

OFFICE OF COMPLIANCE

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

_____)
Steven Patterson,)
Appellant,)
)
v.)
)
Office of the Architect of the)
Capitol,)
Appellee.)
_____)

Case Number: 07-AC-31 (RP)

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board on the petition of Appellant Steven Patterson (“Patterson” or “Appellant”), an employee of the Office of the Architect of the Capitol (“AOC” or “Appellee”), seeking review of the Hearing Officer’s decision granting AOC’s motion for summary judgment, pursuant to Section 5.03(d) of the Procedural Rules of the Office of Compliance.

I. Background

Appellant, who worked as a grade 10 Woodcrafter for the AOC applied for a vacant position as Wood Crafter Leader. On October 17, 2006, he was interviewed for the position and on November 3, 2006 was advised that he had not been selected.

Shortly after the interview, Appellant complained to his supervisor about the interview process, some of which he believed violated AOC’s Personnel Manual, Chapter 335, Career Staffing (“Chapter 335”). He filed an informal grievance with his supervisor on November 16, 2006 expressing his belief that he had been denied full consideration for the position because of “violations” in the selection process. Appellant also advised his supervisor that he believed that the same “improper” selection process could be applied to discriminate against a member of a protected class under Title VII. According to Appellant, he expressed his opposition to such practices.

When informed that his supervisor could not resolve the grievance, Appellant filed a number of informal and formal grievances with the Assistant Superintendent, Superintendent, Director, and finally with the Acting Architect. All of these grievances

were based on the same grounds: The Appellant's "reasonable and good faith belief" that he had been denied a proper selection process when he was considered for the vacancy promotion.

On April 6, 2007, Appellant filed a request for counseling with the Office of Compliance ("OOC"). He received the final denial of his grievance from the AOC on May 18, 2007. By letter dated May 21, 2007, the OOC referred Patterson back to the AOC for participation in the AOC internal grievance process. Pointing to its procedures,¹ the AOC declined to initiate another grievance process. Patterson returned to the OOC procedures, and on September 26, 2007, a notice of the end of the counseling period was issued.

Appellant then filed a timely request for mediation and after completing mediation, filed a complaint. At a prehearing conference with the parties, when asked directly about the nature of the complaint, Appellant responded that he believed he was the victim of retaliation when his employer intentionally denied him a fair grievance process in direct response to his complaints about the allegedly unfair promotion selection process. Appellant also asserted that he was engaged in protected activity when he complained to his supervisor about the unfair selection process.

After being provided with several opportunities to amend his complaint, Appellant filed an additional amended complaint on July 21, 2008. In this complaint, which included 10 counts, Appellant asserted that he engaged in protected activity when he complained to the AOC about the possibility of discrimination if the same improper selection procedures were applied against a member of a protected class. He stated throughout his latest complaint that various acts² of his Employer were:

[U]nlawful retaliatory employment activity designed to deny Complainant full and fair consideration of his informal and formal grievance ... and was based on Complainant's argument and opposition that Respondent would be engaging in unlawful discriminatory employment practices against a member of a class protected by Section 201 of the CAA were the same ... process violations committed by Respondent ... employed against a member of a class protected by said Section 201 competing for a position.

¹ In a letter by the director of AOC's Equal Employment Opportunity and Conciliation Programs ("EEO/CP"), Patterson was advised that: "The Architect of the Capitol's internal grievance process is governed by AOC Order 771-2, which states that employees must elect to follow either EEO/CP procedures or the AOC Grievance process, but not both, when seeking resolution of any matter. Because you raised the same issue under the AOC Grievance process, EEO/CP cannot attempt to resolve the same matter without violating agency policy."

² Appellant maintains that the AOC took reprisals against him by intentionally delaying and mishandling the informal and formal grievances that he filed. Thus, in his petition for review, Appellant claims that the AOC engaged in several violations of its own policy by, inter alia, failing to respond to his request for an independent investigation of his informal grievances, not advising him of his entitlement to file formal grievances, failing to stop the selection process until an investigation could be performed, untimely requesting additional time to investigate his formal grievance, and untimely denying his grievance.

Appellant also maintains that the AOC created a hostile work environment by issuing a "pattern of decisions" in response to his informal and formal grievances that "created a pervasive hostile work environment which deprived him of the terms, conditions and privileges of employment."

The AOC filed a motion for summary judgment asserting that: (1) there was no causal connection between the alleged protected activity of Appellant and any alleged adverse action taken against him; (2) Appellant did not participate in any alleged protected activity; (3) the AOC's actions in denying each of Appellant's grievances did not deter a reasonable person from opposing alleged violations of the CAA; and (4) Appellant was not entitled to the remedy that he sought.

