UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

63 M.S.P.R. 521

Docket Number CH-0752-93-0248-I-1

LAWRENCE C. BIDDLE, Appellant,

v.

DEPARTMENT OF THE TREASURY, OFFICE OF THE COMPTROLLER OF THE CURRENCY, Agency.

Date: July 13, 1994

James D. Shepherd, Esquire, and Judith A. Baker, Esquire, Chicago, Illinois, for the appellant.

Larry J. Stein, Esquire, Washington, D.C., For the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that affirmed the agency's removal action. For the reasons set forth below, we GRANT the petition for review, AFFIRM the initial decision in part, REVERSE it in part, VACATE it in part, and REMAND the appeal to the Chicago Regional Office for further adjudication.

BACKGROUND

The agency removed the appellant from his Associate National Bank Examiner position based on charges of violating agency standards of conduct regarding sexual harassment and engaging in dishonest conduct. *See* Initial Appeal File (IAF), Tab 9, Subtabs 4c, 4l. On appeal to the Board, the administrative judge sustained the charges, found that the appellant did not establish his affirmative defense of discrimination based on race, and found the penalty of removal reasonable. *See* IAF, Tabs 1, 35.

On petition for review, the appellant asserts that the administrative judge erred in sustaining the charge of violating agency standards of conduct by making a false statement, in interpreting the regulations of the Equal Employment Opportunity Commission (EEOC) and those of the agency regarding sexual harassment, in failing to address his disability discrimination defense, and in denying his motion to compel

discovery regarding his allegations of discrimination based on disability and race. *See* Petition For Review (PFR) File, Tab 5.

On September 8, 1993, one day after the deadline for filing a response, the agency responded in opposition to the petition for review. *See* PFR File, Tab 7. In response to the Clerk of the Board's Order to show cause why the response should not be rejected as untimely filed, see PFR File, Tab 8, the agency submitted a motion for waiver of the time limit with an affidavit from agency employee Rosa Koppel who avers that her secretary Gloria Parker was instructed to place the response with the agency's outgoing mail on September 7, 1993, the last day for timely filing. *See* PFR File, Tab 9. The appellant responded to the agency's motion for waiver. *See* PFR File, Tab 10. On December 2, the agency filed an additional submission. *See* PFR File, Tab 11.

ANALYSIS

The agency's response is untimely.

A party may establish that his pleading was timely filed by presenting credible, unrebutted evidence in the form of an affidavit or sworn statement that, despite the postmark date, the pleading was actually placed in the Postal Service mail stream before the filing deadline. *See Raphel v. Department of the Army*, 50 M.S.P.R. 614, 618 (1991). Koppel's affidavit, however, addresses only the agency's own internal practices; it does not state that anyone in the agency timely placed the response in the U.S. Postal Service mail stream. Therefore, we find that the affidavit does not rebut the presumption that the postmark date establishes the date of filing, and the response was untimely. Moreover, the agency's response to the Board's show cause order does not establish good cause to waive the filing deadline. Koppel merely stated that she relied on the agency's standard mailing procedures but offers no explanation for their failure in this instance. It is well settled that the placing of a submission in the agency's mailroom or delivering it to the agency's mail carrier on the last day for filing does not establish good cause for an untimely filing. *See Hall v. Department of the Army,* 59 M.S.P.R. 161, 163 (1993). Thus, we have not considered the agency's response to the petition for review. Further, we have not considered the agency's untimely December 2 submission.

Charge of engaging in dishonest conduct

As a part of the charge of sexual harassment, the agency cited an incident on May 9, 1992, when the appellant allegedly drove through the neighborhood of the alleged victim of the harassment, co-worker Lolita Eguiguren, parked his car, and went into an alley. On other occasions, he allegedly peered into her window and loitered around her apartment building. *See* IAF, Tab 9, Subtab 41. In an interview with agency officials Mark Nishan, Robert Sejnoha, and Karen Robinson, and a later interview with agency investigators Debbie Ridley and Myrrel Hendricks, the appellant denied being in Eguiguren's neighborhood on May 9. He also denied having been in Eguiguren's neighborhood on other occasions. *See* IAF, Tab 9, Sub-tab 4m. The agency charged the appellant with engaging in dishonest conduct based on his false statements during the interviews.

Since the issuance of the initial decision, the Board has reconsidered its holding in *Greer v. U.S. Postal Service,* 43 M.S.P.R. 180, 184-87 (1990), and determined that an

agency may not separately charge an employee with falsification for denying the misconduct on which another charge is based. *See Walsh v. Department of Veterans Affairs,* 62 M.S.P.R. 586 (1994). These incidents, which the appellant denied occurred, comprised a large part of the sexual harassment charge. Therefore, under *Walsh,* the appellant was within his rights in denying them so that the agency would be forced to prove the misconduct by preponderant evidence. Thus, we find that, under these circumstances, the charge of violating the agency standard of conduct that an employee shall not engage in dishonest conduct is erroneous as a matter of law and cannot stand.

