

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

Architect of the Capitol,)	
Appellant)	
)	
v.)	
)	Case Numbers: 12-AC-30 (CV, DA, RP)
Sunday Iyoha,)	13-AC-03 (CV, RP)
Appellee)	
)	
)	

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 the Architect of the Capitol (“AOC”), against Sunday Iyoha (“Iyoha”). The AOC seeks review of the Hearing Officer’s June 7, 2013 Order, which found in favor of Iyoha’s national origin claim and awarded Iyoha \$30,000.00 in compensatory damages; and the September 18, 2013 Order that awarded Iyoha \$19,227.00 in attorney fees and \$1,188.64 in costs.

Upon due consideration of the Hearing Officer’s Orders, the parties’ briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer’s finding of national origin discrimination; and award of compensatory damages, attorney fees, and costs to Iyoha.

I. Background

AOC Help Desk

In 2008, Iyoha started working for the AOC as the Help Desk Manager in the Production Management Branch (“PMB”) of the Information Technology Division (“ITD”).¹ Iyoha is black, from Nigeria, and speaks with a Nigerian accent. Iyoha was also the Inventory Control Manager. He has a Bachelor’s Degree in English and two Associate Degrees in Mass Communication and in Journalism. He also has a certification for training related to computer servers and work stations. He is a certified support center director (the highest level certification that a help desk manager can achieve) and a support center analyst.

¹ The background facts are largely taken from the facts in the Hearing Officer’s June 7, 2013 Order.

The help desk consisted of both AOC employees and contractors. The primary duties of Iyoha's position consisted of overseeing and monitoring the help desk, and leading projects and tasks. Specifically, he monitored the contractors working at the help desk and prepared reports on the operations of the help desk. Also, he provided technical support to AOC users in the morning before the help desk officially opened.

In 2011, the PMB Chief was Iyoha's First-line Supervisor. He spoke with an Iranian accent. The ITD Deputy Director, who spoke with an American accent, was Iyoha's Second-line Supervisor. The Chief Information Officer ("CIO"), whose accent was unknown, was his Third-line Supervisor. Iyoha's First-line supervisor gave Iyoha "Outstanding" ratings for his 2009 and 2010 annual performance reviews and, as a result, Iyoha received quality step and cash awards.

In 2012, the AOC employees who worked at the help desk included Iyoha, his First-line Supervisor, two employees who spoke with American accents and three employees whose accents were unknown. According to Iyoha, most of the contract employees who worked at the help desk were foreign-born and spoke with non-American accents. Except for the five lead contractor positions,² the AOC did not have the authority to hire or fire contract employees, but could make recommendations concerning contractor personnel to the contractor.

Comments about Accents

After June 2011, a new CIO, Jay Wiegmann ("Wiegmann") replaced the former CIO. Wiegmann is white and spoke with an American accent. The AOC Chief Enterprise Architect also reported to Iyoha's Second-line Supervisor and Wiegmann. She testified that she overheard Wiegmann make several comments about employees with accents. She testified that he said: "[t]hank goodness Sonny [Iyoha] sent me an email because I can never understand him when he talks to me." The Chief Enterprise Architect also testified that Wiegmann said: "We have a Branch Chief from Iran [First-line Supervisor], engineers from Taiwan and Germany who do not speak English as their first languages. What can you expect?"³ The Chief Enterprise Architect maintained she told Wiegmann that he "may be crossing the line," with this remark, and that he responded: "[s]o report me. It's the truth."⁴ The Chief Enterprise Architect maintained that she had no difficulties understanding Iyoha.

The Chief Enterprise Architect stated that Wiegmann advised her that some contractor employees were going to be moved from telephone support positions because they allegedly could not speak clear enough English or understand customers' concerns. The Chief Enterprise Architect also testified that Wiegmann stated that it was frustrating for the AOC customers to

² These positions included: the contract Program Manager, the contract Operations Manager, the contract Help Desk Manager, the contract Network Engineer, and the contract Senior Security Officer.

³ Although Wiegmann did not deny that he made this statement, he testified that he did not remember saying it.

