



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

██████████,  
Complainant,

v.

Tom J. Vilsack,  
Secretary,  
Food Safety Inspection Service,  
Department of Agriculture,  
Agency.

Appeal No. 0120113592

Agency No. FSIS-2007-00933

DECISION

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts Complainant's appeal from the May 5, 2011 final Agency decision (FAD) concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission's review is de novo. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the FAD.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Food Inspector at the Agency's Office of Field Operations in North Carolina. Complainant mostly worked on a turkey evisceration line where he inspected turkey carcasses. His position required that he sit or stand in one spot for an extended period of time while moving his hands, arms, and upper body. The position included some walking and climbing stairs and ladders. Complainant has had back problems since 1991 including a bulging disc and spasms. Complainant stated he would have slight spasms for months that did not incapacitate him and, at other times, he would have a major spasm that would put him out for days. Complainant never requested reasonable accommodation, nor did he submit documentation to management indicating that he had any medical restrictions.

In 2006, Complainant's supervisor (S1) began noticing a high number of sick calls and began monitoring the leave usage of Complainant and a co-worker (CW1). Based on time and attendance records, S1 believed that Complainant was taking sick leave to extend his weekends or prior scheduled leave. On July 10, 2007, S1 issued Complainant a Leave Restriction Letter

stating that he had verbally counseled Complainant regarding a pattern of sick leave use. The letter advised Complainant that sick leave would be granted to him only if he provided acceptable medical documentation and that his sick leave usage would be reviewed in six months.

On August 1, 2007, S1 issued Complainant a Letter of Caution after S1 observed Complainant "hanging back" turkeys, slowing down the inspection line. Complainant acknowledged that he hung back some turkeys while he allowed his trimmer to take a bathroom break. S1 noted that this was a violation of work and safety rules and that it was the supervisor's role to give permission to the trimmer. S1 stated that when he talked with Complainant about the incident, Complainant responded angrily and called him names. After receiving the Letter of Caution, Complainant wished to call the EEO Counselor. Complainant claimed that he informed S1 of this, and S1 told him that he would have to either make the call on his break or take leave.

Complainant filed a formal complaint alleging that he was subjected to discrimination on the bases of race (African-American), disability, and in reprisal for prior protected EEO activity when:

1. On or about July 10, 2007, the Agency failed to provide him with reasonable accommodation and issued him a Leave Restriction Letter despite his prior permitted use of sick leave;
2. On August 1, 2007, he was issued a Letter of Caution;
3. On August 6, 2007, he was denied time to contact the EEO Counselor.

Additionally, Complainant alleged that he was subjected to a hostile work environment when management failed to protect him from aggressive co-workers and that he and his supervisor had cultural differences which resulted in discrimination and misuse of authority.<sup>1</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. On August 13, 2008, the Agency erroneously issued a FAD before a hearing was held. On September 1, 2008, Complainant withdrew his hearing request, but asked that evidence obtained during discovery be included as part of the record. On September 8, 2008, the AJ granted the withdrawal request and ordered the Agency to issue a FAD.

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<sup>1</sup> The Agency stated in its final Agency decision that Complainant motioned to amend his complaint to include these additional issues while the matter was pending a hearing before an Administrative Judge. The Administrative Judge did not rule on the motion prior to Complainant's withdrawal of his hearing request, but the Agency accepted the claim. In addition, the Agency dismissed a claim related to a dispute with another employee which led to an alleged suspension.

The Agency failed to issue a new FAD despite numerous requests by Complainant. Consequently, Complainant appealed, and in ██████ v. Dep't of Agric., EEOC Appeal No. 0120102520 (Sept. 15, 2010), the Commission vacated the previous FAD and ordered the Agency to supplement the record with the hearing record and all evidence produced during discovery and to issue a new FAD. On May 5, 2011, the Agency issued its new FAD.

