U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Shay A. Hitchcock,
Complainant,

v.

Michael Chertoff,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 0120051461'

Agency No. DOT-7-03-7-7206

Hearing No. 130-2004-00094X

DECISION

Complainant timely initiated an appeal from a final agency order concerning his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et* seq. The appeal is accepted pursuant to 29 C.F.R. § 1614.405. For the following reasons, the Commission reverses and remands the agency's final order.

ISSUES PRESENTED

Whether complainant was discriminated against on the basis of his sex, sexual orientation, and in reprisal for prior EEO activity when:

(1) on May 30, 2003, he was forced to resign his probationary position as Supervisor, Transportation Security Screener; and

[1]Due to a new data system, this case has been re designated with the above referenced number.

(2) from March 27, 2003 to May 30, 2003, management subjected him to a hostile work environment.[2]

BACKGROUND[3]

The record reveals the following facts in the light most favorable to complainant: during the relevant time, complainant was employed as a Supervisor Transportation Security Screener at the agency's screening facility located in the Golden Triangle Airport, in Columbus, Mississippi. Complainant's appointment was a temporary appointment, not to exceed five years, with an expiration date of October 27, 2007. On or about March 27, 2003, complainant was allegedly involved in an incident where complainant was accused of groping an Atlantic Southeast Airlines (ASA) employee. The ASA employee alleged that complainant improperly touched and wanded him in the groin area. The ASA employee also alleged that complainant stated "you liked that, didn't you." The ASA registered a complaint with the agency. Complainant's supervisor, (S1) stated in his deposition testimony that he did not believe the incident happened due to complainant's character. S1 Deposition at 19. S1 spoke to a number of witnesses who stated that complainant did not conduct the search in accordance with standard operating procedures, however, none of the witnesses identified complainant's actions as "groping." *Id.* at 21-25. The S1 confronted complainant about the incident, which complainant denied occurred and "pretty much brought him to tears because he didn't think he performed . . . [an] act like that at all." *Id.* at 28. The S1's personal feelings were that "I did not think it warranted an investigation to the fact where [complainant's] job or livelihood was on the line." *Id.* at 30. The S1 believed that ASA and the ASA employee did not like complainant or any of the supervisors. *Id.* at 29, 30. Previously, they had said that complainant was "pompous, he was arrogant. They didn't like the way he handled the check point and things of that nature." *Id.* at 31. After the S1 informed the Assistant Federal Security Director (AFSD) of his conclusion that only counseling was necessary, the AFSD disagreed. *Id.* at 34, 37. According to the S1, the AFSD was "a spearhead behind this attack." *Id.* at 32. The S1 was told by the AFSD to obtain written statements from the agency's

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[2] Complainant alleges that he was subjected to a hostile work environment when: (1) the agency accused him of inappropriately touching and making lewd suggestions to an ASA employee; (2) by undermining his masculinity which affected his abilities to perform his supervisory duties; (3) by subjecting him to false allegations in order to degrade, ridicule, and embarrass him; (4) by being given a verbal lashing by his supervisor; (5) by management's condoning of violence in the workplace; and (6) by being forced to resign. In addition, we note that the record contains an abundance of evidence regarding complainant's co-workers subjecting him to various statements about his lack of masculinity. As such, we find that complainant also alleged that his co-workers subjected him to a hostile work environment.

[3] We note that the underlying case was decided by an EEOC Administrative Judge (AJ) without a hearing. Therefore, the evidence should be viewed in the light most favorable to the non-moving party, in this case, complainant, and all justifiable inferences must be drawn in his favor. *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

witnesses. *Id.* at 37. The S1 took statements from the witnesses. As a result, the AFSD, the S1 and the ASA agreed that a meeting should take place between the parties. The AFSD told complainant that he had to apologize to clear the air. AFSD Deposition at 40, 42. A meeting was arranged between ASA, the S1 and complainant, however, complainant requested to bring in a mediator (mediator), and the ASA refused. The ASA withdrew from the meeting and the issue was not resolved. As a result, it was the decision of the AFSD and the Federal Security Director to discharge complainant. *Id.* at 50. A final memo was generated by the TSA Assistant Federal Security Director (AFSD), in Jackson, Mississippi, to the Federal Security Director on or about May 14, 2003. The AFSD stated in his affidavit that he subsequently told complainant that his actions were inappropriate and his failure to rectify the unworkable situation lead to a proposed termination of his services with the agency. The AFSD told complainant that he had two options, he could receive a letter of proposed termination or he could resign. Complainant chose to resign, and did so on May 20, 2003. The AFSD stated that he did not become aware of complainant's prior EEO activity until roughly one month later.

