

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
33 WHITEHALL STREET, 5TH FLOOR
NEW YORK, NEW YORK 10004-2112**

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CAROLE SMITH,
 Complainant,

v.

**JANET NAPOLITANO, SECRETARY,
TRANSPORTATION SECURITY
ADMINISTRATION (TSA), DEPARTMENT OF
HOMELAND SECURITY,
 Agency.**

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**EEOC Hearing No. 520-2010-00258X
Agency Case Nos. HS-09-TSA-007284**

Before: William Macauley
 Administrative Judge

Appearances: Carole Smith, *pro se*

Cheryl Scott-Johnson, Esq.
Office of Chief Counsel
Transportation Security Administration
Department of Homeland Security
701 Market Street, Suite 3200
Philadelphia, PA 19106

COMMISSION BENCH DECISION

Jurisdiction to decide this matter is predicated on Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §2000e, *et seq.*, and the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16. Applicable rules and regulations promulgated by the Commission appear at 29 C.F.R. §1614, *et. seq.* (1999).

Complainant sought EEO counseling on June 18, 2009. Report of Investigation (“ROI”) at 5, 23. She filed her formal complaint on October 2, 2009. ROI at 1. The New York District Office of the Equal Employment Opportunity Commission (“Commission”) issued an Acknowledgment and Order (“A&O”) to the parties after having received a

request for a hearing on the complaint. Pursuant to the Commission's Scheduling Order, a hearing was held on November 30, 2010 at the TSA, Albany, New York, International Airport.

Upon due consideration of the testimonial evidence introduced at the Commission hearing, together with the relevant evidence contained within the ROI, the AJ finds that the issues in this case have been fully addressed and the evidentiary record is complete.

As such, the AJ concludes that the issuance of a Commission BENCH DECISION is appropriate and, THEREFORE, IS NOW ISSUED in this case.

ISSUE

Did the Agency discriminate against the Complainant on the basis of her religion, Wiccan,¹ when:

(1) It subjected her to harassment from March 4 to June 18, 2009.

Did the Agency discriminate on the basis of her religion and retaliate against Complainant when:

(2) It treated her disparately during that time with respect to her lunches and breaks;

(3) On May 5, 2009, it issued her a letter of reprimand;

(4) and on June 18, 2009, it terminated her employment.

STATEMENT OF FACTS

1. Complainant began employment with the agency as a probationary-status Transportation Security Officer ("TSO") on July 20, 2008. ROI at 60. Her religion is Wiccan. Complainant also is a licensed massage therapist.

2. When Complainant began her employment, she was assigned a mentor, TSO Mary Bagnoli. According to her deposition, Complainant felt uncomfortable with Bagnoli as her mentor because she claimed that Bagnoli constantly reminded her that she

¹ Disability and reprisal as bases for the complaint were dismissed by summary judgment. See Pre-hearing Order dated November 24, 2010. This Decision incorporates by reference the November 24 Pre-Hearing Order. Complainant's disability allegation was dismissed because her impairment, a minor sprain, did not rise to the level of a disability. As stated below in this Decision and in the Pre-Hearing Order, Complainant never complained about religious based harassment from her co-workers. Therefore, she never engaged in protected EEO activity. Consequentially, she cannot prevail in her complaint on these bases.

would be fired if she did not do things correctly, and therefore she felt intimidated. Shortly after the agency assigned Bagnoli to mentor her, Complainant asked for and received a new mentor, Dorothy Tomkins. Tomkins mentored Complainant for several months thereafter. Tomkins testified that she believed Complainant performed her duties well during the period she mentored Complainant and made that known to the agency.

3. Between August 2008 and January 2009, Complainant received three verbal counselings. The first counseling occurred on August 25 from Supervisory TSO Winne because Complainant had displayed her personal cell phone while working at a checkpoint. Lead TSO Blankenberger counseled her on November 8 for leaving her post without permission. On January 26, 2009 STSO Sullivan counseled her about excessive use of sick leave. ROI at 130. Complainant also received a general counseling on October 27, 2008, from STSO Sullivan for being out of uniform. *Id.*

4. Around February 2009, Complainant contacted the agency's Ombudsman to complaint about harassment after she had asked for a new mentor. The ROI contains a December 5, 2008 e-mail from Complainant to Federal Security Director Brian Johannson about Bagnoli's harassed toward her over application of standard operating procedures, about how she suffered abuse from Bagnoli's clique of friends and associates and about Bagnoli's disregard of her ideas concerning the presence of a massage chair at work. ROI at 61.

