UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 175

Docket No. DC-0752-09-0426-I-1

Pemiton E. Gregory,
Appellant,
v.
Department of the Army,
Agency.

August 25, 2010

Gary M. Gilbert, Esquire, Silver Spring, Maryland, for the appellant.

Richard P. White, Esquire, Baltimore, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review and the agency has filed a cross petition for review of the initial decision that reversed the appellant's demotion and suspension and found that the appellant failed to prove his affirmative defenses. For the reasons discussed below, we find that the petitions do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY them. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this

Opinion and Order, STILL REVERSING the appellant's demotion and suspension.

BACKGROUND

¶2 On February 18, 2009, Construction Division Chief John Chubb proposed to remove the appellant from the position of YF-0802-02 Supervisory Civil Engineer at the District of Columbia Integrated Program Office, Baltimore District, U.S. Army Corps of Engineers (DCIPO). Chubb based the proposal on three charges: (1) sexual harassment; (2) creating a hostile work environment; and (3) reprisal against an employee engaging in protected activity. Initial Appeal File (IAF), Tab 5 at 49-50.

¶3 Effective March 29, 2009, Deputy District Engineer Major John Raso demoted the appellant to a non-supervisory GS-12, step 8 Civil Engineer position and suspended him for 21 days, effective April 6 through 26, 2009, "for the following reasons: a. Violations of the Commander's Policy Statement on Sexual Harassment dated 05 October 2006; b. Violations of the Commander's Policy on Employee's Right to Work in a Hostile Free Environment dated 05 October 2006; and c. Violations of the Department of Army Policy on Harassment dated 31 July 2008." IAF, Tab 5 at 10, 12, Tab 6, subtab O at 1-5. Raso did not sustain the reprisal charge. *Id.*, Tab 5 at 12. At the hearing, the agency stipulated that Raso also did not sustain one specification of Charge 2, which was based on the same alleged reprisal. Hearing Transcript (HT) at 40-41; IAF, Tab 26 at 20-21.

¶4 Therefore, the two charges and underlying specifications the agency apparently sustained, as set forth in the notice of proposed removal, were as follows:[1]

> a. Violation of Department of the Army policy and the Commander's Policy on Sexual Harassment dated 5 October 2006. You made

[1] As discussed below, it is not clear that Raso actually determined whether all of the conduct occurred and whether it constituted sexual harassment.

> inappropriate and unwelcome verbal comments of a sexual nature in the workplace in the presence of employees under your supervision, by using words to the effect of:
>
> 1. In the summer of 2008 you stated to Ms. [Jean] Hawthorne, an employee you supervise, that you had a working tongue and stuck it out in front of her in the presence of a witness.
>
> 2. On or about September 8, 2008 you sexually harassed a co-worker, Ms. Vonda McDonald, by commenting that she argued like your wife and that you wanted marital benefits if she continued.
>
> 3. On or about September 9, 2008 you commented to Ms. McDonald that she would look fine when she turns 40.
>
> 4. On or about October 20, 2008 you harassed Ms. McDonald by asking her for her services, waving $300, and asked her to come get the money, girl . . . oh wait, let me turn my music on and then come get it.
>
> b. Violation of Department of the Army policy and the Commander's Policy Memorandum No. 19, Employee's Right to Work in a Hostile Free Environment, dated 5 October 2006 by actions or words to the effect.
>
> 1. The facts and allegations in paragraph 2 [apparently, paragraph a] of this memorandum are incorporated by reference.
>
> 2. In the summer of 2008 you stated to Ms. Hawthorne, an employee you supervise, that you had a working tongue and stuck it out in front of her in the presence of a witness and cut her coat and reimbursed her $40.00 for a replacement.
>
> 4. On or about September 18, 2008 you stated to your co-worker, Ms. McDonald that you had heard her husband had come to the office looking for you. You asked her Am I going to have to start breaking Virginia state law and bring my gun to work.

IAF, Tab 5 at 49-50.

¶5 The appellant filed an appeal in which he alleged, inter alia, that the agency did not prove that his actions were sexual harassment. IAF, Tab 1 at 5. He also raised affirmative defenses of harmful error and racial discrimination. *Id.*, Tab 1 at 5; Tab 26 at 6-20.

¶6 The administrative judge found that the policy language cited in the charges was sufficiently similar to that of Title VII of the Civil Rights Act of 1964 prohibiting the creation of a "hostile work environment" to require the agency to meet the Title VII standard as an element of its sexual harassment charge. She therefore found that, to sustain the charges, the agency had to prove both that unwelcome sexual conduct occurred and that the conduct created a hostile working environment. Initial Decision (ID) at 4-5.

