

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**Washington, DC 20013**

**Shay Hitchcock, Complainant,**

**v.**

**Janet Napolitano, Secretary, Department of Homeland Security, Agency.**

Appeal No. 0120080828  
Hearing No. 130-2004-00094X  
Agency No. DOT-7-03-7-7206

**DECISION**

On December 7, 2007, complainant filed an appeal from the agency's November 7, 2007 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The appeal is accepted pursuant to 29 C.F.R. § 1614.405(a).

**BACKGROUND**

The Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration (TSA), required TSA to hire, train, and deploy Federal security screeners to replace the private sector screeners who worked for the airlines or for security companies hired by the airlines. Complainant started working for TSA through a contractor in late June, 2002. On or about October 27, 2002, when his contract work ended, he became a full time TSA employee as a Supervisor Transportation Security Screener at the Golden Triangle Regional Airport in Columbus, Mississippi.

Complainant's appointment was a temporary appointment in the Excepted Service, not to exceed five (5) years, with an expiration date of October 27, 2007. During complainant's tenure at the Golden Triangle Regional Airport, there was a tension between TSA employees and employees of Atlantic Southeast Airlines (ASA). The tension between TSA employees and ASA employees escalated in March 2003 when employees under complainant's supervision allowed a gun and a bomb through the security checkpoint, during a TSA test. ASA's employees ridiculed TSA's employees for their failure.

On or about March 27, 2003, complainant was involved in an incident in which complainant was accused of groping an ASA employee (ASA E1). The incident occurred when complainant wandered and touched ASA E1 in the groin area during a security screening. ASA E1 alleged that during the screening, complainant said, "you like it, don't you?" Then, due to the incident ASA Station Manager (ASA SM) filed a complaint with TSA.

Complainant met with ASA SM to discuss the incident. During the meeting complainant stated, "[i]f ASA E1 was embarrassed by the security procedures that we must perform in the checkpoint, then I do apologize to him for being embarrassed. However, I did nothing inappropriate in the checkpoint." Complainant's supervisor (S1) conducted an investigation concerning ASA E1's allegations. After the investigation was completed, S1 counseled complainant on proper wandering procedures.

In May 2003, the TSA Assistant Federal Security Director (AFSD) was notified of ASA E1's complaint, and instructed S1 to gather statements. After reviewing these statements, AFSD instructed complainant and S1 to meet with ASA, and if necessary, complainant should apologize for his actions and "clear the air." Complainant refused to apologize to ASA E1 for his actions.

Based on the TSA investigation, AFSD concluded that complainant's conduct, and his refusal to either apologize or accept responsibility for the incident was causing an intolerable situation between TSA and ASA at the Golden Triangle Airport. Accordingly, AFSD and the Federal Security Director (FSD) decided to discharge complainant.

On May 20, 2003, complainant contacted an EEO counselor. On May 30, 2003, AFSD informed complainant that due to his failure to rectify the issue between the TSA and ASA, he had two options, termination or resignation. Complainant resigned from his position.

On August 25, 2003, complainant filed an EEO complaint alleging that he was discriminated against on the bases of sex, sexual orientation, and in reprisal for prior EEO activity when:

1. from March 27, 2003 to May 30, 2003, management subjected him to a hostile work environment;<sup>1</sup> and
2. on May 30, 2003, he was forced to resign his probationary position as a Supervisor, Transportation Security Screener.

Since the agency delayed in its investigation, after 180 days passed, complainant requested a hearing before an EEOC Administrative Judge (AJ1). AJ1 issued a decision finding no discrimination.<sup>2</sup> The agency implemented AJ1's decision. Complainant appealed to the Commission.

In *Hitchcock v. Department of Homeland Security*, EEOC Appeal No. 0120051461 (May 3, 2007), the Commission concluded that there "are simply too many unresolved issues which require an assessment as to the credibility of the various management officials, co-workers, and complainant himself." Accordingly, we reversed the agency's final action and remanded the matter for an EEOC hearing.

On August 29, 2007, another AJ (AJ2) held a hearing. On September 26, 2007, AJ2 issued a decision finding no discrimination. As initial matter, AJ2 noted that complainant alleged that he had been subjected to a hostile work environment based on his sex, sexual orientation, and in reprisal. However, based on complainant's allegations, AJ2 concluded that complainant is claiming he was subjected to all of the incidents (i.e., comments concerned complainant's clothes, his culinary skills, management style, etc.) because of failure to conform to gender stereotypes. Therefore, AJ2 determined that complainant's allegations are based on his sex, not because of his sexual orientation. Accordingly, AJ2 found that complainant's allegations are within EEOC's jurisdiction.

However, AJ2 concluded that complainant failed to establish a prima facie case of harassment. Specifically, AJ2 concluded that the evidence fails to show that the identified actions, taken in totality, were sufficiently severe or pervasive to alter complainant's working conditions.

AJ2 also concluded that although the comments were apparently frequent, it is unclear if complainant perceived the conduct to be unwelcome, based on his response to much of the behavior. AJ2 found that testimony during the hearing showed that complainant took no action against subordinate employees, who made the comments, and that, on some occasions, he laughed at the comments.

