

Johnetta Gatlin-Brown v. U.S. General Accounting Office

Docket No. 00-02

Date of Decision: November 9, 2001

Cite as: Gatlin-Brown v. GAO (11/9/01)

Before: Anne M. Wagner, Member, for the Board *en banc*; Michael Wolf, Chair; Jeffrey S. Gulin, Vice-Chair

Summary judgment

Disparate treatment

Hostile work environment

Discrimination

Retaliation

DECISION ON PETITIONER'S APPEAL OF THE INITIAL DECISION GRANTING SUMMARY JUDGMENT

Petitioner Johnetta Gatlin-Brown appeals from an initial decision granting the General Accounting Office's (GAO) Motion For Summary Judgment on her claims of hostile work environment, disparate treatment in job assignments, and retaliation for filing a previous discrimination complaint. We have fully considered Petitioner's challenge to the March 23, 2001 initial decision granting summary judgment to the Respondent in this proceeding. Based on a review of the record before the Administrative Judge, we conclude that the initial decision addressed and correctly determined each issue presented by the Petition for Review. Therefore, the Personnel Appeals Board (PAB) **affirms**.

Background

Petitioner was hired by GAO in 1974 and, since 1979, has worked a schedule at variance with her official schedule, including frequent unscheduled leave, for reasons related to her health. In 1981, she began work as a Band I evaluator in the Agency's Dayton office. *See* Petitioner's Statement of Facts filed August 28, 2000 (S/F) ¶¶1, 2; Deposition of Johnetta Gatlin-Brown (Dep.) at 12. In 1994, Petitioner, an African-American, filed an equal employment opportunity (EEO) complaint with the GAO Civil Rights Office (CRO), alleging, in part, racial discrimination. *See* S/F ¶1; Affidavit of Leslie G. Aronovitz (Aronovitz Aff.) at 7. In 1994, Dayton was subject to management in the Cincinnati Office, but came under Chicago management during subsequent Agency realignment. *See* Aronovitz Aff. at ¶23.

Throughout her career, Petitioner has performed various projects pertaining to defense logistics issues and carried out so-called “budget scrub” assignments. According to Petitioner, budget scrub tasks are undesirable, do not prepare evaluators for more desirable assignments or promotions, and are assigned disproportionately to African-Americans. She claims that GAO assigned her budget scrub duties in retaliation for her bringing a discrimination complaint in 1994. *See* S/F ¶¶5-6, 10, 14-15, 18, 73; Dep. at 71, 274-76.

Petitioner also alleges that she was unlawfully subjected to a hostile work environment. Specifically, from 1995 to 1997, Petitioner’s direct supervisor at the Dayton office was Richard Strittmatter. Throughout this period, Mr. Strittmatter questioned Petitioner about her time and attendance. *See* S/F ¶¶20-21; JGB’s Limited Chronology of Events with Strittmatter, dated Oct. 24, 1997 (Chron.), at 1-2. At times, these inquiries occurred in the presence of other staff and colleagues. *See* S/F ¶¶22, 24; Chron. at 1-2. Beginning in January 1997, the frequency with which Mr. Strittmatter questioned Petitioner about her time and attendance intensified until July, when he notified her that he would no longer approve her variable schedule. *See* S/F ¶24; Chron. at 1.

At that point, Petitioner contacted Leslie Aronovitz, the Chicago Field Office Manager, to complain that her supervisor’s refusal to respect her need for irregular hours was causing her health problems. She also asked to be reassigned. Letter to Aronovitz, dated Jul. 31, 1997. *See also* S/F ¶26; Chron. at 2; Dep. at 150-51. Construing this request to be one for accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, Ms. Aronovitz asked Petitioner to submit medical documentation. *See* S/F ¶33; Chron. at 3-4; Aronovitz Aff. at 3; letter from Glenda Lopez-Blaza, M.D., dated Aug. 20, 1997. Petitioner subsequently met with Ms. Aronovitz and Stewart Herman, Deputy Manager of the Chicago Field Office, and she agreed to remain in her position for another month based upon their assurances that Mr. Strittmatter would be directed not to bother her. *See* S/F ¶¶40-41; *see also* Chron. at 6; Dep. at 165-67.