¶7 The administrative judge reviewed the testimony concerning the background of the charges. The administrative judge cited former Equal Employment Opportunity Specialist Kim Brewton's testimony that Hawthorne and McDonald made the allegations during a "sensing" session he conducted for non-supervisory employees on December 1, 2008, and that he spoke with the appellant, who stated that he should have been more careful. The administrative judge also cited Senior Construction Manager William Hettchen's testimony that he was the appellant's supervisor at the time; that he issued a reprimand to the appellant[2]; and that, to the best of his knowledge, the appellant did not engage in any additional offensive conduct after that. ID at 6-9.

¶8 Concerning Charge 1, Specification 1 and Charge 2, Specifications 1 and 2 (the tongue incident), the administrative judge reviewed the testimony about the June 7, 2008 meeting among the appellant, Hawthorne, and Project Engineer Kevin Redd during which the appellant stuck out his tongue and stated that he had a working tongue. ID at 9-11. The administrative judge found that the appellant admitted "the comment attributed to him and acknowledged that it was in poor taste," but she credited his explanation that it was not directed toward Hawthorne, it referred to his "quick wit," and Hawthorne laughed after he made the statement. *Id.* at 12. The administrative judge also credited Redd's testimony that Hawthorne asked him "could you believe that," that he responded "you have

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[2] The notice of proposed removal rescinded the reprimand. IAF, Tab 5 at 49.

to excuse some people," and that he believed that the appellant's comments were inappropriate. She found, however, that Redd did not recall telling Hawthorne that he believed that the appellant liked her. She did not "fully credit" Hawthorne's testimony, finding that she was unable to conclude that the behavior was directed at Hawthorne; finding it significant that Hawthorne did not mention any improper sexual conduct by the appellant until the sensing session on December 1, 2008; finding it notable that Brewton, whom she found credible, testified that he and others at the sensing session thought that Hawthorne was overreacting and that he questioned her truthfulness; and finding credible Hettchen's testimony that he believed that Hawthorne twisted facts and tended to exaggerate her allegations against the appellant. *Id*. at 12-13.

¶9 The administrative judge further found that, even if "the appellant's conduct was an inappropriate sexual comment, there is no evidence to demonstrate that it was unwelcome or based on Ms. Hawthorne's sex as it does not appear that the comment was directed to Ms. Hawthorne, nor is there any evidence to demonstrate that the comment was sufficiently severe or pervasive to interfere with Ms. Hawthorne's performance or to create an abusive work environment." ID at 13. The administrative judge therefore did not sustain the specifications, implicitly because the agency failed to show that the admitted conduct constituted Title VII sexual harassment. *Id*.

¶10 Concerning Charge 2, Specification 2 (the coat-cutting incident), the administrative judge reviewed Hawthorne's and the appellant's testimony, including the appellant's testimony that he told Hawthorne that she had a string hanging by her elbow; she came over and held her arm out to allow him to cut the string; the next day, she told him that he cut her coat; he apologized and gave her $40; and he did not clip a string on her shoulder, where the coat was cut, but on her elbow. The administrative judge found that Hawthorne's claim concerning how her coat was cut was not credible or consistent with the evidence. ID at 18. The administrative judge further found that it "appears that Ms. Hawthorne

voluntarily allowed the appellant to cut her jacket." *Id.* at 18-19. The administrative judge concluded that, although "it was inappropriate for the appellant to touch Ms. Hawthorne in any manner," she did not credit Hawthorne's version of events, and that, furthermore, Hawthorne admitted in her deposition that she did not believe that "the appellant's action of cutting her jacket was sexual in nature." *Id.* at 19. Therefore, the administrative judge did not sustain the specification, implicitly because the agency failed to show that the conduct constituted Title VII sexual harassment. *Id.*

¶11 Concerning Charge 1, Specification 2, and Charge 2, Specification 1 (the marital benefits comment), the administrative judge cited McDonald's testimony that she informed Brewton during the sensing session that the appellant stated to her "if you are going to argue with me like you are my wife, I want marital benefits," and she interpreted the comment to mean that the appellant wanted sex. ID at 14. The administrative judge cited the appellant's testimony that he said "you argue with me like my wife and there are no benefits," but that this was not a sexual statement. *Id.* at 14. The administrative judge found that the appellant "credibly testified and displayed a very calm, clear, direct and straightforward demeanor," and that it was undisputed that "the appellant made the comment attributed to him." *Id.* Although she found that McDonald "also testified in a calm, direct manner," she found "it very difficult to credit her testimony." *Id.* She cited various e-mails in which McDonald "engaged in playful banter with the appellant," *id.*, including an inappropriate e-mail less than 1 month before the sensing session, and found that they seemed to contradict McDonald's allegation that the appellant sexually harassed her and created a hostile work environment. She found that McDonald clearly engaged in inappropriate behavior herself and did not try before the sensing session to inform the appellant that his comments were unwelcome. ID at 15. She further found that the "charge" required the appellant to have engaged in inappropriate and unwelcome conduct of a sexual nature in the presence of employees under his supervision, and it was undisputed

that the appellant did not supervise McDonald. She concluded that, because the behavior was consensual, it did not meet "the basic definition of sexual harassment." Therefore, she did not sustain the specification. *Id.* at 14-15.

