

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

Kevin Evans,)	
Appellant)	
)	
v.)	
)	Case Numbers: 14-CP-18 (CV, RP)
United States Capitol Police Board,)	13-CP-61 (CV, RP)
Appellee)	13-CP-23 (CV, RP)
)	
)	
)	

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by Kevin Evans (“Evans”) (black) against the United States Capitol Police Board (“USCP”). Evans seeks review of the Hearing Officer’s January 6, 2015 Order, which found in favor of the USCP on Evans’ four retaliation claims and one claim of disparate treatment based on his race (black).¹

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer’s decision on all claims.

I. Background

Employment History

Evans began working for the USCP in 1990. He alleges that he is a claimant in the *Blackmon-Malloy v. United States Capitol Police Bd.* case, a Title VII race discrimination lawsuit brought by a number of black USCP officers in 2001. *See Blackmon-Malloy v. United States Capitol Police Bd.*, 338 F. Supp.2d 97 (D.D.C. 2004) (“*Blackmon-Malloy*”).

In 2006, Evans was promoted to Sergeant. Also that year, the USCP found that Evans violated its Anti-Discrimination/Anti-Harassment (“ADAH”) policy when Evans used a leather memo pad to touch a female officer’s buttocks. The USCP suspended Evans for five days without pay and required him to take two hours of sexual harassment training as part of his discipline.

¹ The Hearing Officer had earlier dismissed other disparate treatment, hostile work environment, and constructive discharge claims.

Investigation

In summer 2012, three USCP officers filed internal complaints against Evans with the USCP's Office of Professional Responsibility ("OPR"). The first officer's (race unknown, male) allegations against Evans included, but are not limited to, Evans failing to properly conduct his job, assigning a part-black female officer to unfavorable posts, making inappropriate remarks to the part-black female officer and other female officers, harassing and intimidating the part-black female officer, attempting to cause friction among officers, partnering with a black female sergeant to conduct a very hostile and unprofessional roll call, causing 10 employees to transfer from a shift, and harassing officers for allegedly not following policy.

The part-black female officer mentioned above filed the second complaint. She generally complained that Evans was fixated on her too much, asked other officers about her, attempted to be close to her, tried to create friction between her and other officers, and denied her training. A third officer (white male) filed the third complaint.² The OPR consolidated the three complaints and assigned a sergeant (white male) as the investigator.

Racial and Sexual Comments

During the investigation, the OPR found that Evans had made some inappropriate comments to subordinates. The OPR learned from a female officer (race unknown) that Evans once told her that her glasses made her look like a "sexy librarian." The female officer stated that she was not offended by the comment, but found the comment to be inappropriate. Evans maintains that he did not remember using the word "sexy", but nonetheless agreed that he did during the investigation because he was threatened with discharge for not telling the truth by the sergeant conducting the investigation.

The investigation also made findings on a conversation between Evans and two white male subordinate officers. The first white male officer stated that he was the father to four children by four different black women. The second white male officer indicated that he had also dated black women. Evans offered, "You must like chocolate milk." Both officers laughed. Evans admitted that the comment was inappropriate.

On two different occasions, the black female sergeant who was the subject of the group complaint directed at her and Evans, walked by Evans and three male subordinate officers. Evans asked the male officers whether they would "do her" or "hit that" or "tap that." The officers believed Evans was referring to whether they would have sex with the black female sergeant and thought the comment was inappropriate. Evans also admitted that his comments

² Evans maintains that the first and third officers were union representatives who were attempting to solicit complaints against Evans and initiate a group complaint against Evans and the previously mentioned black female sergeant.

were inappropriate, but stated that he intended his comments to reference whether the men would date the black female sergeant.

Further, Evans stated that he learned from another officer that the part-black female officer, who later made the second complaint against him, joked at a roll call that “Black men and a bench have something in common – they both can’t support a family.” Evans stated that he could not understand why the part-black female officer had this view because her father is black. He maintained that he was concerned about the part-black female officer’s dating preferences because she could carry a weapon while seemingly holding a hostile view of black men. He asked another black male officer if he had any difficulties working with the part-black female officer, because of her apparent dislike of black men.³

Evans’ Suspension During the Investigation

The commander of the OPR (white female) determined that some of the allegations against Evans were likely to be sustained and to lead to Evans’ demotion or termination because some of the offending remarks were confirmed early in the investigation. As a result, the USCP Deputy General Counsel (white male) recommended that Evans be placed on administrative leave with pay for the remainder of the investigation. He maintains that employees are placed on leave with pay during an investigation when it appears that the charges against them are likely to be sustained and lead to the employees’ demotion or termination. On September 7, 2012, the USCP placed Evans on administrative leave with pay. The USCP later confiscated Evans’ work blackberry (cell phone) during the investigation.