Viewing the facts in the light most favorable to complainant with regard to his hostile work environment claim reveals that complainant was subjected to comments from co-workers regarding his behavior. In complainant's deposition testimony he stated that the comments made toward him included that he did "women's work," as well as, "why are you doing such feminine work? You would make someone a good wife one day." Complainant's Deposition at 48. Complainant also stated that his co-workers would state that he would "bitch like his old woman," or "a real man does not . . . ask opinions, he just does it." Complainant's Deposition at 54.

PROCEDURAL HISTORY

Complainant sought EEO counseling and subsequently filed a formal complaint on August 25, 2003, alleging that he was discriminated as described above. Since the agency delayed in its investigation, after 180 days passed, complainant requested a hearing before an AJ. The AJ issued a decision without a hearing finding no discrimination. In his decision, the AJ determined that the investigative record was adequate and no further development of the record was necessary. Turning to the claims, the AJ found that complainant had also alleged that he was constructively discharged when he was forced to resign and looked at the allegation as a separate claim of discrimination. The AJ dismissed all of complainant's claims alleging discrimination based on sexual orientation since "the EEOC does not have jurisdiction over claims of sexual orientation discrimination." AJ Decision at 2. The AJ concluded that the EEOC did not have jurisdiction over complainant's hostile work environment claim because "the available evidence persuasively demonstrates that the claim is based on the complainant's belief that his co-workers perceived him as being a homosexual." AJ Decision at 6. Additionally, with regard to the constructive discharge claim, the AJ concluded that complainant "never discussed any evidence which fell within the EEOC's adjudicatory authority to support his claim." AJ Decision at 7. The AJ further found that complainant failed to establish a prima facie case of sex discrimination because he did not show "that he was treated less favorably than a similarly situated female supervisor under the same or similar circumstances." AJ Decision at 11. Finally, the AJ found that complainant failed

to establish a *prima facie* case of retaliation since "the evidence demonstrates that complainant had not participated in any protected activity under Title VII, of which [his second line supervisor (S2)] was aware, at the time the decision to terminate him was made." *Id.* Ultimately, the AJ concluded that the evidence does not support complainant's allegations of discrimination and that there are no genuine disputes of material facts. The agency's final action implemented the AJ's decision.

CONTENTIONS ON APPEAL

On appeal, complainant contends, among other things, that complainant's sex discrimination claim cannot be dismissed as it is wholly separate from a sexual orientation discrimination claim. The complainant also argued that the AJ erred in finding that complainant failed to establish a *prima facie* case of sex discrimination because he did not identify a similarly situated individual not of his protected class who was treated differently than he. Complainant additionally argues that the AJ erred in dismissing the hostile work environment complaint as only involving issues regarding his sexuality. Instead, complainant argues, the claim included the allegation that his masculinity was challenged. Further, complainant alleges that he raised numerous issues regarding the credibility of witnesses and that the AJ inappropriately weighed the evidence. The agency requests that the Commission affirm its FAD implementing the AJ's decision since complainant was unable to establish that the agency's actions were the result of sex discrimination or retaliation. Specifically, the agency argues that complainant's allegations regarding sexual orientation should be dismissed since they are outside the jurisdiction of the EEOC. Further, the agency argues that complainant cannot demonstrate that he was discriminated against because he has not produced any evidence that he was subjected to either a hostile work environment or disparate treatment.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, summary judgment is not appropriate. In the context of an administrative proceeding, an AJ may properly consider summary judgment only upon a determination that the record has been adequately developed for summary disposition. *Petty v. Department of Defense*, EEOC Appeal No. 01A24206 (July 11, 2003).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrener, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Department of Justice, EEOC Request No. 05940339 (February 24, 1995).

As a preliminary matter, we note that on appeal, we review the FAD issued without a hearing de novo. 29 C.F.R. § 1614.405(a). The Commission has repeatedly held that discrimination based on sexual orientation does not constitute discrimination based on sex actionable under Title VII. See, *e.g.*, Morrison v. Department of the Navy, EEOC Request No. 05930964 (June 16, 1994) (claim that harasser told co-workers that complainant was gay and had been seen kissing another man was based on complainant's perceived sexual orientation, not his sex, and therefore was not actionable as sex discrimination under Title VII). Therefore, we find that the AJ appropriately issued a decision without a hearing dismissing complainant's claims of discrimination based on sexual orientation.

