American Federation of Government Employees, Local 3729 and US Army Corps of Engineers, Huntington District

104 FLRR-2 27
103 LRP 50329

Federal Arbitration

0-AR-3751

September 18, 2003

The union's grievance was sustained. The agency denied accommodations for the grievant and did not act on her complaint of a hostile work environment. The grievant was a qualified individual with a disability and entitled to reasonable accommodations.

The grievant injured her foot while on the job and became permanently disabled. She claimed the agency refused to allow her to use an automatic door and a handicapped parking space. It also created and failed to end a hostile work environment. The arbitrator agreed and ordered the agency to assign the employee a parking space at no cost. The arbitrator also ordered the agency to cease and desist all actions that led to the creation of a hostile work environment and allow the employee to use the automatic door.

The grievant requested accommodations for her disability. The agency denied her request, claiming the grievant failed to supply the necessary documentation.

She also complained of a hostile work environment. Coworkers called the grievant "Hop-a-Long, Gimp, Chester, and Crip." The agency claimed it was unaware of the problem.

To prove a hostile work environment, the grievant must show:

-- She was in a protected class.

-- She was subjected to harassment in the form of unwelcome verbal or physical conduct involving a protected class.

-- The harassment was based on the statutorily protected class.

-- The harassment created an intimidating, hostile or offensive work environment.

To avoid liability the agency must show it "neither knew or should have known about the harassment," and it took immediate and appropriate corrective action once it became aware of the harassment.

The agency failed to do this, the arbitrator stated. The grievance was sustained.

Arbitrator: Skonier, John M.

APPEARANCES:

FOR THE UNION:
Michael J. Snider, Esq.

FOR THE AGENCY:
Rayetta W. Waldo, Esq.

Procedural History

The undersigned was notified by letter of his selection by the American Federation of Government Employees, Local 3729 (Union) and the US Army Corps of Engineers, Huntington District (Agency or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, a hearing was held on June 10, 2003 in Huntington, West Virginia, at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Subsequent to the close of the hearing, post hearing briefs were submitted and the matter is now ready for final disposition.

Background Facts

Ms. Lisa Mullen (hereinafter the Grievant) is employed by the Agency as a Museum Technician. In October 1989, she injured her foot while on the job. This injury left her permanently disabled, with a substantial limitation on her ability to walk.

On April 1,1993, the Grievant signed a Negotiated Settlement Agreement in resolution of an EEOC Complaint. In pertinent part, this agreement required the Agency to allow the Grievant to spend the first and last forty minutes of her work day in sedentary activities, to make a good faith effort to locate a parking space close to the Federal Building ... at the complainant's expense," and that the Grievant would schedule her work so that she would be productive during the forty minute sedentary periods. (Exhibit A-l)

The Grievant signed a second Negotiated Settlement Agreement on February 21,1995 which provided, in pertinent part, that the Agency would allow her twice the amount of time for field work assignments as it would allow an individual without any limitation in his or her ability to drive or walk. (Attached to Agency's Brief)

On or about December 27, 2000, the Grievant requested that she be permitted to use a handicapped parking space in the rear of the Agency's work place. At that time, there were several parking spaces designated with handicapped parking signs. On May 16,2001, upon her return from an extended medical leave of absence, the Grievant sent an E-mail to Mr. Mark Lycan, the Manager of Individuals with Disabilities Program for the Agency, informing him that she had returned to work and asking the status of her request. He responded by asking for medical documentation "detailing your present functional limitations and prognosis for say 6 months and 1 year". (Exhibit A-9)

On August 31, 2001, the Grievant supplied him with medical documentation from 1992 "establishing substantial limitations in walking". (Exhibit A-8) After reviewing this information, as well as the requirements of the Rehabilitation Act of 1973 and facilities management regulations, on September 10,2001, Mr. Lycan prepared a memorandum for Ms. Annette Quinn, the then Chief of the Logistics Management Office, outlining his analysis and opinion regarding various issues raised by the Grievant's request. (Exhibit A-7)