In the FAD, the Agency initially assumed *arguendo* that Complainant was an individual with a disability and had established a *prima facie* case of discrimination and reprisal. The Agency determined that management had articulated legitimate, nondiscriminatory reasons for its actions. Specifically, as to the July 2007 Leave Restriction Letter, S1 affirmed that he began monitoring Complainant and CW1's leave usage because of a higher number of sick calls in 2006. S1 further stated that he counseled Complainant in February 2007 about his use of sick leave. Complainant called in sick thereafter in May 2007 which extended his weekend, but S1 took no action because it was the first suspected instance after the warning. On June 13, 2007, Complainant left work early claiming to be sick. Complainant called in sick on June 14, 2007, and had annual leave scheduled for June 15, 2007. As a result, S1 issued Complainant the Leave Restriction Letter on July 10, 2007.

With respect to the August 2007 Letter of Caution, S1 explained that the letter was not discipline and just documented a discussion they had about hanging back turkeys. Further, S1 affirmed that it was the supervisor's duty to give permission for a trimmer to take a break, not Complainant's, and that hanging back birds is not permitted as it jeopardizes safety. In addition, S1 asserted that when he discussed this with Complainant, Complainant called him names which he documented in the Caution Letter.

Regarding the August 6, 2007 incident, S1 stated that Complainant told him that he wished to leave the inspection station to make a phone call, but never identified who he wished to call or the purpose of the call. S1 maintained that he kept asking Complainant who he wished to call and the purpose and Complainant just said "you know who." S1 affirmed that Complainant then said that S1 was refusing to let him call and to "forget it." S1 noted that a supervisor has the discretion to permit an inspector to leave the line if they need to make an urgent call or for official business. Complainant's second-level supervisor (S2) confirmed that S1 told her that Complainant had requested to make a phone call, but would not reveal who he was calling. S2 added that if there was no one to relieve Complainant and he would not reveal the reason for the call, there was no requirement to allow him time to make the call.

The Agency concluded that Complainant had not established that management's reasons for its actions in the above incidents were pretextual. As a result, the Agency found that Complainant had not been discriminated or retaliated against as alleged as to these incidents.

With regard to his claim that he was denied reasonable accommodation, the Agency determined that although Complainant provided 10 years of leave statements, this only showed that Complainant took a similar amount of leave each year, and S1 approved the leave. The

record indicated that S1 granted Complainant sick leave over time to care for a family member and his mother as well as Complainant's own sicknesses. The leave statements do not reveal how much sick leave Complainant took for himself or how much sick leave he took to care for his family members. The only medical evidence in the record related to Complainant's back problems is documentation related to a 2004 hospital admission, a note regarding a 2007 back spasm episode, and a June 6, 2008 general note about his medical history of back pain. None of the documentation indicated that Complainant had any physical restrictions. In addition, Complainant admitted that he never asked for an accommodation. The Agency determined that while S1 may have allowed liberal sick leave usage for Complainant for ten years, the leave restriction was not a denial of reasonable accommodation in violation of the Rehabilitation Act.

Finally, as to Complainant's harassment claim, the Agency determined that the record contained two "Threat Reports" dated December 15, 2005 and March 31, 2007. Each of the Threat Reports described contentious interactions between Complainant and CW1. Complainant stated that the December 2005 Threat Report was a "counter-complaint" to a complaint filed by CW1 against him for talking to her trimmer. S1 intervened and investigated the incident. CW1 told him that Complainant never threatened to harm her, but he appeared angry when she asked him to stop speaking with her trimmer. Likewise, Complainant told S1 that he was not subjected to any slurs or threats and that he filed his counter-complaint to defend himself. S1 recommended that they seek resolution through the Voluntary Dispute Intervention Program, but CW1 later refused.

In his March 2007 Threat Report, Complainant described an incident where CW1 walked by him in the hallway and told him to let her "throw away her own cadaver birds." The incident escalated and Complainant claimed that CW1 was in his face telling him to grow up. Complainant said he told her to shut up, and she called him a moron. S1 strongly told both to stop arguing.

