

OFFICE OF COMPLIANCE

LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

William Hudson)
Appellant,)
)
v.)
)
Office of the Architect of the)
Capitol,)
Appellee.)
)
)
)

Case Numbers: 08-AC-44 (CV, RP)
09-AC-04 (RP)

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

**ORDER FOR JOINDER OF CASES
AND
DECISION OF THE BOARD OF DIRECTORS**

These cases are before the Board of Directors (“Board”) pursuant to petitions for review filed by William Hudson (“Appellant” or “Hudson”), an employee with the Office of the Architect of the Capitol (“AOC” or “Appellee”). Hudson seeks review under Section 5.03(d) of the Procedural Rules of the Office of Compliance (“OOC”), of the July 12, 2010, order by Hearing Officer Gary M. Gilbert granting the Appellee’s Motion for Summary Judgment in Case No. 08-AC-44 (CV, RP) (“*Hudson I*”) and the July 12, 2010 decision by Hearing Officer Gilbert that dismissed the complaint on its merits after an evidentiary hearing in Case No. 09-AC-04(RP) (“*Hudson II*”). The Appellant timely filed petitions for review of the Hearing Officer’s decisions and orders and supporting briefs. The Appellee employing office filed briefs in opposition to both petitions for review.

The Board has duly considered the Hearing Officer’s Decisions and Orders in both cases, and the parties’ filings. For the reasons that follow, the Board joins the cases and affirms the Hearing Officer’s decision in both cases.

I. Background

Both *Hudson I* and *Hudson II* concern events occurring in the Paint and Refinishing Shop (Paint Shop) in the Senate Office Building where Hudson was employed by AOC

on a permanent basis as a painter in the Paint Shop and was supervised by Assistant Supervisor (and later, Supervisor) Jack Sypult. In both cases, Hudson's alleged protected activity concerned his advice to a co-worker Sidney McMahan to file a complaint with the Office of Compliance ("OOC") about discriminatory acts towards McMahan and Hudson's intention to act as a witness for McMahan should he make such a filing.

Hudson I

On April 30, 2007, during lunch in the break room of the Paint Shop, Hudson told temporary employee Sidney McMahan that he should file a complaint with the OOC about discriminatory acts towards McMahan in the Paint Shop concerning his race and sexual orientation. Hudson gave this advice to McMahan in the presence of co-workers Mike McMullin, Kevin Tippins, and Peter Sheehan.

A petition, dated August 28, 2007, and signed by twenty employees in the Paint Shop was filed with the Equal Employment Opportunity and Conciliation Programs Division ("EEO/CP"). This petition listed incidents occurring from 2000 to 2007 in which Hudson was alleged to have engaged in physical attacks, verbal abuse, and discriminatory remarks based on age and national origin toward co-workers. The petition alleged that Hudson's behavior had created a hostile work environment and asked the EEO/CP to resolve this problem.

Venattia Vann, a specialist in the EEO/CP, investigated the matter raised by the petition from the Paint Shop employees. Vann met with Hudson on November 20, 2007. Vann did not show Hudson the petition her office had received. Hudson refused to answer any questions and asked that she present him with written questions. Vann provided written questions, which Hudson answered in writing.

Vann interviewed a number of employees from the Paint Shop and informed Teresa Bailey, the Director of the EEO/CP, that witnesses confirmed that Hudson had engaged in the types of comments and conduct alleged in the employees' petition. Bailey determined that EEO and Diversity training should be planned to address the situation.¹

On January 23, 2008, Bailey and Vann met with Hudson and his representative. Bailey stated that she and Vann began the meeting by telling Hudson that they wanted to share the outcome of the claim that had been made in the employee petition. Bailey stated that Hudson interrupted saying that Vann had not talked to him about the specific claims against him. Bailey stated that she ended the meeting because it was not accomplishing anything. The EEO/CP did not grant Hudson's request for a copy of the petition or a copy of Vann's investigation of the matters raised in the petition.

In affidavits submitted during the hearing, Vann and Bailey stated that they did not know who Sidney McMahan was and had not heard that Hudson had advised McMahan to file a complaint. Sypult, who was not present when Hudson advised McMahan, stated in his

¹ In June 2008, all of the Senate Office Building shops, including the Paint Shop, received training on interaction with others and EEO training.

affidavit that he had not heard that Hudson told McMahan to file a complaint nor that McMahan had filed anything with OOC.