On September 19, 2001, Mr. Lycan sent a memorandum to the Grievant indicating that he had "evaluated your request for assignment to a government-provided parking space as a request for accommodation under the Rehabilitation Act of 1973." He indicated that he asked for medical documentation so that he could determine if she had "an impairment that substantially limits a major life activity, i.e. walking, and that the impairment was not likely to improve over the coming year." He stated that "my intention was to evaluate the medical documentation to determine if you could, with or without accommodation perform the essential functions of your position." He further stated that if he had been able to make such determinations, the Grievant would have met "the definition of a qualified employee with a disability under the Rehabilitation Act and thus would be entitled to reasonable accommodation under the Rehabilitation Act." At that point, he would then "move onto defining what would constitute a reasonable accommodation for your specific impairment." Mr. Lycan then noted that the

medical documentation provided by the Grievant was from the 1992-1993 time frame and that the Agency was already accommodating the Grievant's "mobility limitation" as stipulated by the Grievant's physician at that time. He concluded that as the Grievant had not provided any current documentation, that "there has been no substantial change in [her] medical condition" and "there is, therefore, no reason to consider assignment of a government-leased parking space as you requested." (Exhibit A-6)

By memorandum dated September 20, 2001, Ms. Quinn also denied the Grievant's request, stating that she did not meet the "stipulated criteria" of facilities management regulations found at 41CFR101-20.104 because she had not provided documentation that indicated she met the definition of a "severely handicapped employee." (See Exhibit A-6)

On September 19, 2001, the Grievant requested permission to use the handicapped accessible door and was denied. On October 11,2001, the Grievant noted that the handicapped signage had been removed from the parking spaces at issue.

On January 14, 2002, Chief Union Steward Paula Simpson, who is also currently the President of the Union, submitted a grievance on behalf of the Grievant Under the heading "ACTIONS BEING GRIEVED:" it stated:

denial of access to and use of available, signed, handicapped parking space; denial of use of automatic door (handicapped accessible); reprisal for requesting assistance with a physical handicap; continuing condition of harassment and hostile environment due to physical handicap.

(Exhibit A-4)

The "BASIS OF GRIEVANCE:" was specified as:

violations of negotiated Basic Agreement, including Article 12; the Rehabilitation Act of 1973; Title VII of the Civil Rights Act; District Engineer's stated philosophy (don't turn your back on someone who needs help);

(Id.)

The grievance was duly processed to the instant arbitration for resolution.

Discussion and Opinion

There are several issues in this matter. The first is whether the Agency created, perpetuated and/or failed to end a hostile work environment toward the Grievant. The second is whether the Agency violated the parties' Basic Agreement, Title VII, or the Rehabilitation Act of 1973 when it refused to provide the Grievant with

a handicapped parking space, the third issue is whether the Agency violated the parties' Basic Agreement, Title VII, or the Rehabilitation Act of 1973 when it refused to allow the Grievant access to an automatic door (handicapped accessible); and the fourth issue is whether the Agency violated the EEOC Negotiated Settlement Agreement dated April 1, 1993. Each of these issues will be dealt with individually.

Hostile Work Environment

The Union asserts that "the Agency created, perpetuated and failed to end a hostile work environment (disability) from June 2000 to the present." (Union's Brief, pl)

The Agency argues that the Grievant never provided it with specific examples of comments and/or actions that created the alleged hostile work environment during the grievance process. It was not until the hearing that the Union provided specific examples. Further, the Agency points out that EEO Officer Geneva Lares testified that she had dealt with all EEO issues the Grievant had raised to her and that the Grievant "voluntarily elected not to pursue a hostile work environment claim." (Agency's Brief, p. 8)