¶12 Concerning Charge 1, Specification 3, and Charge 2, Specification 1 (the turning 40 comment), the administrative judge found that, although Raso testified that the specifications were sustained, he did not address them in the agency's final decision and did not believe that the comment occurred because it was a "he said, she said situation." The administrative judge consequently did not sustain the specifications. ID at 15-16.

¶13 Concerning Charge 1, Specification 4, and Charge 2, Specification 1 (the $300 incident), the administrative judge cited McDonald's testimony as follows: She was standing in the doorway of the appellant's office while the appellant was seated behind his desk. She spoke of her psychology background twice with the appellant, once during her initial interview and on another occasion in the appellant's office. She was having a conversation with the appellant and she stated "If I had my own practice I would not take anyone in the office on as a client because they could not afford my services." The appellant responded "Yes I can" and he took out $300. During the sensing session, she stated that the appellant shook the $300 at her and stated, "come and get it little girl, let me turn my music on." She believed he wanted a lap dance from her. The administrative judge found, however, that during her deposition, McDonald admitted that, after the appellant made this alleged comment to her, she laughed, went back to her desk and she continued working. ID at 16-17.

¶14 The administrative judge found that the appellant testified as follows: He had exited the conference room and stated to McDonald that he may need to use her services to handle stress; McDonald replied that he could not afford her services; he "arrogantly" pulled out $300, which he had collected from rental property, to show that he could afford her services; his comment was not sexual; his relationship with McDonald was cordial and informal; and he did not

supervise her. The administrative judge found, for the reasons previously noted, that the appellant and McDonald engaged in inappropriate banter with each other, but because it was consensual, it did not meet the basic definition of sexual harassment. Therefore she did not sustain these specifications. ID at 17.

¶15 Concerning Charge 2, Specification 4 (the gun comment), the administrative judge cited the appellant's testimony as follows: McDonald told him several times that her husband wanted to meet him. He repeatedly asked her why her husband wanted to meet him. He admitted that he stated "Am I going to have to break Virginia law and bring in my gun?" He was not threatening her husband and knows it was an inappropriate comment to make. His relationship with McDonald did not change until he began questioning her leave. The administrative judge found that, for the reasons previously noted, the appellant and McDonald engaged in inappropriate consensual banter with each other. Moreover, the appellant testified that he gave McDonald a ride to the bus following the incident, and there is no indication that she objected. Therefore, the administrative judge did not sustain this specification. ID at 19-20.

¶16 In conclusion, the administrative judge noted that the appellant engaged in inappropriate conduct, he admitted to doing so, his behavior was more egregious because of his supervisory status, and it was worthy of discipline. She found, though, that instead of charging the appellant with inappropriate conduct, the agency elected to charge him with violating its sexual harassment and hostile work environment policies and therefore was required to meet the Title VII standard as an element of its charge. She found that the agency had failed to do so, and that she could not sustain an agency action based on charges the agency could have levied but had not. Consequently, she found that the agency failed to prove either charge by a preponderance of the evidence. ID at 20.

¶17 The administrative judge rejected as unproven the appellant's affirmative defense of harmful error. ID at 21-25. She acknowledged the appellant's argument, inter alia, that the agency imposed a disparate penalty against him by

not disciplining Hettchen, who he alleged committed similar offenses by retaliating against Hawthorne when he forced her to sign a settlement agreement in her equal employment opportunity complaint against the appellant. *Id.* at 22; *see* IAF, Tab 5 at 70 (December 31, 2008 Memorandum For Record). The administrative judge found, though, that the charges and circumstances surrounding the appellant's alleged conduct were very different than those surrounding Hettchen's, noting, inter alia, that the appellant was charged with violating the agency's sexual harassment and hostile work environment policies; that, although he was also charged with reprisal, that charge was not sustained; and thus, that Hettchen was not an appropriate comparator employee. She also found that, although Hettchen and the appellant were both managers in DCIPO, there was no evidence that they were similarly situated and supervised by the same individual. ID at 23-24.

¶18 The administrative judge also rejected as unproven the appellant's affirmative defense of racial discrimination based on the same disparate treatment argument. She acknowledged that the appellant is African-American and that Hettchen is white, but found no evidence that they were similarly situated or that they were disparately treated. ID at 25-26.

¶19 Accordingly, the administrative judge reversed the agency's action. ID at 1-2, 26. In an erratum, she ordered the agency to provide the appellant with interim relief.[3] IAF, Tab 38.

