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

[redacted]
Mac O.,[1]
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Capital Metro Area),
Agency.

Appeal No. 0120152431

Hearing No. 430-2015-00006X

Agency No. 4K-230-0089-14

DECISION

On July 20, 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 June 18, 2015, final decision 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. For the following reasons, the Commission AFFIRMS the Agency's final decision in part and REVERSES the Agency's final decision, in part.

BACKGROUND

On February 18, 2014, the Agency hired Complainant as a City Carrier Assistant (CCA) at the Montrose Heights Post Office in Richmond, Virginia. CCA's are non-Career employees whose work hours can vary. They could be expected to work up to six days per week and up to twelve hours per day, including holidays, Saturdays, and some Sundays. On April 10, 2014, while still in probationary status, Complainant was terminated.

[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.

On May 1, 2014, Complainant filed an EEO complaint in which he alleged that various individuals in his chain of command[2] discriminated against him on the basis of religion (Seventh-Day Adventist) and retaliated against him for protected EEO activity[3] when:

1. He was denied an accommodation not to work during his Sabbath from March 1, 2014 through April 5, 2014;

2. On March 14, 2014, his paycheck was short work hours and his request for copies of his PS Form 1260s went unanswered;

3. On March 18, 2014, he was suspended for a day and since then, his work hours were decreased;

4. On March 3, March 20, and April 8, 2014, he was forced to work in unsafe conditions when he was provided a caravan to deliver curbside mail;

5. From March 3 through April 10, 2014, he was not provided the proper tools, training or direction to complete his route timely; and

6. On April 10, 2014, he was terminated from his employment.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the investigative report (IR) and notice of his right to request a hearing before a Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to disparate treatment as alleged. The Agency also found that Complainant failed to show that he had been subjected to discriminatory harassment, even though Complainant himself had never raised that issue. However, the decision did not raise or address Complainant's claim that he was denied a religious accommodation.

[2] Complainant identified the following individuals as the responsible management officials: two acting Customer Service Supervisors (ACSS1 and ACSS2); the Customer Service Manager (CSM); and the Postmaster.

[3] Complainant identified the instant EEO complaint as his protected activity and reprisal as a basis only with respect to incident (6). However, on February 27, 2014, shortly after he completed his orientation and training, he submitted a written request to the CSM and to the Postmaster to have Saturdays off for the purpose of religious observance. IR 192. This too is considered protected EEO activity. Throughout his affidavit, he maintained that the CSM and other named management officials took action against him because he had requested a religious accommodation on multiple occasions. Accordingly, we will consider reprisal to be a basis for incidents (2) through (5) as well as six.

Incident (1): In addition to his personal request submitted on February 27, 2014, see supra n.3, Complainant also submitted a letter from the pastor of his church to the Postmaster dated March 5, 2014. IR 193. The pastor explained that Seventh-Day Adventists refrain from all educational, recreational, and work-related pursuits from sunset Friday to sunset Saturday. He asked that the Postmaster allow Complainant to maintain his commitment to his religious conviction by allowing him this time off or a transfer to post offices in the area that were closed during those hours. Complainant averred that although he worked on Saturdays as directed, he had asked the CSM to give him Saturdays off on multiple occasions, and that each time, the CSM turned down his request without offering any possible accommodations. IR 76-81, 103, 170. The CSM admitted that she was aware of his religious accommodation requests but maintained that she could not grant those requests because of the Agency's operational needs. She pointed out that when Complainant applied for the CCA position, he was informed that he might have to work up to six days per week and up to twelve hours per day. IR 103-05, 154-55. She further averred that if she granted Complainant's request, the Agency would have to pay overtime to employees that were already on the clock. IR 106. When asked by the EEO investigator what actions were taken on Complainant's request for a religious accommodation, the CSM replied that she was not aware of any actions taken. IR 105.

Incident (2): Complainant averred, in essence, that his hours were decreased, that he had not been paid for all of the hours that he worked, and that the CSM refused to provide him with copies of the Form 1260s that documented the hours that he worked. IR 82-83. The CSM averred that for most employees, it took a while after they started working to get them into the payroll system, and that during this interim period, Complainant was given pay adjustments. IR 108-09. She also averred that on one occasion, when she tried to issue Complainant a pay adjustment, Complainant's brother, who was serving as his representative, instructed him not to sign for it. IR 110. ACSS1 averred that he had observed the CSM showing Complainant his work hours, and that Complainant had received a Form 1260 every morning. ACSS1 also stated that employees were advised to sign their 1260s in duplicate and to keep a copy for themselves. IR 156, 196-200.

Incident (3): Complainant acknowledged that on March 18, 2014, he was not actually suspended. Rather, about an hour before his shift was scheduled to begin on that day, he was called and told that he would not be needed that day. He averred that the call "sounded like," he was being suspended or disciplined. IR 84-86. The CSM and ACSS1 responded that there were no set hours for CCAs, and that on that particular day, all of the full-time and part-time career carriers were covering their routes. IR 111, 157.