The Union offered the testimony of Union President Simpson, Chief Union Steward Hazelett, and the Grievant. Both Ms. Simpson and Ms. Hazelett testified to personal knowledge of instances in which they heard co-workers call the Grievant "Hop-a-Long, Gimp, Chester, and Crip." Ms. Simpson testified that she heard these comments made on a weekly basis by managers, guards, and fellow employees, although in the last week or two prior to the hearing, she had not heard any comments. She also testified about employees questioning the Grievant about her use of a cane and wheel chair and making comments as to the truth of her disability. Ms. Simpson further testified that she and the Grievant told various supervisors about these comments and actions, specifically Ginger Mullins, Ben Borda, and Mike Worley; as well as EEO Officer Lares, Executive Assistant to the Colonel, Frank Matthews; and Ms. Quinn. Ms. Simpson stated that the Agency did not investigate the complaints and that it did nothing to stop the comments or actions. On cross-examination, Ms. Simpson provided specific names and instances during which she personally witnessed disparaging and/or inappropriate remarks being made about or toward the Grievant. Ms. Hazelett corroborated this testimony and she, too, gave specific examples of derogatory comments that had been made about the Grievant in her presence. The Agency maintains that the testimony of these two witnesses should be discounted because Ms. Simpson is the Union President and Ms. Hazelett is a Union Steward.

The Grievant testified about specific comments and actions that had been made in her presence. She testified that the comments made her feel "like a side-show freak" and that the Agency's lack of response made her feel as though she has

"no value to the Agency". On cross-examination, the Grievant acknowledged that she has not filed a formal EEOC complaint. Ms. Hatten, the Grievant's mother, testified about her daughter's distress over the situation she was faced with on a routine basis. The Agency asserts that Ms. Hatten's testimony should be discounted because she is the Grievant's mother and is not an unbiased, disinterested party.

Randy Blain, a Supply Technician in the Logistics Management Office and the person known as the "key" custodian because he is responsible for the keys to the rooms, buildings, gates, and, most pertinent to the matter at issue, the electronic card keys necessary for admittance to the parking lot at issue, testified that Ms. Quinn had directed him to not talk to the Grievant about parking, keys or other related things. He further testified that he had overheard Ms. Quinn say she did not think the Grievant needed a parking space. He was directed on two different occasions to deactivate the Grievant's card key which allowed access to the parking lot area. The Agency noted that Mr. Blain had been disciplined for the improper use of the internet and that the Grievant, as his Union Representative, had represented him during the matter.

The Agency asserted that it was not aware of the Grievant's complaints and that if it had been made aware, it would have taken appropriate action. It further stated that it would counsel those individuals named during the instant hearing as to the inappropriate nature of their comments and actions. The Agency also maintained that the Union had the opportunity to provide more detailed information regarding this matter during the grievance process, yet it chose not to. The Agency offered the testimony of Ms. Lares, Ms. Quinn, Colonel Rivenburgh and Mr. Lycan. Ms. Lares testified that the Grievant had come to her with complaints about disparaging comments at various times and that she dealt with them on an informal level. The Grievant never pursued the matter through formal EEOC channels. She acknowledged that the Grievant told her she had been called such things as "gimp and Hop-a-Long" and that the matter of a hostile work environment had been raised.

Pertinent to this issue, Mr. Lycan testified regarding the removal of the handicapped parking signs from the parking spaces behind the Agency building. He said that he recommended that Logistics Management (LM) contact the General Services Administration (GSA) to have the signs removed because he believed they were not designated handicapped spaces, rather they were assigned parking spaces covered under the facilities management regulations, specifically 41 CFR101-20.104-2, which provides as follows regarding the assignment of parking spaces not required for official needs:

(d) Agencies shall in turn assign spaces to their employees, using the following order of priority:

(1) Severely handicapped employees. Justifications based on medical opinion may be required.

(Exhibit A-7)

He testified that he wanted GSA to evaluate whether the parking spaces at issue were handicapped spaces, per se. On cross-examination, he acknowledged that he had not brought up the issue regarding the signage on the parking spaces until after the Grievant requested a parking space.

Colonel Rivenburgh testified that he made the final response denying the grievance (Exhibit A-l), although he acknowledged on cross-examination that the document was drafted by Ms. Rayetta Waldo, Agency General Attorney and Ms. Bolt, a Technical Advisor in Employee and Labor Relations. He testified that he based his decision on a review of Mr. Lycan's and Ms. Waldo's advice. On cross-examination, he admitted that he neither met with the Grievant nor requested any additional information from the Union. He also never contacted the EEOC Office, nor did he conduct any investigation into the Grievant's allegations of a hostile work environment.

Ms. Quinn testified that she was not aware of the Grievant's EEO activities. She said she did not know the Grievant very well. She said that at times she was instructed by management to extend the Grievant's usage of the temporary handicapped parking.