Text Messages

On October 2, 2012, Evans sent a text message to his confiscated work blackberry, which read “Hey Evans, I have some info about [the first officer who directed a complaint against Evans].” Evans sent the text message to determine if anyone was monitoring his work blackberry during the investigation. The sergeant assigned to Evans’ investigation looked into why Evans sent the text message. He also searched Evans’ work blackberry. He discovered a text message between Evans and his girlfriend on September 8, 2012 that discussed their use of condoms and how many they had left. While Evans’ girlfriend used sexually explicit words in the text message, Evans did not. Evans, however, explained that a comment in the September 8 text message was a reference to “anal sex.”

Results of the Investigation

³ Evans’ supervising lieutenant (white female) told Evans to leave the part-black female officer alone and not ask anyone else about working with her or make any references about her dating preferences. Evans’ supervising lieutenant closed the issue and then wrote a counseling document to confirm her conversation with Evans. The counseling occurred before the start of Evans’ investigation.

The OPR completed Evans' investigation report ("ROI") on February 1, 2013. The OPR found that 34 of 39 allegations were either "not sustained," "unfounded," "dismissed," or that Evans was "exonerated." However, five charges were sustained against Evans:

1. Three charges of Violation of Operational Directive (ADAH policy) – (a) several comments about the part-black female officer's racial dating preferences⁴; (b) one comment that two white subordinate officers must like "chocolate milk" because they both indicated that they dated and/or had children by black women and questions to male subordinates about whether they would "do, tap, or hit that," referring to having sex with a black female sergeant; and (c) a comment that a subordinate female officer's glasses made her look like a "sexy librarian";
2. One charge of Violation of Operational Directive (Conduct Unbecoming) based on the sexually-explicit text message that Evans engaged in with his girlfriend on his work blackberry; and
3. One charge of Violation of Operational Directive (Abuse of Process) based on Evans' sending a fraudulent text message to his work blackberry.

A Disciplinary Review Officer (race unknown, female) recommended that Evans be demoted to private first class. The USCP issued Evans a notice of demotion, which was based on two comparator cases. The first case involved a white male captain who was demoted to the rank of lieutenant for viewing pornography on a personal DVD player in his police car and on his work computer with the knowledge of his subordinates. The demoted white male captain also failed to turn in the DVD when requested, alleging that he could not find it. The second case involved a white male sergeant who communicated by telephone and social media with three female subordinate officers at their homes and made inappropriate flirtatious remarks to them. The USCP found that he had violated the ADAH policy and demoted him to officer.

Evans requested a hearing before the Disciplinary Review Board ("DRB") to contest his notice of demotion.⁵ The DRB found that the evidence related to the race and gender comments did not support an ADAH violation. The DRB substituted a charge of making inappropriate comments, for Evans' comments related to (i) the dating preferences of the part-black female officer; (ii) the "chocolate milk" comment; and (iii) the "sexy librarian" comment. The DRB also found that Evans committed an abuse of process violation and engaged in conduct unbecoming a police official for the same reasons found by the OPR. The DRB determined that the comparators that the OPR used were not applicable and recommended Evans only be suspended for 30 days without pay.

⁴ The OPR "sustained, but closed" the allegation that Evans asked a black male coworker of the part-black female officer if he was comfortable working with her because she allegedly did not like black men. The charge was deemed closed because Evans' supervising lieutenant had previously counseled Evans about making the comments.

⁵ The DRB made recommendations to the USCP Chief on disciplinary matters and was made up of five officers.

Chief Kim Dine (white male) reviewed the results of the investigation, the closed counseling case where Evans asked a subordinate whether he was comfortable working with the part-black female officer, the DRO's recommendations, the DRB's recommendations, and the *Douglas* Factors.⁶ Among other things, Chief Dine stated that Evans, as a supervisor, was to serve as a "role model" for others. Instead, as Chief Dine observed, "Here we had a supervisor in a quasi-military organization who engaged in intentional repeated behavior related to sex and race." Chief Dine explained that he lost confidence in Evans' management abilities. On January 7, 2014, Chief Dine demoted Evans to private.