5. On March 4, 2009, Complainant told Assistant Federal Security Director Matthew Lloyd that Bagnoli was harassing her again and that she would report the harassment to an Ombudsman. That day, Lloyd issued a memorandum informing managers and supervisors about a situation existing between Complainant and Bagnoli and directing them to keep them separate at the checkpoint or baggage area and to coordinate their lunches and breaks to effect the separation to the greatest extent possible. ROI at F-7, F-10 at 67, 85; Lloyd Testimony.

6. On March 5, Training Coordinator Nick Morano wrote a memorandum documenting negative behavior by the Complainant during a training instruction. F-10 at 167. Three days later, Complainant was counseled verbally for failing to check a boarding pass as required. ROI at F-10, 131, 169.

7. On or about March 12, 2009, Complainant learned that employees were making jokes and asking her questions about her religion since the beginning of March. On March 13, Lloyd called Complainant into his office to tell her that Bagnoli had complained to him in writing that Complainant had followed her four days earlier and waited for her by the fence in the employee parking lot. According to both Lloyd and Complainant, Lloyd said that Bagnoli accused her of following her on Route 87 one day. There is no dispute that the route is Complainant's only way home from work. Bagnoli had told Lloyd that she was afraid of Complainant because she was a Wiccan-practicing witch and that Complainant had put a spell on the heater of her car on March 4. Complainant admitted to Lloyd that she was an adherent to Wiccan. Complainant testified that Lloyd would not let her see the complaint Bagnoli had written. Lloyd

testified that he suggested that Complainant mediate her conflicts with Bagnoli and that Complainant might like to use mediation as an opportunity to dispel misconceptions Bagnoli may have had about Complainant's religion. Lloyd did not insist that Complainant appear at a mediation, and Complainant declined to do so. ROI at 110, 131, 169-70. However, during the March 12 meeting, Complainant abruptly left the room while crying and Lloyd had to retrieve her twice to conclude the interview. He reported her behavior at the interview to TSA Albany Airport management.

8. Lloyd testified that he did not credit Bagnoli's accusation that Complainant was following her to harass her based on his conversation with both Bagnoli and Complainant. He also testified that Bagnoli had expressed to him fears that Complainant was a practicing witch, to which Complainant responded that she was a practicing Wiccan, not a witch. This testimony is corroborated in a memo he wrote to himself on March 12 about his investigation of Bagnoli's accusation. He states that he told Complainant that mediation was a "good venue to dispel misconceptions and falsehoods promulgated about her religious practices and provided a forum to resolve personality conflicts between the two parties." ROI at 110. Lloyd corroborated Complainant's decision not to participate in mediation and that "she felt that [Lloyd] would intentionally fail to document TSO Bagnoli's expression of fear of witchcraft ..." *Id.* Lloyd testified that he reported his finding verbally to TSA Manager Jack Englehardt who decided to continue separating Complainant and Bagnoli after Lloyd concluded his investigation. The separation continued until the end of Complainant's employment.

9. On March 20, 2009, STSO Stephen Zayach verbally counseled Complainant for tardiness. ROI at 131, 171.

10. On April 10, 2009, Complainant volunteered to work overtime but became annoyed, recalcitrant and uncooperative with her supervisors when told that she might have to stay later than anticipated to screen female passengers from a delayed flight. ROI at Tab F-9. The Agency issued Complainant a letter of reprimand for her "inappropriate and unprofessional" conduct at the checkpoint on April 10. The agency's investigation of the incident is contained at ROI Exh. 9.

11. Englehardt summarized Complainant's work history in a report dated June 2, 2009. The work history mentioned five verbal counselings, four written general counselings and one letter of reprimand. ROI at 134-40. Englehardt testified that he recommended to the Acting Albany Airport Federal Security Director Patricia Sykes that Complainant's probationary employment be terminated based on Complainant's poor work history. ROI at 134-40.

12. Complainant suffered a sprained ankle on June 6, 2009, while walking from the airport office to the baggage department and was sent immediately to the emergency room. She remained off-duty until June 18, when she returned to work.

13. On June 18, 2009, the Agency terminated Complainant's probationary employment for inappropriate conduct and lack of dependability throughout her

employment at the TSA. In the termination memorandum, signed by Sykes, the agency lists approximately thirteen violations of agency rules and regulations for which Complainant had been counseled spanning from August 25, 2008 to May 11, 2009. The fifth incident, on March 4, 2009, was the conflict mitigation measure separating Bagnoli from Complainant that required Bagnoli to be escorted to the employee parking lot by a supervisor to ensure her safety, as well as the March 12 meeting with Lloyd in which Smith left the room and had to be instructed twice to return. Other incidents consisted of inappropriate display of a cell phone, being out of uniform, leaving her post, excessive use of sick leave, negative behavior, failing to check a boarding pass, general counseling for tardiness, insubordinate behavior, the May 11 letter of reprimand and leaving her assigned posts. ROI at 130-1.