The Union claims that:

> To establish a prima facie case of hostile environment harassment, a 'complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving a protected class; (3) the harassment complained of was based on the statutorily protected class; and (4) the harassment affected a term or condition of employment, and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating and intimidating, hostile or offensive work environment. Jackson v. United States Postal Service, EEOC Appeal No. 01972555 (April 15, 1999); CFR § 1604.11
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> ...
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> To avoid liability for the hostile environment, an agency must show, in the case of harassment by coworkers, that it neither knew or should have known about the harassment, and/or that it took immediate and appropriate corrective action as soon as it was put on notice of the harassment. 29 CFR § 1604. ll(d). ...

(**Union's Brief**, p. 2)

The record and documentation provided in this matter reveal that the Grievant did put the Agency on notice through her complaints to the EEOC Office. The testimony of Ms. Simpson, Ms. Hazelett, Mr. Blain and the Grievant is found to be credible regarding derogatory comments and/or actions made against the Grievant. Although the main focus of the grievance appears to have been over the denial of the parking space, the fact remains that the hostile work environment issue was raised. There is no evidence that the Agency did any investigation into the Grievant's allegations until October of 2001 and at that time, the focus of the investigation was on the denial of the parking space and the alleged removal of the handicapped parking signage as a retaliatory measure. It is noted that the Grievant did not want to pursue a formal EEOC complaint on this matter.

On the basis of the record as a whole, I find that the Agency did violate Articles 3 and 12 of the Basic Agreement by failing to take immediate action in response to the Grievant's and/or Ms. Simpson's notifications to various management officials regarding derogatory comments and/or actions made toward the Grievant as a result of her handicap.

Denial of Handicapped Parking Space

The Union asserts that the Association violated Articles 3 and 12 of the Basic Agreement by refusing to grant her request for a handicapped parking space at the rear of the Agency building. The Agency asserts that such spaces are not "official" handicapped parking spaces and that their issuance is governed by 41 CFR101-20.104 (d). As the Grievant did not meet the definition of a "severely handicapped employee", the Agency was not required to provide her with a parking space. The Agency further argues that it never acknowledged that the Grievant is disabled under the law. It asserts that she failed to provide requested current medical documentation that the Agency required in order to make such a determination. As the medical information she provided dated from 1992, the Agency asserts that it under no requirement to grant the Grievant further accommodations than those already granted in the Negotiated Settlement Agreement.

The testimony of the Union witnesses revealed that they consider the Grievant to be permanently disabled as a result of an injury she suffered on the job in 1989. Ms. Simpson testified that the Grievant had trouble walking, that she uses a cane and sometimes, a wheelchair. She cannot run or play ball with her son. She must use her left foot to drive. On cross-examination, Ms. Simpson stated that she has seen the Grievant struggling to walk down the uneven cobblestoned alley by the Agency Building. Ms. Hazelett testified that she knows the Grievant cannot run or climb stairs and that she has a substantial problem walking. She said that the Grievant cannot participate in fire drills due to her limitations. Both Ms. Simpson

and Ms. Hazelett responded in the affirmative when asked if the Grievant was disabled. Her mother testified that the Grievant cannot do her own house cleaning, that she uses the electric carts provided by various stores such as Walmart when she shops, she cannot climb stairs, she parks her car in her yard to unload purchases, her neighbor mows her lawn and her son is responsible for taking out the trash. Ms. Hatten said she frequently does things for her grand-son because of the Grievant's disability.

Mr. Lycan testified that because the Grievant did not provide him with any new medical documentation, he concluded that her medical condition had not changed and that there was no need for the Agency to provide additional accommodations than those provided in the Negotiated Settlement Agreement. He said he did not have the information he would need to make a determination as to whether the Grievant was a qualified individual under the Rehabilitation Act of 1973. He further testified that the allocation of the parking spaces at issue is not governed by the Rehabilitation Act, rather their issuance is determined by 41 CFR101-20.104. He said he did not dispute the Grievant's disability in terms of permanence, rather he questioned its severity in light of the Rehabilitation Act. On cross-examination, Mr. Lycan explained that he believed the Rehabilitation Act did not apply in this matter because the parking lot at issue was small. He acknowledged that the Agency has an obligation to explore a request for a reasonable accommodation. When asked which would govern if there is a conflict between the Rehabilitation Act and 41 CFR101-20.104, he responded that he did not know.

