



U.S. Department of Justice

Federal Bureau of Investigation

Office of the General Counsel

Washington, D.C. 20535

April 5, 2004

** Gamal EEO
complaint is
filed again
Gamal*

Mr. Mark L. Gross
Complaint Adjudication Officer
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

RE: GAMAL ABDEL-HAFIZ v. JOHN D. ASHCROFT,
ATTORNEY GENERAL, DEPARTMENT OF JUSTICE
EEOC CASE NO. 310-2001-05165X
AGENCY FILE NO. F-99-5371

Dear Mr. Gross:

On March 18, 2004, you sent notification to this office of your intent to issue a Final Order in the above-captioned matter. The Federal Bureau of Investigation received your notice on March 22, 2004.

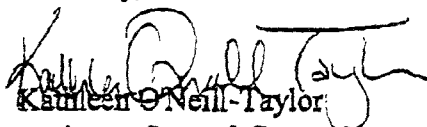
In order to assist your decision-making in this matter, the Federal Bureau of Investigation submits the following:

1) the Agency's Memorandum in Support of a Final Order Finding No Discrimination and Affirming the Administrative Judge's Decision;

2) a certificate of service.

Thank you for your attention to this matter.

Sincerely,


Kathleen O'Neill-Taylor
Assistant General Counsel
Employment Law Unit I
Office of the General Counsel

Enclosures (2)

UNITED STATES DEPARTMENT OF JUSTICE
COMPLAINT ADJUDICATION OFFICE

Gamal Abdel-Hafiz,

Complainant,

v.

EEOC No. 310-2001-05165X

Agency No. F-99-5371

John Ashcroft,
Attorney General,
Department of Justice,

Agency.

AGENCY'S MEMORANDUM IN SUPPORT OF A
FINAL ORDER FINDING NO DISCRIMINATION
AND AFFIRMING THE ADMINISTRATIVE JUDGE'S DECISION

On March 9, 2004, Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ) Joel Kravetz issued an Order of Dismissal in the above-captioned matter. Because Complainant, Gamal Abdel-Hafiz (Hafiz), failed to establish that he was subject to an adverse employment action or to a hostile work environment, the AJ dismissed his complaint of discrimination for failure to state a claim.

FACTUAL BACKGROUND

1. In March 1999, a Special Agent (SA) from the Federal Bureau of Investigation's (FBI's) Chicago Division requested that Hafiz wear a hidden recording device to record his conversation with a Muslim, who was the subject of an FBI investigation. Report of Investigation (ROI) Tab 9 at 10.

2. For a variety of reasons, Hafiz refused to record his conversation with the subject. ROI Tab 9 at 11. Hafiz' supervisors concurred with his decision. Id. at 12.

3. On May 26, 1999, the Chicago Division SA discussed Hafiz' refusal to record the conversation with an SA in the FBI's Dallas Division, and he also discussed Hafiz' refusal to wear a recording device for an SA in the FBI's Washington Field Office and for an SA in the FBI's Tampa Division. ROI Tab 9 at 12-14; Tab 9A.

4. During this telephone conversation between the Chicago SA and the Dallas SA, the Chicago SA stated that a terrorist group had been caught attempting to infiltrate the FBI. ROI Tab 6 at 2; Tab 9A.

5. Additionally, during the May 26, 1999 telephone conversation, the Chicago SA stated that, in his opinion, Muslim agents should not be assigned to international terrorism matters, that Muslims will always sympathize with each other, that Hafiz should be removed from the Grand Jury 6(e) list, and that Hafiz should not have access to certain case files. ROI Tab 9 at 13-14; Tab 9A.

6. On May 28, 1999, Hafiz contacted an Equal Employment Opportunity (EEO) counselor to allege that the telephone conversation between the Chicago SA and the Dallas SA discriminated against him based on his religion and national origin. ROI Tab 3.

