

THOMAS HUTTER,)	
)	
Claimant,)	
)	
vs.)	No. 10-003
)	
ALL AMERICAN GRATING, INC.,)	
)	
Respondent.)	

ADJUDICATION

This case involves an employment discrimination claim brought by Thomas Hutter under the Allegheny County Human Relations Act, Allegheny Co. Ord. No. 26-09-OR (hereinafter “ACHRA”) A hearing was held on July 30, 2012 in conference room # 1 at the Court House the in Pittsburgh, Pennsylvania, before Chairman Mark F. Nowak, Esq., and Commissioners Honorable Justin M. Johnson, Retired, La’Tasha D. Mayes, and Barbara Daly Danko.

The Allegheny County Human Relations Commission (hereinafter “ACHRC”) has reviewed the Notes of Testimony and exhibits introduced at the hearing. The issue before this Commission is whether Respondent All American Grating, Inc. (hereinafter “AAG”) engaged in an adverse, discriminatory employment practice against Claimant Thomas Hutter on the basis of Hutter’s sexual orientation, in violation of the ACHRA.

FINDINGS OF FACT

The Commission hereby finds The relevant Facts in this matter to be as follows:

1. Respondent AAG employs more than four employees, and is based in Allegheny County. N.T. p. 14.

2. AAG has no sexual harassment or discrimination policy. N.T. p. 161. No official mechanisms are in place to facilitate the filing of employee complaints. N.T. pp. 161-162.
3. Gabriel J. Tamilia was, at all times relevant to this proceeding, the general manager at AAG, and the executive officer in charge of running the company. N.T. p. 18. Gerald T. Tamilia was an “absentee owner” who’s primary role was to sign checks. N.T. p. 64.
4. In February 2005, AAG hired Claimant Thomas Hutter on a part-time basis to work on certain marketing initiatives, including the production of a “140-page catalog”. N.T. pp. 16-18.
5. In or around May 2006, AAG hired Hutter in a full-time capacity to provide IT support, as well as to continue working on AAG’s marketing initiatives. N.T. pp. 17-18.
6. In 2009, Hutter’s hourly pay rate at AAG was \$26 per hour, and his approximate gross annual pay was \$55,594.50. N.T. p. 41; Ex. J. He was also receiving full health benefits, including vision, with the exception of dental. N.T. p. 41.
7. In or around September 2009, Hutter, due to job related stress arising from Tamilia’s treatment of him, began seeing a psychologist, Dr. Hermina Szeles, and was prescribed Clexa,

antianxiety medication, and Klonopin, acute anxiety medication. N.T. p. 30, 106-108.

8. On February 15th, 2010, Hutter quit his employment at AAG. N.T. pp. 31-32. Hutter was not terminated from his position. N.T. p. 12. .
9. Hunter filed for unemployment, and Hutter's unemployment appeal was contested by AAG. N.T. pp. 38-39: Ex. G. Hutter was able to obtain unemployment benefits. N.T.p.42.
10. Hutter sought employment throughout 2010 amd 2011, and applied to numerous companies during that time period. N.T p. 40: Ex. I. Hutter also provided "AC Coy. Cyber Coders, Oxford solutions, and several technical recruiters within Pittsburgh" with cover letters and updated copies of his resume to "facilitate finding work." N.T. p. 40 Despite Hutter's affirmative efforts, he was unable to obtain employment for a period of more than one year. N.T. p. 42.
11. In October 2010, Red Valve Company engaged Hutter in a lengthy interviews process, comprised of multiple interviews, and Hutter was hired as Red Valve's marketing director in
12. February 2011. He began work in March 2011. N.T. pp. 40-41.
13. Hunter's approximate gross annual pay at Red Valve was \$48,000 and he received no benefits. He also received

“significantly less PTO time” than what was afforded to him by former employer AAG. N.T. p.43.

14. In May 2011, Hutter resigned from his position as marketing director at Red Valve due to health complications. He is currently “doing contract work.” N.T. p.43.

