach is not consistent with what the EEOC and the Special Panel

actually found in this case, it is not based on a developed, consistent interpretation of discrimination law by the EEOC, and it introduces an analytical framework that is bound to confuse litigants and administrative judges in future direct threat cases.

Neil A. G. McPhie
Chairman