As previously stated in the discussion of the prior issue, Colonel Rivenburgh testified that he responded to the grievance at the third level, however, he did not actually author the response. He testified that in making his decision to deny the grievance, he only relied on Ms. Waldo's advice and Mr. Lycan's information. (See Exhibit A-7) He did not meet with the Grievant or the Union nor did he request any additional information. He said he spent more than one hour but less than two on the grievance process. He stated that because the Grievant did not provide updated medical information, there was no reason to believe her medical condition had changed to the point that she needed additional accommodations.

Ms. Quinn testified that the Grievant had been granted a temporary parking space earlier in the year, prior to the filing of the instant grievance. She said that she and Mr. Lycan discussed the Grievant's request for a permanent space and that she knew Mr. Lycan had analyzed the Rehabilitation Act and 41 CFR101-20.104 and concluded that the Grievant was not eligible for a permanent space. (Exhibit A-7) She explained, however, that she did her own analysis of 41 CFR101-20.104 and that she based her memorandum to the Grievant on that analysis. (Exhibit A-6)

The Agency asserted that it followed the procedures outlined in the document presented by the Union during the hearing, Enforcement Guidance: Reasonable

Accommodation and Undue Hardship Under the Americans with Disabilities Act. This EEOC document was prepared to "clarify the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship." (Id.) The Agency maintains that because the Grievant did not provide current medical documentation, it was unable to make a determination as to whether the Grievant was a qualified employee with a disability. While it "agrees that the Grievant has a mobility limitation" it asserts that "she has not provided evidence that her physical impairment substantially limits a major life activity (in this case, walking)." (Agency's Brief, pp. 3-4)

A significant aspect of the Agency's argument on this issue focuses on its assertion that the Grievant did not provide it with proper information for it to make the determination as to whether she was a qualified individual with a disability under the law. The ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities unless to do so would cause undue hardship. The ADA defines a "disability" as follows:

> A charging party has a "disability" for purposes of the ADA if she or he (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. A charging party must satisfy at least one of these three parts of the definition to be considered an individual with a "disability." ...
> ...
> When determining whether a charging party satisfies the definition of "disability," the investigator should remember that the concepts of "impairment," "major life activity," and "substantially limits" are relevant to all three parts of the definition of "disability." ...
>
> Major Life Activities
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> -- Examples of major life activities listed in Title I regulations include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
>
> -- Other examples of major life activities include sitting, standing, lifting, and mental and emotional processes such as thinking, concentrating, and interacting with others.
>
> Substantially Limits
>
> -- An impairment is substantially limiting if it prohibits or significantly restricts and individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity.

> -- The determination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment.

(Union Exhibit -- **EEOC Executive Summary: Compliance Manual Section 902, Definition of the Term "Disability"**)

A review of the medical documentation provided by the Grievant, albeit from 1992, reveals that the District Supervisor of the West Virginia State Board of Rehabilitation, Division of Rehabilitation Services, Mr. Dwight L, McMillion, responded to both the Agency's request for his opinion as to the severity of the Grievant's disability and, subsequently, the Grievant's separate request in which she apparently asked for his assistance in certifying her as severely disabled. By letter to the Agency dated September 28, 1992, Mr. McMillion stated, in pertinent part that:

> ... certifying "severe handicap" for parking is not typically a function we're called upon to do. I will, however, offer you some technical assistance on my interpretation of the ADA and your requirements under it as an employer.
>
> H.M. Hills, Jr., M.D. states in his report to you dated August 7, 1991 "that there is a direct relation between the foot injury of 10-26-89 and the knee as well as with the foot injury and the back pain". That statement by Dr. Hills and the other medical recommendations you have provided to me would suggest that Ms. Mullen does, in fact, need and deserve the accommodation of closer accessible parking if space is available.
>
> The Americans with Disabilities Act does not require an employee to be "severely disabled" in order to warrant a reasonable accommodation by an employer. Walking is one of the major life activities covered under the ADA that requires reasonable accommodation when the person is substantially limited. The severity and duration of a disability are certainly contributing factors in the decision of whether reasonable accommodation is necessary. Whether the West Virginia Division of Rehabilitation Services would choose to certify Ms. Mullen severely disabled under our standards or not is not pertinent. The issue of her need for an accommodation has to do more with the limitations she has upon a major life activity. In this case that activity is walking. Her limitations are clearly documented.