ANALYSIS AND FINDINGS

For a complainant to prevail on his disparate treatment claim under Title VII, the evidence of record must initially establish, at least, that there is some substance to the charge. The complainant must establish a *prima facie* case of disparate treatment; that is, a body of evidence such that, if not rebutted, a finder of fact could conclude that unlawful discrimination occurred. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). If a *prima facie* case is established, the burden of production shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged action. Burdine, 450 U.S. at 253-4; McDonnell Douglas, 411 U.S. at 802. If the Agency is successful, the complainant may then show that the agency's articulated reason is a mere pretext for discrimination.

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...religion . . ." 42 U.S.C. § 2000e-2(a)(1). A complainant can establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). Accordingly, "a complainant may establish a *prima facie* case of discrimination based on religion by demonstrating that: (1) he is a member of a protected group; (2) he suffered an adverse employment action and (3) similarly situated employees not in his protected group were treated more favorably than he was, or some other circumstance from which an inference of discrimination may be drawn." Rodriguez v. Dept. of Veterans Affairs, EEOC Appeal No. 01A06029, 2002 EEOPUB LEXIS 1072, at * 7 (Feb. 12, 2002).

To establish a *prima facie* case of reprisal for participating in the Title VII Equal Employment Opportunity process, a complainant must show that: (1) he engaged in protected activity; (2) the alleged discriminatory official was aware of the protected activity; (3) he was adversely affected by an action of the agency contemporaneously with or subsequent to the protected activity; and (4) there is a casual connection between the protected activity and the agency action. Walker v. Dept. of Health and Human

_____, EEOC Appeal No. 01983215 (January 14, 2000). The causal connection may be shown by evidence that the adverse action followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. Lucas v. Dept. of the Navy, EEOC Appeal No. 02-00242-004 (August 10, 2006). Generally, the Commission has held that nexus may be established if events occurred within one year of each other. Patton v. Dept. of the Navy, EEOC Request No. 05950124 (June 27, 1996); Mallis v. U. S. Postal Serv., EEOC Appeal No. 01A55908 (October 3, 2006).

If a *prima facie* case is established, the burden of production shifts to the agency to articulate a legitimate, nondiscriminatory reason for the challenged action. Burdine, 450 U.S. at 253-4; McDonnell Douglas, 411 U.S. at 802. In instances in which the agency articulates a legitimate, nondiscriminatory reason for its action, the legal analysis may proceed directly to a determination of whether or not a complainant has satisfied his burden of showing pretext. Hass v. Dep't of Commerce, EEOC Appeal No. 05970837 (July 7, 1999) (citing U.S. Postal Serv. v. Aikens, 460 U.S. 711, 713-14 (1983)); see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993).

As to Complainant's allegations of a hostile work environment, in Harris v. Forklift Systems, 114 S. Ct. 367, 370 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. EEOC Notice No. 915.002 (March 8, 1994), Enforcement Guidance on Harris v. Forklift Systems, Inc. ("EEOC Enforcement Guidance") at 3. The Court stated that an "objectively hostile or abusive work environment" is created when "a reasonable person would find [it] hostile or abusive" and the complainant subjectively perceives it as such. Harris at 370; EEOC Enforcement Guidance at 3.

In determining whether an objectively hostile or abusive work environment exists, the trier of fact should consider whether a reasonable person in the complainant's circumstances would have found the alleged behavior to be hostile or abusive. EEOC Enforcement Guidance at 6. Even if the harassing conduct produces no tangible effects, such as psychological injury, a complainant may assert a Title VII cause of action if the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin. Harris at 371; EEOC Enforcement Guidance at 3, 6. When a work place is permeated with discriminatory intimidation, ridicule and insult that are sufficiently severe or pervasive to alter the working conditions of the victim's employment and create an abusive working environment, Title VII is violated. Harris at 370; EEOC Enforcement Guidance at 3.

To determine whether a work environment is objectively hostile or abusive, the trier of fact must consider all of the circumstances, including the following: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Harris at 371; EEOC Enforcement Guidance at 4, 5. Evidence of the general work atmosphere, involving employees other than the complainant, also is relevant to the issue of whether a hostile environment exists in

violation of Title VII. Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), affirmed in part and reversed in part; Delgado v. Lehman, 665 F. Supp. 460, 468 (E.D. Va. 1987). While the trier of fact should consider all relevant factors, no single factor is required to establish a hostile or abusive work environment claim. Harris at 371; EEOC Enforcement Guidance at 6.