Charge of sexual harassment

The appellant and Eguiguren were social friends as well as co-workers. They went out to dinner and to shows together, sometimes alone and sometimes with others. When Eguiguren moved from her parents' house to an apartment in June 1991, the appellant helped her move. The appellant visited her in her apartment and she visited him. The friendship was platonic. During the summer of 1991, however, Eguiguren decided that she wished to be less friendly with the appellant and began to limit the time she spent with him. The appellant began to ask repeatedly for an explanation for her changed attitude. Eguiguren told him that, because of personal problems, she was not seeing friends so often, but the appellant was not satisfied with that explanation. Another co-worker, Diane Patterson, informed Eguiguren that she had seen the appellant watching outside Eguiguren's apartment one evening in July. The appellant sometimes came to Eguiguren's apartment uninvited. On August 15, 1991, when he knocked on her door late in the evening, she did not invite him into the apartment. He discussed the situation with other co-workers, including Suzanne Brase, Claudia Parker, Sun Rapp, and Kathy Metcalf. Finally, in October 1991, Eguiguren bluntly told the appellant that she wanted to have only a professional relationship with him and that she wanted him to stop bothering her.

The appellant wrote Eguiguren a letter in response indicating a desire to have a romantic relationship with her. The letter upset Eguiguren and she telephoned the appellant to inform him that she never had any romantic interest in him and never would. She warned him that he had been seen in her neighborhood, apparently watching her apartment, and that she would inform her supervisor if he continued to bother her.

The appellant testified at the hearing that he drove into Eguiguren's neighborhood on approximately 20 occasions between February and May 1992. *See* Initial Decision at 2-5. On about half of those occasions, he got out of his car and walked down her street in the hope of seeing her and resolving their differences. *See* Hearing Transcript (HT) at 701-02. The conduct culminated with the charged May 9 incident when for the first time Eguiguren observed the appellant standing outside her apartment watching the apartment. Eguiguren's roommate, Elizabeth Cahill, testified that when she arrived home an excited group of neighbors were gathered and were talking about "the guy whose (sic) been hanging around the neighborhood." *See* HT at 201. Cahill further testified that she and the neighbors observed the appellant standing and staring at the apartment for 8-10 minutes until one of the neighbors chased him away with his dog. *See* HT at 204-06. Following this incident, Eguiguren and Cahill elicited statements

from the neighbors that they had observed the appellant regularly visiting the area around Eguiguren's apartment and looking into her windows.

Although the agency charged the appellant with violating its standard of conduct forbidding sexual harassment, the parties stipulated that the EEOC regulations were applicable. *See* IAF, Tab 30. The administrative judge delineated the agency's burden to prove sexual harassment under EEOC regulations at 29 C.F.R. § 1604.11(a) and found that the agency had made the requisite showing by a preponderance of the evidence. *See* Initial Decision at 6-7. The agency had to establish that the allegedly harassing conduct occurred, that it was unwelcome, that it was of a sexual nature, and that it unreasonably interfered with Eguiguren's work performance or created an intimidating, hostile or offensive working environment. *See Van Amber v. U.S. Postal Service,* 47 M.S.P.R. 320, 324 (1991). An agency charging creation of a hostile environment must show that the employee's conduct was sufficiently severe or pervasive to create an objectively hostile or abusive environment, one that a reasonable person would find hostile or abusive. *See Harris v. Forklift Systems, Inc.,* — U.S. 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *King v. Hillen,* 21 F.3d 1572, 1582 (Fed.Cir.1994).

The appellant does not dispute the events leading up to the charge of sexual harassment. Rather, he argues that they were not sexual harassment but only attempts to clarify the status of their friendship and perhaps improve it. He contends that at first his attentions to Eguiguren were welcome and that, after she informed him that they were unwelcome, he did not engage in a pattern of behavior but rather only the one isolated incident, the May 9 visit. *See* PFR File, Tab 5. The appellant's argument that his attentions were at first welcome does not excuse his behavior once he learned, in October 1991, that Eguiguren no longer wanted his friendship.

Although the appellant asserts that the May 9 incident was the only instance of allegedly offensive behavior after Eguiguren informed him that his attentions were unwelcome, the appellant admitted in testimony that he walked down Eguiguren's street approximately 10 times in the hopes of seeing her between February and May 1992. Statements from neighbors indicate that he was a frequent visitor to the street, that he was seen in the alley next to the appellant's apartment and in the stairwell, and that he aroused their suspicions. *See* IAF, Tab 9 Subtab 4m.