¶20 The appellant has filed a petition for review and the agency has filed a cross petition for review of the initial decision. Petition For Review (PFR) File, Tabs 1, 3, 5. Both parties have also filed responses. *Id.*, Tabs 10, 13.

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[3] After an undue disruption determination, the agency assigned the appellant to a non-supervisory position as a GS-13, step 5 Civil Engineer, which it states is equivalent in pay and benefits to his prior position as a YF-02 supervisor, effective the date of the initial decision. Petition For Review (PFR) File, Tab 3 at 10, 56-58, 61-62. The appellant has not contested the interim relief provided.

ANALYSIS

¶21 We find that the appellant and the agency have failed to show that the administrative judge committed any error that prejudiced their substantive rights. Therefore, we DENY the appellant's petition for review and the agency's cross petition for review. We REOPEN this case on our own motion, however, to explain our conclusion that the administrative judge correctly applied the Title VII sexual harassment standard to both charges in this case and correctly found that the agency failed to prove the charges under Title VII.

The administrative judge correctly applied the Title VII sexual harassment standard to both charges.

¶22 Contrary to the agency's argument, the administrative judge did not sua sponte apply the Title VII sexual harassment standard without providing the agency with notice and an opportunity to respond. The agency asserts that neither the administrative judge nor the appellant raised the matter below and that the Judge's Handbook required the administrative judge to identify all issues that she had accepted for adjudication. PFR File, Tab 3 at 11-13. Admittedly, the administrative judge issued only one substantive prehearing conference memorandum in which she simply stated that the agency bears the burden of proving "the charged conduct" by preponderant evidence. IAF, Tab 30 at 2. However, even if the Judge's Handbook required notice of the standard she intended to apply, the Handbook is not mandatory and failure to apply its provisions does not establish adjudicatory error. *See, e.g.*, *Koehler v. Department of the Air Force*, 99 M.S.P.R. 82, ¶ 13 n.4 (2005); Judges' Handbook, Chapter 1, Section 1. In addition, although the appellant did not explicitly state that Title VII should apply because the policy language tracks that of Title VII, the appellant's August 14, 2009 prehearing submission clearly argues that Title VII standards apply, and thus, the appellant placed the agency on notice that the standards set forth in Title VII are applicable in this case. IAF, Tab 26. The appellant again addressed Title VII in his written closing argument, *id.*, Tab 34,

and the agency also discussed the applicability of Title VII standards in its written closing argument submitted on the same day, *id.*, Tab 35.

¶23 Moreover, the Board itself has issued decisions in which it has determined for the first time that agencies were required to meet the Title VII standard of proof. *See, e.g., Salazar v. Department of Energy*, 88 M.S.P.R. 161, ¶ 5 (2001). The agency presumably should have been familiar with such decisions. *See also* HT at 411 (Agency representative's statement that "I would submit, Your Honor, we all know what we're talking about when we talk about sexual harassment and hostile work place.") We find that the agency reasonably should have known, prior to the hearing, that the administrative judge would apply the Title VII standard in analyzing the charges, and that any failure by the administrative judge to reference that standard explicitly prior to the hearing did not prejudice the agency because the agency has not explained what evidence it would have presented to meet its burden of proof that it has not already submitted.

¶24 Where an agency charges an employee with violating its hostile work environment sexual harassment policy but not with violating Title VII, and the agency policy defines sexual harassment without explicit reference to Federal law and without tracking Title VII, thus setting forth a lower threshold for proving sexual harassment, the agency is required to prove only that the appellant's conduct violated the agency's policy. *Viens v. Department of the Interior*, 92 M.S.P.R. 256, ¶ 6 (2002). Where, however, an agency charges an employee with violating its sexual harassment policy and that policy explicitly references the Title VII standard, including creating a hostile working environment, the Title VII standard must be applied, and the agency is required to prove that the appellant's conduct violated Title VII. *Id.* Similarly, where an agency charges an employee with violating its hostile work environment sexual harassment policy and that policy tracks the language of Title VII's regulations, even though the policy does not explicitly reference them, the proper standard for judging the alleged misconduct is that of Title VII. *Id.*

¶25 As the agency's sexual harassment policies in this appeal did not explicitly reference Title VII, the issue in this case is whether the agency policies sufficiently track the language of Title VII regulations and guidance as to make it appropriate to require the agency to prove sexual harassment under the Title VII standard. 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 v. Vinson*, 477 U.S. 57, 67 (1986).

