

Nicholas Carbone v. U.S. General Accounting Office

Docket No. 72-704-02-85

Date of Decision: May 13, 1988

Cite as: Carbone v. GAO (5/13/88)

Before: James, Chair; Cappello, Kaplan, Kaufmann, and Weinstein, Members

Age Discrimination

Constructive Discharge

Age Discrimination - Transfer of Employees

DECISION OF THE PAB

Introduction

This matter is before the PAB pursuant to the motion of Respondent, the General Accounting Office, to reopen and reconsider the decision of the Presiding Member finding that Respondent undertook a series of personnel actions that discriminated against Petitioner because of his age. In his August 31, 1987, decision, the Presiding Member ruled that Respondent's temporary reassignment and subsequent permanent transfer of Petitioner to GAO Headquarters in Washington, D.C., were acts of age discrimination, and that such actions were taken to force Petitioner to retire. In its motion for reconsideration, Respondent argues that the Presiding Member's finding is inconsistent with law and unsupported by substantial evidence.

I. Factual Background

Petitioner began work for Respondent in January 1951 in the Boston Regional Office. Petitioner received a series of promotions until 1969, when he was promoted to a GS-15 Assistant Regional Manager in the Boston Regional Office. Petitioner remained at the GS-15 level from 1969 until he left the service of the Federal government in 1985.

The position of a GS-15 Assistant Regional Manager in Respondent's regional office is the second highest position in a regional office, exceeded only by the position of Regional Manager. Petitioner served under several Regional Managers in the Boston Regional Office. At the time Petitioner was promoted to the position of Assistant Regional Manager in the Boston Regional Office, the Regional Manager was Joseph Eder. Petitioner served under Mr. Eder until 1976, when Mr. Eder was succeeded by Fred Layton, who was the Regional Manager in Boston until 1980. From 1980 until 1982, the Regional Manager was David Sorando. Louis Lucas, another Assistant Regional Manager in the Boston Regional Office, was the Acting Regional Manager in 1982-83. In 1983, Morton Myers became the Regional Manager in Boston, and Mr. Lucas returned to the position of Assistant Regional Manager. One of Mr. Myers' first tasks as Regional Manager was to reorganize the management scheme of the Boston Regional Office to mirror the organizational scheme of Respondent's Headquarters office.

On July 6, 1983, the Comptroller General of GAO issued a directive devising a new initiative for GAO Headquarters called the Post Assignment Quality Review System team, and directed that members of this team be comprised of GS-15 staff from the various GAO regional offices. On July 12, 1983, Petitioner was assigned to this team effective October 1, 1983. Petitioner served on the Post Assignment Quality Review System team until the end of December 1984, taking the assignment in Washington, D.C., as a temporary duty assignment. The Post Assignment Quality Review System team was assigned to work under the supervision of the Assistant Comptroller General for Operations in Washington, D.C., who at the time was Francis Fee.

In August 1984 Mr. Fee notified Petitioner that at the conclusion of his term on the Post Assignment Quality Review System assignment, Petitioner was to be permanently reassigned to the GAO Headquarters office in Washington, D.C. Petitioner asked for, and received, a temporary stay of the permanent change of station until approximately January 1985.

In January 1985 Mr. Fee notified Petitioner that Petitioner's reassignment to Fee's office in GAO Headquarters, which was to have become effective in October 1984, would become effective on March 18, 1985. The Agency's stated reasons for the permanent change of station were 1) that Petitioner had difficulty in maintaining work relationships in Boston, and that Petitioner's presence in the Boston Regional Office would cause serious disruption to the efficient management of the office, and 2) that Petitioner's successful performance on the Post Assessment Quality Review System team demonstrated that Petitioner would be able to contribute most to the mission of Respondent working for Mr. Fee in Washington, D.C.

Petitioner filed a formal complaint of discrimination based on age on February 12, 1985, claiming that the temporary duty station in Washington, D.C., and subsequent order for permanent reassignment to Washington, D.C., were designed to force him to retire. Respondent's administrative process of Petitioner's complaint was duly exhausted. Petitioner reported for duty in Washington, D.C., on March 18, 1985, as directed, and then retired, effective March 29, 1985.

Petitioner timely filed a Petition for Review in this matter on February 18, 1986. As relief, Petitioner requested reinstatement to his former position as a GS-15 in the Boston Regional Office, plus all lost benefits, as well as costs and attorney fees. In his Petition for Review, Petitioner claimed that he had been forced to retire involuntarily, and that the permanent reassignment was age-motivated. Petitioner stated that the reassignment was, in effect, a constructive discharge because Respondent knew that the reassignment would create a hardship on him because the relocation would generate an extreme personal and financial burden on Petitioner.

