

OFFICE OF COMPLIANCE
Washington, DC

JOE D. CLARK)
)
 Complainant)
)
 v.) Case No.: 01-AC-388
) (RP)
)
 OFFICE OF THE ARCHITECT)
 OF THE CAPITOL)
)
 Respondent)

DECISION AND JUDGMENT

This matter is before the Office of Compliance on allegations of retaliatory employment practices, a resulting hostile work environment and their culmination in Joe D. Clark's resignation from the Office of the Architect of the Capitol (AOC). Violations of the Congressional Accountability Act of 1995 (CAA) §207 (a), 109 Stat. 13, 2 USC 1217 are alleged.

Synopsis of Issues

Complainant, Joe D. Clark, joined the AOC on February 18, 1996 as a Personnel Assistant, GS 6/4. He resigned from AOC on May 24, 2001 as a Personnel Assistant, GS 7/5, one day prior to his termination for various employment deficiencies.

Since December, 1999, Mr. Clark has initiated three proceedings with the Office of Compliance. Identification of each proceeding facilitates an understanding of the issues in this case

First Proceeding: 12- -99 99-AC-313	Alleged gender <i>discrimination</i> by AOC in failing to promote Mr. Clark to GS 8. Resolved by counseling agreement dated January 4, 2000 which required training, feedback and an evaluation after 90 days of training.
Second Proceeding: 12-12-00 00-AC-104	Alleged breach of the January 4, 2000 agreement and retaliation. Resolved by decision of a Hearing Officer concluding that AOC complied with agreement except for "neglect" in providing the specified evaluation. He found no evidence of discrimination or retaliation, rather Mr. Clark's poor work performance justified non-promotion and reassignment of duties. Case 00-AC-104, <u>Decision of Hearing Officer, 21.</u> The decision was affirmed by the Board of Directors.
Third Proceeding: 11-20-01 01-AC-388	Alleged retaliatory employment practices resulting in a hostile work environment and Mr. Clark's resignation on May 24, 2001.

The second proceeding and the third proceeding focus on the same time period, many of the same AOC employment practices and basically the same work performance by Mr. Clark. However, in the third proceeding, some issues, allegations, and proofs differ but most are very similar.

The primary issue in this third proceeding is "causal connection." Although Mr. Clark's "protected activity" and AOC's documented personnel actions are uncontested, there is substantial controversy on (1) the managerial legitimacy of the personnel actions concerning Mr. Clark and (2) the relevance/significance of alleged failures of the AOC to conform its employment practices to various Federal laws or its alleged errors in applying its own regulations when the narrow issue is "retaliation" against Mr. Clark for "protected activity."

The secondary issues in this proceeding include proof of "adverse action" when a resignation is involved. There is also an issue of limitations/jurisdiction based on counting the 180 day time period from the date when notice is received vs. the date of termination set forth in the notice.

Statement of Proceedings and Description of Evidence

The complaint in this proceeding was filed on June 5, 2002. Response was filed on June 26, 2002. Both met statutory time limitations.

Reasonable pre-hearing discovery and commitments of counsel in other Office of Compliance cases required an extension of time for hearing. Hearing was commenced on August 27, 2002

The taking of evidence continued until September 17, 2002.

There were interruptions to accommodate schedules of the hearing officer, counsel, witnesses and availability of staff and space.

At the evidentiary hearing, Mr. Clark presented 3 witnesses. Their testimony may be summarized as follows:

- Mr. Clark testified to his employment experiences with the AOC and to his feelings of humiliation and isolation during reassignment of his duties.

- Mr. Edwin Lopez testified to his role as an AOC human relations counselor who counseled with Mr. Clark, sometimes acted as a neutral observer in conferences about Mr. Clark's work performance and who, on one occasion, gave Mr. Clark erroneous advice which was corrected promptly.

- Ms. Sharon K. Harris, an employee of AOC, who represented Mr. Clark in his disciplinary proceedings and who viewed the denial of a continuance and failure to receive a copy of the decision after the hearing as discriminatory and retaliatory.

Complainant's exhibits 1-43 were received. Some exhibits, particularly 35-43, incorporated testimony from the second proceeding.

The AOC presented 3 witnesses whose testimony may be summarized as follows:

- Ms. Mary Medlin supervised Mr. Clark at some relevant times and found his work performance deficient for a GS 7. On cross-examination she testified to AOC personnel policies.