¶26 We find that the administrative judge correctly applied the Title VII standard to the charges in this case. In that regard, the agency asserts that the administrative judge erred in applying the Title VII standard to Charge 2 because it charged the appellant with misconduct under its own policy, Policy No. 19. It contends that she provided no authority for her conclusory ruling that, although Policy No. 19 did not expressly cite to Title VII, it tracked the conduct prohibited by Title VII and Equal Employment Opportunity Commission regulations. The agency argues that Policy No. 19 does not refer to Title VII; its language and prior Board decisions show that it does not track Title VII language; it specifically indicates that a single improper joke may, under appropriate circumstances, constitute a violation, as opposed to requiring the creation of a hostile working environment; and it includes references to racial or other prohibited hostility. The agency cites several decisions, mostly initial decisions, to support its argument. It apparently acknowledges that an agency policy that tracks the language of, or refers to, Title VII requires it to prove sexual harassment under Title VII, and that it may not sustain a charge based on a different or lesser offense, but asserts that it avoided such a problem by charging the appellant with substantially similar conduct under two separate charges. It argues that, in short, the charge that the appellant violated Policy No. 19 was not a sexual harassment charge, but an inappropriate conduct charge. It then

discusses rules of statutory construction and apparently asserts that the administrative judge should have applied them in evaluating its policies. It contends that it had two separate and distinct policies for sexual harassment and for hostile work environment and the appellant was put on notice of the policies. It argues that it proved that the appellant violated Policy No. 19. PFR File, Tab 3 at 12-22, 31-35.

¶27 The agency has not shown that the administrative judge erred in finding that Charge 2 and Policy No. 19 (IAF, Tab 25, Ex. 3) required the agency to prove sexual harassment under the Title VII standard. As the agency admits, the administrative judge acknowledged that Policy No. 19 did not specifically refer to Title VII. PFR File, Tab 3 at 13; ID at 4. That alone is insufficient to show that the administrative judge erred in finding that the agency was required to prove sexual harassment under the Title VII standard. *See Viens*, 92 M.S.P.R. 256, ¶ 6. Further, despite its assertion that Policy No. 19 indicates that a single improper joke may constitute a violation, the agency admits that the policy states: "Train your employees not to tolerate offensive comments from other co-workers, i.e., jokes shared between co-workers may be overheard by other co-workers who are offended, thereby setting the stage for a hostile work environment." PFR at 14 n.4 (emphasis added). In addition, the agency has not explained how Policy No. 19's reference to racial or other prohibited hostility, as well as to sexual harassment, shows that the Title VII standard should not apply. Moreover, the agency's heavy reliance on initial decisions does not establish adjudicatory error because initial decisions are not precedential. *See, e.g., Roche v. Department of Transportation*, 110 M.S.P.R. 286, ¶ 13 (2008), *aff'd*, 596 F.3d 1375 (Fed. Cir. 2010).

¶28 In that regard, Policy No. 19, although somewhat vague and addressing both racial and sexual harassment, still required proof that the actions created a hostile work environment. Indeed, as previously noted, the title of the memorandum is "Employee's Right to Work in a Hostile Free Environment."

Further, although the policy occasionally refers to single instances of misconduct, e.g., stating that "[i]n the event an unlawful act occurs, corrective and/or remedial action will be taken to ensure that similar violations will not occur," the gist of the policy is to prohibit a hostile work environment, e.g., referring to "[t]he emotional harm brought on by an employment atmosphere charged with sexual, racial or other prohibited hostility . . ."; stating that "[e]mployees of this District have a right to work in an environment free of sexual harassment and slurs based on their differences"; noting that "recent court decisions have held that remedial action should be 'reasonably calculated to end the harassment,' and that managers should impose sufficient penalties to ensure a workplace free from racial and sexual harassment"; stating that "[m]anagers' responsibilities in this area are to set an example and help create a positive work environment"; and, as previously noted, instructing them to "[t]rain your employees not to tolerate offensive comments from other co-workers, i.e., jokes shared between co-workers may be overheard by other co-workers who are offended, thereby setting the stage for a hostile work environment." IAF, Tab 25, Ex. 3. Title VII regulations, of course, define sexual harassment as unwelcome conduct when, inter alia, the conduct creates an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a).

¶29 Moreover, as the administrative judge found, the agency could simply have charged the appellant with inappropriate conduct if it did not want to meet the Title VII standard; it was not required to cite an agency policy to support such a charge. *See, e.g., Hatch v. Department of the Air Force*, 40 M.S.P.R. 260, 266 (1989) (stating that not all misconduct for which disciplinary action may be taken is specifically prohibited by statute or regulation). Part of the problem appears to have been that the agency chose to cite policies but lacked a clear understanding of which policies it was charging the appellant with violating. In that regard, the agency apparently argued at hearing that the "Department of the Army policy" referred to in its charges was not simply a general reference to the two more

specifically identified October 5, 2006 policies, but a reference to a June 8, 2007 Commander's Policy Memorandum #3, Command Policy, Prevention of Sexual Harassment and a July 31, 2008 Army Policy on Harassment, which it attempted to introduce. HT at 236; IAF, Tab 25, Exs. 4, 5. The appellant objected, and the administrative judge sustained the objection. HT at 236-39. We agree with the administrative judge that the agency's vague reference to "Department of the Army policy" in the charges, when it specified the 2006 policies by title and date, did not place the appellant on notice that it was charging him with violating additional agency policies, and, thus, that Raso should not have found that the appellant violated the 2008 policy. IAF, Tab 5 at 10. In general, we also note that Raso's testimony revealed that he had no clear understanding of the sexual harassment standard he applied in sustaining the adverse action. HT at 56-61.

