

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Christina L. Brown,

Charging Party,

v.

Albert DiCenso,

Respondent.

HUDALJ 05-91-0495-1

Decided: June 26, 1997

James P. Baker, Esquire
For Respondent

Harry L. Carey, Esquire
Eileen Ray, Esquire
For the Government

Before: Constance T. O'Bryant
Administrative Law Judge

**INITIAL DECISION
ON APPLICATION FOR ATTORNEYS' FEES**

On March 20, 1995, I issued an Initial Decision dismissing a Charge of Discrimination against Respondent on the ground that the Charging Party had failed to prove by a preponderance of the evidence that Respondent had violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("the Act"). On April 18, 1995, that decision was reversed by the Secretary and remanded to me to determine the amount of damages to be awarded and the civil penalty to be assessed. On June 19, 1995, I issued an Initial Decision on Remand.

Respondent appealed the June 19, 1995, decision and on September 23, 1996, the United States Court of Appeals for the Seventh Circuit reversed the finding of violation of the Fair Housing Act and dismissed the Charge against Respondent. On November 6, 1996, Respondent filed an application for Attorneys' Fees and Costs in the amount of \$14,085.98, pursuant to 5 U.S.C. § 504 and 24 C.F.R. § 140.940. (*See also* 24 C.F.R. § 180.705, effective November 4, 1996). The Charging Party filed a memorandum opposing the award. Respondent's reply to the Government's memorandum was filed on December 19, 1996.

The Application will be denied in part and granted in part.

When an agency has conducted an adversary adjudication, a qualified prevailing party (5 U.S.C. § 504(b)(1)(B)) is entitled to recover the fees and other expenses incurred by the party in connection with the proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified. *Europlast, Ltd. v. N.L.R.B.*, 33 F. 3d 16 (7th Cir. 1994); *Quality C.A.T.V., Inc. v. N.L.R.B.*, 969 F. 2d 541 at 543 (7th Cir. 1992).

The term "substantially justified" means "justified in substance or in the main" -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It means "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Id. at 567*. Thus, the "substantial justification" standard applied under the EAJA treads a middle ground between an automatic award of fees to the prevailing party and one made only when the government has taken a patently frivolous stand. *Losco v. Bowen*, 638 F. Supp. 1262, 1265 (S.D.N.Y. 1986).

To meet its burden of substantial justification, the government must show a reasonable basis in truth for the facts alleged, a reasonably sound legal theory, and a reasonable connection between the facts alleged and the theory propounded. *Marcus v. Shalala*, 17 F. 3d 1033 (7th Cir. 1994); *Europlast, Ltd. v. NLRB*, 33 F. 3d 16 (7th Cir. 1994). "The test for substantial justification is whether the agency had a rational ground for thinking it had a rational ground for its action..." *Kolman v. Shalala*, 39 F. 3d 173 at 177 (7th Cir. 1994).

Substantial Justification

The Government charged that Respondent violated the law by engaging in conduct that constituted sex discrimination against Complainant in violation of Section

804(b) of the Act and for retaliating against her for resisting his acts of sexual aggression by initiating proceedings to evict her from her apartment. *See* Section 818 of the Act. The Government proceeded against Respondent under both the hostile environment and *quid pro quo* theories of sexual harassment.

In an attempt to prove violations of the Act, the Charging Party established that Respondent and Complainant had a landlord-tenant relationship, and presented testimony relating five separate incidents of harassing conduct, over a four-to-five month period, by Respondent. In the Initial Decision, I concluded that the Complainant was credible in her description of the incidents and in her stated belief that Respondent was responsible for them. However, after considering all the evidence, including Respondent's denials of involvement, I found that the evidence established only one incident of sexual harassment, described as follows:

In mid-October or early November, Respondent came to Complainant's apartment to collect the rent.... On this occasion, while Complainant stood at the door, Respondent asked about the rent and simultaneously began caressing her arm and back. He said to her words to the effect that if she could not pay the rent, she could take care of it in other ways. Complainant slammed the door in his face. Respondent stood outside calling her names - a "bitch" and "whore," and then left. *HUD v. DiCenso*, 2 Fair Housing-Fair Lending (P-H), ¶25,098 at 25,879.

Applying the law to this one incident of harassing conduct, I concluded that this incident, although offensive and abhorrent, was not severe enough to create a hostile housing environment. Further, I found that the evidence did not establish a violation of the Act under the *quid pro quo* theory of sexual harassment, and therefore dismissed the Charge of Discrimination against Respondent.