Mr. Strittmatter did not approach the Petitioner again until the end of October 1997 (*see* S/F ¶42; Dep. at 168), when he questioned her concerning a post-pay period adjustment on her pay form that she had previously agreed to make. Petitioner angrily left his office. *See* S/F ¶44. Later that day, he questioned her again about the time entry on the form, and in doing so, followed her back to her desk. Although there is no evidence suggesting that Mr. Strittmatter was threatening, Petitioner stated that she became frightened and yelled at him to leave her alone. Petitioner reported both incidents to the Chicago managers. *See* S/F ¶¶44-47; Chron. at 9-10. She also requested assistance from the GAO Civil Rights Office. *See* e-mail dated Oct. 24, 1997.

Petitioner subsequently met with Ms. Aronovitz and Mr. Herman and was told that she would be reassigned upon completion of her current project. The managers also asked her for further medical support for her claim.¹ *See* S/F ¶¶50-52. At the end of October, Petitioner observed

¹ Petitioner subsequently notified Ms. Aronovitz that she objected to the medical requests given that she was not seeking, and had never sought, accommodation under the ADA. Letter to Leslie Aronovitz, dated Oct. 31, 1997; *see also* Aronovitz Aff. at 3-4; Dep. at 51.

Mr. Strittmatter making notations with regard to her attendance. When he later approached Petitioner to obtain certain job-related information, she refused to answer, telling him, instead, to get away from her. See S/F ¶¶53, 55; see also Chron. at 8-10.

After this last incident, Petitioner again sought assistance from Ms. Aronovitz but became doubtful of the manager's commitment to reassign her. Shortly thereafter, she engaged in informal discussions about her complaint with the Civil Rights Office. See S/F ¶¶56-57, 59-61. Petitioner filed a formal complaint with that office in January 1998, alleging race and sex discrimination in the allocation of assignments at the Dayton office, retaliation for her 1994 filing of an EEO complaint, and a hostile work environment.

That complaint formed the basis of the instant Petition for Review. Upon completion of the discovery period in this case, Respondent moved to dismiss the hostile work environment claim as untimely and moot.² Alternatively, it moved for summary judgment on all three claims. After obtaining an extension of time, Petitioner, proceeding *pro se*, filed a response to the Motion to Dismiss and for Summary Judgment. Her response included a Statement of Facts, a Chronology of Events, a separate document entitled "Summary Judgment Standard" and exhibits. Noting that Petitioner's filing was not sufficient to defeat the pending Motion, the Administrative Judge, *sua sponte*, issued an order granting Petitioner leave to resubmit the Statement of Facts in affidavit form and, in particular, to identify "what specific facts she intends to prove, and how she intends to prove these facts, to establish her claim of unlawful discrimination." Order of Nov. 14, 2000. Petitioner timely filed the Statement of Facts and Chronology in affidavit form, but did not elaborate on the discrimination claim. GAO filed a response to the amended opposition on December 8, 2000, pointing out the failure to flesh out the discrimination claim. The Administrative Judge thereafter granted Petitioner retroactive leave to submit a supplemental memorandum and attachment. Respondent filed a reply to the supplemental submission on January 8, 2001.

On January 8, 2001, Petitioner again filed additional documents outside the filing schedule with a request for leave to do so. Respondent objected to the submission. After due consideration, the Administrative Judge denied Petitioner leave to file the additional documents, but noted that much of the material sought to be admitted was duplicative and that many of the documents were already in the record. Oral argument was scheduled for February 1, 2001. On January 25, 2001, Petitioner submitted another document entitled "Petitioner's Opposition to Respondent's Motion to Dismiss." At the outset of the argument on February 1, Respondent noted its objection to this latest submission. The Administrative Judge ruled to strike the untimely submission, but in doing so, notified Petitioner that she could refer to its contents during the oral argument. The transcript of that hearing reflects that she in fact read portions of the stricken document into the record.