DISCUSSION

I. Background

Hutter testified that he revealed his sexual orientation as a homosexual to AAG’s general manager, Gabriel J. Tamilya, in late 2006 or early 2007 in response to whispered discussion he overheard in the workplace regarding his sexual orientation. N.T. p. 19. Several months after this event, Tamilya began revealing details about Hutter’s homosexuality to outside business contacts and co-workers. N.T. pp. 20-22. On one such occurrence, Tamilya “outed” Hutter to Bob Manella, a business contact at grating manufacturer Laurel Steel, during a telephone conversation while in Hutter’s presence. N.T. p. 21. Afterward, Hutter confronted Tamilya and explained that he did not want Tamilya to reveal his sexual orientation to outside contacts or co-workers. N.T. p. 21. Despite this conversation, Tamilya chose to out Hutter to numerous AAG employees. N.T. pp. 21-22.

Additionally, not long after Hutter revealed his orientation, Tamilya began making “sexualized comments” to Hutter which Hutter found to be “humiliating.” N.T. p. 20. Starting in 2008, Tamilya began a routine of announcing that he was “going outside to smoke a fag” before taking a smoke break. N.T. pp. 22, 45-47. Tamilya made this proclamation on more than

10 separate occasions, and did so in the presence of other AAG employees.¹ N.T. pp. 22, 45-47. During this time period, Tamilia also engaged in verbal abuse of a non-sexual nature against Hutter. Tamilia's overall treatment of Hutter culminated in Hutter making an announcement to the "entire office" about the inappropriate nature of Tamilia's conduct towards him and leaving work for the remainder of that day. N.T. pp. 58-60.

In the summer of 2009, the harassment to which Hutter was subjected in the workplace by Tamilia increased substantially. N.T. p. 29. Hutter testified about an event in which a new AAG employee requested time off to recover from hemorrhoid surgery, and Tamilia drew an inappropriate analogy between the employee's health condition and Hutter's perceived sex life, stating that if Hutter's partner "Edward fucked [Hutter] in the ass so hard the night before, [he] would still expect [Hutter] to come to work the next day." N.T. pp. 23-24. This comment was said within earshot of Hutter's colleagues. N.T. p. 50.

On a separate occasion, Tamilia showed several of Hutter's colleagues three drawings on a doodle pad depicting a woman with male genitalia. N.T. p. 25; Ex. A. Hutter testified that Tamilia handed the doodle pad to Hutter and, when Hutter attempted to return the pad, Tamilia stated "no, no, you keep this, I think this is your kind of girl." N.T. pp. 25-26. This resulted in laughter around the office at Hutter's expense. N.T. p. 26.

On January 28, 2010, Hutter's birthday, Hutter received a text message from Tamilia which read "Happy Birrhdya[sic] Faggot." N.T. p. 26; Ex. B. On February 9, 2010, after Hutter informed Tamilia he was snowed in due to a severe snowfall and could not come to work, Tamilia sent Hutter a text message asking if he was "buried in cum from being locked up with Eddie all weekend, ha-ha." N.T. pp. 27-29.

¹ Hutter testified that Rick Deakins, Glen Berns, Andy Kovach, and possibly Janet Cura were present during Tamilia's "smoke a fag" comments. N.T. p. 47.

Starting in 2009, Hutter began to suffer panic attacks in the office during which it would feel “like [his] throat was closing . . . and [his] hands would shake.” N.T. p. 29. Hutter also began to experience “crying episodes” upon returning home. N.T. pp. 29-30. In September of 2009 Hutter began receiving counseling, and was prescribed Celexa, anti-anxiety medication, and Klonopin, acute anxiety medication. N.T. p. 30. Hutter informed Tamilia that he was suffering from anxiety due to Tamilia’s treatment of him. N.T. pp. 50, 53, 108. On February 15th, 2010, Hutter quit his employment at All American. N.T. pp. 31-32. The condition of Mr. Hutter as described by him was corroborated by Mr. Handley. N.T. p. 122-6.

II. Credibility Finding

This Commission has found that Hutter and Edward Handley, based on their demeanor and the quality of their responses to the questions of both counsel, testified truthfully. Tamilia’s testimony, which was scrutinized using the same criteria, was found to be not credible in all material respects. On that basis, all substantive factual disputes have been resolved in favor of Hutter and should be done so on appeal.

III. Applicable Law

Under ACHRA, it is considered an unlawful practice for an employer to discriminate against an employee “with respect to his or her compensation, terms, conditions or privileges of employment” on the basis of the employee’s sexual orientation. Allegheny Co. Code art. V, § 215-32(A). The term discrimination has been broadly construed to include “[a]ny exclusion, denial, intimidation, coercion, difference or segregation in treatment.” *Id.* at § 215-31(F). For the purposes of the ordinance, an employer has been defined as any individual employing four or more persons. *Id.* at § 215-31(H).