Respondent argues that the Government did not have substantial justification to bring the charges in the first instance. I conclude that there was a reasonable basis in fact and law for the Government to bring the charges. At the hearing level, this case turned on the credibility of the parties. Although I found only one act of harassing conduct, the Complainant testified to repeated harassing acts by Respondent. She testified that Respondent made a sexual advance toward her which she rebuffed and then engaged in a string of harassing actions against her, over a period of months, both sexual and nonsexual in nature, culminating in his initiating eviction proceedings. Further, she testified that she was intimidated by him and found it difficult living as a tenant in his dwelling. In my decision I wrote that:

[C]omplainant testified to five specific incidents that she alleged to be of a sexually harassing nature, starting in late August or early September and ending in December 1990. Two of these involved a face-to-face confrontation, and one of the two involved a touching, and uttering of offensive words of a sexual nature as well as profanities. The remaining three involved alleged unauthorized entries into Complainant's apartment believed to be by Respondent, done with the intent to harass her. *Id* at 25,882.

Thus, had Complainant's testimony been fully credited by me and had I drawn the inferences from the evidence of the several incidents as urged upon me by the Charging Party, I would have found Respondent responsible for all the acts of harassment alleged by Complainant. In such case, the evidence might have been sufficient to establish a pervasive and persistent harassing atmosphere sufficiently severe to create a hostile environment, and a violation of the Act. Since the Charging Party could not have anticipated my determinations on credibility, I find that it was not unreasonable for the Government to have brought the charges in the first instance. *See Europlast, Ltd. v. N.L.R.B.*, 33 F. 3d 16, at 17 (7th Cir. 1994); *Quality C.A.T.V. v. N. L. R. B.* 969 F. 2d 541 at 545 (7th Cir. 1992).

Respondent asserts that even if the Charging Party was justified in bringing the Charge initially, it was not justified in continuing to pursue what amounted to a legally unsupportable theory of liability after the Initial Decision. He contends that in filing exceptions to the Initial Decision and urging the Secretary to review the case after the Initial Decision, the Charging Party either knew or should have known that the one incident of harassing behavior factually established by the decision was insufficient under existing case law to establish sexual harassment under either the hostile environment theory or the *quid pro quo* theory of prosecution. In other words, the Charging Party continued to prosecute the case without any basis in law or fact. Respondent argues, therefore, that he should be entitled to recover at least the fees and expenses incurred in defending his position following the Initial Decision. I agree with this contention.

It is well established that the prevailing party may recover a partial award if the agency's position was not justified in a part of the proceedings. *See Quality C.A.T. V. v. N.L. R. B.*, 969 F. 2d 541 (7th Cir. 1992). *See also McDonald v. Washington*, 15 F. 3d 1126 at 1129 (D. C. Cir. 1994); *Battles Farm Co. v. Pierce*, 806 F. 2d 1098 at 1104 (D. C. Cir. 1986), vacated on other grounds, 487 U. S. 925 (1988).

The reasonableness of the decision to continue to prosecute the case after the Initial Decision depends on whether there was a reasonably sound connection between

the facts as accepted by the Charging Party and the legal theory of violation alleged. *Marcus*, 17 F. 3d at 1035.

We turn, then, to the merits of the Government's litigating position. In seeking review by the Secretary of the Initial Decision, the Charging Party urged the adoption of the Findings of Fact established in the Initial Decision, but argued that the legal conclusion reached -- that the facts as found did not establish a violation of the Act -- was in error. The Government persisted in this position until reversed by the Seventh Circuit.

The Government makes essentially four arguments in support of the thesis that its litigating position was consistently reasonable. These are: 1) that examination of the relevant case law shows that it is possible for a single incident, depending on the totality of the circumstances, to constitute sexual harassment in a housing or employment context; 2) the level of the severity of a single incident necessary to create a hostile housing environment was an open question under the Fair Housing Act at the time this case was prosecuted; 3) [by implication only] that it was advancing in good faith a novel but credible extension and interpretation of the law;¹ and 4) because one of the judges of the Seventh Circuit, who reviewed this case, believed that the position of the Government was reasonable and dissented from the opinion reversing the Secretary. We examine now the reasonableness of each of these contentions.