- Ms. Linda Poole supervised Mr. Clark in late 1999 and part of 2002. She found many errors in his work, many complaints about the substantial impact his errors had on benefits due other employees and a number of material misrepresentations by Mr. Clark concerning his work.

- Ms. Rebecca Tiscione, now director of AOC human relations, knew Mr. Clark as a co-worker and as one of his supervisors. She spoke of discipline imposed concerning a claim for benefits, undone or erroneous work, and her role in the termination proceeding.

Respondent numbered exhibits 1-14 but did not offer 5, 6, or 7.

The exhibits which were offered and received related to Mr.

Clark's work performance, notice of deficiencies, his

disciplinary case file and AOC employment policies.

The record remained open for receipt of counsel's post-hearing memoranda and for the result of any appeal which could be taken in the second proceeding. There was high potential for collateral estoppel and issue preclusion

On May 30, 2003, the Board of Directors issued its decision in the second proceeding. The Board decision was not sent to or received by the hearing officer in this third proceeding until July 16, 2004, less than 90 days before the decision herein

Summary of Decision

Based on the findings of fact and conclusions of law set forth below, it is the Hearing Officer's opinion and decision that the complaint should be dismissed with prejudice.

The employment actions of the AOC concerning Mr. Clark were not retaliatory and did not create a hostile work environment

1. There is no direct evidence of retaliation against Mr. Clark based on "protected activity" in his first or second applications to the Office of

Compliance. Moreover, Mr. Clark's work environment was supportive, not hostile. He received more training, more feed-back and more adjustments of duties than most employees. Effort was consistently made to train him or find work areas in which he would perform well.

2. Inferences which might be drawn from proximity in time between "protected activity" and employment action are not supported by the facts and are overwhelmed by Mr. Clark's poor work performance attributable to neglect of duties, not inability to perform.

3. Failure of the AOC, if any, to comply with various Federal enactments or practices or its own regulations is not ipso facto or per se proof of discrimination or retaliation under the CAA. There must be proof of "causal connection" between the deficiency and the practices prohibited by the CAA.

The Office of Compliance is not a personnel agency designed to correct all personnel errors by agencies of the Legislative branch. Its jurisdiction is limited in matters like Mr. Clark's to rectifying statutorily identified retaliation for protected activities.

Findings of Fact

1. On May 24, 2001, Joe D. Clark resigned from his position as a Personnel Assistant GS 7/5 with the AOC.

a. The reasons which Mr. Clark gave for his resignation were "supervisory harassment" by female supervisors based on his sexual orientation and "retaliatory actions" which resulted in a hostile work environment. Compl. Ex. 1.

b. At the time of his resignation, Mr. Clark knew

(1) his employment with AOC would be terminated on May 25, 2001, (2) the disciplinary action by termination would become a permanent part of his record and (3) termination was based on failure to give full value and service to AOC, unauthorized and excessive use of telephones, AWOL, misrepresentations of material facts negligent workmanship. Compl. Ex. 28 (Hantman letter

to Clark, May 21, 2001) and Compl. Ex. 3.

2. From at least late 1999 until May 24, 2001, Mr Clark had work performance problems. Those problems impacted the AOC and its other employees. The problems persisted despite AOC efforts to improve Mr. Clark's performance.

a. The work performance problems included:

abnormally high rate of error

failure to perform assigned tasks

failure to give "full value and service" as required by the AOC standards of conduct

misrepresentation of material facts

need for intensive supervision to assure accuracy and completion of work.

The details of these problems are documented in the proposal to terminate his employment and by the testimony of his supervisors, Mary Medlin, Linda Poole and Rebecca Tiscione

Compl. Ex. 3; Tr. 290-323, 368-394; 484-506. For example, errors by Mr. Clark have exceeded the combined errors of his co-workers. He spent 37 work hours, nearly a work week, on personal long distance telephone calls in one six month period. He was absent from his work station leaving the "front desk" without AOC personnel. His unprocessed personnel actions and job applications ranged from 50 unprocessed personnel actions to 106 job applications stacked in or on file cabinets in his office. The misrepresentations centered on false statements about this undone work.