Discussion

A. Standard of Review

² Respondent did not seek review of the Administrative Judge's denial of its motion to dismiss Petitioner's claim of hostile work environment. As such, that ruling is not before the Board.

On appeal from an initial decision, the Board may review the record "as though it were making the initial decision itself." 4 C.F.R. §28.87(g). This standard is particularly appropriate in cases involving the award of summary judgment. In reviewing the Administrative Judge's rulings on exclusion of evidence from the record, the harmful error rule is applied. *See* 4 C.F.R. §28.87(g)(4).

B. Analysis

1. Consideration of Evidence Regarding Staffing Patterns

The Petitioner asks the Board to consider additional evidence in the form of two exhibits concerning the staffing patterns for Dayton Band I evaluators from 1994 to 1998, as well as an analysis of the job assignments within that same period. Request for Reconsideration³ (May 1, 2001) at 2. She maintains that these documents show that only two Band I evaluators, both African-American, were required to work on assignments other than weapon systems review. Request at 2. She further claims that the evidence shows that while the same one or two of the seven Caucasian Band I evaluators in the Dayton office worked on the annual budget scrub, all three of the African-American Band I evaluators in the Dayton office were required to do so. Request at 2.

In the proceedings below, the Petitioner had sought leave to admit these documents into the record after the time for responding to the Agency's Motion for Summary Judgment had expired, and after twice being allowed to supplement her filings. The Administrative Judge's decision denying her request was squarely within his authority "to take all necessary action to avoid delay in the disposition of all proceedings" and not an abuse of discretion. 4 C.F.R. §28.22(b).

Nor can the rejection of the untimely documents be deemed harmful procedural error. 4 C.F.R. §28.87(g). The record demonstrates that the Administrative Judge gave Petitioner ample opportunity to address perceived evidentiary deficiencies in her case. *See* Order (Nov. 14, 2000) (granting *sua sponte* additional time in which to resubmit a response, supported by affidavits, to Respondent's Motion for Summary Judgment); Order (Dec. 12, 2000) (granting request out of time to file submission on discrimination claim). Petitioner did not include the documents relating to staffing assignments in her supplementary response, but rather, waited until four weeks later (Jan. 8, 2001) to seek leave, over the Agency's objection, to admit them into the record to support her opposition to the pending Motion.

Nor would it be appropriate for the Board to consider additional evidence at this point. Generally, on appeal, the Board may consider only new and material evidence that was, despite due diligence, unavailable when the record was closed. 4 C.F.R. §28.87(g)(1). Here, Petitioner merely states that "two key documents with material evidence about my staffing on Dayton jobs is now available that was not available when the record was closed." Request at 1. Her only explanation is that the need for such evidence became apparent to her after reading the decision dismissing her case and, "learn[ing that the Administrative Judge] viewed many of my facts as

³ Petitioner filed two documents entitled Request for Reconsideration. The first, dated April 6, 2001, constituted the notice of appeal, and the second, dated May 1, 2001, was in the nature of a brief. *See* 4 C.F.R. §§28.87(b)(1) and (c).

beliefs." Request at 2. In fact, however, these are documents that Petitioner attempted to file on January 8, 2001--before the initial decision was rendered. Petitioner made no statement or showing, either at that time or now on appeal, that these materials would not have been available in a timely manner with the exercise of due diligence. She has failed to establish grounds for admitting the exhibits at this point in the proceedings.

In *Daigle v. VA*, 84 MSPR 625, 629-30 (1999), the Merit Systems Protection Board did consider new evidence on appeal where the judge raised an issue *sua sponte* for the first time in the initial decision with no prior notice that the issue would be dispositive.

The present case clearly falls outside that limited exception. The Administrative Judge's decision did not raise, or turn on, any new issues beyond those contemplated by Petitioner's claims. Specifically, with regard to the relevant claim of disparate treatment at issue here, the grant of summary judgment for the Agency was based on the conclusion that Petitioner failed to meet a fundamental element of her *prima facie* case, namely, that the alleged adverse employment action was a result of discrimination. Moreover, as stated above, the Administrative Judge expressly invited Petitioner to resubmit her opposition to address the perceived evidentiary deficiencies in her case, and gave her a second opportunity to do so. Thus, unlike in *Daigle*, the Petitioner here was plainly on notice of her need to produce evidence connecting the budget scrub assignments to unlawful discrimination by the Agency in order to prevail on her claim of disparate treatment.