As to the first argument -- that it is possible for a single incident to constitute sexual harassment in a housing context, the Charging Party erroneously states that on appeal to the Secretary the narrow issue was "whether a single instance of sexual aggression could constitute a hostile housing environment" (Secretary's Answer to Respondent's Application for Attorney Fees and Costs at p. 4). Whether a single instance of sexual aggression could constitute a hostile housing environment was never the issue on appeal. The Initial Decision acknowledged that a single egregious act could violate the Act. It considered and compared the facts in this case to those in the case of *Beliveau v. Caras*, 873 F. Supp. 1393 (C.D. Cal. 1995), a Title VIII case in which respondent was found to have violated the Act based on one incident. *HUD v. DiCenso* at 25,885. The issue on appeal was whether the single incident of harassment in this

¹The Government argues that "one instance where Congress felt a fee award would be inappropriate occurs when the Government is 'advancing in good faith a novel but credible extension and interpretation of the law,'" citing *S & H Riggers & Erectors*, 672 F. 2d 426, 431 and H. R. Rep. No. 1418, 1980 U. S. Code Cong. & Ad. News at 499. See Secretary's Answer at p. 5. However, the Government did not explicitly assert that it was advancing a novel but credible extension and interpretation of the law. In any event, for the reasons discussed below, such an assertion would not be persuasive.

case was sufficiently severe to establish a hostile housing environment.

As to the Government's position that the issue being litigated was an open question, it is true that at the time the Government took its appeal to the Secretary, the Seventh Circuit had not determined what constitutes a "hostile" environment in a Title VIII case. However, the law was well established as to what constitutes a "hostile" environment in Title VII cases. Moreover, the Government has taken the position throughout this litigation that what constituted a hostile environment in the housing context required the same analysis courts have undertaken in the Title VII context. Therefore, whether the Government's position was substantially justified on appeal depends to an important degree on the clarity of the governing law at the time the Government made its litigating decision. "If the extant law is clearly against the government, its position is not substantially justified." *Spencer v. N.L.R.B.*, 712 F. 2d 539, 557 (D. C. Cir 1983), *cert. denied*, 466 U. S. 936 (1984). "When a case presents only a single issue, the court merely examines the extant governing law to see if the government's position has support." *Battles Farm Co. v. Pierce*, 806 F. 2d 1098 at 1104 (D. C. Cir. 1986). "Clarity of the applicable law is an important factor in determining whether the government's position was substantially justified." *Frey v. Commodity Futures*, 931 F. 2d 1171 at 1176 (7th Cir. 1991).

The Government acknowledges that all courts that have found actionable sex harassment under Title VIII have incorporated Title VII doctrines into their analyses. *See Honce v. Vigil*, 1 Fed 3d at 1085 (10th Cir. 1993); *Beliveau v. Caras*, 873 F. Supp 1393 (C.D. Cal. 1995); *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending (P-H), ¶15,472 at 15,136 (W.D. Ohio, 1983), *aff'd per curiam*, 770 F. 2d 167 (6th Cir. 1985); and *Grieger v. Sheets*, 1 Fair Housing-Fair Lending (P-H) ¶ 15,605 (N.D. Ill. 1989). These cases hold that in order to establish a hostile environment in a case brought under the Act, the actions of the landlord must be pervasive and persistent, they must be sufficiently severe or pervasive to alter the conditions of the housing arrangement, and that a case is not made out if the alleged harassment is isolated or trivial or casual. Further, whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. Factors to consider include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or merely an offensive utterance; and whether, in an employment case, the conduct unreasonably interferes with an employee's work performance. *See Harris v. Forklift Systems, Inc.*, 510 U. S. 17 at 23 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 at 67 (1986). Not only must the conduct be offensive in the mind of the victim, but it must also be sufficiently severe or pervasive to create an objectively hostile or abusive environment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find

hostile or abusive--is beyond Title VII's purview." *Harris*, 510 U.S. 17 at 21 (1993).