¶30 Given its own inability to clarify the policies and standards underlying the charges, the agency has not explained why the administrative judge should have applied principles of statutory construction in an attempt to harmonize its policies. The agency further has not explained why the administrative judge should have attempted to interpret them in such a way as to apply to separate and distinct situations. Because the language in the agency's sexual harassment policies closely tracks the language in Title VII, the administrative judge correctly applied the Title VII sexual harassment standard to both charges. *Viens*, 92 M.S.P.R. 356, ¶¶ 5-8.

The administrative judge correctly found that the agency failed to prove both charges under the Title VII sexual harassment standard.

¶31 The Supreme Court has described the Title VII standard – conduct that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment – as a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). To be actionable, conduct must be severe or pervasive enough to

create an objectively hostile or abusive work environment; 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. *Id.* at 21-22. Determining whether the environment is hostile or abusive must be made by examining all the circumstances, including 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. *Viens*, 92 M.S.P.R. 256, ¶ 10 (2002). Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment that constitute sexual harassment. *Id.*

¶32 The agency argues that the administrative judge applied incorrect standards in evaluating credibility in determining that it failed to prove its charges against the appellant, even under the Title VII sexual harassment standard. It contends that she erred under *King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996), in considering the appellant's perspective or intent in determining whether it proved sexual harassment. It also contends that she incorrectly evaluated witness demeanor, apparently by judging some witnesses' credibility by how they appeared at the hearing and Hawthorne's credibility by how others reacted to her. It similarly contends that the administrative judge erred in crediting some witnesses because of their calm and straightforward demeanor and then discrediting McDonald's testimony without explanation, although she also found McDonald to be calm and direct. It asserts that, as a result, the administrative judge concluded that the appellant was credible and McDonald was not credible based on the same criteria and conclusions. PFR at 23-26.

¶33 The agency has not shown that any adjudicatory error in evaluating credibility prejudiced its substantive rights. Admittedly, it appears that the administrative judge erred under *Frazier*, 77 F.3d at 1363, to the extent that she noted the appellant's credibility concerning his intent in making certain

comments, as opposed to his credibility in describing the incidents and the participants' reactions. In addition, it is unclear why she relied heavily on demeanor evidence in evaluating most of the witnesses, except for Hawthorne, even though Hawthorne also testified at the hearing. As discussed below, however, any adjudicatory error in that regard did not affect the outcome of the case. Thus, it does not provide a basis for reversing the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

¶34 The agency next disputes some of the administrative judge's findings concerning the specific comments and incidents charged. We note in general that, as with the definition of sexual harassment and the policies to be applied, Raso's testimony does not show that he necessarily made his decision based on whether the comments or incidents actually occurred. For example, in discussing the "turning 40" comment that the administrative judge did not sustain, he did not seem to understand that whether he decided that the appellant made the comment affected whether he should sustain the action. HT at 45-49.

¶35 The agency asserts that, contrary to the administrative judge's finding, the appellant admitted in response to discovery that he cut Hawthorne's coat. It further asserts that the administrative judge erred in finding that Hawthorne consented to the appellant's action, even if she consented to having a string from the elbow of her jacket cut, and that a single incident of such physical contact rises to a Title VII violation. PFR File, Tab 3 at 27-28. The agency has failed to address the administrative judge's finding, however, that Hawthorne admitted in her deposition that she did not believe that the appellant's action of cutting her jacket was sexual. ID at 19. In addition, Raso testified that he did not know whether Hawthorne consented to the appellant cutting the string off of her coat and that he did not think that the action had sexual connotations. HT at 97. Thus, the agency has not shown how the administrative judge erred in finding that, even if the incident occurred as it described, it constituted Title VII sexual harassment.