2. Disparate Treatment

In claiming that the Agency subjected her to discriminatory treatment, the Petitioner argues that the budget scrub assignments precluded her from competing for a promotion. Request at 3. The Administrative Judge reasonably interpreted this claim as focusing on the lack of promotion and concluded that the Agency was entitled to summary judgment because Petitioner had not applied for, much less been denied, a promotion, and therefore did not demonstrate the existence of an adverse personnel action. *Decision* at 17-18 (citing *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999)). He went on to find that even if the budget scrub assignment was considered to be an adverse employment action, any inference of discrimination was obviated by the fact that white, as well as African-American, evaluators were assigned that duty. *Decision* at 18.

The Board affirms the grant of summary judgment for the reasons articulated in the initial decision. In addition, the recent decision in *Freedman v. MCI*, 255 F.3d 840 (D.C. Cir. 2001), provides further support for the decision below. There, an MCI technical engineer claimed that he had been unlawfully transferred to the night shift, denied training opportunities and equal assistance in the company's mentorship program, denied the use of tools and computers, given inappropriate assignments, and denied the personal feedback given other employees due to his religion. *Id.* at 843. Relying on *Brown v. Brody*, the District Court had found that the transfer to the night shift was not an adverse employment action because it did not involve loss of salary or benefits. The Court of Appeals in *Freedman* rejected such a cramped reading of *Brown*, saying that even a lateral transfer could be adverse if there were some "other materially adverse consequences affecting the terms, conditions, or privileges of the plaintiff's employment." 255 F.3d at 844 (quoting *Brown*, 199 F.3d at 457). Thus, the D.C. Circuit found that actions such as

a change to the night shift, even when resulting in higher pay, and the denial of training opportunities, including inadequate mentoring, could rise to the level of adverse employment actions depending on the impact on an individual's employment.⁴ Similarly, it noted that a temporary assignment to a less desirable job could be an adverse employment action when accompanied by loss of pay, benefits, or future employment opportunities. *Id.* at 848.

Consequently, the budget scrub assignments at issue here might arguably have constituted an adverse employment action independent of whether Petitioner had, in fact, been denied a promotion. Indeed, the Administrative Judge assumed as much. *Decision* at 18. However, the Petitioner failed to produce probative evidence (1) that the assignments adversely impacted her employment; or (2) that she was treated differently from the other employees with regard to these assignments because of her race. In her Petition for Review (at 8), Petitioner alleges that every Band I staff member promoted in the Dayton Office for FY '94 to FY '98 was assigned to reviewing weapons systems acquisition, and that she was never given such assignments. She further alleges that this ensured that she "never had a chance to compete for promotion." *Id.* Despite repeated opportunities to substantiate these claims, Petitioner did not respond in a timely manner with the requisite proof. Left standing on the record is the Regional Manager's Affidavit, referring to "budget scrub" and stating her belief that "the Dayton Office is still open today because of its contribution to budgetary savings for the Office." Aronovitz Aff. at ¶7.

3. Hostile Work Environment

Title VII of the Civil Rights Act encompasses claims that an employee's work environment is discriminatorily hostile or abusive. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986). Title VII is violated when an employee is the victim of "discriminatory intimidation, ridicule, and insult," *id.* at 65 (emphasis added), "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'." *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The test, in part, is an objective one, that is, whether the environment is such that a reasonable person would find it hostile or abusive. *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993). Conduct that is merely offensive or which renders a workplace unpleasant does not violate Title VII. *Id.* Similarly, that a supervisor exhibits a "nasty attitude" is "insufficient to establish a hostile atmosphere, especially where, as here, there is no evidence that the 'nasty' attitude is pervasive and constant." *Freedman*, 255 F.3d at 849 (citing *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998)).