7. Hafiz filed a complaint of discrimination on July 2, 1999. ROI Tab 2.

ARGUMENT

I. Complainant Fails To State A Claim Under Title VII

A. No Adverse Employment Action

In order to prove his discrimination claim, Hafiz must demonstrate that he suffered a "materially

adverse employment action." See Haugerud v. Amery School Dist., 259 F.3d 678, 691 (7th Cir. 2001); Jones v. Department of the Army, EEOC No. 05A00428 (2002). Specifically, Hafiz must allege some personal loss or direct harm which affects a term, condition, or privilege of employment. Merrin v. Department of Veterans Affairs, EEOC No. 01975461 (1998). An adverse employment action must typically constitute a "materially adverse change in the terms of ... employment," such as "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Kocsis v. Multi-Care Mgt., Inc., 97 F.3d 876, 885-86 (6th Cir. 1996). To be considered materially adverse, a change in working conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." Id. at 886. Indeed, "not everything that makes an employee unhappy is an actionable adverse action." Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)(poor evaluations not adverse employment action); see also Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999); Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994)("not every unpleasant matter short of [discharge or demotion] creates a cause of action"); Gronne v. Apple Bank for Sav., 2000 WL 298914 *5-6 (E.D.N.Y. 2000)(plaintiff's "unhappiness at being transferred is not enough to constitute an adverse employment action"); Bunis v. Runyon, 1997 WL 639241 at *3 (S.D.N.Y. 1997)(plaintiff's unhappiness "not enough to transform [employer's action] into an adverse employment action within the meaning of Title VII").

Significantly, "a remark or comment, unaccompanied by concrete action, does not constitute a direct and personal deprivation sufficient to render an individual aggrieved." Henry v. Postmaster

General, EEOC No. 05940695 (1995)(complainant whose supervisor inquired about his schedule change is not aggrieved). Thus being criticized, embarrassed, humiliated, or berated by a supervisor or a co-worker does not render an employee aggrieved unless such remarks are accompanied by some concrete action. Banks v. Department of Health and Human Servs., EEOC No. 05940481 (1995). Moreover, rudeness by supervisors or co-workers does not rise to the level of an adverse employment action. See Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 693 (8th Cir. 1997). As such, the comments made by the Chicago SA to the Dallas SA are insufficient to rise to the level of an adverse employment action.

B. Complainant Was Not Subject To A Hostile Work Environment

In order to determine whether a hostile work environment exists, courts consider the frequency of the allegedly discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interferes with an employee's work performance. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002). Additionally, to succeed, a hostile work environment claim requires harassment that is severe or pervasive. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); see also Jackson v. Department of Defense, EEOC No. 01A24593 (2003). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment ... is beyond Title VII's purview." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998). Courts have routinely held that the mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not affect the conditions of employment to a sufficiently significant degree to violate Title VII. See Rogers v. EEOC, 454 F.2d 234, 238 (5th

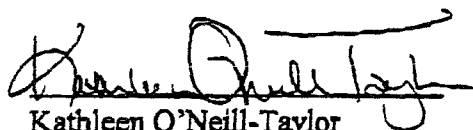
Cir. 1971), cert. denied, 406 U.S. 957 (1972).

Based on the facts as asserted by Hafiz, he cannot establish a hostile work environment. His allegations are neither severe nor pervasive. Indeed, his claim is based on one telephone conversation between two Special Agents located in two different FBI field offices. Hafiz himself was not a party to the conversation, and his employment conditions were not affected at all due to the conversation. At most, the conversation as relayed to Hafiz by his co-worker was merely offensive. As such, Hafiz' complaint must be dismissed.

CONCLUSION

For the foregoing reasons, the AJ's Order of Dismissal must be affirmed, and a Final Order of no discrimination must be issued.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing was sent by first-class U.S. mail this day to the following:

Complainant

Mr. Gamal Abdel-Hafiz
2401 Pinehurst Drive
Flower Mound, Texas 75028

I certify that the foregoing was sent by facsimile and first-class U.S. mail this day to the following:


Complainant's Representative

Richard L. Swick, Esquire
Swick & Shapiro, P.C.
1225 I Street, N.W.
Suite 1290
Washington, D.C. 20005

United States Department of Justice, Complaint Adjudication Office

Mr. Mark L. Gross
Complaint Adjudication Officer
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