Hudson filed the instant complaint on December 8, 2008, alleging that Vann's refusal to advise him that he was the subject of a complaint based on race, age, national heritage and claims of threatening behavior; Vann's refusal to provide him with a copy of the claims brought against him; Vann and Bailey's determination that the allegations of the petition were true; and Vann and Bailey's refusal to provide him with a copy of the report and/or findings of the investigation conducted by the EEO/CP of claims against him were all actions taken in retaliation for his protected activity of advising McMahan to file a discrimination complaint. He further alleged that the employee petition to the EEO/CP, which made the complaints about him and the actions in connection with it, created a retaliatory hostile work environment.

On May 7, 2009, the Respondent filed its Motion for Summary Judgment. Oral argument on the motion was heard on June 25, 2009. The Hearing Officer then advised the parties of his intent to grant the motion. Subsequently, a related matter involving the Petitioner was also set for hearing before the Hearing Officer. *Hudson v. Office of the Architect*, 09-AC-04 (RP) (*Hudson II*). The Hearing Officer decided to consider reopening the instant case, *sua sponte*, and withheld issuance of the decision granting summary judgment. After hearing evidence in *Hudson II*, the Hearing Officer decided that there was no reason to reconsider the decision to grant summary judgment. He issued the decision in *Hudson I* on July 12, 2010.

Hudson II

An incident involving Hudson and co-workers Donnie Turner, Charles Littleford, and Robert Henry occurred on April 24, 2008, while they were on a break in the cafeteria of the Dirksen Senate Office Building. After some conversation with Turner where Turner told Hudson he needed to move on and start with a clean slate, Hudson allegedly made a gesture with his hands and said something like, "anybody messes with me, I give them both barrels."

Sypult was informed of this incident on the following day. On April 30, 2008, Sypult issued an "Incident Report" to Hudson describing Hudson's encounter with Turner.

Marvin Simpson, Hudson's second level supervisor, then began an independent investigation of the April 24th incident. He asked Sypult to get a statement from Hudson. Hudson provided Sypult with a written description of the April 24th conversation. Simpson concluded in a letter dated May 5, 2008, that Hudson's intent was not hostile and that allegations indicating that Hudson's behavior was threatening were unsubstantiated. Hudson and Turner agreed with Simpson's findings and signed the letter. Simpson then considered the matter successfully resolved.

Subsequently, Hudson learned that Sypult maintained a supervisor's file containing information related to potential disciplinary matters. Hudson asked to see this file, but

Sypult refused. Hudson then asked Simpson to see the file. Simpson asked his supervisor and it was determined that Hudson was entitled to review the file. Some six weeks after his request, Hudson was allowed to review the file and discovered that a copy of the April 30 incident report was in the file. The Simpson letter of May 5, 2008 was also in the file.

Hudson filed a complaint alleging that AOC issued the incident report on April 30, 2008, and Sypult refused to allow him to view the supervisor's file in retaliation for his having engaged in protected activity. Hudson also alleged that AOC created a retaliatory hostile work environment.

After a hearing, the Hearing Officer issued a decision on July 12, 2010, dismissing the complaint in its entirety.

II. 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). The Board's review of the legal conclusions that led to the Hearing Officer's determination is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Board reviews the hearing officer's grant of summary judgment *de novo*. See, e.g., *Medrad, Inc. v. Tyco Healthcare Group LP*, 466 F.3d 1047, 1050 (Fed. Cir. 2006).

III. Analysis

Pursuant to Section 7.06(a)(2) and (b) of the Office's Procedural Rules², in view of the fact that the factual and legal allegations in the complaints filed in these cases are interrelated and in order to expedite processing of the cases, the Board is ordering, on its own initiative, that Cases 08-AC-44 (CV, RP) and 09-AC-04 (RP) be joined. In doing so, the Board has determined that joining the cases will not adversely affect the interests of the parties.

² §7.06 (Consolidation and Joinder of Cases), provides that joinder is appropriate when:

“(a)(2)...one person has two or more claims pending and they are united for consideration. For example, where a single individual who has one appeal pending is challenging a 30-day suspension and another appeal pending challenging a subsequent dismissal, joinder might be warranted.

(b) The Board, the Office, or a Hearing Officer may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite processing of the cases and not adversely affect the interests of the parties, taking into account the confidentiality requirements of Section 416 of the Act.

The Board has considered each case in light of the other and finds no reason to disturb the Hearing Officer's findings and rulings in either case.