However, in Price Waterhouse v. Hopkins, 490 U.S. 228, 250, (1989), the Supreme Court held that sex discrimination includes allegations involving sex stereotyping.

> [w]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

Id. at 251, quoting *Los* Angles Dept. of Water and Power v. *Manhart*, 435 U.S. 702, 707 n.13 (1978), quoting Spring v. United Air Lines, Inc. 444 F.2d 1194 (7th Cir. 1971). In Price Waterhouse, the plaintiff was denied partnership in the accounting firm because she was "macho," but according to management, could improve her chances for partnership if she were to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." 490 U.S. at 235. The Court held that an employer who acts "on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

With regard to complainant's claims of sex based discrimination involving his termination, constructive discharge, and hostile work environment claims, we find that AJ erred, as a matter of law, when he dismissed the claims outright for stating a claim of only sexual orientation discrimination. The record clearly reflects that complainant believed that he was being discriminated against because of his failure to conform to gender stereotypes. In his formal complaint, complainant specified that the reason he believed that he was discriminated against was because of his sex. Additionally, complainant stated that he had "several witnesses that can corroborate the workplace hostility toward me as well as the rumors and allegations concerning my lack of masculinity." Formal Complaint (emphasis added). Furthermore, we find that the

record is incomplete with regard to the ASFD's perception or bias against complainant with regard to his "lack of masculinity." The mediator, in his affidavit stated that the ASFD referred to complainant as "faggot" and a "queer." Merely because these derogatory terms refer to sexual orientation does not automatically require that the ASFD was motivated by complainant's alleged sexual orientation. See *e.g.* Capos, et *al* v. Department of Justice, EEOC Appeal Nos. 01943337, 01943338, 01943339, 01943340 (July 8, 1996). The ASFD denies uttering these statements in his affidavit. Neither witness had evidence to corroborate the veracity of either of their statements, therefore, we find that the AJ inappropriately weighed the affidavit testimony of the ASFD and the mediator.[4] Additionally, we note that there is no other evidence in the record regarding the ASFD's perception of complainant or whether he had heard of the statements made by complainant's co-workers.

With regard to complainant's sex based hostile work environment claim, complainant clearly established that he alleged that he was harassed due to his co-workers' statements because of his failure to conform to sex stereotypes. There is voluminous deposition testimony to demonstrate that various co-workers subjected complainant to comments regarding his lack of masculinity, including his non-masculine clothes, baking skills, managerial skills and work style. The United States Supreme Court, in Oncale v. Sundowner *Offshore* Services, Inc., 523 U.S. 75 (1998), held that same-sex sexual harassment claims are cognizable under Title VII. Sexton v Department of Transportation, EEOC Request No. 05970111 (June 17, 1999). Comments made by both males and females are actionable. Therefore, we find that the AJ erred in dismissing complainant's harassment as a complaint of sexual orientation harassment. Additionally, we note that there is a dearth of affidavit testimony regarding complainant's hostile work environment allegations that he was subjected to a hostile work environment when: (1) the agency accused him of inappropriately touching and making lewd suggestions to ASA employee; (2) by undermining his masculinity which affected his abilities to perform his supervisory duties; (3) by subjecting him to false allegations in order to degrade, ridicule, and embarrass him; (4) by being given a verbal lashing by his supervisor; (5) by management's condoning of violence in the workplace; and (6) by being forced to resign. We note that the record only contains affidavit testimony regarding the comments made by complainant's co-workers and does not address with any specificity how complainant believed he was subjected to a hostile work environment with regard to these incidents, as well as any response from management or other witnesses as to what occurred.

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[4] We note that although the AJ also dismissed complainant's claim of sex discrimination because he failed to produce a similarly situated comparator outside of complainant's protected class, complainant may present other, noncomparative evidence which supports an inference that the agency was motivated by unlawful discrimination in order to establish a prima facie case of discrmination. See *O'Connor* v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); EEOC Enforcement Guidance on *O'Connor* v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002, at n.4 (September 18, 1996). As such, we find that complainant's failure to identify a comparator does not automatically mean that he has failed to establish a prima facie case of discrimination.