⁴ Wiegmann did not deny that the Chief Enterprise Architect told him that his comments were "crossing a line." He stated he could not recall if the comments were made.

speak with these contractors. According to her, Wiegmann stated: “It’s like when you call an organization, enter an account number, then enter it again; then you are routed somewhere, then you eventually end up speaking to someone in India who asks for the account number again.” In response to the Chief Enterprise Architect’s question whether the AOC had authority to change the contractor help desk employees, Wiegmann answered, “yes, we can make suggestions, but it is up to the contractor if they agree.” The Chief Enterprise Architect advised Iyoha, his First-line Supervisor and the AOC Service Delivery Branch Chief (“SDB Chief”) about Wiegmann’s comments regarding his feelings about employees who spoke with non-American accents.

Iyoha’s First-line Supervisor testified that Wiegmann did not like “foreigners” in management positions and that he made frequent comments about his inability to understand people with foreign accents. The First-line Supervisor stated that Wiegmann sometimes would tutor him about the use of American slang so that “we could speak like a native American.”

The SDB Chief testified that he attended meetings where Wiegmann discussed employees’ accents and their ability to communicate. He had conversations with Iyoha’s First-line Supervisor and the Chief Enterprise Architect about Wiegmann’s statements, which they all believed were discriminatory. The SDB Chief stated that Wiegmann expressed concern that customers were not able to understand employees on the help desk because of their accents, and that the ITD needed to be more customer focused and improve communications with customers.⁵

Iyoha testified that he had never received complaints about his accent or any AOC employee’s or contractor’s accent who worked for the help desk. The Hearing Officer noted that she had no difficulty understanding Iyoha or any of the witnesses who spoke with non-American accents.⁶

Realignment

On Friday, October 5, 2012, the AOC notified Iyoha that he was being reassigned to a Project Manager position in the SDB, effective Monday, October 8, 2012. Iyoha objected because the AOC did not provide him with the reasons for the position change or any training for his new position. Iyoha also objected because he no longer was able to work with people and their

⁵ The contractor Deputy Program Manager for the help desk testified that there were many meetings in which communication issues were discussed, but was not clear whether issues with accents were discussed. He denied hearing that Wiegmann wanted those who spoke with accents removed from the help desk. He did acknowledge, however, that Wiegmann raised issues in meetings about “unclear communications” in which users could not understand help desk employees because they did not speak English clearly.

⁶ In June 2011, the AOC conducted a survey about the performance of each AOC Division. The AOC conducts these surveys every two years. Overall, the 2011 ITD survey results reveal that a significant number of respondents highlighted positive interactions with the ITD staff, noting their responsiveness, professionalism, and demeanor. Many survey respondents stated that the help desk was the primary or sole strength in the ITD. Wiegmann testified that the 2011 ITD survey results were “marginally better” than the 2009 results. He stated that the complaints about the ITD were mostly that it took too long to boot up computers in the mornings and that the ITD would sometimes close tickets without solving the reported problems. Wiegmann also read a survey comment to AOC employees during a meeting which stated that “people on the Help Desk need to speak better English.”

computers, but now could only work with applications and software. He also asserted that he now dealt with only one unit of the AOC and not all of the AOC, as he had done before he was reassigned. Further, Iyoha claimed that he was no longer able to use his customer service skills and training. He sent an email protesting the reassignment, but received no response.

The AOC maintains that Iyoha was reassigned because he performed poorly as the Help Desk Manager and that the help desk was redundant. Wiegmann testified “there was general confusion and a lack of coordination” relating to a 2011 monitor deployment managed by Iyoha. He also claimed that frequently, customer requests would end up in Iyoha’s queue because he would insert himself into a request, but Iyoha would fail to resolve the issue.⁷

Wiegmann and Iyoha’s Second-line Supervisor also testified that Iyoha was reassigned because his position was redundant. The Second-line Supervisor stated that there was confusion regarding the responsibilities of the AOC employees and contract employees, which resulted in the Second-line Supervisor being unable to hold the contract employees accountable.

Wiegmann denied that Iyoha’s accent had anything to do with his reassignment. He cited that Iyoha retained the same grade 13 level as his former position. Further, he explained how he created the new position by taking some of the responsibilities of an overworked employee in the SDB and giving those responsibilities to Iyoha. He claimed that in spite of Iyoha’s alleged shortcomings as a Help Desk Manager, he is an accomplished Program Manager.

Wiegmann and the Second-line Supervisor explained that management created the “Virtual Customer Service Team” (“VCST”), which was headed by a cost estimator who is white and spoke with an American accent. The VCST also consisted of employees who all speak with American accents.

