



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

████████████████████
Margaret M.,¹
Complainant,

v.

Dr. David J. Shulkin,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 0120151790

Agency No. 2003-0785-2013104323

DECISION

On April 21, 2015, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 20, 2015, final decision concerning her 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. For the following reasons, the Commission AFFIRMS, in part, and REVERSES, in part, the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Sales Clerk, VC-2091-02, under a temporary appointment at the Agency's Veterans' Canteen Service in St. Louis, Missouri. Her tenure in the position began in April 2013 and was due to terminate on September 8, 2013. According to Complainant, during the course of her employment she was repeatedly subjected to sexually harassing behavior by a coworker, CW1. She did not report these incidents until mid-August 2013, when she revealed to another coworker, CW2, how she had been harassed. On August 14, 2013, CW2 reported Complainant's allegations to his supervisor, S1, who also supervised Complainant. In response, S1 informed the local Agency EEO office of Complainant's allegations. The EEO office dispatched its Program Manager (PM1) to interview

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

witnesses, including Complainant and CW1. PM1 determined that Complainant had not been harassed by CW1 as she claimed.

After the interviews had taken place, in the course of discussing what actions to take in response to Complainant's allegations, S1 disclosed to PM1 that the Agency had decided not to extend Complainant's employment beyond her "not to exceed" date of September 8, 2013. In order to prevent Complainant from having any further contact with CW1, S1 decided to place Complainant on administrative leave with pay immediately. While Complainant was on administrative leave, the Agency entered into negotiations with her to resolve any potential EEO claim Complainant might assert arising from the harassment to which she claimed to have been subjected. In the course of these negotiations, the Agency extended Complainant's termination date beyond September 8, 2013 (Report of Investigation (ROI) at 179) and offered to return Complainant to duty in order to resolve any potential EEO complaint. Complainant did not accept the proposed settlement. ROI at 151. Her employment was terminated on October 19, 2013.² ROI at 180.

In light of PM1's conclusion that CW1 had not harassed Complainant, the Agency took no corrective action with respect to CW1, although PM1 and S1 saw fit to warn CW1 that, due to the Agency's "zero tolerance" for sexual harassment, he would have been subject to immediate removal if he had committed the acts of which Complainant accused him. ROI at 151. So far as the record reflects, the Agency took no further action in response to Complainant's claim of harassment before the instant proceedings began.

On May 8, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), and in reprisal for prior protected EEO activity when:

1. between April 2013 and August 2013 she was subjected to sexual harassment by a co-worker;
2. on August 22, 2013, she learned that the Agency intended to terminate her employment effective September 7, 2013; and
3. between April 2013 and August 2013, she was subjected to hostile workplace harassment.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a hearing within the time frame

² At the same time that Complainant reported CW1's harassment of her, a second female victim, CW3, accused CW1 of harassment. As part of her investigation into Complainant's allegations, PM1 also investigated CW3's claims. PM1 concluded that CW3's charges against CW1 were also unfounded.

provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In that decision, the Agency found that Complainant failed to prove that the Agency was liable for having discriminated against her. With respect to the sexual harassment claim, the Agency, contrary to the harassment investigator's conclusion, found that Complainant had proven sexual harassment by demonstrating she was "subjected to conduct that was overtly sexual in nature" at the hands of a co-worker which was "severe or pervasive enough to constitute an objectively hostile work environment based on sex." Final Agency Decision (FAD) at 13. Ultimately, however, the Agency found that it should not be held vicariously liable because, according to the FAD, the Agency proved that it had taken "prompt and effective remedial action" upon learning of the harassment. Id at 15.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Claims #1 & #3 (Harassment)

To establish a case of sexual harassment creating a hostile work environment, Complainant must show, by a preponderance of the evidence, that: (1) she belongs to a protected class; (2) she was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment affected a term or condition of employment, either unreasonably interfering with the work environment or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

An agency is liable for harassment by a co-worker or other non-supervisor when it "knows or should have known of the conduct, unless the agency can show that it took immediate and appropriate corrective action." See 29 C.F.R. § 1604.11(d). The appropriateness of the agency's conduct in response to harassment depends upon "the particular facts of the case - the severity

and persistence of the harassment, and the effectiveness of any initial remedial steps.” Owens v. Dep’t of Transportation, EEOC Appeal No. 05940824 (Sept. 5, 1996); Taylor v. Dep’t. of the Air Force, EEOC Request No. 05920194 (July 8, 1992). “Appropriate corrective action” is a response that is reasonably calculated to stop the harassment. When an agency becomes aware of alleged harassment, the agency has the duty to investigate such charges promptly and thoroughly. See Rodriguez v. Dep’t of Veterans Affairs, EEOC Appeal No. 01953850 (Aug. 29, 1996).

