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

BREN LOWERY	)	
	)	
Appellant,	)	
	)	
v.	)	**Case Number: 10-AC-14 (CV, RP)**
	)	
OFFICE OF THE ARCHITECT OF THE CAPITOL,	)	
	)	
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 Office of the Architect of the Capitol ("AOC" or "Appellant") to the Decision and Order of Hearing Officer Paul Coran which found that AOC employee, Bren Lowery ("Lowery" or "Appellee") was subjected to a hostile work environment based on racial discrimination and to the Hearing Officer's Supplemental Decision and Order awarding $50,000.00 for compensatory, non-pecuniary damages.

BACKGROUND

Bren Lowery, an African-American Visitor Assistant Supervisor, started working for the Capitol Guide Service in September 2008. On November 13, 2008, the Capitol Guide Service was transferred to the Office of the AOC to operate within the Capitol Visitor Center ("CVC"), which opened to the public on November 23, 2008.

In or around November or December of 2008, various employees witnessed Mark Turnbull ("Turnbull"), another Visitor Assistant Supervisor ridiculing and mocking Appellee's speech and writing at a nearby bar during "happy hour." Around the same time, at another local bar, Vernon Alston ("Alston") an African-American tour guide with the CVC, witnessed Turnbull distribute an e-mail written by Appellee to a number of employees, refer to him as ignorant and uneducated, and disparage his writing. The other employees laughed and played a bingo-type game they called "Brengo." The object of the game was to accumulate words mispronounced by Appellee which they termed "Brenisms." When Alston stated to Turnbull that Lowery could not help the way he speaks, Turnbull responded: "You are African-American, you're black but you don't sound like that when you talk over the radio." Turnbull also told Alston that Appellee

sounded "ethnic." Alston witnessed similar behavior at three or four additional happy hours and stopped going because it upset him. Alston informed Appellee of these events.

After that time, the mocking continued. Appellee made several complaints to management that other employees were making fun of the way he spoke and treating him disrespectfully. During a morning general staff meeting, a number of employees broke out in laughter when they were instructed to call Appellee with questions. Appellee testified that during some morning staff meetings with 60-80 employees present, employees would laugh at him when he misspelled or stumbled over words. In addition, employees would laugh when he walked by the break room. There were also several incidents when employees would mock him when he spoke over the radio. Other employees also testified that they often saw CVC employees denigrating Appellee in the employee locker room. These comments were described as "vicious" and racially motivated as other employees questioned Appellee's background, resume, spelling, and pronunciation. This behavior was also reported to management. Through a claim with the AOC's Equal Employment Opportunity and Conciliation Program ("EEO/CP") on July 9, 2009, Appellee complained that management had failed to address the behavior of a small group of Visitor Assistants who were making derogatory comments about him. Sometime in August 2009, Appellee and a fellow Visitor Assistant Supervisor reported to management that Turnbull had parodied an e-mail written by Appellee in front of other employees during a happy hour at a nearby bar and that other employees engaged in the game "Brengo."

On October 22, 2009, Appellee filed a request for counseling with the Office of Compliance ("OOC"). After mediation ended on October 06, 2010, Appellee filed a complaint with the OOC on January 06, 2011. The complaint alleged racial discrimination and retaliation for reporting the discrimination and hostile work environment. Appellee alleged in the complaint that: 1) he was assigned more physically arduous duties than those of his comparator personnel; 2) he was subject to demeaning micro-management of his written work by his supervisor; 3) he was denied advanced sick leave; 4) he received three counseling statements criticizing his work attendance, for failing to follow sick leave procedures, and for granting unauthorized sick leave to a subordinate; and 5) he was subject to a racially hostile work environment when Turnbull encouraged employees to ridicule his speech and writing.

Hearing Officer's Decision and Supplemental Decision

A two-day hearing was held and, after receiving and considering post-hearing briefs from both parties, the Hearing Officer issued a Memorandum Decision and Order on September 16, 2011, finding that Appellee had been subjected to a hostile work environment because of his race [1]. In this Decision and Order, the Hearing Officer found that Appellee was subjected to "regular, recurring and lasting demeaning ridicule" that was sufficiently severe and pervasive to alter the conditions of his employment in that it "undermin[ed] his authority as a supervisor." Based on Alston's uncontroverted testimony that Turnbull told him that despite Alston being an African

[1] All other claims in the complaint were dismissed. The Hearing Officer found that Appellee had not established that he suffered racial discrimination by being assigned more arduous duties and by receiving supervisory criticism of his written product. The Hearing Officer also held that Appellee had not proven that he suffered retaliation for his reports of discrimination to management when management issued him coaching memoranda regarding his leave usage and absence from work. Appellee did not request review of these claims.