Procedural Background

Evans filed three requests for counseling. Mediation failed in all three cases. On June 9, 2014, Evans filed administrative complaints for all three cases. After being directed by the Hearing Officer to file a bill of particulars, Evans alleged that the USCP committed the following: (1) retaliation – prolonging an unnecessary investigation into false allegations that Evans had harassed his subordinates; (2) retaliation – suspending Evans during his investigation; (3) disparate treatment – preventing Evans from counseling non-black officers regarding grooming policies; (4) disparate treatment – preventing Evans from imposing discipline on non-black officers who violated policies; (5) disparate treatment - suspending Evans during his investigation; (6) disparate treatment - failing to support Evans' efforts to discipline subordinates; (7) hostile work environment – allowing the union to solicit complaints against Evans; (8) constructive discharge – discharging Evans from his position as sergeant; (9) retaliation – issuing a notice of demotion; and (10) retaliation – demoting Evans.

On August 27, 2014, the Hearing Officer granted summary judgment for the USCP on the hostile work environment claim and all the disparate treatment claims⁷ except for the claim relating to Evans' suspension during the investigation (count 5). Also, the Hearing Officer denied Evans' motion for summary judgment. Therefore, only the retaliation counts (1, 2, 9, 10) and the disparate treatment suspension count (5) remained for hearing. On January 6, 2015, the Hearing Officer found for the USCP on the remaining counts.

Evans filed a brief in support of his petition for review. The USCP filed an opposition. Evans filed a reply brief.

II. Hearing Officer's Decisions and Orders

Retaliation

⁶ The *Douglas* factors were established by the decision of the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). The *Douglas* factors are certain enumerated criteria and mitigating or aggravating circumstances that must be considered and balanced in determining an appropriate penalty for the sustained charge. See e.g., *Kline v. Dep't of Transp.*, 808 F.2d 43, 46 (Fed. Cir.1986).

⁷ The constructive discharge claim had also been dismissed prior to the hearing.

With respect to the retaliation claims, the Hearing Officer found that Evans engaged in protected activities when he participated in the *Blackmon-Malloy* case and filed his first two requests for counseling; and that the investigation, suspension, and demotion were all actions likely to deter a reasonable person from engaging in protected activities. However, the Hearing Officer held that Evans failed to show that any of the decision-makers involved in Evans' investigation and subsequent demotion had actual knowledge of Evans' involvement in the *Blackmon-Malloy* case or of Evans' first two requests for counseling. The Hearing Officer also rejected Evans' theory that the USCP had constructive knowledge of Evans' participation in the *Blackmon-Malloy* case. Further, the Hearing Officer determined that there was no evidence of animus or that Evans had any negative or hostile interactions with any of the decision-makers that might have prompted retaliation. Thus, the Hearing Officer concluded that Evans failed to prove that any of the non-retaliatory reasons given by the USCP for the adverse actions against Evans were pretext for retaliation.

Also, the Hearing Officer concluded that any union motivation behind the OPR complaints had nothing to do with the initiation of the investigation by the USCP, which was required by protocol. The Hearing Officer also found that the USCP had legitimate, non-retaliatory reasons for the investigation, and for Evans' suspension and demotion. The investigation was conducted in accordance with the protocol of the USCP, and Evans added to the delay in the investigation when he sent a misleading text message to his work phone, which appeared to be a violation of the USCP order to not discuss the investigation with anyone. The Hearing Officer also held that the comparator cases used by the USCP to justify Evans' demotion did not contribute to Evans' proof of retaliation.

Disparate Treatment Discrimination

As for Evans' disparate treatment suspension claim, the Hearing Officer found that Evans failed to prove that there was a similarly situated official who was not suspended during an investigation of similar misconduct. Also, the Hearing Officer reasoned that it appeared likely to the USCP that the charges would be sustained against Evans during the investigation due to early corroboration of the offending comments and given Evans' past comparable misconduct, which justified Evans' suspension during the investigation.

