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**106 LRP 68836**

**Paul DiGangi, Complainant, v. Michael Chertoff, Secretary, Department of Homeland Security (Transportation Security Administration), Agency**

**Equal Employment Opportunity Commission-OFO**

Appeal No. 0120053932

Hearing No. 370-04-00255X

Agency No. HS-050575

**November 9, 2006**

## Related Index Numbers

**27.0293 Disparate Treatment, Legitimate/Non-Discriminatory Reason**

**31.0293 Disparate Treatment, Legitimate/Non-Discriminatory Reason**

**20.0293 Disparate Treatment, Legitimate/Non-Discriminatory Reason**

**33.0932 Witness, Credibility**

## Ruling

The EEOC affirmed an administrative judge's determination that the complainant was legitimately terminated and could not credibly support his claim that a supervisor sexually harassed him.

## Meaning

The EEOC generally defers to an AJ's credibility determinations because the AJ is able to observe the demeanor of a witness first-hand. If an agency provides a legitimate, nondiscriminatory reason for its decision to terminate a complainant, the complainant must show the explanation was pretext for discrimination in order to prevail.

## Case Summary

A Transportation Security Administration supervisory airport screener at the Saipan International Airport on the Mariana Islands alleged that he was subjected to discrimination on the bases of his sex, race (Caucasian), color (white), and age (DOB: 04/05/51) when he was sexually harassed by a supervisor, and when he was terminated. An EEOC AJ found no discrimination. In part, the AJ found that the screener did not establish a prima facie case of discrimination, that the screener was not credible, and that the agency legitimately explained he was terminated for misconduct, which included using his government travel card to go to Tinian Island with his girlfriend. The EEOC affirmed the AJ's decision on appeal. It agreed that the agency legitimately explained its decision to terminate the screener for misconduct, and it deferred to the AJ's determination that the screener did not credibly support his claims of sexual misconduct on the part of his supervisor.

The EEOC agreed with the AJ's determination that the screener could not show that he was treated less favorably than any similarly situated individual outside his protected groups. Even if he had established a prima facie case of discrimination, the EEOC found the TSA legitimately explained that he was terminated for "using a government travel card to finance a New Year's Eve trip to a resort-casino."

The screener could not show this explanation was pretext for discrimination. Although he presented a newspaper article that seemed to suggest his supervisor resigned because of the screener's complaint, the EEOC agreed with the AJ's determination that this insinuation was unsupported and merely speculative.

With regard to the screener's claim of sexual harassment, the AJ found his testimony was "inconsistent, uncorroborated, and unreliable." He further noted that, during cross-examination, the screener "perspired excessively and was nervous and defensive." The AJ concluded that the screener's claims of sexual impropriety on the part of his supervisor were contrived, noting that the supervisor testimony was convincing, even under rigorous cross-examination. The EEOC deferred to the AJ's credibility determinations.

## Full Text

### Decision

 

## Jurisdiction

On May 11, 2005, complainant filed an appeal from the agency's April 8, 2005 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The appeal is deemed timely and is accepted pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission AFFIRMS the agency's final order.

## Background

At the time of events giving rise to this complaint, complainant worked as a Supervisory Transportation Security Screener at the Saipan International Airport on the Mariana Islands. The relevant facts in this case are the following.

Complainant was hired as a one-year probationary employee September 29, 2002. He alleges that sometime in November 2002, complainant's supervisor, the Saipan Federal Security Director (S1), subjected him to improper sexual advances. The first incident purportedly occurred when S1 asked complainant to go to his hotel room. When complainant arrived at his room, S1 was in his underpants, made a reference to his genitalia while telling complainant about a recent massage, and adjusted his penis inside his shorts. See Hearing Tr. (HT), Vol. II at 253-255. A few months later, while complainant and S1 shopped for a cell phone, S1 allegedly placed his hand on complainant's leg and said that "if I were to suck cock one time it wouldn't make me a cocksucker." Complainant's Depo. at 195-98; HT, Vol I at 126. The final incident of sexual harassment that complainant alleges occurred about a month later when, early one morning S1 repeatedly asked complainant to join him in a hotel sauna while they awaited the hotel restaurant to open for breakfast. See HT, Vol. I at 140-43.