American, he was able to communicate in a manner "acceptable to Turnbull" and that Lowery sounded "ethnic," the Hearing Officer determined that "the management instigator [Turnbull] and other perpetrators of that egregious conduct so acted because [Appellee] is an African American." The Hearing Officer concluded that Lowery's work environment was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe and pervasive to alter the conditions of his employment and create an abusive work environment. See, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

Having found that the Appellant created a hostile work environment, the Hearing Officer also determined that the Appellant was liable for the violations because it "presented insufficient evidence to establish that it acted in a timely or complete fashion to neutralize or even minimize the injury inflicted upon [Appellee] by his hostile work environment." Because Appellant had failed to conduct a timely and thorough investigation or take sufficient remedial actions, it could not "demonstrate that it undertook an effective effort to ameliorate the attitudes of the numerous employees who were conditioned to mock [Appellee]." See, *Curry v. Dist.of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999) (an employer can be held liable only if it "knew or had reason to know of the harassment and failed to implement any prompt and appropriate corrective action.")

On October 7, 2011, Appellee timely filed a "Motion for Attorney's Fees, Expenses, and Compensatory Damages." After receiving and considering briefs from both parties, the Hearing Officer issued a Supplemental Memorandum of Decision and Order on January 19, 2012, denying Appellee's claim for $300,000 in compensatory damages, but instead awarding him $50,000 for injuries to his reputation and health. The Hearing Officer determined that Lowery's injury to his reputation and self-esteem constituted his most significant harm for purposes of compensatory, non-pecuniary damages. In addition, the Hearing Officer determined that part of the award was for harm to Appellee's health resulting from the aggravation of Appellee's existing medical condition. The Hearing Officer also awarded $20,372.71 in attorney's fees and costs, and post-judgment interest on those awards.

Petition for Review and Opposition

In a timely filed petition for review, Appellant sought Board review of the Hearing Officer's decision. Specifically, Appellant argued that because there were no specific findings of whether unlawful conduct took place within the 180-day statutory period, there was no jurisdiction under Section 402(a) of the Congressional Accountability Act. Appellant also argued that the Hearing Officer erred in finding that Appellee was subjected to a hostile work environment based on discrimination and that Appellant did not take sufficient remedial action to correct the situation. Appellant also appealed the award of $50,000 in compensatory non-pecuniary damages as excessive.

In his opposition to Appellant's Petition for Review, Appellee argued that the Hearing Officer properly found that: 1) Appellee was subjected to a hostile work environment based on discrimination; 2) Appellant failed to implement prompt and corrective action; and 3) the compensatory damages were appropriate.

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 it determines the decision to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with the 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 Hearing Officer"s determination on questions of law is *de novo*. *Chambers v. Dep't of the Interior*, 602 F.3d 1370, 1375 (Fed. Cir. 2010)

ANALYSIS

The Board has considered the Hearing Officer"s decision, the parties" briefs, and the record in this proceeding. For the reasons that follow, the Board finds that the Hearing Officer had jurisdiction to hear this case and affirms his finding that Appellee was subjected to a hostile work environment based on his race. The Board-further affirms the award for compensatory, non-pecuniary damages.

Jurisdiction

In its petition for review, Appellant claims the Hearing Officer did not have jurisdiction because the proscribed conduct occurred more than 180 days before the Appellee requested counseling and the Hearing Officer failed to identify unlawful conduct that took place within the 180 day statutory period. Contrary to Appellant"s argument, we find substantial evidence in the record that harassing conduct continued well into the 180-day statutory period. It is clear from the record that the complained of conduct lasted at least until Appellee complained to higher level management in July and August 2009. Appellee testified that he went to the EEO/CP on July 9, 2009 to file a claim because he "needed to seek some assistance in … the situation that was taking place. And after…going to [his supervisors in November 2008 and March 2009]… [he] didn"t see that things were getting better."[2] Further, on the claim form itself, filed in July 2009, Appellee described the workplace harassment in the present tense: "statements being made by various visitor assistants about my status as a supervisor…"

Appellee also testified that he went to management on August 19, 2009 and complained because the ongoing ridicule and "verbal bashing" by his subordinates was "getting out of control and something needed to be done." Similarly, in response to a question from the Hearing Officer as to whether the harassment ceased after his complaints to higher management in August 2009, Appellee testified that the ridicule by coworkers "did not slack off… [and] was pretty consistent."