Incident (4): Complainant averred that on March 3, March 20, and April 8, 2014, he was subjected to unsafe working conditions when he was assigned a caravan for curbside mail delivery. IR 88-89. The CSM replied that for city deliveries, the Agency provides two types of vehicles, caravans and long-life vehicles (LLVs), and that curbside deliveries account for only five percent of the route. She also stated that Complainant was trained in vehicle safety regarding LLVs, as were other new employees, and that in the event that a carrier did not have a LLV when asked to make curbside deliveries, the carrier should call management. IR 112-14.

ACSS1 averred that Complainant had never mentioned unsafe conditions to him. He also pointed out that it was sometimes necessary for the Montrose Heights Post Office to work with the vehicles that they had available, noting as an example a rural carrier who used her own car to make deliveries. IR 158.

Incident (5): Complainant averred that for the length of his probationary tenure, he was never provided with the tools and training he needed to do his job properly, and that he was being set up to fail by management. In particular, he stated that there were not enough scanners in the facility and that he was without one very frequently, and that he was never given keys to the cluster-type mail boxes assigned on his route. He also repeated his assertion that LLVs were not provided when he needed to make curbside deliveries. IR 91-92. The CSM, ACSS1, and ACSS2 all stated that as with all new employees, Complainant was assigned an on-the-job-instructor (OJI) for his first three days on the delivery routes, that cluster box keys were always available, and that the Post Office had a shortage of scanners, necessitating that they be shared. IR 114, 124, 159, 172.

Incident (6): Complainant received a notice dated April 10, 2014, informing him that he would be terminated. The notice, signed by ACSS2 and approved by the CSM, specified that he was being terminated because he had been involved in a vehicular accident earlier that day in which he was at fault. Complainant had driven his vehicle into a ditch while making deliveries. IR 160. The CSM averred that if a probationary employee was involved in an at-fault accident, he or she would be fired, and that Complainant was made aware of this policy during orientation. IR 117. ACSS2 averred that even if Complainant had not been involved in an accident, she would have terminated him anyway based on his performance. Complainant was rated as unsuccessful in three of the five job performance factors for the first thirty days of his probationary period. IR 95, 173, 182, 194-95, 204.

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").

Denial of Religious Accommodation – Incident (1):

Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation is shown to impose an undue hardship. 42 U.S.C.

§ 2000e(j); 29 C.F.R. § 1605.2(b)(1). The traditional framework for establishing a prima facie case of discrimination based on religious accommodation requires an employee to demonstrate that: (1) he or she has a bona fide religious belief, the practice of which conflicted with their employment; (2) he or she informed the Agency of this belief and conflict; and (3) the Agency nevertheless enforced its requirement against Complainant. Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993); Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984).

Once Complainant establishes a prima facie case, the Agency must show that it made a good faith effort to reasonably accommodate Complainant's religious beliefs and, if such proof fails, the Agency must show that the alternative means of accommodation proffered by Complainant could not be granted without imposing an undue hardship on the Agency's operations. Pursuant to 29 C.F.R. § 1605.2(a)-(e), the Commission's "Guidelines on Discrimination Because of Religion" (the Guidelines), alternatives for accommodating an employee's religious practices include, but are not limited to, voluntary substitutes and swaps, flexible scheduling, and lateral transfers and job changes. Undue hardship does not become a defense until the employer claims it as a defense to its duty to accommodate. Ansonia Board of Education v. Philbrook, 479 U.S. 60, 68-69 (1986). In order to show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis cost. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).

An Agency's obligation to reasonably accommodate the religious practices of its employees, if this can be done without undue hardship, applies equally to probationary and permanent employees. Brewer v. U. S. Postal Service, EEOC Request No. 05880283 (Aug. 12, 1988). The employee in Brewer was a part-time probationary letter carrier who claimed that the Agency failed to provide religious accommodation by forcing him to work on Saturdays. Like Complainant, he was a Seventh-Day Adventist whose observance of the Sabbath fell on Saturday. Just as in the instant case, the employee did not inform anyone at the Agency prior to being hired that he would be unable to work on Saturdays for religious reasons. The employee was told that he would have to work on Saturdays and did so. After several months had passed, the employee approached his supervisor telling her that he could no longer in good conscience continue to work on Saturdays. The Supervisor passed the employee's request on to the Postmaster, who told the employee to put his request in writing. Upon receiving the employee's written request to be excused from working on Saturdays, the Postmaster fired him. Although the Postmaster promised the employee that he would attempt to find him a position at a larger facility that could give him the accommodation he needed, the Postmaster never did so. The Commission ultimately concluded in Brewer that the Agency failed to show that granting the employee's accommodation would result in an undue hardship.

The scenario in the instant case is virtually identical to that in Brewer. As in that case, Complainant was a probationary employee and a Seventh-Day Adventist who sought to have Saturdays off so that he could observe the Sabbath in accordance with the tenets of his faith. And, just as in Brewer, his request was denied and he was compelled to work on Saturdays in

order to avoid being fired. The CSM's stated justification for not granting Complainant's request for Saturdays off was that the Post Office would incur overtime.