Due to the holidays, S1 left Saipan for a trip to the United States mainland. He was gone from December 5, 2002 through January 19, 2003. See HT, Vol. III at 669. Complainant remained in Saipan, and on the evening of New Year's Eve, he used his government travel card to travel to Tinian Island, a casino-resort locale, with his girlfriend. See Complainant's Depo. at 225-26; HT, Vol. I at 190-91, 193-94; Agency Ex. 11A.

Late in February 2003, screeners informed S1 that complainant was rarely seen at the airport, that he was claiming substantial overtime, and that he had tried to procure the services of a prostitute with his government travel card. See Ex. 4B; Ex. 8 at 18-19. Based on these allegations, S1 reassigned complainant along with another acting Screening Manager who had been accused of other improprieties. See Ex. 2; Ex. 6 at 135-36. S1 then asked his secretary (A1) to look into complainant's use of the government credit card. See Ex. 4; Ex. 6 at 23; Ex. 10. After reviewing the card statement and complainant's time and leave report for January 2, 2003, A1 discovered that although there was no evidence that complainant had used the government card for a prostitute, there was proof that he had used the card to finance the New Year's pleasure trip. See Ex. 10.

Consequently, A1 asked the Employee Relations Specialist (A2)[2] at the headquarters office in Washington, D.C. to weigh in on the matter and provide guidance on how to proceed. A2 concluded that complainant's actions constituted a misuse of his travel card which was to be used solely for official business. As such, A2 recommended that complainant be removed. See HT, Vol. III at 582; Ex. 15; Ex. 15. A2 drafted the termination letter on April 17, 2003. The letter charged complainant with using the government travel card to purchase two airline tickets to Tinian as well as for other personal purchases at the Tinian Dynasty Hotel and Restaurant. See Ex. 14.

On May 2, 2003, complainant contacted an EEO Counselor and filed a formal EEO complaint on August 14, 2003, alleging that he was discriminated against on the bases of race (Caucasian), sex (male), color (White), and age (D.O.B. 04/05/51) when:

 

1. He was not promoted to a Screening Manager position and paid accordingly;

2. He was not given pay owed to him, including a cost of living allowance;

3. He was subjected to sexual harassment; and

4. He was terminated from his position as a provisional Supervisory Airport Screener.

No investigation into the matters alleged took place. At the lapse of the statutory 180 day investigation period, complainant timely requested a hearing before an EEOC Administrative Judge (AJ). As there was no Report of Investigation, AJ allowed the parties to develop the record through a thorough discovery. The hearing was then held on November 16 and 17, 2004, and the AJ issued a decision on March 17, 2005.

## Final Agency Action

The AJ found no evidence of discrimination. He concluded that complainant had failed to establish a prima facie case of discrimination because he had not shown that similarly situated employees had been treated more favorably under similar circumstances. The AJ also found that the agency had legitimate reasons for its actions and that complainant's evidence of pretext was insufficient to meet his burden. With regard to his sexual harassment claim, the AJ also found that it was insufficient. After evaluating the live testimony of S1 and complainant, the AJ made a credibility determination and found that complainant's testimony was inconsistent, non-credible, and uncorroborated.

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

In his statement on appeal, complainant argues that the hearing and the AJ's conclusions were a "cover up." He maintains that although he no longer had counsel, the attorney who had represented him at the hearing informed him that actual hearing testimony flatly contradicted the AJ's findings.[3] He further accuses the AJ of improper conduct during the hearing, suggesting bias. Moreover, complainant argues that the transcript and recordings of testimony were tampered with so as to create a hearing record favorable to the agency. He points out that parts of A1's testimony are missing, specifically, testimony in which she allegedly stated that S1 wanted Saipan management to be composed of Black locals. Lastly, with regard to S1, complainant states that he hastily left his position in Saipan after his case "broke open," suggesting an admission of impropriety. In fact, complainant attaches an online newspaper article, which he had introduced at the hearing, but which the AJ rejected as unsupported. This article identifies complainant as having filed a sexual harassment and race discrimination complaint against S1 and points out that S1 resigned from his post for personal reasons following the complaint. In addition, complainant notes on the article that A1 also resigned from her job in Saipan due to S1's actions.

