

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

88 M.S.P.R. 161

MARTIN F. SALAZAR,
Appellant,

DOCKET NUMBER
AT-0752-99-0626-I-1

v.

DEPARTMENT OF ENERGY,
Agency.

DATE: March 30, 2001

Samuel W. Cruse, Esquire, Augusta, Georgia, for the appellant.

Timothy P. Fischer, Esquire, Aiken, South Carolina, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued February 25, 2000, that sustained his 30-day suspension. For the reasons set forth below, the Board GRANTS the appellant's petition, and REVERSES the initial decision. The agency action is NOT SUSTAINED.

BACKGROUND

¶2 The agency suspended the appellant for 30 days, and directed him to attend sexual harassment training, based upon the charge of inappropriate conduct that violated the "Savannah River Operations Office Policy on Sexual Harassment,

SRP 98-04.” Specifically, the agency charged that, upon seeing a picture of Stephanie Reel, an employee for a government subcontractor, in an agency newsletter, the appellant called Ms. Reel, told her several times that she was beautiful, asked if she was married, and when she replied yes, told her that her husband was a lucky man.

¶3 Following a hearing on appeal, the administrative judge sustained the agency action, finding as follows: (1) The agency proved its charge against the appellant because Ms. Reel’s version of the telephone conversation was more credible than the appellant’s version of the call; (2) the appellant failed to establish the affirmative defense of reprisal for filing equal employment opportunity (EEO) complaints; and (3) the penalty was within the bounds of reasonableness for the sustained misconduct, especially in light of the appellant’s prior disciplinary record for similar misconduct.

¶4 In his petition for review, the appellant asserts, among other things, that the administrative judge did not give proper credit to important testimony. He argues that Ms. Reel stated that she did not consider the conversation to be sexually harassing in nature, and that even if she had testified that she was sexually harassed, the telephone call did not rise to the level of sexual harassment, as interpreted by the Supreme Court. He also asserts that the administrative judge erroneously interpreted the record in analyzing his reprisal claim, and challenges the appropriateness of the penalty.

ANALYSIS

¶5 The appellant’s petition raises the question of whether the agency charged him with violating the sexual harassment standard set by Title VII of the Civil Rights Act of 1964, or that of a stricter agency sexual harassment policy. For the following reasons, we find that, while the agency applied its own sexual harassment policy, that policy does not significantly differ from Title VII standards.

¶6 In sexual harassment appeals, the Board gives careful scrutiny to the policy at issue, and to whether the policy tracks the Title VII requirements. Where an agency charges an employee with violating its sexual harassment policy, and not with violating Title VII, the agency is required to prove only that the appellant's conduct violated that policy. See *Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 234-35 (1993). In *Alsedek*, the agency policy made no mention of the creation of a "hostile environment," as Title VII requires in pertinent part, nor did the agency proposal refer to it. The decision letter there explicitly stated that the agency was applying agency policy and not Title VII. Thus, the Board concluded that the administrative judge erroneously applied Title VII standards. The Board more recently followed the *Alsedek* analysis in *Cisneros v. Department of Defense*, 83 M.S.P.R. 390, 393-96 (1999) *aff'd*, No. 99-3463 (Fed. Cir. Oct. 10, 2000) (NP). There, the agency policy defined sexual harassment without specific reference to Federal law, except to state generally that covered conduct also violated state and Federal law. In both cases, because the agency's policy set forth a lower threshold for proving sexual harassment, the agency was required only to meet that standard.

¶7 Where, however, an agency policy explicitly references Title VII, and its standards, including creating a hostile working environment, Title VII standards must be applied and, to be actionable, the misconduct must violate those standards, notwithstanding the agency's statement in its notice and decision letters that the charged conduct violated agency policy. See *King v. Hillen*, 21 F.3d 1572, 1572-79 (Fed. Cir. 1994). Similarly, where the agency regulation cited in the proposal notice mirrors the language of the Title VII's implementing regulations, the proper standard for judging the alleged misconduct is the definition of sexual harassment at 29 C.F.R. § 1604.11. See *Lowe v. Department of Justice*, 63 M.S.P.R. 73, 76-77 (1994).

¶8 In this case, a review of the agency's policy, and its proposal and decision letters, establishes that the agency's policy mirrors Title VII and its implementing

regulation. The agency's sexual harassment regulation, SRP 98-04, first states that its objective is to provide a work environment free from sexual harassment and to ensure all employees are committed to this goal. It also states as a "Directive" that sexual harassment will not be tolerated, and that 29 C.F.R. § 1604.11 defines sexual harassment; it then sets forth that regulation's definition of conduct constituting sexual harassment.