[2] Appellant contends that the Hearing Officer erred when, in paragraph 4 of his decision, he stated that Appellee complained to Tina Pearson in March 2009. Appellant claims that this would be impossible because Tina Pearson was not working for Appellant at this time. We note, however, that the Hearing Office corrected his finding in paragraph 32 of his decision when he found that Appellant reported the conduct to Beth Plemmons in March 2009. This finding is clearly supported by the testimony in the record; consequently, we find that any mistake in paragraph 4 of the Decision to be harmless error that is not prejudicial to the Appellant. See, CAA § 406(d) (requiring us to review the whole record and take due account of the rule of prejudicial error).

In addition, the other Visitor Assistant Supervisor who accompanied Appellee when he complained to management in August testified at the hearing that she knew that Appellee "*is* the topic of jokes and things like that among the employees."(emphasis added.) This supervisor further testified that she observed "employees or other supervisors having laughs at Mr. Lowery's expense, laughing at anything he did or said."

Another employee credibly testified that she saw CVC employees demeaning Appellee in the employee locker room in vicious and racially motivated ways. These employees questioned Appellee's background, resume, spelling, and pronunciation. They "defaced" Appellee's writing in front of her and discussed the happy hour incidents that took place in November and December 2008.[3] This witness stated that Appellee was the subject of this harassment "all the time" and "constantly."

We therefore find Appellant's argument of lack of jurisdiction to be without merit. There is abundant and substantial evidence in the record that Appellee was subjected to ongoing harassment well into the 180-day statute of limitations period.[4]

Hostile Work Environment

We next turn to the Hearing Officer's conclusions about the overall environment to which Appellee was subjected. We agree with his conclusions that Appellee's work environment was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe and pervasive to alter the conditions of his employment and create an abusive work environment.

To prove a hostile work environment claim, Appellee must show (1) he was a member of a protected group; (2) he was subject to unwelcome harassment in the form of unwelcome verbal or physical conduct involving the protected group; (3) the harassment was based on his membership in the protected group; (4) that the harassment affected a term, condition, or privilege of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) that the employing office knew or should have known of the harassment and failed to take appropriate remedial action. See, *Duncan v. County of Dakota, Nebraska*, 2012 WL 3139332 (8th Cir. 2012); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

"A workplace becomes „hostile" for purposes of Title VII only if the allegedly offensive conduct "permeate[s] [the workplace] with „discriminatory intimidation, ridicule, and insult," that is

[3] Although the conduct at the bars occurred in November and December 2008, outside of the 180-day period, the fact that the stories of the derision that took place continued to circulate perpetuated the harassment and underscores the Hearing Officer's finding that "the hostile work environment rendered [Appellee] a laughing stock among the general employee population, with whom he had to work every day…The message was trumpeted loud and clear that [Appellee]was „uneducated", and he was indelibly branded with it."

[4] Appellant contends that the investigation conducted by its management in August 2009 found that "the incidents" ended in January 2009. As with other arguments made on appeal, Appellant's focus is on Turnbull's conduct and not on the conduct of other employees. Appellant offers no explanation as to why, if the conduct was not continuing, the Appellee would have complained about the harassing conduct in March 2009 and then again (with another employee) in August 2009. We therefore conclude that actionable harassment was continuing at the time of the complaints in August 2009.

„sufficiently severe or pervasive to alter the conditions‟ of the victim‟s employment and create an abusive working environment." In determining whether a hostile work environment exists, the court must take into account "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." *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)). See, *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 21 (1993).

The incidents of harassment must be "more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Carter v. Greenspan*, 340 F. Supp. 2d 13, 24 (D.D.C. 2004). The alleged harassment must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive. *Harris* 510 U.S. at 21-22.

The fact that Appellee is a member of a protected class is not in dispute, nor is the racial basis of the offending conduct. The record is replete with evidence that Turnbull‟s comments were racially based and fueled the subsequent harassment. The Hearing Officer properly relied on this evidence. Appellee testified that he understood the harassment to be based on his race and he perceived it as abusive. He believed that Turnbull‟s verbal bashing and humiliation, conduct that caught on with the other employees, was intended to harass and humiliate him as an African-American. As the Hearing Officer found, when Appellee would walk by the break room, other employees would burst out in laughter, mocking him. During the daily morning meetings, where 60-80 employees were present, many of them laughed and ridiculed Appellee when they believed that he mispronounced or misspelled words. Appellee testified that the ridicule and mocking made him feel incompetent as a supervisor and he believed that the harassment was a direct attack on him as an African-American.