The Hearing Officer rejected Evans' allegation that he was treated differently than a white male sergeant who had not been suspended during his investigation, finding the investigations to be dissimilar. In that earlier investigation, the complaining officer (white male) had reported that the white male sergeant had repeatedly kissed and hugged him at the start of roll call and had made comments about having sex with the complaining officer's black wife. The complaining officer testified during Evans' hearing that he was in a hostile work environment, but also testified that he had downplayed the offending behavior when he spoke to the OPR during the white male sergeant's investigation because he did not "want to make waves" and the white male sergeant was still his supervisor. The OPR Commander testified at the hearing that the white

male sergeant was not suspended during his investigation because the USCP did not believe it would sustain a charge that would lead to demotion or firing. The Hearing Officer therefore found for the USCP on the disparate treatment claim related to Evans' suspension.⁸

Hostile Work Environment

Finally, the Hearing Officer dismissed Evans' hostile work environment claim on summary judgment because the Hearing Officer found that Evans did not adequately oppose the USCP's motion or provide sufficient evidence to overcome the USCP's entitlement to judgment as a matter of law.

III. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c); *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), at *3 (Jan. 21, 2011).

IV. Analysis

Retaliation

The Hearing Officer's dismissal of Evans' retaliation claims is affirmed. To establish a claim for retaliation under the CAA, an employee is required to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two. *See Britton v. Office of the Architect of the Capitol*, Case No. 02-AC-20 (CV, RP) (May 23, 2005). If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Frazier v. United States Capitol Police*, 12-CP-63 (CV, AG, RP), at *6 (Feb. 11, 2014). The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden of proof to complainant to show that the employer's reason is merely a pretext for unlawful retaliation. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981).

Here, Evans has failed to prove that the USCP held any retaliatory animus toward him with regard to conducting its investigation, suspending Evans during the investigation, providing him

⁸ The Hearing Officer also noted that another sergeant who was a white male was suspended with pay for calling and making inappropriate sexual comments to female subordinates. The Hearing Officer further noted that the OPR Commander testified that, from 2012-2014, several officials of all races were suspended with pay during investigations.

a notice of demotion, and actually demoting him. For example, Evans alleges that two union members filed 2 of the 3 internal complaints against Evans and sought to have other union members file a group complaint against Evans. Yet, there is no record evidence that the USCP was a part of or behind these complaints.

Also, the decision to suspend Evans during the investigation is in accordance with the USCP's practice of suspending officials during an investigation when it appears that a sustained charge could lead to demotion or termination. The USCP had early corroboration during the investigation that Evans made inappropriate comments and had been previously disciplined for engaging in sexually inappropriate behavior. Therefore, it was reasonable for the USCP to conclude that there likely would be charges sustained against Evans, which could lead to his demotion or removal.

Further, the USCP provided evidence that two white supervisory officials were suspended during their investigations because the USCP had reasoned that they likely would be demoted or fired. While Evans argues that another white male sergeant was not suspended during his investigation despite engaging in more egregious behavior, the complaining officer had downplayed the alleged offensive behavior during that white male sergeant's investigation. Therefore, the USCP had no grounds to suspend the white male sergeant during his investigation.

More importantly, Evans has failed to prove any retaliatory animus with regard to his suspension or demotion. The record does not reveal that any of the decision-makers were hostile to Evans. Here, the USCP disciplined Evans because he made inappropriate comments to his subordinates after he had been disciplined previously for inappropriately touching a female employee. The Hearing Officer's dismissal of the retaliation claims is affirmed.⁹

Disparate Treatment Discrimination

We also affirm the Hearing Officer's dismissal of the claims of disparate treatment discrimination. A plaintiff in a discrimination case always bears the burden of proving that the defendant intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). If the plaintiff meets its initial burden, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973). If the employer succeeds, then the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason ... was in fact pretext" for unlawful discrimination. *Id.* at 804; *Iyoha v. The Office of the Architect of the Capitol*, 12-AC-30 (CV, DA, RP); 13-AC-03 (CV, RP), at *7 (July 30, 2014).