The appellant also argues that the administrative judge erred in finding that his allegedly harassing behavior was sexual in nature The administrative judge carefully and exhaustively analyzed this element of the sexual harassment charge. *See* Initial Decision at 7–10 The administrative judge recognized that the appellant's conduct did not involve any sexually explicit language, touching, or overt attempts to start an intimate relationship. Sex-based harassment, however need not involve sexual activity or language, to give rise to Title VII liability if it is sufficiently pervasive and directed at employees because of their sex. *See Hillen,* 21 F.3d at 1583, citing 8 F.E.P. Manual at 405:6692 (quoting *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1416 (10th Cir.1987)). The administrative judge relied on the tone of the letter from the appellant to Eguiguren to establish that the appellant's conduct had a sexual connotation. From the letter and the appellant's testimony at the hearing, the administrative judge inferred an attempt to establish a romantic relationship. Furthermore, the administrative judge found that the

appellant's behavior in watching Eguiguren's apartment could only indicate an obsession "far beyond the feelings that any mere platonic friendship could engender." *See* Initial Decision at 10. Although in *Van Amber,* 47 M.S.P.R. at 325, the Board found that an isolated late night visit to the home of an employee had no sexual connotation when there was no other indication that the appellant sought to establish an intimate relationship with the alleged victim, the behavior in this appeal goes beyond that of the appellant in *Van Amber.* We see no reason to disagree with the administrative judge's conclusion that this behavior was sexual in nature because the appellant sought to establish a romantic relationship, the conduct was based on Eguiguren's sex, and it occurred with sufficient frequency to become pervasive. *See Hillen,* 21 F.3d at 1583.

The agency also presented evidence in the form of testimony by Eguiguren and her roommate Elizabeth Cahill that Eguiguren was adversely affected by the behavior. She became frightened and nervous to the point that she moved from her apartment. She had difficulty sleeping, had physical symptoms of stress, and could not concentrate on her job. *See Carosella v. U.S. Postal Service,* 30 M.S.P.R. 199, 201–02 (1986), *affd,* 816 F.2d 638 (Fed.Cir.1987). Eguiguren also testified that she was concerned about the appellant's discussing their relationship with others at work, including Claudia Parker who evaluated Eguiguren during the relevant time period. Considering all of this evidence, the administrative judge found that the appellant's behavior created an abusive working environment. The appellant argues on petition for review that none of the alleged harassing behavior occurred at work and was not so egregious as to create a hostile environment by altering the terms of employment. *See* PFR File, Tab 5. We disagree and find that the administrative judge correctly analyzed this issue. The fact that the appellant and Eguiguren worked in close proximity, when added to the anxiety his behavior caused her, changed the terms of her employment. *See Harris,* — U.S. at –, 114 S.Ct. at 370–71; *Hillen,* 21 F.3d at 1579. Additionally, his involving others in the workplace, particularly Parker, may be sufficient in itself to create a hostile environment.

We recognize the difficulty in establishing reasonable guidelines for appropriate social behavior among co-workers. Not every attempt to establish an intimate relationship or every invitation to dinner and a show amounts to sexual harassment. The evidence in this appeal, however, indicates that the appellant's behavior had gone beyond what was reasonable. Even after Eguiguren told him his attentions were unwelcome, the appellant persisted in visiting and questioning her about her reluctance to see him. When Eguiguren informed him of her decision to limit their association to the workplace, the appellant became angry. Although the appellant argues that the one incident on May 9 is not sufficient to establish a pattern of behavior in support of a charge of sexual harassment, he admitted in testimony that he had visited Eguiguren's neighborhood approximately 20 times and stopped to look for her on half of those occasions between February and May 1992.

Thus, we find that the repeated, uninvited visits to the complainant's neighborhood, where the appellant lurked and peered into her window, in conjunction with the appellant's discussion of his relationship with Ms. Eguiguren, both to fellow workers and, post-October 1991, with Ms. Eguiguren, constitute sexual harassment and sustain the agency's charge.

Procedural error

The appellant asserts, as he did below, that the agency committed procedural error by failing to advise him of his right to counsel while he was being interviewed. To the extent that this argument challenges the falsification charge, we need not address it because we do not sustain that charge. Moreover, the appellant's rights under the sixth amendment to the Constitution are not implicated because he was not subjected to a custodial interrogation. *See Howard v. Office of Personnel Management,* 31 M.S.P.R. 617, 621 (1986), *affd,* 837 F.2d 1098 (Fed.Cir.1987); Initial Decision at 15–16. Under 5 U.S.C. § 7114(a), an employee is entitled to have a representative present when he is being questioned in connection with an investigation if he reasonably believes that disciplinary action will result and he requests the presence of a representative. The statute imposes no *Miranda*-like requirement to inform an employee of his right to representation other than to require an agency to inform employees annually of their right to be represented. The appellant does not assert that he requested a representative and that the agency refused his request Further, the appellant does not contend that the agency failed to provide the annual notice of a right to representation. Therefore there is no basis upon which to suppress any evidence gathered in the interviews.