Testimony by other employees provides support for the Hearing Officer‟s finding that Appellee was subjected to an environment that a reasonable person would find hostile or abusive. For example, in credited testimony, an employee testified that the harassment directed at Appellee was racially motivated where other employees questioned Appellee‟s background, resume, spelling, and pronunciation. The employee witnessed Turnbull and a number of other employees regularly say derogatory things about Appellee, insulting his choice of words, using the term "Brenisms" to denote their ridicule. They "defaced" his writings and played games that made fun of him, such as "Brengo." Other employees testified that they saw Turnbull and 15-20 other employees deride Appellee‟s written work products at neighborhood bars on three to four separate occasions. This type of behavior was also witnessed in the break rooms at the CVC. A colleague testified that she was aware of the game "Brengo" and knew Appellee was the topic of occasional jokes among the employees when he mispronounced words over the CVC radio.

In asserting that Appellee was not directly teased by anyone, but only that he was told about the teasing, Appellant argues that the reporting of third-hand allegations could not be viewed as *subjectively* hostile.[5] We disagree. That offensive conduct occurs outside a complainant‟s

[5] Appellant relies on *Hampton v. Vilsack*, 760 F.Supp.2d 38 (D.D.C. 2011), However, *Hampton* does not stand for the proposition that evidence of indirect harassment alone is *never* sufficient to rise to the level required to make a

presence does not mean that it cannot be perceived subjectively as hostile. Instead, the totality of the circumstances should still be considered when deciding whether harassment creates a hostile work environment. See, *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23 (1993)(whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances); *Berryman v. SuperValu Holdings, Inc.*, 669 F.3d 714 (6th Cir. 2012)("a plaintiff does not need to be the target of, or a witness to harassment in order for us to consider that harassment in the totality of the circumstances; but he does need to know about it."); *Hawkins v. Anheuser-Busch*, *Inc*., 517 F. 3d 321, 335-336 (6th Cir. 2008)("offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII … evidence of racist conduct targeting other employees certainly mattered as to whether the work environment was objectively hostile, and evidence that [the plaintiff] learned of these incidents clearly demonstrated that the plaintiff subjectively perceived that her work environment was one hostile to her.")(internal citations omitted). In considering the totality of the circumstances in this case, especially where Appellee was well aware of the continual derisive conduct directed toward him, we find that Hearing Officer did not err in concluding that Appellee suffered an actionable hostile work environment.

With respect to Appellant"s argument that the conduct by other employees was not sufficiently severe and pervasive to alter Appellee"s terms and conditions of employment, we find that the record supports the Hearing Officer"s finding that the prolonged teasing and mocking took a toll on Appellee and interfered with his work. Appellee credibly testified that employees laughed and mocked him when he walked by the break room. During morning meetings when he was responsible for making daily announcements, Appellee was subjected to ridicule and derision which made him feel incompetent as a supervisor. Other employees, including peers and subordinates, testified that they knew Appellee was the topic of jokes among the employees when he spoke over the CVC radios. As the Hearing Officer found in assessing the damages owed to Appellee:

> ...[the] severity of [Appellee"s] racially hostile work environment, … persisted for many months with [Appellant"s] knowledge, but without its intervention. It is painful to conceive of a more devastating assault on a supervisor"s authority, reputation and standing as that visited upon [Appellee]. The situation was exacerbated further by the newness of the organization. [Appellee] had no prior reputation to stand upon when his worthiness was so devastatingly denigrated because of his race.

Based on the above, we affirm the Hearing Officer"s legal conclusions that Appellant violated the act by subjecting Appellee to an illegal hostile work environment based on race.

Failure to Implement Remedial Action

Appellant asserts that it should not be held liable because it implemented sufficient remedial action. [6] We agree with the Hearing Officer"s conclusion that Appellant did not act in a timely

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proper claim of hostile work environment. Rather, it explicitly bases its findings of harassment on the totality of the circumstances, where the directness of the harassment is only one factor. See *Hampton,* 760 F. Supp at 57.