On March 12, 1986, Respondent filed a motion to dismiss the Petition for Review on the grounds that Petitioner had failed to allege facts sufficient to create an inference of age discrimination and that absent a showing of discrimination, the Board had no jurisdiction to review reassignments which do not involve a reduction in grade or pay. The Presiding Member held his ruling on Respondent's motion in abeyance pending the outcome of prehearing procedures.

The Presiding Member conducted the evidentiary hearing in this case over a period of seven days in October and November 1986. Respondent was represented by counsel and Petitioner appeared pro se. Each side filed post-hearing briefs.

The Presiding Member found that Respondent's action in transferring Petitioner to Washington, D.C., from Boston was a violation of the Age Discrimination in Employment Act (ADEA). The Presiding Member further found that Petitioner had proven a case of constructive discharge, and that a reasonable person would have felt compelled to resign given the working conditions imposed on Petitioner by Respondent. The Presiding Member ruled that Petitioner's reassignment was actually a demotion because the transfer resulted in Petitioner being reassigned from a GS-15 supervisory position to a GS-15 position with no supervisory duties.

The Presiding Member ordered Petitioner reinstated to a GS-15 position in the Boston Regional Office, with restoration of all lost wages and benefits, and reimbursement of the costs and legal fees incurred by Petitioner in pursuing his appeal.

On October 26, 1987, Respondent filed a motion for reconsideration of the Presiding Member's decision pursuant to 4 C.F.R. {28.25(c)}. Petitioner, through counsel, filed his opposition to Respondent's motion for reconsideration on December 23, 1987. By leave of the Board, and because of special circumstances on the record, both parties were granted leave to file reply briefs.

II. Analysis

A. Standard of Review

We review the Presiding Member's decision under the provisions of 4 C.F.R. §28.25(c), which provides that the Board may reopen, reconsider and ultimately reverse a decision of a Presiding Member when it is established that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (2) The decision of the Hearing Officer is based on an erroneous interpretation of statute or regulation;
- (3) The decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (4) The decision is not made consistent with required procedures; or
- (5) The decision is unsupported by substantial evidence.

Here, Respondent argues that the decision of the Presiding Member is inconsistent with law and unsupported by substantial evidence. Specifically, Respondent contends that there was not sufficient evidence on which the Presiding Member could base a finding of age discrimination, and that, further, the Presiding Member applied the wrong standards and burden of proof in assessing the evidence.

Petitioner contends that the Presiding Member's decision is correct in all respects, and that the evidence on record fully supports the Presiding Member's finding that Petitioner was a victim of age discrimination and that Respondent's actions were designed to force the resignation of Petitioner.

In reviewing the Presiding Member's decision, we must first insure that the Presiding Member discerned and applied the proper legal standard. Then we review the Presiding Member's factual findings and his application of the legal standard to the facts found. Anderson v. City of Bessemer, 470 U.S. 564 (1985); Cuddy v. Carmen, 762 F.2d 119 (D.C. Cir.), cert. denied, 106 S.Ct. 597 (1985). Our review of the

Presiding Member's factual findings is under the clearly erroneous standard. Id.; Chen v. GAO, 821 F.2d 732 (D.C. Cir. 1987). If we find that the Presiding Member failed to analyze the evidence under the correct legal standard, we may find reversible error. Pullman-Standard v. Swint, 456 U.S. 273 (1982). We need not reach the question of the correctness of the Presiding Member's factual findings if he applied an erroneous legal standard in reaching his decision. Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974).

If, however, we conclude that the Presiding Member utilized the proper legal standard, we must then decide if the decision itself is supported by substantial evidence on the record viewed as a whole. The substantial evidence test is particularly relevant here. Substantial evidence has been defined as:

More than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. Accordingly, it "must do more than create a suspicion of the existence of the fact to be established...." Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300.

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951). In applying the substantial evidence test in this case, we first look to the elements of the charges Petitioner sought to prove at hearing, and then to the quantum of proof required to sustain Petitioner's allegations. In so doing, we are mindful of the fact that we may not simply substitute our judgment for the judgment of the Presiding Member, but must, instead, carefully consider the findings and conclusions of the Presiding Member. Chen v. GAO, supra.

B. Petitioner's Age Discrimination Claim

In an action brought under the Age Discrimination in Employment Act, the burden of persuasion that the employer discriminated against the employee because of the employee's age rests with the employee at all times. Loeb v. Textron, 600 F.2d 1003, 1011 (1st Cir. 1979). See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The employee (Petitioner here) may carry this burden by the introduction of direct or circumstantial evidence that he was discriminated against because of his age. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122 (1985).