AJ2 also concluded that complainant failed to establish a prima facie case of sex discrimination when he was forced to resign from his probationary position. AJ2 found that even assuming he did so, the agency articulated legitimate non discriminatory reasons for its action. Specifically, the AJ found that the agency presented evidence that its relationship with ASA was damaged due to complainant's alleged misconduct. AJ2 further found that due to complainant's refusal to cooperate in resolving the conflict with the local ASA officials, the agency determined that the termination of complainant, a probationary employee, was the most effective way to resolve the dispute and improve its relationship.

AJ2 noted that the agency's decision to terminate complainant, in order to placate the local ASA officials, appears to have been viewed by AFSD as the most expeditious way to resolve the ongoing dispute between the agency and ASA. The AJ concluded that while it may have not been the fairest way to deal with complainant, complainant has presented no evidence that the decision was tainted by discriminatory animus.

The agency subsequently issued a final order adopting the AJ's finding that complainant failed to prove that he was subjected to discrimination as alleged.

## **CONTENTIONS ON APPEAL**

On appeal, complainant restates arguments made at the hearing and considered by AJ2. Moreover, complainant pointed out witnesses' testimony during the hearing. Complainant contends that the weight of the evidence was on complainant's side and was disregarded by the AJ. Complainant contends that the AJ failed to address a number of credibility weaknesses in AFSD's testimony. According to complainant, AFSD's testimony was not credible because he was a former FBI deputy director who "was investigated for misuse of expense accounts and admitted to paying money back to the government as a result."

In response to complainant's appeal, the agency argues that AJ2 properly found no discrimination and no hostile work environment. The agency requests that we affirm its final decision.

## **ANALYSIS AND FINDINGS**

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed

is a factual finding. See *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, § VI.B. (November 9, 1999).

Based upon a thorough review of the record, we agree with AJ2's finding of no discrimination. To prevail in a disparate treatment claim such as this, complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the agency has articulated legitimate and nondiscriminatory reasons for its conduct. See *U. S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-17 (1983); *Holley v. Dep't of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997). To ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Holley v. Dep't of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997); *Pavelka v. Dep't of the Navy*, EEOC Request No. 05950351 (December 14, 1995).

We concur with AJ2's finding that the evidence of record supports a finding that there was no discriminatory animus in the agency's actions. The agency has articulated legitimate, nondiscriminatory reasons for its actions and complainant has failed to show that the agency's reasons were mere pretext to mask unlawful discrimination. Moreover, complainant has failed to show by a preponderance of the evidence that any agency action was motivated by discriminatory animus toward complainant's protected classes. It is not sufficient "to disbelieve the employer; the fact-finder must believe the plaintiff's explanation of intentional discrimination." *O'Dell v. United States Postal Service*, EEOC Appeal No. 01981939 (May 23, 2001) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993)). The ultimate burden of persuading the trier of fact that the agency intentionally discriminated against complainant remains at all times with complainant. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

Additionally, we found that complainant failed to prove his claim of harassment. We agree with AJ2's holding that the conduct complained of is not severe or pervasive enough to create an objectively hostile work environment based on sex or reprisal. See *Fox v. General Motors*, 247 F. 3d 169 (4th Cir. 2001); *McLeod v. Social Security Administration*, EEOC Appeal No. 01963810 (August 5, 1999).

## **CONCLUSION**

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the agency's final order implementing AJ2's finding of no discrimination.

FOR THE COMMISSION:

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Carlton M. Hadden, Director  
Office of Federal Operations

March 12, 2010

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Date

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STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0408)

You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and

official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

#### RIGHT TO REQUEST COUNSEL (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

1 Complainant alleged that during his employment with TSA, employees under his supervision made several offensive comments toward him. For example, he heard comments regarding him bringing food items to work, in that employees called such activity a "woman's job." According to complainant, a couple of employees stated that he [complainant] would "make somebody a good wife someday." Complainant also alleged that one employee told him that he had a "girlish walk." Another employee stated, "you bitch like my old woman." Complainant further alleged that another employee told him, "Why don't you just be a real man and take care of it instead of asking opinions?" Complainant also stated that on certain occasions employees laughed about his clothes.

2 AJ1 dismissed all of complainant's claims alleging discrimination based on sexual orientation because the EEOC "does not have jurisdiction over claims of sexual orientation discrimination." AJ1 also concluded that the EEOC did not have jurisdiction over complainant's hostile work environment claim because "the available evidence persuasively demonstrates that the claim is based on the complainant's belief that his co-workers perceived him as being homosexual." AJ1 further found that that complainant failed to establish a prima facie case of sex or reprisal discrimination. Specifically, the AJ concluded that complainant did not show "that he was treated less favorably than a similarly situated female supervisor under the same or similar circumstances," and "the evidence demonstrates that complainant had not participated in any protected activity of which S2 was aware." Therefore, AJ1 found that there were no genuine disputes of material fact.

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