Evans cannot prove his disparate treatment claims because he cannot show that any alleged adverse actions taken against him, such as his suspension and demotion, were motivated by his

⁹ The Board need not opine on whether any of the relevant decision-makers from the USCP had actual knowledge of Evans' participation in the *Blackmon-Malloy* case because Evans cannot establish the requisite retaliatory animus to be successful on his retaliation claims.

race.¹⁰ With regard to the suspension, Evans maintains that he should not have been suspended during his investigation because another white male sergeant was not suspended during his investigation despite committing allegedly more egregious behavior. The circumstances of that investigation, however, are not similar to Evans' investigation because, in the earlier investigation, the complaining officer had stated during the USCP investigation that the white male sergeant's behavior did not offend him. Therefore, it was reasonable for the USCP to conclude that it could not suspend the white male sergeant during that investigation because the USCP could not sustain a charge that would lead to his demotion or termination. Thus, Evans has not demonstrated that the differences in the USCP's handling of the two investigations had anything to do with Evans' race.

Evans also has not proven that his demotion was motivated by his race. Evans' comments that led to his demotion were racially and sexually inappropriate. His actions are especially troubling because Evans was a supervisor who made such comments to his subordinates. Furthermore, the USCP disciplined Evans in the past for touching a female officer on her buttocks. Here, the USCP had a legitimate non-discriminatory reason to remove Evans from a supervisory position for inappropriate behavior, as it has chosen to hold its supervisors to a higher standard. *See Ajayi v. Aramark Business Svcs., Inc.*, 336 F.3d 520, 533 (7th Cir. 2003) (court rejected plaintiff's race discrimination termination claim because plaintiff should legitimately expect to be held to a higher standard as a supervisor with respect to policy violations as opposed to an alleged comparator cashier). The dismissal of the disparate treatment claims is affirmed.

Hostile Work Environment

We affirm the Hearing Officer's dismissal of the hostile work environment claim on summary judgment. To prevail on a hostile work environment claim, a plaintiff must show that the employer subjected him to "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Baird v. Gotbaum*, 662 F.3d 1246, 1250-51 (D.C. Cir. 2011); *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). A hostile work environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). A court will examine the "totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance," to determine whether the plaintiff was subject to a hostile work environment.

¹⁰ Evans' appeal of his disparate treatment claims appears to not address his earlier dismissed claims (i.e. preventing Evans from counseling non-black officers regarding grooming policies). Therefore, the Board finds that Evans has waived those claims. *Swann v. The Office of the Architect of the Capitol*, Case No. 15-5001, 2015 WL 5210251 (D.C. Cir. 2015) (citing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.")). Nonetheless, the Board finds that the Hearing Officer properly dismissed those claims.

Baloch, 550 F.3d at 1201. Title VII is not intended to create a “general civility code for the American workplace.” *Taylor v. Solis*, 571 F.3d 1313, 1323 (D.C. Cir. 2009).

The allegedly hostile actions that Evans endured (i.e. the hostile union activity, the number of charges directed against him, the “fishing” for complaints against him, the length of the investigation, etc.) were not sufficiently severe or pervasive to constitute an actionable hostile work environment. For instance, Evans has not proven that the USCP relevant decision makers were part of or condoned the union complaints against Evans. Further, the USCP’s protocols required the USCP to investigate the allegations against Evans. The length of the investigation was not subjectively or objectively abusive or unreasonable, given the large number of charges involved. While only 5 of the 39 charges were sustained, those charges were serious ones involving Evans’ inappropriate racial and sexual remarks to subordinate employees. Given the undisputed material facts presented on the motion for summary judgment, the dismissal of the hostile work environment claim is affirmed.¹¹

ORDER

For the foregoing reasons, the Board affirms Hearing Officer’s decision to dismiss all claims.

It is so ORDERED.

Issued, Washington, DC December 9, 2015.

¹¹ Evans also alleges that the Hearing Officer was biased against him because she, among other things, forced him to file a bill of particulars, questioned him during the hearing, and commented on the merits of the retaliation claim before the hearing. The Hearing Officer did not act inappropriately in asking Evans to clarify his complaint or in questioning him during the hearing to clarify any potential confusion about his testimony. In addition, the Hearing Officer did not commit any error in commenting on the deficiencies of Evans’ retaliation claims prior to hearing where the Hearing Officer indicated that she would consider all the evidence. See *Gloria Halcomb v. The Association & Executive Board of the Committee of Correspondents Radio, et al.*, 03-SN-45, at *12 (Apr. 20, 2005) (“Review of the record in this case reveals no evidence of any antagonism against Complainant on the part of the Hearing Officer...”). Evans’s bias claim thus fails.