Where the employee does not present direct evidence of age discrimination, the analytical framework set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, supra, applies. Under the McDonnell Douglas-Burdine formulation, a plaintiff in an age discrimination case carries the initial burden of establishing a prima facie case of age discrimination. Once the prima facie case has been established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. If the employer succeeds in carrying this burden, the employee must then prove by a preponderance of the evidence that the employer's explanation was a mere pretext for discrimination. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252.

In establishing a prima facie case of age discrimination, the individual plaintiff must allege sufficient facts to create a reasonable inference that age was a determining factor in the employment decision at issue. Here, Petitioner was required to show that (1) he was in the protected class, (2) he was doing the job well enough to meet his employer's legitimate expectations (qualified), (3) in spite of his performance he was displaced, and (4) that he was replaced by a younger person. Loeb v. Textron, 600 F.2d at 1013.

The Presiding Member found that Petitioner had established a prima facie case by showing that (1) Petitioner was in the protected age group at the time the contested action was taken, (2) Petitioner was qualified and performing the duties of his position successfully, (3) he was adversely affected by the decision of Respondent to reassign him out of the Boston Regional Office, and (4) a person under the age of forty with the same or similar qualifications as Petitioner was subsequently hired as a GS-15 Assistant Regional Manager in the Boston Regional Office. The Presiding Member found that Petitioner's reassignment was, in effect, a demotion, because Petitioner's duties changed from that of a GS-15 Assistant Regional Manager in Boston with supervisory responsibilities to a GS-15 Management Analyst in Washington, D.C., with no supervisory duties.

Respondent contends that it was error for the Presiding Member to find that Petitioner established a prima facie case. Respondent argues that, as a matter of law, Petitioner's reassignment from Boston to Washington, D.C., did not qualify as a demotion because the personnel action did not result in a loss of pay or grade, and therefore, does not constitute an adverse action. Respondent further argues that, even if the Presiding Member's interpretation of the law is correct, the evidence on the record does not support the Presiding Member's finding that the position to which Petitioner was transferred was not a supervisory position. Instead, Respondent points out that a comparison of Petitioner's former duties of Assistant Regional Manager with the duties of his new position shows that Petitioner's reassignment still left him an integral part of Respondent's management team with a variety of supervisory and management duties.

We agree with Respondent that the clear weight of established precedent holds that an employee reassignment that does not result in a reduction in pay or grade is not a "demotion." Neal v. Walters, 750 F.2d 347, 351 (5th Cir. 1984); Fucik v. United States, 655 F.2d 1089, 1095-96 (Ct. Cl. 1981); Williams v. Department of Army, 651 F.2d 243 (4th Cir. 1981). See also, Wilson v. Merit Systems Protection Board, 807 F.2d 1577 (Fed. Cir. 1986); Thomas v. United States, 709 F.2d 48 (Fed. Cir. 1983); Grasso v. Internal Revenue Service, 657 F.2d 224 (8th Cir. 1981). The Presiding Member's finding that Petitioner was demoted when he was transferred from Boston to Washington, D.C., was clearly an erroneous legal conclusion which, under most circumstances, requires reversal. However, a personnel action that violates the Age Discrimination in Employment Act may be construed as an adverse action even where there is no financial loss to the employee. Endres v. Helms, 617 F. Supp. 1260 (D.D.C. 1985). Moreover, even where a transfer is not considered an adverse action, it is nevertheless unlawful if the transfer is designed to coerce the employee to resign. Fucik v. United States, *supra*. Thus, while Respondent's contentions are well taken, we think there is at least arguable legal justification for the Presiding Member's finding that Petitioner had established a prima facie case of age discrimination. In so ruling, we are mindful that the burden placed on an employee to prove a prima facie case should never be onerous or inflexible. Coburn v. Pan American Airways, Inc., 711 F.2d 339, 342 D.C.Cir.), Cuddy v. Carmen, *supra*.

The Presiding Member held that Petitioner, by establishing a prima facie case, had created a rebuttable presumption that he was a victim of age discrimination, and the burden then shifted to Respondent to articulate a legitimate, nondiscriminatory reason for reassigning Petitioner to Washington, D.C. Respondent's burden in this regard is slight; Respondent need only introduce admissible evidence which raises a genuine issue of fact as to whether it transferred Petitioner for good cause, or on some other basis than Petitioner's age. If Respondent carries this burden, the presumption raised by Petitioner's prima facie case is dispelled. Burdine, 450 U.S. at 255.