Iyoha’s Second-line Supervisor further explained that the VCST was created because the Help Desk Manager position no longer existed. She stated “[w]e wanted to help people understand that there was some place, something that they needed, that those were the people that they could probably go to directly.” In response to a question about how a customer would make a request for customer service after the realignment, the Second-line Supervisor answered, “you go to the Help Desk.... The same way as before.”

Iyoha’s First-line Supervisor testified that he was moved from his position as the PMB Chief to a position in the Office of the CIO. He testified that Wiegmann did not want “foreigners” in

⁷ The AOC also cited Iyoha’s lowered “Fully Successful” 2011 performance rating as evidence of his poor record. Wiegmann testified that he generally did not know on a day-to-day basis how well or poorly Iyoha performed.

management positions. He also stated that Wiegmann wanted to limit employees with accents to positions where they were not handling phone calls.⁸

The contract Program Manager testified that he was surprised by the realignment and was not familiar with the name “VCST.” He stated that the only change was that he now reported to a new PMB Acting Branch Chief instead of to Iyoha and Iyoha’s First-line Supervisor, the former PMB Chief.

The Hearing Officer determined that the contractor moved the contract employees to desk support positions and to field technician positions with limited interaction with customers.⁹

Impact on Iyoha

Iyoha testified that, as a result of his reassignment, he suffered from anxiety attacks, depression and discomfort at work. He claimed that he used to give motivational speeches to large groups, but no longer does so because he is sensitive about his accent. Iyoha’s wife testified that Iyoha was depressed, had continued muscle spasms and stopped participating in family-fun activities. Iyoha saw mental health therapists in the Employment Assistance Program (“EAP”) at the AOC as well as his primary care doctor, who referred him to a specialist to treat his muscle spasms.

On October 18, 2012, Iyoha filed an administrative complaint with the Office of Compliance. He alleged that the AOC had subjected him to race, color, religion, and disability discrimination as well as retaliation. In February 2013, Iyoha filed a second administrative complaint alleging that he was discriminated against based on his race, color, religion, and national origin when the AOC lowered his 2011 performance year rating to “Fully Successful” and reassigned him from his Help Desk Manager position.¹⁰ Both complaints were joined.

I. Hearing Officer’s Decisions and Orders

On June 7, 2013, the Hearing Officer issued an Order finding that Iyoha failed to prove discrimination on the bases of race, color, religion, and disability. The Hearing Officer also

⁸ Wiegmann testified that Iyoha’s First-line Supervisor did not effectively manage employees, follow progressive discipline, amass sufficient technical knowledge, and make good decisions. He denied that the First-line Supervisor’s accent had anything to do with him being transferred. Iyoha’s Second-line Supervisor also testified that the First-line Supervisor did not properly supervise Iyoha or evaluate his direct reports.

⁹ The contract Program Manager testified that after the realignment of contract employees, there is one contract employee with a foreign accent currently answering the phone. He also stated that the other contract employees assigned to the help desk all speak with American accents. The SDB Chief asserted that some employees who spoke with accents were replaced by others who spoke English as their first language. The contract Deputy Program Manager testified that after the ITD was realigned, several contract help desk employees were moved from answering telephones. All of these contract employees spoke with non-American accents and were of foreign nationalities.

¹⁰ Iyoha also alleged that the AOC discriminated against him based on his alleged disability (myofascial pain syndrome) by lowering his 2011 performance year rating. He also alleged retaliation due to his lowered performance rating and reassignment.

found no retaliation. The Hearing Officer held, however, that Iyoha was discriminated against because of his national origin when he was reassigned. The Hearing Officer awarded Iyoha \$30,000.00 in compensatory damages. On September 18, 2013, the Hearing Officer awarded Iyoha \$19,227.00 in attorney fees and \$1,188.64 in costs for his national origin claim. The AOC submitted a petition for review to appeal the national origin finding and awards.

National Origin Discrimination

The Hearing Officer found that Iyoha's reassignment was an adverse employment action because Iyoha was the only employee moved from the PMB to a position created by Wiegmann in the SDB. The Hearing Officer reasoned that Iyoha was unsure what his job duties at his new position were and no longer worked with a large number of customers and their computers. The Hearing Officer determined prior to his reassignment Iyoha interacted with all AOC personnel as Help Desk Manager, but now worked with only one department. The Hearing Officer also concluded that Iyoha's new assignment did not fully utilize his skills, trainings, or certifications.