Examination of cases from the the Seventh Circuit does not support the Government's argument that the case law supported a finding that the one incident in this case was of sufficient severity to create a hostile housing environment. No court has found that one single incident of harassing conduct, not involving the touching of a sexual or intimate body part, was egregious enough to create a hostile environment under either Title VII or Title VIII. A review of Seventh Circuit cases under Title VII shows that the court had repeatedly held that isolated and innocuous incidents such as the touching of nonsexual body parts, coupled with offensive remarks of a sexual nature, do not support a finding of sexual harassment violative of Title VII. In *Saxton v. American Tel. & Tel. Co.*, 10 F. 3d 526 (7th Cir. 1993), the defendant on one occasion put his hand on the plaintiff's leg and kissed her until she pushed him away. Three weeks later, the defendant lurched at the plaintiff from behind some bushes and unsuccessfully tried to grab her. Although this defendant harassed plaintiff on more than one occasion, put his hand on the plaintiff's leg in a sexually suggestive way, and forced a kiss on her until she pushed him away, the court found that his conduct was not frequent or *severe* enough to create a hostile environment. *Id* at 534-35. Similarly, in *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F. 2d 333 (7th Cir. 1993), the court held that defendant's conduct in asking plaintiff for dates on repeated occasions, placing signs which read "I love you" in her work area, and twice attempting to kiss her, was too isolated and *insufficiently severe* to create a hostile work environment. Also, in *Chalmers v. Quaker Oats Co.*, 61 F. 3d 1340 (7th Cir. 1995), the one instance where defendant directed plaintiff to step behind an office divider out of view of the hallway where he kissed her on her cheek was found not to be sufficiently severe to violate Title VII. Although the Seventh Circuit court has stated that sporadic behavior, if sufficiently abusive, may support a claim, *see Chalmers at* 1345, these case precedents compel the conclusion that it would be unreasonable to suppose that the one incident of harassing conduct by Respondent in this case would be found violative of the Act. As the Seventh Circuit wrote in reversing the Secretary's decision, "DiCenso's conduct, while clearly unwelcome, was much less offensive than other incidents which have *not* violated Title VII." Slip op. at 5 (emphasis added).

The Government has cited numerous cases in other circuits to support its argument that it was reasonable to appeal this case. The cases are cited to show that courts have found harassing conduct not involving the touching of a sexual body part to be violative of the Act or Title VII. The citations are misleading. While it is true that the cited cases did not involve the touching of a sexual body part, they all involved *repeated acts* of harassment, over a period of months or years, culminating with the discharge or constructive discharge of the plaintiff. In *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1247 (6th Cir. 1989) the defendant visited plaintiff's place of employment

several times a week over a three month period. On each visit he would lean against her, touch her hips and call her “honey” or “baby.” When she rebuffed him, he became very critical of her work and took action against her for poor work performance. Her complaint against him included three pages describing his harassing actions. In *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F. 2d 900 (11th Cir. 1988) plaintiff was repeatedly harassed by a co-worker over a period of time. He called her a “bitch” and a “whore” in front of customers, taunted her because she wore pants instead of a skirt or dress, teased her about her wig and threatened to pull it off. Similarly, in *Sparks v. Pilot Freight Carriers, Inc.* 830 F. 2d 1554, 1556 (11th Cir. 1987) the court related that plaintiff’s employer, who had repeatedly harassed her over several months, had made remarks to her that were “too sexually explicit” to be repeated. Defendant asked if she were married, had a boyfriend, could she get pregnant. He tried to rub her shoulder, and smell her hair. He repeatedly inquired into her personal life and sought to be invited to her home where he would bring a bottle of wine. When plaintiff rebuffed him, he made threatening remarks to her such as, “Your fate is in my hands,” and “Revenge is the name of the game.” Although each of these cases addressed facts in common with the facts in the instant case -- the sexually suggestive touching of plaintiff’s hip in *Wheeler*; calling plaintiff a “bitch” and a “whore” in *Huddleston*; and the suggested *quid pro quo* in *Sparks*, none of the cited cases provides substantial justification for the Government’s litigating position in this case. The Government has failed to cite a single case in which conduct comparable to that established in this case was considered violative of the Act or of Title VII. Each of the cases cited by the Government involved either multiple incidents of offensive behavior or a single incident in which the conduct complained of rose to the level of a sexual battery (unwelcome touching of a sexual body part).²

To the extent that the Government implies that it was advancing a novel but credible extension and interpretation of the law, the implication is not persuasive. The Government relied on “the totality of the circumstances” standard to justify its position that the single incident of harassment committed by Respondent was severe enough to violate the Act. It states that “[a]n examination of the case law shows that it is possible for a single incident, depending on the totality of the circumstances, to constitute a hostile environment in a housing or employment context.” See Government’s Answer to Respondent’s Application for Attorney’s and Costs, p. 4-5. First, as the Government acknowledges, the “totality of the circumstances” was not a new standard or even an