Respondent's stated reason for taking the action of reassigning Petitioner was that the action was necessary in order to implement an effective management scheme in the Boston Regional Office. Respondent stated that the management structure in the Boston Regional Office had, over the years, evolved into a situation where the three Assistant Regional Managers worked so independent of the Regional Manager and each other that staff relationships and management relationships were beset with problems.

Respondent also stated that it had difficulties with Petitioner's "ability to establish and to maintain positive work relationships with both the management team and the staff in the Boston Regional Office"¹ and Petitioner's reassignment was felt to be the most efficacious method of reducing the staff and management problems within the Boston Regional Office.

Respondent having articulated this legitimate, nondiscriminatory reason for reassigning Petitioner, the burden shifts back to Petitioner to show by a preponderance of the evidence that Respondent's asserted reason for the personnel action is but a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252-53; Coburn v. Pan American World Airways, Inc., 711 F.2d at 342. The ultimate burden in an age discrimination case is for Petitioner to prove that age was a "determining factor" in the challenged employment decision. Age must make a difference in the employer's action, such that "but for" age discrimination, the challenged employment action would not have taken place. Id.; Cuddy v. Carmen, 694 F.2d 853, 857-58 (D.C. Cir. 1982). The burden of persuasion remains with Petitioner at all times. Burdine, 450 U.S. at 253. Petitioner contends that the real reason motivating Respondent's actions of first temporarily and then permanently transferring him to Washington, D.C., was to discriminate against him because of his age. It was this age discrimination which, Petitioner reasons, ultimately forced his resignation. Petitioner argues that Respondent's action of hiring a younger person as an Assistant Regional Manager, after transferring Petitioner out of the same position, constitutes age discrimination on its face. In his Petition for Review, Petitioner asserted that Respondent's stated reasons for the transfer--"it's [GAO's] long-standing difficulty in achieving and maintaining an effective and cooperative senior management structure in the Boston Regional Office and its perception that since 1977 I [Petitioner] had a major role in fostering much of the friction and dissidence in [the] Boston Regional Office." -- is a pretext for age discrimination. As proof of pretext, Petitioner offered the testimony of a number of staff members and senior managers with whom he had worked in the Boston Regional Office, who testified variously that Petitioner was not an uncooperative person, that he was supportive of management initiatives, and that he was not the primary source of the friction and dissension in the Boston Regional Office.

In our review of the record to decide if Petitioner proved that age was a determining factor in Respondent's transfer of Petitioner's duty station from Boston to Washington, D.C., we look first at the reasons given by Respondent for transferring Petitioner. We then evaluate the record to determine if Petitioner's evidence would support a reasonable inference that Respondent's proffered reasons were not the actual reasons for the transfer of Petitioner. Our review of the record is not one of weighing the quality and quantity of Respondent's evidence against Petitioner, but one of determining if Petitioner's evidence supports a reasonable inference that Respondent's espoused reasons for the transfer of Petitioner were really a pretext for discrimination. The Presiding Member found that Petitioner had carried his ultimate burden of persuasion by proving by a preponderance of the evidence that Respondent's proffered justification for reassigning Petitioner was a pretext for discrimination. Thus, the question before us is whether there is substantial evidence to support the Presiding Member's decision. We conclude that there is not.

The Presiding Member determined that Petitioner had proven pretext based on two primary findings: (1) the evidence of record did not show that Petitioner failed to maintain positive work relationships with staff and management; and (2) Petitioner did not have a major role in the friction and dissension which occurred in the Boston Regional Office. Petitioner's evidence consisted almost entirely of the testimony of persons who had worked with him in the Boston Regional Office. Those witnesses testified that Petitioner was a good manager and a good-to-excellent technician. The Presiding Member gave great weight to this testimony to show that Petitioner did not, in fact, have difficulty maintaining positive working relationships with staff. The Presiding Member also gave much credence to the favorable testimony offered in Petitioner's behalf by Mr. Sorando, Mr. Lucas, and Mr. Layton. All three of these witnesses had served as Regional Managers in Boston at various points in Petitioner's tenure as Assistant Regional Manager. However, the Presiding Member seemingly ignored the testimony that Petitioner's attitude and demeanor created problems in the office. Mr. Sorando testified that some of the staff perceived Petitioner as a "tyrant." Mr. Sorando also characterized Petitioner as having a tendency to take "inflexible stands on each matter" such that Petitioner had "the appearance of being uncooperative and intransigent." These comments appeared in Mr. Sorando's written performance appraisal of Petitioner, although Mr. Sorando explained on the witness stand that such remarks were not meant to convey a negative impression of Petitioner's performance as an Assistant Regional Manager.