In both cases, the Appellant maintained that Supervisor Sypult was aware of and encouraged the employee petition to the EEO/CP. In *Hudson I*, the Hearing Officer found no evidence to support this argument. In *Hudson II*, the Hearing Officer generally credited Sypult's testimony. The Appellant argues that Sypult's testimony in *Hudson II* that he received news of the April 24, 2008 incident the day after it occurred is proof that Sypult knew of the employee petition to EEO/CP in *Hudson II*. This argument fails for several reasons. One instance of conduct that was reported quickly to Sypult does not establish that all instances of conduct are similarly reported to him. Further, the employee petition to the EEO/CP was a collective action by employees that urged the EEO/CP to address a long-standing situation that employees appeared to feel had not been sufficiently addressed by management. Since employees chose not to go to management over this matter, it is reasonable to infer that employees would not be quick to report their EEO petition to management. There is, therefore, no ground for questioning the Hearing Officer's finding in *Hudson I* of no evidence that Sypult knew about the employee petition.

The Appellant also argues in both cases that knowledge of the employee petition to EEO/CP should be attributed to Sypult because he shared a symbiotic relationship with the employees who signed the petition. The same argument was made in *Sheehan v. Architect of the Capitol*, Case 08-AC-58(RP). That case also centered on Hudson's April 30, 2007, advice to McMahan to file a complaint with OOC and on the Paint Shop employees' petition against Appellant to the EEO/CP. Sheehan was a witness to Hudson's advice to McMahan. In his case, Sheehan argued that he had been retaliated against for his protected activity of opposing AOC's efforts to punish Hudson for advising McMahan to file a complaint. The Hearing Officer credited Sypult's testimony that he had nothing to do with the preparation of the petition and had not become aware of it until after it had been submitted to the EEO/CP. In his Petition for Review, Sheehan raised the same argument of a symbiotic relationship that Hudson raises here. The Board rejected that argument in its decision affirming the Hearing Officer. In *Sheehan*, the Board noted that there was no substantial evidence to support the existence of a symbiotic relationship between the petition signers and Sypult. The Board stated: "Indeed, far from acting in concert or in common cause with Sypult, the record shows that the proponents of the petition took pains to "keep the supervisors out of it," presumably because the petition itself was an implied rebuke to Sypult and Steadman." The argument fails here for the same reasons. There is no substantial evidence supporting it.

In *Hudson I*, the Hearing Officer made contradictory findings concerning whether Hudson's advice to McMahan that he file a discrimination complaint was protected under the opposition clause. Thus, in addressing the retaliation claims, the Hearing Officer concluded that Hudson's encouraging McMahan to file a discrimination complaint was not protected because there was no proffer of evidence that Hudson ever conveyed any such concerns about the discriminatory treatment of McMahan to management. Yet, in

addressing the hostile work environment claim, the Hearing Officer concluded that Hudson's advice to McMahan was protected under the opposition clause because by advising McMahan, he confronted the discriminatory acts he witnessed against another. We find it unnecessary to resolve these contradictory views of the law because even assuming that Hudson's advice to McMahan was protected activity, the evidence supports the Hearing Officer's findings in *Hudson I* and *Hudson II* that Hudson failed to show that the alleged retaliatory acts in either case were caused by his activity.

Upon due consideration of the Hearing Officer's decisions, the parties' briefs and filings, and the record in *Hudson I* and *Hudson II*, the Board affirms the Hearing Officer's finding of no violation in *Hudson I*. The Board agrees with the Hearing Officer that no genuine issue of material fact exists in this case, and that the Appellee is entitled to summary judgment as a matter of law. With respect to *Hudson II*, the Board finds that the Hearing Officer's findings and conclusions are amply supported by substantial evidence. The Board affirms the Hearing Officer's decision that the AOC did not retaliate against Hudson because of his protected activity, and did not create a retaliatory hostile work environment, in violation of Section 207(a) of the Congressional Accountability Act ("CAA").

ORDER

Pursuant to Section 406(e) of the CAA and Section 8.01(d) of the Office's Procedural Rules, the Board joins Cases 08-AC-44 (CV, RP) and 09-AC-04 (RP) and affirms the Hearing Officer's granting of the Appellee's Motion for Summary Judgment in Case 08-AC-44 (CV, RP). Further, the Board affirms the Hearing Officer's dismissal of the Complaint in Case 09-AC-04 (RP).

It is so ORDERED.

Issued, Washington, DC on March 30, 2011.