²The Government also cited *Beliveau v. Caras*, 873 F. Supp. 1393 (C.D. Cal. 1995) involving off color and flirtatious remarks coupled with a battery of the tenant’s breasts and buttocks by the landlord while inside the tenant’s apartment; *Ellison v. Brady*, 924 F. 2d 872 (9th Cir. 1991) involving a series of unwelcome acts, not a single incident; and *King v. Board of Regents of the University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990) involving repeated incidents.

extension of previous interpretations, but rather one which comes from “an examination of the case law.” *See Harris, supra*. Indeed, the Seventh Circuit, in reversing the Secretary’s decision, applied that standard: “Considering the totality of the circumstances in this case, we agree with the ALJ that DiCenso’s conduct was not sufficiently egregious to create an objectively hostile housing environment.” Slip op. at 5.

To the extent that the Government sought to extend the interpretation of the law of hostile environment, it has been held that “[f]or the purpose of the EAJA, the more clearly established are the governing norms, and the more clearly they dictate a result in favor of the private litigant, the less ‘justified’ it is for the government to pursue or persist in litigation. The government is always free, of course, to seek modification or repudiation of established doctrine, but individual private litigants should not be compelled to subsidize such reevaluations of controlling doctrine.” *Spencer v. N.L.R.B.* at 558-59. The objective of the EAJA is to level the playing field. It aims to insure that the government does not take unjustified positions when it forces a citizen into court, and, if it does, that the citizen can recover attorney fees. Its purpose is “to eliminate for the average person the financial disincentive to challenge unreasonable government actions.” *Commissioner of I.N.S. v. Jean*, 496 U. S. 154, at 163 (1990). When the government “takes a long shot,” it must subsidize litigation costs. *Battles Farm* at 1104, citing *Spencer v. N.L.R.B.*, 712 F. 2d at 558.

Finally, the Charging Party contends that the dissenting opinion of Seventh Circuit Judge Flaum in this case, by itself, supports finding that the decision was justified to a degree that would satisfy a reasonable person in that, it asserts, Judge Flaum was satisfied with the reasonableness of the Secretary’s legal interpretation. In dissenting from the majority opinion in this case, Judge Flaum’s advocated judicial restraint, concluding that since the Secretary was charged under the Act with administering it and had a special expertise in policy considerations which underlie it, the role of the reviewing court should be deferential to the Secretary’s policy considerations. Although Judge Flaum believed the majority provided no basis for doubting the reasonableness of the Secretary’s interpretation of the Fair Housing Act, his dissent did not show support for the Secretary’s position based on application of the facts to legal precedent. He stated that the majority “may very well be correct in stating that DiCenso’s conduct would not be sufficient to give rise to a claim for sexual harassment under our Title VII precedent.” Slip op. at 7. Accordingly, the dissenting opinion does not show that the Government was substantially justified in appealing the decision in this case.

Special Circumstances

The Government argues that even if I find that the Charging Party did not have a reasonable basis in law or fact to proceed in this case, special circumstances clearly exist that would make an award of attorney fees and costs unjust. 5 U.S.C. § 504(a)(1). It argues that Respondent's act of sexual aggression and his less-than-credible testimony at the hearing, considered together, present special circumstances that would make an award of fees and costs unjust. I agree with Respondent that it is not the function of the Charging Party to prosecute landlords who engage in offensive, objectionable behavior, unless the nature of that behavior reasonably suggests a violation of the Act. To agree with the Charging Party would be to condone administrative overreaching.

Conclusion

Accordingly, I find that the position of the United States was not substantially justified as to the prosecution of the case after the Initial Decision, and that there are no special circumstances in this case which make an award unjust. Further, I find that the number of hours claimed (84.5 hours at \$75.00 and 13.5 hours at \$50.00) is reasonable as well as the expenses incurred (\$564.60). Therefore, Respondent is entitled to the amount of \$7,577.10 for his attorneys' fees and costs (attorneys' fees of \$7,012.50 and costs of \$564.60) incurred after March 20, 1995 for defending the case after the Initial Decision.

Respondent's application for fees and costs is Denied in part and Granted in part. So ORDERED.

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION ON APPLICATION FOR ATTORNEYS' FEES issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 05-91-0495-1, were sent to the following parties on this 26th day of June, 19970, in the manner indicated:

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