Disability discrimination

The appellant asserts in his petition for review that the administrative judge did not address his defense of discrimination based on disability. *See* PFR File, Tab 5. The appellant alleged in his response to the proposal notice that the agency perceived him as having a mental disorder and that such a perception entitled him to the protections of the Rehabilitation Act of 1973, specifically some kind of accommodation. *See* IAF, Tab 9, Subtab 4g. The appellant did not include disability discrimination in his answer to item 28 on the Board appeal form requiring the appellant to indicate the form of discrimination he was alleging. Nor did he raise such an allegation at any other time in the proceeding below. Thus, the administrative judge did not err by failing to address this issue. Moreover, even if he had considered it, the appellant would not have prevailed because he did not raise a prima facie case of disability discrimination. *See Stenmark v. Department of Transportation,* 59 M.S.P.R. 462, 470 (1993). The appellant is correct that an employee who is perceived to be disabled may be a disabled individual for the purposes of the Rehabilitation Act. *See Sargent v. Department of the Air Force,* 55 M.S.P.R. 387, 395 (1992). In this instance, however, the appellant introduced no evidence that the removal action was taken because of the agency's alleged perception of him, that his alleged disability caused the misconduct, or that his misconduct was entirely a manifestation of his alleged disability.

Discovery issues

The appellant also contends that the administrative judge improperly denied his motion to compel discovery, specifically answers to interrogatories and requests for production of documents relating to his defense of discrimination based on race. *See* PFR File, Tab 5. The administrative judge found that the appellant's discovery requests were overbroad and the information requested not shown to be relevant. *See* IAF, Tab 19. The appellant requested documents regarding allegations or suspicions of expense account falsification and the agency evidence file for any Central District employee accused or suspected of, or terminated for expense account falsification**.** Interrogatories

sought the identity of any bank examiner in the Central District investigated for dishonesty, the identity of and specific information about any employee accused of sexually harassing a co-worker, the identity of anyone accused of off-duty misconduct, and the identity of employees who complained of sexual harassment. The information sought was not limited in time. *See* IAF, Tabs 14, 15.

With the exception of interrogatories regarding employees accused of sexual harassment, we agree with the administrative judge's determination that the requests were overbroad and in some instances irrelevant. To show disparate treatment, an appellant must show, inter alia, that he was similarly situated to another employee who was not a member of the protected group that included the employee raising the defense. *See Mascarenas v. Department of Defense,* 54 M.S.P.R. 303, 308 (1992). The information regarding others charged with dishonesty is no longer necessary to the appellant's defense because we do not sustain the falsification charge. The information regarding employees accused of off-duty misconduct is overbroad and irrelevant because those employees were not sufficiently similarly situated to the appellant. *See Bess v. Department of the Navy,* 46 M.S.P.R. 583, 589–90 (1991); *Mills v. Department of the Navy,* 30 M.S.P.R. 403, 406–07 (1986). As for interrogatory 73 seeking information regarding employees who have complained of sexual harassment and hostile environment, we fail to see the relevance of that information. The allegedly discriminatory actions at issue are those taken by agency personnel reacting to complaints, not the complainants themselves. Even if the information showed that complainants tended to bring such complaints against members of a particular protected group, such information would not show that the removal was taken for a prohibited reason.

We find, however, that the administrative judge erred in denying the appellant's motion to compel answers to interrogatories 36 and 37, asking for information about employees accused of sexual harassment. We find that such information is relevant to the appellant's discrimination defense. The agency's objection that the Privacy Act, 5 U.S.C. § 552a, precludes it from providing information regarding such misconduct can be overcome by redacting the name and any identifying information. On remand, the agency shall respond by providing the appellant with sanitized information.

ORDER

Accordingly, we AFFIRM the initial decision in part, finding that the agency has proved the charge of sexual harassment by preponderant evidence, and REVERSE the initial decision in part, finding that the charge of engaging in dishonest conduct cannot be sustained as a matter of law. We VACATE the initial decision with regard to the affirmative defense of race discrimination, and REMAND the appeal for further adjudication of this issue, including the submission of responses to discovery requests as detailed above. On remand, the administrative judge shall consider anew the appellant's defense of discrimination based on race in the light of those responses and any additional evidence and argument resulting from the discovery from either party. If the administrative judge finds that the appellant has not proven discrimination based on race, he should determine whether the penalty of removal is within the tolerable limits of

reasonableness based on the remaining sustained charge of sexual harassment. *See Douglas v. Veterans Administration, 5* MSPB 313, *5* M.S.P.R. *280, 308* (1981).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.