The agency, for its part, requests that we affirm its final order.

## Standard of Review

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, § VLB. (November 9, 1999).

## Analysis and Findings

We begin our discussion noting that most of the testimony at the hearing was by telephone. As the alleged incidents took place on the Mariana Islands, the AJ assigned to hear the claim was seated in the San Francisco, California District Office. However, most of the federal employees involved in the matter were in Saipan and one was in Washington, D.C. S1 and complainant, among a few others, attended the hearing in San Francisco. E-mail exchanges between counsel for complainant and the agency indicate that complainant objected to the telephonic testimony because it prevented the AJ from making necessary credibility determinations. See Email exchanges of November 3 and 4, 2004, attached to Complainant Hearing Exs. However, complainant did not formally object. Consequently, the AJ issued a Hearing Order allowing the telephonic hearing. See Second Amended Hearing Order.[4]

We have recently held that testimony may not be taken by telephone in the absence of exigent circumstances, unless at the joint request of the parties and provided specified conditions have been met. *See Louthen v. United States Postal Serv.*, EEOC Appeal No. 01A44521 (May 17, 2006); *Sotomayor v. Dep't of Army*, EEOC Appeal No. 01A43440 (May 17, 2006); *Rand v. Dep't of Treasury*, EEOC Appeal No. 01A52116 (May 17, 2006).[5] However, as the facts of this case pre-date our decisions regarding telephonic hearings, we assess the AJ's conduct in holding a telephonic hearing by considering the totality of the circumstances. *See Villanueva v. Dep't of Homeland Sec*, EEOC Appeal No. 01A34968 (Aug. 10, 2006). In this regard, we find that exigent circumstances existed as key witnesses were in remote locations. Moreover, although the testimony of some of these witnesses influenced the AJ's decision, the AJ did not rest the entirety of his findings on the credibility of these witnesses. The agency produced S1 at the hearing, whose physical presence and live testimony was necessary in this matter. As such, we find that the telephonic hearing that occurred amounted to a harmless error.

## Disparate Treatment

Turning now to the merits of the case, we note that 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). Complainant must initially establish a prima facie case by demonstrating that he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *See Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. *See McDonnell Douglas*, 411 U.S. at 804 n.14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. *See Texas Depar't of CommunityAffairs v. Burdine*, 450 U.S. 248, 253 (1981). To ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993).

Having reviewed the record, we agree with the AJ's assessment that complainant has failed to meet his initial burden of establishing a prima facie case of discrimination. Although he names several white probationary screening managers who, like him, had been fired during their probationary periods, they cannot serve as comparators for establishing his claim because they are not similarly situated individuals outside of his protected classes. Moreover, none of his proffered comparators have been treated differently or more favorably for similarly misusing their official government travel card. Even if we assume that he had established a prima facie case, the agency provided a legitimate, non-discriminatory reason for taking action against complainant. A2, who worked out of the headquarters office and had never met complainant, asserted that using a government travel

 

card to finance a New Year's Eve trip to a resort-casino constitutes misuse of government property, and that when such misuse occurs it is typical and warranted to terminate a conditional employee. See HT, Vol III at 565-608. We agree with this assessment, and, as the AJ points out, the agency had "cause" to terminate complainant. See AJ Decision at 8.

Turning now to whether complainant established by a preponderance of the evidence that the agency's reason was merely a pretext to discriminate against him, we again agree with the AJ's conclusions. In his statement on appeal, complainant suggests that S1's resignation is evidence of pretext, given that it occurred hastily and shortly after news of complainant's complaint reached the media. He also implicitly argues that A1's testimony is proof that S1 terminated complainant and other White employees to discriminate against him because of race and color. First, with regard to the news article, we do not find this sufficient proof. The article states that S1 resigned due to personal reasons. Although the article implies, as complainant does, that the resignation was prompted by complainant's EEO complaint and further suggests an agency cover-up of some sort, we agree with the AJ that such insinuations are unsupported and based on mere speculation.