The Hearing Officer also concluded that the circumstances of Iyoha's reassignment created an inference of discrimination. The Hearing Officer determined that Wiegmann implemented a decision to move AOC employees and influence the move from the Help Desk of contract employees who spoke with non-American accents. The Hearing Officer found that the Chief Enterprise Architect, Iyoha's former First-line Supervisor, the contract Deputy Program Manager, and the SDB Chief credibly testified that Wiegmann repeatedly made disparaging comments about both AOC and contract employees with foreign accents, particularly those on the Help Desk. The Hearing Officer found that many of these witnesses understood the comments to be discriminatory and that it appeared to them that Wiegmann had a bias against employees who spoke with foreign accents.

The Hearing Officer did not credit the testimony of Wiegmann and Iyoha's former Second-line Supervisor that Iyoha was not a good Help Desk Manager and that his position was redundant. The Hearing Officer based that determination on her findings: that the Help Desk had obtained overall more positive than negative comments from the ISP survey; that Iyoha had received a July 2012 personal commendation about his excellent customer service; that Iyoha had earned "Outstanding" ratings for his 2009 and 2010 performance reviews; and that Wiegmann had admitted that he was not familiar with Iyoha's day-to-day performance. The Hearing Officer found that the AOC's explanation regarding Iyoha's performance was not supported by the evidence and was a pretext for reassigning him based on discriminatory motives. Further, the Hearing Officer found that Iyoha's position was not redundant because his position was "replicated" by the VCST and managed by a lesser-qualified employee.

The Hearing Officer also found that the inference of discrimination was buttressed by the fact that Wiegmann did not give Iyoha any reasoning for his reassignment, despite Iyoha's protests

and requests to know why he was transferred. Also, the Hearing Officer questioned whether there was a reorganization plan because it did not appear that Wiegmann gave anyone affected by it notice of what was to occur. The Hearing Officer reasoned that there was no established reorganization plan as alleged by Wiegmann which resulted in Iyoha's reassignment, except for moving those employees with foreign accents to less customer-facing positions.

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).

III. Analysis

National Origin 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 (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.

The Hearing Officer properly concluded that Iyoha suffered an adverse action. An adverse employment action is a significant change in employment status, such as "firing, failing to promote, a considerable change in benefits, or reassignment with significantly different responsibilities." *Stewart v. Ashcroft*, 352 F.3d 422, 426 (D.C. Cir. 2003). While Iyoha's pay and grade level remained the same following his involuntary transfer, Iyoha no longer had the opportunity to work with a large number of customers and their computers; to interact with all AOC personnel; and to fully utilize the skills, trainings, and certifications that he acquired over 16 years. He was also unsure of the duties of his new position. As Iyoha's reassignment resulted in significantly different responsibilities, the Hearing Officer properly found that the involuntary transfer constituted an actionable adverse employment action. *Kelly v. United States Dept. of Transp.*, 840 F.Supp.2d 293, 303-304 (D.D.C. 2012) (summary judgment denied where plaintiff's reassignment from the division administrator of the D.C. Division of the Federal Motor Carrier Safety Administration to an equal employment opportunity specialist position due to poor job performance was an actionable adverse employment action); *see also Clipper v. Billington*, 414 F.Supp.2d 16, 22-23 (D.D.C. 2006) (adverse employment action found when employee "was detailed out of her parking specialist position to various other positions with

‘undescribed duties’ for nearly two years ... [and] the positions she was detailed to had insufficient work assignments and low responsibilities.”).

The Hearing Officer also properly concluded that the circumstances of Iyoha’s reassignment created an inference of discrimination based on national origin. The Hearing Officer determined that the Chief Enterprise Architect, Iyoha’s former First-line Supervisor and the SDB Chief credibly testified that they heard Wiegmann repeatedly make disparaging comments about both AOC and contract employees who spoke with foreign accents, especially those working on the help desk.¹¹ These witnesses understood the comments to be discriminatory; it appeared to them that Wiegmann had a bias against employees who spoke with foreign accents. They also testified that many of the employees who spoke with foreign accents were replaced by others who spoke English as their first language. Therefore, the record supports the Hearing Officer’s findings that Wiegmann was biased against Iyoha because of his Nigerian accent and removed him from his Help Desk Manager position as a result. *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (sufficient evidence in the record to support the court’s conclusion that the plaintiff’s demotion resulted from the opinion held by certain dental college faculty that the plaintiff was unsuitable to continue as supervisor because of his national origin and related accent).