(Exhibit A-8)

In his response to the Grievant dated November 16,1992, Mr. McMillion stated:

> Since I have worked with you and the Corps' Human Resources Office on this issue previously, as a courtesy I decided to telephone Mr. Bart Spencer to inform him of the letter and the questions you had asked. He assured me that your request for a reasonable accommodation would soon be acted upon in a positive way, Based upon his report that an accommodation was eminent, it does not seem appropriate for me to get further involved in this issue at this time.
>
> In my letter to Mr. L. G. Hatfield of September 28, 1992 of which you received a copy, I stated clearly that it is not our Agency's responsibility to certify "severe handicap" for parking. I still stand by that decision. It is, however, necessary for your employer to make whatever reasonable accommodations are necessary that you may need. It appears that is soon to be forthcoming.

(Id.)

The ADA discusses the concept of "substantially limits" by stating that "an impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity." The record is clear that the Grievant's ability to walk is significantly restricted when compared to that of the average person. The record is also clear that the Grievant has continually suffered with this same impairment. The fact that she did not provide more recent medical documentation does not bar her from being considered a "qualified person with a disability." Based on the record, it is clear that the Grievant is a qualified individual with a disability, as defined by the ADA. She not only "(1) has a physical or mental impairment that substantially limits a major life activity [walking]," she also "(2) has a record of such an impairment," and "(3) is regarded as having such an impairment." As stated by Mr. McMillion:

> [t]he Americans with Disabilities Act does not require an employee to be "severely disabled" in order to warrant a reasonable accommodation by an employer. Walking is one of the major life activities covered under the ADA that requires reasonable accommodation when the person is substantially limited. ... The issue of her need for an accommodation has to do more with the limitations she has upon a major life activity. In this case that activity is walking. Her limitations are clearly documented.

(Id.)

As the Grievant is a qualified individual with a disability, she is entitled to reasonable accommodation, unless the Agency can prove undue hardship.

In this matter, the Agency also argued that the requirements of 41 CFR101-20.104 take precedence over those of the ADA. 41 CFR101-20.104-2 deals with the allocation and assignment of employee parking spaces. Once an agency has been assigned parking spaces, the regulation provides for their allocation as follows:

> (d) Agencies shall in turn assign spaces to their employees, using the following order of priority:
>
> (1) Severely handicapped employees. Justifications based on medical opinion may be required.

(Exhibit A-7)

The Agency points out that the definition of a "handicapped employee" found at 41 CFR101-20.003(n) is:

> (n) Handicapped employee means an employee who has a severe, permanent impairment which for all practical purposes precludes the use of public transportation, or an employee who is unable to operate a car as a result of permanent impairment who is driven to work by another. ...

(Id.)

The fact that the Grievant may not fit this definition does not ipso facto mean that she is not eligible for a parking space. As previously stated, the Grievant is eligible for a reasonable accommodation, unless the Agency can prove such accommodation would cause undue hardship.

In the memorandum Mr. Lycan prepared for Ms. Quinn, he stated that:

> ... It has always been my position, as director of the individuals with disabilities program that, given our parking situation, assignment to parking spaces is not a reasonable accommodation under the Rehab Act. Leased spaces are scarce resources, and may or may not always be available to the District. I would gladly recommend assigned parking as an accommodation under the Rehab Act if the District managed a parking lot available to District employees in general.
>
> The District's requirement to accommodate begins with access to the building, ... Therefore, assignment of agency-provided parking spaces on the back lot is the responsibility of the Logistics Management Office under facilities management regulations, found in 41 CFR. ...