Mr. Lucas also prepared a written performance appraisal of Petitioner. Mr. Lucas specifically noted that certain aspects of Petitioner's behavior contributed to the negative work environment in the Boston Regional Office. At the hearing, Mr. Lucas testified that the statements in the performance appraisal were taken out of context, and that, overall, he gave Petitioner a "fully successful" performance rating. The Presiding Member relied heavily on the testimony of Mr. Sorando and Mr. Lucas to clarify the remarks made on their performance appraisals of Petitioner; however, in crediting their sworn testimony over their written remarks, the Presiding Member failed to consider that Respondent had no access to this testimony beforehand. In addition, the Presiding Member largely ignored the testimony by Mr. Sorando, Mr. Lucas, and Mr. Layton (as well as several other witnesses) that Petitioner had an abrasive manner in dealing with staff, and frequently was perceived as having a negative attitude. Thus, the record clearly reflects that not only the written performance appraisals but the actual testimony of Petitioner's supervisors indicates that Petitioner did convey a demeanor of uncooperativeness and negativeness. Mr. Sorando and Mr. Lucas also testified that although they evaluated Petitioner as "fully successful" in all performance areas, they nevertheless counseled Petitioner that he needed to take corrective action in terms of his attitude.

It is precisely those aspects of Petitioner's personality and management style attested to by Mr. Sorando and Mr. Lucas which were cited as the determinative factors in the decision to detail him to Washington, D.C. Both Mr. Myers and Mr. Fee, the officials who made the decision to detail and permanently transfer Petitioner, cited their ongoing problems with Petitioner's attitude as the primary criteria in their decision to reassign Petitioner out of the Boston Regional Office. Even if Mr. Myers and Mr. Fee were wrong in their initial assessments of Petitioner's attitude, such would not be probative of any actual intent to discriminate against Petitioner because of Petitioner's age. "The defendant need not persuade the court that it was actually motivated by the proffered reason.... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Burdine, 450 U.S. at 254-55 (citing cases).

Here, there is no substantial evidence to show that Respondent's proffered reason is pretextual. That there were problems in management relations and staff relations in the Boston Regional Office was admitted by all who testified, including Petitioner. The evidence of record clearly shows that Respondent felt that the

best way to begin to correct the problem was by removing Petitioner from the management structure in the office. Petitioner offered evidence to show that he was not the primary reason for the problems, but that instead he was a valued employee with a wealth of technical expertise. That evidence is well taken, but it is not the employee's judgment of his value to the organization that is relevant; it is the perception of his supervisors that is relevant. Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980). In fact, even if Mr. Fee and Mr. Myers had harbored personal animosity towards Petitioner, that would have no bearing on whether age was a determining factor in the decision to transfer Petitioner from Boston to Washington, D.C. Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 70 (6th Cir. 1982).

With respect to the Presiding Member's finding that Petitioner was not the major cause of the friction and dissension in the Boston Regional Office, a somewhat more detailed analysis is required. This is necessitated not only because of the rather disjointed manner in which the Presiding Member addresses this issue, but also because, in our view, the Presiding Member both misapprehends the weight of the evidence on the record as well as misapplies the law to this evidence.

The record evidence clearly reflects that the problems in the Boston Regional Office had been a source of concern for Respondent for a number of years. Mr. Fred Layton, who was the Regional Manager in Boston from 1976 to 1980 testified that immediately after becoming Regional Manager in 1976, he was approached by a number of staff members who complained about the dissension between the three Assistant Regional Managers. Mr. Layton also stated that, as a result of the management problems in the Boston Regional Office, consultants were brought in from Respondent's headquarters in 1977 to administer an attitude survey to the Boston Regional Office staff, and to conduct meetings amongst the senior level staff in the office in order to address the problem of the Boston Regional Office management and staff.

Mr. Fee, the official who made the ultimate decision to transfer Petitioner from Boston to Washington, D.C., testified that he was aware of the management problems in the Boston Regional Office as early as 1976, when Mr. Fee was Respondent's Regional Manager in New York. Mr. Fee testified that Stuart McElyea, his predecessor as Respondent's Director of Field Operations, had sought Mr. Fee's assistance in 1977 to help improve the management problems in the Boston Regional Office. It is also undisputed that, at a meeting in St. Louis in 1978, Mr. McElyea threatened to transfer the three Assistant Regional Managers if they did not begin to cooperate with each other and be more supportive of the Regional Manager.