In this case, the Agency acknowledges in its FAD that Complainant has proven that she was subjected to sexual harassment at the hands of her co-worker, CW1. The Agency also acknowledges that it became aware of the pattern of harassment to which Complainant had been subjected on August 14, 2013. Thus, the Agency will be held liable for the harassment unless it can show that it took appropriate corrective action to prevent recurrence of the harassment. We conclude that the Agency did not take appropriate corrective action here. CW1, the alleged harasser, was not disciplined in any manner. Nor was he reassigned or required to undergo remedial training.

So far as the record reflects, the only “corrective” action the Agency took was to remove Complainant from the workplace by placing her on administrative leave. The Commission has held that reassigning the person targeted for harassment is not appropriate corrective action. See Taylor, EEOC Request No. 05920194, supra. (“While relocating ‘problem personnel’ would be appropriate remedial action . . . treating the victim as one of the problem personnel was not.”)

Commission precedent holds that the consequence of a failure to prove that the Agency took appropriate action in dealing with co-worker harassment, is the imposition of liability on the Agency. See, e.g., * * *, v. Tennessee Valley Authority, EEOC Appeal No. 0120123132 (May 14, 2015); * * * v. United States Department of Justice, EEOC Appeal No. 0120141244 (July 22, 2014). Accordingly, under the circumstances of this case, we conclude that Complainant was subjected to a hostile work environment due to sexual harassment and that the Agency failed to take appropriate action that would have insulated it from liability.

Claim #2 (Notice of Termination)

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). She must generally establish a prima facie case by demonstrating that she 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 where 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); Holley v. Dep’t of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). 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 (2000); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519

(1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

The Agency explains that Complainant was given notice that her temporary employment would not be extended because she had demonstrated a pattern of tardiness that indicated that she was not suited for the position she occupied. ROI at 150, 152. This is a legitimate, nondiscriminatory reason for the Agency's actions. Complainant adduced no evidence that the Agency's explanation for its action was a pretext designed to conceal discriminatory animus. Any suggestion that Complainant was terminated in retaliation for raising a claim of sexual harassment is unavailing. Documentary evidence shows that prior to August 14, 2013, when Agency management first learned that Complainant had been subjected to sexual harassment, the Agency had already made the determination not to extend Complainant's employment. ROI at 193.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the finding of no discrimination with regard to Claim 2 and REVERSE the Agency's final decision with regard to Claims 1 and 3. The Agency is directed to take remedial actions in accordance with the ORDER below.

ORDER

To the extent that it has not already done so the Agency is ordered to take the following remedial actions:

1. The Agency shall give Complainant notice of her right to submit evidence (pursuant to the guidance given in Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)) in support of her claim for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall issue a final decision on compensatory damages pursuant to 29 C.F.R. § 1614.110(b), and shall pay any awarded compensatory damages 30 days from the date of that determination.
2. Within ninety (90) days from the date this decision is issued, the Agency shall conduct a minimum of eight (8) hours of in-person or interactive training for the responsible management officials involved in this case regarding their obligations under Title VII with special emphasis on management responsibilities with regard to claims of sexual harassment and discriminatory harassment/hostile work environment.
3. Within sixty (60) days from the date this decision is issued, the Agency shall consider

taking disciplinary action against the responsible management officials. The Agency shall report its decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. Training is not considered discipline.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Veterans Canteen Services facility in St. Louis, Missouri copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

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 in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (T0610)

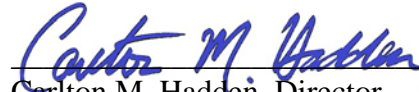
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 11, 2018

Date