¶36 The agency also asserts that the administrative judge erred in finding that the tongue comment was not directed at Hawthorne and that Hawthorne did not know the context of the statement because she entered the room in the middle of a conversation between the appellant and Redd. PFR File, Tab 3 at 27-28. Again, however, even if the agency's assertions are true, it has not specifically addressed the administrative judge's finding that the appellant credibly testified that Hawthorne laughed when he made the comment and gesture. ID at 12. Admittedly, Redd testified that he did not hear her laugh. HT at 181. After testifying that the appellant said in his written reply that Hawthorne was laughing, though, Raso stated "I don't have reason to believe that he's lying." HT at 62-63. Moreover, the administrative judge cited the appellant's testimony that he had no indication that Hawthorne was offended. ID at 11. Consistent with this, Hawthorne testified that she did not think that she ever told the appellant that she thought him sticking his tongue out was inappropriate. HT at 156. In addition, the agency has not specifically addressed the administrative judge's finding that, even if the appellant made an inappropriate sexual comment, it was not sufficiently severe or pervasive to interfere with Hawthorne's performance or to create an abusive work environment. ID at 13. Thus, the agency has not shown that the administrative judge erred in finding that it failed to prove Title VII sexual harassment.

¶37 The agency contends that the administrative judge abused her discretion in ruling that she would not consider Hawthorne's testimony concerning two incidents of the appellant's inappropriate statements to her and her daughter, in evaluating the appellant's credibility, on the basis that they were not part of the charges. It asserts that the testimony related to the appellant's motive and propensity to behave in a certain manner. PFR File, Tab 3 at 28-30. The administrative judge allowed some testimony on other alleged incidents, but sustained the appellant's objection to the testimony on the basis that the incidents were not part of the proposal or decision letters. HT at 147-50. The record does

not show that the agency preserved an objection to the administrative judge's ruling. *Id.* at 150. Therefore, the Board does not need to consider its objection on review. *See, e.g., Leite v. Department of the Army*, 109 M.S.P.R. 229, ¶ 13 n.4 (2008). In any event, given the agency's argument that the administrative judge erred under *Frazier* in considering the appellant's motive, it has not shown how the testimony would be relevant.

¶38 The agency argues that, even assuming that the Title VII standard applies, the administrative judge erred in finding that the appellant's conduct did not create a hostile work environment. It asserts that the administrative judge erred in considering each act as an isolated event rather than evaluating the cumulative effect of the appellant's conduct. It notes that the appellant acknowledged much of the conduct and refers to Redd's testimony and reaction. It contends that the administrative judge erred in discrediting Hawthorne because others described her as overreacting and because she did not mention the appellant's improper conduct until the sensing session, asserting that a complainant is not required to expressly testify that she felt sexually harassed; that Hawthorne, as a probationary employee, likely feared repercussions; and that the sensing session was a safe environment for her to reveal the appellant's conduct. Concerning McDonald, the agency notes that the appellant admitted the "no benefits" statement and argues that the administrative judge erred in discrediting McDonald's interpretation on the basis that they engaged in inappropriate consensual e-mail banter. It contends that McDonald sent the e-mails only after learning that, despite his contrary representations, the appellant was never her supervisor. It asserts that the appellant admitted that he waved the money in front of McDonald. It further asserts that he told McDonald that he was going to bring his gun to work upon learning that her husband had visited the office to talk to him about his behavior, acknowledging that it was an inappropriate comment. It contends that the administrative judge erred in not sustaining the specification because McDonald then accepted the ride from the appellant. PFR at 35-40.

¶39 The agency's arguments ultimately constitute mere disagreement with the administrative judge's explained factual findings and credibility determinations, many of which were based on demeanor, and it has failed to show sexual harassment under the Title VII standard. Again, the agency has not specifically addressed the administrative judge's finding that the appellant credibly testified that Hawthorne laughed when he made the working tongue comment and gesture and that he had no indication that she was offended, and that she did not believe that any action in cutting her jacket was sexual. ID at 11-12, 19. Admittedly, the administrative judge did not clearly find whether the appellant stated to McDonald that he "wanted marital benefits" or that "there are no benefits." *Id.* at 14. Further, Brewton testified that the appellant told him that he did say to McDonald "that if she continued to act like my wife, I want marital benefits." HT at 263. Again, however, the administrative judge found that the agency failed to establish that the appellant's comments and conduct towards McDonald were unwelcome. *Id.* at 14-17, 19-20. That the administrative judge found McDonald credible in testifying as to the statement does not mean that the administrative judge erred in finding her not credible concerning whether the appellant's conduct was unwelcome. *See, e.g., Pedersen v. Department of Transportation*, 9 M.S.P.R. 195, 198 (1981). Because, in essence, the agency has merely disagreed with the administrative judge's findings and credibility determinations, some of which were based on demeanor, its cross petition for review does not establish the administrative judge erred in her ultimate conclusions on the charges. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Therefore, we find that the administrative judge correctly concluded that the agency failed to prove the charges under the Title VII standard.

The appellant has failed to show that the administrative judge committed prejudicial error in finding his affirmative defense of racial discrimination unproven.