The establishment of the ACHRC is authorized by the Pennsylvania Human Relations Act (hereinafter "PHRA"). 43 Pa.C.S.A. § 962.1(d) (permitting "legislative bodies of political subdivisions . . . to grant to local commissions powers and duties similar to those now exercised by the Pennsylvania Human Relations Commission under" the PHRA). The ACHRC has been vested with the authority to "receive . . . complaints charging unlawful discriminatory practices in violation of [ACHRA] taking place within the County." Allegheny Co. Code art. V, § 215-36(B)(3). If an employer is found to have engaged in an unlawful employment practice as defined by ACHRA, the Commission "shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice," and the Commission has the authority to order appropriate remedial action which includes, but is not limited to, the following:

[R]eimbursement of certifiable travel expenses in matters involving the complaint, compensation for loss of work in matters involving the complaint, hiring, reinstatement or upgrading of employees, with or without back pay . . . any other verifiable, reasonable out-of-pocket expenses caused by unlawful discriminatory practice, or other compensation as provided under the Pennsylvania Human Relations Act.

Id. at § 215-37(I)(1).

IV. AAG's Objections

Respondent AAG raised objections during the July 30, 2012 hearing regarding: (1) this Commission's authority to conduct a hearing without permitting discovery; (2) this Commission's compliance with its own rules and regulations; and (3) the sufficiency of the record on appeal. N.T. pp. 8-12. This Commission will address each of AAG's objections in the order in which they were presented.

First, AGG argues that this Commission was required to permit discovery prior to the July 30, 2012 hearing. AGG asserts that both the PHRA and the Pittsburgh Commission on Human Relations allow for discovery, and that this Commission, by not granting discovery, “exercis[ed] powers beyond that which may be exercised by the state.” N.T. pp. 8-9. This argument is premised on a fundamental misunderstanding of what rights are owed to a respondent in an administrative proceeding.

In Pennsylvania, in the context of an administrative hearing, due process only requires that a respondent receive “notice and the opportunity to be heard.” Vaders v. Pa. State Horse Racing Commn., 964 A.2d 56, 58 (Pa. Cmmw. 2009) (citing 2 Pa.C.S.A. § 504). It is well established that “*discovery* generally as provided by the Pennsylvania Rules of Civil Procedure in court proceedings is *not made available in administrative proceedings.*” Weinberg v. Commonwealth, Ins. Dept., 398 A.2d 1120, 1121 (Pa. Cmmw. 1979) (emphasis added). As such, a refusal to grant discovery will not violate a respondent’s right to due process. Vaders, 964 A.2d at 58-60. While this Commission, as a County entity, must also conform to the requirements of the Allegheny County Home Rule Charter, nothing in the Charter requires this Commission to permit discovery. AAG had no right to discovery, and this Commission acted well within the scope of its authority in determining not to permit discovery.

Second, AAG argues that this Commission failed to follow its own rules and procedures by not conducting a preliminary investigation, providing AAG with notice of the finding of probable cause prior to the scheduling of the July 30, 2012 hearing, or promoting conciliation between the parties. N.T. pp. 10-11. To the contrary, this Commission has fully complied with all the rules and procedures that govern it.

A preliminary investigation is not required by the ACHRA. The Act specifies that, if after the filing of a complaint this Commission “determines that an investigation is warranted,” a preliminary investigation shall be conducted by the Allegheny County Department of Human Resources. Allegheny Co. Code art. V, § 215-37(D). However, as indicated by § 215-37(D)’s language, this determination is discretionary in nature. In the present matter, this Commission found that the parties’ pleadings and submitted materials, along with a supplementary investigation conducted by Caroline Liebenguth and Jennifer Stroschein, were sufficiently compelling to both establish a finding of probable cause and eschew the need for a preliminary investigation.