As the Hearing Officer properly held, the AOC’s asserted reasons for Iyoha’s reassignment -- poor performance and the redundancy of the Help Desk Manager position -- are inconsistent with the factual record and are evidence of pretext. Iyoha received “Outstanding” ratings on his 2009 and 2010 performance evaluations, and quality step increases and cash awards associated with those ratings.¹² Moreover, the ISP survey comments were mainly positive about the Help Desk and Iyoha had received a personal commendation from a human resource professional months before his position change. Therefore, we cannot disturb the Hearing Officer’s finding that Iyoha’s alleged poor performance was not a reason he was reassigned to another position.

There also are no proper grounds to disturb the Hearing Officer’s findings that the Help Desk Manager position was not duplicative of other AOC functions. Iyoha and Iyoha’s former First-line Supervisor credibly testified that the VSCT was handling the same duties of the help desk previously managed by Iyoha. Also, the contract Program Manager stated that the only change was that he now reported to another employee instead of Iyoha and Iyoha’s First-line Supervisor.

¹¹ See *Sheehan v. Office of the Architect of the Capitol*, 08-AC-58 (CV, RP) (Jan. 21, 2011) (observing that “credibility determinations are entitled to substantial deference, because it is the Hearing Officer who ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.’” (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)); *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the court “will not disturb the Board’s adoption of an ALJ’s credibility determinations ‘unless those determinations are hopelessly incredible, self-contradictory, or patently unsupported.’” (quoting *United Servs. Auto. Ass’n v. Nat’l Labor Relations Bd.*, 387 F.3d 908, 913 (D.C. Cir. 2004)) (internal quotations omitted)).

¹² Although Iyoha did not receive “Outstanding” for his 2011 annual rating, he still achieved “Fully Successful.”

Finally, Iyoha's former Second-line Supervisor testified that a user seeking assistance with computer problems would contact the help desk the same way that they would previously contact the help desk when it was managed by Iyoha.¹³

Based on the above, the Hearing Officer's holding in favor of Iyoha's national origin discrimination claim is hereby affirmed.

Damages

We also affirm the Hearing Officer's award to Iyoha of \$30,000.00 for compensatory damages because of the impact of the reassignment on him. A review of compensatory damage awards will usually involve consideration of: (1) whether the award is monstrously excessive, (2) whether there is no rational connection between the award and the evidence, and (3) whether the award is comparable to those in similar cases. *Fox v. Hayes*, 600 F.3d 819, 845 (7th Cir. 2010). "An award for nonpecuniary loss can be supported, in certain circumstances, solely by a plaintiff's testimony about his or her emotional distress." *Tullis v. Townley Engineering & Manufacturing Co., Inc.*, 243 F.3d 1058, 1068 (7th Cir. 2001). Here, the Hearing Officer found that Iyoha and his wife testified credibly about the impact of the reassignment on Iyoha. Also, the AOC has failed to show that the award is monstrously excessive, devoid of any rational connection with the evidence, or incomparable to awards in similar cases. *See, e.g., Lowery v. Architect of the Capitol*, 10-AC-14 (CV, RP) (Dec. 12, 2012) (affirming the award of \$50,000.00 in compensatory damages based on testimony regarding the humiliation suffered by the plaintiff due to a hostile work environment). Finally, the award of \$19,227.00 in attorney fees and \$1,188.64 in costs is reasonable and is also affirmed.¹⁴

ORDER

For the foregoing reasons, the Board affirms Hearing Officer's decisions to find in favor of Iyoha's national origin claim and award Iyoha \$30,000.00 in compensatory damages; \$19,227.00 in attorney fees; and \$1,188.64 in costs.

It is so ORDERED.

Issued, Washington, DC on July 30, 2014.

¹³ The AOC argues that Wiegmann had no national origin bias because he placed two foreign-born employees on the VCST, and recommended two foreign-born contractors to customer-facing positions. Even if correct, an employer cannot escape liability simply because some members of the protected class are treated fairly. *See Connecticut v. Teal*, 457 U.S. 440, 55 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.").

¹⁴ The AOC did not provide any substantive briefing in support of its petition to challenge the award of attorney fees and costs. The Board need not consider cursory or conclusory arguments of the kind presented here by the AOC. *See, e.g., Herbert v. Office of the Architect of the Capitol*, 839 F.Supp.2d 284, 297-98 (D.D.C. 2012); *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir.1999) (*en banc*).