By Memorandum Opinion and Order issued August 18, 2008, Hearing Officer Susan R. Winfield granted AOC's Motion for Summary Judgment, holding that Appellant had failed to demonstrate that there was a *prima facie* case of retaliation or hostile work environment. In granting the Motion for Summary Judgment, the Hearing Officer noted that the crux of Appellant's complaint was that the AOC took reprisals against him when it intentionally violated its grievance procedures in retaliation for his protected activity. The protected activity claimed by Appellant was his complaint that *had* AOC used the "flawed" selection process with applicants in a protected class, it would have been discriminatory.

Finding Appellant's complaint too speculative, the Hearing Officer determined that he never protested discrimination against an identified member of a protected class. Nor did he assert that any member of a protected class was denied a promotion despite being qualified. Most importantly, Appellant did not claim that membership in a protected class was a substantial factor in anyone being denied a promotion.

As the Hearing Officer found:

The reality in the instant case is that plaintiff's claims are specious when he insists that he was engaged in the protected activity of challenging his non-selection and the process by which he was not selected. He cannot establish that his activity was protected when the most he asserts is a hypothetical. Proof of discrimination, by definition, requires more than that. The speculation that plaintiff engages in is legally insufficient to provide the umbrella of standing that he seeks.

Because of this Officer's conclusion that plaintiff is unable to establish an essential element of his claims of retaliation, that is, he is unable to establish that he engaged in any protected activity or that he sought to oppose a cognizable claim of discrimination against either himself or any member of a protected class, there is no longer a genuine issue of material fact. It is unnecessary to discuss at length the remaining elements of the claims of retaliation or the parties' other arguments. Summary judgment must be entered in favor of the Employer.

Hearing Officer's Memorandum Opinion and Order, 13.

With respect to Patterson's claim of Hostile Work Environment, the Hearing Officer held:

For the reasons stated previously, since plaintiff does not present *prima facie* evidence of a discrimination claim at all, but merely speculates that such a claim might have arisen if members of a protected class had been subjected to Employer's vacancy selection process, he likewise does not properly raise a claim for retaliatory hostile work environment.

Id. at 14.

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).

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). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id., at 247-248. We review 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

On August 18, 2008, the Hearing Officer issued her Decision granting the Employer's Motion for Summary Judgment on the grounds that the plaintiff had failed to make a *prima facie* case of retaliation or hostile work environment. The Appellant timely filed a petition for review of the Hearing Officer's decision. The Appellee employing office filed a brief in opposition to the petition for review.

The Board has considered the hearing officer's decision, the parties' briefs, and the record in this proceeding. The Board agrees with the hearing officer that no genuine issue of material fact exists in this case, and that AOC is entitled to summary judgment as a matter of law.

To establish evidence of retaliation, Appellant is required, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), to demonstrate: (1) that he engaged in activity protected by Section 207(a); (2) that the employing office took action against him that is "reasonably likely to deter" protected activity; and (3) that a causal connection existed between the two. *Duncan v. Office of the Architect of the Capitol*, 02-AC-59 (RP) (Sept. 19, 2006); See, *Britton v. Office of the Architect of the Capitol*; *Solomon v. Office of the Architect of the Capitol*, 02-AC-62 (RP)(December 7,

2005).

As the Hearing Officer determined, Appellant failed to demonstrate that he engaged in protected activity because he never protested discrimination against an identified member of a protected class, asserted that any member of a protected class was denied a promotion despite being qualified, or claimed that a substantial factor in anyone being denied a promotion was membership in a protected class. Moreover, while Appellant was not required to prove that the AOC's alleged failure to follow its own procedures during the interview was actually discriminatory, but only that he possessed a reasonable, good faith belief that the practice was unlawful, the record supports the finding that Appellant could not have had a reasonable belief that he was opposing an employment practice made unlawful by the CAA. *See, George v. Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005) (incidents of which employee complained could not reasonably be thought to be unlawful.)

Similarly, the record supports the Hearing Officer's finding that the Appellant did not present *prima facie* evidence of a discrimination claim at all, but rather speculated that such a claim might have arisen if members of a protected class had been subjected to Employer's vacancy selection process. Without a finding of discrimination or retaliation, Appellant cannot support a claim of retaliatory hostile work environment.

For the reasons set forth above, the Board finds that no genuine issue of material fact exists in this case and that the record supports the Hearing Officer's decision.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board affirms the Hearing Officer's grant of Summary Judgment.

It is so ordered.

Issued, Washington, D.C.: April 21, 2009