The Commission has held that accommodations that would require an employer to regularly pay premium wages such as overtime to substitute employees impose more than a de minimis cost on the employer and could constitute an undue hardship. Owings v. U. S. Postal Service, EEOC Appeal No. 01841576 (June 24, 1986). However, it bears repeating that the Agency cannot raise the issue of overtime or any other financial or logistical issue as an undue hardship until it demonstrates that it made a reasonable effort to find an accommodation that would enable Complainant to practice his religion without having to worry about losing his job. See Philbrook, supra. In this case, neither the Postmaster nor the CSM made any effort to look into the possibility of schedule swaps or any other type of accommodation, and the CSM admitted as much. IR 105. Consequently, the Agency cannot support its assertion that granting Complainant his requests to have Saturdays off would have caused an undue hardship by forcing it to incur overtime. We therefore find, based on the evidentiary record before us, that Complainant established that the Agency had denied his request for a religious accommodation when the CSM refused to allow him to have Saturdays off between March 1, 2014 and April 5, 2014.

Disparate Treatment on the Bases of Religion and Reprisal – Incidents (2) through (6):

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). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. In this case, Complainant is a member of a protected religious group and had engaged in protected EEO activity by asking for a religious accommodation. With regard to incidents (2) through (5), he showed that his hours were reduced, he was required to deliver mail under conditions that he believed were unsafe, and he did not have scanners and other tools he needed for the job. As to incident (6), he showed that he was terminated during his probationary period. All of this occurred at the same time that he had been requesting Saturdays off for religious observances. This is sufficient to establish a prima facie case of discrimination based on religion and reprisal.

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). In this case, the CSM and the other named management officials provided legitimate, nondiscriminatory explanations for all five incidents. As to incident (2), the CSM and ACSS1 stated that Complainant was given pay adjustments until he was placed into the payroll system and that he needed to retain personal copies of the Form 1260s. Concerning incident (3), they maintained that Complainant was not needed on March 18, 2014, since all of the delivery routes that day were covered. Regarding incident (4), the CSM denied that Complainant was forced to operate a caravan in unsafe conditions and that because delivery vehicles were sometimes in short supply,

carriers had to make do with whatever was available. With respect to incident (5), the CSM, ACSS1 and ACSS2 all stated that Complainant was given the same training given to other new employees, that there were not enough scanners to go around, and that carriers sometimes forgot their cluster box keys. Finally, with regard to incident (6), the CSM and ACSS2 both maintained that Complainant was terminated because of his poor performance during the first thirty days of his probationary period and because he was involved in a vehicular accident that was his fault.

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993). Complainant may demonstrate pretext by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Service, EEOC Appeal No. 0120060802 (Nov. 20, 2007), request for reconsideration denied, EEOC Request No. 0520080211 (May 30, 2008). When asked by the EEO investigator what evidence he had that his religion or his requests for religious accommodation were motivating factors in the actions taken by the responsible management officials, Complainant merely restated the elements of his prima facie case, even admitting with respect to incidents (2), (3), and (4) that he was not certain whether his religion played a role in those incidents. IR 83, 87, 90, 93, 96. Beyond these assertions, however, he has not presented affidavits, declarations, or unsworn statements from witnesses other than himself or documents which contradict the explanations provided by the Postmaster, the CSM, ACSS1, or ACSS2, or which call their veracity into question. Accordingly, we find, as did the Agency, that Complainant did not establish that any of the Agency officials relied on unlawful considerations of Complainant's religion or his request to have Saturdays off for religious reasons in taking the actions described in incidents (2) through (6).

Furthermore, the Commission finds that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) Complainant's claim of hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final decision to the extent it pertains to incident (1) and AFFIRM the Agency's final decision as it pertains to incidents (2) through (6).

ORDER (C0610)

The Agency is ordered to take the following remedial action:

1. Within ninety (90) calendar days from the date that this decision is issued, the Agency shall complete a supplemental investigation, and issue a decision, in order to determine Complainant's entitlement to compensatory damages incurred as a result of the Agency's unlawful denial of his request for Saturdays off as an accommodation to his religious observances between February 18 and April 10, 2014. The Agency shall afford Complainant the opportunity to submit evidence in support of his claim for damages within the 90-day time frame, and Complainant shall cooperate with any additional evidentiary requests made by the Agency. Within thirty (30) calendar days of the date that the Agency determines the amount of compensatory damages owed Complainant, the Agency shall pay that amount.

2. Within ninety (90) calendar days from the date that this decision is issued, the Agency shall provide appropriate remedial EEO training to the responsible management officials identified in this decision as the Postmaster and the CSM, including at least eight (8) hours of in-person or interactive training on an Agency's obligation to provide accommodations to its employees for religious observances. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

3. Within sixty (60) calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management officials identified as the Postmaster and the CSM. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

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 Montrose Heights Station facility 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).

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

November 29, 2017
Date