The Board agrees with Petitioner that "this type of analysis is generally laden with questions of fact." Request at 4. The conduct cited by Petitioner as reflective of the hostile work environment consisted entirely of inquiries by Mr. Strittmatter into her time and attendance, and particularly, her use of unpredictable and variable flex time. *Decision* at 14. However, even accepting (as the Administrative Judge did) all of her allegations, including those relating to the conduct of her supervisor, Richard Strittmatter, as true, the Board cannot conclude that Petitioner suffered "discriminatory intimidation, ridicule, [or] insult." *Meritor*, 477 U.S. at 65. Moreover, in the absence of any evidence of conduct that might objectively be viewed as abusive, the Board

⁴ The Court concluded, however, that *Freedman* failed to make out a claim of discrimination because he did not establish that he was treated differently from other employees because of his religion. 255 F.3d at 844.

finds that the Administrative Judge did not err as a matter of law in finding that the supervisor's inquiries regarding Petitioner's schedule, time and attendance could not objectively be characterized as hostile or as motivated by Petitioner's race or sex. *Id.* at 14-15.

In light of this conclusion, the Board does not find Petitioner's arguments dealing with imputing liability to the employer persuasive. Request at 7. In this regard, she alleges that she did not have a reasonable avenue for complaining about Mr. Strittmatter's conduct and that GAO management knew of, but failed to address, the alleged harassment. However, absent a finding of actionable harassment, an employer cannot be found liable for failing to respond timely to the alleged supervisory conduct.

Moreover, here, the record reflects that numerous avenues of complaint were available to, and invoked by, Petitioner to express her discontent with Mr. Strittmatter's apparent dissatisfaction with her unpredictable work schedule. *Decision* at 9. She lodged her first complaint with GAO management in July 1997. *Decision* at 6. In August 1997, GAO managers responded to Petitioner's complaints by directing Mr. Strittmatter not to question Petitioner further about her time and attendance. *Decision* at 7; Dep. at 165-67. He did not approach her for over two months thereafter. Dep. at 168. By the end of October 1997, Petitioner was no longer working with Mr. Strittmatter. Thus, even if his conduct did rise to the level of harassment, it appears from the record that Petitioner's complaints were both heard and addressed by GAO management with reasonable promptness. Therefore, the Board rejects her argument regarding imputed liability.

4. Retaliation

To establish a *prima facie* case of retaliation under 5 U.S.C. §2309(b)(9), the Petitioner was required to show that (1) she engaged in a protected activity; (2) the accused official knew of the activity; (3) the adverse personnel action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the personnel action. See *Webster v. Department of Army*, 911 F.2d 679, 688-91 (Fed. Cir. 1990), *cert. denied*, 502 U.S. 861 (1991); *Warren v. Department of Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). The record in this case supports the conclusion that Petitioner failed to provide sufficient evidence of retaliation for her filing of a civil rights complaint in 1994.

Any alleged retaliation in the form of failure to protect Petitioner from harassment obviously fails without an underlying finding of hostile work environment. Her claim similarly fails to the extent that Petitioner argues that her work assignments (*e.g.*, budget scrubs) were the product of retaliation. Her assignment to budget scrub work both pre-dated and post-dated her 1994 discrimination claim. She was not given any budget scrub assignments in 1995. In addition, numerous other employees were assigned to budget scrub work in the years after 1994. These facts would preclude any reasonable fact-finder from reaching the conclusion that Petitioner's assignments were the product of a retaliatory motivation.⁵

⁵ Petitioner further contends on appeal that the attempted rescission of her "medical accommodation" also reflects unlawful retaliation. Response at 5. As noted in the initial decision, however, she only alluded to this in her Petition for Review and did not enumerate it in her list of charges. Moreover, she has consistently refused in the past to characterize her work schedule as an accommodation mandated by

Conclusion

Accordingly, the decision of the Administrative Judge is hereby **AFFIRMED**.

SO ORDERED.

statute. *See Decision* at 2 n.1. In light of these factors, the Board declines to reach this issue.