Therefore, we find that the record is incomplete with regard to this claim. As a result, we find that the AJ inappropriately issued a decision without a hearing with regard to all the incidents of complainant's sex discrimination claim.

Similarly, with regard to complainant's claim of retaliatory termination and constructive discharge, we find that the AJ erred in issuing a decision without a hearing. Specifically, we find that complainant established a genuine issue of material fact as to whether the ASFD had knowledge of complainant's prior protected EEO activity before deciding to terminate complainant. The ASFD stated in his affidavit that he had never met with complainant's mediator. ASFD Deposition at 51. The ASFD stated that he had talked to the mediator over the phone after complainant was advised of his termination, but merely referred him to the Federal Security Director. *Id*. at 52-53. However, the mediator provided a written affidavit stating that he "personally spoke with an individual, ASFD, on the phone he [sic] said that he was interested in mediating the case and invited me down to the office to discuss the matter." Mediator Affidavit. The mediator stated that on May19, 2003, he came to the agency to speak with the parties to see if the issue could be resolved. *Id*. The ASFD met with the mediator and refused to sign the Mediation Agreement in the beginning of the meeting. *Id*. Further the mediator stated that he had "personally made [the ASFD] aware that [complainant] had filed an EEO complaint. I further advised him by telephone that it would not be advisable to terminate [complainant] from his position given that he had filed an EEO" because complaint and the agency's actions could be seen as retaliatory. *Id*. The AJ determined in his decision that this statement meant that the mediator's affidavit "at best . . . merely confirms that [the ASFD's] decision to terminate the complainant's employment had already been made prior to [the mediator] allegedly telling him about complainant's prior EEO activity." AJ Decision at 5. However, we find that taking the facts in the light most favorable to complainant, it is ambiguous as to whether the mediator met with the ASFD and whether the issue of complainant's EEO complaint was discussed before or after complainant was terminated. The record reflects that complainant had initiated his first EEO counselor contact on May 20, 2003. EEO Counselor's Report, Tab 1. The ASFD completely denies having any contact with the mediator, while the mediator provided that he did meet with the ASFD. Further, we find that the AJ inappropriately weighed the strength of the mediator's testimony against that of the ASFD, who stated that he did not know of complainant's activity until after deciding to terminate complainant; whereas the mediator stated that, although it was unclear as to exactly when, he informed the ASFD that complainant had filed an EEO complaint. Additionally, we note that it is unclear from the record whether the mediator's contact with the agency was a form of opposition to the agency's actions on the behalf of the complainant. Therefore, we find that the AJ erred in issuing a decision without a hearing on this claim.

Turning to complainant's retaliatory hostile workplace claim, we find that, as mentioned above, the AJ erred in issuing a decision without a hearing since the record is incomplete with regard to complainant's contentions that he was subjected to a hostile work environment. In addition, we note that these incidents are so similar to complainant's claim of constructive discharge that we decline to fragment this claim from the others.

The hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." *See* Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (November 9, 1999); *see also* 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives complainant of a full and fair investigation of her claims." *Mi S. Bang v. United States Postal Service*, EEOC Appeal No. 01961575 (March 26, 1998). *See also Peavley v. United States Postal Service,* EEOC Request No. 05950628 (October 31, 1996); *Chronister v. United States Postal Service,* EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials, co-workers, and complainant, himself. Therefore, judgment as a matter of law for the agency should not have been granted as to complainant's claims of retaliation with regard to his termination and constructive discharge claims, as well as, his claim of sex-based hostile work environment claim.

CONCLUSION

After a careful review of the record, including complainant's arguments on appeal, the agency's response, and arguments and evidence not specifically discussed in this decision, the Commission reverses the agency's final action and remands the matter to the agency in accordance with this decision and the Order below.

ORDER

The agency shall submit to the Hearings Unit of the appropriate EEOC field office the request for a hearing within fifteen (15) calendar days of the date this decision becomes final. The agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. The agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0501)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. ***See*** 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. ***See*** 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0701)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. ***See*** 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. ***See*** 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. ***See*** 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0900)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. ***See*** Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ***et*** seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden

Carlton M. Hadden, Director
Office of Federal Operations

MAY 3 2007

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

MAY 3 2007

Date

Equal Opportunity Assistant