With regard to A1's testimony, we have closely reviewed the hearing transcript, specifically the section in which she states that she had misgivings about S1's firing of White employees (see HT, Vol. I, at 386), and again we find that this testimony is insufficient to establish pretext. A1 may have had misgivings about the termination of certain other employees, but she testifies that, in complainant's case, she discovered the improper travel card charges and that his termination came upon A2's recommendation. For his part, A2 testified he was not influenced by S1 in recommending termination. See HT, Vol III at 589. Therefore, we conclude that complainant's arguments of pretext on appeal fail to withstand scrutiny.[6]

## Sexual Harassment

In order to establish a prima facie case of sexual harassment, the complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his sex; (3) that the harassment complained of was based on his sex; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. *See Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Enforcement Guidance on *Harris v. Forklift Systems, Inc.*, EEOC Notice No. 915.002 (March 8, 1994).

The AJ determined that complainant had failed to establish a prima facie case of sexual harassment because, based on his observations and impressions at the hearing, he found complainant's testimony inconsistent, uncorroborated, and unreliable. He further found that during cross-examination, complainant perspired excessively and was nervous and defensive. According to the AJ, "complainant's allegations regarding all of these sex-based encounters was contrived." AJ Decision at 11-12, On the other hand, the AJ found S1's testimony to be straightforward, clear and convincing, withstanding even rigorous cross-examination. Upon review of the record and the hearing testimony, we find no corroboration or any other witness statement or evidence that suggests that the alleged incidents took place. In fact, we note complainant has not disputed the AJ's conclusions on appeal. Therefore, without any evidence indicating otherwise, we defer to the AJ, as he observed the parties first-hand and is in a better position to make credibility determinations, and we conclude that complainant failed to prove by a preponderance of the evidence that he was subjected to harassment.

## Conclusion

 

We discern no basis to disturb the AJ's decision. After a careful review of the record, including complainant's contentions on appeal, the agency's response, and arguments and evidence not specifically addressed in this decision, we AFFIRM the agency's final order.

## Statement of Rights -- On Appeal Reconsideration (M0701)

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 19848, Washington, D.C. 20036. 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 (S0900)

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 (Z1199)

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 that the Court appoint an attorney to represent you and that the Court 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 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]Due to a new data system, your case has been redesignated with the above referenced appeal number.

[2]The record indicates that this individual was a contractor hired by TSA as a human resources expert to provide management and employees advice and guidance on personnel matters. He also provided management with recommendations on appropriate

 

disciplinary action. See HT, Vol. III at 569

[3]Additionally, complainant alleges on appeal that his attorney refused to continue to represent him and acted in an unprofessional manner. He explains that he has filed complaints against her before the state Bar association and other entities. To the extent complainant intends that the Commission take action against his former counsel, we inform complainant that such action is beyond the purview of our jurisdiction, and that he must pursue his claims through other avenues.

[4]We note that whether or not there is an objection on the issue is not dispositive. *See Sotomayor v. Dep't of Army*, EEOC Appeal No. 01A43440 (May 17, 2006).

[5]In *Louthen*, the Commission promulgated its policy regarding the taking of telephonic testimony in the future by setting forth explicit standards and obligations on its Administrative Judges and the parties. *Louthen* requires either a finding of exigent circumstances or a joint and voluntary request by the parties -- with their informed consent. When assessing prior instances of telephonic testimony, the Commission will determine whether an abuse of discretion has occurred by considering the totality of the circumstances. In particular, the Commission will consider factors such as whether there were exigent circumstances, whether a party objected to the taking of telephonic testimony, whether the credibility of any witnesses testifying telephonically is at issue, and the importance of the testimony given telephonically. In *Sotomayor*, we further held that where telephonic testimony was improperly taken, the Commission will scrutinize the evidence to determine whether the error was harmless.

[6]With regard to complainant's claims that the transcript and the tapes of the telephonic testimony appear to have been tampered with, we find no support for this assertion. We have carefully reviewed the transcript and find no evidence of such claims.

**Cases Cited**

340 U.S. 474
456 U.S. 273
EEOC Appeal No. 01A44521
EEOC Appeal No. 01A43440
EEOC Appeal No. 01A52116
EEOC Appeal No. 01A34968
438 U.S. 567
450 U.S. 248
530 U.S. 133
120 S.Ct. 2097
509 U.S. 502
682 F.2d 897

 