To evaluate whether the alleged conduct in a work environment is sufficiently severe or pervasive to constitute a hostile environment, the “claim generally requires a showing of a pattern of offensive conduct.” See Core v. Henderson, EEOC Appeal No. 01960887, 1998 EEO PUB LEXIS 4899, at *13 (Sep. 8, 1998) (citing EEOC Policy Guidance on Current Issues of Sexual Harassment, N-915-090, No. 137 (Mar. 19, 1990)). While a “mere utterance of an ethnic or racial epithet which engenders offensive feelings would not . . . violate Title VII,” Meritor Savings Bank, 477 U.S. at 67; see also Schwapp v. Town of Avon, 118 F.3d 106, 111 (requiring “more than a few isolated incidents of racial enmity” to constitute a hostile work environment), a “workplace where race comments are commonplace could constitute a hostile work environment.” See Johnson v. Dept. of Justice, EEOC Appeal No. 01992631, 2002 EEO PUB LEXIS 6311, at *10 (Sep. 11, 2002); see also Core, EEOC Appeal No. 01960887, at *14 (holding that even a “limited number of highly offensive slurs or derogatory comments may in fact state a claim or support a finding of discrimination under Title VII.” See Core, EEOC Appeal No. 01960887, at *14.

After conducting a hearing in this matter, Complainant has not prevailed in substantiating her allegations that the Agency subjected her to religious-based disparate treatment or reprisal based on her complaints that the Agency subjected her to such. Turning to the harassment, Complainant testified that many of her co-workers harassed her by making stereotypical and derogatory comments that she was a practicing witch due to her adherence to Wicca. According to her, these comments were widespread among her co-workers. However, at the hearing, she admitted that she never took her objections to these comments to a single supervisor or manager. She only took them to an Ombudsman in sessions that were structured and designed to be confidential. She testified that the Ombudsman was not an arm of management, and she went to an Ombudsman to report the harassment *because* her communications with him would be considered confidential. She also admitted that no derogatory comment to her relative to her religion was ever made by management or made in the presence of a manager or supervisor. While the Agency did not contest her allegations that her co-workers had made derogatory comments to her, the preponderant evidence supports a finding that the agency was never made aware of this harassment while she was employed as a probationary TSO. Thus, Complainant has not prevailed that she was subjected to harassment by the agency.

Turning to her remaining allegations of religious and retaliatory-based discrimination, Complainant did not create any inferences that the Agency subjected her to such. She did not show that the motive for regulating her lunches or breaks was for any reason aside from her conflicts with Bagnoli. She did not show that the separation or any regulation or limitation of her breaks was motivated by an animus by management

toward her Wiccan religion. Nor did she show inferences that any discipline she received, including her termination, was due to illegal animus. For example, she did not show that any similarly situated probationary TSO outside of her protected classifications was treated more favorably than she over any incident for which she received any discipline. Although witness Englehardt lacked credibility when he testified that Complainant never communicated her religion to him before he recommended her termination, a finding that he had knowledge of her religion alone simply is not enough to conclude that he recommended her termination on account of it.

Judgment for the Agency on all allegations in the complaint.

NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(b), 109(g) or 109(i). EEOC regulations require the Agency to take final action on the complaint by issuing a final order within 40 calendar days of receipt of the hearing file and this decision. The Agency's final order shall notify the complainant whether or not the Agency will fully implement this decision, and shall contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. A copy of the Final Order shall also be provided to the Administrative Judge.

With the exception detailed in the next paragraph, complainant may not file an appeal to the Commission directly from this decision. Rather, complainant may appeal to the Commission within 30 calendar days of receipt of the Agency's final order concerning its implementation of this decision. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. §1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached to the final order.

Complainant may only appeal directly from this decision in the event that the Agency has **not** issued its final order within 40 calendar days of its receipt of the hearing file and this decision. In this event, the complainant should append a copy of the Administrative Judge's decision to the appeal. The complainant should furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the opposing party.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
U.S. Equal Employment Opportunity Commission
Office of Federal Operations


131 M Street, NE
Suite 5SW12G
Washington, DC 20507
Fax No. (202) 663-7022

Facsimile transmissions over 10 pages will not be accepted.

For further guidance regarding appeals, the parties may consult 29 C.F.R. §1614.401 et seq. and Chapter 10 of the Commission's Management Directive-110. These documents are available on the EEOC's website at www.eeoc.gov.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. §1614.504, an Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within 30 calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within 30 calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least 35 calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within 30 calendar days of receiving the notice of appeal.



WILLIAM MACAULEY
Administrative Judge

Date: December 21, 2010