3. Between late 1999 and May 24, 2001, the AOC took several employment actions concerning Mr. Clark with knowledge that he had previously engaged in "protected activity." The evidence concerning those employment actions focuses on:

- modification or "reassignment" of duties as a Personnel Assistant GS 7/5
- failure to give in-grade increases and denial of promotion to GS 8
- placement on restrictive leave and telephone use
- initiation of improper termination proceedings.

4. The changes in Mr. Clark's duties as a Personnel Assistant were precipitated by his poor work performance

a. In October of 2000, despite efforts by AOC to improve his performance, Mr. Clark's high rate of error

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- failure to give in-grade increases and denial of promotion to GS 8
- placement on restrictive leave and telephone use
- initiation of improper termination proceedings.

4. The changes in Mr. Clark's duties as a Personnel Assistant were precipitated by his poor work performance

a. In October of 2000, despite efforts by AOC to improve his performance, Mr. Clark's high rate of error

and the impact of those errors caused Ms. Tiscione to reassign him to the "front desk" and processing new job applications Tr. 489-491.

b. On February 23, 2001 Mr. Clark was relieved of duties at the "front desk" and processing job applications. His rate of error and his failure to complete tasks and his absence from his desk again generated complaints and had impact on the AOC. Tr. 490-491, 497-505. His new duties were assigned on a daily basis and included shredding papers as well as other routine clerical tasks.

Tr. ____

c. Mr. Clark did not experience any change in job title or loss of pay when was given different assignments. He continued to have the opportunity for a step increase to GS 8. Tr. 492.

5. Mr. Clark's failure to obtain in-grade or step increases after his "protected activity" are attributable to his work performance.

a. Mr. Clark's failure to perform well at the GS 7 level is documented by exhibits and testimony previously cited. Ms. Tiscione's letter denying an in-grade increase on May 8, 2001 tells Mr. Clark that he has not corrected those deficiencies. Comp. Ex. 8. Ms. Medlin's opinion

on his failure to perform well as a GS 7 is credited. Tr. 386.

b. Prior awards of in-grade increases occurred from April 1997 to May 1999 before the serious decline in job performance. Comp. Ex. 9a, 9b and 9c.

c. AOC error, if any, with regard to giving Mr. Clark written notice of intent to deny an increase was attributable to confusion. AOC was engaged in an on-going effort to work out an operational performance evaluation policy. In addition, Mr. Clark's deficiencies had been discussed with him many times. Ms. Poole in her letter of May 8, 2001, offered to meet with him but the meeting and the denial was mooted by Mr. Clark's resignation. Tr. 334-342.

6. Placement of Mr. Clark on restricted leave and telephone use arose from his abuses of each.

a. Mr. Clark's abuses of leave and telephone use are documented in testimony and exhibits cited above, particularly including Compl. Ex. 3 at pp. 1-3; Ms. Medlin's testimony, Tr. 388; Ms. Tiscione's testimony, Tr. 498-499 and Resp. Exs. 12 and 14.

b. The AOC interim policy on leave was in effect and followed. Resp. Ex. 10.

c. There is no evidence that Mr. Clark was targeted or singled out for restrictions.

7 The disciplinary proceedings which resulted in a decision to terminate Mr. Clark's employment with the AOC were conducted in accord with AOC practice and procedure. Tr. 393-400, Compl. Ex. 14. There was no evidence of a "connection" between the disciplinary proceedings and Mr. Clark's protected activities with the Office of Compliance

a. The document initiating the disciplinary proceeding identified serious defects in Mr. Clark's service to the AOC. Compl. Ex. 3.

b. In an 8 page decision the assigned hearing officer, Robert Barshay, found "substantial evidence" to support the 5 "charges" in the initiating document. He also found that appropriate procedures were followed in bringing the charges. Resp. Ex. 8, Hearing Summary, Findings and Recommendations, May 7, 2001.

c. The alleged errors in the proceedings do not reflect retaliatory motives by AOC.

(1) Issues concerning phone use were not "stale" or maliciously "relitigated." Although Mr. Clark had reimbursed AOC for the calls, the impact of so many calls on Mr. Clark's work performance

had not been subject of discipline. Tr. 380 and 474- 75.