Mr. Fee replaced Mr. McElyea as Director of Field Operations in 1979. Mr. Fee testified that one of his initial priorities was to try to resolve the problems in the Boston Regional Office. As a result, he held several meetings with Mr. Layton and the Assistant Regional Managers. Mr. Fee stated that, partly as a result of these meetings, he realized that Mr. Layton was unable to resolve the problems among the Assistant Regional Managers, and unify the Boston Regional Office staff. Therefore, in 1980, Mr. Fee replaced Mr. Layton as Regional Manager with Mr. David Sorando, hoping that a stronger, more experienced Regional Manager could resolve the situation. Mr. Fee testified that, when the problems in Boston did not abate under Mr. Sorando's tenure, he concluded that the problems did not lie principally with the Regional Manager, but with the Assistant Regional Managers. Mr. Fee stated that he had made it clear in his meetings with Mr. Layton, Mr. Sorando and the Assistant Regional Managers that, if things did not change in the Boston Regional Office, he would not be hesitant to move people.

In addition to testimonial evidence, there are a number of documents in the record which indicate the concern of Respondent's headquarters management with the problems in the Boston Regional Office. The consultant study and questionnaire results show that the Boston Regional Office staff perceived the Assistant Regional Managers as the main source of the administrative problems in this office. In 1981, Mr. Fee directed a memorandum to the Comptroller General informing him of his progress in ameliorating the problems in the Boston Regional Office, and that Mr. Fee had met with the Regional Manager and Assistant Regional Managers to make clear to them that if changes did not occur, one or all of them might be transferred out of the office. In 1982, Mr. Fee ordered a study (the FOD study) of all of the GAO Regional Offices. David Sorando was interviewed in his capacity as Boston Regional Manager, and was quoted in the study as saying that the Boston Regional Office had too many Assistant Regional Managers, and that the Boston Assistant Regional Managers were resistant to change and extremely difficult to work with. Thus, it is clear by the record evidence that Respondent had been attempting to resolve the problems in the Boston Regional Office for a number of years before Petitioner was eligible to retire, and that one of the primary solutions considered was transferring some of the employees considered to be most emblematic of the problems. The record contains no evidence put on by Petitioner to dispute these contentions by Respondent. Respondent urges that, given the historical perspective set forth above and the problems it had with Petitioner's attitude, its decision to transfer Petitioner was in the best interests of solving the problems in the Boston Regional Office. Petitioner's only evidence of pretext came from testimony by Mr. Foley, Mr. Lucas and several subordinate staff members in the Boston Regional Office. Mr. Foley and Mr. Lucas testified that, as Assistant Regional Managers with Petitioner, they worked closely together, and were as supportive of management initiatives as the structure in the Boston Regional Office permitted. The subordinate staff members' testimony, as recounted above, was primarily to the effect that Petitioner was an excellent technician, a sound manager, and very cooperative. The Presiding Member found Respondent's defense to be pretextual. The Presiding Member found that the problem in the Boston Regional Office management structure was not the result of any problems between the Assistant Regional Managers, but instead, was caused by the organizational framework within the office as dictated by the various Regional Managers. The Presiding Member further found that, even if the Assistant Regional Managers were at the base of the problem in Boston, the testimony of the subordinate staff showed Petitioner was not the Assistant Manager most responsible for the problems in the office. In our view, the finding of the Presiding Member in this regard is clearly irrelevant to the Petitioner's burden of proving pretext. As we discussed earlier, the Presiding Member gives great weight to the testimony proffered by Petitioner's witnesses to the effect that Petitioner was technically proficient and a good manager, but erroneously ignores the fact that almost all of those same witnesses testified that there was "friction and dissidence" in the Boston Regional Office, and that the problems stemmed from the fact that the three Assistant Regional Managers did not work well together or with the Regional Manager. Each of the Assistant Regional Managers was seen as having his own area of expertise, his own method of operation, and his own clique of subordinates--all of which made it difficult for each new Regional Manager to take control of the office and re-direct it according to the dictates of Respondent's management policies.

The record also shows that Petitioner was perceived by management as being negative and uncooperative. Petitioner was clearly the most vociferous of the Assistant Regional Managers in the Boston Regional Office. Respondent could reasonably assume, therefore, that transferring Petitioner out of the Boston Regional Office would be an effective step in curing the management/staff relationships in the office. As the Supreme Court has so clearly stated, when "working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick v. Meyers, 461 U.S. 138, 151-52 (1983). The Presiding Member found that another Assistant Regional

Manager, and not Petitioner, bore the primary responsibility for the problems in the Boston Regional Office. Even if that finding were true (and we choose not to address its accuracy), we think it is of little relevance to Petitioner's burden of proving that age was a determining factor in Respondent's decision to transfer Petitioner out of the Boston Regional Office. Merely casting doubt on the employer's proffered justification will not meet Petitioner's burden of persuasion that the employer was motivated by discriminatory intent. Burdine, 450 U.S. at 253-54; Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987).