Under ACHRA, this Commission is not required to provide a respondent with notice of a finding of probable cause prior to the scheduling of a hearing. See § 215-37(F). Additionally, this Commission is not required to promote conciliation between the parties when mediation is not found to be a viable course of action:

If the [ACHRA], in its discretion, finds it is not possible to eliminate such unlawful practices by persuasion, the Commission shall cause to be issued and served a written notice, together with a copy of such complaint as the same may have been amended, requiring the party named in such complaint, hereinafter referred to as "respondent," to answer the charges of such complaint at a hearing before the Commission at a time and place to be specified in such notice. The Commission may appoint a hearing examiner or designate no fewer than three of its members to preside at such a meeting, or it may at its election conduct such hearing en banc.

Id. at § 215-37(G)(1) (emphasis added).

AAG, through its counsel Burns White, indicated that it was not amenable to conciliation. Specifically, in counsel’s September 10, 2010 letter to this Commission, counsel advised us that

AAG “d[id] not wish to mediate this matter.” The record does not indicate that AAG changed this stance prior to the hearing.

Lastly, AAG argues that the July 30, 2012 hearing does not constitute a “complete record” for the purposes of 2 Pa.C.S.A. § 754, primarily for the reasons articulated in its first two objections. N.T. pp. 11-12. Since the rationales behind AAG’s first two objections have both been demonstrated to be erroneous, this third objection has no legitimate basis to rest upon.

V. Analysis

After reviewing the record in this case, we conclude that Hutter has provided sufficient evidence to recover on his hostile work environment claim under ACHRA.

While not necessarily directly analogous to the legal standard implemented under ACHRA, a prima facie case of “hostile work environment” discrimination is established under the PHRA when an employee from a protected class sufficiently demonstrates: (1) he or she “suffered intentional discrimination”; (2) the discrimination was “severe *or* pervasive and regular”; (3) the discrimination “detrimentally affected” the employee; (4) the discrimination would “detrimentally affect a reasonable person of the same protected class”; and (5) the discriminator “was a supervisory employee or agent.” Infinity Broadcasting Corp. v. Pa. Human Relations Commn., 893 A.2d 151, 158 (Pa. Cmmw. 2006) (emphasis added).

There is no “mathematically precise test” utilized to determine whether a claimant has “presented sufficient evidence” to establish the existence of a hostile work environment. Kosereis v. Rhode Island, 331 F.3d 207, 216 (1st Cir. 2003) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). Since employment discrimination can manifest itself in “sophisticated and subtle forms,” a court or commission considering a hostile work environment claim must “analyze the aggregate effect of all evidence and reasonable inferences therefrom, including

those concerning incidents of facially neutral mistreatment.” Cardenas v. Massey, 269 F.3d 251, 261-62 (3d Cir. 2001).

Tamilia’s sexual harassment of Hutter was frequent, explicit, and unambiguous in nature. Tamilia made repeated declarations in the presence of Hutter that he was “going outside to smoke a fag” prior taking his smoke breaks. Tamilia did this in excess of 10 times, and in front of Hutter’s colleagues. N.T. pp. 22, 45-47. Tamilia made a crude comparison between the painful effects of hemorrhoid surgery and Hutter’s perceived sex life in front of Hutter’s colleagues. N.T. pp. 23-24. Tamilia provided Hutter with several drawings of a woman with male anatomy, and humiliated Hutter in front of his co-workers by suggesting she was his “kind of girl.” N.T. pp. 25-26. Tamilia also sent Hutter several text messages inappropriately addressing Hutter’s sexual orientation. N.T. pp. 26-29.

Based on the unambiguously sexual quality of Tamilia’s statements and conduct towards Hutter, and the regularity with which they occurred, it is a reasonable to conclude such acts were intentional, as well as commonplace. Additionally, this Commission finds it reasonable to conclude that Tamilia’s comments, texts, and drawings, when considered in the aggregate, and in light of his leadership position within the company, would likely offend and detrimentally affect a reasonable person in the same situation as Hutter.

The last issue necessary to address is whether Hutter himself was offended by Tamilia’s inappropriate sexually-themed comments and actions to the extent that he felt they created a hostile work environment. See Harris, 510 U.S. at 21-22 (explaining that “if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment”). There is sufficient evidence to conclude that it did.

Hutter has characterized Tamilia's "pointedly sexualized comments," many of which were made in the presence of co-workers, as being "humiliating." N.T. p. 20. Hutter has testified that Tamilia's hemorrhoid surgery analogy, which Hutter contends was the first instance in which Tamilia used Hutter's "personal life as a means to vent his anger," left Hutter feeling "flabbergasted" and at a loss for words. N.T. p. 24. Hutter testified he considered resigning, but did not do so due to the state of the tech job market. N.T. pp. 52-53.