(2) Denial of a continuance to Mr. Clark occurred after he had been given some delays and after he had notice that no further continuances would be granted. Resp. Exs. 2, 3 and 4. He was not alone among AOC employees in being denied a continuance. Tr. 396.

(3) Restriction on the availability of the hearing officer's termination decision was not restriction applied to Mr. Clark for his activities. Restricted availability was an AOC policy uniformly applicable to all employees subject to disciplinary proceedings. Tr. ____.

(4) Use of an auto pen by the Architect of Capitol in initiating an internal form approving Mr. Clark's termination is not an irregularity in proceedings. The Architect signed the letter of May 8, 2001 terminating Mr. Clark and stating, "I have reviewed your case and based on my final decision on reasons..." Resp. Ex. 8. Letter from Hantman to Clark and Compl. Ex. 6.

8. During Mr. Clark's 5 year tenure with the AOC many efforts were made to assist Mr. Clark in improving his work performance.

a. Mr. Clark received a greater amount of feed-back and assistance than is normally necessary for a GS 7. He was given extra training pursuant to the settled agreement in 99-AC-313 as noted in second proceeding.

b. The testimony that Mr. Clark could perform assigned tasks, but did not, is credited. Tr. 386.

9. Although Mr. Clark had a number of work place problems, there is no evidence of a hostile work environment.

a. Mr. Clark continuously received aid with his job performance as cited above.

b. Except for a confrontation near Christmas in 1999, there is no evidence of inappropriate personal behavior by Mr. Clark or his supervisors or his co-workers. Tr. 301-303.

c. The change in his work site was attributable to construction work in AOC offices, not purposeful isolation of Mr. Clark.

10. The dates bearing on initiation of this Office of Compliance proceeding are:

May 22, 2001 when Mr. Clark received Mr. Hantman's letter terminating employment effective May 25, 2001

May 24, 2001, the date of Mr. Clark's resignation

November 20, 2001, the initiation of this proceeding. Compl. Exs. 6, 1 and 24; Resp. Ex 8.

Conclusions of Law

1. The Office of Compliance has jurisdiction to hear the allegations of this complaint.

a. Mr. Clark's request for counseling was filed on November 20, 2001, 180 days after his resignation on May 24, 2001.

b. The date of the "alleged violation" under the CAA should be interpreted as the effective date of the action which constitutes an alleged violation. But for Mr. Clark's resignation, the action giving rise to the alleged violation in this case would not have been effective until May 25, 2001.

2. Mr. Clark does not sustain his burdens of proof or persuasion on his claims of retaliation and a resulting hostile environment under the CAA.

a. There is no direct evidence of retaliatory motive in any action taken by the AOC concerning Mr. Clark.

b. Any inference of retaliation which might be drawn from the proximity of Mr. Clark's protected activities and termination of his employment with the AOC are overwhelmed by his consistently poor job performance.

c. AOC failure, if any, to comply with Federal statutes and rules or with its own regulations has little value in this proceeding.

(1) The evidence of alleged general failures by in its personnel practices did not establish a "causal connection" between Mr. Clark's protected activity and AOC employment action concerning him.

(2) There was no evidence that Mr. Clark was singled out or targeted for application of any allegedly deficient rules or practices.

(3) The relationship between the alleged failures and Mr. Clark's protected activity is too attenuated to be persuasive.

3. In the absence of adequate proof of "causal connection" Mr. Clark cannot prevail on his claims of retaliation and a resulting hostile environment

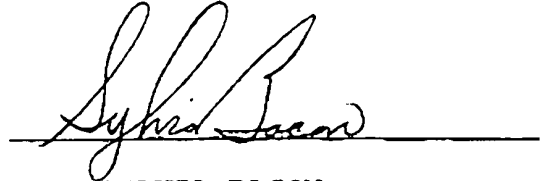
4. There were legitimate, managerial, non-pretextual reasons for each of the employment actions taken by the AOC concerning Mr. Clark.

Judgment

THEREFORE, it is this 30th day of September, 2003

ORDERED that judgment is entered for the Office of the Architect of the Capitol and it is

FURTHER ORDERED that the complaint filed herein on June 5, 2002 is dismissed with prejudice.

A handwritten signature in cursive script, appearing to read "Sylvia Bacon", is written over a solid horizontal line.

SYLVIA BACON
Hearing Officer

Certificate of Service

See attachment.