There are other instances of the Presiding Member's failure to properly analyze the record evidence. Felix Brandon, Respondent's Director of Personnel, testified as to the perception held by Respondent's higher-level officials concerning the problems with the Assistant Regional Managers in Boston. The Presiding Member discounted Mr. Brandon's testimony, ostensibly because Mr. Brandon did not base his testimony on his own personal observations. However, the Presiding Member failed to consider that it was Respondent's perception of the problems in the Boston Regional Office that motivated Petitioner's transfer. The decision to transfer an employee rests at Respondent's headquarters with officials who generally do not have personal knowledge of the employee, but must rely on information they receive from their regional managers to form their perceptions of regional office employees. If headquarters management must have personal knowledge of an employee before that employee could be transferred, few persons might ever be transferred. The Presiding Member's failure to properly apprehend these facts is, in our view, indicative of an effort to prove Respondent was wrong, rather than apply the burdens of proof as the law requires. The testimony by Mr. Sorando that he was misquoted in the FOD study commissioned by Respondent is another example. Mr. Sorando testified that remarks attributed to him that "...the Assistant Regional Managers are not receptive to organizational change and are extremely difficult to work with" were not his exact words, but seemed to be, instead, a characterization of Mr. Sorando's conversation by the interviewer. The Presiding Member again credits the testimony of Mr. Sorando over the written document, but does not state how Respondent was wrong in relying on the written study to assess the scope of the problems in the Boston Regional Office.

The Presiding Member also finds inconsistencies in the testimony of Mr. Fee, Mr. Schwandt, and Mr. Myers concerning the events of April 1984 as evidence that Petitioner's age played a role in Respondent's decision to transfer Petitioner. Our examination of the record does not support the Presiding Member's findings. The record does not show that Mr. Fee could ever recall the date of the meeting he had with Petitioner. Nor does the record reflect that Mr. Schwandt knew of Mr. Fee's intent to transfer Petitioner at the time Mr. Schwandt met with Petitioner and Mr. Myers. There was also no basis in the record for the Presiding Member's belief that there had been no previous communication between Mr. Fee, Mr. Schwandt, and Mr. Myers. Again, the Presiding Member makes credibility findings that are not supported by the record. More importantly, the Presiding Member does not identify any aspect of the discussions between Mr. Fee, Mr. Myers, and Petitioner concerning Petitioner's retirement which would indicate that their inquiries about Petitioner's retirement were anything more than that necessary for management to plan for staffing in the upcoming fiscal year. The Presiding Member correctly states that Petitioner must prove by a preponderance of the evidence that age was a determining factor in the decision to transfer him from Boston to Washington, D.C. Viewing the record as a whole, however, we do not find substantial evidence to support the Presiding Member's decision that Petitioner met his burden. The factors cited by the Presiding Member to find that Respondent's articulated reasons were pretextual are simply not supported by the record evidence. Instead, we think the record clearly shows that Respondent based its decision to transfer Petitioner on reasonable factors other than age. The Presiding Member has based his decision almost exclusively on credibility findings that are not supported by the record. When a fact-finder uses a faulty theory or otherwise misapprehends the facts on the record to make credibility determinations,

findings based solely on those credibility assessments cannot stand. Henson v. City of Dundee, 682 F.2d 897, 912 (11th Cir. 1982).

The Presiding Member has analyzed the record evidence in this case as if Respondent was required to justify its decision to transfer Petitioner on the basis of sound management theory. However, in an age discrimination case, the employer has no duty to justify its management decisions. The issue is not whether the employer's articulated reason justified the personnel action, but whether the employer acted for a nondiscriminatory reason. Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983). See also, Ledoux v. District of Columbia, 820 F. 2d 1293 (D.C. Cir. 1987).

In sum, we find there is not substantial evidence on the record for the Presiding Member's finding that the transfer of Petitioner from Boston to Washington, D.C., was intentional age discrimination.

C. CONSTRUCTIVE DISCHARGE

The Presiding Member, for the most part, used the same findings of facts on which he based his age discrimination holding to rule that Petitioner was constructively discharged from his employment with Respondent. Although we question if the Presiding Member correctly applied the legal standard in his analysis, we need not reach that issue, because we again find that the decision is not supported by substantial evidence on the record viewed as a whole.