In 2009, after Tamilia's harassment of Hutter based on Hutter's sexual orientation had escalated, Hutter informed Tamilia that he was suffering from anxiety due to Tamilia's treatment of him. N.T. pp. 50, 108. Hutter had several conversations with Tamilia concerning his anxiety. N.T. pp. 53-54. Hutter's anxiety became so severe that "[a]s early as September of 2009" he began seeing a psychologist and taking two different types of anti-anxiety medication. N.T. p. 30. Hutter's perceived need for treatment by a psychologist was a direct result of Tamilia's comments and conduct towards him. N.T. pp. 106-108. Hutter has also testified that, upon receiving Tamilia's January 28, 2010, "Happy Birrhdya[sic] Faggot"² text message he once again contemplated quitting, going so far as to consult with "family, friends," and former and current work colleagues. N.T. p. 60. The following month Hutter did quit, due in part to the treatment Tamilia had subjected him to. N.T. pp. 31-32. Mr. Hutter's condition was also testified to by Mr. Handley. N.T. p.122-6.

Hutter's testimony as to his mental state of mind, his multiple conversations with Tamilia concerning his anxiety, his obtainment of professional counseling, his use of anxiety medication, and his motivation for quitting, taken together, establish a compelling basis to conclude that Hutter perceived himself to be in a hostile work environment while employed at AAG. As such, Hutter has satisfied all the elements of a hostile work environment claim under the ACHRA.

² N.T. p. 26; Ex. B.

In conclusion, this Commission finds that AAG engaged in an adverse, discriminatory employment practice against Hutter on the basis of Hutter's sexual orientation, in violation of the ACHRA.

CONCLUSION OF LAW

1. Claimant Thomas Hutter has provided sufficient evidence to maintain a finding that his former employer, All American Grating, Inc., unlawfully discriminated against him on the basis of his sexual orientation, in violation of Allegheny County Ordinance No. 26-09.

ORDER

AND NOW, this 6th ^{December} ~~November~~, 2012, the Allegheny County Human Relations Commission ORDERS and DECREES the following:

All American Grating, Inc. shall:

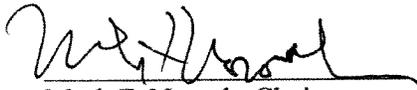
- 1) cease and desist from engaging in further unlawful discriminatory treatment of any of its employees
- 2) provide compensation to Hutter for loss of work for the period of February 1, 2010 until March 1, 2011, adjusted for income received from other employers, or earned as an independent contractor; or received from unemployment compensation
- 3) provide compensation to Hutter for costs incurred in securing medical coverage and treatment after the termination and

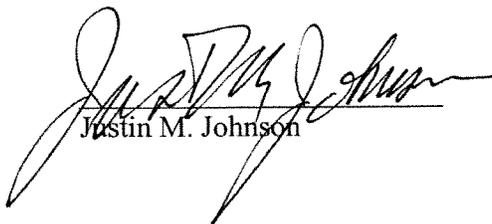
subsequent reinstatement of his AAG provided health coverage;

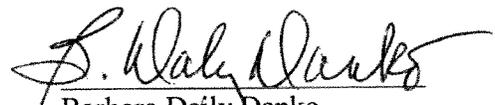
Thomas Hutter shall file a certified statement setting forth all compensation sought for:

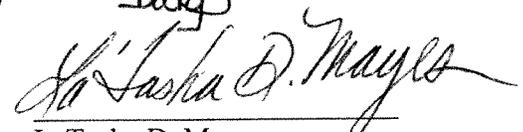
- 1) loss of earnings during the period of February 1, 2010 until March 1, 2011, adjusted for unemployment compensation received, loss of health benefits, diminished paid time off (PTO), as well as earnings at other employment or as an independent contractor;

All American Grating, Inc., has a period of 30 days following the filing of Hutter's Statement of Fees and Costs Incurred, in which it may file an Answer. If deemed necessary by the Commission, a hearing may be held to arrive at a final order, subject to appeal, which will encompass all matters properly before the ACHRC.


Mark F. Nowak, Chairman


Justin M. Johnson


Barbara Daily Danko


LaTasha D. Mayes