¶40 To establish an affirmative defense of prohibited employment discrimination or retaliation before the Board, a Federal employee first must establish a prima facie case under the burden shifting scheme in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, (1973). An appellant may establish a prima facie case by showing that he (1) is a member of a protected class; (2) suffered an adverse employment action; and (3) that the unfavorable action gives rise to an inference of discrimination. 411 U.S. at 802. *See also Chappell-Johnson v. Powell*, 440 F.3d 484, 488 (D.C. Cir. 2006) (citing *Brown v. Brody*, 199 F.3d at 452); *Stella v. Martin*, 284 F.3d 135, 145 (D.C. Cir. 2002). However, with most appeals of adverse actions taken under 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action, i.e., the charged misconduct. Accordingly, the agency has done everything that would be required of it if the appellant had made out a prima facie case, and whether he in fact did so is no longer relevant in most cases. *See Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). Thus, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See id*.

¶41 The question to be resolved then is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason for the removal and that the agency intentionally discriminated against him. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, (1993); *Marshall*, 111 M.S.P.R. 5, ¶ 17. The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes

on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc). While such evidence may include proof that the employer treated similarly situated employees differently, an appellant may also prevail by introducing evidence (1) that that the employer lied about its reason for taking the action; (2) of inconsistency in the employer's explanation; (3) of failure to follow established procedures; (4) of general treatment of minority employees or those who engage in protected activities; (5) of incriminating statements by the employer. *See Brady v. Office of the Sergeant at Arms, U.S. House of Representatives*, 520 F.3d 490, 495 (D.C. Cir. 2008).

¶42 In this appeal, the appellant has presented evidence that the demotion and suspension constituted disparate treatment racial discrimination solely on basis that a comparator employee, Hettchen, received more favorable treatment for similar misconduct. The appellant argues that the administrative judge erred in finding that he failed to prove racial discrimination based on disparate treatment by incorrectly adopting her disparate treatment penalty analysis in deciding his discrimination claim, rather than applying less stringent Title VII standards. Specifically, he asserts that she erred in finding that Hettchen and he were not "similarly situated individuals." In that regard, the appellant asserts that she erred in considering that, because Hettchen had not been charged with retaliation or any other misconduct, he was not a proper comparator employee. He argues that it is the similarity of the comparative employee's conduct that is controlling, not the charges the agency chooses to bring against the employee. He also contends that the administrative judge erred in finding no evidence that Hettchen and he were supervised by the same individual. Citing Chubb's testimony, he contends that they were in the same chain of command because Chubb was Hettchen's direct supervisor and Hettchen was his direct supervisor. He further contends that Chubb was made aware of the allegations against Hettchen by

Brewton, but that no action was taken against Hettchen. He concludes that he showed that he and Hettchen were similarly situated because they were alleged to have engaged in similar misconduct, a violation of Title VII, against the same employee, and that the allegations were brought to the attention of the same management official by the same Equal Employment Opportunity director. PFR at 6-12.

¶43 The appellant has failed to show that the AJ committed any prejudicial error in analyzing his discrimination claim. Granted, she erroneously represented that the agency's failure to charge Hettchen with similar misconduct, as opposed to whether he engaged in such misconduct, was a factor showing that he was not a proper comparator employee for disparate penalty purposes. ID at 24. In addition, it appears that Hettchen and the appellant were both supervised by Chubb. HT at 90, 101, 392, 394. However, the appellant has failed to explain how the specific charges levied against him, which involved alleged sexual misconduct against two women on several occasions, are sufficiently similarl to the single incident of alleged retaliation by Hettchen. In that regard, we note that, although the agency ultimately did not sustain the charges by proving that the underlying conduct constituted Title VII sexual harassment, the appellant admitted to some of the underlying conduct. The appellant has identified no evidence that Hettchen engaged in similar conduct.

¶44 The Board has held that, for other employees to be deemed similarly situated for purposes of an affirmative defense of discrimination based on disparate treatment, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employees. Thus, to be similarly situated, comparators must have reported to the same supervisor, been subjected to the same standards governing discipline, <u>and engaged in conduct similar to the appellant's</u> without differentiating or mitigating circumstances. *See Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 13 (2009) (citing *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003)) (emphasis added). Thus,

because the appellant has failed to sustain his ultimate burden of proving that he was similarly situated to Hettchen, he has not shown that the administrative judge committed prejudicial error in finding that he failed to prove his affirmative defense of racial discrimination.

ORDER

¶45 We ORDER the agency to cancel the appellant's demotion and suspension and to restore the appellant effective March 29, 2009. *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.

¶46 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.

¶47 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 to describe 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).

¶48 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 in 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).

¶49 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶50 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. §§ 1201.201, 1201.202 and 1201.203. 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 77960
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 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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

	DFAS CHECKLIST **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.