The Presiding Member accurately states in his decision that a constructive discharge occurs when an employer makes the employee's working conditions so difficult or unpleasant that a reasonable person would feel compelled to resign--regardless of whether the employer's intentions are to force the employee's resignation. Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985). The determinative factor is not the intentions of the employer, but the effect of the conditions on a reasonable employee. Id.; Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981). Petitioner retired on March 29, 1985, eleven days after he was transferred from a GS-15 Assistant Regional Manager position in Boston to a GS-15 Management Analyst position in Washington, D.C. Petitioner contends that the reassignment to Washington, D.C., was designed to force him to retire, and as such, constituted constructive discharge because Respondent was aware that a transfer to Washington, D.C., would create professional, family and financial hardships for him. Petitioner also alleged that his working conditions in the Boston Regional Office were rendered so intolerable that a reasonable person in his position would have felt compelled to retire.

The Presiding Member sustained Petitioner's charge of constructive discharge, and found that Respondent had subjected Petitioner to working conditions of such nature that a reasonable person would have felt compelled to resign. The "aggravating factors" cited by the Presiding Member that combined to make Petitioner's working conditions intolerable were: (1) Petitioner was deprived of his management position in the reorganization of the Boston Regional Office; (2) Petitioner was stripped of his office, staff, and supervisory responsibilities; (3) managerial positions (Assistant Regional Manager) for which Petitioner was qualified were given to younger employees; (4) Petitioner was placed on a 14-month temporary duty assignment in Washington, D.C., just prior to becoming eligible for retirement; (5) Petitioner was demoted and transferred to Washington, D.C., after becoming eligible to retire; (6) Petitioner was told that his performance in the area of maintaining positive working relationships was deficient even though he had received fully satisfactory performance ratings; (7) Petitioner was humiliated and suffered loss of prestige by Respondent's actions. The Presiding Member stated that the above factors, coupled with the age discrimination suffered by Petitioner, were sufficient to prove Petitioner's claim of constructive discharge.

We find that none of the factors cited by the Presiding Member, standing alone, is sufficient to support a finding of constructive discharge. A transfer from a supervisory job to a non-supervisory job at the same grade level is not a demotion. See cases cited, supra. Nor is a transfer from a supervisory position to a non-supervisory position sufficient to constitute constructive discharge, even if the transfer results in a loss of prestige or authority. Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2nd Cir. 1983); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119-20 (1st Cir. 1977); Neale v. Dillon, 534 F. Supp. 1381, 1390 (E.D.N.Y.), aff'd. without opinion, 714 F.2d 116 (2nd Cir. 1982). There is no real evidence on the record that Petitioner's transfer caused him humiliation and embarrassment, but even if there were such evidence, that would not be sufficient to support a constructive discharge. See Shawgo v. Spradlin, 701 F. 2d 470, 481-82 (5th Cir.), cert. denied, 104 S.Ct. 404 (1983). Federal agencies have broad discretion to transfer employees, Qualls v. United States, 678 F.2d 190 (Ct. Cl. 1982), and a constructive discharge cannot be based on an employee's subjective preference for one position over another. Kelleher v. Flawn, 761 F. 2d at 1086.

We have noted that we find no evidence of age discrimination here, but even were Petitioner's transfer a result of age discrimination, that alone would not suffice to prove constructive discharge. Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982). The Presiding Member also found that Mr. Myers found Petitioner difficult to deal with and also considered Petitioner insubordinate. Clearly, there were tensions between Mr. Myers and Petitioner. However, the fact that problems and tensions exist on the job do not suffice to establish constructive discharge. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1254 (4th Cir. 1985), cert. denied, 106 S. Ct. 1461 (1986). Moreover, there is no evidence that Mr. Myers ever charged Petitioner with being insubordinate, but rather, that Mr. Myers accepted Petitioner's actions as evidence of what he had already heard about Petitioner's negative attitude and difficulty in establishing working relationships.

Finally, although the Presiding Member states that the working conditions in the Boston Regional Office were made so intolerable for Petitioner that a reasonable person would have felt compelled to resign, it must be noted that Petitioner brought his age discrimination charge because he did not want to leave Boston.

We conclude that the record evidence, when viewed as a whole, does not contain substantial evidence to support the Presiding Member's decision that Petitioner was transferred because of age discrimination nor that Petitioner was constructively discharged from his employment with Respondent.

Accordingly, the decision of the Presiding Member is reversed.

Notes

1. Agency Exhibit 3, Part 2, § 21.