¶9 Title 29 C.F.R. § 1604.11 states that sexual harassment violates Title VII, and defines circumstances constituting sexual harassment. It provides that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a). The regulations also state that the EEOC will examine the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred, to determine whether the alleged conduct constitutes sexual harassment. 29 C.F.R. § 1604.11(b).

¶10 The policy statement also lists additional specific acts that "may" constitute sexual harassment at the agency. It states that sexual harassment "may" include the following conduct: letters, telephone calls, or distribution or display of materials of a sexually explicit suggestive nature; deliberate touching, leaning over, cornering, or pinching; sexually suggestive looks or gestures; requests, suggestions, or pressure for sexual favors; sexual teasing, jokes, remarks, questions, or other sexually offensive comments; or pressure for a dating or personal relationship. Finally, the policy statement reads that "whether

invited or uninvited, such actions have no place in the [agency] environment.” Appeal File, Tab 7, subtab 4f(4).

¶11 Thus, this policy does not provide any greater restrictions on conduct than those found in Title VII and its regulations. Indeed, on its face, the policy merely quotes the elements of a sexual harassment charge under section 1604.11. While the statement includes a list of illustrative conduct, the list does not create a “stricter” standard by making actionable any conduct which does not otherwise violate the law or regulations.

¶12 The agency’s proposal and decision letters further support the conclusion that the agency based its action on Title VII standards. The proposal notice alleges that the appellant’s conduct was “pervasive,” and the decision letter directly quotes section 1604.11, as that section is mirrored in the agency’s policy. The decision letter also specifically concludes that the appellant created a hostile working environment through his alleged misconduct. Appeal File, Tab 7, subtabs 4b, 4f. We therefore conclude that the agency’s internal sexual harassment policy is co-extensive with Title VII standards, and that the agency must prove that the appellant’s alleged misconduct constituted sexual harassment under Title VII.

¶13 The Supreme Court has held that Title VII is violated when the workplace is permeated with unwelcome discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399, 2405-06 (1986). The Court has explained that this standard for determining whether conduct violates Title VII takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. It has said that mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII, and that conduct that is not severe or pervasive enough to create an objectively

hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview. It has also stated that, if the victim has not subjectively perceived the environment as abusive, the conduct has not actually altered the conditions of the victim’s employment and there is no Title VII violation. *See Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370-71 (1993).

¶14 The Court has further indicated that the determination as to whether the environment is hostile or abusive must be made by examining all the circumstances. These may include the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with an employee’s work performance. The Court also held that the effect on the employee’s psychological well-being is relevant to determining whether the victim actually found the environment abusive, but psychological harm is not required for a finding of harassment. *Harris*, 114 S. Ct. at 371. It has also explained that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment that would constitute sexual harassment. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998).

¶15 Applying the Court’s decisions concerning sexual harassment under Title VII, and the provisions of section 1604.11, to the conduct at issue yields the conclusion that the agency has not proven a violation of Title VII. The appellant’s misconduct, the single telephone call to Ms. Reel, does not violate Title VII because it was an isolated incident that was not extremely serious and did not appear to unreasonably interfere with Ms. Reel’s work performance.

¶16 The appellant's remaining arguments pertain to the administrative judge's findings on the reprisal and penalty issues. With respect to the reprisal issue, the appellant argues that, contrary to the administrative judge’s findings, the claim of the proposing official, Ms. Johnson, that she was unaware of the appellant's

history of filing prior EEO complaints was contradicted by the testimony of Ms. Reel's supervisor, Mr. Jakubczek, who had spoken to Ms. Johnson regarding the incident with Ms. Reel. There was, in fact, a conflict between these testimonies. Mr. Jakubczek testified that Ms. Johnson told him that this was not the first type of incident of this kind in which the appellant had engaged. Hearing Tape 2, Side B. Ms. Johnson, however, testified that she did not make this statement to Mr. Jakubczek. Hearing Tape 4, Side B. Because these testimonies did not pertain to the issue of whether the agency took the suspension action at issue in reprisal for the appellant's prior EEO activity, this claim does not provide a basis for setting aside the administrative judge's conclusion that he failed to establish this affirmative defense. Initial Decision at 5-7. Finally, in light of our conclusion that the agency failed to prove the charge against the appellant, we need not address the appellant's arguments regarding the appropriateness of the penalty.

ORDER

¶17 We ORDER the agency to cancel the appellant's suspension, and to restore the appellant effective June 9, 1999. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶18 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶19 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶20 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

**NOTICE TO THE APPELLANT
REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.