

# **Herbert E. Gregory v. U.S. General Accounting Office**

**Docket No. 20-101-15-82**

**Date of Decision: September 30, 1985**

**Cite as: Gregory v. GAO (9/30/85)**

**Before: Bowers, Presiding Member (Member Brown filed a separate Dissenting Opinion 11/12/85)**

**Summary Judgment**

**Management Rights**

**Discipline**

**Disparate Treatment**

## **SUPPLEMENTAL DECISION OF PRESIDING MEMBER**

On August 29, 1984, the Presiding Member issued a decision in which she upheld GAO's action in continuing the indefinite suspension of Mr. Gregory, who, at the time, had been indicted for an alleged off-duty sexual offense of a violent nature. She held that legitimate concerns for the safety of female employees in the work setting, which often included travel and isolated settings, provided the required nexus between Mr. Gregory's off-duty misconduct and the efficiency of the service. On November 28, 1984, the full Board issued its final decision in the case, affirming the Presiding Member.

By letter dated January 21, 1985, Mr. Gregory requested that the Board reconsider its decision, based upon alleged new and material evidence showing that he had been treated differently than another allegedly similarly situated employee and, thus, that his indefinite suspension was not for such cause as promotes the efficiency of the service. GAO opposed the request.

On February 28, 1985, while that request was pending with the Board, Mr. Gregory lodged a timely petition for review of the Board's final decision with the U.S. Court of Appeals for the District of Columbia Circuit (No. 85-1133). By Order issued June 24, 1985, the Court remanded the record to the Board so that additional evidence could be received and considered.<sup>1</sup>

On July 19, 1985, GAO filed a motion for summary decision on the basis that the Petitioner stated in a pleading to the Court of Appeals that he "does not dispute any facts presented by the GAO regarding the [other employee's] case."<sup>2</sup> According to GAO, these facts establish conclusively that the off-duty misconduct with which Petitioner was charged and the off-duty misconduct with which the other employee was charged were not equivalent. The GAO maintains, therefore, that as a matter of law it is entitled to a summary decision that there was no disparate treatment.

In a pleading dated July 16, 1985, Mr. Gregory opposed GAO's motion and requested a summary decision in his favor. While he acknowledges that he does not dispute the basic facts surrounding the other employee's arrest, Mr. Gregory does challenge "the disparate treatment given Petitioner considering the equally serious charges against both Petitioner and [the other employee]."

The material facts are undisputed and summary decision on this issue is appropriate.

After reviewing all of the information offered by both parties, the Presiding Member has determined that GAO's motion for a summary decision should be granted. Petitioner has failed to establish that he was the victim of disparate treatment. The Presiding Member disagrees that Mr. Gregory and the other employee are similarly situated.

The charges against Mr. Gregory concerned a sexual assault upon a woman in which it was alleged that he violently threatened her with serious bodily harm. Mr. Gregory, like most evaluators, would have opportunities during the normal course of business to work in close proximity to and relative isolation with other evaluators and/or representatives of outside agencies, including females. Indeed, at the time of his indefinite suspension, Mr. Gregory's first and second level supervisors were both female. It was the violent nature of the sexual offense for which Mr. Gregory was charged, and the resultant concern for the safety of females in the workplace, which the Board held justified his indefinite suspension.

In contrast, none of the evidence regarding the other employee demonstrates that concern for the safety of employees, whether male or female, was ever a question. He was arrested for solicitation of a homosexual act which all of the records indicated were consensual between the victim and the accused. There was no evidence of force or violence or the threat of such.

The violent nature of Mr. Gregory's off-duty sexual misconduct, and the resultant concern for the safety of females in the workplace, sufficiently distinguishes the two cases. Mr. Gregory and the other employee were not similarly situated, and, thus, Mr. Gregory was not the victim of disparate treatment.

The Presiding Member affirms her decision of August 29, 1984, that management properly exercised its judgment by indefinitely suspending Petitioner and thereby not risking endangering female employees of the GAO and otherwise if such conduct were repeated in the work setting.

#### **Notes**

1. On May 29, 1985, prior to the Court's Order, the full Board had expressed its intention that the Presiding Member reopen the case for the limited purpose of receiving evidence from the parties regarding Mr. Gregory's new claim.
2. Petitioner's Motion in Opposition to Staying of Briefing Schedule in No. 85-133.