[6] Appellant relies on *Blackenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 873 (6th Cir. 1997) in asserting that it cannot be found liable for merely "negligent" response to co-worker harassment but instead must be found to

or complete fashion to neutralize or minimize the injury inflicted upon Appellee by his hostile work environment.

Once a hostile work environment is established, an employee alleging harassment by a coworker must still establish that the employer is liable because it knew or should have known of the harassment, yet failed to take prompt and appropriate corrective action. *EEOC v. Harbert-Yeargin, Inc*., 266 F, 3d 498, 518 (6th Cir. 2001). As noted by the Hearing Officer, employer liability for co-worker harassment can be found only if (1) "[the employer] knew or had reason to know of the harassment and (2) failed to implement prompt and appropriate corrective action." *Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999); *see also Ginger v. District of Columbia*, 477 F.Supp. 2d 41, 55 (D.D.C. 2007); *Kelley v. Billington*, 370 F.Supp.2d 151 (D.D.C. 2005); *Ridley v. District of Columbia*, 945 F. Supp. 333, 336 (D.D.C. 1996).

"[I]f an employer fails to take corrective action after learning of an employee's … harassing conduct, or takes inadequate action that emboldens the harasser to continue his misconduct, the employer can be deemed to have 'adopt[ed] the offending conduct and its results, quite as if they have been authorized affirmatively as the employer's policy.'" *Swenson v. Potter*, 271 F 3d 1184,1192 (9th Cir. 2001)(citing *Faragher* 524 U.S. at 789).

Upon finding that Appellant created a hostile work environment and knew about Appellee's complaints, the Hearing Officer properly found that Appellant failed to implement prompt remedial action. The record contains ample evidence that Appellant knew of the continuous discriminatory harassment directed towards Appellee. Appellee complained on multiple occasions to a first line supervisor in November 2008 and March 2009; to a second line supervisor in March 2009; to the EEO/CP in July 2009; and to management in August 2009. Moreover, other employees and Appellee's peer complained to management about the treatment that Appellee was receiving sometime between May and August 2009. Appellant contends that it implemented corrective and remedial action after Appellee's August 2009 complaint to management. However, as the Hearing Officer properly determined, Appellant's response was too little and too late. No action was taken after the earlier complaints to management. This latest complaint resulted only in a counseling memorandum for Turnbull and there was no specific evidence that other employees were counseled or that the harassment stopped after Turnbull was counseled. Thus, as indicated above, while Appellee's complaints about the harassing conduct were raised to management as early as November 2008, the harassment continued well past August 2009.

Notwithstanding Appellant's additional argument that Appellee's complaints were too vague to trigger an investigation, we agree with the Hearing Officer that under the circumstances, Appellant was well aware of the harassment and under an obligation to remedy it. See, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002)("the repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of

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"manifest indifference or unreasonableness" which was not the case here. However, the holding in *Blackenship* was effectively abrogated by the Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758-59 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775, 799 (1998). S*ee Madeja v. MBP Corp.*, 821 A.2d 1034, 1042-43 (2003) (recognizing that *Ellerth* and *Farragher* effectively overruled *Blankenship*). *Ellerth* and *Farragher* clarified that employer liability for co-worker harassment may be predicated upon negligence in discovering and remedying co-worker sexual harassment. *Madeja* 821 A.2d at 1043

its existence"); *Ridley v. District of Columbia*, 945 F. Supp. 333, 336 (D.D.C. 1996) ("knowledge may … be imputed if the harassment is so severe or pervasive that a reasonable employer would be inspired to investigate and discover the facts.")(internal quotations deleted)

Accordingly, we affirm the Hearing Officer's finding that Appellant did not act in a timely manner sufficient to ameliorate the harassment.

Damages

We further affirm the Hearing Officer's finding that an award to Appellee of $50,000.00 for compensatory, non-pecuniary damages was appropriate because of "the public humiliation [Appellee] suffered among his colleagues and the entire employee complement as a result of his racially hostile work environment." The Appellant asserts that the medical evidence presented by the Appellee does not support the award of compensatory damages. A review of compensatory damage awards will usually consider: (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).

The Appellant 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. We are satisfied that, regardless of the medical evidence, the testimony regarding the humiliation suffered by the Appellee due to the hostile work environment is sufficient to support the award.

For the foregoing reasons, the Hearing Officer's decision is **affirmed**.

It is so ordered.

Issued: at Washington, D.C., December 12, 2012