The Agency concluded that while Complainant claimed that the harassment was ongoing through at least June 2008, Complainant provided no other evidence of incidents other than those alleged in the two Threat Reports. In addition, Complainant alluded to an incident in September 2007, however, he failed to elaborate or provide any additional information about the incident. The Agency determined that the incidents were not sufficiently severe or pervasive to establish a hostile work environment. Furthermore, S1 became involved in both incidents immediately and took steps to stop the behavior. Finally, there was no evidence that any of the alleged incidents were motivated by discriminatory or retaliatory animus. As a result, the Agency concluded that Complainant had not been subjected to a hostile work environment.

Complainant submitted the instant appeal without any arguments or contentions in support.<sup>2</sup>

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<sup>2</sup> Complainant filed his appeal 43 days beyond the limitation period; however, given the Agency's repeated failures to obey both the AJ and the Commission's previous orders, the Commission exercises its discretion to accept Complainant's appeal.

### ANALYSIS AND FINDINGS

As an initial matter, on January 17, 2013, the Commission issued a Show Cause Order informing the Agency that the submitted complaint file was incomplete. The Commission granted the Agency 20 days to submit the supplemental evidence generated by both parties during the discovery phase and ordered by the AJ and the Commission to be included as part of the investigative record. To date, the Commission has not received any of the requested documents, nor has the Commission received any explanation from the Agency as to why it has failed to submit the complete complaint file.

#### *Disparate Treatment*

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

In the instant case, assuming arguendo that Complainant is an individual with a disability and has established a prima facie case of discrimination and reprisal, the Commission finds that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, as to the Leave Restriction Letter, S1 affirmed that he began monitoring sick leave requests because the previous year's data revealed possible abuse by Complainant and CW1. ROI, at 38. S1 states that he counseled Complainant in February 2007 about the appearance of sick leave abuse. Id. Complainant called in sick in May which extended his weekend, but S1 decided not to say anything because it was the first time after the counseling. Id. at 39. After other instances of Complainant calling in sick, S1 determined that Complainant was abusing sick leave and issued him the Leave Restriction Letter in July 2007. Id.

Regarding the August 2007 Letter of Caution, S1 affirmed that Complainant was hanging back turkeys while his trimmer went on break. ROI, at 39, 62. S1 noted that Complainant should not have allowed his trimmer to go on a break as it is the supervisor's responsibility to grant permission and to find a substitute. Id. at 39. Additionally, S1 confirmed that the practice of hanging back turkeys is not allowed because it jeopardizes safety. Id. S1 explained to Complainant that his actions were improper and when he attempted to document it, Complainant became loud and abusive. Id. at 39-40. S1 maintained that the Letter was not

discipline; rather, it was documentation of a discussion they had regarding Complainant's actions. Id. at 39, 62.

Finally, as to the August 6, 2007 EEO Counselor request, S1 averred that Complainant called him to his inspection station and said he wanted to make a phone call. ROI, at 40. S1 stated that he asked Complainant who he wanted to call and Complainant said "you know who." Id. When S1 asked again, Complainant accused him of refusing to give him time and told him to just forget it. Id. S1 confirmed that the policy is that a supervisor allows leave from the line to make a telephone call based on the nature of the requested call, such as urgency or official business. Id. In this case, S1 stated that he had no information on Complainant's request because he refused to tell him who he wanted to call. Id.

Because the Agency proffered legitimate, nondiscriminatory reasons for the alleged discriminatory events, Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 256.

The Commission finds that the record is devoid of any persuasive evidence that Complainant's protected classes were factors in any of the Agency's actions. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of unlawful animus. Complainant failed to carry this burden. Accordingly, the Commission finds that Complainant failed to show that he was discriminated or retaliated against as alleged.

#### *Denial of Reasonable Accommodation*

As to Complainant's reasonable accommodation denial claim, the Commission notes that the Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. 1630.2(g); (2) he is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) ("Enforcement Guidance"). Under the Commission's regulations, an Agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2 (o) and (p). The Commission shall assume without deciding (for the purposes of this decision) that Complainant is a qualified individual with a disability.