(Exhibit A-7)

Mr. Lycan testified that because the Agency negotiates with GSA for the parking spaces, he did not consider them to be eligible for assignment to individuals under the reasonable accommodation requirement of the ADA.

The EEOC Enforcement Guidance pamphlet referenced earlier also provides guidance on undue hardship considerations. It reads, in pertinent part, as follows:

> An employer does not have to provide a reasonable accommodation that would cause an " undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:
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> -- the nature and cost of the accommodation needed;
>
> -- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
>
> ...
>
> The ADA's legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. Undue hardship is determined based on the net cost to the employer.

(Union Exhibit -- **Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act**, emphasis in original)

In this matter, the Agency has parking spaces available which it leases from GSA, therefore, it cannot claim undue hardship in providing a reasonable accommodation.

Based on the record as a whole and for the reasons discussed above, I find that the Agency violated the parties' Basic Agreement when it denied the Grievant's request for assignment to a permanent parking space in the rear lot of the Agency's building.

Automatic Door

The Union stated that this situation has been remedied, however, it pointed out that the Grievant still suffered emotional and physical damages from its occurrence and that it also contributed to the hostile work environment. As the

Agency has already taken the appropriate steps to resolve this matter, no further action is needed.

Violation of EEOC Negotiated Settlement Agreement

The Union argues that the Agency has violated the EEOC Negotiated Settlement Agreement dated April 1, 1993 on a continuous basis. It points to the Grievant's testimony that she has been assigned non-sedentary duties during her forty minute non-sedentary periods and that the Agency did not "continue to attempt to find parking at the parking lot currently owned by Michael Webb, ..." The Union also argued that paragraph 5 of the EEOC Negotiated Settlement Agreement is contrary to public policy, therefore, the Agency's argument that the Grievant has no right to request the reasonable accommodation based on the fact that she signed the EEOC Negotiated Settlement, Agreement must fail. The Agency argues that the Union should be barred from raising this issue at it did not bring it to the attention of the Agency during the grievance process. As the issue was first raised at the instant arbitration hearing, the Agency maintains that it should not be adjudicated in this matter.

The record reveals that this matter was not raised in the original grievance nor is there any indication that it was discussed at any time during the grievance process. The Agency had no prior notice that it would be required to provide witnesses and/or documentation to refute allegations of non-compliance with the EEOC Negotiated Settlement Agreement prior to the instant arbitration. It is noted that the Agency did provide documentary evidence with its post hearing brief of the attempts that it had made in 1993 and again in 1995 to obtain parking for the Grievant.

Obviously, both the Agency and the Grievant should abide by the legal terms of their EEOC Negotiated Settlement Agreements. In the instant matter, the record does not provide sufficient information to make a determination as to whether the Agency has violated the terms of the EEOC Negotiated Settlement Agreement dated April 1, 1993.

Conclusion

As the four issues have been discussed and disposed of above, the only remaining matter is the determination of an appropriate award. In its brief, the Union requested that:

The Grievant be made whole, including a finding of discrimination/retaliation, a cease and desist order, compensatory damages for her physical and emotional injuries, an Order that the Agency reasonably accommodate Grievant with assignment of a vacant parking spot and payment of reasonable attorney fees.

(Union's Brief, p. 12)

For the reasons cited in the discussion of the individual issues, I find that the Agency did create, perpetuate and fail to end a hostile work environment. I also find that the Grievant's request for a reasonable accommodation in the form of an assigned parking space in the rear lot of the Agency's Building should be granted. If is noted that the EEOC Negotiated Settlement Agreement signed on April 1, 1993 provided for the Grievant's payment of any parking fees, therefore, I find it appropriate to award the Grievant compensatory damages in the form of providing the aforementioned parking space at no charge to the Grievant.

Award

On the basis of the record as a whole and for the reasons discussed, the grievance is sustained in part as follows:

(1.) The Agency is directed to cease and desist all actions that led to the creation of a hostile work environment toward the Grievant.

(2.) The Agency is directed to assign a parking space in the lot at the rear of the Agency Building to the Grievant at no cost to the Grievant.

(3.) The Agency is directed to continue to allow the Grievant access to the automatic door.

Mr. John Mark Skonier