Complainant argued that use of his sick leave over the past ten years was a reasonable accommodation. The record reveals, however, that Complainant was granted sick leave for

various different reasons over the years, including for the care of family members and, according to S1, only 25% of the time did Complainant claim that it was for his back condition. ROI, at 39. The record is devoid of any evidence that Complainant ever requested a reasonable accommodation in order to perform the essential functions of his job or that it was obvious to the Agency that he may have needed an accommodation. Notably, none of the submitted medical documentation in the record mentioned any need for an accommodation or that Complainant was under any physical restrictions. Accordingly, the Commission finds that Complainant has not demonstrated that he was denied reasonable accommodation in violation of the Rehabilitation Act.

### *Hostile Work Environment*

The parties conducted discovery regarding Complainant's claim of harassment prior to Complainant's hearing request withdrawal. As discussed above, the Commission previously ordered the Agency to include the supplemental materials produced during discovery in the record; however, the complaint file that the Agency submitted to the Commission was incomplete. The Commission issued a Show Cause Order ordering the Agency to submit the missing supplemental evidence, and the Agency failed to respond. Based on the Agency's repeated failure to submit the complete record, the Commission finds that the imposition of sanctions is warranted. See Vu v. Soc. Sec. Admin., EEOC Appeal No. 0120072632 (Jan. 20, 2011) (sanctions appropriate where the agency failed to provide the Commission with motions and responses in support and opposition to decision without a hearing). The Agency was on notice that sanctions were possible if it failed to submit the requested documents by February 6, 2013.

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U. S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009); Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec 8, 2000). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the integrity of the EEO process. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009); Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007).

The Commission's regulations are perfectly clear with respect to the Agency's obligation to submit the complete record and to do so in a timely manner. "The agency must submit the complaint file to the Office of Federal Operations within 30 days of initial notification that the

complainant has filed an appeal.” 29 C.F.R. § 1614.403(e). Further, “[a]gencies should develop internal procedures that will ensure the prompt submission of complaint files upon . . . notice that a complainant has filed an appeal.” Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-12 (Nov. 9, 1999). Based on the Agency’s repeated failures to submit a complete complaint file, the Commission finds that the most appropriate sanction is default judgment in favor of Complainant as to his hostile work environment claim.

After deciding to issue a default judgment for a complainant, the Commission needs to determine if there is evidence that establishes Complainant's right to relief. One way to show a right to relief is to establish the elements of a prima facie case. See Royal, EEOC Request No. 0520080052; see also Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (Apr. 21, 2005). In the instant case, Complainant alleged that management failed to protect him after he complained that he was harassed by co-workers. For example, Complainant claimed that CW1 has intimidated and taunted him because of his race since December 2005 and management failed to address her behavior despite his reports. Based on the specific circumstances present, and the Agency’s failure to produce the hearing record, as well as all discovery conducted pertaining to this specific claim, the Commission finds that Complainant would have established a prima facie case of discriminatory harassment and this is sufficient to support a conclusion, by default judgment, that Complainant is entitled to relief in this case.

### CONCLUSION

Based on a thorough review of the record, the Commission AFFIRMS the FAD with respect to claims (1) – (3). The Commission REVERSES the FAD regarding the hostile work environment claim. The Commission REMANDS this matter for further processing in accordance with this decision and the ORDER below.

### ORDER

Within fifteen (15) days of this decision becoming final, the Agency shall issue Complainant notice of his right to request a hearing concerning his entitlement to relief. If Complainant requests a hearing, the AJ assigned to the case shall preside over the development of evidence relevant to the issue of relief and issue a decision on remedies in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110(a). If Complainant fails to request a hearing, the Agency shall conduct an appropriate investigation to determine what remedies are due and issue a decision in accordance with 29 C.F.R. § 1614.110(b) within sixty (60) days of the date Complainant declines a hearing.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered

corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

### STATEMENT OF RIGHTS - ON APPEAL

#### RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Nov. 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The

Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

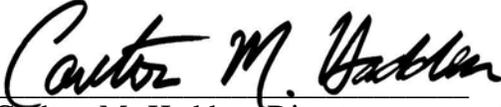
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

June 5, 2013  
Date